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| **Bulletin No. 171**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/171-November-2011.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/171-November-2011.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/171-November-2011.html#h3)4.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/171-November-2011.html#h5)5.     [Contributions](http://www.law.unimelb.edu.au/bulletins/171-November-2011.html#7)6.     [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

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

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| **1.1 Treasury discussion paper on the handling and use of client money in relation to OTC derivatives transactions**On 19 November 2011, the Assistant Treasurer and Minister for Financial Services and Superannuation released a discussion paper on the handling and use of client money in relation to over-the-counter (OTC) derivatives transactions.The purpose of the discussion paper is to discuss a number of issues relating to the holding of client money in connection with OTC derivatives transactions, and to review whether the client monies provisions of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) provide sufficient protections for investors.The discussion paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=2231" \t "_new).etailed Contents**1.2 APRA releases consultation package on implementation of Basel III liquidity reforms**On 16 November 2011, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper outlining its proposed implementation of the Basel III liquidity reforms in Australia. The discussion paper and draft Prudential Standard APS 210 Liquidity (APS 210) incorporate the Basel III liquidity reforms released by the Basel Committee on Banking Supervision in December 2010 and enhanced qualitative requirements outlined in the Basel Committee's Principles for Sound Liquidity Risk Management and Supervision released in September 2008.APRA proposes to apply the new global liquidity standards to the larger authorised deposit-taking institutions (ADIs).  These new standards are the Liquidity Coverage Ratio (LCR) and the Net Stable Funding Ratio (NSFR).  However, APRA does not intend to apply these standards to ADIs that are subject to a simple quantitative metric, the minimum liquidity holdings (MLH) regime.  The enhanced qualitative requirements will apply to all ADIs in Australia.APRA is proposing to follow the Basel Committee's timetable for the implementation of the new global liquidity standards.  Accordingly, the LCR requirement will become effective from 1 January 2015 and the NSFR requirement from 1 January 2018.  APRA is also proposing that the qualitative requirements outlined in the package become effective when the revised APS 210 is implemented.Following consideration of submissions received on the discussion paper, APRA intends to publish a final Prudential Standard APS 210 Liquidity in mid-2012. APRA will undertake consultation in early 2012 on the detailed reporting requirements associated with the Basel III liquidity reforms in Australia. The discussion paper and draft prudential standard are available on the [APRA website](http://www.apra.gov.au/adi/Pages/adi-consultation-packages.aspx%22%20%5Ct%20%22_new).etailed Contents**1.3 European Commission proposed enhanced regulation of credit rating agencies** On 15 November 2011, the European Commission announced proposals to strengthen the existing regulatory framework for credit rating agencies.   The EU Regulation on Credit Rating Agencies (CRA), which has been in force since December 2010, was part of Europe's response to the commitments made by the G20 at the November 2008 Washington summit. This Regulation was amended in May 2011, to adapt the Regulation to the creation of the European Securities and Markets Authority (ESMA). The existing CRA Regulations focus on registration, conduct of business and supervision of CRAs.The proposed draft Directive and draft Regulation have four main goals:**(a) To limit reliance on credit ratings**The EC's proposals in July 2011 on the Capital Requirements Directive IV reduced the number of references to external ratings and required financial institutions to do their own due diligence. Similar changes are proposed with regard to rules relating to fund managers, in a complementary draft directive. It is proposed that this will be completed by changes to rules on insurance next year. A general obligation for investors to do their own assessment is also included in the EC's proposal.In addition, more and better information underlying the ratings will need to be disclosed by CRAs and by the rated entities themselves, so that professional investors will be better informed in order to make their own judgments. For example, CRAs would have to communicate their ratings to ESMA, which would make sure that all available ratings on the market for a debt instrument are published under a European Rating Index (EURIX), freely available to investors.At the same time, credit rating agencies will have to consult issuers and investors on any intended changes to their rating methodologies. Such changes would have to be communicated to ESMA which would check that applicable rules on form and due process have been followed.**(b) More transparent and more frequent sovereign debt ratings**Member States would be rated more frequently (every six months rather than 12 months) and investors and Member States would be informed of the underlying facts and assumptions on each rating. To avoid market disruption, sovereign ratings should only be published after the close of business and at least one hour before the opening of trading venues in the EU.   **(c) More diversity and stricter independence of credit rating agencies to eliminate conflicts of interest**Issuers will have to rotate every three years between the agencies that rate them. In addition, two ratings from two different rating agencies will be required for complex structured finance instruments and a large shareholder of a credit rating agency should not simultaneously be a large shareholder in another credit rating agency.**(d) Make CRAs more accountable for the ratings they provide**A CRA should be liable in case it infringes, intentionally or with gross negligence, the CRA Regulation, thereby causing damage to an investor having relied on the rating that followed such infringement. Such investors should bring their civil liability claims before national courts. The burden of proof would rest on the credit rating agency.EU rules would apply to ratings of public entities within the EU but also outside the EU provided that the sovereign ratings are issued by a CRA registered in the EU. Further information about the proposals is available on the [European Commission website](http://ec.europa.eu/internal_market/securities/agencies/index_en.htm%22%20%5Ct%20%22_new).etailed Contents**1.4 Commonwealth Government's Department of Finance and Deregulation publishes Business Enterprise Governance and Oversight Guidelines** On 15 November 2011, the Department of Finance and Deregulation published its 'Commonwealth Government Business Enterprise Governance and Oversight Guidelines'.  These apply to both Government Business Enterprises (GBEs) that are Commonwealth authorities and GBEs that are wholly-owned Commonwealth companies. The Guidelines are available on the [Department of Finance and Deregulation](http://www.finance.gov.au/publications/governance-arrangements/docs/GBE_Guidelines.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.5 ESMA launches a consultation on the considerations of materiality in financial reporting** On 10 November 2011, the European Securities and Markets Authority (ESMA) launched a consultation paper titled 'Considerations of materiality in financial reporting'.   According to ESMA, the objective of financial statements is to provide information to a range of users for the purpose of economic decision making. To be useful, such statements must present fairly the financial position, performance and cash flows of the reporting entity. Where information which is required by the relevant financial reporting framework is omitted or misstated and such information could influence the economic decision-making of a user, financial statements cannot be said to achieve a fair presentation.  The concept of "materiality" is used to describe such information. The purpose of the consultation paper is to seek comments from interested parties on their understanding of various aspects of "materiality" in an effort to contribute to a consistent application of this important concept in financial reporting.The consultation paper is available on the [ESMA website](http://www.esma.europa.eu/popup2.php?id=8053" \t "_new).etailed Contents**1.6 US Securities and Exchange Commission developments** **(a) New rules to toughen listing standards for reverse merger companies** On 9 November 2011, the SEC approved new rules for the three major US listing markets that toughen the standards that companies going public through a reverse merger must meet to become listed on those exchanges.Currently, reverse merger companies like other operating companies can pay to be listed on an exchange, where investors can purchase and sell shares of the company. In some cases, regulators and auditors have greater difficulty obtaining reliable information from reverse merger companies, particularly those based overseas. Reverse mergers permit private companies, including those located outside the US, to access US investors and markets by merging with an existing public shell company. In 2010, the SEC launched an initiative to determine whether certain companies with foreign operations - including those that were the product of reverse mergers - were accurately reporting their financial results, and to assess the quality of the audits being done by the auditors of these companies. The SEC and US exchanges have in recent months suspended or halted trading in more than 35 companies based overseas citing a lack of current and accurate information about the firms and their finances. These included a number of companies that were formed by reverse mergers. Under the new rules, Nasdaq, NYSE, and NYSE Amex will impose more stringent listing requirements for companies that become public through a reverse merger. Specifically, the new rules would prohibit a reverse merger company from applying to list until:The company has completed a one-year "seasoning period" by trading in the US over-the-counter market or on another regulated US or foreign exchange following the reverse merger, and filed all required reports with the Commission, including audited financial statements.The company maintains the requisite minimum share price for a sustained period, and for at least 30 of the 60 trading days, immediately prior to its listing application and the exchange's decision to list. Under the rules, the reverse merger company generally would be exempt from these special requirements if it is listing in connection with a substantial firm commitment underwritten public offering, or the reverse merger occurred long ago so that at least four annual reports with audited financial information have been filed with the SEC.For further details on the new rules, see [NYSE Amex Notice and Order](http://www.sec.gov/rules/sro/nyseamex/2011/34-65710.pdf%22%20%5Ct%20%22_new); [NYSE Notice and Order](http://www.sec.gov/rules/sro/nyse/2011/34-65709.pdf%22%20%5Ct%20%22_new); and [NASDAQ Notice and Order](http://www.sec.gov/rules/sro/nasdaq/2011/34-65708.pdf%22%20%5Ct%20%22_new).**(b) Confidential private fund risk reporting**  On 26 October 2011, the SEC voted unanimously to adopt a new rule requiring certain advisers to hedge funds and other private funds to report information for use by the Financial Stability Oversight Council (FSOC) in monitoring risks to the US financial system.The rule, which implements sections 404 and 406 of the Dodd-Frank Act, requires SEC-registered investment advisers with at least US$150 million in private fund assets under management to periodically file a new reporting form (Form PF).  Information reported on Form PF will remain confidential.Private fund advisers are divided by size into two broad groups - large advisers and smaller advisers. The amount of information reported and the frequency of reporting depends on the group to which the adviser belongs. The SEC anticipates that most private fund advisers will be regarded as smaller private fund advisers, but that the relatively limited number of large advisers providing more detailed information will represent a substantial portion of industry assets under management. As a result, these thresholds will allow the FSOC to monitor a significant portion of private fund assets while reducing the reporting burden for private fund advisers.Further information on the new reporting requirements is available on the [SEC website](http://www.sec.gov/news/press/2011/2011-226.htm%22%20%5Ct%20%22_new).etailed Contents**1.7 APRA releases discussion paper on covered bonds and securitisation** On 8 November 2011, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper outlining its proposals to introduce a new prudential standard for authorized deposit-taking institutions (ADIs) that issue covered bonds. The discussion paper is accompanied by a draft of 'Prudential Standard APS 121 Covered bonds' (APS 121).The discussion paper, 'Covered bonds and securitisation matters', and the draft prudential standard reflect the Government's recent amendments to the [Banking Act 1959 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "Default) to allow ADIs to issue covered bonds. APRA has already removed the prohibition on ADIs issuing covered bonds from its prudential standards. The discussion paper and draft prudential standard aim to ensure that ADIs adopt prudent practices when issuing covered bonds and managing risks associated with exposure to a covered bond special purpose vehicle. Following consideration of submissions received, APRA will finalise APS 121 and related amendments to other prudential standards with a view to implementation in early 2012. Included in the discussion paper, but unrelated to covered bonds, are proposed changes to 'Prudential Standard APS 120 Securitisation' (APS 120) to clarify the prudential treatment of holdings of subordinate tranches of securitisations held by an ADI other than the originator of the loans. Subject to feedback on this proposal, APRA envisages that the proposed changes would be incorporated into APS 120 and take effect from 1 January 2012.The discussion paper and draft APS 121 are available on the [APRA website](http://www.apra.gov.au/adi/Pages/Covered-bonds-and-securitisation-matters-Nov-2011.aspx%22%20%5Ct%20%22_new).etailed Contents**1.8 APRA releases research on illiquid investments of super funds** On 7 November 2011, APRA released the results of research into investment in illiquid assets by large APRA-regulated superannuation funds.The research, released in the APRA Working Paper 'Risk and return of illiquid investments: A trade-off for superannuation funds offering transferable accounts', examines investments in illiquid assets and the subsequent impact on portfolio performance.  Illiquid assets include directly held property, unlisted property trusts, infrastructure investments, private equity and hedge funds.In recent years, many funds have increased their allocations in illiquid assets in the expectation that these assets would yield sufficiently large returns to compensate for their illiquidity.  Illiquid assets may provide diversification benefits and an opportunity to leverage existing investment expertise, but are less suitable in meeting the liquidity demands placed on superannuation funds, including those relating to members' right to transfer their balances to other funds.The key findings of the research are that:not-for-profit funds (corporate, industry and public sector funds) have a higher illiquid asset allocation on average, although there is a wide range in allocations among both retail and not-for-profit funds;not-for-profit funds that allocate a greater proportion of their portfolios to illiquid assets are generally larger, have higher net cash inflows and have younger members - all factors which tend to reduce liquidity needs; andfrom September 2004 to June 2010, not-for-profit funds with more illiquid investments experienced higher risk-adjusted returns, which suggests they captured a return premium for investing in these assets.The research focuses on 146 large superannuation funds with total assets of at least $200 million. These funds represent about three-quarters of the assets in APRA-regulated superannuation funds.The research is available on the [APRA website](http://www.apra.gov.au/AboutAPRA/Pages/research-working-papers.aspx%22%20%5Ct%20%22_new).etailed Contents**1.9 International survey of corporate responsibility reporting** On 7 November 2011, KPMG published the International Survey of Corporate Responsibility Reporting 2011, which reviews trends of each of the G250, as well as 3,400 companies worldwide, representing the national leaders in 34 countries and 15 industry sectors.  Nearly every Global Fortune 250 (G250) company now reports its corporate responsibility activity, while reporting by pharmaceuticals, consumer markets, and construction industries more than doubled since KPMG International last conducted its global survey in 2008.The survey found that CR reporting is now undertaken by 95% of the G250, while the largest 100 companies (N100) in each country surveyed increased reporting by 11% since 2008, to 64% overall, with developing nations showing fast uptake.Almost half of the G250 companies report gaining financial value from their CR initiatives. In the absence of a regulatory global sustainability reporting standard, the drive for consistency and accessibility to quality data was highlighted in the findings. The Global Reporting Initiative (GRI) Sustainability Reporting Guidelines are used by 80% of the G250 and 69% of N100 companies.Countries leading reporting in the survey in 2008 continue to dominate in 2011 with the United Kingdom and Japan at 100% and 99%, respectively, of companies reporting.South Africa's King Corporate Governance Commission code is attributed for the sharp increase in CR reporting, rising to third place 97% reporting, up from 45% in 2008; The Americas at 69% overall (with the US at 83% and Canada 79%) and the Middle East and Africa region (61%) are quickly gaining ground; China, new to the survey this year, demonstrates rapid uptake with 60% of its largest companies reporting on corporate responsibility; Lowest ranked were New Zealand and Chile (27%), India (20%) and Israel (18%); Australia passed the midpoint on CR reporting, increasing from 45 to 57%; andNordic countries saw a sharp rise in CR reporting with the change attributed to heightened public interest in CR issues as well as government regulation. The report is available on the [KPMG website](http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Pages/2011-survey.aspx%22%20%5Ct%20%22_new).etailed Contents**1.10 Sharman Inquiry on going concern assessment and liquidity risk releases preliminary report and recommendations** On 4 November 2011, the UK Sharman Inquiry published its preliminary report and recommendations.  