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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | |  | |      |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%231) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%232) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **1.1   Final rules on banks' disclosure of the composition of their capital issued by the Basel Committee**   On 26 June 2012, the Basel Committee on Banking Supervision issued its final rules on the information banks must disclose when detailing the composition of their capital. Entitled 'Composition of capital disclosure requirements - Rules text', the publication sets out a framework to ensure that the components of banks' capital bases are disclosed in standardised formats across jurisdictions.    During the financial crisis, market participants and regulators were hampered in their efforts to undertake detailed assessments of banks' capital positions and make comparisons across jurisdictions. Adding to these difficulties were insufficiently detailed disclosure by banks and a lack of consistency in reporting across banks and jurisdictions. This lack of clarity may have contributed to uncertainty during the financial crisis and could have masked how far banks were relying on forms of capital that were insufficiently loss-absorbent. The new disclosure requirements are aimed at improving market discipline by enhancing both transparency and comparability.    The rules aim to improve the quality of Pillar 3 disclosures in respect of the capital that banks use to meet their regulatory requirements. Improvements to the disclosure of banks' capital requirements (ie the composition of risk-weighted assets) are also under consideration as part of the Committee's review of Basel III implementation.    The rules are available on the [Bank for International Settlements website](http://www.bis.org/publ/bcbs221.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.2  New form of licence expands access to financial advice**   On 23 June 2012, the federal government announced a new form of financial advice licence that will increase the availability of financial advice.  The new limited Australian Financial Services Licence (AFSL) is expected to see up to 10,000 accountants become licensed and able to provide a much broader range of financial advice than they were previously able to.  In addition to being able to advise on self-managed superannuation (SMSF) funds and superannuation generally, licence holders will be able to give 'class of product advice' on basic deposit products, general and life insurance, securities, and simple managed investment schemes.  The new licence does not allow specific product recommendations but is designed to enable accountants and any financial advisers who may hold this licence to provide more strategic and low-cost forms of financial advice which will assist the public to manage their finances effectively.  A streamlined transition period will be available for accountants between 1 July 2013 and 1 July 2016, with the aim of making it easier for accountants to transition into the AFSL regime in recognition of their existing professional qualifications.  There will be public consultation on draft regulations to give effect to these measures in the second half of the year.  Further information is available on the [Treasury website](http://ministers.treasury.gov.au/Ministers/brs/Content/pressreleases/2012/attachments/36/Replacement-for-accountants-exemption.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.3  APRA releases insurance reporting requirements consultation package**   On 22 June 2012, the Australian Prudential Regulation Authority (APRA) released a consultation package detailing proposed revisions to the reporting framework for general and life insurers. The proposed changes reflect the revised capital framework which will be applicable to general and life insurers from 1 January 2013.  The package is available to download from the [APRA website](http://www.apra.gov.au/CrossIndustry/Consultations/Pages/LAGIC-Reporting-Requirements-June-2012.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.4  Canadian securities regulators consults on regulation of proxy advisory firms**  On 21 June 2012, the Canadian Securities Administrators (CSA) published for comment CSA Consultation Paper 25-401 'Potential Regulation of Proxy Advisory Firms'.  The purpose of the consultation paper is to address specific concerns about the services provided by proxy advisory firms and their potential impact on Canadian capital markets, and to determine if, and how, these concerns should be addressed by Canadian securities regulators.  The CSA is seeking feedback on the following concerns that market participants, primary issuers and their advisors raised about proxy advisory firms:   * potential conflicts of interest; * potential perceived lack of transparency; * potential inaccuracies and limited engagement with issuers; * potential corporate governance implications; and * the extent of reliance by institutional investors on the recommendations provided by proxy advisory firms.   The CSA also seeks comments on a range of possible securities regulatory responses and frameworks, if it is determined that a securities regulatory response is warranted.  Further information is available on the [CSA website](http://www.securities-administrators.ca/aboutcsa.aspx?id=1079" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.5  FRC releases report on remuneration**  On 21 June 2012, the UK Financial Reporting Council (FRC) released the Financial Reporting Lab's (the Lab) project report on 'A single figure for remuneration'.  The report was undertaken at the request of the Department of Business Innovation and Skills (BIS) in connection with their policy decisions around executive remuneration.  The Lab worked closely with a wide range of leading companies and investors in preparing the proposals contained in the project report.  The proposals describe the components of remuneration that the investors involved in the project believe should be contained within total remuneration, as well as how these components should be measured and the related disclosure.  Investors also want companies to report separately the most recent awards relating to long term incentives, including performance shares and options, which may vest in the future.  The report is available on the [FRC website](http://frc.org.uk/getattachment/3a986efa-82e5-4f08-b70c-a2ffc22dedc5/FRC-Lab-A-single-figure-for-remuneration.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.6  BIS reform of directors' remuneration**  On 20 June 2012, the UK's Department for Business, Innovation and Skills (BIS) announced the introduction of comprehensive reforms of the framework for directors' remuneration.  According to the BIS, the reforms aim to address failures in corporate governance by empowering shareholders to engage effectively with companies on pay.  Measures include:   * A binding vote on pay policy, requiring the support of a majority of shareholders voting to pass. The policy should clearly set out how pay supports the strategic objectives of the company and include better information on how directors' pay compares to the wider workforce; * The binding vote will be held annually unless companies choose to leave their remuneration policy unchanged, in which case it will be compulsory at least every three years.  For the first time, once a policy is approved companies will not be able to make payments outside its scope.  If a company chooses to change its pay policy, it will have to put it before shareholders for re-approval. This aims to encourage companies to devise long-term policies and put a brake on annual pay ratcheting; * As part of their pay policy, companies will have to clearly explain their approach to exit payments, which will also be subject to the binding vote.  When a director leaves, the company will have to promptly publish a statement of payments the director has received.  Companies will not be able to pay exiting directors more than shareholders have agreed; * Alongside the binding vote on policy, shareholders will continue to have an annual advisory vote on how pay policy was implemented in the previous year, including actual sums paid to directors.  If a company fails the advisory vote, it will be required to put its overall pay policy back to shareholders in a binding vote the following year; * In addition, the Financial Reporting Council will consult on updating the Corporate Governance Code so that companies should make a statement when a significant minority of shareholders vote against a pay resolution (see Item 1.7 of this Bulletin); and * Companies will have to report a single figure for the total pay directors received for the year (see Item 1.5 of this Bulletin). This figure will cover all rewards received by directors, including bonuses and long term incentives. Companies will also have to report details of whether they met performance measures and a comparison between company performance and chief executives' pay.   To introduce these reforms, the UK Government will shortly bring forward amendments to the Enterprise and Regulatory Reform Bill, which is currently before Parliament. Revised, simplified regulations setting out how companies must report directors' pay will be published at the same time. This will include measures to make pay reports clearer and more transparent for investors.    The UK Government intends the reforms to be enacted by October 2013.   Further information is available on the [BIS website](http://news.bis.gov.uk/Press-Releases/Government-announces-far-reaching-reforms-of-directors-pay-67b96.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.7  FRC consults on executive remuneration**  On 20 June 2012, the UK Financial Reporting Council (FRC) announced that it would consult on whether to amend the UK Corporate Governance Code to address a number of issues relating to executive remuneration. The consultation will be carried out after the UK Government's legislation on voting and reporting on executive remuneration has been finalised.  The FRC will consult on two proposals that the UK Government has asked it to consider: to extend the Code's existing provisions on claw-back arrangements, and to limit the practice of executive directors sitting on the remuneration committees of other companies.  It will also seek views on whether companies should engage with shareholders and report to the market in the event that they fail to obtain at least a substantial majority in support of a resolution on remuneration.  Further information is available on the [FRC website](http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2012/June/FRC-to-consult-on-executive-remuneration.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.8  SEC adopts rule requiring listing standards for compensation committees and advisers**   On 20 June 2012, the US Securities and Exchange Commission (SEC) announced it had approved a rule that directs national securities exchanges to adopt listing standards for public company boards of directors and compensation advisers.  The new rule, required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, requires exchange listing standards to address:   * the independence of the members on a compensation committee; * the committee's authority to retain compensation advisers; * the committee's consideration of the independence of any compensation advisers; and * the committee's responsibility for the appointment, compensation, and oversight of the work of any compensation adviser.   Once an exchange's new listing standards are in effect, a listed company must meet the standards in order for its shares to continue trading on that exchange.  The SEC also amended its proxy disclosure rules to require new disclosures from companies about their use of compensation consultants and conflicts of interest.  The new rule and rule amendments will take effect 30 days after publication in the Federal Register. No later than 90 days after effectiveness, each exchange that lists equity securities must propose listing standards that comply with the new rule. The new listing standards must be approved by the Commission within one year of the new rule becoming effective.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2012/2012-115.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.9  Financial advice reforms enacted**   On 20 June 2012, the federal government announced the successful passage through Parliament of the [Corporations Amendment (Future of Financial Advice) Bill 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=126927" \t "_default) and the [Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=128199" \t "_default).  The Bills implement the key elements of the Future of Financial Advice (FOFA) reforms, which are the federal government's response to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into the collapse of Storm Financial and Opes Prime.  On 20 June 2012, the federal government also moved amendments in the Senate to implement more flexible transition arrangements announced in March 2012.  While the reforms will still commence from 1 July 2012 as originally announced, the application of the provisions will be voluntary until 1 July 2013.  The federal government is currently consulting on whether the term 'financial planner' or 'adviser' should be defined in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).  Further information is available on the [Future of Financial Advice website](http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.10  Legislation enacted to clarify shareholder voting on executive pay**   On 18 June 2012, the [Corporations Amendment (Proxy Voting) Bill 2012 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=132496" \t "_default) was passed by the Senate to clarify the issue of undirected proxies in the shareholder vote on remuneration.  In 2011, the [Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=124604" \t "_default) (the Act) and one of the reforms under the Act addressed conflicts of interest by prohibiting key management personnel and their closely related parties from voting on remuneration matters.  An exception was provided to allow the chair of an annual general meeting (AGM) to vote undirected proxies where the shareholder provides informed consent for the chair to exercise the proxy. There was uncertainty as to whether this exception also applied to the non-binding vote on remuneration.  The [Corporations Amendment (Proxy Voting) Act 2012 No. 73 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=133666" \t "_default) clarifies that the chair of an AGM will be able to exercise undirected proxies for the non-binding remuneration vote, where a shareholder provides their express authorisation to the chair in accordance with the requirements of the ASX Listing Rules for meetings.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.11  FSB reports to G20 Leaders on financial regulatory reform progress**   On 19 June 2012, the Financial Stability Board (FSB) announced that the G20 Leaders had endorsed the FSB's amended Charter, which strengthens the FSB's role in coordinating international standard setting and in monitoring implementation of agreed policies and international standards at the national level.    The FSB has also published the following reports delivered to G20 Leaders:   * an overview report on progress in the implementation of the G20 recommendations for strengthening financial stability; * a 'scoreboard' status report prepared by the FSB Secretariat, in consultation with FSB members, that assesses the current state of progress made in global policy development and implementation of financial regulatory reforms; * recommendations for strengthening the FSB's capacity, governance and resources; and * a report, identifying the effects of regulatory reforms on emerging market and developing economies and reviewing potential unintended consequences, prepared in coordination with the staff of the International Monetary Fund and the World Bank.   The G20 committed to implement financial reform to agreed timelines and expressed support for the ongoing policy work of the FSB and its members:   * to strengthen national resolution regimes and recovery and resolution planning for global systemically important financial institutions (global SIFIs); * to strengthen the oversight and regulation of the shadow banking system; * to extend the framework for SIFIs to domestic systemically important banks, and to global systemically important insurers and other non-bank financial entities; * to implement over-the-counter (OTC) derivatives reforms; * to implement the FSB Principles and Standards for Sound Compensation Practices; * to identify potential unintended consequences of agreed financial regulatory reforms for emerging market and developing economies; * to end mechanical reliance on credit rating agency ratings; and * to improve adherence to supervisory and regulatory cooperation and information exchange standards.   G20 Leaders also endorsed the FSB recommendations regarding the development of a global legal entity identifier (LEI) for parties to financial transactions, with a global governance framework representing the public interest.  The reports are available on the [FSB's website](http://www.financialstabilityboard.org/" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.12  IOSCO report on the credit default swap market**   On 16 June 2012, the International Organization of Securities Commissions (IOSCO) released a report titled 'The Credit Default Swap Market'.    The report seeks to inform the ongoing regulatory debate on credit default swaps (CDS) and highlight some of the key policy issues involving these financial swap agreements.  IOSCO's report discusses the recent changes and current trends in the CDS markets. It also provides information from recent literature about CDS trading, pricing and clearing, while covering the following areas:   * Basic functioning of CDS contracts and market size * Features of the CDS market   + Contract standards   + Market structure   + Counterparty risk and collateralisation   + CDS prices and bond spreads   + CDS role under Basel III * The impact of CDS on the bond market   + CDS impact on credit spreads and creditor incentives   + CDS impact on the secondary market of underlying bonds   + CDS role in the price discovery process   Among the report's conclusions is that existing empirical evidence on many aspects of the CDS market tends to be mixed, such as on the impact of CDS on the orderly functioning of the primary and secondary markets of the underlying bonds and on creditor incentives, although the CDS market is found to have an important role in the price discovery process.   The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD385.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.13  IOSCO report on institutional investors in emerging markets**   On 14 June 2012, the International Organization of Securities Commissions (IOSCO) released a report titled 'Development and Regulation of Institutional Investors in Emerging Markets'.      