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| SAI Global Corporate Law Bulletin No. 165**>** |  |

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| **Bulletin No. 165**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/165%20May%202011.htm#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/165%20May%202011.htm#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/165%20May%202011.htm#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/165%20May%202011.htm#h4)5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/165%20May%202011.htm#h5)6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/165%20May%202011.htm#7)7.     [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 SEC proposes rules to increase transparency and improve integrity of credit ratings**On 18 May 2011, the US Securities and Exchange Commission voted unanimously to propose new rules and amendments intended to increase transparency and improve the integrity of credit ratings.The proposed rules would implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 and enhance the SEC's existing rules governing credit ratings and Nationally Recognized Statistical Rating Organizations (NRSROs).Under the SEC's proposal, NRSROs would be required to:Report on internal controlsProtect against conflicts of interestEstablish professional standards for credit analystsPublicly provide - along with the publication of the credit rating - disclosure about the credit rating and the methodology used to determine itEnhance their public disclosures about the performance of their credit ratings. The SEC's proposal also requires disclosure concerning third-party due diligence reports for asset-backed securities.A summary of the proposed rules and the text of the proposed rules are available on the [SEC website](http://www.sec.gov/news/press/2011/2011-113.htm%22%20%5Ct%20%22_new).etailed Contents**1.2 APRA consults on refinements to the prudential framework for general insurance groups** On 16 May 2011, the Australian Prudential Regulation Authority (APRA) released a consultation package relating to refinements to the prudential and reporting framework for general insurance groups (GI Level 2 groups).  The package contains a discussion paper outlining the proposed changes as well as draft prudential standards and draft reporting forms and instructions. The proposed refinements to prudential standards aim to address issues or gaps identified during implementation of the GI Level 2 group prudential framework in 2009, and to achieve better alignment with the Level 2 prudential framework for authorised deposit-taking institutions. Consequential changes to the reporting standards aim to align aspects of GI Level 2 group reporting with the reporting framework for Level 1 general insurers and to provide some additional clarifications.  It is expected that the final prudential standards, reporting forms and instructions will be released by 1 December 2011, with the first reporting under the revised framework to be in respect of the six month period ending 31 December 2011.The consultation package is available on the [APRA website](http://www.apra.gov.au/Policy/Refinements-to-the-prudential-framework-for-general-insurance-groups-May-2011.cfm%22%20%5Ct%20%22_new).etailed Contents**1.3 Survey shows CFOs split when asked if corporate governance stifles entrepreneurial activity**Views are polarised among CFOs in Australia and Asia when asked if corporate governance inhibits their entrepreneurial activity, according to a survey by the Institute of Chartered Accountants in Australia published on 16 May 2011. The Institute's CFO Survey 2011: Corporate Governance Performance and Insights - canvassed the opinions of 250 CFOs of listed companies in Australia, Singapore, Hong Kong and Malaysia. Of all respondents, 38% disagreed that greater emphasis on corporate governance reduced their entrepreneurial activity and a further 27% of respondents were reluctant to agree or disagree.The Institute's Executive General Manager, Lee White said, "Only 35% of respondents actually believed increased emphasis on corporate governance reduced their entrepreneurial activity. This suggests that some of the comments from directors and other business people about increased governance requirements hindering their risk-taking may be overstated. It may also indicate that as a result of the global financial crisis there is greater recognition by CFOs of the fact that good risk management contributes to, rather than detracts, from effective risk taking."Other key findings from the survey include: **Role of auditors**Overall 86% of respondents agree auditors demonstrate sufficient levels of professional scepticism while 66% agreed that auditors vigorously challenged management assumptions. 57% agree or strongly agree that auditors vigorously challenge management projections. This was lower in Hong Kong (40%) and higher in Singapore (65%). **Integrated reporting - CSR not a priority**Overall 65% of respondents indicated their company did not report on Environmental Sustainability as this, and other Corporate Social Responsibility (CSR) issues are not mandatory, while some 34% said it was not relevant. Of those currently not reporting on these areas, some 54% indicated they have no intention to do so in the next year. **In tough economic times - business prefer tax incentives for investment**In tough economic times, more than 50% of all respondents indicated increased tax incentives for investment from government would help their business, as opposed to controlling interest rate rises and exchange rate appreciation. A notable minority of about 30% of respondents in Singapore and Malaysia identified controlling interest rate rises as a priority.     51% of respondents had dealt with the impact of the global financial crisis by deferring capital expenditure with some 37% also reducing staff numbers. Reducing staff numbers was higher in Australia at 47% of respondents, compared to Singapore, Hong Kong and Malaysia where the level was closer to 30%. etailed Contents**1.4 Report on remuneration in the UK**On 16 May 2011, the UK High Pay Commission published an interim report titled 'More for less: What has happened to pay at the top and does it matter?' The report is an audit of the current debate on top pay.  It reveals the growth in pay experienced by those at the top of the income distribution over the last 30 years and discusses the causes of this growth.Ahead of its final report later this year, the High Pay Commission has stated that it wants to see a framework for fair pay that sees government and business tackling what it refers to as rapidly spiralling top pay through:Reforms on transparency;Greater accountability; andDeveloping a fair framework for fair pay.  The High Pay Commission is an independent inquiry into high pay and boardroom pay across the public and private sectors in the UK. The matters dealt with in the interim report are:Why pay matters (to companies, to the economy and to society);The state of pay (what has happened to top pay and executive pay);What has driven this rise in pay at the top? (pay and performance, pay and business structures, a competitive market at the top, social and political factors); andA fair framework for pay. The interim report is available on the [Commission's website](http://highpaycommission.co.uk/%22%20%5Ct%20%22_new).etailed Contents**1.5 Guidance note for prospective directors when joining a board**On 12 May 2011, the UK Institute of Chartered Secretaries and Administrators (ICSA) published an updated version of its guidance note titled 'Joining the right board - due diligence for prospective directors'. The revised guidance is designed to advise prospective directors on the due diligence process they should undertake prior to joining a company.Key recommendations in the note include:Having pre-appointment meetings with a number of board members and the company secretary as well as certain external advisers, especially if the individual is taking on the role of the chairman of the company or chair of the audit or remuneration committee Discussing with the board the outcome of the last board evaluation process, and the plans to tackle any areas which were considered to be in need of development.  