The inquiry, led by Lord Sharman, was launched in March 2011 by the Financial Reporting Council, to identify lessons for companies and auditors regarding the going concern assessment and liquidity risk.The Inquiry recommends, amongst other things, that the FRC should harmonise, and clarify, the purpose of the going concern assessment and disclosure process in the [UK Corporate Governance Code and related guidance](http://www.frc.org.uk/corporate/ukcgcode.cfm%22%20%5Ct%20%22_new) and should consider whether the language used in the Code - to the effect that directors should state that the entity is a going concern - is too definitive.  The UK Corporate Governance Code (formerly the Combined Code) sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders.The preliminary report and recommendations of the Inquiry are available on the [FRC website](http://www.frc.org.uk/images/uploaded/documents/The%20Sharman%20Report%20-%20final%200311111.pdf%22%20%5Ct%20%22_new).  See also further information on the [background to the Sharman Inquiry](http://www.frc.org.uk/about/sharmaninquiry.cfm%22%20%5Ct%20%22_new).etailed Contents**1.11 Policy measures to address systemically important financial institutions**On 4 November 2011, the G20 Leaders endorsed the implementation of an integrated set of policy measures proposed by the Financial Stability Board (FSB) to address the risks to the global financial system from systemically important financial institutions (SIFIs), and the timeline for implementation of these measures. Specific measures focus on global SIFIs (G-SIFIs) to reflect the greater risks that these institutions pose to the global financial system.The policy measures comprise:A new international standard as a point of reference for reforms of national resolution regimes, to strengthen authorities' powers to resolve failing financial firms in an orderly manner and without exposing the taxpayer to the risk of loss;Requirements for resolvability assessments, recovery and resolution plans and institution-specific cross-border cooperation agreements for G-SIFIs;Requirements for additional loss absorption capacity above the Basel III minimum for global systemically important banks; andMore intensive and effective supervision through stronger supervisory mandates, and higher supervisory expectations for risk management functions, risk data aggregation capabilities, risk governance and internal controls.The FSB has also identified the initial group of 29 G-SIFIs for which the resolution-related requirements will need to be met by end-2012. Going forward, the list of G-SIFIs will be updated each year in November. The additional loss absorbency requirement will apply from 2016, initially to those banks identified in November 2014 as G-SIFIs. These banks will also have to meet the higher supervisory expectations for data aggregation capabilities by January 2016.Further information is available on the [FSB website](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new).etailed Contents**1.12 Discussion paper on the future of the Financial Reporting Panel**On 4 November 2011, the Parliamentary Secretary to the Treasurer released a discussion paper outlining options relating to the future of the Financial Reporting Panel (FRP). The FRP's primary function is to resolve disputes between the Australian Securities and Investments Commission and a company, disclosing entity or registered scheme over the application of accounting standards in its financial reports.The discussion paper presents options designed to enhance the process by which cases are referred to the FRP. The discussion paper also considers whether there is a continuing role for the FRP in the financial reporting framework, in light of the costs of maintaining a body which has dealt with few applications since being established.The Consultation Paper is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2220" \t "_new).etailed Contents**1.13 FSA publishes review of firms' structured product design processes and proposes new guidance on retail product development** On 2 November 2011, the UK Financial Services Authority (FSA) introduced further guidance for firms when developing new structured products which they want to market to consumers.The FSA assessed seven major providers of structured products, responsible for approximately 50% of structured products in the UK retail market by volume and value. The review was conducted between November 2010 and May 2011 and found that while there had been some improvements, weaknesses remain in the way firms are designing and approving structured products - increasing the risk to consumers. Firms tended to focus on their own commercial interests rather than consumer needs. Following this review, the FSA is publishing guidance that firms should consider when designing structured products and dealing with the after sales process. Much of the guidance is also relevant to other retail products.Firms should:identify the target audience and then design products that meet that audience's needs; pre-test new products to ensure they are capable of delivering fair outcomes for the target audience; ensure a robust product approval process is in place for new products; and monitor the progress of a product throughout its life cycle. Further and more detailed actions for firms are outlined within the publication. The guidance is open for consultation until 11 January 2012.This is the second piece of guidance the FSA has published focusing on product design. On 1 November 2011, the FSA and OFT jointly published guidance for consultation aimed at firms that are developing, or planning to develop, protection products similar to payment protection insurance (PPI).Guidance Consultation on 'Retail Product Development and Governance - Structured Products Review' is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Policy/guidance_consultations/2011/11_27.shtml%22%20%5Ct%20%22_new).   Guidance Consultation on 'Payment Protection Products' is also on the [FSA website](http://www.fsa.gov.uk/pages/Library/Policy/guidance_consultations/2011/11_26.shtml%22%20%5Ct%20%22_new).etailed Contents**1.14 Report on the dynamics of the Australian superannuation system: the next 20 years** On 2 November 2011, Deloitte released a report titled 'The Dynamics of the Australian Superannuation System: the next 20 years 2011 - 2030', which explores a range of scenarios within the Australian superannuation industry.   With current total assets of around $1.4 trillion in the Australian system, this is projected to grow to $3 trillion by 2020, $4.5 trillion by 2026 and more than $6 trillion by 2030.  According to the report, this growth will be driven by a Superannuation Guarantee (SG) of 9% potentially rising to 12%, population growth, and the ageing population. The report shows the comparative growth in superannuation assets by market segment, in the demographic makeup of post and pre-retirement funds, and what longevity means for retirement adequacy. The Report also projects that recent strong growth in industry funds, master trusts and Self Managed Super Funds, will continue at the expense of corporate and public sector funds.The Report is available on the [Deloitte website](http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/news-research/Press%20releases/Louise%20Denver/Dynamics%20of%20the%20Aus%20Superannuation%20System_Report.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15 G20 endorse OECD's High-Level Principles on Financial Consumer Protection** On 1 November 2011, the G20 Finance Ministers and Central Bank Governors announced they had endorsed the 'High-level Principles on Financial Consumer Protection'.   The Principles were developed by the OECD Committee on Financial Markets, in collaboration with others, as a response to the G20 Finance Ministers and Central Bank Governors call in February 2011 for the OECD, the FSB and other relevant international organisations to develop common principles on consumer protection in the field of financial services.   The Principles are designed to assist G20 countries and other interested economies to enhance financial consumer protection. They are voluntary principles, designed to complement, not substitute for, existing international financial principles or guidelines. The ten Principles are:1.     Legal, Regulatory and Supervisory Framework 2.     Role of Oversight Bodies 3.     Equitable and Fair Treatment of Consumers 4.     Disclosure and Transparency 5.     Financial Education and Awareness 6.     Responsible Business Conduct of Financial Services Providers and Authorized Agents 7.     Protection of Consumer Assets against Fraud and Misuse 8.     Protection of Consumer Data and Privacy 9.     Complaints Handling and Redress 10.   Competition The 'G20 High-Level Principles on Financial Consumer Protection' are available on the [OECD website](http://www.oecd.org/dataoecd/58/26/48892010.pdf%22%20%5Ct%20%22_new).etailed Contents**1.16 Recommendations to strengthen oversight and regulation of shadow banking**On 27 October 2011, the Financial Stability Board (FSB) published a report titled 'Shadow Banking: Strengthening Oversight and Regulation'. This report provides the FSB's recommendations on this subject that were requested by the G20 Leaders at the November 2010 Seoul Summit.The "shadow banking system" can broadly be described as "credit intermediation involving entities and activities outside the regular banking system." According to one measure, the global shadow banking system grew rapidly before the crisis, from an estimated US$27 trillion in 2002 to US$60 trillion in 2007, and remained at around the same level in 2010.Intermediating credit through non-bank channels can have advantages, for example by providing an alternative source of funding and liquidity. However, as the recent financial crisis has shown, the shadow banking system can also be a source of systemic risk both directly and through its interconnectedness with the regular banking system. It can also create opportunities for arbitrage that might undermine stricter bank regulation and lead to a build-up of additional leverage and risks in the overall financial system. Enhancing supervision and regulation of the shadow banking system in areas where systemic risk and regulatory arbitrage concerns are inadequately addressed is therefore important.The report's recommendations for effective monitoring set out high-level principles for the relevant authorities and a stylised monitoring process. This process calls on authorities to first assess the broad scale and trends of non-bank credit intermediation in the financial system, drawing on information sources such as Flow of Funds and Sector Balance Sheet data, and complemented with other information such as supervisory data. Based on this assessment, authorities should narrow down their focus to those types of non-bank credit intermediation that have the potential to pose systemic risks, by focusing in particular on those involving the four key risk factors: (i) maturity transformation; (ii) liquidity transformation; (iii) imperfect credit risk transfer; and/or (iv) leverage. Authorities should then assess in detail the potential impact that the severe distress or failure of certain shadow banking entities/activities would pose to the overall financial system through looking at other factors, such as the inter-connectedness between the shadow banking system and the regular banking system.The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_111027a.pdf%22%20%5Ct%20%22_new).etailed Contents**1.17 FSB/OECD report on consumer finance protection with particular focus on credit**On 26 October 2011, the Financial Stability Board (FSB) published a report on consumer finance protection in the area of consumer credit, including mortgages, credit cards, and secured and unsecured loans. The report, which was produced in collaboration with the Organisation for Economic Co-operation and Development (OECD):provides a global overview of policy initiatives completed or planned to strengthen consumer protection frameworks;presents a comprehensive picture of existing and evolving institutional arrangements; andreviews the work of regulators and prudential supervisors in various areas of consumer protection, including responsible lending practices, disclosure guidelines, product intervention, and complaints and dispute resolution mechanisms.The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_111026a.pdf%22%20%5Ct%20%22_new).etailed Contents**1.18 Report on anti-corruption and bribery practices in corporate Australia**  On 26 October 2011, the Australian Council of Superannuation Investors (ACSI) published a research report titled 'Anti-corruption and Bribery Practices in Corporate Australia: A review of the S&P/ASX200'.  According to World Bank estimates, corruption costs between US$1 trillion and US$1.6 trillion globally each year. The research report commissioned by ACSI and produced by CAER (Corporate Analysis Enhance Responsibility) provides a snapshot of exposure to bribery and corruption risk across ASX200 companies, focusing on those with operations in high-risk sectors and/or high-risk countries.  Supported by previous research undertaken by CAER, EIRIS company assessments and incorporating data produced by Transparency International's Corruption Perception Index and the World Bank Governance Indicators, the report indicates that: The number of ASX100 companies operating in a sector or country deemed high-risk for corruption has increased from 56% in 2006 to 75% in 2011;  ASX100 companies lag the top 100 companies (by market cap) from the UK, US and Europe in prohibiting the giving and receiving of bribes; and 126 ASX200 companies operating internationally are exposed to a high-risk sector, country or both, but 40% of these companies have no public policy that prohibits bribery or facilitation payments. The Report also provides comparisons of companies' stated anti-corruption and bribery policies against companies' disclosed management systems for implementation. The Report is available on the [ACSI website](http://www.acsi.org.au/images/stories/ACSIDocuments/generalresearchpublic/11_anti_corruption__bribery_practices_in_corporate_australia.oct_11.pdf%22%20%5Ct%20%22_new).etailed Contents**1.19 Regulators and government agencies annual reports** Several regulators and other government agencies with responsibility for corporate law and corporate governance have recently released their annual reports for 2010-2011. They include: [Australian Accounting Standards Board Annual Report 2010-11](http://www.aasb.gov.au/admin/file/content102/c3/AASB_Annual_Report_2010-11.pdf%22%20%5Ct%20%22_new);[Australian Auditing and Assurance Standards Board Annual Report 2010-11](http://www.auasb.gov.au/admin/file/content13/c6/AUASB_Annual_Report_2010-11.pdf%22%20%5Ct%20%22_new);[Australian Office of Financial Management Annual Report 2010-11](http://www.aofm.gov.au/content/publications/reports/annualreports/2010-2011/index.asp%22%20%5Ct%20%22_new);[Australian Prudential Regulation Authority Annual Report 2010-11](http://www.apra.gov.au/AboutAPRA/Publications/Pages/Annual-Report.aspx%22%20%5Ct%20%22_new);[Australian Securities and Investments Commission Annual Report 2010-11](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/annual-report-2010-11.pdf/%24file/annual-report-2010-11.pdf%22%20%5Ct%20%22_new);[Australian Securities Exchange Annual Report 2010-11](http://www.asxgroup.com.au/media/PDFs/ASX_Limited_Annual_Report_2011.pdf%22%20%5Ct%20%22_new);[Commonwealth Director of Public Prosecutions Annual Report 2010-11](http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2010-2011.pdf%22%20%5Ct%20%22_new);[Commonwealth Treasury Annual Report 2010-11](http://www.treasury.gov.au/contentitem.asp?NavId=036&ContentID=2209" \t "_new);[Companies Auditors and Liquidators Disciplinary Board Annual Report 2010-11](http://www.caldb.gov.au/caldb/caldbweb.nsf/Attbyfilename/CALDB%2011%20Annual%20Report%20%28FINAL%29.pdf/%24file/CALDB%2011%20Annual%20Report%20%28FINAL%29.pdf%22%20%5Ct%20%22_new);[Corporations and Markets Advisory Committee Annual Report 2010-11](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFAnnual%2BReport%2B2010%2B2011/%24file/CAMAC_AR_2010-11.pdf%22%20%5Ct%20%22_new);[Financial Reporting Council Annual Report 2010-11](http://www.frc.gov.au/reports/2010_2011/index.asp%22%20%5Ct%20%22_new); [Insolvency and Trustee Service Australia Annual Report 2010-11](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about%2Bus-%3Epublications-%3Eannual%2Breports%22%20%5Ct%20%22_new); and[Takeovers Panel Annual Report 2010-11](http://www.takeovers.gov.au/content/resources/reports/annual_reports/2010-11/%22%20%5Ct%20%22_new).etailed Contents |

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

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| **2.1 Review of mortgage brokers' responsible lending conduct**On 17 November 2011, ASIC published a review of mortgage brokers providing credit assistance for home loans in the first six months of the new national credit regime. The review found that while they are generally aware of the new responsible lending obligations and taking steps to comply, there is room for improvement.ASIC's review, which examined the procedures of 16 mortgage brokers, did not consider whether individual loans were appropriate. While the review did not find evidence of equity stripping, it identified some risks of non-compliance with the responsible lending requirements, particularly where credit assistance was provided for loans promoted as low documentation (low doc).Consistent with the regulatory requirements, files reviewed generally recorded inquiries into a consumer's credit requirements and objectives, inquiries into and verification of a consumer's financial situation, and/or assessment of whether a consumer would be able to meet their obligations under the proposed credit contract without substantial hardship.Some of the compliance risks ASIC identified in its review included instances of brokers not recording: a consumer's requirements and objectives beyond the immediate purpose of the home loan (e.g. to buy a home); steps taken to verify a consumer's income, or relying only on statements from a consumer to verify income, when providing credit assistance for home loans promoted as low doc; inquiries into a consumer's actual living expenses or steps taken to verify a consumer's ongoing fixed expenses; and how a consumer's ability to make repayments under the proposed credit contract had been assessed. ASIC's review focused on the practices of mortgage brokers, rather than lenders, because the responsible lending requirements did not apply to most home lenders until January 2011. A further review of how credit providers in the home lending market are now meeting their responsible lending obligations will commence in coming months. Report 262, 'Review of credit assistance providers' responsible lending conduct, focusing on 'low doc' home loans' is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports%22%20%5Ct%20%22_new).etailed Contents**2.2 ASIC proposals for research houses**On 16 November 2011, ASIC released a consultation paper proposing research report providers, including research houses, separate their business units as a strategy to manage conflicts of interest as part of moves to improve confidence in the independence and quality of research reports. This proposed segregation would involve strict and formal physical and electronic separation between ancillary business units such as consulting and funds management services and the research business.A key conflict of interest issue for research report providers is whether providers should accept payment from product issuers to produce research about the issuer's own products. ASIC