The report focuses on a wide range of developmental issues and challenges faced by emerging markets seeking to develop their institutional investor base.  Some of these challenges include limited capital market size and liquidity, competition to capital market investment from substitute services, regulatory restrictions, overly dominant distribution channels and constraints on cross-border activities.  Additional discussion on related macro-economic and capital market conditions in the emerging markets and analysis of cross-border activities of institutional investors are also included in the report.    The report offers a set of key recommendations for policy makers and regulators looking to attract and better regulate institutional investors in their jurisdictions. It highlights the importance of the legal protection of property and ownership rights. It also emphasises the need to ensure reasonable transaction costs, develop flexible trading and hedging mechanisms, remove undue administrative impediments on product authorisation processes, build a multi-pillar pension system with tax incentives and provide a level playing field for foreign investors.  Finally, the report recommends that regulators periodically review the regulatory framework and coverage, combine deregulation with enhanced supervision and enforcement, and improve coordination with other regulatory bodies to monitor, mitigate and manage systemic risk.   The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD384.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.14  FSB releases third progress report on implementation of OTC derivatives market reforms**   On 15 June 2012, the Financial Stability Board (FSB) released its third six-monthly progress report on the implementation of over-the-counter (OTC) derivatives market reforms.   The report reviews progress made by international standard-setting bodies, national and regional authorities and market participants towards meeting the commitments made by G20 Leaders at the Pittsburgh 2009 Summit that, by end-2012, all standardised OTC derivative contracts be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties (CCPs); that OTC derivative contracts be reported to trade repositories; and that non-centrally cleared contracts be subject to higher capital requirements.   The report notes that, since the previous FSB progress report in October 2011, progress has been made in setting international standards, the advancement of national legislation and regulation by a number of jurisdictions; and practical implementation of reforms to market infrastructures and activities.  However, much remains to be completed by the end-2012 deadline.  Broadly speaking, the jurisdictions with the largest markets in OTC derivatives - the EU, Japan and the US - are the most advanced in structuring their legislative and regulatory frameworks.  They expect to have regulatory frameworks in place by end-2012 and practical implementation within their markets is well underway.  Other jurisdictions are generally less advanced, although progress has been made by many of them, particularly with respect to central clearing and reporting to trade repositories.  The Third Progress Report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_120615.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.15  UK Government releases White Paper on banking reform**  On 14 June 2012, the UK Government released a White Paper 'Banking reform: delivering stability and supporting a sustainable economy', which sets out the UK Government's detailed proposals for implementing the recommendations of the Independent Commission on Banking (ICB), to fundamentally reform the structure of banking in the UK.  The White Paper offers further detail on plans to separate retail and investment banking through a 'ring-fence' and increase competition in the banking sector.  It sets out proposals to make banks more resilient, as well as making them simpler to resolve in the event of failure.  The UK Government proposes that investment banks should be separated from traditional banking, as part of a regulatory system in which the public does not subsidise banks and banks are allowed to fail without a threat to the system at large.  Draft legislation will follow later this year, with the White Paper confirming that all legislation will be finalised by 2015.  The White Paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/fin_stability_regreform_icb.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.16  FSB releases implementation monitoring report on compensation practices**   On 13 June 2012, the Financial Stability Board (FSB) released a report on the progress made by member jurisdictions and firms in implementing the FSB 'Principles for Sound Compensation Practices and their Implementation Standards' since the October 2011 thematic peer review. The report forms part of the FSB's Coordination Framework for Implementation Monitoring.    Almost all FSB member jurisdictions have now completed the implementation of the Principles and Standards (P&S).  Those jurisdictions identified as having significant gaps at the time of the 2011 peer review have made progress in their implementation. Several jurisdictions have recently issued additional regulation or supervisory guidance.  Progress has also been made in implementing the Basel Committee's Pillar 3 disclosure requirements for remuneration, but more needs to be done to fully embed them in regulation or supervisory guidance across all jurisdictions.    Most jurisdictions report that financial institutions have made good progress in adjusting compensation practices to better align them with the P&S, particularly those firms deemed significant for the purposes of the P&S.  There remain challenging areas where more progress is needed, the most critical of which are the alignment of compensation with ex-ante risk taking and ex-post performance, and the identification of material risk takers.   Further information is available on the [FSB website](http://www.financialstabilityboard.org/press/pr_120612.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.17  Final report and recommendations of inquiry into going concern and liquidity risk**  On 13 June 2012, the UK Sharman Panel of Inquiry, established at the invitation of the Financial Reporting Council (FRC) to consider 'Going Concern and Liquidity Risks: Lessons for companies and auditors', released its final report and recommendations.  The Panel's key recommendations are that:   * The primary purpose of the going concern assessment and reporting should be to reinforce responsible behaviour in the management of going concern risks; and * The going concern considerations made by directors and reviewed by auditors should cover both solvency and liquidity and that these should be considered over the cycle, taking an appropriately prudent view of future prospects.   The Panel also recommended that the FRC should:   * Seek to clarify and harmonise the differing definitions of going concern and related risks in accounting, auditing and governance requirements, working with the international bodies. * Review its Guidance for Directors to ensure that the going concern assessment is integrated with business planning and risk management; focus as appropriate on both solvency and liquidity risks (including risks to the entity's business model or capital adequacy) that could threaten the entity's survival through the cycle; and includes stress tests of liquidity and solvency. * Integrate going concern reporting with its Effective Company Stewardship proposals, to present a fuller picture of the principal risks the entity is taking and facing in pursuit of its business model and strategy rather than only highlighting going concern risks when there are significant doubts about the entity's survival. * Enhance the role of the auditor by seeking an explicit statement in the auditor's report about whether the auditor has anything to add to or emphasise in relation to the narrative disclosures made by the directors about the robustness of the process of assessing going concern and its outcome.   The Final Report and Recommendations are available on the [FRC website](http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2012/June/Sharman-panel-publishes-final-report-and-recommend.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.18 APRA releases draft Basel III capital reforms reporting requirements**   On 8 June 2012, the Australian Prudential Regulation Authority (APRA) released for consultation a Discussion Paper and draft Reporting Standards outlining its proposed reporting requirements for implementing the Basel III capital reforms in Australia.     Electronic copies of the consultation package are available on the [APRA website](http://www.apra.gov.au/MediaReleases/Pages/11_26.aspx" \t "_new).   APRA has also released a letter to ADIs proposing amendments to the criteria for capital instruments to be included in Additional Tier 1 or Tier 2 Capital and clarifying the capital treatment and reporting for joint arrangements.  An electronic copy of this letter is available on the [APRA website](http://www.apra.gov.au/adi/Publications/Pages/other-information-for-adis.aspx" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.19  IOSCO consults on global developments in securitisation regulation**   On 7 June 2012, the International Organization of Securities Commissions (IOSCO) released a Consultation Report titled 'Global Developments in Securitization Regulation', which seeks public comment on policy issues arising from the work of its Task Force on Unregulated Markets and Products (TFUMP).    The Consultation Paper is in response to a request from the Financial Stability Board (FSB) as part of its work to strengthen oversight and regulation of the shadow banking system.     The paper:   * provides background to IOSCO's work; * provides a snapshot of global securitisation activity; * makes observations about regulatory approaches in jurisdictions covered by the work and outlines and assesses the extent of differences; and * makes policy recommendations addressing:   + differences in approaches to risk retention;   + improvements in transparency; and   + measures to standardise disclosure.   The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD382.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.20  IOSCO report on international standards for derivatives market intermediary regulation**   On 6 June 2012, the International Organization of Securities Commissions (IOSCO) released a report titled 'International Standards for Derivatives Market Intermediary Regulation', which recommends high-level international standards for the regulation of market participants that are in the business of dealing, making a market or intermediating transactions in over-the-counter (OTC) derivatives.   Historically these derivatives market intermediaries (DMIs) often have not been subject to the same level of regulation as participants in the traditional securities market.  Without sufficient regulation, some DMIs operated in a manner that created risks to the global economy that manifested during the financial crisis of 2008.    The recommendations in the Report are intended to address:   * DMI obligations that should help mitigate systemic risks; * requirements intended to manage counterparty risk in the OTC derivatives markets; and * protecting participants in the OTC derivatives markets from unfair, improper or fraudulent practices.   Recommendations are made regarding the following substantive areas:   * registration/licensing standards; * capital standards or other financial resources requirements for non-prudentially regulated DMIs; * business conduct standards; * business supervision standards; and * recordkeeping standards.   The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.21  Competition in the clearing and settlement of the Australian cash equity market**  In June 2012, Treasury released a Council of Financial Regulators discussion paper which examines competition in the clearing and settlement of the Australian cash equity market. The paper has been prepared with contributions from ASIC, the Reserve Bank of Australia (RBA), the Commonwealth Treasury and the Australian Competition and Consumer Commission (ACCC).  The paper sets out a preliminary assessment of the issues that might need to be addressed to ensure that competition between providers of clearing and settlement services does not adversely impact the effective functioning of the market for ASX securities or the stability of the Australian financial system. The paper also discusses competition and access issues that could arise when considering the existing post trade market structure for ASX securities, and how these might, in principle, be addressed.  Further information is available on the [Treasury website](http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Competition-in-the-clearing-and-settlement-of-the-Australian-cash-equity-market" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.22  IOSCO consults on internal controls and procedures of credit rating agencies**   On 25 May 2012, the International Organization of Securities Commissions (IOSCO) released a consultation report titled 'Credit Rating Agencies: Internal Controls Designed to Ensure the Integrity of the Credit Rating Process and Procedures to Manage Conflicts of Interest'.     The consultation report describes certain internal controls and procedures that credit rating agencies (CRAs) use to promote the integrity of the credit rating process and address conflicts of interest, with a view to promoting a better understanding of these practices.     The internal controls and procedures described by the report are divided into six categories.   Internal controls:   * Quality of the rating process * Structural support to ensure the quality of the rating process * Monitoring and updating * Integrity of the rating process   Procedures:   * Managing firm-level conflicts * Managing employee-level conflicts   The report seeks to describe the operational practices of the CRAs that are designed to give effect to the relevant provisions of the IOSCO 'Code of Conduct Fundamentals for Credit Rating Agencies', which was published in December 2004 and revised in May 2008.    The report is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD380.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.23  Research study on credit card reform**   The latest research study of the Centre for Corporate Law and Securities Regulation at the University of Melbourne has been published. It is titled 'Consumer Credit Reform and Behavioural Economics: Regulating Australia's Credit Card Industry' and is authored by Paul Ali, Cosima McRae and Ian Ramsay.  Australian credit card debt has grown rapidly over the last two decades and there were, as at September 2011, 14.9 million credit card accounts in Australia with outstanding balances of $49.2 billion, representing an ownership rate of 87% of the adult population. Credit cards are the second largest type of household credit product provided by Australian banks, after household mortgages. This research note examines the recent reforms enacted under the [National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=125270" \t "_default). The reforms include (1) a requirement for key fact sheets (containing information about costs, fees and repayments) for all new credit card contracts; (2) a requirement for credit card providers to "make reasonable inquiries about the maximum credit limit that a consumer requires", to notify consumers when they have exceeded their credit limit, and to provide warnings about the consequences of minimum repayments; and (3) a ban on credit card providers issuing written credit limit increase invitations except where a consumer has consented. The research note links the reforms to behavioural economics by identifying how the reforms address two key consumer biases - optimism and imperfect self-control, and examines how the reforms seek to alter the behaviour of consumers vulnerable to financial hardship.   The paper is available on the [Social Science Research Network website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2052615" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1)  **1.24  Study of official liquidators' views on insolvent companies' Report as to Affairs**   The Insolvency Practitioners Association of Australia has published a paper titled 'An Appraisal of the Report as to Affairs' by Peter J Keenan.     The paper presents the results of a survey of official liquidators concerning the Report as to Affairs form required for insolvent companies and associated compliance issues.  The survey was carried out in November and December 2011. The report also examines the history and purpose of the Report as to Affairs (RATA), laws which impose duties to submit the form, and ideas for change.     The RATA is a form which is prepared for the purpose of showing the financial position of a company at commencement of its entry into liquidation, controllership or administration.  There are eight provisions in the external administration chapter of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) under which an obligation to prepare such a report is imposed or may arise.  In most circumstances the report is to be prepared by company directors.  Since late 2004, sole responsibility for design and content of the form has resided with the corporate regulator, ASIC.   Two key findings of the survey are that:   * liquidators rate receiving a properly prepared RATA - one with full particulars of the company's assets, liabilities and securities - as an important requirement for the efficient performance of their role in a court-ordered winding up; and * liquidators rate the typical RATA that they receive as incomplete, inaccurate and unreliable.   The report is available on the [Centre for Corporate Law and Securities Regulation website](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/index.cfm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%233) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **2.1  Representatives providing financial services in regulated emissions units**   On 28 June 2012, ASIC announced that financial services representatives would be able to provide financial services involving regulated emissions units, following steps taken by ASIC to clarify the law.   ASIC announced the relief under Class Order 'Emissions units: Relief for representatives' [CO 12/794], to apply from 1 July 2012 until 31 December 2012.  During this period, representatives may provide financial services in regulated emissions units providing they act for either:   * a person registered with ASIC to provide those financial services; or * an Australian financial services (AFS) licensee holding a licence with an appropriate authorisation for regulated emissions units.   The class order addresses a technical concern in the law and provides certainty for representatives.