One aspect of the guidance note is the set of due diligence questions which prospective directors can draw on to help them assess the company in a number of areas.  The guidance note is available on the [ICSA website](http://www.icsa.org.uk/assets/files/pdfs/guidance/Guidance%20Notes%202011/ICSA%20Guidance%20on%20joining%20the%20right%20board%20May%202011.pdf%22%20%5Ct%20%22_new).etailed Contents**1.6 Issues in cross border resolution of financial service firms**On 9 May 2011, the Institute of International Finance (IIF) - a global association of financial services firms with over 430 member institutions - published proposals for the cross border resolution of financial services firms. The report is titled 'Addressing priority issues in cross border resolution'. The IIF highlights in the report a set of 'bail-in' actions that have the potential to transform the way the market in financial services operates by ensuring that firms of all shapes and sizes can fail - with losses being absorbed by shareholders and creditors and with no expectation of taxpayer bail-outs.The IIF states that effective resolution is essential in achieving long term resilience and financial stability and it plays a key role in addressing important issues of moral hazard. In its report, the IIF makes proposals to preserve critical functions in failing firms to ensure against serious systemic disruption. It emphasises the importance of building a robust cross-border resolution framework. The report is available on the [IFF website](http://www.iif.com/%22%20%5Ct%20%22_new).etailed Contents**1.7 European code for external governance and responsible investment**On 9 May 2011, the European Fund and Asset Management Association (EFAMA) published two reports: the EFAMA Code for External Governance and the EFAMA Report on Responsible Investment.EFAMA believes that good standards of governance are critical to ensuring confidence in the European capital markets. The purpose of the EFAMA Code for External Governance is to provide a framework of high-level principles and best practice recommendations which will act as a catalyst for engagement between investment management companies and the companies in which they invest. Adherence to this code will support interaction between investment managers and investee companies and ensure a strong link between governance and the investment process.The principles of the EFAMA code set out the best practice for investment management companies when they engage with the companies in which they invest. The principles are designed to enhance the quality of the communication with investee companies and to foster creation of value for investors by dealing effectively with concerns over the companies' performance.Responsible Investment (RI) is an important feature of the investment management industry with an increasing investor demand in many markets. Having analysed the developments in Member States, EFAMA concluded that there are a variety of approaches to RI not least because individual investors' perceptions differ as to what can be described as responsible. Therefore the concept cannot be captured by a single regime, but a variety of approaches must be allowed.Of key importance in EFAMA's view is that when an investment management company provides RI products, it should commit to an adequate amount of transparency regarding its processes so that investors are able to evaluate and compare how the product meets the RI requirements. Increased transparency of client reporting, communication of investment approaches and selection methods would help investors distinguish between different RI offerings and allow them to make more informed decisions. This would be facilitated by European industry guidance on transparency.The two reports are available on the [EFAMA website](http://www.efama.org/index.php%22%20%5Ct%20%22_new).etailed Contents**1.8 Report on competition in the Australian banking sector** On 6 May 2011, the Senate Economics References Committee published a report titled 'Competition within the Australian banking sector'. The matters dealt with in the report include: The global financial crisis: stability and competition Banks' home loan interest rates Profitability and concentration in the banking industry Reducing barriers to customers moving between financial intermediaries Promoting more competitors The securitisation market Price signalling Supervision of the financial system Government guarantees for the financial system Taxation and related measures Small business finance. The majority members of the Committee put forward 39 recommendations in the report. The government Senators formed a minority of members of the Committee who participated in this inquiry and report. They separately put forward six recommendations in the report. The report is available on the [Parliament of Australia website](http://www.aph.gov.au/Senate/committee/economics_ctte/banking_comp_2010/report/report.pdf%22%20%5Ct%20%22_new).etailed Contents**1.9 UK Financial Reporting Council consults on boardroom diversity** On 5 May 2011, the UK Financial Reporting Council (FRC) began consultation on whether the UK Corporate Governance Code should be revised to require listed companies to publish their policy on gender diversity in the boardroom and report against it annually. This was a recommendation in Lord Davies' report, "Women on Boards", which was published in February.Views are also sought on whether the Code should identify some of the key issues to be considered when boards carry out their regular effectiveness reviews, and on the timing of any changes that might be made to the Code as a result of the consultation.The Consultation Paper is available on the [FRC website](http://www.frc.org.uk/images/uploaded/documents/FRC%20Consultation%20Document%20-%20Gender%20Diversity%20on%20Boards2.pdf%22%20%5Ct%20%22_new).etailed Contents**1.10 SEC seeks public comment on short sale disclosure**On 4 May 2011, the US Securities and Exchange Commission published a request for public comment on the feasibility, benefits, and costs of two short selling disclosure regimes as a part of a study mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.Section 417 of the Dodd-Frank Act directs the SEC's Division of Risk, Strategy and Financial Innovation to study two short sale disclosure regimes. A transactions reporting regime would add short sale-related marks to the consolidated tape in a voluntary pilot program. A position reporting regime would entail real time reporting of investors' short positions either to the public or to regulators only. To better inform the study, the request seeks public comment on both the existing uses of short selling in securities markets and the adequacy or inadequacy of the information regarding short sales available today. The request also seeks public comment on the likely effect of these possible future reporting regimes on the securities markets, including their feasibility, benefits, and costs.The consultation document is available on the [SEC website](http://www.sec.gov/rules/other/2011/34-64383.pdf%22%20%5Ct%20%22_new).etailed Contents**1.11 Progress of the FSB's initiative to promote international cooperation and information exchange** On 29 April 2011, the Financial Stability Board (FSB) published a report on the progress of its initiative to encourage the adherence of all countries and jurisdictions to regulatory and supervisory standards on international cooperation and information exchange. The initiative commenced in March 2010 in response to a call by the G20 Leaders at their April 2009 Summit in London for the FSB to develop a toolbox of measures to promote adherence to prudential standards and cooperation among jurisdictions. It complements similar initiatives by the Global Forum on Transparency and Exchange of Information for Tax Purposes to promote adherence to international standards in the tax area, and by the Financial Action Task Force for standards concerning anti-money laundering and combating the financing of terrorism. According to the report, the FSB's initiative is making good progress. A large number of the jurisdictions evaluated by the FSB