is seeking feedback on whether these conflicts of interest associated with product issuers paying for research:can be effectively and robustly managed; or should be avoided entirely.Consultation Paper 171 'Strengthening the regulation of research report providers (including research houses)' also proposes research houses lodge a compliance report every two years. The biennial report would require research houses to address issues such as research methodology and processes, internal conflicts management procedures, conflicts disclosure to users, and managing research quality and transparency.Key issues identified from ASIC's review were:the incidence (or the perception of) conflict of interests potentially arising through research houses' revenue model, ancillary businesses and analyst arrangements; the adequacy of skills and experience of research analysts in producing quality research; and the lack of transparency and comparability for research methodology. ASIC also identified an apparent 'expectations gap' between financial advisory firms and research houses about the nature and role of research in its review. In particular, advisers expressed a view that research houses should cover less products and undertake more in-depth research. By contrast, some research houses saw their role as providing product coverage for a range of products in each market segment and identifying the 'best of breed' products.Consultation Paper 171 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.3 Proposed new policy for downstream acquisitions** On 11 November 2011, ASIC announced it was inviting industry feedback on proposed updates to its policy relating to downstream acquisitions which can occur as a result of an acquisition in another company. Consultation Paper 170 'Downstream acquisitions: Update to RG 71' details ASIC's plans to update guidance on the takeovers exception for downstream acquisitions set out in item 14 of section 611 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  A downstream acquisition occurs when a person acquires a relevant interest in more than 20% of the voting securities in an Australian company (downstream entity) as a result of an acquisition in another company, including a foreign body corporate (upstream entity). Acquisitions of this kind can have a significant impact on the control of the downstream entity and therefore, its shareholders. ASIC's policy on downstream acquisitions is currently set out in Regulatory Guide 71 'Downstream acquisitions' ([RG 71](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg71" \t "_new)). The proposed updates will take into account the significant developments in Australian takeover law since the guide was last updated in 1996. These developments include amendments to the exception for downstream acquisitions in item 14 and an extension of the takeovers regime in Chapter 6 to listed managed investment schemes.The consultation paper also includes proposed changes to the conditions that may apply when ASIC grants relief for a downstream acquisition that is not exempt under item 14.Finally, ASIC's updated guide will provide entities and their advisers with ASIC's current views on how the exception in item 14 applies, and its policy on granting relief.ASIC is seeking comments on the proposed updates to RG 71 by 16 January 2012 and plans to publish a final guide later in 2012. Consultation Paper 170 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp170-published-11-November-2011.pdf/%24file/cp170-published-11-November-2011.pdf%22%20%5Ct%20%22_new).etailed Contents**2.4 ASIC seeks to make prospectuses more useful** On 10 November 2011, ASIC announced that it has finalised guidance that will help companies produce better prospectuses. It has also released a webpage on MoneySmart that will help potential investors to understand them. ASIC's guide, Regulatory Guide 228 'Prospectuses: Effective disclosure for retail investors' ([RG 228](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg228" \t "_new)), follows extensive industry consultation on draft guidance set out in Consultation Paper 155 ([CP 155](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp155" \t "_new)).  It aims to address problems ASIC has identified with prospectuses in the past. The guide also contains practical tools to assist issuers and their advisers in producing clear, concise and effective disclosure. ASIC received 22 submissions on CP 155 from stakeholders including leading industry associations and several law and accounting firms. These submissions were very positive about ASIC's proposal to give guidance on prospectuses. However, there were differing views on some issues such as the use of photographs, disclosure of financial information and directors' track records. Requests were also made for further guidance on disclosure of confidential information about a company's business. A table summarising ASIC's key solutions for more user-friendly prospectuses is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/11-248MR%2BASIC%2Bseeks%2Bto%2Bmake%2Bprospectuses%2Bmore%2Buseful?openDocument" \t "_new).etailed Contents**2.5 New financial requirements for responsible entities of managed investment schemes** On 7 November 2011, ASIC released new financial requirements for responsible entities (REs) of managed investment schemes (MISs).  The changes, implemented through Class Order (CO 11/1140) and outlined in updated versions of Regulatory Guide 166 'Licensing: Financial requirements' (RG 166) and Pro Forma 209 'Australian financial services licence conditions' (PF 209), aim to ensure REs have adequate resources to meet operating costs and there is appropriate alignment with the interests of investors.Under the changes - which are the first significant changes in more than a decade to the rules covering financial requirements for MISs - REs must prepare 12-month cash-flow projections which must be approved at least quarterly by directors.To meet the new net tangible asset (NTA) capital requirements, REs must hold the greater of:$150,000;0.5% of the average value of scheme property (capped at $5 million); or10% of the average RE revenue (uncapped).A liquidity requirement has also been introduced where an RE must hold at least 50% of its NTA requirement in cash or cash equivalents, and an amount equal to the NTA requirement in liquid assets.ASIC is giving existing REs until 1 November 2012 to comply with the new financial requirements. The new requirements for REs will not come into effect until the end of the transition period.If REs that are RSE licensees are required to meet the new financial resource requirements as a part of the Stronger Super reforms, ASIC will consider if amendments to the updated financial resource requirements are appropriate, having regard to ASIC's objective that the financial resource requirements reflect the operational risks of REs.The updated versions of [RG 166](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep259-appendix-1--draft-rg166-published-7-November-2011.pdf/%24file/rep259-appendix-1--draft-rg166-published-7-November-2011.pdf%22%20%5Ct%20%22_new) and [PF 209](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep259-appendix-2--PF209-draft-rg166-Financial-requirements-for-REs.pdf/%24file/rep259-appendix-2--PF209-draft-rg166-Financial-requirements-for-REs.pdf%22%20%5Ct%20%22_new) are appendices to Report 259 'Response to submissions on CP 140 Responsible entities: Financial requirements' ([Report 259](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep259-published-7-November-2011.pdf/%24file/rep259-published-7-November-2011.pdf%22%20%5Ct%20%22_new)). Class order CO 11/1140 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co11-1140.pdf/%24file/co11-1140.pdf%22%20%5Ct%20%22_new).  etailed Contents**2.6 Consultation on term deposits relief** On 4 November 2011, ASIC released a consultation paper on proposals for relief to allow banks and non-banks to issue term deposits that are only breakable on 31 days' notice, as part of moves by Australia's financial services sector to meet new global liquidity standards.Basel III liquidity standards aim to promote more resilient banking sectors, including improving sectors' ability to absorb shocks arising from financial and economic stress. The Australian Prudential Regulation Authority (APRA) has commenced consultation with industry, including ASIC, on the implementation of Basel III in Australia.Term deposits for up to two years issued by authorised deposit-taking institutions (ADIs) that are only breakable on 31 days' notice would achieve recognition of the 31-day term under the Basel III liquidity standards.Relief may be required due to potential regulatory uncertainty about whether such term deposits would qualify as basic deposit products under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The definition of basic deposit product in section 761A of the Corporations Act does not specify the period of notice that an ADI may require a depositor to give in order to make an early withdrawal from a term deposit of up to two years (except for the special provision for mutuals contained in reg 7.1.03A of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default)).Given that a minimum notice period of 31 days would be required for term deposits to gain recognition under the Basel III liquidity standards, there is potential regulatory uncertainty about whether such term deposits would satisfy the basic deposit product definition without some form of relief provided by ASIC. Consultation Paper 169 'Term deposits that are only breakable on 31 days' notice: Proposals for relief' ([CP 169](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp169-published-4-November-2011.pdf/%24file/cp169-published-4-November-2011.pdf%22%20%5Ct%20%22_new)) outlines the relief and the conditions of relief under consideration by ASIC.  Comments on the consultation paper are due by 23 December 2011.etailed Contents**2.7 Rules for capital for Chi-X market** On 28 October 2011, ASIC registered market integrity rules for capital for the Chi-X market, which started operating on 31 October 2011.   These rules are modelled closely on the market integrity rules for capital for the ASX market, to ensure a level playing field for the two equities markets. Participants who are market participants of both ASX and Chi-X markets can satisfy the capital rules for both markets with one amount of capital, and need report to ASIC under one set of rules only.  These rules were proposed in ASIC's Consultation Paper 161 'Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets' ([CP 161](http://www.asic.gov.au/asic/asic.nsf/byheadline/CP-161-Proposed-ASIC-market-integrity-rules-for-capital-and-related-requirements-ASX-ASX24-and-Chi-X-markets?openDocument" \t "_new)).   The rules amend the existing ASIC market integrity rules for the Chi-X market by inserting two new chapters for capital and capital reporting.[ASIC Market Integrity Rules (Chi-X Australia Market) Amendment 2011 (No.1)](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/MIRs-Chi-X-Market-Amendment-No-1-2011-signed-25-Oct.pdf/%24file/MIRs-Chi-X-Market-Amendment-No-1-2011-signed-25-Oct.pdf%22%20%5Ct%20%22_new) has amended the pre-existing [ASIC Market Integrity Rules (Chi-X Australia Market) 2011](http://www.asic.gov.au/asic/asic.nsf/byheadline/Market%2Bintegrity%2Brules?openDocument" \l "chix-mirs" \t "_new).ASIC has also released an amended Regulatory Guide 226 'Guidance on ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X markets' ([RG 226](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg226-published-28-October-2011.pdf/%24file/rg226-published-28-October-2011.pdf%22%20%5Ct%20%22_new)), providing guidance on the operation of the capital rules for the Chi-X market, as well as the capital rules for the ASX and ASX 24 (futures) markets.etailed Contents**2.8 Clarification of requirements for telephone sales of general insurance products**On 28 October 2011, ASIC announced class order relief to change the time for giving a Product Disclosure Statement (PDS) for a general insurance product when a retail client seeks a quote for the product during a telephone call.Quotes for general insurance products are often sought by retail clients during telephone calls to help the client compare products. Relief provided by Class Order [CO 11/842] has been given to address practical difficulties in giving a PDS during a telephone call and allow the continued provision of quotes to retail clients.[CO 11/842] applies the requirement to give a PDS differently depending on whether the client wants to be given a PDS at or around the time the quote is given. Under the relief, the client can choose to receive the PDS, and, if they do, the general insurer or intermediary must give a PDS as soon as practicable after the quote is given. This means that the PDS can be given after the telephone call. The relief given by ASIC does not affect the time at which a PDS must be given if a quote is given during an unsolicited telephone call, or is otherwise unsolicited by the retail client.The relief seeks to balance the consumer protection interest of retail clients with industry concerns about compliance costs.  The relief follows a consultation period where ASIC sought feedback on the issue and set out proposals for relief (see [10-221AD](http://www.asic.gov.au/asic/asic.nsf/byheadline/10-221AD%2BASIC%2Bconsults%2Bon%2Btelephone%2Bsales%2Bof%2Bgeneral%2Binsurance%2Bproducts?openDocument" \t "_new)). ASIC's Consultation Paper 144 'Time for giving a PDS during telephone sales of general insurance products' ([CP 144](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp144" \t "_new)) outlined relief under consideration by ASIC to enable the provision of quotes during both solicited and unsolicited telephone calls without a PDS being given at or before that time. The submissions received to CP 144 were not supportive of the relief that was proposed, and ASIC decided not to proceed with the relief outlined.However, submissions from the general insurance industry indicated that the existing legislative concessions to the PDS requirements that facilitate telephone sales processes do not fully cover the current quoting practice of general insurers and intermediaries. These existing provisions do not cover circumstances where the client seeks a quote for comparison with other available products, and does not make an immediate decision about whether or not to acquire the general insurance product specified in the quote.Class Order 11/842 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co11-842.pdf/%24file/co11-842.pdf%22%20%5Ct%20%22_new).  See also [Regulatory Guide 168](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg168-published-28-October-2011.pdf/%24file/rg168-published-28-October-2011.pdf%22%20%5Ct%20%22_new) 'Disclosure: Product Disclosure Statements (and other disclosure obligations)'.etailed Contents |

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

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| **3.1 ASX Listing Rules - 'good fame and character' requirement for directors of new listed entities** ASX is amending the Listing Rules with effect from 1 January 2012, to require an applicant for ASX listing to satisfy ASX that its directors or proposed directors at the date of listing are of good fame and character.  Applicants will be required to provide to ASX a criminal history check, a bankruptcy check and a statutory declaration from each director affirming that they have not been the subject of relevant disciplinary or enforcement action by an exchange or securities market regulator. These requirements will apply to applications for new listings that are lodged on or after 1 January 2012, and to listed entities that are required on or after 1 January 2012 to re-comply with Chapter 1 and Chapter 2 of the Listing Rules under Listing Rule 11.1.3. The new requirements reflect ASX's desire to maintain the reputation of the ASX market and also align with the 'good fame and character' requirement that applies to the directors of participants in ASX's licensed markets and clearing and settlement facilities. They also dovetail with the views expressed by ASIC in [Regulatory Guide 228](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg228-published-10-November-2011-1.pdf/%24file/rg228-published-10-November-2011-1.pdf%22%20%5Ct%20%22_new) as to the sorts of information that companies which access the capital markets through a prospectus should be disclosing about their directors. The 'good fame and character' requirements are discussed in [Listed Entities Update 07/11](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20110928_0711_HTML.htm%22%20%5Ct%20%22_new), issued on 28 September 2011. ASX has also reviewed and re-written Listing Rule Guidance Note 1 Applying for Admission and Quotation, Guidance Note 4 Foreign Entities and Guidance Note 12 Significant Changes to Activities which, among other things, will reflect the new 'good fame and character' requirement. The new Listing Rules and the draft Guidance Notes will be made available on [ASXGroup.com.au](http://www.asxgroup.com.au/%22%20%5Ct%20%22_new) in advance of the effective date.  etailed Contents**3.2 Alan Cameron to chair ASX Corporate Governance Council** On 9 November 2011, ASX announced the appointment of Mr Alan Cameron AO as the new Chairman of the ASX Corporate Governance Council. ASX has convened the Council since its inception in August 2002.  The Council brings together 21 business, investment and shareholder groups to oversee the principles-based and industry-wide framework it developed for corporate governance.  The overriding objective of the Council is to ensure that its principles and recommendations remain relevant and continue to provide a practical guide for listed companies, their investors and the wider Australian community. The media release regarding Mr Cameron's appointment is available on the [ASXGroup.com.au website](http://www.asxgroup.com.au/%22%20%5Ct%20%22_new). etailed Contents**3.3 PureMatch to go-live 28 November 2011** On 11 November 2011, ASX announced that regulatory clearance had been received from the Australian Securities and Investments Commission, allowing the launch of ASX PureMatch.  ASX confirmed that PureMatch will go live on Monday, 28 November 2011. PureMatch is ASX's new high speed/low latency order book for trading the most liquid ASX-listed stocks and domestic exchange traded funds (ETFs).  It offers a new execution service alongside ASX's existing TradeMatch order book, through which all ASX-listed securities can be traded.  PureMatch will also provide an alternative to other venues that trade ASX-listed securities. The securities available for trading on PureMatch will be introduced in two stages to enable orderliness and to give participants time to familiarise themselves with the new service.  Ten securities will be available for trading on PureMatch in the first stage.  