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-145MR+Certainty+for+representatives+providing+financial+services+in+regulated+emissions+units?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.2  Policy update on administrative action against financial services providers**   On 28 June 2012, ASIC released a revised version of Regulatory Guide 98 'Licensing: Administrative action against financial services providers' to assist participants in the financial services industry understand when and how ASIC may take administrative action such as a banning action.  The revised policy reflects amendments to ASIC's administrative powers under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), introduced as part of the Future of Financial Advice (FoFA) reforms which are due to commence on 1 July 2012. Other revisions ensure consistency between RG 98 and Information Sheet 151 'ASIC's approach to enforcement' (INFO 151), which sets out how ASIC exercises its enforcement powers.   The main changes to RG 98 relate to ASIC's power to suspend or cancel an Australian financial services (AFS) licence or to make an order banning a person from providing a financial service on the basis of anticipated future conduct; that is, where ASIC has reason to believe that the licensee is likely to contravene their AFS obligations or that a person is likely to contravene their legal obligations.   In addition, ASIC has clarified the sorts of factors it may consider when deciding whether to take administrative action and updated examples of conduct relating to specific periods of banning.   Table 1 in RG 98 has been updated to clarify the sorts of factors ASIC may consider in deciding whether to take administrative action, consistent with the factors set out in INFO 151.   Table 2 in RG 98, which sets out factors and examples of conduct relating to specific periods of banning, has been updated to place a stronger emphasis on underlying conduct; in particular conduct involving dishonesty, rather than the amount of loss (if any) resulting from the licensee or person's actions or the absence of prior contraventions by them.  Regulatory Guide 98 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg98" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.3  Further consultation on key market structure reforms**   On 28 June 2012, ASIC published Consultation Paper 179 'Australian market structure: Draft market integrity rules and guidance' on market structure reforms.    ASIC has also published the feedback report on Consultation Paper 168 'Australian equity market structure: Further proposals' and Report 290 'Response to submissions on CP 168 Australian equity market structure: Further proposals'.     The approach being taken by ASIC is as follows:   * on market operator systems and controls - ASIC has published draft guidance clarifying expectations on market operators' systems and controls. This can be found in the draft addendum to Regulatory Guide 172 'Australian market licences: Australian operators' (RG 172); * on extreme price movements - ASIC has amended the anomalous order threshold and extreme cancellation range rules, and extended those amended rules to the ASX SPI 200 Index Future: See draft rules in Chapter 2 of the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011 and Section B of updated draft Regulatory Guide 223 'Guidance on ASIC market integrity rules for competition in exchange markets' (RG 223); * on enhanced data for market supervision - ASIC has drafted a rule requiring identification of a subset of the information proposed in CP 168: See Chapter 5A of the draft ASIC Market Integrity Rules (Competition) and Section H of updated draft RG 223; and * on pre-trade transparency, ASIC has drafted a rule on price improvement and altered the block trade sizes as proposed.  ASIC is not proceeding with a new rule on a minimum size threshold for dark orders at this stage: See draft rules 4.2.1 and 4.2.3 of the ASIC Market Integrity Rules (Competition), and Section D of updated draft RG 223.   There are a small number of areas where ASIC will continue to consult with industry with a view to publishing draft rules and guidance soon. In particular:   * on automated trading participant controls - ASIC proposes to make no new rule on algorithm testing, a new rule requiring direct control over filters and the ability to disable order flow, amend existing rules to require annual review of systems, and publish guidance clarifying ASIC's expectations on trading system controls, testing of systems and additional minimum standards for direct market access. ASIC is consolidating and updating the guidance currently in ASX guidance notes, and intends to publish draft rules and guidance early in the third quarter of 2012; and * on the format of section 912E reports - ASIC intends to publish guidance late in 2012 on the revised information and format of reports required, after further industry engagement. ASIC also intends to make new market integrity rules for suspicious activity reporting and short sale tagging requirements, which will apply to trading on the ASX and Chi-X markets. The obligations associated with these rules will not commence until January 2013 and March 2014 respectively.  ASIC consulted on these issues in 2010, and will publish these rules and guidance shortly.   These new requirements bring the Australian market in line with international best practice, and reinforce ASIC's strategic priorities of maintaining fair and efficient financial markets.   [Consultation Papers 179 and 168](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp179" \t "_new), [Report 290](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep290" \t "_new) and [Regulatory Guides](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Regulatory%20guides" \t "_new) are available on the ASIC website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.4  Areas of focus for 30 June 2012 financial reports**   On 26 June 2012, ASIC released the results of its reviews of financial reports for years and half-years ended 31 December 2011 and announced its areas of focus for 30 June 2012 financial reports.  A focus in 2012 will be revenue recognition and expense deferral policies. In addition, ASIC's surveillance of financial reports of listed entities and other entities with larger numbers of users will be extended to selected proprietary companies and companies with substantial assets held in emerging economies.  At 30 June 2012, directors and auditors should focus particularly on:   * revenue recognition and expense deferral policies; * asset values and the disclosure of associated assumptions; * off-balance sheet arrangements; and * going concern assessments.   Directors and auditors should also focus on disclosures of useful and meaningful information for investors and other users. This includes the disclosure of non-IFRS financial information in accordance with ASIC Regulatory Guide 230 'Disclosing non-IFRS financial information'. ASIC's reviews at 31 December 2011 covered 120 financial reports of listed entities and those unlisted entities with larger numbers of users.  While financial reporting in Australia is generally of a high standard, ASIC continues to identify some deficiencies in key areas. ASIC has made enquiries of a number of entities and a number of material adjustments have been made.  Further information about focuses for 30 June 2012 financial reports and the findings of ASIC's reviews of the financial reports for the periods ended 31 December 2011 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Attachment+to+12-140MR:+ASIC%27s+areas+of+focus+for+30+June+2012++financial+reports?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.5  Shorter PDS regime guidance and relief**  On 18 June 2012, ASIC released guidance to assist issuers of superannuation products and simple managed investment schemes comply with the shorter product disclosure statement (PDS) regime.   The shorter PDS regime commenced fully on 22 June 2012 and is designed to make PDSs shorter and simpler, and help consumers compare financial products more easily.  Issuers of new products have been required to comply with the regime since 22 June 2011 and other product issuers have been able to voluntarily opt-in.   ASIC has published 'Shorter PDSs: Complying with requirements for superannuation products and simple managed investment schemes' to provide concise guidance for industry on technical issues related to implementation of the new shorter PDS regime.   ASIC has also updated 'Shorter PDS regime: Superannuation, managed investment schemes and margin lending' to reflect the amendments to the transition period implemented by the [Corporations Legislation Amendment Regulations 2011 (No 2) (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=128861" \t "_default). Class order relief  ASIC will also provide interim class order relief from the shorter PDS regime for multifunds, superannuation platforms and hedge funds.  This relief only comes into effect once the class order has been registered; meaning that it has been recorded on the Federal Register of Legislative Instruments which may be accessed at [www.frli.gov.au](http://www.frli.gov.au/" \t "_new).  The relief in Class Order [CO 12/749] means that issuers of these products will remain subject to the disclosure provisions under Chapter 7 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).  This relief is for an interim period only pending a future federal government decision on the appropriate regulation of these products.   ASIC's relief applies on an interim basis for 12 months, and may be reviewed earlier upon the making of regulations by the federal government. Updated regulatory guides  To reflect the new shorter PDS regime, ASIC has updated:   * Regulatory Guide 91 'Horse racing and breeding schemes' * Regulatory Guide 160 'Time-sharing schemes', and * Regulatory Guide 173 'Disclosure for on-sale of securities and other financial products'.   RG 91 relates to horse racing and breeding schemes and the shorter PDS regime does not apply as these schemes do not fall within the definition of a simple managed investment scheme.  RG 160 explains ASIC's approach to regulating time-sharing schemes under the Corporations Act. The shorter PDS regime does not apply as these schemes do not fall within the definition of a simple managed investment scheme.   RG 173 explains ASIC's approach to granting relief from the on-sale of securities and other financial products provisions in the Corporations Act.    Further information is available on [ASIC's website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-131MR+Shorter+PDS+regime+guidance+and+relief?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.6  Release of information on transferring assets for trustee companies**   On 5 June 2012, ASIC released a regulatory guide to explain what information licensed trustee companies need to provide to ASIC when they seek approval to transfer the assets and liabilities of the estates they manage to another licensed trustee company.  ASIC will only grant approval when it is satisfied that a transfer will be in the interests of the clients (when viewed as a group) of the transferring company and those of the receiving company. This is a precondition to the transfer going ahead under the provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The information required by Regulatory Guide 237 'Trustee companies: Transfer determinations by ASIC' (RG 237) is to ensure that ASIC has sufficient information to properly consider the transfer applications.   Licensed trustee companies provide trustee services which include acting as an executor of a will, trustee or under a power of attorney. The assets and liabilities of the trust estates they manage in providing these services are those that they may seek approval from ASIC to transfer using this process.  ASIC was given the power to approve these transfers on the commencement of the national regulatory regime for trustee companies in May 2010.  Prior to the new regime, trustee companies had to be authorised in each state or territory in which they operated.  It is anticipated that trustee company groups will use the transfer process to rationalise their trustee services business and transfer the trust estate management part of their business to a single Australian financial services licence holder within their group.  RG 237 deals with the three types of applications ASIC anticipates receiving from trustee companies managing trust estates. These are:   * voluntary transfers between trustee companies belonging to the same corporate group * voluntary transfers between unrelated trustee companies, and * compulsory transfers from one unrelated trustee company to another.   Regulatory Guide 237 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument" \l "rg237" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.7  Consultation on new guidelines for credit advertisements**  On 5 June 2012, ASIC released a consultation paper about credit advertising to promote good practice and help industry comply with their legal obligations when advertising credit products and services.   Consultation Paper 178 'Advertising credit products and credit services: Additional good practice guidance' (CP 178) reflects ASIC's strong focus on ensuring accurate advertising that does not mislead financial consumers and investors.   ASIC reminds promoters of credit products and services, and publishers of advertising for these products and services, that it will be regularly reviewing ads, noting recent actions taken against financial institutions who have engaged in misleading marketing.  ASIC's guidance also contains real examples of the concerns raised with promoters of credit products or services.  CP 178 relates specifically to credit facilities and builds on Regulatory Guide 234 'Advertising financial products and advice services: Good practice guidance' which was released earlier this year and applies to all types of financial products.   Consultation Paper 178 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation+papers?openDocument" \l "cp178" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.8  Launch of national Business Names Register**  On 28 May 2012, ASIC released a new online system to register, renew and search business names.   The national Business Names Register replaces eight state and territory systems, simplifying business registration in Australia by offering a single online service. The launch of this initiative, together with the joint Australian Business Number (ABN)/Business Name registration transaction scheduled for later this year, is expected to deliver approximately $480 million in benefits to business, consumers and the federal government over eight years.   Under the new streamlined service, businesses only need to register their name once to have national effect and have the option of registering their name at a cost of $30 annually, or $70 for three years.  Previously, a business operating and registering their business name in every state and territory incurred a cost of more than $1,000 for the same period.   ASIC's Business Names Register contains over 84 million migrated data records previously held by state and territory agencies across Australia.  This includes over 1.6 million existing business name registrations which have been automatically transferred to ASIC's national register. ASIC will contact current business name holders when it is time to renew their business name.   Under the new system, future business owners can also look up the availability of a business name through a real-time automated check.  Before choosing a new business name, business owners can search ASIC's register to make sure that a similar name, or an identical one, is not being used by another business.  ASIC also encourages new business owners to check for existing registered trade marks and domain names to avoid running into legal difficulty at a later stage.  Importantly, registering a business name does not provide any proprietary rights over a name - only a trade mark can give that kind of protection.  To help with this, new business name applicants can follow a free link to the simplified Australian trade mark search (TM Check) and domain name searches.   Further enhancements to the national Business Names Register will be delivered progressively until November 2012. These initiatives include a joint ABN (Australian Business Number) and Business Name registration transaction for new businesses to access from the ABR website.   Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-106MR+ASIC+launches+national+Business+Names+Register?openDocument" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.9  Relief decisions - October 2011 to January 2012**  On 24 May 2012, ASIC released a report outlining decisions on relief applications between 1 October 2011 and 31 January 2012. The report also discusses the various publications released during this period.  The report, 'Overview of decisions on relief applications (October 2011 to January 2012)' (REP 288), aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), the [National Consumer Credit Protection Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "_default) or the [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "_default).  ASIC uses its discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit or where ASIC can facilitate business without harming other stakeholders.  REP 288 summarises situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act, the licensing and responsible lending provisions of the National Credit Act and the registration provisions of Schedule 2 of the Transitional Act.  The report also highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.  Decisions by ASIC to refuse to exercise its powers are described on an anonymous basis.  Report 288 is available from the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep288" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2)  **2.10  Supervision of the insolvency industry**  On 22 May 2012, ASIC released its first annual report into its supervision of registered liquidators, detailing surveillance and enforcement outcomes in 2011: Report 287 'ASIC regulation of registered liquidators: January to December 2011'.  Issues of competence, independence and inappropriate self gain underpinned ASIC's supervisory activity.   ASIC has a program of compliance visits for registered liquidators based on risk assessment and market intelligence. This includes complaints and information from the public and the profession itself.  ASIC also conducted project work, including checking compliance with independence declarations, remuneration disclosure and insurance requirements.  In 2011, ASIC received 426 reports of alleged misconduct concerning registered liquidators, in some instances about the same external administration. Many of these reports (51%) required educative outcomes for the complainants due to, for example, creditors not fully appreciating a liquidator's duties and obligations or the insolvency process.  