already demonstrate sufficiently strong adherence to the relevant standards. Others are implementing reforms to strengthen their adherence, or have requested new assessments of their adherence from the IMF and World Bank because their earlier assessments are outdated or they have never undergone an assessment. A very small number of jurisdictions have elected not to engage in dialogue with the FSB. To recognise the progress that most jurisdictions evaluated by the FSB have made toward addressing weaknesses in international cooperation and information exchange, and incentivise improvements by those jurisdictions not cooperating fully, the FSB will ahead of the November 2011 G20 Leaders Summit publish the names of all jurisdictions evaluated under the current initiative. The public list will identify non-cooperative jurisdictions. The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_110429.pdf%22%20%5Ct%20%22_new).etailed Contents**1.12 Financial advice reforms** On 29 April 2011, the Australian Government announced further details of its Future of Financial Advice reforms. Three key elements of the reforms are: a requirement for financial advisers to get clients to 'opt-in' every two years if they wish to continue to receive ongoing advice; banning all commissions on risk insurance inside superannuation; and a broad ban on volume-based payments. Further details of the announcement include:A decision to ban all trailing and up-front commissions and like payments from 1 July 2013. A broad ban on volume-based payments, targeted at removing payments that have similar conflicts to product provider-set remuneration, such as commissions. This includes those payments based on volume or sales targets from platform providers to financial advisory dealer groups. A ban on any 'soft-dollar' benefit that is $300 or more (per benefit) from 1 July 2012 (excluding professional development and IT administration services where set criteria are met). Further information is available on the [Treasury website](http://ministers.treasury.gov.au/Ministers/brs/Content/pressreleases/2011/attachments/064/064.pdf%22%20%5Ct%20%22_new).etailed Contents**1.13 SEC proposes rule amendments to remove credit rating references in Exchange Act Rules**On 27 April 2011, the US Securities and Exchange Commission voted unanimously to propose amendments that would remove references to credit ratings in several rules under the Exchange Act. These proposals represent the next step in a series of actions taken under the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 to remove references to credit ratings within agency rules and, where appropriate, replace them with alternative criteria. Under Dodd-Frank, federal agencies must review how their existing regulations rely on credit ratings as an assessment of creditworthiness. At the conclusion of this review, each agency is required to report to Congress on how the agency modified these references to replace them with alternative standards that the agency determined to be appropriate.The proposed rules are available on the [SEC website](http://www.sec.gov/rules/proposed/2011/34-64352.pdf%22%20%5Ct%20%22_new).etailed Contents**1.14 SEC proposes product definitions for swaps**On 27 April 2011, the US Securities and Exchange Commission voted unanimously to propose rules further defining the terms "swap," "security-based swap," and "security-based swap agreement." The Commission also proposed rules regarding "mixed swaps" and books and records for "security-based swap agreements." The rules were proposed jointly with the Commodity Futures Trading Commission (CFTC) and stem from the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.The proposal seeks to provide guidance in rules and interpretations by using clear and objective criteria that should clarify whether a particular instrument is a swap regulated by the CFTC, a security-based swap regulated by the SEC, or a mixed swap regulated by both agencies.The proposed rules are available on the [SEC website](http://www.sec.gov/rules/proposed/2011/33-9204.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15 Review of compensation arrangements for consumers of financial services - consultation paper** On 20 April 2011, the Assistant Treasurer and Minister of Financial Services and Superannuation announced the publication of a consultation paper titled 'Review of compensation arrangements for consumers of financial services'. The review was announced in response to recommendation 10 of the report by the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into financial products and services in Australia. Arrangements are currently in place to protect consumers of financial services, including through access to low cost dispute resolution schemes and to compensation arrangements for those who suffer loss or damage from a breach of a statutory obligation by a licensed financial service provider. This allows, for example, compensation for a loss resulting from a provider's misconduct. However, it is stated in the paper that 'the current default arrangements', which rely largely on professional indemnity insurance, 'provide a measure of assurance but no guarantee that retail clients will be able to recover compensation to which they may be entitled'.The problem for consumers is where a provider does not have recourse to professional indemnity insurance cover and does not have the financial capacity to pay compensation. This may be the case where the provider has ceased to trade or has become insolvent.The consultation paper draws attention to a number of ways that existing compensation arrangements can be strengthened. These include a more proactive administration of the requirements for professional indemnity insurance, giving more attention to the financial resources held by a provider, as well as a scheme of last resort to provide compensation where a provider is unable to do so. The consultation paper provides information, frames issues and raises questions on the need for, and costs and benefits of, a statutory compensation scheme for clients who suffer damage or incur loss as a result of misconduct by persons with whom they have dealt in the financial services sector. In particular: Chapter 1 deals with the context and scope of the review. It also provides background on the overall regulatory framework for financial services and the regulatory philosophy on which it is based. Chapter 2 describes the current compensation arrangements within that regulatory framework.Chapter 3 addresses the operation of those compensation arrangements in practice. Chapter 4 provides a comparison with compensation arrangements in other countries and industry sectors.Chapter 5 provides some preliminary observations and draws out issues for further consideration.Attachment A provides a summary of relevant regulations and Attachment B provides a summary of compensation arrangements in the EU, Canada and the US.The Consultation Paper is available on the [Treasury website](http://futureofadvice.treasury.gov.au/content/consultation/compensation_arrangements_CP/downloads/Compensation_Consultation_Paper.pdf%22%20%5Ct%20%22_new).etailed Contents**1.16 Report on the banking crisis in Ireland** On 19 April 2010, the Irish Government released the final report of the Commission of Investigation into the Banking Sector in Ireland. The report is titled 'Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland - Report of the Commission of Investigation into the Banking Sector in Ireland'.  The cost of the banking collapse has been very significant. The escalating cost of saving its banks forced the Irish Government to seek EUR67.5 billion in bailout loans from the European Union and International Monetary Fund in November 2010 when markets refused to lend it or the banks more money. The government has to date injected EUR46.3 billion in aid to rescue the banking system and may need to contribute most of the EUR24 billion the Irish central bank has identified that may be needed to help cover anticipated losses at four surviving lenders over the next three years. That may increase the total cost to the government to just over EUR70 billion, equivalent to about 44% of the annual output of the Irish economy.  