ASX proposes to expand the list of securities to all S&P/ASX 200 stocks plus ETFs on Monday, 12 December 2011, subject to regulatory clearance. ASX has also announced introductory pricing (excluding GST) for PureMatch that is designed to attract and reward liquidity providers. The [media release](http://www.asxgroup.com.au/media/PDFs/PureMatchLaunchandPricingFinal-AustralianSecuritesExchange-ASX.pdf%22%20%5Ct%20%22_new) and [further information on PureMatch](http://www.asx.com.au/trading_services/new_market_services.htm%22%20%5Ct%20%22_new) are available on the ASXGroup.com.au website.etailed Contents**3.4 ASX committed to support implementation of Emissions Trading Scheme** On 10 November 2011, ASX announced its commitment to supporting the implementation of an Emissions Trading Scheme (ETS) in 2015 as part of the Clean Energy legislative package approved by the Australian Senate on 8 November 2011. Key to the success of the ETS will be the introduction of secondary and futures markets for carbon permits and any fungible carbon-related products. These markets will generate the short and long-term price signals and risk mitigation required to underpin investment certainty. ASX has a longstanding interest in providing market support for emissions trading in Australia and anticipates that it will be able to introduce a futures market for carbon prior to the commencement of the ETS to help industry participants manage forward price risk. ASX is also able to provide facilities for secondary market trading, clearing and settling of the physical permits. ASX is expecting there will be significant demand for efficient, secure and cost-effective risk and permit transfer, combined with the need for transparent price discovery.  ASX has well-developed exchange infrastructure and distribution mechanisms to support an ETS and secondary market trading, and considerable experience operating successful energy and environment derivatives markets.  Many likely participants in the forthcoming ETS are already users of ASX infrastructure today, including trading and investment banks, large corporations, electricity generators and retailers, mining and transport companies, and primary producers. ASX users will also gain operational and capital efficiencies by clearing those products at a single clearing house, ASX Clear (Futures), ASX's futures central counterparty clearing subsidiary.  Flexible operating rules will also enable the clearing of over-the-counter (OTC) derivative transactions via block trading facilities. The media release is available on the [ASXGroup.com.au website](http://www.asxgroup.com.au/media/PDFs/ASX_Ready_to_Support_ETS-AustralianSecuritiesExchange-ASX.pdf%22%20%5Ct%20%22_new).etailed Contents**3.5 Migration of the ASX Grain Futures and Options market to ASX 24** On 24 October 2011, the ASX Grain Futures and Options market was migrated to ASX 24.  The primary aim of the migration was to support continued market growth and promote greater liquidity for the Australian grain and oilseed marketplace by improving both market accessibility and market functionality. Key benefits of the migration to ASX 24 are improved market access, enhanced margining methodology and margin offset, extended trading hours and enhanced order types. The amendments are summarised on the [ASX Grain Futures and Options Migration webpage](http://www.asx.com.au/products/asx-grain-futures-and-options-migrating.htm%22%20%5Ct%20%22_new).etailed Contents**3.6  Reports** On 4 November 2011, ASX released the following reports for October 2011:the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_October_2011_-_Final.pdf%22%20%5Ct%20%22_new);the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2011/notice2011_215.pdf%22%20%5Ct%20%22_new); andthe [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/111104maASX_Compliance_Monthly_Activity_Report_-_October_2011_Final.pdf%22%20%5Ct%20%22_new).etailed Contents |

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| **4. Recent Corporate Law Decisions** |  | ext Section |

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| **4.1 Statutory demand set aside for offsetting claim despite contractual bar on set-offs or counterclaims** (By Kathleen McNally and Rebecca Magee, Clayton Utz) Bakota Holdings Pty Ltd v Bank of Western Australia Ltd [2011] NSWSC 1277, Supreme Court of New South Wales, Barrett J, 31 October 2011 The full text of this judgment is available at: [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=155295](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=155295" \t "_new)**(a) Summary** In this judgment, Barrett J considered an application by Bakota Holdings Pty Ltd ('the Guarantor') pursuant to sections 459G and 459H(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act') to set aside a statutory demand served on it by the Bank of Western Australia ('the Bank'). Barrett J set aside the statutory demand on the basis that a guarantee to pay money in full without set-off, counterclaim or deduction did not extinguish any right of action a guarantor has against the creditor. Barrett J noted that the definition of "offsetting claim" in section 459H(5) of the Act included a cross-demand as well as counterclaim and set-off. **(b) Facts** The Guarantor guaranteed to the Bank the due and punctual payment by FOB-Airlie Beach Pty Ltd ('FOB') of the borrowed funds. The guarantee relevantly provided that: "As long as any of the guaranteed money remains unpaid, you may not, without our consent: (a) reduce your liability under this guarantee and indemnity by claiming that you or the debtor or any other person has a right of set-off or counterclaim against us". "You must pay us the guaranteed money in full without set-off, counterclaim or deduction". The Guarantor applied to set aside the statutory demand on the basis of the existence of an "offsetting claim" pursuant to section 459H(1)(b) of the Act (the Guarantor did not seek to rely upon section 459H(1)(a) of the Act regarding a "genuine dispute"). The Guarantor's offsetting claim related to alleged misleading and deceptive statements by officers of the Bank that the facilities would be rolled over. Section 459H relevantly provides: "(1) This section applies where, on application under section 459G, the Court is satisfied of either or both of the following:(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates;(b) that the company has an offsetting claim." Section 459H(1)(5) defines offsetting claim as a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates). The Bank contended that the Guarantor's claim for loss or damage for misleading or deceptive conduct did not fall within the definition of "offsetting claim" due to the above mentioned clauses in the guarantee. **(c) Decision** **(i) Does an "offsetting claim" exist?** Barrett J concluded that the above mentioned clauses in the guarantee did not extinguish the Guarantor's rights of action against the Bank. Barrett J accepted that any right of set-off or counterclaim was not able to be relied upon by the Guarantor in proceedings by the Bank to recover under the guarantee. However, he stated that so long as the Guarantor's claim for loss or damages against the Bank satisfies the "genuine" requirement of the "offsetting claim" definition, the existence of that claim is sufficient for the purposes of section 459H(1)(b). Barrett J acknowledged that this finding was against previous judgments including his own judgment in *Blue Hills Village Management (Liverpool) Pty Ltd v Babcock & Brown International Pty Ltd* [2009] NSWSC 87. However, Barrett J noted at [24] that the judges in those cases were not referred to the Full Federal Court decision of *John Shearer Ltd v Gehl Company* (1995) 60 FCR 136. **(ii) Is the offsetting claim genuine?** Barrett J dealt with whether the Guarantor's alleged claim was genuine. Barrett J held, adopting the formulation by Palmer J in *Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 74 at [18], that a claim will be "genuine" if it is arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful. Barrett J was of the view that - although the claim may be difficult to establish due to credibility issues - the claim was genuine in the sense referred to above. **(iii) Did the supporting affidavit enable the court to see the amount of the offsetting claim?** Barrett J considered the requirement that an affidavit in support of a set-aside application must enable the court to see the "amount" of the offsetting claim. Barrett J confirmed that the affidavit must contain sufficient material for an estimate to be made. The Guarantor's affidavit alleged an offsetting claim for the full value of the guaranteed debt. Although the affidavit did not articulate the reasons why the Guarantor claimed damages would equal the guaranteed debt, Barrett J found that this could be inferred. etailed Contents**4.2 Oppressive conduct to shareholder under section 232 of the Corporations Act** (By Celeste Koravos, DLA Piper Australia) Grego v Copeland [2011] VSC 521, Supreme Court of Victoria, Ferguson J, 20 October 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2011/521.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/521.html%22%20%5Ct%20%22_new)  **(a) Summary** In this case the Supreme Court of Victoria confirmed the findings of the Associate Judge that the conduct of the four defendants, Mark Copeland, Giancarlo Grego, JRD Investments Pty Ltd and Jimmi Dexta Pty Ltd (collectively "the Defendants") was oppressive to Frank Grego ("the Plaintiff") under section 232 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). **(b) Facts** **(i) Background** The Plaintiff and three of the defendants, Copeland, Grego and JRD Investments Pty Ltd were shareholders in the fourth defendant Jimmi Dexta Pty Ltd ("the Company"). The Plaintiff held 18% of the Company's shares. The Plaintiff contended that since about June 2006, the defendants had conducted the affairs of the Company in a manner oppressive to him for the purposes of section 232 of the Act, which provides: 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. **(ii) Findings of Associate Judge** The Associate Judge found in favour of the Plaintiff, and ordered as follows: that the defendants purchase the shares held by the Plaintiff in the Company for $32,142.86;that within 21 days the defendants procure National Australia Bank Limited to release and discharge the Plaintiff from the guarantee that the Plaintiff had given in favour of that ban, and remove the Plaintiff as a guarantor in relation to the Company;that the Company pay the Plaintiff $11,658 plus interest of $1,569.04 as reimbursement for an amount that the Plaintiff had paid to American Express in respect of a credit card that he had used for payment of expenses related to the Company; andthat the Defendants pay the Plaintiff's costs of and incidental to the proceeding. The Associate Judge found that the Defendants had not assisted the Plaintiff to sell his shares to a potential third party purchaser, Georgiadis, but that the Defendants were not under any duty to do so. The Defendants sought leave to appeal against the decision of the Associate Judge. Ferguson J noted that leave may be granted where it is established that the decision of the Associate Judge is arguably affected by error. The Plaintiff relied on eight grounds that he contended constituted oppression, being: a demand made in May to June 2006 that the Plaintiff inject $160,000 into the Company or else he would be removed as a shareholder and director;improper exclusion of the Plaintiff from participation in management of the Company, which involved the Plaintiff's employment being terminated in June 2006 and his removal as a director on 14 June 2006;failure to hold any meetings of members to which the Plaintiff was invited since 14 June 2006;failure to make the Plaintiff a reasonable offer for his shares;incorporation of a new company, JD Brands Pty Ltd, to which assets of the Company were diverted;failure or refusal to honour the Company's financial obligations towards the Plaintiff in his capacity as an employee;denial of access to information to the Plaintiff about the Company's affairs; andincorrect characterisation of certain payments that were made as shareholders' loans, rather than as capital. The parties accepted the findings of fact of the Associate Judge relating to each of these grounds other than the final ground. The Defendants argued that even accepting the Associate Judge's findings of fact, the grounds alleged did not amount to oppression. **(c) Decision** Ferguson J dismissed the Defendants' application. Ferguson J observed that whether conduct is unfair or oppressive in a commercial company is assessed objectively through the eyes of a commercial bystander. In particular, if the conduct is so unfair that reasonable directors would not have thought it fair, then relief will be granted. The conduct must be considered in its context, and while separate instances of conduct on their own may not be unfair, cumulatively they may constitute oppression. Her Honour noted that: "looking at the evidence as a whole, it is clear that this was more than a simple case where the majority shareholders were in control of the Company and exercising their powers as such. The cumulative effect of the conduct over time resulted in oppression." Key factors included: Exclusion of the Plaintiff from management without making a reasonable offer for his shares. Her Honour confirmed that, looked at objectively from the position of a reasonable director, it was unfair to the Plaintiff to exclude him from management of the Company without offering to make any payment to him for his shares, even where the shares may have had little value and where the transfer may have secured his release from liability to third party financiers.Re-characterisation of amounts paid as loans instead of capital. Although the evidence was not consistent on how those amounts should be characterised, Ferguson J confirmed that the documentary evidence supported the conclusion that the moneys paid should be treated as capital.Refusal to meet the Company's financial obligations towards the Plaintiff.Diversion of assets to JD Brands Pty Ltd. Ferguson J noted that it was irrelevant that the assets transferred may have had little value, or that any revenue generated by JD Brands Pty Ltd may have benefited the Company, as diverting assets away from the Company was not appropriate.The demand that the Plaintiff contribute $160,000 into the Company or face removal as a director and loss of his shares. Her Honour confirmed that this was not a reasonable demand to make in circumstances where it had earlier been accepted that the Plaintiff would not contribute money. Ferguson J held that the following orders made by the Associate Judge were appropriate: the purchase of the Plaintiff's shares at a price of $32,142.86 (being an amount that a third party had offered and the Plaintiff would have accepted at a time when he and his co-shareholders were content to part ways and when there had been some oppressive conduct);procurement of the release of the guarantee that the Plaintiff gave in favour of the National Australia Bank Limited; andpayment of the American Express card liability and interest. etailed Contents**4.3 No requirement for 'fullest and best evidence' to rebut a presumption of insolvency** (By Monali Pandey and Jessica Digby, Corrs Chambers Westgarth) Coates Hire Operations Pty Ltd v D-Link Homes Pty Ltd [2011] NSWSC 1279, Supreme Court of New South Wales, White J, 31 October 2011 The full text of this judgment is available at: [http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=155303](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=155303" \t "_new)  **(a) Summary** Coates Hire Operations P/L ('Coates Hire') applied to have D-Link Homes P/L ('D-Link Homes') wound up in insolvency. Coates Hire alleged that there was a presumption of insolvency pursuant to section 459C(2)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) on the basis of D-Link Homes' failure to comply with a statutory demand. D-Link Homes alleged that it was not served with the statutory demand; it was solvent; and it disputed the debt claimed. In respect of the issue of service, White J held that service was effective. The presumption that the statutory demand had been delivered in the ordinary course of post had not been rebutted. In respect of the issue of solvency, Coates Hire submitted that D-Link Homes had not provided the "fullest and best evidence" of solvency. White J held that the question of solvency is to be decided on the balance of probabilities and that the presumption of insolvency is capable of being rebutted if the evidence is sufficiently persuasive even if more or better evidence of solvency could be adduced. As part of the question of solvency, White J considered the debt due by D-Link Homes to its director as the only debt that the company would not be able to pay as and when it became due and payable. The director gave evidence that he had no present intention of demanding payment of the debt due to him, which evidence White J accepted. White J held that even though D-Link Homes had not established that the debt to the director was only payable on demand, on the basis that the director had no intention of demanding payment of it, as a matter of 'commercial reality', the position was the same as if the debt were payable on demand. On this basis, White J held that D-Link Homes was solvent and Coates Hire's application for winding up was dismissed. **(b) Facts** D-Link Homes was a builder and hired equipment from Coates Hire. Coates Hire claimed that D-Link Homes owed it the sum of $43,916.58 in unpaid hire fees for invoices issued between 31 August 2010 and 16 December 2010. Over the period 11 February 2011 and 8 March 2011, Mr Hoang, the director of D-Link Homes advised Coates Hire in two emails that it was suffering financial difficulties because a company that owed D-Link Homes money had gone 'broke'. On 9 March 2011, Coates Hire retained a mercantile agent, Oceanic Mercantile P/L ('Oceanic Mercantile') to prepare a statutory demand. This statutory demand was posted to the registered office of D-Link Homes by ordinary post. D-Link Homes claimed that the statutory demand was never received and that the presumption of insolvency resulting from non-compliance with a statutory demand did not apply. In the alternative, if the presumption of insolvency did apply, D-Link Homes claimed that such presumption was rebutted by evidence that D-Link Homes was solvent. **(c) Decision** The case concerned the following three issues: whether the statutory demand was served on D-Link Homes;whether the presumption of insolvency had arisen and, if so, whether D-Link Homes had adduced the "fullest and best" evidence to rebut this presumption; andwhether D-Link Homes had proved that it was solvent. **(i) Was the statutory demand effectively served?** Section 29 of the [Acts Interpretation Act 1901 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "Default) provides that properly addressing, prepaying and posting a document will be deemed to be effective service, unless the contrary is established. Coates Hire led evidence as to the posting of the statutory demand by Oceanic Mercantile to the registered office of D-Link Homes, which was the private residence of its sole director. White J held that even if the statutory demand was not received by the director of D-Link Homes, its service would be effective under section 29 of the Acts Interpretation Act 1901 (Cth) provided it was posted properly and received in the letter box of the company's registered office. White J concluded that there was insufficient evidence to rebut the presumption that the statutory demand was delivered in the ordinary course of post, therefore the statutory demand was deemed to have been effectively served. **(ii) Had the presumption of insolvency arisen, and what was required to adduce the "fullest and best" evidence?