Key statistics from Report 287 include:   * During 2011 ASIC opened eight formal investigations into registered liquidators. At year end it had 10 open investigations. * ASIC received and analysed 426 reports of alleged misconduct concerning registered liquidators. * Reports of alleged misconduct and enquiries against registered liquidators average 3.5% of the total 75,951 reports and enquiries ASIC received across all its areas over the five and a half years to 31 December 2011. * ASIC completed more than 200 reviews examining issues including practitioner independence, competence and remuneration.   Report 287 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep287" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h2) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%234) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **3.1  Reports**   On 5 June 2012, ASX released:   * the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_May_2012_-_FINAL.pdf" \t "_new); * the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_151.pdf" \t "_new); and * the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_-_May_FINAL.pdf" \t "_new)   for May 2012.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h3)  **3.2  ASX Listing Rules Chapter 10 - independent experts' reports**   On 4 June 2012, ASX announced that Listing Rule 10.10 has been amended so that an independent expert's opinion as to whether or not a transaction is fair and reasonable must be displayed prominently in the notice of meeting, and on the covering page of accompanying documents.  Previously, Listing Rule 10.10 only required prominent display of the independent expert's opinion if the conclusion was that the transaction was not fair and reasonable.   A new Listing Rule 10.10A has been introduced in relation to the distribution of the independent expert's report.  This rule allows the independent expert's report to be sent in electronic form to shareholders who have elected to receive notices of meeting in electronic form.   A listed entity is required:   * to ensure that the independent expert's report is easily accessible on its website; * to ensure that the address of its website is given to each ordinary security holder; and * if requested, send a hard copy of the independent expert's report to an ordinary security holder at no cost, and ensure that ordinary security holder is informed in the notice of meeting of this option for receiving the independent expert's report.    Further information is available on the [ASX website](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20120604_0512_HTML.htm" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h3)  **3.3  ASX launches Equity OTC Clear service for equity options**   On 28 May 2012, ASX launched Equity OTC Clear, an efficient clearing service for ASX participants to anonymously report transactions in over-the-counter ('OTC') equity options.  ASX's service does not require participants to lodge an International Swaps and Derivatives Association ('ISDA') contract.  It also provides investors with flexible expiry dates and strike prices.   Other benefits of the service include:   * the creation of overnight settlement prices for OTC contracts by ASX; * corporate action contract adjustments for the OTC contracts in consistent alignment with corporate action adjustments to regular listed equity option contracts; and * the ability for investors to deal with multiple brokers to achieve netting-out efficiencies by closing back-to-back long/short OTC positions.   The media release is available on the [ASXGroup.com.au](http://www.asxgroup.com.au/media/PDFs/Equity_OTC_Clear_-_FINAL.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h3) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%235) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **4.1  Minemakers Limited**  On 25 June 2012, the Takeovers Panel made a declaration of unacceptable circumstances and orders in relation to an application dated 5 June 2012 by Minemakers Limited in relation to its affairs.  Minemakers is currently the subject of an off-market takeover bid by UCL Resources Limited.  On 28 May 2012, UCL lodged its bidder's statement with ASIC. Minemakers sought a declaration of unacceptable circumstances in relation to disclosure in UCL's bidder's statement.  The Panel considers that there are material information deficiencies in the bidder's statement, including in relation to:   * proposed funding of UCL's bid; * related party transactions; * capital structure of the combined group; and * recent sales prices of Minemakers and UCL shares and the offer premium.   The Panel has made orders to the effect that UCL:   * immediately advise the market, in a form approved by the Panel, that the bidder's statement contains information deficiencies and UCL will lodge a replacement bidder's statement; * prepare a replacement bidder's statement in a form approved by the Panel; and * not before lodgement of the replacement bidder's statement: (i) despatch the original statement or any supplementary or replacement statement, or (ii) publish (or further publish to the extent already published) such information.   Further information is available on the [Takeovers Panel website](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2012/036.htm&pageID=&Year" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h4) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%236) | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | **5.1  Directors of hedge fund business found guilty of concealing 'sham' swaps**   (By Isabel Waters and Kate Johnson, King & Wood Mallesons)   Weavering Capital (UK) Ltd (in liq) v Peterson [2012] EWHC 1480 (Ch), England and Wales High Court (Chancery Division), Proudman J, 30 May 2012   The full text of this judgment is available at:  [http://www.bailii.org/ew/cases/EWHC/Ch/2012/1480.html](http://www.bailii.org/ew/cases/EWHC/Ch/2012/1480.html" \t "_new)   **(a) Summary**   These proceedings concerned allegations of fraud and negligence brought by collapsed London hedge fund manager Weavering Capital (UK) Limited ('WCUK') and its liquidators against WCUK directors and staff.     The key allegation levelled against WCUK's Chief Executive and Managing Director, Mr Peterson, and his fellow defendants was that a WCUK-managed incorporated hedge fund called Weavering Macro Fixed Income Fund ('the Macro') had entered into a series of 'sham' transactions purported to involve interest rate swaps with a related counterparty called Weavering Capital Fund ('WCF').     Justice Proudman of the England and Wales High Court found in favour of the claimants on almost all counts, and awarded damages of $450 million.    **(b) Facts**    Mr Peterson established WCUK as a family business in 1998.  He was a director, the chief executive officer and the principal investment manager of WCUK.     WCUK managed, and acted as investment adviser to, WCF and the Macro (both incorporated entities).  Mr Peterson's stepfather and brother were directors and Mr Peterson himself eventually became a director of WCF.   The Macro began trading with $539k of assets under management and, within the first month, had lost 19.3% of the assets in exchange trading.  This loss was offset by apparent gains earned through over the counter ('OTC') transactions with WCF and was recorded as a 3.2% profit.    The terms of OTC derivatives, in contrast to exchange-traded derivatives, are negotiated between the parties to the transaction. Swaps are traded OTC.     From 2005 to 2009, the Macro entered into 30 swap transactions with WCF valued at $600m.  Potential losses were effectively transformed into increases in the Macro's net asset value, which gave the appearance of a smooth and successful business.    Marketing documents were sent to investors purporting to provide 'a full breakdown of [investment] positions' of the Macro.  Not only did these documents contain no mention of the swaps, they made various statements to the effect that the Macro 'traded very little in OTC instruments' and invested in 'primarily futures and options'.  Due diligence questionnaires ('DDQs'), for example, stated that the 'majority of the securities we trade are exchange traded', when in fact the majority of the portfolio comprised swaps.    Except for the unaudited semi-annual accounts for 2004, the Macro's accounts never disclosed that the counterparty to the OTCs was in fact a related party and not a major bank, as stated in the offering memorandum inviting people to invest in the funds.    During the global financial crisis, investors made a large number of redemption requests to the Macro which it was unable to meet.  PricewaterhouseCoopers LLP ('PwC') was subsequently engaged to assist the Macro with its liquidity problems. PwC discovered that the Macro had four current swaps with WCF with a reported value of $637 million.  After investigating WCF's creditworthiness, PwC determined that Mr Peterson's valuation of some WCF assets was 'so grossly over-inflated as to be absurd'.  The Macro was subsequently placed into liquidation.    **(c) Decision**    The High Court found Mr Peterson guilty of deceiving clients and breaching his duty of care to investors owed in his capacity as a director. Three of Mr Peterson's fellow defendants were also found liable for negligently permitting the fraud to happen based on breach of fiduciary duties owed to WCUK as directors and employees.    Broadly, the key issues in assessing the liability of the defendants were:   (i)           whether fraud was perpetrated at all; and, if so (ii)          whether the swaps were a sham in the legal sense.   **(i)            Was a fraud perpetrated?**   Justice Proudman's judgment highlights many misrepresentations and misleading statements about the nature of the investment strategy contained in documentation prepared by WCUK.  Her Honour concluded that investors had not been told 'the full picture' in relation to the swaps and the reported net asset value of the Macro.  She noted that WCUK's marketing tools all referred exclusively to the exchange-traded futures and options and did not mention the swaps, OTC transactions or counterparty risk.     Justice Proudman further identified a number of omissions, irregularities and deficiencies in the paperwork for the swaps.  For example, half the trade confirmations for the swaps were missing and those available contained signatures forged by Mr Peterson (purporting to be his stepfather's signature) and discrepancies resulting from backdating the documentation by as much as a month.  The backdating of swap documentation also suggested that the swaps were not genuine.   Looking at the documentation as a whole, Justice Proudman concluded that 'the actual risks were completely different from the picture presented'.    **(ii)          Were the swaps a 'sham'?**   Justice Proudman quoted Lord Diplock in *Snook v London & West Riding Investments* [1967] 2 QB 86 who defined 'sham' acts by parties as those 'which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create'.    Justice Proudman observed that, in all the circumstances, she considered that the swaps were never intended to be enforceable instruments; rather, they were employed to manipulate the financial information presented so that the impression would be given that the Macro was successful.     The primary case for the claimants - that the swaps were not genuine commercial transactions at all but merely 'shams' in the legal sense - was therefore made out.    **(iii)        Findings in relation to individuals**   The High Court found Mr Peterson guilty of misleading investors by concealing the fund's investments in the swaps. He was consequently liable for breaching numerous director duties.     In terms of the trading strategy adopted and representations made to investors, the Court was satisfied that all WCUK personnel had 'acted in accordance with [Mr Peterson's] instructions' and were not deliberately fraudulent.  They did not, however, escape liability for negligence.     Mr Peterson's wife, also a director of WCUK, was found guilty of negligently permitting the fraud to happen.  Justice Proudman observed that Mrs Peterson not only omitted to ask questions but positively approved the swap trading strategy and, had she acquired a sufficient knowledge of WCUK's business, she would have known the swaps contravened the Macro's contract with investors. The Court determined that Mrs Peterson failed to meet the standard expected of a reasonable director of a hedge fund management company in her position, with her experience, actual knowledge and intelligence.  The fact that Mrs Peterson was highly paid was also a relevant factor in resolving the extent of her director's duties: the higher the level of reward, the greater the responsibilities reasonably to be expected to go with it.    Another director, Mr Dabhia, was also found guilty of negligently breaching his director duties by failing to acquire a sufficient knowledge and understanding of WCUK's business.  Her Honour accepted that many of Mr Dabhia's communications with investors were dictated by Mr Peterson and Mr Dabhia 'did not think through what he was actually doing' but instead trusted Mr Peterson implicitly while having only a 'foggy' understanding of the swaps. These excuses were, however, no defence to a claim for breach of director duties.     Mr Platt, a highly paid employee of WCUK who was regarded by Mr Peterson as his 'right hand man', was found guilty of negligence for breach of an implied term of his employment contract to perform his duties with proper care. The claimant's primary case against Mr Platt for dishonest assistance failed because Justice Proudman concluded on the evidence that Mr Platt had honestly, if unquestioningly, believed that Mr Peterson's explanations made sense.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.2  When is a debt 'secured'?**    (By Anthony Burke and Jessica De Simone, Clayton Utz)   Roberts v Investwell Pty Ltd (In liq) [2012] NSWCA 134, New South Wales Court of Appeal, Bathurst CJ, Beazley JA and Tobias AJA, 25 May 2012  The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158469](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158469" \t "_new)    **(a) Summary**   In this decision, the New South Wales Court of Appeal discusses what is required for an equitable mortgage or equitable charge over present, or future property, to come into existence.  This is an appeal from the decision of Hammerschlag J in the New South Wales Supreme Court.  Hammerschlag J held the Agreement (defined below) by which the respondent company, Investwell Pty Ltd (In Liquidation) ('the Company'), was required to grant a mortgage over the Land (defined below) owned by the Company, or an equitable mortgage or charge over the Company's assets, to the appellant (Mr Roberts) at the request of Mr Roberts, only gave Mr Roberts the option of requesting one or more forms of security.  The Agreement itself did not create an equitable mortgage or equitable charge.  On appeal, the Court was asked to determine whether at the time payment was made by the Company to Mr Roberts, it was a payment in respect of a secured debt and did not constitute an unfair preference, and therefore was not a voidable transaction.  Bathurst CJ (with whom Beazley JA and Tobias AJA agreed) held that for an equitable mortgage or equitable charge to be created there must be an intention to create an immediate proprietary interest or immediate right of recourse to identifiable, present or future, property.  The appeal was dismissed on the grounds that the relevant contractual provision in the Agreement, on its true construction, did not confer an immediate right in, or right to, present or future property. As such, Mr Roberts was an unsecured creditor.  **(b) Facts**    Mr Roberts was a director and shareholder of the Company.  On 21 June 2001, the Company purchased land in Maroubra ('the Land') with the vision of developing five units.  By April 2002, it was apparent there was a shortfall in funding to complete the development.  Mr Roberts, the Company and two of the Company's shareholders entered into a Directors and Shareholders Agreement ('the Agreement') whereby Mr Roberts (in his personal capacity) agreed to use his best endeavours to provide further funds and security for the project.  The Agreement contained the following relevant provision (at clause 21): 'The parties agree that if requested by Roberts at any time [the Company] must at its own expense immediately grant to Roberts a mortgage over the Land, an equitable mortgage or charge over [the Company's] assets and undertakings, and/or such other security as Roberts may consider necessary.  Any such securities must be in a form acceptable to Robert's legal advisers.'  Three of the five units were sold on 25 February 2003, and a fourth was sold on 26 February 2003.  On 12 March 2003, the Company sold the remaining unit for $409,000.00.  The Company used the proceeds to discharge an outstanding debt owed to Holiday Coastal Credit Union from which it borrowed money to purchase the Land.  The balance, a remaining $164,306.83, was paid to Mr Roberts as a creditor of the Company.  The Company was insolvent at the time the payment was made.  An order for the winding-up of the Company was made on 12 March 2007.  Pursuant to this order the Company and liquidator brought proceedings against Mr Roberts, claiming the amount paid to him was a voidable transaction and sought its repayment.  **(c) Decision at first instance**  On 29 June 2011, Hammerschlag J held the payment made by the Company to Mr Roberts in the sum of $164,306.83 was a voidable transaction and ordered, under section 588FF(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), that Mr Roberts pay that sum, interest and costs of the proceeding, to the Company.  It was held that Mr Roberts was an unsecured creditor of the Company and the payment constituted an unfair preference.  The debt was unsecured because clause 21 of the Agreement only gave Mr Roberts the option of requesting one or more forms of security rather than creating an enforceable security interest over the property or assets of the Company.  **(d) Decision on appeal**  On appeal, the issue was whether at the time of payment, the payment was in respect of a secured debt and therefore did not constitute an unfair preference (pursuant to section 588FA of the Act) and therefore was not a voidable transaction.  On appeal Mr Roberts argued that his debt was secured and that clause 21 of the Agreement characterised the security as an equitable charge or equitable mortgage over the whole of the Company's assets or undertakings, including the Land.  The Company submitted that an equitable mortgage only comes into existence when it is capable of specific performance.  Clause 21 depended on the choice of security made by Mr Roberts, so that, until a choice of security was identified and a request for the security was made, specific performance by the Company to grant a mortgage to Mr Roberts was not possible.  **(i) The difference between an equitable mortgage and an equitable charge**  The Court held that it has long been accepted that a specifically enforceable agreement to grant a legal mortgage over property will constitute an equitable mortgage.  The Court, citing the decision of *Pico Holdings Inc v Wave Vistas Pty Limited* (2005) HCA 13; (2005) 79 ALJR 825 at 68, noted that it is the specific enforceability which creates the equitable mortgage.  In comparison, an equitable charge does not necessarily create an equitable mortgage.  The Court observed that, if the property of the chargor is appropriated to the chargee for payment of a debt and the chargee has an immediate right to have it made available for the payment of the debt, an equitable charge is created.  In other words, an equitable charge is created when property is made liable or specially appropriated to discharge a debt.  Furthermore, it is the availability of an equitable remedy to enforce the immediate right which gives rise to a chargee's proprietary interest by way of security in the property charged.  **(ii) Could clause 21 be construed to create an equitable mortgage or equitable charge?**  The Court held that the question of whether a contractual provision creates an equitable mortgage or equitable charge depends on the construction of the clause in question.  If the provision confers an immediate equitable interest in identifiable property, or grants an immediate right of recourse to present or future property, then the grantee will be a secured creditor.  The Court dismissed the appeal on the grounds that clause 21 of the Agreement, on its true construction, did not confer an immediate right of recourse to present or future property to Mr Roberts as:   * the obligation to grant a mortgage was expressed to be on the request of Mr Roberts; * the property subject to the proposed security was expressed as alternatives and, as such, was not identifiable; and * the form of the security was not settled but rather was required to be in a form acceptable to Mr Roberts' legal advisers.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.3  Misleading and deceptive conduct - sale of a complex financial product - section 12DA(1) ASIC Act 2001**  (By Brenton Clarke, Ashurst)   Salvatore Coco v Westpac Banking Corporation [2012] NSWSC 565, Supreme Court of New South Wales, Justice Hammerschlag, 25 May 2012  The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/565.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/565.html" \t "_new)  **(a)  Summary**   A financial adviser of the defendant bank, in selling a particular complex financial product, advised a customer as to the operation of the financial product in a way that was significantly more advantageous than the way in which it actually operated.  The defendant bank was found to have engaged in misleading and deceptive conduct in relation to financial services and therefore had contravened section 12DA(1) of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (the ASIC Act). Damages were assessed under section 12GF(1) of the ASIC Act on the basis of the loss suffered by the plaintiff had the financial product operated the way the plaintiff believed it would operate.   **(b) Facts**   The plaintiff had various meetings with two particular financial advisers of the defendant bank ('Bank') in relation to investing in the Bank's managed investment product, the Guaranteed Portfolio Service ('GPS'). It was proposed that the Bank would lend the plaintiff $10 million to invest in the GPS.   The GPS had the following features:   * The initial $10 million would be invested in units in six managed funds ('Units') for the investment period, which was 5 years. * The Bank could switch or re-allocate the investment in the Units to zero coupon bonds ('Bonds'). * If the value of the Units decreased, a selling trigger mechanism would operate to progressively switch the Units into the Bonds.  If the value of the Units increased, any investment in the Bonds would be transferred back into the Units. * If the whole investment was switched into Bonds, it would remain as Bonds until the end of the 5 year investment period. * Any distributions from investment in the Units would be reinvested in the Units. * A 'capital guarantee', whereby the investor would be guaranteed the value of their initial investment (in this case the $10 million) at the end of the investment period.  Any shortfall of the value of the investment at the end of the investment period as compared to the start was to be paid by the Bank.  However, if the performance of the Units reached a pre-determined level, the guaranteed capital would automatically increase by 20% of the initial investment.   In discussions with the Bank before entering into the investment, the plaintiff  had particular concern about the downsides of the investment, with particular regard to how the 'capital guarantee' would operate. In these discussions, one of the Bank's financial advisers repeatedly described to the plaintiff how he thought the GPS operated, advising the plaintiff in relation to the capital guarantee and shortfall that:   * the plaintiff would be guaranteed the $10 million initial investment at the end of the investment period; and * any dividends from the Units or interest earned on the Bonds during the investment period would not form part of the guarantee and the plaintiff would be entitled to such distributions at the end of the 5 year term.   The plaintiff therefore believed that at the end of the 5 year investment period, he would receive his initial $10 million investment plus any dividends or interest earned from the investment. On the basis of this belief, the plaintiff entered into the GPS.  During the investment period, the plaintiff was advised by the Bank, in respect of the operation of the GPS, that he would not receive any dividends or interest on the Bonds which the GPS had accumulated. Additionally, the plaintiff was advised he would only receive his initial $10 million investment back at the end of 5 year investment period.   The plaintiff claimed that the Bank, through the advice of its financial advisers, had mislead the plaintiff as to the operation of the GPS in a way in which it materially did not operate, therefore engaging in misleading and deceptive conduct in contravention of section 12DA(1) of the ASIC Act.   **(c)  Decision**   **(i) Misleading and deceptive conduct**   The main issue in the case centred around how the capital guarantee operated and the way in which any shortfall between the value of an investment as at the start date and at the end of the investment period was to be determined.   His Honour held that the Bank's financial adviser had repeatedly mislead the plaintiff in their pre-contractual discussions by the adviser's incorrect statements as to the operation of the GPS in relation the capital guarantee and calculation of any shortfall.   As part of the Bank's submissions, the Bank argued that despite anything conveyed by its financial adviser to the plaintiff, the Bank should not be found to have engaged in misleading or deceptive conduct because written material was provided by the Bank which correctly described the operation of the GPS and not how the plaintiff believed it would operate.  Therefore, the Bank contended that this clear communication trumped anything differently which the financial adviser may have conveyed.   However, Justice Hammerschlag rejected this argument.  His Honour held that the financial adviser's misleading statements to the plaintiff were directed at how the financial product described in the written material worked, qualifying such written material. His Honour also noted that the financial adviser could have referred the plaintiff to the written material when specific enquiries about the GPS were made by plaintiff, which the financial adviser did not do.      The Bank was therefore found to have engaged in misleading and deceptive conduct in relation to financial services and therefore contravened section 12DA(1) of the ASIC Act.   **(ii)  Relief**   In determining the plaintiff's loss for the purposes of section 12GF(1) of the ASIC Act, Justice Hammerschlag held that loss or damage under section 12GF(1) is actual loss or damage.  As the case was one which involved misrepresentation, his Honour held that that the loss must be determined by reference to what the plaintiff would have done had the plaintiff not relied on the Bank's misrepresentation.    His Honour accepted that there was a sufficient causal connection between the plaintiff's loss and the financial adviser's inaccurate statements to the plaintiff, and that on the balance of probabilities, the plaintiff would not have entered into any alternative investment had the bank not engaged in misleading conduct.   Justice Hammerschlag considered it appropriate that damages be assessed on the basis that the plaintiff receive the benefit of the bargain which the Bank held out the plaintiff would receive (as if the transaction proceeded in accordance with the plaintiff's beliefs and the Bank's misrepresentation of the GPS).   The plaintiff was therefore awarded damages to the value of the dividends and income earned by the GPS until the end of the five year investment period.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.4  Validity of appointment of administrator and administrator's entitlement to remuneration**   (By Jessica Bounds, King & Wood Mallesons)   Dolores Correa and The Spanish Club Limited (subject to Deed of Company Arrangement) v Kenneth Michael Whittingham (No 3) [2012] NSWSC 526, Supreme Court of New South Wales, Black J, 21 May 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158641](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158641" \t "_new)    **(a) Summary**   The plaintiffs sought a declaration from the court that the defendant was not validly appointed as the voluntary administrator and deed administrator of The Spanish Club Limited ('the Club') and, accordingly, the Club did not have to pay the defendant's fees and expenses of acting as administrator and deed administrator.  Black J held that the defendant had been validly appointed and therefore was entitled to rely on the statutory regime for determination of his remuneration as the administrator.   Black J also rejected the plaintiffs' request to make orders under section 447E of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) that the defendant was not entitled to claim remuneration, because the plaintiffs failed to satisfy the court that the defendant had acted in a way prejudicial to the Club's interests.     **(b) Facts**    The Club had previously been granted an interlocutory injunction to prevent the defendant from selling the Club's assets and, in a separate case, the defendant applied to the court for directions to hold a meeting of creditors to vary the deed of company arrangement ('DOCA') or alternatively place the Club into liquidation.    In the present case, the plaintiffs, Ms Correa and the Club, claimed that the defendant, Mr Whittingham, should not be entitled to recover fees and expenses for having acted as administrator and deed administrator and should be required to repay the fees and expenses that had already been paid to him. The primary basis for that claim was the plaintiffs' contention that Mr Whittingham was not validly appointed as the Club's administrator.    Mr Whittingham claimed that he was validly appointed by a resolution passed by the Club's directors and an instrument of appointment signed by two directors of the Club.  The form of the resolution appointing Mr Whittingham was signed by Ms Sanchez, a director of the Club, but did not state the names of directors in attendance or the date, time and location of the relevant meeting. Mr Whittingham raised a question with Ms Sanchez as to the form of the resolution and was informed that the directors had provided their approval by phone but did not want to be named as they were afraid of recriminations from people within the Club.  Having found that response satisfactory, on 17 November 2008 Mr Whittingham sought and obtained verbal approval from the relevant statutory authority.  He also sought advice from his solicitors on the same day who advised him that his appointment was valid.   The plaintiffs argued that Mr Whittingham's appointment was not valid because:   * the appointment did not comply with the Club's constitution, as the Club did not at the time have the requisite minimum number of directors and, in any event, there was no quorum at any meeting of directors at which the appointment was made; and * the directors had failed to form a genuine opinion as to the Club's insolvency which is required for the appointment of an administrator under section 436A of the Corporations Act.   Mr Whittingham contended that even if the constitutional requirements were not met, his appointment was valid by reason of the assumptions in sections 128 to 129 of the Corporations Act.  Mr Whittingham also argued that if his appointment was invalid, the court should exercise its discretion in his favour and rely on its powers in sections 447A or 1322 of the Corporations Act to validate his appointment.     The plaintiffs further sought orders disentitling Mr Whittingham from remuneration under section 447E of the Corporations Act, which allows the court to make any order it thinks just if an administrator has acted in a way prejudicial to the interests of the Club or its creditors. The plaintiffs argued that the way Mr Whittingham had dealt with the Club's property was prejudicial to the Club's interests.    **(c) Decision**    **(i) Was the appointment valid?**   Black J held that while the appointment was not made in accordance with the Club's constitution, Mr Whittingham could rely on the statutory assumptions in the Corporations Act.  His Honour held that even though Mr Whittingham could and should have made further inquiries of the Club's directors and circumstances of his appointment, it was not established that he knew or suspected that his appointment did not comply with the requirements of the Club's constitution.  Accordingly, the plaintiffs could not rely on the failure to comply with the constitution to invalidate Mr Whittingham's appointment.    Further, in response to the plaintiffs' argument regarding the failure of the board to form a genuine opinion as to the Club's insolvency as required by section 436A, Black J held that the information available to the Club's directors at the time provided a strong basis for the view that the Club was insolvent.    **(ii) If there was no valid appointment, can the court exercise its discretion in the defendant's favour?**  Against the contingency that an appellate court may take a different view on the question of validity of Mr Whittingham's appointment, Black J also made orders validating the appointment under sections 447A and 1322 of the Corporations Act. The fact that Mr Whittingham had failed to previously make an application to the court for a declaration of valid appointment did not disentitle him from bringing an application under sections 447A and 1322 of the Corporations Act.   Black J commented that the making of orders under sections 447A and 1322 of the Corporations Act would place Mr Whittingham in the same position as any other administrator who had been validly appointed, and that he would need to establish his entitlement to remuneration in accordance with the statutory regime. The matters relevant to Black J exercising the court's discretion under section 447A  were:   * the legislative purpose of Pt 5.3A of the Corporations Act would be served by validating the appointment where the number of directors is short of constitutional requirements, given the likely difficulty in persuading a person to become a director of an insolvent company; * the administrator acted upon legal advice as to validity of his appointment; * the administration was necessary given the matters indicating the Club's insolvency or likely insolvency; * the administrator had completed his work on the footing that the administration and DOCA were valid; and * there was 'plainly a useful purpose' in exercising the discretion in favour of the administrator as it would preserve and allow his access to the statutory regime for determination of his remuneration and would ensure the administration process was not undermined by matters which were not raised by the plaintiffs in a timely manner.   Black J further commented that the 'court will be more likely to exercise its powers to give such effect to the apparent position if that was in fact the preferable position for the Club at the relevant time'.  The plaintiffs failed to show evidence that Mr Whittingham acting as administrator was not the preferable position at the relevant time.    Black J also exercised his discretion under section 1322 in favour of Mr Whittingham. Black J was satisfied that the appointment was of a procedural nature, that Mr Whittingham had acted honestly and that it was just to make the order.  Black J also was satisfied that 'no substantial injustice' would arise as a result of such order. He held that exposing the Club to the statutory regime for determining the administrator's remuneration would not cause them a 'substantial injustice'.  His Honour commented that the observation in *Cheerine Group (International) Pty Ltd v Yeung* [2006] NSWSC 1047 that a company's liability for professional fees and expenses is within the concept of 'substantial injustice' should be treated as a finding on the particular facts rather than as expressing a general principle.   **(iii)             Should Mr Whittingham be entitled to claim remuneration?**   Black J refused to make orders under section 447E of the Corporations Act to deny Mr Whittingham his remuneration as Mr Whittingham had not acted in a way prejudicial to the Club's interests.  In making that decision, his Honour followed the test in *Honest Remark Pty Ltd v Allstate Explorations NL* [2006] NSWSC 735, namely that demonstration of prejudice requires 'a comparison between the actual position of the creditors or members and their hypothetical position if the relevant prejudicial conduct did not occur.'  The plaintiffs failed to bring forward any evidence that established that the Club would have been in a better position if Mr Whittingham had not dealt with the Club's property in the way he had.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.5  Indemnification under a professional indemnity insurance policy for legal costs incurred in ASIC proceedings**   (By Tuning Soebagjo, Ashurst)   Kyriackou v ACE Insurance Limited [2012] VSC 214, Supreme Court of Victoria, Vickery J, 18 May 2012   The full text of this judgement is available at:  [http://www.austlii.edu.au/au/cases/vic/VSC/2012/214.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/214.html" \t "_new)    **(a) Summary**   Justice Vickery held that a claim made by Mr Kyriackou against ACE Insurance Limited ('ACE') to indemnify him for legal costs incurred in respect of ASIC proceedings against him did not fall under a policy of professional indemnity insurance provided by ACE.     **(b) Facts**   Mr Kyriackou took out professional indemnity insurance with ACE for the period 6 September 2006 to 6 September 2007 ('the Policy'). Under the Policy, ACE would indemnify the insured against 'Loss arising and Claim in respect of civil liability for breach of a duty owed in a professional capacity'.   'Claim' is defined in the Policy as a claim by a third party to civil compensation or civil damages arising out of the insured's business.    The Policy also excluded payment for loss arising out of a breach by Mr Kyriackou of a duty owed in the capacity of a director or secretary of a body corporate.    On 28 May 2007, ASIC commenced Federal Court proceedings against Mr Kyriackou (and others) for their alleged involvement in an unregistered managed investment scheme, seeking interlocutory and final relief ('ASIC Proceedings'). The ASIC Proceedings sought to restrain Mr Kyriackou and others from further operating or promoting the unregistered managed investment scheme.    In July 2008, ASIC sought and was later granted leave to discontinue the ASIC Proceedings and no determination was made of the ASIC Proceedings.    Mr Kyriackou incurred substantial legal costs and expenses in defending the ASIC Proceedings.   On 20 March 2009, Mr Kyriackou lodged a claim under the Policy for indemnification and ACE refused to provide indemnification.   **(c) Decision**    Vickery J dismissed Mr Kyriackou's claim, finding that the ASIC Proceedings fell outside the scope of the Policy on two grounds:   * 'Claim' as defined in the Policy is a claim for civil compensation or civil damages, however the ASIC Proceedings did not involve a claim for civil compensation or civil damages. * The Policy was for professional indemnity in respect of civil liability for breach of duty owed in a professional capacity, and the ASIC Proceedings involved activity in a commercial capacity.   **(i)  Civil compensation or civil damages**   Vickery J considered that the central question was whether the ASIC Proceedings involved a 'Claim' as defined by the Policy.  This depended on whether the ASIC Proceedings amounted to a claim against Mr Kyriackou for civil compensation or civil damages, which Vickery J interpreted to mean a 'claim for pecuniary redress for some actionable wrong'.   Under the Originating Process, ASIC sought orders to wind up the scheme, appointment of a liquidator, and an order pursuant to section 1324(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) to restrain Mr Kyriackou from further operating or promoting the scheme. In this regard, Mr Kyriackou sought to rely on section 1324(10) of the Corporations Act which provides a power to award damages.    Vickery J found that, as the Originating Process did not specifically seek orders by way of compensation or damages, the ASIC Proceedings did not constitute a 'Claim' as defined in the Policy.   **(ii) Professional capacity**    Vickery J considered the meaning of 'Professional Capacity' under the Policy and found that the ASIC Proceedings did not amount to a claim made against Mr Kyriackou in respect of a civil liability for a breach of a duty owed in a professional capacity.   It was held that the claim was not for breach of a duty by Mr Kyriackou in a professional capacity, but rather in his capacity as an entrepreneur in the management of his group of companies.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.6  Power of the court to order the winding up of a solvent company after a finding of oppression against minority shareholders**   (By Katrina Sleiman and Andrew Turner, Corrs Chambers Westgarth)   Hillam v Ample Source International Ltd (No 2) [2012] FCAFC 73, Full Court of the Federal Court of Australia, Emmett, Jacobson and Buchanan JJ, 18 May 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/73.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/73.html" \t "_new)   **(a) Summary**   The Full Federal Court considered an appeal from a decision of Robertson J who had made orders to wind up Bonython Metals Group ('BMG') pursuant to section 233 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) after making a finding of oppression towards a minority shareholder.     The Full Federal Court accepted the appellants' submission that an order to wind up a solvent company is an extreme step, but stated that is very different from proceeding upon any 'principle' or assumption that a winding up order of a solvent company is inappropriate, and that no such implication arises from section 232 or 233 of the Act.  The Court found that the order made by Robertson J was justified in the circumstances and dismissed the appeal.   **(b) Facts**    BMG's principal business activity was to raise capital to undertake exploration and development of mineral resources. Mr Hillam, the appellant, was described as 'the driving force behind BMG' and at the time of trial held 32% of the shares (his domestic partner held another 32%) and was the CEO of the company.    The application for relief under section 233 of the Act was brought by Ample Source International ('Ample') who, in April 2012, had entered into a term sheet, share allotment and a shareholders' agreement with BMG whereby, upon payment of $16.5m in working capital to BMG, Ample would acquire 25% of the shares in BMG.  'Almost immediately' after these agreements were executed, conflict arose between Mr Hillam and Ample.    There were a range of actions which illustrated the commercial unfairness which the Full Court held was the focus of their inquiry. Some of the circumstances include Mr Hillam:   * making payments from BMG's account (of which Mr Hillam was the sole signatory) of money contributed by BMG to other entities which Mr Hillam owned; * limiting Ample's access to any financial records and information about board meetings; * holding board meetings and purporting to pass resolutions otherwise than in accordance with the terms of the shareholders' agreement; * excluding Ample from the management of the company generally; and * making unauthorised payments to Mr Hillam for additional personal expenses in excess of those agreed to.   Upon consideration of these allegations, Robertson J found at first instance that there was oppressive conduct for the purposes of section 232(e) of the Act.    Section 232 provides, relevantly:   The Court may make an order under section 233 if: (a) the conduct of a company's affairs; or (b) an actual or proposed act or omission by or on behalf of a company; or (c) a resolution, or a proposed resolution, of members or a class of members of a company; is either: (d) contrary to the interests of the members as a whole; or (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.    Section 233 provides a non-exhaustive list of potential orders [(a)-(j)] that may be made in the case of such a finding:   (1)  The Court can make any order under this section that it considers appropriate in relation to the company, including an order:  (a)  that the company be wound up; ...   Ample initially sought an order that it be allowed to buy out the majority interest in BMG.  However, this was rejected at first instance and not renewed on appeal.  Ample's alternative position was that BMG should be wound up.    The appellants had made a number of alternative suggestions, all of which were rejected by Robertson J; the only one that was advanced on appeal being that BMG sell its interest in the only major investment BMG had made in order to buy out Ample's share in the company.  Additional proposals (that were not put forward at trial) were suggested by Mr Hillam on appeal, however their Honours held that the appellants were 'confined to the position they relied on before the trial judge', as the consideration of such propositions would require the consideration of evidence which was not available on appeal.    **(c) Decision**    The Full Court agreed 'with the evident conclusion of the trial judge that the oppression of the minority interest of Ample Source in this case was serious.  It was the result of Mr Hillam's conduct.  That conduct was calculated and systematic.  It is against that background, and not independently of it, that assessment of appropriate relief must occur.'   The appellants argued that the power to wind up a company pursuant to section 233(a) of the Act 'was to be exercised only as an extreme step' and relied on an extract from a judgment of Lord Wilberforce of the Privy Council in *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 13 ALR 561, who said (at 566-7), 'to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made'.    The Full Court was quick to put Lord Wilberforce's comments in context and distinguish the facts of that case from those of BMG whose 'expenditure had been considerable [while] no money had been earned' and that in this case, '[t]here were explicit complaints that BMG's affairs were being mismanaged.'   The Full Court acknowledged that, while there was no presumption against the winding up of a solvent company in circumstances such as these, there were valid warnings in the case law which indicated that such an action was an extreme step and those warnings should be considered.  Their Honours reiterated, however, that this was not in any way meant to impose into the legislation any implication that the winding up of a solvent company was inappropriate.    In their Honours' strong opinion, '[t]he real question is whether a winding up order was appropriate to deal with and address the grounds for relief which had been established.  The answer to that question must be found in the facts of the particular case.'    The finding ultimately made by the Full Court was that, given the seriousness of the oppression, coupled with the lack of any 'realistic prospect of a commercially viable solution', an order winding up BMG was 'not only reasonably available to the trial judge' but it was 'virtually inevitable that that should happen.'  The appeal was dismissed with costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.7  Sole director's authority to sign cheques on behalf of a company; reliance on such authority**   (By Sophie Payton, DLA Piper)   Katwell Pty Ltd v National Australia Bank Limited [2012] NSWSC 513, Supreme Court of New South Wales, Sackar J, 18 May 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/513.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/513.html" \t "_new)   **(a) Summary**   Katwell Pty Limited ('Katwell') alleged that there was a mandate in respect of its National Australia Bank ('NAB') account ('Katwell's account') which required cheques drawn on its account to be signed by Mr John Katerinis ('Katerinis') and, after 17 January 2005, by Katerinis and Mr Scott Kitas ('Kitas').   Katwell alleged that the NAB breached the mandate by drawing cheques on Katwell's account that were signed only by Kitas.   The primary judge held that Kitas had Katwell's authority to sign cheques drawn on Katwell's account and that the NAB was entitled to rely upon that authority.  On this basis the primary judge held that Katwell had no reasonable cause of action and summarily dismissed the proceedings.   The Court held that the primary judge had failed to give appropriate weight to evidence that, if accepted, would prove that Kitas did not have authority to sign cheques drawn on Katwell's account and that the NAB was on notice of Kitas' lack of authority.   **(b) Facts**      Kitas was the sole director and Katerinis was the sole secretary of Katwell from 20 June 2001 to 22 February 2006.  On 1 October 2003, Katerinis opened a NAB account on behalf of Katwell.  On 31 May 2010 Katwell and Katerinis commenced proceedings against the NAB alleging that:   * Katwell, or both Katwell and Katerinis, had entered into a contract with the NAB under which the NAB was to only pay cheques drawn on Katwell's account that were signed by Katerinis or, after 17 January 2005, by both Katerinis and Kitas; * In breach of the contract, the NAB paid cheques drawn on Katwell's account that were signed only by Kitas; and * Kitas misappropriated the monies paid out by reason of the cheques signed only by Kitas, and Katwell and Katerinis suffered losses as a result.   On 11 February 2011, Katerinis was removed as a party to the proceedings after becoming bankrupt in late 2010.     On 28 October 2011, the NAB made an application for the proceedings to be summarily dismissed.  On 7 November 2011, Macready AsJ heard the NAB's application and subsequently dismissed the proceedings.  On 6 December 2011, Katwell appealed from Macready AsJ's interlocutory judgment.   **(i) Interlocutory judgment**   Macready AsJ held that Katwell had no reasonable cause of action based on the following principal findings:   * On 19 December 2003, Katwell gave NAB a mandate in respect of Katwell's account under which Katerinis was to be the only authorised signatory; * On 12 January 2005, the mandate was changed so that both Katerinis and Kitas had to sign any cheques drawn on Katwell's account; * The cheques complained of by Katwell were all signed only by Kitas while he was the sole director of Katwell; * It was inferred that section 198B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) applied as a replaceable rule in the absence of evidence of the existence of a constitution governing Katwell's operation; * There was no evidence that NAB had turned its mind to the authority of Kitas to sign the cheques in question; * By virtue of section 198B of the Corporations Act, Kitas had actual authority to sign cheques drawn on Katwell's account; and * By virtue of section 129 of the Corporations Act, the NAB was entitled to assume that Kitas had authority to sign the cheques in question.   Section 198B(1) of the Corporations Act provides that the director of a proprietary company that has only one director may sign a negotiable instrument on behalf of the company.   Section 129 of the Corporations Act provides that a person may make certain assumptions including that anyone who appears, from publically available information, to be a director of a company has authority to exercise the powers exercised by a director of a similar company.     Section 128(4) of the Corporations Act provides that a person is not entitled to make an assumption under section 129 if, at the relevant time, they knew or suspected that the assumption was incorrect.   **(ii) Grounds of appeal**   Katwell contended that Macready AsJ erred in finding that it had no reasonable cause of action.  Specifically, it submitted that it was reasonably arguable that Kitas did not have actual authority pursuant to section 198B(1) of the Corporations Act because:   * The power conferred by section 198B(1) of the Corporations Act on a sole director of a proprietary company to sign cheques is not absolute and does not extend to authorising transactions that are misappropriations of the company property; and, or alternatively, * Kitas' authority had been limited by decisions taken at Kitas and Katerinis' first meeting on 19 December 2003 that Kitas would not be a signatory on Katwell's account and, later on 12 January 2005, that Kitas would be a joint signatory on Katwell's account.   Katwell further submitted that it was reasonably arguable that Kitas did not have ostensible authority to sign the cheques pursuant to section 129 of the Corporations Act because, at the time of the relevant dealings, the NAB knew or suspected that Kitas did not have authority.  **(c) Decision**    Sackar J held that the following evidence, if accepted, would prove that Kitas did not have authority to sign cheques drawn on Katwell's account and that the NAB was on notice of Kitas' lack of authority:   * At Kitas and Katerinis' first meeting on 19 December 2003, Kitas made statements to the effect that he did not want to have authority to sign cheques drawn on Katwell's account and that Katerinis accepted these statements; and * On 12 January 2005, Mr Greg Heffernan, the manager of the NAB's Marrickville branch, made statements to Katerinis which demonstrated his understanding that both Katerinis and Kitas' signatures were required in order for the NAB to draw a cheque on Katwell's account.   Sackar J upheld the appeal on the basis that Macready AsJ had failed to give appropriate weight to this evidence such that his decision to strike out the proceedings was provoked by error.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.8  Non sequitur: creditor's failed claim for damages under section 1324(10) of the Corporations Act based on a director's contravention of section 182(1)**    (By Marianna Parry, Freehills)   McCracken v Phoenix Constructions (Qld) Pty Ltd [2012] QCA 129, Queensland Court of Appeal, Fraser and White JJA and Applegarth J, 18 May 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/qld/QCA/2012/129.html](http://www.austlii.edu.au/au/cases/qld/QCA/2012/129.html" \t "_new)   **(a) Summary**   The case encompasses an appeal by Mr McCracken from an earlier decision of the trial judge to award damages to the plaintiff, Phoenix Constructions (Qld) Pty Ltd ('Phoenix'), pursuant to section 1324(10) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act) in the context of a contravention by Mr McCracken of the director's duty under section 182(1) of the Act ('Contravention').     The Court allowed the appeal with costs on the basis that, although Mr McCracken did contravene section 182(1) of the Act and Phoenix appeared to have standing to claim under section 1324, it did not follow that the Court had the power to award damages under section 1324(10).  In addition, the Court found that Phoenix failed to prove that it suffered its claimed loss because there was no evidence that, in the absence of the Contravention, Mr McCracken's company, Coastline Construction (Aust.) Pty Ltd ('CCAPL') would have sufficient assets to repay Phoenix's contractual claim.    **(b) Facts**    Mr McCracken was a sole director of CCAPL when it entered into the Construction Management Agreement with Phoenix in September 2004 ('CMA') to develop the land earlier purchased by Mr McCracken's wife, Mrs McCracken. There was a prior joint venture agreement ('JVA') between CCAPL and Mrs McCracken which gave CCAPL valuable rights with respect to the land, while omitting to state which, if any, of the units of the developed land would be reserved for Mrs McCracken.    In 2006, a dispute arose about the amount owed by CCAPL to Phoenix under the CMA.  Phoenix served a creditor's statutory demand on CCAPL and subsequently instituted proceedings against CCAPL for damages for breach of the CMA.  The parties underwent several unsuccessful mediation sessions in January and February 2007.  After one of these sessions, Mr McCracken said to a director of Phoenix: 'I will not be paying anything and I can close the company down if I need to'.    