According to the report, many participants - banking boards, politicians, former regulators, and external auditors - did not fully realise the risks of concentrated lending during the boom years. External bank auditors were 'silent observers' and regulators knew of corporate governance failings at the worst of the banks. In addition, the Irish Government's September 2008 decision to guarantee the liabilities of the banks was taken without seriously contemplating alternative options.  It is stated in the report that the 'willingness of banks to accept higher risks by providing more and shockingly larger loans primarily for commercial property deals was an important reason for the gradual increase in financial fragility in Ireland' and that this led to a gradual adoption of lower credit standards by a number of Irish banks. Neither banks nor borrowers apparently really understood the risks they were taking. Many banks were increasingly led and managed by people with less practical experience of credit and risk management than before. Governance at these banks also fell short of best practice. In addition, although the financial regulator was clearly aware of many of these problems in the banks, little was done. It is stated in the report the bank officers interviewed as part of the inquiry could not recall any meaningful engagement with the financial regulator about prudential issues (except technically, as part of the Basel II process). According to bank management, 'prudential issues were tick-the-box checks that formal procedures were in place, not checks on how they worked in practice. On the contrary, when prudential sector concentration ratios were exceeded, the financial regulator did nothing to demand any limitation in risk exposure despite being fully informed'.  The report also contains 'lessons' from the inquiry. The following is an extract: 'A main lesson is the need to make sure, both in private and public institutions, that there exist both fora and incentives for leadership and staff to openly discuss and challenge strategies and their implementation. In part because they must form a view on banks' financial sustainability, bank auditors should have a regular, compulsory dialogue with its client's senior management and boards on the bank's business model, strategy and implementation risks. The result of such discussions should also, at least when clearly relevant, be communicated to the financial regulator. 'Furthermore, authorities as well as bank boards and management need to remain particularly vigilant and professionally suspicious during extended good times. Nevertheless, history indicates that this is unlikely to be the case, in practice, for a number of reasons. Thus, it seems unlikely that regulatory or governance reform alone will prevent a future crisis. This argues for structural changes in the banking sector, appropriately reducing and delimiting at least the part of the banking system that may be subject to the various types of government support. The economic size of the country and the sovereign as well as moral hazard considerations should affect the extent of such constraints. In addition, in order to slow a renewed "procedures creep", banks should consider establishing internal, hard voluntary lending limits which they would make difficult to change or circumvent. 'Also, the selection of management and board members in both responsible authorities and banks may need even more attention than before. It is the impression of the Commission that long, preferably practical, experience in financial markets has a tendency to promote not only competence but also financial prudence. Banks might do well, in the long run, to ensure that their senior management has, or at least has close access to, extensive lending and risk management expertise; more banking experience in boards would also prove useful. Authorities might also do well to make even greater use of experienced practitioners, domestic and foreign, in various roles. 'Additionally, cooperation between all relevant authorities needs to become less formal but more comprehensive and should include professional staff. While accountability requires clarity on who makes a decision, the need for good decisions would seem to require regular, open, professional and constructive discussion among all relevant institutions. In that regard, much remains to be done in Ireland and elsewhere. For instance, it seems particularly vital to urgently and substantially increase staff with financial market expertise in the Department of Finance for it to be able to actively fulfil its part of the stability mandate, including cooperating closely and professionally with the Central Bank and internationally. 'Finally, it appears to the Commission that little seems to argue against policies to markedly limit (even properly structured) bonus and pay for management in both banks and authorities, in Ireland and internationally. A consistent message of the bankers interviewed by the Commission has been that money is only part of their work incentive. For people serious about professional public service, money should be even less of an incentive.' The report is available on the [Commission's website](http://www.bankinginquiry.gov.ie/Home.aspx%22%20%5Ct%20%22_new).etailed Contents**1.17 Use of phoenix companies by organised crime**On 15 April 2011, the Australian Crime Commission published the report "Organised Crime in Australia: 2011'.According to the report, there is evidence of links between phoenix activity and organised crime. Phoenix activity occurs when directors of a company that is about to be liquidated transfer assets to another company which they also control. This leaves no assets to pay creditors but enables the business to continue under the new company. Complaints concerning phoenix activity are increasing in Australia and the activity is being used to avoid tax and superannuation liabilities in a range of industries. According to the Commission, professional facilitators such as insolvency practitioners, solicitors and tax agents have been identified as assisting individuals to take part in phoenix activity.It is also stated in the report that phoenix activity has historically been most prevalent in small, labour-intensive, cash-focused businesses with a turnover below A$2 million and this remains the case. Recently, however, phoenix activity appears to have spread into the higher end of the small and medium enterprises market segment. It is also beginning to emerge in sectors such as property development and finance. Particularly vulnerable industries include the private security, building and construction, entertainment, telecommunications, property development, labour hire, employment, road transport and cleaning industries. The Australian community bears a significant part of the cost of phoenix activity through reduced tax revenue. It is used to avoid a range of taxes including income tax, goods and services tax and superannuation guarantee obligations. State tax authorities may also be adversely affected by phoenix activity.The report is available on the [Commission's website](http://www.crimecommission.gov.au/publications/oca/index.htm%22%20%5Ct%20%22_new).etailed Contents**1.18 Financial Stability Board publishes progress report on OTC derivatives market reforms implementation** On 15 April 2011, the Financial Stability Board (FSB) published a progress report on implementation of OTC derivatives market reforms. The report summarises progress made toward implementation of the G20 commitments concerning standardisation, central clearing, exchange or electronic platform trading, and reporting of OTC derivatives transactions to trade repositories. In particular it looks at progress against the 21 recommendations set out in the FSB's October 2010 report for implementing reforms in an internationally consistent and non-discriminatory manner to meet the G20 commitments. In the report, the FSB makes several overall observations on progress, including identifying a number of issues meriting additional attention in the near term. Major implementation projects are underway in the largest OTC derivatives markets, and international policy