** Section 459C(2)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) creates a presumption that a company is insolvent if the company fails to comply with a statutory demand. D-Link Homes adduced evidence as to its solvency from a certified practising accountant. Coates Hire submitted that this evidence did not constitute the "fullest and best" evidence of solvency due to several deficiencies in the accountant's evidence. The origin of the requirement for the "fullest and best" evidence of solvency for the purpose of rebutting the presumption of insolvency arose from the judgment of Hayne J in Commonwealth Bank of Australia v Begonia (1993) 11 ACLC 1075, which was a single judge decision of the Supreme Court of Victoria. White J considered this case and stated at [61] that "[h]is Honour did not say that only the fullest and best possible evidence of a company's financial position would be sufficient to displace a presumption of insolvency". White J agreed that the accountant had not taken sufficient steps to independently verify the amounts owed by D-Link Homes to creditors and the recoverability of debts owed to the company. The accountant had relied solely on information and invoices provided to her by D-Link Homes and had failed to undertake independent enquiries, for example by reviewing delivery dockets, orders and prior invoices, and contacting creditors directly. White J referred to section 140 of the [Evidence Act 1995 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "Default) and stated that solvency need only be established on the balance of probabilities and that the presumption of insolvency is capable of being rebutted if the evidence adduced is sufficiently persuasive, even if further evidence could potentially have been introduced. As such, the deficiency in the level of independent verification of solvency did not prevent the presumption of insolvency from being rebuttable. **(iii) Had D-Link Homes rebutted the presumption by proving that it was solvent?** Section 95A of the Corporations Act 2001 (Cth) provides that a person is insolvent if they are unable to pay their debts as and when they become 'due' and 'payable'.White J was satisfied on the balance of probabilities that D-Link Homes was able to pay its debts as they became due and payable, with the exception of a debt owed to its sole director, in the sum of $458,621. The director gave evidence that he had no present intention of requiring D-Link Homes to repay the debt. White J accepted this evidence. After considering whether the debt owed by D-Link Homes to its director was a debt payable on demand, White J considered the authorities on the assessment of solvency, which must be made as a matter of 'commercial reality' having regard to the 'practical business environment'. White J held that even though D-Link Homes had not established that the debt owed to the director was only payable on demand, on the basis that the director had no intention of demanding payment of it, as a matter of 'commercial reality', the position was the same as if the debt were payable on demand. White J stated that if this construction of section 95A was wrong, as winding up is a discretionary remedy, it would be appropriate for the Court to exercise its discretion not to wind up the company in such a circumstance in light of the nature of the debt owed. Coates Hire's application for winding up was dismissed. etailed Contents**4.4 Directors' rights to appear on behalf of deregistered companies** (By John O'Grady and Genevieve Bourke, Corrs Chambers Westgarth) Binetter v Commissioner of Taxation [2011] FCA 1195, Federal Court of Australia, Stone J, 21 October 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1195.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1195.html%22%20%5Ct%20%22_new)**(a) Summary**Mr Gary Binetter was the director of two deregistered companies, ACN 087 623 541 and ACN 078 272 867. Both companies had been voluntarily deregistered in 2006. After several unsuccessful attempts made on his own behalf to oppose orders for the reinstatement and winding up of the two deregistered companies of which he was the director, Mr Binetter applied for leave to appear as an officer of the company under section 471A(1A)(d) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Sections 471A(1) and (1A) together have the effect that where a company is being wound up, a director or officer of the company cannot perform or exercise a function of the company unless they have the approval of the court. Stone J refused leave under section 471A(1A)(d), and in doing so considered whether a winding up order can take effect at the same time as an order for reinstatement of a deregistered company, as well as the principles to be considered in the court's exercise of discretion under section 471A(1A)(d). **(b) Facts** The two companies of which Mr Binetter was a director had failed to lodge tax returns prior to being deregistered, and the Commissioner of Taxation sought reinstatement of the two companies in order to serve notices of assessment on them. Mr Binetter was given leave to be heard at the hearing of the Commissioner's application. On 16 December 2010 Jagot J made orders for the reinstatement and winding up of the two companies and the appointment of a liquidator. Mr Binetter sought leave to appeal, but rather than seek leave to appear under section 471A(1A)(d), which allows an officer of a company being wound up to act on behalf of the company with the approval of the court, Mr Binetter sought leave on the grounds that he was 'aggrieved' or 'sufficiently interested'. Perram J held that merely being the director of a company, or a person who might be examined by the liquidator of a company, did not make Mr Binetter sufficiently interested, and dismissed the appeal on the basis that he did not have standing. Mr Binetter then applied to Jagot J to set aside her orders of 16 December 2010 on the basis that the companies were necessary parties to any winding up order, relying on the same interest which had enabled him to appear at the initial hearing. This application was also rejected. Undeterred, Mr Binetter brought the present application for leave to make applications in the name of the companies to set aside the orders under section 471A(1A)(d). **(c) Decision** **(i) Reinstatement and winding up - sequential or simultaneous** Mr Binetter's submission rested on the assumption that the orders for reinstatement of the companies and the orders for winding up came into effect sequentially. The company had to come into existence before it could be wound up. This argument was rejected by Jagot J at first instance, and Stone J quoted lengthily from her judgment. This assumption supported two claims: first, that a court had no power to make a winding up order in relation to a dissolved company; and second, that the companies could apply to set aside Jagot J's orders on the basis that they had a right to be joined as necessary parties in the short time, however fleeting, between their being reinstated and placed into liquidation. Both of these claims were rejected. **(ii) Power to make orders relating to a deregistered company - Corporations Act** Stone J accepted that in the absence of legislative authority, the court has no power to make orders in respect of a nonexistent entity, including an unincorporated association or a deregistered company. While there had previously been express authority to make orders in relation to deregistered companies, this was removed by the enactment of the [Company Law Review Act (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5793" \t "Default) in 1998. Stone J referred to *Melluish v Underwood Development* [2004] NSWSC 429, in which Barrett J had held that the court could reinstate a company for the sole purpose of putting it into immediate liquidation, and also considered other cases in which a company which had been deregistered in liquidation was reinstated in liquidation. She found that the note to section 601AH(3)(b), which provides that the Court may direct ASIC to transfer property vested in it to another person, supports the conclusion that reinstatement and winding up may take place contemporaneously under the Act. Mr Binetter's submissions that the companies must come into existence before being wound up were said to be "an anthropomorphic fallacy" which "equate deregistration of a company with the death of a person." Rather, Stone J asserted that "deregistration [of a company] is the consequence of the Court's orders; just as the Court's orders can effect a change in the legal status of the company so also can its orders reverse that change by an order for reinstatement and winding up." There was, therefore, no reason to see the court's orders as coming into effect sequentially. The company came back into existence as a company being wound up, and there was no point in time after reinstatement, not even an instant, when the company was not in liquidation. Accordingly, as long as the Court considered that the relevant order was appropriate, it had power to make the orders. Stone J found that Jagot J had given careful and detailed consideration to Mr Binetter's arguments, and there was no reason for her to find otherwise. **(iii) Approval of the Court: section 471A(1A)(d)** In relation to Mr Binetter's application to act in the name of the company under section 471(1A)(d), Stone J held that the nature of the application being pursued would affect the exercise of the court's discretion. The relevant factors which Stone J considered were: prejudice to creditors;the likelihood of success; andthe risk of injustice. Prejudice to creditors as a result of the costs of proceedings brought to set aside a winding up order was not considered in detail here, as Mr Binetter had agreed to fund the proceedings himself and to pay any adverse costs order. The likelihood of success in any application for which leave to appear was granted is also a relevant factor. Stone J considered the question of whether Jagot J's decision was attended with sufficient doubt to warrant its being reconsidered, and held that neither the application to set aside the winding up orders, nor an appeal from that application, had sufficient prospect of success to warrant reconsideration. An application to set aside the winding up orders had already been dismissed by Jagot J, and were a similar application to be brought in the name of the companies, the same issues would arise. Those questions had already been dismissed by Jagot J as well as by Stone J. Mr Binetter's submission that the companies would be able to rebut a finding that they were insolvent was rejected by Stone J. Moreover, Jagot J's reasoning was "clear and cogent", and unlikely to be reversed on appeal. There was therefore little likelihood of success even if Mr Binetter was granted leave to appear on behalf of the companies, and little utility in granting the order sought. The final consideration was the risk of injustice if leave to apply on behalf of the companies was not granted. Stone J relied on the fact that Mr Binetter had been represented by competent counsel, and by both senior and junior counsel, and had been fully heard on the issues. Mr Binetter's submissions had been fully considered and dismissed and there would therefore be no risk of injustice in refusing him leave to apply in the name of the companies. etailed Contents**4.5 Application by a disqualified person to manage a corporation** (By Laura Loftus, DLA Piper Australia) Nenna v Australian Securities and Investments Commission [2011] FCA 1193, Federal Court of Australia, Middleton J, 20 October 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2011/1193.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1193.html%22%20%5Ct%20%22_new)  **(a) Summary** In anticipation of a disqualification order being made by the Court under section 206C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'), the applicant, Mr Nenna, gave notice of an application under section 206G of the Act for leave to manage two corporations of which he was a director, namely RGN Pty Ltd ('RGN') and Robe Consulting Pty Ltd ('Robe'). The case considered two separate issues: Should Mr Nenna be entitled to continue as a director of each company?Could the Court, pursuant to section 1322 of the Act, overcome the applicable procedural issues (namely, that Mr Nenna did not lodge written notice with ASIC pursuant to section 206G(1) at least 21 days before making the application for leave)? Middleton J held that Mr Nenna should be permitted to manage RGN and that the procedural issues could be overcome by the Court making an order under section 1322(4)(a) of the Act. **(b) Facts** Mr Nenna was director of two companies, RGN and Robe, and gave notice of an application under section 206G of the Act for leave to manage the companies after being disqualified. Mr Nenna and his wife were the two directors of each company and held all the shares in each company. RGN was the trustee of the Nenna Family Superannuation Fund, a self managed superannuation fund in which Mr Nenna and his wife were the only members, investments were managed by Pitcher Partners and accounting work was done by Dominion Private Clients. Robe was the trustee of a trust established in connection with a business called Robe Consulting, which provided corporate or business consulting services. Mr Nenna was an independent contractor to Robe, which provided his services to its clients. The primary client of Robe was KPMG, and Mr Nenna proposed to work on bringing in additional business. **(i) Should Nenna be granted leave to continue as a director?** ASIC did not oppose Mr Nenna's application for leave to manage RGN as a director (subject to certain conditions) but opposed Mr Nenna's application for leave to manage Robe. In relation to RGN, Middleton J confirmed that leave should be granted to Mr Nenna because: the nature of the conduct leading to the disqualification was of less significance with a trustee of a self managed superannuation fund because RGN deals with a very limited section of the public;the nature of Mr Nenna's managerial involvement was limited;Mr Nenna's character was well supported;the company had two members and two directors;Mr Nenna had acknowledged his wrongdoing;the degree of control he would exercise over the management of the trustee was less relevant in the case of a self-managed superannuation fund;neither protection of the public nor general deterrence would be served by Mr Nenna being prevented from continuing as a director, as it was unlikely that members of the public would come into contact with him in his capacity as a director; andhaving regard to the nature of decisions that Mrs Nenna would 'alone' make from time to time during the period of Mr Nenna's disqualification (if she were to be appointed as director instead of Mr Nenna under a power of attorney) and her consultation with Mr Nenna in relation to investment decisions in particular, it was likely that Mr Nenna would be involved in management of RGN whether or not he was granted leave and it would not be desirable in the circumstances to leave Mrs Nenna in a position where she may be knowingly concerned in a breach of the law by Mr Nenna, or to leave Mr Nenna in a position where he may be acting contrary to the Court's disqualification order. In relation to Robe, Middleton J confirmed that leave should not be granted to Mr Nenna because: the nature of the conduct leading to the disqualification was of greater significance in respect of Robe because Robe deals with a potentially wider section of the public, being KPMG and other possible clients;the nature of Mr Nenna's involvement in Robe was much greater as he would be the sole provider of the consulting services, and this would be an instance of a company dealing with a section of the public where the disqualified person would be the main individual representing the company in all its dealings;the degree of control Mr Nenna would exercise over the management of Robe was, by reason of the matters noted immediately above, more relevant than in the case of RGN; andMr Nenna had not established an inability to continue to provide consulting services through Robe if he was not a director or manager of that company, nor that the company would not be able to conduct its affairs without him being granted leave to manage Robe.**(ii) Procedural issues** On 25 July 2011, Mr Nenna gave notice of an application under section 206G of the Act for leave to manage the two companies. At the time of the notice of application, no disqualification order had been made by the Court. On 31 August 2011, the Court ordered that Mr Nenna be disqualified from managing corporations for a period of 2 years commencing at 4.30pm on 10 October 2011. Therefore, Middleton J confirmed that until 4.30pm on 10 October 2011, Mr Nenna was not a "person who is disqualified" within the meaning of section 206G(1) of the Act. Any application could only be made after Mr Nenna had been disqualified. Mr Nenna made a further application after 4.30pm on 10 October 2011, relying on the materials in his earlier application. A further complication arose because written notice must be lodged with ASIC at least 21 days before making the application under section 206G(1). In this proceeding, Mr Nenna could not technically lodge the application until at least 21 days after 10 October 2011, and when he lodged the application after 10 October 2011, he did not provide notice to ASIC in the required form or with the correct period of notice. Mr Nenna sought an order under section 1322(4)(a) that his failure to comply with section 206G(2) did not invalidate his applications for leave to manage RGN and Robe. **(c) Decision** **(i) Should Nenna be granted leave to continue as a director?