Within a week, Mr McCracken entered on behalf of CCAPL into a deed of amendment to the JVA with Mrs McCracken ('Deed of Amendment'), assigning the rights to seven units of the developed land (which had not been yet sold by CCAPL) to Mrs McCracken. Although Phoenix applied for Mareva orders in February 2007 which resulted in Mrs McCracken, CCAPL and later Mr McCracken personally giving various undertakings to the court with respect to the assets, the court found that the undertakings were given too late.  Phoenix, having first instituted proceedings against CCAPL, added Mrs McCracken as a second defendant, and eventually added Mr McCracken as a third defendant.  At trial, Phoenix pursued its claim against Mr McCracken only, as CCAPL had been liquidated by Mr McCracken and Mrs McCracken had become bankrupt.   At first instance, Cullinane J declared that the diminution of CCAPL's assets pursuant to the Deed of Amendment constituted a contravention of the director's duty under section 182(1) by Mr McCracken, as he had improperly used his position to gain an advantage for the second defendant and caused detriment to CCAPL.  The trial judge then held that the plaintiff was entitled to damages amounting to its loss in the sum of $1,495,208.71 plus interest in the sum of $530,003.46 under section 1324 of the Act, which gave the Court powers to grant injunctions and/or damages in lieu.    On appeal, Fraser JA, White JA and Applegarth J agreeing, set aside the orders made by Cullinane J and dismissed the plaintiff's claim with costs. The Court, however, rejected the appellant's request that costs be paid by the respondent on indemnity basis and instead ordered the appellant to pay:   * the respondent's costs, including reserved costs ('Costs'), of prosecuting the proceedings against CCAPL and defending CCAPL's counterclaim; and * 70% of the Costs of and incidental to the proceedings against Mr McCracken.   **(c) Decision**    Fraser JA considered the following issues:   * Should the trial judge's finding that Mr McCracken contravened section 182(1) be set aside on the ground that evidence was wrongly excluded? * Did section 1324(10) empower the trial judge to award the claimed damages to Phoenix for Mr McCracken's contravention of section 182(1)? * Did Phoenix prove that it suffered the claimed loss?   His Honour dealt with these issues as summarised below.   **(i)   Should the trial judge's finding that Mr McCracken contravened section 182(1) be set aside on the ground that evidence was wrongly excluded?**   The defendant argued that the finding of the Contravention should be set aside because the trial judge erred in excluding the evidence, tendered in the form of affidavits from the McCrackens and their solicitor and accountant, to the effect that the Deed of Amendment 'reflected an earlier understanding between Mr and Mrs McCracken that, upon completion of the joint venture, she would own the units which were subsequently identified' in it.     At trial, the plaintiff objected to that evidence on the ground that the affidavits only established the subjective intentions of the parties and so the judge concluded that the evidence was not admissible in the proper construction of the JVA.  The defendant did not challenge that finding.    On appeal, the defendant argued that the evidence tended to show that the director's purpose was not to 'simply give away the company's property so as to make it unavailable to meet Phoenix's claim' and that the evidence of the director's awareness or belief was relevant to the issue under section 182.     Rejecting this ground of appeal, Fraser JA held that, since at the trial the defendant did not raise this point, a re-trial would be necessary if the evidence were now admitted.   **(ii) Did section 1324(10) empower the trial judge to award the claimed damages to Phoenix for Mr McCracken's contravention of section 182(1)?**   Fraser JA did not deny Phoenix's standing to claim under section 1324 of the Act.  Instead, his Honour had repeatedly made a point that '[a]lthough [section 1324(10)] empowers the Court to award damages 'to any other person' and does not define the nature of those 'damages', it does not follow that the Court might award any measure of damages to any person for any effect upon that person's interests'.  His Honour followed the precedent in Executor Trustee Australia Ltd v Deloitte Haskins Sells (1996) 22 ACSR 270, while dismissing the authorities provided by Phoenix as being either distinguishable or not on the point.     The Court also found, among other things, that:   * construing section 1324 in the way 'propounded by Phoenix would produce an incongruous result that damages might be awarded only where the Court's power to grant an injunction was engaged and where the claimant had applied for an injunction rather than for damages'; * the entitlement to claim and recover compensation for a contravention of section 182(1) was created by Part 9.4B of the Act, which contained provisions allowing only the affected corporation and ASIC to recover specified damages or compensation, while section 1317J provided that 'no other person may apply for any of those remedies'; * a distinction between 'damages' in section 1324(10) and 'compensation' under section 1317H was 'a distinction without a difference'; and * other 'surprising results' flowed from the construction suggested by Phoenix such as that 'either there might be double recovery (recovery by the creditor and the corporation) at the expense of the officer who contravened section 182(1) or the creditor might recover at the expense of the corporation'.   It was held that section 1324(10) did not empower the trial judge to award the damages claimed by Phoenix and the judgment was set aside.   **(iii) Did Phoenix prove that it suffered the claimed loss?**   At trial, Phoenix's loss from the Contravention was equated with the amount of Phoenix's contractual claim against CCAPL.  On appeal, Fraser JA stated that Phoenix might have suffered that loss only if CCAPL retained sufficient assets to meet the whole of Phoenix's claim before the Contravention.  The defendant contended that Phoenix failed to prove the alleged loss, because CCAPL had other unsecured creditors and there was no evidence of its financial position.  Phoenix objected to this argument on a number of grounds, including that it was for Mr McCracken to prove that CCAPL had insufficient assets to pay its creditors.     Fraser JA found for the defendant as '[t]he fact that Mr McCracken did not give evidence [of the company's financial position] could not justify drawing an inference adverse to him in the absence of any evidence which was capable of supporting that inference.  It follows that Phoenix failed to prove that it suffered its claimed loss.'  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.9  You can't mix and match: pooling orders and Aboriginal and Torres Strait Islander Corporations**   (By Chris Keefe, Clayton Utz)   In the matter of Aboriginal Connections Aboriginal Corporation (In Liquidation) and Guri Wa Ngundagar Aboriginal Corporation (In Liquidation) [2012] NSWSC 491, Supreme Court of New South Wales, Barrett JA, 14 May 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/491.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/491.html" \t "_new)   **(a) Summary**   The Court does not have the authority to make a pooling order pursuant to section 579E(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) in relation to a 'group' consisting of a company registered under that Act and an entity incorporated under the [Aboriginal Councils and Associations Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7110" \t "_default) (the ACA Act) (and registered under the [Corporations (Aboriginal and Torres Strait Islanders) Act 2006 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=93399" \t "_default) (the Corporations (ATSI) Act)).   Under the Corporations (ATSI) Act, the winding up provisions of the Corporations Act apply to Australian and Torres Strait Islander Corporations ('ATSI Corporations') as though the term 'company' was substituted by the term 'Aboriginal and Torres Strait Islander Corporation'.   The Court found that substituting 'Aboriginal and Torres Strait Islander Corporation' for 'company' for the purposes of section 579E(1) had the effect of removing the reference to 'company' altogether and, therefore, it was not possible to make a pooling order in respect of a group consisting of a 'company' and an 'Aboriginal and Torres Straight Islander Corporation'.    **(b) Facts**    The case concerned an ex parte application by the liquidator of Aboriginal Connection Pty Ltd ('AC') and Guri Wa Ngundagar Aboriginal Corporation ('GWN') (two closely linked entities that were each subject to creditors' voluntary winding up) seeking a pooling order under section 579E(1) of the Act which, if made, would enable the two entities to be treated as one for the purposes of the windings up.    At the time of the application, AC was a 'company' as defined by section 9 of the Corporations Act (having been registered under section 118 of the Corporations Act), while GWN was incorporated under the ACA Act and registered as an Aboriginal and Torres Strait Islander Corporation under the Corporations (ATSI) Act.     **(c) Decision**    **(i) 'Pooling' for a company registered under the Corporations Act and a corporation not registered under the Corporations Act**    At the first hearing on 4 October 2011, Barrett JA found that the Court did not have the authority to make a pooling order in respect of the two entities.     Section 579E(1) of the Act required the Court to identify 'a group of 2 or more companies' to be a pooled group.  The liquidator submitted that GWN should be treated as a 'company' for this purpose and relied on section 526.36(1) of the Corporations (ATSI) Act, which provides for the winding up provisions of the Act to apply to ATSI Corporations as if all relevant references to a 'company' were substituted by references to an 'Aboriginal and Torres Strait Islander Corporation'.   Barrett JA considered whether a 'group' under section 579E(1) of the Corporations Act could be read as a reference to a group consisting of one or more companies and one or more ATSI Corporations.     In making his decision, Barrett JA found that:   * section 526.36(1) of the Corporations (ATSI) Act required that the winding up provisions of the Act are to be read 'as if' the substitutions were incorporated into them; and * accordingly, '[i]t must follow that when one puts a reference to 'an Aboriginal and Torres Strait Islander corporation' in the place of every reference to 'a company', no reference to 'a company' remains' (at [16]).   On that basis, his Honour concluded that 'nowhere in the statutory scheme is it possible to find a reference to a group consisting of one or more companies and one or more Aboriginal and Torres Strait Islander corporations'.   The liquidator then sought (and was granted) an adjournment for the purpose of investigating the feasibility of obtaining re-registration in respect of one or other of the entities so that both would be of the same type and it would be within the Court's power to make a pooling order (provided the other statutory pre-conditions were satisfied).   **(ii) Pooling AC and GWN when each were registered under the same legislation**   The liquidator successfully re-registered AC as an ATSI Corporation under the Corporations (ATSI) Act and the application was brought back before Barrett JA for determination.   Barrett JA accepted that the two entities constituted a group for the purposes of making a pooling order and turned to consider the remaining elements of section 579E(1) (set out below):   Section 579E Pooling Orders  (1)  If it appears to the Court that the following conditions are satisfied in relation to a group of 2 or more companies:  (a)  each company in the group is being wound up; (b)  any of the following subparagraphs applies: (i)  each company in the group is a related body corporate of each other company in the group;  (ii)  apart from this section, the companies in the group are jointly liable for one or more debts or claims; (iii)  the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group; (iv)  one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;  the Court may, if the Court is satisfied that it is just and equitable to do so, by order, determine that the group is a pooled group for the purposes of this section.  In making his decision, his Honour considered the following six questions identified in *Re Kirby Street (Holding) Pty Ltd* [2011] NSWSC 1536; (2011) 87 ACSR 84 as being necessary to interpret section 579E of the Act:   1. Is there a group of two or more companies (or here, ATSI Corporations) (section 579E(1))? 2. Is each corporation in the group being wound up (section 579E(1)(a))? 3. Is at least one of the conditions in sub-paragraphs (i) to (iv) of section 579E(1)(b) satisfied?  4. What does the evidence show with respect to the matters in section 589E(12) (as they may affect the answer to the following question 5)? 5. Is it just and equitable that the order sought be made (section 579E(1)(b))? 6. Does section 579E(10) preclude the making of a pooling order?   Barrett JA found that the first two questions were simply answered in the affirmative.    The third question was met by the fact that Mr Lockwood, the sole member of AC, held his shares as a nominee of GWN.   With respect to question 4, his Honour found there was sufficient evidence that the two entities' operations were so intermingled it was difficult to separate them in relation to employment, stock and accounts.  There was a 'virtually insoluble confusion as to the separate rights and obligations of the two entities and the state of the financial account between them' (at [35]).   Having regard to those matters, his Honour found that it was just and equitable to make a pooling order.     Question 6 required Barrett JA to consider whether the making of a pooling order would materially disadvantage an eligible unsecured creditor.  His Honour found that the steps taken by the liquidator to notify all known creditors of his intention to apply for a pooling order, coupled with a 'unanimous lack of opposition or reservation', demonstrated that there was no basis for a conclusion that the pooling order sought would materially disadvantage such a creditor.    Accordingly, his Honour concluded that the liquidator had satisfied the Court of all matters necessary to justify the making of the pooling order sought in respect of AC and GWN.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.10  Is it a breach of duty for directors to provide a pre-completed proxy form to shareholders?**    (By Steven Grant, Minter Ellison)   Riverfront Nominees Pty Ltd v Beacon Minerals Ltd [2012] WASC 154, Supreme Court of Western Australia, Le Miere J, 9 May 2012   The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/wa/WASC/2012/154.html](http://www.austlii.edu.au/au/cases/wa/WASC/2012/154.html" \t "_new)   **(a) Summary**   Although this case turns on its facts and was an interlocutory matter only, it provides a useful summary of what actions directors can take in relation to advising, or communicating with, shareholders in relation to resolutions to be put to a general meeting, particularly in the context of providing pre-completed proxy forms.  The case illustrates that causing a pre-completed proxy form to be sent to the shareholders of a company may not be an improper exercise of a director's powers in the absence of some ulterior purpose or some other improper exercise of power.     **(b) Facts**   On 23 February 2012, the plaintiff, Riverfront Nominees Pty Ltd ('the Plaintiff'), commenced proceedings by originating process, seeking interim and permanent injunctions restraining the first defendant, ASX Listed Beacon Minerals Ltd ('the Company') issuing or dispatching to its shareholders any pre-completed proxy form in relation to the meeting of the Company's shareholders to be held on 12 March 2012, and restraining the directors of the Company (the second, third and fourth defendants) from causing or taking any step to cause the company to issue or despatch to shareholders any such pre-completed proxy form.  By interlocutory process of the same day, the Plaintiff also sought interim or interlocutory injunctions in the same terms.   The Plaintiff was the holder of not less than 4.8 million shares in the Company.    On or about 27 January 2012, various shareholders of the Company requisitioned a meeting of the members of the Company for the purpose of removing the existing directors and replacing them with various people, including Mr Michael who was the sole director and shareholder of the Plaintiff.  The Company issued a notice of meeting and proxy form in response to this requisition on or about 15 February 2012.   On or about 6 February 2012, the Company issued a notice of meeting and proxy form seeking shareholder approval for the sale of the main undertaking of the Company, being mining lease ML77/1254.  Mr Michael did not support the sale of the mining lease and caused an open letter opposing the sale to be sent out to the shareholders of the Company.   The notice of general meeting which was sent out to shareholders was accompanied by a proxy form which was uncompleted to the extent that it permitted shareholders to vote for or against the resolution. The Company caused a notice to be posted on the ASX announcement board on 23 February 2012. The notice was in the form of a letter addressed to the Company's shareholders.  The notice letter set out in essence the reasons why, in the opinion of the directors, the transaction was in the best interests of the shareholders and attached a pre-completed proxy form voting in favour of the resolution to sell the mining lease.   Counsel for the Plaintiff argued that:   * sending the notice letter and the attached pre-completed proxy form voting in favour of the resolution to the shareholders was improper in the context of Listing Rule 14.2.  Listing Rule 14.2 provides that 'A notice of meeting must include a proxy form which must satisfy the following rules:  14.2.1 The proxy form must provide for the security holder to vote for or against each resolution...'; and * that in doing so, the directors breached their obligations under section 181 of the Corporations Act 2001 (Cth).  Section 181(1) provides that a director or other officer of a corporation must exercise their powers and discharge their duties in good faith in the interests of the corporation and for a proper purpose.   **(c) Decision**   Le Miere J heard the application for interim or interlocutory relief and dismissed the application.   Referring to an extract from Ford's Principles of Corporations Law by R P Austin and I M Ramsay, Le Miere J noted that it is not a breach of a director's duty to:   * inform shareholders of matters relevant to a resolution being placed before the shareholders; * advise the shareholders to vote one way or other in relation to that resolution; or * use company funds to cause such information or notices to be provided to the shareholders.   