development is proceeding according to the timetable set out in the October report:The Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) published in March a consultative report on harmonised principles for financial market infrastructures, covering payment systems, central securities depositories, securities settlement systems, and central counterparties (CCPs), and including guidance on trade repositories. IOSCO published in February a study evaluating the benefits and challenges associated with the implementation of measures aimed at increasing exchange and electronic trading. It will conduct further analysis on the current market use of multi or single-dealer platforms. The largest derivatives dealers and other major market participants delivered in March a letter to the OTC Derivatives Supervisors Group, setting out broad objectives, specific initiatives and supporting commitments in this letter as the foundation of a roadmap for implementation of G20 objectives. The Committee on the Global Financial System (CGFS), CPSS, and IOSCO held a forum in January 2011 and are organising follow-up work to promote expanding access to central clearing to a broader set of participants, and links between CCPs, without sacrificing the rigour of CCP risk controls.Nevertheless, although implementation is still in its early stages, the FSB is concerned that many jurisdictions may not meet the G20's end-2012 deadline and believes that, in order for this target to be achieved, jurisdictions need to take substantial, concrete steps toward implementation immediately. Differences in approaches are emerging in some areas that could weaken the effectiveness of reforms in these markets, create potential opportunities for regulatory arbitrage, or subject market participants and infrastructures to conflicting regulatory requirements. Divergent approaches to requirements for the reporting of transaction data to trade repositories may lead to difficulties in cross-border sharing of data or aggregating data on a global basis unless steps are taken to ensure consistency. Potential emerging inconsistencies may also be seen in the development and future application of clearing requirements and strengthened margining/collateralisation practices across asset classes, products and market participants, and requirements for trading on multi-dealer versus single dealer platforms. In this context, the FSB has requested that IOSCO undertake further analysis on market use of multi- or singledealer platforms. The FSB will continue to monitor developments through its OTC Derivatives Working Group as implementation progresses, and identify any further emerging inconsistencies that should be addressed. The FSB will publish a further progress report by October 2011 that should provide greater insight as to whether progress is on track, including greater detail on implementation by asset class (covering interest rate, credit, equity, commodity and foreign exchange). The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_110415b.pdf%22%20%5Ct%20%22_new).etailed Contents**1.19 Progress on strengthening financial stability** On 15 April 2011, the Financial Stability Board (FSB) published a report to G20 Finance Ministers and Central Bank Governors titled 'Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability'. The matters dealt with in the report are: 1. Implementation of reforms to bank capital and liquidity standards2. Addressing systemically important financial institutions (SIFIs): (a) SIFI determination and loss absorbency; (b) Resolution tools and regimes; and (c) Supervisory intensity and effectiveness3. Shadow Banking4. Improving the OTC and commodity derivatives markets5. Developing macroprudential frameworks and tools6. Progress towards convergence on strengthened accounting standards7. Strengthening adherence to international supervisory and regulatory standards: (a) Peer reviews; (b) Reforming compensation practices to support financial stability; (c) Co-operation and information exchange initiative; and (d) Compendium of Standards 8. FSB regional consultative groups9. Other issues: (a) Financial stability issues in emerging market and developing economies; (b) Consumer finance protection; (c) Reducing reliance on CRAs; (d) Addressing data gaps revealed by the financial crisis; and (e) Market integrity issues.The report is available on the [FSB website](http://www.financialstabilityboard.org/publications/r_110415a.pdf%22%20%5Ct%20%22_new).etailed Contents |

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

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| **2.1 New ASIC Chairman**On 13 May 2011, Mr Greg Medcraft commenced his appointment as ASIC chairman for a five-year term, replacing Mr Tony D'Aloisio. Mr Medcraft joined ASIC as a Commissioner in February 2009. His regulatory responsibilities as Commissioner included Investment Banking, Investment Managers, Super Funds and Financial Advisers. Prior to joining ASIC, Mr Medcraft was Chief Executive Officer and Executive Director at the Australian Securitisation Forum. Mr Medcraft spent nearly 30 years in Investment Banking at Société Générale in Australia, Asia, Europe and Americas. More recently, he was the Managing Director and Global Head of Securitisation, based in New York. In 2002, Mr Medcraft co-founded the American Securitization Forum and was its Chairman from 2005 until 2007 when he returned to Australia. The American Securitization Forum is an industry group representing some 350-member institutions comprising all major stakeholders in the US$1 trillion US securitisation market. In January 2008, he was appointed Chairman Emeritus of the American Forum and remains a member of that Board and Management committee.etailed Contents**2.2 ASIC research on the impacts of misconduct**On 19 May 2011, ASIC published research on the social impact of misconduct in the financial services industry. It gives examples of misconduct leading to financial losses, such as inappropriate advice, fraud, defective disclosure and misleading or deceptive conduct. The report is titled 'Compensation for retail investors: the social impact of monetary loss'.The report presents the results of a study into the social impacts of investors suffering losses due to licensee misconduct in circumstances where the licensee is unable to provide full compensation. It was undertaken to better understand the personal consequences of investors not being fully compensated and to help inform submissions to the Government's review into whether a statutory compensation scheme should be introduced in Australia. The key findings of the study are:investors who suffered the most had invested all their money, had not diversified or went into debt as part of their investment strategy; most investors' losses were associated with an underlying product that was either frozen or collapsed; the impact of the monetary loss was immediate on investors without a financial buffer, for others the first six months from when they discovered their loss were critical. Most investors received none, or only a few cents in the dollar back; investors had little knowledge of existing avenues of redress, such as their financial service provider's internal dispute resolution system or the external dispute resolution scheme they belonged to; investors were reluctant to commence legal action to recover their monetary loss, particularly where they blamed themselves; some investors suffered 'catastrophic loss' as their loss was 'so significant their life will never be the same'. Some felt prolonged anger, uncertainty, worry and depression; and investors who suffered monetary loss lacked confidence in the Australian financial system, financial advisers, the government and regulators including ASIC.The report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \t "_new).etailed Contents**2.3 Consultation on market integrity rules for the FEX market**On 12 May 2011, ASIC released a consultation paper proposing new market integrity rules which will apply should Financial and Energy Exchange Limited (FEX) be granted an Australian market licence. This follows Consultation Paper 149 'Application for an Australian market licence: Financial and Energy Exchange