** On the basis of the submissions from ASIC, Middleton J held that Mr Nenna should be entitled to manage RGN, but not Robe. **(ii) Procedural issues** Middleton J considered that ASIC had been "notified" because it was aware of Mr Nenna's intention to make an application under section 206G(1) almost 3 months before the application came to the court. Middleton J did not consider any useful purpose would be served by insisting on compliance with section 206G(2) and granted an order declaring the proceeding not to be invalid on the basis that it is just and equitable that the order be made (section 1322(6)(a)(iii)) and no substantial injustice has been or is likely to be caused to any party (section 1322(6)(c)). Middleton J considered that that section 1322(4)(a) may concern "irregularities" rather than "procedural irregularities". If this was the case, Middleton J was concerned that a line of authority may preclude the Court from granting the order because "irregularity" may not include deliberate acts of non-compliance with the Act. Middleton J considered a number of authorities regarding irregularities and procedural irregularities, and concluded that "the issue of whether 'irregularity' or 'procedural irregularity' can be one which is a deliberate act of non-compliance with the Act can be resolved by construing its meaning in its context". Middleton J concluded that the terms "irregularities" and "procedural irregularity" can involve deliberate acts of non-compliance. In such circumstances, the question for the Court would then be whether the requirements of section 1322(6) of the Act are otherwise complied with so that the Court could make an order under section 1322. Middleton J confirmed that an order could be made under section 1322(4)(a) even if the provision is concerned with "irregularities and the order is to declare a deliberate irregularity valid. Middleton J therefore made a declaration that the application under section 206G(1) of the Act was not invalid by reason of the contravention of section 206G(2), with Mr Nenna to pay ASIC's costs of the application. etailed Contents**4.6 Inferring knowledge for accessorial liability under the Trade Practices Act 1974 (Cth)** (By Patrice Galatis, Freehills) Stewart v White [2011] QCA 291, Supreme Court of Queensland Court of Appeal, McMurdo P, Muir JA, Wilson AJA, 18 October 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/qld/QCA/2011/291.html](http://www.austlii.edu.au/au/cases/qld/QCA/2011/291.html%22%20%5Ct%20%22_new)  **(a) Summary** The defendant appellant was the sole director of a company that was found to have engaged in misleading conduct responsible for loss incurred by the plaintiff respondent. On appeal, it was argued that the primary judge erred in finding that the appellant was accessorily liable under the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) ('TPA') because the requisite knowledge had not been made out. A majority of the Court of Appeal found that because the appellant acted as the alter ego of the corporation, it was enough in establishing accessorial liability under section 75B to infer that the appellant knew that the corporation had no reasonable grounds for making the representation. Muir JA dissenting on this point decided that it was necessary to positively show that the accessory knew the corporation had no reasonable grounds for making the representation. On a separate ground of appeal, the Court unanimously upheld the primary judge's finding of negligence. The appeal was dismissed. **(b) Facts** The defendant appellant, Douglas Stewart, was the sole director of Douglas Ian Stewart Financial Services Pty Ltd ('Financial Services') and known to the plaintiff respondent, Warren White, as a mortgage broker. The respondent asked the appellant for his recommendations for investment projects and the latter suggested a development project involving the purchase of certain parcels of land, the building of houses on those parcels and their eventual re-sale. The appellant made various representations, including that a good profit would be realized if three parcels were purchased and each property would increase by around $100,000 within 12 months. A joint venture agreement ('JVA') was entered into between the respondent, Mr White, the appellant, Mr Stewart, and a third person, Mr Astill, for the purposes of the development project. According to the JVA, any profit generated by the investment would be shared by all parties, but any loss was to be solely borne by the respondent. The clauses which purported to relieve the appellant of any liability are: "5.8 In the event that the property market does not recover and the completed property is: (a) sold for a loss and the Venture costs are not completely recovered; or (b) has a value ... that is not sufficient to cover the Venture costsThen the Client does not have any recourse to Mr Stewart or Mr Astill for the failure of the Venture." "5.9 The parties acknowledge that Mr Stewart and Mr Astill are not liable for any loss of profit from the Venture." The respondent relied upon the representations made by the appellant and purchased three parcels of land, realizing a loss of almost $300,000 upon their re-sale. In the primary proceeding, the plaintiff respondent claimed damages against Financial Services on the basis of negligence, for financial advice given by the company to the respondent, and under sections 52 and 53A of the TPA, for misleading and deceptive conduct and for making false representations respectively. The respondent also claimed damages in negligence against the appellant, and contended that the appellant was directly and knowingly concerned in the contravention of section 52 by the company and thus liable under section 75B of the TPA. The respondent was successful on all claims in the first instance and awarded damages amounting to the loss incurred from the re-sale. On appeal the appellant contended that the primary judge erred in (i) the construction of the exclusion clauses of the JVA, and (ii) finding that the appellant was knowingly involved in the misleading conduct of the company under the TPA. **(c) Decision** **(i) Negligence - interpretation of exclusion clauses under the joint venture agreement** The primary judge found that the appellant and Financial Services owed a duty of care to the respondent to take reasonable care not to cause loss through giving misleading information and advice. Further, it was held that the duty was breached because there was no evidence to support the representation by the appellant that the value of the three parcels of land would increase. On appeal, the only issue in relation to the negligence cause of action was whether clauses 5.8 and 5.9 of the JVA restricted any tortious liability of the appellant. The appellant argued that the primary judge erred in the construction of the clauses, which purportedly relieved the appellant of liability. Muir JA upheld the decision of the primary judge in restricting the protection that the clauses afforded to losses incurred in the 'working of the venture itself' and not as extending to protecting the appellant against losses incurred by reason of the appellant's negligence. His Honour noted that it 'would require a strained construction of Clause 5.8 to extend its concluding words to cover tortious liability for pre-contractual representations by the appellant'. **(ii) TPA - liability of the appellant under section 75B** The appellant's company, Financial Services, was found to have breached section 52 of the TPA because it had made a misleading representation as to the increase in value of the properties and because it had no reasonable grounds for making that prediction under section 51A. The Court confirmed that the test for accessorial liability under section 75B of the TPA required establishing that the appellant had actual knowledge that the representation was made and that either it was misleading or that the corporation had no reasonable grounds for making it: *Quinlivan v Australian Competition & Consumer Commission* (2004) ATPR 42-010; *Business & Professional Leasing Pty Ltd v Dannawi* [2008] NSWSC 902; *Hatt v Magro* (2007) 34 WAR 256. The issue at appeal was whether the respondent had established that the appellant had actual knowledge that Financial Services had no reasonable grounds for making the representation. An important distinction was highlighted between the evidentiary burden which applies to the corporation under section 51A and that which applies to an accessory to the corporation's misleading prediction under section 75B. The burden lies on the corporation to show that it had reasonable grounds for making the prediction in order to avoid liability under section 52 of the TPA. However, in the case of an accessory who is knowingly concerned in the contravention, the onus lies on the other party to show that the accessory had knowledge that the corporation had no reasonable grounds for making the prediction. The appellant submitted that although Financial Services had no reasonable grounds for making the representation, the primary judge made no such explicit finding, nor had he found as required by section 75B that the appellant knew that Financial Services had no reasonable grounds for making the representation. Muir JA rejected the argument by the respondent that the knowledge of Financial Services was the same as that of the appellant, and vice versa, because the appellant was the sole director who had made the representation on behalf of the company. His Honour said that it was not enough that Financial Services was deemed to have no reasonable grounds, by virtue of Financial Services' failure to discharge the reverse burden, and rely on that finding as the basis for assuming that the appellant was knowingly concerned. Instead, a positive finding that the appellant knew there were no reasonable grounds for making the representation was required. In contrast, Wilson AJA and McMurdo P decided that in circumstances such as the present where the appellant acted as the alter ego of the corporation being its only spokesperson and the only person acting on its behalf, it was enough to infer that the appellant knew that the corporation had no reasonable grounds for making the representation. etailed Contents**4.7 Court restrains general meeting on the basis that proposed resolutions would be devoid of legal effect if passed** (By Tracy Chew, Clayton Utz) In the matter of Winlyn Developments Pty Ltd [2011] NSWSC 1218, Supreme Court of New South Wales, Barrett J, 13 October 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1218.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1218.html%22%20%5Ct%20%22_new)  **(a) Summary** This was an interlocutory application, heard against the background of a continuing oppression suit between the parties, which sought to prevent a general meeting of Winlyn Developments Pty Ltd ('Winlyn') from proceeding. Barrett J considered the legal effect of the proposed resolutions, particularly in light of the difference in the powers of shareholders and directors, and held that each of the proposed resolutions would, if passed, be devoid of legal effect. Given this, and the undesirability of allowing legally meaningless resolutions to go forward lest those who have proposed them rely on them, once passed, as if they were legally meaningful, Barrett J made orders restricting Winlyn from holding a meeting, and shareholders from convening meetings, on the proposed resolutions. However, Barrett J found no basis for restraining shareholders from calling further general meetings pending determination of the continuing oppression proceedings, because the pendency of an oppression suit does not give a plaintiff a blanket right to see one of the company's decision-making organs paralysed until the suit is determined. **(b) Facts** The plaintiff was Taiqi Investments (Aust) Pty Ltd ('Taiqi'), a 20% shareholder of Winlyn. The defendants included Winlyn, Yu Wen Cao ('Wendy') and Jinbiao Zheng ('Jinbiao') (20% and 60% shareholders of Winlyn respectively). On 20 September 2011, Wendy and Jinbiao convened a general meeting of Winlyn to take place on 12 October 2011. The following resolutions were proposed: Resolution 1 - that the company make rectification and notify ASIC of the appointment of Jinbiao as a director of Winlyn;Resolution 2 - that further shares will be issued at $1 per share to meet the financial obligation of Winlyn in respect of various loan facilities. Shareholders may subscribe as many shares as he or she is willing and ready, provided that such subscription would not result in that shareholder's percentage interest in the company exceeding his or her current shareholding; andResolution 3 - that a loan with respect to National Australia Bank would be repaid and the directors' guarantor discharged. In addition, the defendants had tendered into evidence a form which they claimed indicated that Jinbiao had been appointed as director of Winlyn on 10 October 2011. The purported appointment was notified to ASIC on 11 October 2011. Taiqi sought orders to restrain: (1) Winlyn from proceeding with any business at the general meeting other than taking steps to adjourn it; (2) Wendy and Jinbiao from calling any general meeting of Winlyn to consider or resolve the proposed resolutions; (3) Wendy and Jinbiao from calling any general meeting of Winlyn pending determination of the continuing oppression proceedings; and (4) Jinbiao from acting as a director of Winlyn pursuant to the purported appointment on 10 October 2011. **(c) Decision** Barrett J held that all of the proposed resolutions, if passed, would not produce a legally meaningful consequence, for the reasons detailed below. **(i) Resolution 1 - not a resolution appointing or ratifying appointment of director** Barrett J affirmed that the company in general meeting has power to appoint a director under replaceable rule section 201G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Corporations Act'). However, the intended meaning and effect of Resolution 1 were extremely obscure. That Winlyn "make rectification" and "notify ASIC" of Jinbiao's appointment, was neither: a resolution appointing Jinbiao as director (Barrett J referred to the proxy form, which had referred to Resolution 1 as being a resolution appointing Jinbiao as director. Despite this implying that the proposed resolution, if passed, might effect an appointment, Barrett J noted that the terms of this shorthand label in the proxy form cannot control the content of the resolution itself); nor a resolution ratifying Jinbiao's purported appointment as director, as it would not be possible for the notice of meeting (dated 20 September 2011) to propose a resolution ratifying an appointment which was not yet in existence. The evidence indicated the purported appointment of Jinbiao occurred on 10 October 2011. Given this, Resolution 1 was not a resolution shareholders could meaningfully pass. **(ii) Resolution 2 - issue of shares for Board, not shareholders, to decide** Barrett J held that Resolution 2, if passed, would have no valid effect or operation. In deciding this, Barrett J held that the replaceable rules in the Corporations Act are to be approached in the same way as the provisions of a company's constitution have long been approached in case law. That is, unless a clear contrary intention is shown, functions assigned to the directors and functions assigned to the shareholders cannot be exercised by the other. Barrett J referred to the replaceable rule in section 198A of the Corporations Act, which provides that, inter alia, the business of a company is to be managed by or under the direction of the directors. In applying section 198A, Barrett J concluded that it is the Board, not shareholders, that has the power to issue shares, fix the price and terms of issue and decide how the proceeds are to be applied. Barrett J then referred to section 254D(4) of the Corporations Act, which provides a carve-out to section 198A. That is, shareholders may authorise the directors to make a particular issue of shares without complying with the replaceable rule in section 254D(1). (Section 254D(1) requires the directors to offer any issue of new shares first to existing shareholders in proportion to the number of shares already held in the relevant class.) Barrett J concluded that Resolution 2 was not a resolution made under section 254D(4) for 2 reasons: (1) the terms of Resolution 2 contemplate the issue of shares to existing members only; and (2) given the shareholders may subscribe for whatever shares he or she chooses provided they maintain their percentage interests in Winlyn, the most reluctant shareholder sets the size of the total issue. Therefore, Resolution 2 does not authorise the directors to make "a particular issue of shares" as required under section 254D(4). **(iii) Resolution 3 - repayment of loan for Board, not shareholders, to decide. Discharge of directors' guarantor not for Board or shareholders to decide.** Barrett J similarly applied section 198A to conclude that a decision to repay the loan to National Australia Bank was a matter for the Board, not shareholders, to decide. In any event, to the extent that Resolution 3 purported to effect a discharge of the directors' guarantee, it seeks to do something that no organ of the company is capable of achieving. **(iv) Orders in relation to the proposed resolutions** Barrett J made orders restraining Winlyn from proceeding with the general meeting as convened in the notice of meeting, and Wendy and Jinbiao from considering the proposed resolutions in another general meeting. Importantly, Barrett J's decision to restrict the consideration of the proposed resolutions was based on the undesirability of allowing legally meaningless resolutions to go forward lest those who have proposed them rely on them, once passed, as if they were legally meaningful. However, Barrett J found no basis for restraining the defendants from convening any further general meetings while the continuing oppression proceedings were being heard, holding that the pendency of an oppression suit does not give Taiqi a blanket right to see one of the company's decision-making organs paralysed until the suit is determined. **(v) Invalid appointment as director** With respect to the fourth order sought by Taiqi, Barrett J referred to the replaceable rules in sections 201G, 201H, 248A, 248F and 248G of the Corporations Act (in relation to the appointment of directors, Board resolutions and quorums at Board meetings), and held that the purported appointment of Jinbiao as director on 10 October 2011 was invalid because Jinbiao was not appointed by resolution at a general meeting, by a written resolution signed by both directors, or by resolution passed at a Board meeting at which a quorum of two was present. This was despite ASIC having been notified on 11 October 2011 of Jinbiao's appointment. Barrett J noted that the ASIC register regarding officers is no more than prima facie evidence of matters appearing in it. etailed Contents**4.8 Breach of duties - former senior managers turning on their former employer** (By Tian Xu, Mallesons Stephen Jaques) Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd [2011] FCA 1154, Federal Court of Australia, Tracey J, 12 October 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1154.