Counsel for the Plaintiff submitted that the Plaintiff did not object to the directors of the Company informing shareholders how the directors recommended that they should vote in relation to the proposed resolution.  Rather, the Plaintiff objected to the directors causing the Company to send out to shareholders a pre-completed proxy form which was completed so as to be in favour of the proposed resolution.  Although the notice of the meeting included a proxy form which provided for the security holder to vote for or against each resolution, counsel for the Plaintiff submitted that by causing the Company to subsequently send out a further notice, which included a proxy form completed in favour of the resolution, the directors negated or defeated the purpose of Listing Rule 14.2.1.   Le Miere J did not accept this submission, noting that the purpose of the rule requiring a notice of meeting to include a proxy form which provides for the security holder to vote for or against each resolution is to enable or to facilitate a shareholder to vote for or against the resolution without attending the meeting.  That purpose was not defeated by the shareholder receiving a subsequent proxy form which is completed for or against the resolution.  Nor was that purpose defeated by the directors causing the Company to send a pre-completed proxy form to the shareholders.   It does not follow that merely because the directors have caused to be sent out a pre-completed proxy form that it is an improper exercise of their powers.  While it might be an improper exercise of their powers if they exercised that power for some ulterior purpose or in some other way improperly exercised their power, there was no such evidence in this case.  Le Miere was not satisfied to the requisite degree that causing the Company to send a pre-completed proxy form to the shareholders was of itself, and without anything more, an improper exercise of the directors' powers.   Le Miere J noted this was an application for an interim injunction, where the Plaintiff must make out a prima facie case that there has been a breach of the directors' powers; namely, that they have exercised their powers for an improper purpose.  Furthermore, Le Miere noted that regard must be had to the fact that the practical effect of granting an injunction in this case would be to prevent the defendants sending out the notice with the pre-completed proxy form prior to the meeting and thereby, the grant or refusal of the interlocutory injunction was in practical terms the grant or refusal of final relief, as well as interlocutory relief.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.11  Obtaining leave to bring proceedings in the company's name**   (By Gabrielle Bell and Emma McDonell, Corrs Chambers Westgarth)   Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd [2012] NSWSC 462, Supreme Court of New South Wales, Black J, 8 May 2012    The full text of this judgment is available at:  [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/462.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/462.html" \t "_new)    **(a) Summary**   Mathew Capital Partners Pty Ltd ('MCP'), a shareholder of Coal of Queensland Holdings Limited ('COQ Holdings'), sought leave 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 Corporations Act) to bring proceedings ('Proposed Proceedings') in the name of COQ Holdings against Queensland Coal Corporation Pty Ltd and Queensland Coking Coal Pty Ltd ('QCC Parties').  MCP also sought orders under section 247A of the Corporations Act to inspect specified books of COQ Holdings.    As a result of participating in a capital raising of COQ Holdings in June 2011, MCP acquired a 15.4% interest in COQ Holdings.  The written investor presentation provided to MCP at that time referred to a proposed initial public offering of shares in COQ Holdings ('IPO').  The dispute arose in connection with COQ Holdings' rights in relation to the proposed IPO.     Under section 237(2) of the Corporations Act, the Court must grant an application for leave to bring, or intervene in, proceedings under section 237(1) if it is satisfied:   * it is probable that the company itself will not bring, or properly take responsibility for, the proceedings; * the applicant is acting in good faith; * it is in the best interests of the company that the applicant be granted leave; * if the applicant is applying for leave to bring proceedings, that there is a serious question to be tried; and * of a timing requirement.   Under section 247A(5) of the Corporations Act, the Court may make an order authorising the applicant , or another person on the applicant's behalf, to inspect books of a company only if it is satisfied that:   * the applicant is acting in good faith; and * the inspection is to be made for a purpose connected with applying for leave under section 237 or bringing or intervening in proceedings with leave under section 237.   The Court found that MCP had not established that the proceedings were in the best interests of COQ Holdings, nor had MCP established that there was a serious question to be tried.  Therefore, two of the five requirements for the grant of leave under section 237(2) were not met and leave was not granted to MCP to bring the Proposed Proceedings in the name of COQ Holdings.  Further, the Court did not grant an order for the inspection of specified books of COQ Holdings under section 247A, based on the fact that the specified purpose for that order was the conduct of the Proposed Proceedings, which the Court did not grant leave to bring.   **(b) Facts**    In mid 2011, COQ Holdings ('the Defendant') initiated two capital raisings and raised a total of $35.6 million.  COQ Holdings used the funds to acquire approximately 21.4% of the shares in COQ.  The remaining shares in COQ were owned by QCC Parties and Founder (converting shares).     COQ, COQ Holdings, QCC Parties and others then entered into an initial shareholders agreement regarding COQ on 18 June 2011 ('Initial Shareholders' Agreement') (COQ Holdings contends that this document was not executed).  On 28 June 2011, COQ, COQ Holdings, QCC Parties and Founder entered into a more detailed agreement ('Shareholders' Agreement').  On 10 August 2011, the Shareholders' Agreement was amended by deed ('Amended Shareholders Agreement').     The Initial Shareholder's Agreement contained a condition that the QCC Parties (or their nominee) would be issued a number of shares equivalent to 50% of the issued capital of COQ Holdings immediately after the IPO if the IPO raised more than $51 million.  In consideration for those shares, the QCC Parties would transfer their shares in COQ to COQ Holdings ('Uplift Right').     Clause 5.1(a) of the Amended Shareholders' Agreement provided that 'the parties agree to negotiate in good faith and use reasonable endeavours to agree to the terms of, and complete, a compliant IPO by the IPO Date.'  The 'IPO Date' is defined in the Amended Shareholders' Agreement as 30 April 2012.      By March 2012, a dispute had arisen between MCP ('the Plaintiff') and QCC Parties.  Details of the Proposed Proceedings that MCP proposed to bring in the name of COQ Holdings included:   * a declaration that the 'IPO Date' in the Amended Shareholders' Agreement had been extended from 30 April 2012 to 30 June 2012; * mandatory orders that QCC Parties and COQ negotiate in good faith and use reasonable endeavours to agree to terms of, and to complete, a compliant IPO by 30 June 2012 or a later date arising from other orders sought in the Summons; and * mandatory orders that QCC Parties and COQ do all things to provide all assistance as reasonably required to complete a compliant IPO by 30 June 2012, or such later date by reason of the orders sought.   The Proposed Proceedings were considered by the Board of COQ Holdings on 13 April 2012, which decided not to bring them.     **(c) Issues**   The Court considered if the five requirements under section 237(2) were satisfied.  In addition, his Honour examined the exercise of the Court's discretion under section 247A, which required the Court to not only consider whether it was appropriate to make an order, but also which books of the company should be made available under such order.     **(d) Decision**   In finding that the Proposed Proceedings were not in the best interests of COQ Holdings, his Honour relied on the construction of the Amended Shareholders' Agreement and on the evidence provided by directors of COQ Holdings.  MCP had argued that the Proposed Proceedings were necessary to preserve the Uplift Right provided for under the Initial Shareholders' Agreement and that the benefit of the Uplift Right would be lost if the IPO was not conducted by 30 June 2012.  In rejecting this assertion, the Court first determined that irrespective of the dispute over the execution of the Initial Shareholders' Agreement, the operative document was the Amended Shareholders' Agreement.  The terms of the Amended Shareholders' Agreement materially adversely affect the rights of COQ Holdings set out in the Initial Shareholders' Agreement, including the Uplift Right.  Black J had real doubt as to whether the Uplift Right existed, and found that it was not worth COQ Holdings incurring the detriment of commencing proceedings to protect it, particularly if it is unlikely the proceedings could be determined by 30 June 2012.  Further, the evidence of two directors of COQ Holdings indicated that completing an IPO by 30 June 2012 would not be in COQ Holdings' interests, based on advice on timing from two investment banks.   On the issue of establishing a serious question to be tried, his Honour highlighted that the test is not particularly demanding, particularly where MCP has not had access to COQ Holdings' documentation.  However, Black J did not support the proposition that the proposed variation to the definition of IPO Date in the Amended Shareholders' Agreement was binding on the parties due to (i) a lack of consideration for the agreement to change the date; and (ii) questions regarding whether the advisers to the parties had the authority to bind the parties.  Further, Black J found that MCP failed to provide details of the conduct or omissions of the QCC Parties that constituted a breach of the Amended Shareholders' Agreement or that caused the delay of a compliant IPO.     On the final matter relating to section 247A, the Court held that in its application, MCP sought access to the documents for the specific purpose of bringing the Proposed Proceedings.  Since leave for the Proposed Proceedings was not granted, MCP failed to establish an adequate reason for the Court to grant it access to the books of COQ Holdings.  Black J concluded that it remained open for MCP to bring a further application for inspection of COQ Holdings' books if another purpose is identified.  Black J also criticised MCP for seeking access to such a wide range of COQ Holdings' documents without providing adequate reasons as to why this access was required.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5)  **5.12  Charge over contractual rights and obligations not valid without consent of obligor**   (By James Brownstein, DLA Piper)   In the matter of Idoport Pty Ltd (In Liq) (Receivers Appointed) [2012] NSWSC 524, Supreme Court of New South Wales, Ball J, 24 May 2012   The full text of this judgment is available at:  [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158221](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158221" \t "_new)   **(a) Summary**   The Court held that a charge granted by Idoport Pty Ltd over rights and obligations arising out of a contract it held with NAB was invalid, as the contract prevented those rights and obligations from being assigned without the parties' consent. In reaching this conclusion, the Court found that NAB's consent to the assignment was not unreasonably withheld.   **(b) Facts**    John Maconochie sold the AUSMAQ technology to NAB in 1996.  Following the sale, Maconochie set up Idoport Pty Ltd ('Idoport') for the purposes of entering into a agreement by which Idoport would consult to NAB in relation to AUSMAQ in exchange for a service fee and certain bonuses ('Agreement').   Between 1998 and 2000, Idoport brought a number of proceedings against NAB for alleged breaches of the Agreement.  All proceedings were dismissed in 2002; Idoport was ordered to pay NAB's costs and barred from bringing further claims against NAB until the costs were paid ('Barring Order').   In March 2005, Idoport entered into funding agreements with two US entities ('Chargees') that would enable it to settle the outstanding costs orders and commence new proceedings.  Idoport granted a fixed and floating equitable charge in favour of each Chargee over all of its present and future rights, property and undertakings, but excluding its rights and obligations under the Agreement ('Consulting Rights'). The terms of each charge provided that:   * if required by the Chargee, Idoport must seek the written consent of NAB to grant a fixed charge over the Consulting Rights; and * the Chargee can declare at any time by written notice to the Chargee that the charge operates as a fixed charge over the Consulting Rights, with or without the consent of NAB.   In March 2006, the Chargees asked Idoport to seek NAB's consent to grant a fixed charge over the Consulting Rights.  Idoport did so, and NAB requested further information from Idoport in April 2006.  This information was provided to NAB in November 2006.   By January 2007, NAB had not given consent and the Chargees exercised their right to declare a fixed charge over the Consulting Rights.  NAB eventually notified Idoport in February 2007 that it was not willing to provide consent, after considering (amongst other factors) that:   * there was an ongoing dispute between Idoport and NAB; * NAB was a major unsecured creditor of Idoport; and * the funds provided to Idoport by the Chargees were not sufficient to allow Idoport to pay its total debt to NAB.   In November 2008, the Chargees appointed receivers over all of Idoport's assets, including the Consulting Rights.  Since that time, NAB has disputed their right to do so.   In this proceeding, NAB sought declarations that:   * the Consulting Rights did not form part of the secured property that was the subject of the fixed and floating equitable charges; and * the appointment of the receivers, insofar as it related to the Consulting Rights, was invalid.   The Chargees claimed that NAB's withholding of consent was unreasonable, and had the effect of depriving Idoport of the benefits of the Agreement.   **(c) Decision**    Ball J found in favour of NAB, and granted both declarations. This conclusion was reached on the basis that:   * in order to assign rights under the Agreement, it was necessary to obtain NAB's consent and they did not do so * the Chargees bore the onus of proving that consent was unreasonably withheld; and * consent was not unreasonably withheld.   **(i) Necessary to obtain consent to assign rights**   Ball J accepted that Idoport's rights and obligations under the Agreement could not be assigned without NAB's consent, noting the general principle that 'a purported assignment of a contractual right in breach of a provision of the contract prohibiting assignment is ineffective'. The Agreement provided that 'the rights and obligations of each party under this Agreement are personal' and 'cannot be assigned, encumbered or otherwise dealt with'.   Ball J also dismissed the Chargees' argument that the fixed charge over the Consulting Rights was merely a right between the Chargees and Idoport that did not impact on NAB.  The existence of a charge and the ability to appoint a receiver both involved proprietary rights enforceable against NAB, and as such NAB's consent was required.   **(ii) Chargees bear the onus of proof**   Satisfied that the requisite consent had not been obtained, Ball J turned to the Chargees' claim that consent was unreasonably withheld.  The Chargees relied on the principle from Massoud v NRMA Insurance Ltd that a party seeking a declaration has the onus of proving all matters that are 'necessary elements' of the declaration sought.   Ball J noted that NAB was seeking a declaration that there was no valid charge over the Consulting Rights, and not a declaration that they had acted reasonably in withholding consent to the charge. It was not a 'necessary element' of NAB's claim that they had acted reasonably; provided they could establish that consent was required and not given, the onus was on the Chargees to prove such consent was unreasonably withheld.    **(iii) Consent not unreasonably withheld**   The Chargees raised four arguments in support of its contention that NAB had unreasonably withheld consent.  Ball J dismissed each argument. The arguments were:   * That the Agreement contained an implied term that the parties would 'do all things necessary...to enable the other party to have the benefit of the Agreemen', and that NAB's refusal to give consent deprived Idoport of benefits due.  Ball J accepted that such a term was implied in the Agreement, but was not satisfied that Idoport had been deprived of any benefit.  The Chargees were unable to explain how Idoport had been deprived of the ability to enforce its rights under the Agreement, given the Barring Order was in place and Ball J did not believe Idoport would ever be in a position to settle the outstanding costs order. * That NAB had unreasonably delayed giving consent, on the basis that NAB had all the information needed to make a decision by November 2006, and did not respond until February 2007.  Ball J noted that Idoport itself had delayed the process by taking seven months to respond to NAB's request for information, so there was no reason for NAB to assume the matter was urgent. Ball J also felt the Christmas break was a reasonable justification for NAB's delay. * That NAB had factored irrelevant considerations into its decision to withhold consent.  Ball J held that it was reasonable for NAB to have regard to its own rights under the Agreement and the disadvantages to NAB of an assignment of those rights, in light of Idoport's failure to provide reasons in support of a granting of a charge. NAB was also justifiably concerned about the effect that an assignment of rights would have on the Barring Order. * That NAB withheld consent with the collateral purpose of stultifying any future action Idoport may take in relation to the Consulting Agreement, and had failed to provide any reasons for the decision suggesting otherwise.  Ball J noted that the evidence showed NAB had weighed up a number of relevant factors that made withholding consent a reasonable conclusion. Further, the Chargees were unable to demonstrate that NAB's refusal to grant consent would actually give rise to the alleged collateral purpose.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h5) | |      |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://my.lawlex.com.au/alert/pic/spacer.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/178-June-2012.html%23h1) | | | http://my.lawlex.com.au/alert/pic/spacer.gif |

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