Limited', which was released in March 2011. This paper outlined the nature of the proposed FEX market and sought feedback on FEX's application for a licence to operate an exchange market for energy, commodity and environmental derivatives. Consultation Paper 157 'Proposed ASIC market integrity rules: FEX market' proposes market integrity rules for FEX that are substantially similar to the current ASIC Market Integrity Rules (ASX 24 Market) 2010, adopted from the long standing Australian Securities Exchange operating rules.The consultation paper explains ASIC's approach to developing market integrity rules for the FEX market and sets out how they would apply to market participants who also need to comply with the ASIC Market Integrity Rules (ASX 24). Consultation Paper 157 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.4 Consultation on financial requirements for issuing retail OTC derivatives**On 9 May 2011, ASIC released a consultation paper to seek feedback on the financial requirements for issuers of over-the-counter (OTC) derivatives, such as contracts for difference or margin foreign exchange, to retail investors.As the market for retail OTC derivatives in Australia is growing, ASIC has reviewed the financial requirements of issuers of these products. This is to ensure that issuers have adequate financial resources to manage their operating costs and risks and the owners of issuers are committed to the viability of the business. Consultation Paper 156 'Retail OTC derivative issuers: Financial requirements' seeks feedback on:requiring issuers to create rolling 12-month cash flow projections, removing the current requirements to hold surplus liquid funds (SLF) and adjusted surplus liquid funds (ASLF) and replacing these with a requirement to hold net tangible assets (NTA) of at least the greater of $1 million or 10% of average revenue, specifying the NTA liquidity requirements for issuers, introducing a reporting framework concerning the level of NTA held by issuers, and a staged implementation process. ASIC will consider updating regulatory guidance based on the response to the consultation paper. Current guidance for financial risk frameworks for issuers is in Regulatory Guide 166.Consultation Paper 156 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \t "_new).etailed Contents**2.5 Amendment of class order to provide further hedging relief to market makers**On 29 April 2011, ASIC announced it had made a minor amendment to ASIC Class Order [CO 09/774] 'Naked short selling relief for market makers', which will allow licensed market makers to short sell securities in the S&P/ASX300 index, in order to hedge risk. Previously, this was only allowed for securities that appeared in the S&P/ASX200 index. While section 1020B of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) prohibits naked short selling, licensed market makers have been afforded relief to enable them to mitigate the risks involved in their market making activities. The remaining conditions in [CO 09/774] remain unchanged. The amended class order commenced on 19 April 2011.In September 2008, as a result of volatility in markets across the world, including Australia, ASIC announced a series of measures relating to short selling. During this sustained period of volatility, ASIC restricted the relief given to market makers to ensure that liquidity and settlement risks were properly managed. A condition of the relief is that market makers have reasonable grounds to believe securities lending arrangements can be put in place to allow delivery and market makers acquire or borrow sufficient products by the end of each day to ensure that they can deliver all products sold during that day at the time delivery is due.For the additional 100 stocks in the S&P/ASX 300, ASIC's analysis indicates the liquidity and ease with which market makers can cover short positions are broadly in line with the S&P/ASX 200 stocks. As a result, the impact of the change is considered to be low with sufficient investor and market protections in place under the conditions of the relief to market makers.Download [[CO 09/774]](http://www.asic.gov.au/asic/asic.nsf/byheadline/2009%2BClass%2BOrders?openDocument" \l "co09-774" \t "_new) and see Regulatory Guide 196 Short selling ([RG 196](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg196" \t "_new)) for further information.etailed Contents**2.6 Publication of final competition market integrity rules**On 29 April 2011, ASIC published new market integrity rules to provide the framework for the introduction of competition in equity exchange markets and new market integrity rules specifically for the Chi-X market. ASIC also published two regulatory guides on the new rules. The new competition market integrity rules are in line with the summary of the proposed market integrity rule framework ASIC released on 3 March 2011.The package of documents published on 29 April 2011 consists of:**Competition** [Competition market integrity rules](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-market-integrity-rules-competition-in-exchange-markets-2011.pdf/%24file/ASIC-market-integrity-rules-competition-in-exchange-markets-2011.pdf%22%20%5Ct%20%22_new) [Competition market integrity rules regulatory guide](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG223-published-29-April-2011.pdf/%24file/RG223-published-29-April-2011.pdf%22%20%5Ct%20%22_new) (RG 223) [Feedback report to ASIC consultation paper 145 (CP 145)](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep237" \t "_new) (REP 237) [Non-confidential submissions to CP 145](http://www.asic.gov.au/asic/asic.nsf/byheadline/CP145-Australian-equity-market-structure--Submissions?openDocument" \t "_new) **Chi-X** [Chi-X market integrity rules](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-market-integrity-rules-Chi-X-Australia-market-2011.pdf/%24file/ASIC-market-integrity-rules-Chi-X-Australia-market-2011.pdf%22%20%5Ct%20%22_new) [Chi-X regulatory guide](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG224-published-29-April-2011.pdf/%24file/RG224-published-29-April-2011.pdf%22%20%5Ct%20%22_new) (RG 224) [Feedback report to ASIC consultation paper 148 (CP 148)](http://www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument" \l "rep238" \t "_new) (REP 238) A [background paper](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/11-87MR-backgrounder.pdf/%24file/11-87MR-backgrounder.pdf%22%20%5Ct%20%22_new) including FAQs and a summary of the package is available. **Background**The competition market integrity rules set out the regulatory framework for competition in exchange markets. They are the result of extensive consultation with the industry and take into account the comments received on Consultation Paper 145 'Australian equity market structure: Proposals' ([CP 145](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp145" \t "_new)). They comprise the rules that ASIC considers necessary for the introduction of competition in Australia. The rules apply to trading on all competing equity markets (i.e. initially ASX and Chi-X). The bulk of these rules take effect on 31 October 2011.A number of rules will take effect once the competition market integrity rules are formally registered as an instrument next week. This will enable the industry to prepare for competition. The rules include the provision of:pre-trade and post-trade information on reasonable commercial terms and on a non-discriminatory basis; other information required by market operators for regulatory purposes (e.g. on trading suspensions); and monthly reports to ASIC about crossing systems. The new market integrity rules specifically for the Chi-X market are substantially similar to the relevant [ASIC Market Integrity Rules (ASX Market) 2010](http://www.asic.gov.au/asic/asic.nsf/byheadline/Market%2Bintegrity%2Brules?openDocument" \t "_new), which were adapted from the long standing ASX operating rules, (now superseded). The Chi-X market integrity rules were set out in Consultation Paper 148 'Proposed market integrity rules: Chi-X market' ([CP 148](http://www.asic.gov.au/asic/asic.nsf/byheadline/Consultation%2Bpapers?openDocument" \l "cp148" \t "_new)). The new rules will take effect