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1154.html%22%20%5Ct%20%22_new)**(a) Summary**Three senior managers (including a managing director) were found to have breached their contractual, equitable and fiduciary duties to their employer. The executives secretly purchased a rival business while they were still employed by that company. They then resigned from their positions and immediately proceeded to compete with their former employer. The court was keen to emphasize the managers' and director's fiduciary and statutory duties and found that they each had a conflict of interest with their employer and placed their personal interests ahead of those of Holyoake. However, it held that some limited commercial knowledge acquired during the course of employment can legitimately be used in subsequent occupations. **(b) Facts** A managing director and two senior managers of Holyoake Industries (Vic) Pty Ltd ('Holyoake') (Messrs Brown, Matkovic and Aloe) negotiated to purchase one of Holyoake's competitors ('Variflow') while they were still employed by Holyoake. They subsequently resigned from their positions with Holyoake and immediately proceeded to operate Variflow in competition with the company. **(c) Decision** Holyoake claimed that the three managers had breached: contractual and fiduciary duties to serve Holyoake with loyalty and fidelity;contractual and fiduciary duties not to use information or opportunities which were acquired during the course of their employment and from which Holyoake could benefit;in the case of Mr Brown, his statutory duties in section 181 of the Corporations Act 2001 (Cth) ('Corporations Act') to exercise his powers and discharge his duties in good faith in the best interest of the company and for a proper purpose;their statutory duty not to use their positions improperly to gain an advantage for themselves or someone else or cause detriment to Holyoake (section 182 of the Corporations Act); their statutory duty not to improperly use information obtained as a director, employee or officer of the company to gain an advantage for themselves or someone else or cause detriment to Holyoake; andin the case of Mr Brown, his duty of confidentiality in relation to various pieces of information taken from Holyoake. **(i) Contractual and fiduciary duties** The three managers accepted that they owed duties of loyalty and fidelity, to return property on leaving employment and not to divulge or use Holyoake's confidential information or trade secrets after leaving employment. However, they argued that: the opportunity to purchase Variflow came to them independently of their employment with Holyoake and it was public knowledge that Variflow was for sale;Holyoake did not pursue the opportunity to purchase Variflow for itself;  they were entitled to seek alternative employment whilst under Holyoake's employment; andthe purchase was, for the most part, negotiated outside normal business hours.Tracey J rejected all four arguments. His Honour held that the opportunity did not come to the senior managers entirely independently of their employment with Holyoake - they had used confidential information in Holyoake's records and their position as senior managers of Holyoake in negotiating to purchase Variflow.Further, as a matter of legal principle, it is not a defence to a breach of fiduciary duty that the person to whom the duty was owed was "unwilling, unlikely or unable" to take advantage of the opportunity for itself (citing *Warman International Limited v Dwyer* (1995) 182 CLR 544). Tracey J also held that the right to seek alternative employment did not excuse a breach of fiduciary and contractual obligations. The fact that the negotiations were conducted outside normal business hours also did not put them beyond the scope of the contractual and fiduciary duties. The question was whether the "particular activities could materially affect Holyoake's business interests" (citing *Digital Pulse Pty Ltd v Harris* (2002) 40 ASCR 487), which they clearly did. Furthermore, Tracey J held that the following facts reinforced the view that the senior managers had breached their contractual and fiduciary duties to Holyoake: they had deliberately concealed the purchase of Variflow from Holyoake, including by using their private email accounts when conducting negotiations;they solicited Holyoake's customers and suppliers with a view to securing business for Variflow; in negotiating the purchase of Variflow, they had used confidential information in Holyoake's records relating to Variflow's business; andin the months leading up to the purchase of the Variflow business, the potential for a conflict of interest between Mr Brown and Mr Aloe and Holyoake was obvious and should have been disclosed to Holyoake. Tracey J also held that V-Flow (the company which purchased the business name Variflow Melbourne) was liable for the same breaches as the senior managers.The senior managers also raised the equitable defences of waiver, estoppel and laches. These were rejected by Tracey J. His Honour did not consider that the respondents had satisfied the relevant hurdles to establish the defences. In particular, in relation to the defence of laches, Tracey J considered that a seven months delay by Holyoake in bringing the proceedings was reasonable given that the senior managers had deliberately sought to conceal their actions. It therefore took time before Holyoake became fully aware of all the relevant facts. **(ii) Statutory Duties** The contents of the statutory duties are substantially similar to those of the contractual and fiduciary duties. It was evident in this case that the senior managers did not act in the best interest of the company but improperly used their position and information for their own benefit. Tracey J held that Mr Brown had contravened section 181(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and that each of Messrs Brown, Aloe and Matkovic had contravened sections 182(1) and 183(1) of the Corporations Act. **(iii) The senior managers' employment contracts** A related issue was that when Mr Brown was the managing director of Holyoake, he negotiated employment contracts with Messrs Aloe and Matkovic which omitted standard clauses which would have prohibited them from working in conflict with Holyoake's interests during their employment and soliciting Holyoake's customers immediately after their resignation. These omissions were not authorized by other Holyoake directors. As these contracts were negotiated immediately before the senior managers secretly purchased Variflow, these omissions were held by Tracey J to be breaches of Mr Brown's contractual, equitable and statutory duties. **(iv) Confidential information** Holyoake also alleged that Mr Brown had improperly used various pieces of confidential information belonging to it. This included a contact list containing Holyoake employees, customers and suppliers, board papers and various training and instruction manuals. His Honour applied the four-step test in *Smith Kline v French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 to determine whether the individual pieces of information in this case were confidential: 1. the plaintiff must be able to identify with specificity the confidential information in question;2. the information has the necessary quality of confidentiality;3. the information was received in circumstances as to import an obligation of confidence; and4. there is actual or threatened use of the information without the plaintiff's consent. Based on the four-step test, the contact list was considered confidential information and Mr Brown was held to have breached his contractual and equitable obligations to Holyoake in taking the information with him to the new business. However, Mr Brown was not found to have breached his contractual and fiduciary obligations in relation to the other information. The board papers and training material were not held to be confidential as Holyoake was unable to identify with specificity which parts were confidential. Further, some of the other information, such as business contacts with suppliers, was considered part of the general stock of the senior managers' professional knowledge and not protected by any duty of confidentiality. etailed Contents**4.9 Receivers justified in refusing to pay a termination fee as an expense of receivership** (By Dylan Barber, Blake Dawson) Australian Securities and Investments Commission v Letten (No 13) [2011] FCA 1151, Federal Court of Australia, Gordon J, 7 October 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2011/1151.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/1151.html%22%20%5Ct%20%22_new)  **(a) Summary** An unregistered managed investment Scheme was wound up pursuant to section 601EE(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The assets of the Scheme included the Reef House Resort. Mirvac was engaged as the manager of the Resort and entitled to a Termination Fee on termination of the Hotel Management Agreement. The Receivers terminated the Hotel Management Agreement in order to facilitate the sale of the Resort. Mirvac contended that it was entitled to the Termination Fee in priority to Westpac (a secured lender in relation to the Resort). The Court rejected Mirvac's contention and determined that the Receivers were justified in refusing to pay Mirvac the Termination Fee in priority to payment of Westpac. **(b) Facts** The defendant was involved in a range of unregistered managed investment schemes. The current case involved a scheme that had assets which included the Reef House Resort (a hotel and various properties) ('Resort'). Firbank Arch Pty Ltd ('Firbank') was trustee of the Reef House Resort Unit Trust. **(i) The Scheme is wound up** On 25 February 2010 the Court ordered that the Reef House Resort Scheme ('Scheme') be wound up as an unregistered managed investment scheme pursuant to section 601EE(1) of the Corporations Act 2001 (Cth). Receivers were appointed in respect of the Scheme ('Receivers'). The Receivers were given the power to sell the Resort pursuant to the Court orders appointing them provided any sale was conditional upon approval by the Court. The Receivers were also permitted to pay certain receivership costs from the proceeds of sale of the assets of the Scheme. **(ii) The Hotel Management Agreement** At the time the Receivers were appointed to the Scheme a Hotel Management Agreement was in force between Firbank and Mirvac Hotels Pty Ltd ('Mirvac'). The Hotel Management Agreement provided that if Firbank terminated the agreement without cause, Firbank was required to pay Mirvac a termination fee calculated by reference to historic management and incentive fees under the Hotel Management Agreement ('Termination Fee'). Mirvac continued to manage the Resort under the Hotel Management Agreement during the receivership and initially marketed the Resort with the Hotel Management Agreement in place. The Receivers caused Firbank to terminate the Hotel Management Agreement when approached by a prospective buyer who provided that it would be a condition of buying the Resort that it was sold with vacant possession. Following this the Receivers settled the contract of sale of the Resort. **(iii) Entitlement to the Termination Fee** Mirvac subsequently contended that it was entitled to payment of the Termination Fee by the Receivers, calculated as $542,040, from the proceeds of the sale of the Resort. Mirvac claimed the Termination Fee as receivership costs in priority to the payment of Westpac Banking Corporation ('Westpac') (which was a secured lender in relation to the Resort). Mirvac contended that it was entitled to the Termination Fee as Westpac would have been bound according to the terms of a Deed of Consent to pay Mirvac the Termination Fee if Westpac had appointed a receiver, terminated the Hotel Management Agreement and sold the Resort. Additionally, Mirvac contended that it was entitled to priority payment of the Termination Fee as it was properly characterised as an expense of the receivership payable out of the proceeds of the sale of the Resort. Alternatively, Mirvac argued that the Receiver was liable pursuant to section 419 of the Act, which provides for liability for debts incurred by the Receivers in the course of a receivership. Mirvac also contended that, as a consequence of correspondence between the Receivers and Mirvac after the Scheme was wound up, the Receivers were contractually bound to pay Mirvac the Termination Fee or otherwise adopted the relevant liability. Mirvac also contended that the Receivers were liable to Mirvac pursuant to case law which set out the circumstances in which a receiver is entitled to be paid out of the proceeds of sale of mortgaged property the cost of any work that directly benefits the mortgagee. **(c) Decision** Justice Gordon found that the Receivers were justified in refusing to pay to Mirvac the Termination Fee in priority to payment of Westpac as secured lender in relation to the Scheme. **(i) Contractual shortcomings of the Deed of Consent** Mirvac's contention that Westpac had taken action for a default under the mortgage, which was required by the Deed of Consent in order to trigger the payment of the Termination Fee to Mirvac, was rejected by the Court, as Firbank had not defaulted in respect of the mortgage provided by Westpac. Furthermore, Westpac had not taken action for a default which was also required under the Deed of Consent. The Deed of Consent also required Westpac to appoint the receiver (it did not anticipate a Court appointed Receiver) and despite Mirvac's submissions to the Court to right a "contractual shortcoming" in the Deed, Gordon J was of the opinion that it was not the Court's role to "rewrite the bargain struck by the parties or rewrite history." **(ii) No equitable basis** Justice Gordon also found that the facts did not lend themselves to a finding that there was some underlying equitable reason why the Termination Fee should be regarded as an expense of the receivership even though it arose out of a pre-receivership contract ('the Hotel Management Agreement'). It was determined that at no time did the Receivers personally adopt the Hotel Management Agreement and the circumstances in which Westpac was to be subject to obligations under the Hotel Management Agreement were limited. These considerations precluded any finding that there was an equitable basis for the Termination Fee to be considered an expense of the receivership. **(iii) Section 419 of the Corporations Act** The Receivers were not liable for the Termination Fee pursuant to section 419 of the Corporations Act as it was not a debt incurred by them (it was incurred by Firbank). Also, the function of a Court appointed receiver is to preserve assets and their potential to earn future profits and not "for the purpose of enforcing any charge" (an additional requirement of section 419). Mirvac's submission that an order should be made that section 419 applied in the current case as if the Receiver had been appointed in order to enforce the charge was too broad and was inappropriate given the purpose of the section and the circumstances of the case. **(iv) No new contract or adoption of the Hotel Management Agreement** Justice Gordon found that there was no basis for finding that there was a new contract between Mirvac and the Receivers on the basis of correspondence between the parties after the appointment of the Receivers and, likewise, there was nothing to suggest that the Receivers had personally "adopted" the Hotel Management Agreement (the Receivers had, in fact, rejected the view that they assumed any personal responsibility in this correspondence). **(v) No separate basis for payment of the Termination Fee to Mirvac** Finally, Gordon J found that principles derived from certain case law did not provide a separate basis for finding that Mirvac was entitled to be paid the Termination Fee. A receiver may have priority over a prior encumbrancer in relation to expenses incurred during the conduct of the receivership, where the encumbrancer was a party to the action in which the receiver was appointed, where the encumbrancer engages in unconscientious conduct or where a person incurs costs for the benefit of all persons with an interest in the fund. However, in the current case, the liability associated with the Termination Fee predated the receivership, Westpac was not a party to the action appointing the Receivers, Westpac had not engaged in unconscientious conduct and, finally, Mirvac had not incurred any costs which were of benefit to the Scheme. etailed Contents**4.10 Selective capital reductions - what is fair and reasonable to the company's shareholders as a whole?** (By Brodie Same, Freehills) Elkington v CostaExchange Ltd [2011] VSC 501, Supreme Court of Victoria, Ferguson J, 5 October 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2011/501.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/501.html%22%20%5Ct%20%22_new)  **(a) Summary** CostaExchange Ltd ('the Company'), an unlisted public company, proposed to undertake a selective capital reduction by cancelling all of the shares held by the minority shareholders for a price of $0.86. An independent expert valued the shares in the Company in the range of $0.97 to $1.15 on a control basis and a range of $0.65 to $0.78 on a minority basis. The independent expert concluded that the selective capital reduction was fair and reasonable to the shareholders as a whole. Dr Elkington, a minority shareholder, sought an injunction to restrain the Company from making the capital reduction on the basis that the reduction did not meet the requirement of section 256B(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') as it was not "fair and reasonable to the company's shareholders as a whole". The basis of Dr Elkington's submission was that the price was unfair as it was below the valuation on a control basis and there was nothing to balance this such that it could be construed as 'fair and reasonable'. Ferguson J dismissed Dr Elkington's application as the selective capital reduction did not contravene section 256B(1)(a) of the Act on the basis that: the term "fair and reasonable" denotes a single concept and the fairness of the price is only one consideration;it is the interests of all the shareholders, not just the minority, that is to be considered; andthere was no persuasive evidence tendered to contradict the independent expert's report. **(b) Facts** Various parties with an interest in the Company proposed to enter into a share sale and subscription deed with a private equity firm ('Proposed Transaction'). It was a condition precedent of the Proposed Transaction that the Company undertook a selective capital reduction and the cancellation of 8% of the shares in the Company held by minority shareholders. The independent expert took the view that the selective capital reduction and the Proposed Transaction were interdependent (the 'Combined Transactions') and assessed the impact on the shareholders by determining their relative positions with and without the Combined Transactions. The independent expert valued the shares to be held by the remaining shareholders after the Combined Transactions on a control basis in the range of $0.97 to $1.15. On the assumption that the fair market value of the shares in the Company on a minority basis (in the absence of the Combined Transactions) would be less than the fair market value of the shares on a control basis, a 25% discount (and other adjustments) was applied to the control basis valuation which resulted in a range of between $0.65 and $0.78 on a minority basis. The independent expert noted that if the Combined Transactions were assessed separately on the basis of fairness and reasonableness as proscribed by ASIC Regulatory Guide 111 - Content of expert reports, then the proposed price for the selective reduction was not fair as it was below the valuation on a control basis but was reasonable to the minority shareholders. However, having regard to previous guidance issued by ASIC, as well as other advice, the expert noted that 'fair and reasonable' for the purpose of section 256B(1)(a) of the Act is to be treated as a composite term of which value is only one component. On this basis the expert concluded that the selective capital reduction was fair and reasonable to the shareholders as a whole. A general meeting of the company was held at which the shareholders approved the Proposed Transaction and the selective capital reduction. The selective capital reduction was also approved by special resolution at a special meeting of the shareholders whose shares were to be cancelled under the selective reduction. Dr Elkington contended that the selective capital reduction failed to meet the requirement of being "fair and reasonable to the company's shareholders as a whole" under section 256B(1)(a) of the Act and therefore the Company would contravene section 256D(1) of the Act by undertaking the reduction. **(c) Decision** **(i) 'Fair and reasonable' as separate elements** Dr Elkington submitted that the court should treat the elements of 'fair' and 'reasonable' separately and then weigh them to ascertain if the composite term 'fair and reasonable' was met. The Company argued that this was not the proper interpretation of section 256B(1)(a) of the Act and sought to rely on the judgment in *Re Rancoo Ltd* (1995) 17 ACSR 206 in which Hayne J stated that "the expression 'fair and reasonable' is but a single expression intended to convey a single overall meaning which is not to be identified by reference to particular constituent elements." Ferguson J agreed with the Company that the term 'fair and reasonable' refers to one merged concept and that in assessing what is fair and reasonable a wide range of factors are to be considered with value being merely one of those factors. **(ii) Fair and reasonable