once formally registered as an instrument.etailed Contents**2.7 Improved complaints avenues for clients of traditional trustee services businesses**On 20 April 2011, ASIC released updated regulatory guidance to help improve avenues for making complaints from 1 January 2012. The updated guidance outlines what businesses which provide traditional trustee company services (traditional services businesses) must do to have a compliant dispute resolution system, so customers and beneficiaries can access internal dispute resolution (IDR) and external dispute resolution (EDR) complaints avenues.In addition to court, customers and beneficiaries will be able to complain directly to their traditional services business using IDR procedures, or to the ASIC-approved EDR scheme to which the business belongs (e.g. the Financial Ombudsman Service Limited).The updated regulatory guidance applies to the 28 businesses listed at Schedule 8AA to the [Corporations Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) which must meet the dispute resolution requirements (unless they operate under transitional arrangements and consolidate their traditional services business with an existing licensee's business before 1 January 2012). The updated regulatory guidance follows ASIC's consultation in Consultation Paper 138 'Dispute resolution requirements for trustee companies providing traditional services' which sets out ASIC's proposals for updating the existing dispute resolution requirements in:Regulatory Guide 165 'Licensing: internal and external dispute resolution' (RG 165); and Regulatory Guide 139 'Approval and oversight of external dispute resolution schemes' (RG 139).  The key changes made to RG 165 and RG 139 reflect the unique nature of traditional services complaints - especially complaints involving more than one beneficiary under a will, estate, trust (not including a charitable trust) or common fund managed by a traditional services business (multiple beneficiary complaints).Regulatory Guides 139 and 165 are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \t "_new).etailed Contents |

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| **3.1 ETO market migration to a standard contract size of 100 shares** ASX has introduced a new standard contract size of 100 Shares Per Contract (SPC) for the single stock Exchange Traded Options (ETO) market. The change was phased in (alphabetically by ETO stock code) between Monday 2 May and Friday 13 May 2011. ASX is reducing the ETO SPC to make the contract more affordable and more accessible for all users.  This is a necessary reform for the ETO market that will deliver more liquidity and attract new market entrants. This is the [notice](http://www.asx.com.au/documents/professionals/asx_eto_contract_size_reduction.pdf%22%20%5Ct%20%22_new).etailed Contents**3.2 Results of 2010 Australian share ownership study** On 3 May 2011, ASX released the 2010 Australian Share Ownership Study.  According to the Study, approximately 7.3 million people or 43% of the adult Australian population own shares, either directly (via shares or other listed investments) or indirectly (via unlisted managed funds). The total ownership level has increased from 41% when the Study was last conducted in 2008.  The percentage of investors owning shares direct-only has increased to 30%, up from 25% in 2008. The 2010 Study - the 12th in a series dating back to 1991 - was conducted nationally in October and November last year with a randomly selected sample of 2,400 adult Australians.  It highlights the incidence of share ownership among the population and offers insights into the attitudes, knowledge and behaviour of retail share market investors in Australia. This is the [media release](http://www.asxgroup.com.au/media/PDFs/110503mr_2010_australian_share_ownership_study.pdf%22%20%5Ct%20%22_new) and the [2010 Australian Share Ownership Study](http://www.asx.com.au/documents/resources/2010_australian_share_ownership_study.pdf%22%20%5Ct%20%22_new).etailed Contents**3.3 ASX and AIRA to host free investor relations forum** ASX and the Australasian Investor Relations Association (AIRA) are hosting a national investor relations education forum in 2011 titled 'Critical issues in investor relations: a forum for companies outside the S&P/ASX 200'.  The forum is designed to improve understanding of some of the critical investor relations issues facing companies regardless of their size, sector or resources. The forum will be a half-day session run by AIRA and co-hosted and sponsored by ASX.  It will be held throughout Australia and address the particular needs of listed companies outside the S&P/ASX 200.  It will principally target senior executives who assume the responsibility for, and/or require a practical understanding of, investor relations principles and programs. This is the [media release](http://www.asxgroup.com.au/media/PDFs/110418mrASX-AIRA_IR_Course_Media_Release_final.pdf%22%20%5Ct%20%22_new), which includes forum locations and dates.  Further details can be found at [www.asx.com.au/aira](http://www.asx.com.au/aira%22%20%5Ct%20%22_new) or on the [AIRA website](http://www.aira.org.au" \t "_new).etailed Contents**3.4 Reports** On 5 May 2011 ASX released:the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110505asx_monthly_activity_april2011%281%29.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_075.pdf%22%20%5Ct%20%22_new); and the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/110505asx_compliance_report_april11%281%29.pdf%22%20%5Ct%20%22_new)  for April 2011.etailed Contents |

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

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| **4.1 Panel Publishes Revised Guidance Notes 6, 12, 13 and 15** On 6 May 2011, the Takeovers Panel published revised versions of:Guidance Note 6: Minimum bid price Guidance Note 13: Broker handling fees Guidance Note 15: Trust schemes  On 23 December 2010, the Panel issued a consultation draft of Guidance Notes 6, 13 and 15. It received two submissions and has taken them into account and made further changes. This was part of the Panel's planned process of simplification and included a review of the currency and consistency of the guidance notes. An amended Guidance Note 12 (Frustrating action) was also published on 6 May. On 10 December 2010, the Panel issued a consultation draft of Guidance Note 12. It received 4 submissions and has taken them into account and made further changes. Some of the more important changes are identified below. **Guidance Note 6: Minimum bid price** Guidance Note 6 deals with the Panel's approach to the requirements of section 621(3) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). That section requires that the consideration offered for securities under a bid must be at least as much as was provided, or agreed, by the bidder or an associate for such securities in the 4 months before the date of the bid. Following consultation, the Panel has decided to continue with Guidance Note 6, including a statement that circumstances may be unacceptable if the bid consideration is foreign money and the bidder treats the bid as a cash bid. **Guidance Note 12: Frustrating action** Guidance Note 12 deals with the Panel's approach to actions of a target or potential target company that may lead to an offer lapsing, being withdrawn or not proceeding.Following consultation, the Panel has:clarified that the frustrating action policy does not apply to schemes of arrangement; and included a statement that a target might be able to proceed with a potential frustrating action, following a private approach, by putting the bidder on notice. **Guidance Note 13: Broker Handling Fees** Guidance Note 13 deals with the Panel's approach to bidders offering handling fees to brokers for soliciting acceptances. Following consultation, the Panel has decided that the limits on fees set out in Guidance Note 13 should not be changed. **Guidance Note 15: Trust Schemes** Guidance Note 15 deals with the Panel's approach to mergers by listed trusts and managed investment schemes. Following consultation, the Panel has clarified that:disclosure and approval is required for a responsible entity of the target (or a related party) giving up management rights over the target only if it is a related party transaction; and it is not uncommon for an expert's report to opine on whether a transaction is 'fair and reasonable' and in the 'best interests' of shareholders. Copies of the revised Guidance Notes are available on the [Panel's website](http://www.takeovers.gov.au/content/ListDocuments.aspx?Doctype=GN" \t "_new).etailed Contents |