to the shareholders as a whole** Dr Elkington submitted that the selective reduction was undervalued and not fair to the minority shareholders when compared to the valuation on a control basis and that there was nothing in the expert's report that could outweigh this so as to meet the composite test of 'fair and reasonable'. However, the Court held that the test in section 256B(1)(a) of the Act refers to an assessment on the effect of the "shareholders as a whole" which requires a holistic view of the transaction and that the interests of one group of shareholders should not dominate those of another group of shareholders. This approach is supported by the fact that section 256C(2) of the Act provides separate protection for minority shareholders in a selective capital reduction by requiring any cancellation of shares to be approved by a special resolution of the shareholders whose shares are to be cancelled. It is at this point that an assessment of the fairness to the shareholders whose shares are to be cancelled is undertaken by the shareholders themselves. For these reasons, the Court determined that there was no reason why the consideration for the capital reduction should be compared to the control basis as opposed to the minority basis for the purposes of determining what is "fair and reasonable to the shareholder's as a whole" under section 256B(1)(a) of the Act. **(iii) Independent expert's report** Dr Elkington argued that the expert's reasons for recommending that the selective reduction was fair and reasonable were not compelling. The first element of this argument was that the minority shareholders were deriving benefit solely by being relieved of risks they took when they made their initial investment. It was also argued that factors that would have been included in the valuation such as non-receipt of dividends and the illiquidity of the Company's shares could not also be taken into account as factors to determine the reasonableness of the transaction. Ferguson J held that these were not valid reasons to indicate that the expert's recommendation was flawed as "factors which are relevant to valuation of the shares may also be relevant when considering the advantages and disadvantages to the shareholders of the capital reduction to arrive at an overall conclusion as to whether it is fair and reasonable." It was also contended that there was a failure by the expert to take into account the tax advantages of the transaction obtained by the remaining shareholders after the completion of the Combined Transactions. However, the Court held that this was misguided as the independent expert specifically noted this as a benefit to the remaining shareholders. Further, it was argued that this selective capital reduction was functionally equivalent to a takeover. Therefore, section 256B of the Act should be interpreted in a way that is mutually supportive of the takeover provisions, particularly section 667C of the Act where the expert's valuation is required to be determined on a pro rata basis "without allowing a premium or applying a discount for particular securities in that class." The Company submitted that the fair value test that is applicable to takeovers is different from the fair and reasonable test required under section 256B of the Act. The Court agreed that the valuation methodology for a takeover is of little assistance when considering a selective capital reduction and that care should be exercised when considering the authority in *Catto v Ampol Ltd* (1989) 16 NSWLR 342 which was decided under a different statutory regime. **(iv) Conclusion** Ferguson J dismissed Dr Elkington's application for an injunction as the consideration was fair and reasonable to the shareholders as a whole and there was no evidence to contradict the conclusions of the independent expert's report. etailed Contents**4.11 Leave to bring proceedings against a company under voluntary administration under section 440D does not require "rare circumstances"** (By Patrick Clark, Blake Dawson) Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd [2011] NSWSC 1305, Supreme Court of New South Wales, Hammerschlag J, 5 October 2011 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=155354](http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=155354" \t "_new)  **(a) Summary** Larkden Pty Ltd ('Larkden') and Lloyd Energy Systems Pty Ltd ('Lloyd') were engaged in a dispute over the ownership of various patent applications, which was submitted to arbitration. In the days prior to the arbitrator publishing an award favourable to Larkden, Lloyd was placed into voluntary administration. Under section 440D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), a party may not bring or continue proceedings in a court against a company under voluntary administration without the leave of the Court. Larkden sought leave to begin and pursue proceedings to enforce the arbitral award. Hammerschlag J rejected the Administrator's arguments that leave will only be granted in "rare circumstances" as an unwarranted confinement of the discretion conferred by section 440D. Having regard to the purposes of Part 5.3A of the Corporations Act and the circumstances, Hammerschlag J granted the leave sought. **(b) Facts** Larkden held various patents in the renewable energy field relating to methods of collecting solar energy, storing it in a graphite-based medium and releasing it into usable form ('Technologies'). Lloyd was engaged in a solar thermal power station construction project in western NSW. In 2001, Larkden granted Lloyd a licence to use the Technologies in the project under a written agreement ('Licencing Agreement'). Clause 5.4(a) of the Licencing Agreement provided that if Lloyd developed any improvements or modifications to the Technologies, then Lloyd would allow Larkden to own such improvements and modifications. In September 2008, Solfast Pty Ltd (a wholly-owned subsidiary of Lloyd) filed a patent application ('Solfast Patent Application'). In March 2010, Lloyd was assigned two further patent applications lodged by US company Areva Inc in June 2007 ('Assigned Patent Applications'), pursuant to a settlement agreement with Areva Inc. Larkden asserted that each of the Patent Applications were, either in whole or in part, an improvement or modification to the Technologies, which Larkden was entitled to be made owner of under clause 5.4(a) of the Licencing Agreement. Lloyd asserted that Larkden had no rights or interests in the Patent Applications. On 16 September 2010, Lloyd submitted the dispute to arbitration under clause 11 of the Licencing Agreement. Between 25 July and 3 August 2011, Mr Stephen Wallace White (Arbitrator) heard arbitration proceedings between Lloyd and Larkden. In line with the Arbitrator's draft reasons published on 7 September, Larkden's lawyers wrote to Lloyd seeking consent to a form of orders. On 13 September, prior to the Arbitrator making orders, the directors of Lloyd resolved that, in their opinion, Lloyd was insolvent or likely to become insolvent and appointed voluntary administrators (Administrators) pursuant to section 439A of the Corporations Act. On 20 September, the Arbitrator published further reasons and made orders (Award), which: determined that Larkden was entitled to be made owner of, and have assigned to it, all the rights, title and interest in the inventions embodied in the Patent Applications;determined that Lloyd held its rights, title and interest in Solfast Pty Ltd and the Assigned Patent Applications on constructive trust on behalf of Larkden;ordered that Lloyd specifically perform clause 5.4(a) of the Licencing Agreement by assigning its interests in the Patent Applications to Larkden;ordered that Lloyd perfect Larkden's interest in the Assigned Patent Applications; andordered that Lloyd provide all necessary assistance to Larkden in relation to any proceeding Larkden may take against Solfast Pty Ltd or Areva. On 26 September 2011, Larkden sued out of the Court a Summons, seeking: leave to commence and prosecute proceedings to enforce the Award against Lloyd, pursuant to section 440D(1) of the Corporations Act; anddeclarations and orders to enforce the Award, pursuant to section 35(1) of the [Commercial Arbitration Act 2010 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=115463" \t "Default). Hammerschlag J granted the leave sought. **(c) Decision** Section 440D(1) of Part 5.3A of the Corporations Act relevantly provides that a party may not bring or continue proceedings in a court against a company in voluntary administration without the leave of the Court. **(i) Interpretation of section 440D** In opposing the application for leave, the Administrators submitted that leave will only be granted in rare cases, and that this case did not display the requisite rarity.The Administrators relied on *Foxcroft v The Inc Group Pty Ltd* (1994) 15 ACSR 203, in which Young J stated that the provisions of Part 5.3A (including section 440D) provide for a complete freeze of proceedings against a company so that an administrator has time to assess the company's situation, and the company's creditors have an opportunity to consider whether the company should execute a deed of company arrangement, be wound up, or the administration should end. Young J went on to say: To allow one creditor or potential creditor to proceed would not only take the administrator's attention from what he needs to do under the division in a relatively short period of time, but it would also involve costs in running the legal action on behalf of the administrator, as well as perhaps giving the claimant some advantage over other creditors or potential creditors. Accordingly, it seems to me that an application under section 440D will rarely be granted. The Administrators also pointed to *Brian Rochford Ltd v Textile Clothing and Footwear Union of NSW* (1998) 30 ACSR 38, in which Austin J said that the Court will respond cautiously to an application for leave, having regard to the structure and purpose of Part 5.3A. Hammerschlag J differed from Young J and Austin J, finding that an assumption that leave will only rarely be granted, or that a degree of caution greater than that applied in the exercise of any other discretion (taken within its particular statutory context), "imposes upon the applicant a standard higher than that which the section requires. This is an unwarranted confinement of the discretion." Hammerschlag J referred to *Re Atlantic Computer Systems PLC* [1992] Ch 506, in which the English Court of Appeal considered the statutory analogue to Part 5.3A, and held that the discretion granted by parliament is at large, and it was not for the Court to "cut down". Hammerschlag J noted that the policy underlying Part 5.3A, as evinced by section 435A, is to "maximise the chances of a beleaguered company staying alive". A stay of proceedings might facilitate this by affording the administrator time to assess the company without the distraction of proceedings, halting legal and associated costs, allowing time for proposals to preserve the value of company, giving creditors time to consider their position, and in some circumstances preventing one creditor from gaining some advantage over others. However, Hammerschlag J emphasised that "whilst the discretion under section 440D must be exercised with the objects in mind, it remains one at large. A stay is the starting point. There must be circumstances which warrant its displacement ... those circumstances need have no particular quality of rarity." Whilst noting that arbitral proceedings are not "proceedings in a court" within section 440D, and no stay of them is bought about by the appointment of administrators, Hammerschlag J found that a stay of execution of any order for specific performance is not precluded if appropriate circumstances are shown. **(ii) Circumstances appropriate for Court to grant leave** Hammerschlag J went on to consider whether the circumstances justified granting the leave sought by Larkden. Hammerschlag J considered that: the distraction to the Administrators would be minimal, and the costs modest compared with the arbitral proceedings themselves;time pressure on the Administrators had already been relieved by an extension of the convening period for the second meeting of creditors;the hearing of the proceedings would be short;recognition of the Award would not allow Larkden to prejudice other creditors or potential creditors; andthere was no good reason why unsecured creditors' claims should prevent Larkden seeking vindication of primarily proprietary interests. Hammerschlag J found that the Administrators' arguments were largely ones of law and statutory construction, and not susceptible to summary assessment. An undertaking offered by the Administrators was too heavily conditional, and did not provide a reason why Larkden should be prevented from seeking recognition and enforcement of its primarily proprietary interests. Hammerschlag J found that "there are weighty considerations in favour of granting leave, and very little to be said in favour of refusing it," and granted the leave sought. etailed Contents**4.12 Secret profits a breach of an agent's fiduciary duties** (By Alexandra Phelan, Mallesons Stephen Jaques) FHR European Ventures LLP v Mankarious [2011] EWHC 2308 (Ch), England and Wales High Court (Chancery Division), Simon J, 5 September 2011 The full text of this judgment is available at: [http://www.bailii.org/ew/cases/EWHC/Ch/2011/2308.html](http://www.bailii.org/ew/cases/EWHC/Ch/2011/2308.html%22%20%5Ct%20%22_new)**(a) Summary** This case illustrates the English courts' approach to determining whether a commission or profit made by an agent is "secret" and involves a breach of fiduciary duty, particularly when the principal has some knowledge of the commission or profit. **(b) Facts** The case relates to the sale of a long-term leasehold interest in the Monte Carlo Grand Hotel for ?211.5 million in December 2004. The purchaser was an England and Wales incorporated partnership, FHR European Ventures LLP ('FHR') which was effectively a joint venture fund that was established to acquire luxury hotels. The joint venture parties were the Bank of Scotland Plc ('BoS') (50%), Kingdom Hotels International ('Kingdom') (25%), and Fairmont Hotels and Resorts Inc ('Fairmont') (25%). These entities, along with subsidiaries of Kingdom and Fairmont, formed the claimants in this case. Cedar Capital Partners, led by Ramsey Mankarious, was engaged to negotiate the purchase of the Monte Carlo Grand Hotel on behalf of the joint venture. Following the successful purchase of the Monte Carlo Grand Hotel by the claimants in December 2004, Cedar Capital Partners continued to advise on other projects on behalf of the FHR joint venture and its investors. In April 2005, Kingdom discovered that Cedar Capital Partners had been paid a fee by the vendors in respect of the sale of the Monte Carlo Grand Hotel. The fee was a fixed sum of ?10 million. Kingdom and Fairmont took a strongly adverse view to the discovery that Cedar Capital Partners had been paid this fee. There was evidence that BoS was aware, at the time of the sale, of the fact that a fee was paid but was concerned with the amount of the fee whereas the other joint venture parties maintained that they were not aware that any fee was paid. In 2005, the claimants ceased all business activities with the Cedar Capital Partners, refusing to pay outstanding invoices. In November 2009, the claimants issued proceedings against Cedar Capital Partners and Mr Mankarious for the recovery of the ?10 million fee, on the grounds of breach of fiduciary duties. **(c) Decision** The court found that Cedar Capital Partners owed fiduciary duties to BoS and Fairmont in relation to the establishment of the FHR joint venture and the acquisition of the hotel. Fiduciary duties were also owed to Kingdom. The duties were found to be owed to each joint venture party severally and BoS did not have authority to act on behalf of the other joint venturers. Whilst BoS was aware that the defendants were to be paid a commission of some sort, BoS was not a "leader" with authority (express or implied) to act on behalf of the other joint venture parties. In any event, the defendants had not disclosed the material facts of the commission given they did not disclose the size and scope of the commission to BoS, nor was it customary or standard in its amount in the circumstances. Importantly, Justice Simon found that the agents failed to discharge the burden upon them to prove that each of the joint venture participants had the requisite level of knowledge to amount to consent of the fee arrangements. His Honour found that there was a conflict of duty in Cedar acting in its dual role as adviser to the joint venture and negotiating the sale price and its arrangements with the vendor. In the circumstances, Justice Simon considered that Cedar Capital Partners failed to discharge the burden of proving that the joint venture parties had sufficient knowledge of the fee or commission. Accordingly, the ?10 million fee was determined to be held on constructive trust by the defendants for the claimants and the defendants would not be entitled to claim contractual commission for services in connection with the purchase of the hotel. In handing down this decision, his Honour espoused the general principles surrounding the payment of fees to agents and when "secret" commissions will constitute a breach of fiduciary duties, which are summarised below. **(i) The general principle** An agent cannot "put himself in a position or enter into any transaction in which his personal interest ... may conflict with his duty to his principal, unless his principal, with full knowledge of all the material circumstances and the nature and extent of the agent's interest, consents". Where the agent receives a commission in breach of duty, the agent must account for that sum to the principal although there may be cases where the courts will allow for an equitable allowance in favour of the agent for expenditure incurred and for work and skill applied for the benefit of the principal. This statement of the law of fiduciary duties, and its exception, is uncontroversial. **(ii) Establishing the exception to the general principle - need to disclose material details** His Honour, referring to English case law precedent, stated that "[i]t is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts". This is necessary to enable the principal to provide his or her fully informed consent. The burden is placed on the agent to establish that the principal has provided informed consent. In certain circumstances this may require the agent to disclose the amount of the fee or commission to be paid to the agent. Materiality is assessed by reference to whether the facts might have affected the principal's decision and not whether it would have done so. **(iii) Situations where a secret commission or fee may not be in breach of duty** His Honour also noted that there are circumstances where an undisclosed commission may not be in breach of fiduciary duties, where the agent can show a customary usage or the agent can show that the amount of the commission is standard and ascertainable on enquiry. **(iv) Disclosure to one or more principals** Where the agent has one more principal, the agent must provide sufficient disclosure to each principal unless one of the principals is authorised by the others, whether expressly or impliedly, to receive disclosure on behalf of the other principals.etailed Contents |

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