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| **5. Recent Corporate Law Decisions** |  | ext Section |

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| **5.1 No relief from liability, but a reduction in penalties for directors' contraventions**  (By Matthew Gould, Freehills) Morley v Australian Securities and Investments Commission (No 2); Shafron v Australian Securities and Investments Commission (No 2) [2011] NSWCA 110, New South Wales Court of Appeal, Spigelman CJ, Beazley JA and Giles JA, 6 May 2011 The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151545](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151545" \t "_new)  **(a) Summary** This decision of the New South Wales Court of Appeal deals with further issues following the 17 December 2010 decision of the Court of Appeal in *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331. In the December 2010 decision, two officers of James Hardie International Holdings (JHIH) (Shafron and Morley) were found to have contravened their duties under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), whilst the consideration of relief from liability, disqualification and pecuniary penalty was deferred. Morley's costs appeal was also outstanding. The December 2010 decision of the Court of Appeal was discussed in Item 5.9 of [Corporate Law Bulletin No 162](http://my.lawlex.com.au/news.asp?id=8707&sp=1#059). In this decision the key issues that the Court was asked to determine were:Whether Morley and Shafron should be relieved from liability for their contraventions under sections 1317S and 1318 of the Act; andthe appropriateness of subjecting Morley and Shafron to disqualification orders and pecuniary penalties under the Act, and their magnitude if required. In reaching their decision, the Court held that it must be positively satisfied that a person has acted honestly to relieve them from liability for a contravention, though this does not require the person to give evidence that they acted honestly. Additionally, it was held that both the consideration of honesty and the separate question of whether a person ought to be fairly excused under sections 1317S and 1318 should involve, but not be limited to: character evidence; the degree to which the person's conduct fell short of the statutory standard of care and diligence;the seriousness of the contravention and its potential or actual consequences;impropriety such as deceptiveness or personal gain; and contrition.With respect to pecuniary penalty orders, the Court affirmed that:pecuniary penalty orders are only expected to be imposed where it is considered that a civil penalty disqualification provides an inadequate remedy (*Rich v Australian Securities and Investments Commission* [2004] HCA 42); and the seriousness of a contravention is to be judged by "the degree by which the officer of the corporation has departed from the requisite standard of care and diligence" and the potential or actual consequences (Ipp JA, *Vines v Australian Securities and Investments Commission* [2007] NSWCA 75).  **(b) Facts**  The contraventions related to the decision by JHIH to establish a foundation to deal with asbestos claims ("the Foundation"), and the manner in which it was disclosed.  On appeal, Morley was found to have contravened the Act by failing to advise the JHIH Board that a review of a cash flow analysis relating to the establishment of the Foundation was limited (the "cash flow analysis contravention"). However, the Court found that a draft ASX announcement that had relied on the misconception of a full review had not been approved by the Board, and this reduced the severity of the contravention. Shafron succeeded on appeal in relation to his similar cash flow analysis contravention. However, the Court upheld a contravention that related to a failure to advise the CEO or the Board in relation to the ASX disclosure of a Deed of Company Indemnity ("the DOCI contravention"), and ASIC succeeded in its appeal in relation to a failure to advise the Board about aspects of the actuarial estimates of asbestos liability (the "superimposed inflation contravention"). **(c) Decision**  **(i) Relief from liability** Section 1317S of the Act provides that the Court may either wholly or partly relieve from liability a person who has contravened a civil penalty provision if it appears to the Court that the person has acted honestly, and having regard to all circumstances of the case, the person ought fairly to be excused for the contravention. Section 1318 relevantly provides the Court with a similar ability in relation to liability for breaches of duty in the capacity as an officer of a corporation. The Court affirmed the primary judge's approach to the question of honesty, confirming that:it is not necessary for a person to give evidence that they acted honestly;a finding of honesty can be made from examining the circumstances of the breach and using evidence such as testimonials as to the person's conduct before and after the breach; andit is necessary that the court be positively satisfied that the person had acted honestly (*Australian Securities and Investments Commission v Adler* [2002] NSWSC 483). The Court overturned the finding at first instance that Morley had not acted honestly, holding that although Morley did not explain why he described the review of the cash flow model in misleading terms, "explanation of a negligent failure can often not be given beyond the fact of that failure." As the Court did not find him to have lacked honesty, or to have been "flagrant" in his contravention, the separate question of whether Morley ought fairly to be excused needed to be "determined afresh".  It was held that Morley should not be relieved of liability, as despite positive character evidence and contrition, he was a senior executive in a major public company, and "proper corporate governance and business activity depend on business leaders adhering to standards not only of honesty but also of care and diligence."  **(ii) Disqualifications** Section 206C of the Act allows the Court to disqualify a person from managing corporations for a period it considers appropriate. It can do so where a declaration is made that a person has contravened a civil penalty provision, and the Court is satisfied that the disqualification is justified. Section 206E provides a similar power in relation to multiple contraventions of the Act. The Court had to reconsider Morley's disqualification under section 206C, as the original order relied on a finding that the Draft ASX Announcement had been approved.  Morley's disqualification was reduced from 5 years to 2 years due to the finding that the ASX announcement had not been approved. The disqualification was considered appropriate despite contrition and character references that indicated a low need for personal deterrence because the nature and significance of the contravention made general deterrence an important consideration, and it was "necessary that relief be granted appropriate to mark significant failure in performance of the duties of a senior executive of a large public corporation and to maintain public confidence in the law's upholding of corporate standards." Shafron was found to have contravened the Act twice, and therefore section 206E was applicable. Of the two contraventions, one was constant (the DOCI contravention) and one was only found on appeal (the superimposed inflation contravention). With respect to the DOCI contravention, it was held that there was no material error shown in the initial 7 year disqualification. This was because:the contraventions could not be properly classed as "involving momentary inattention or lapses of judgment";personal deterrence was important, as despite Shafron stating his acceptance of responsibility it was held that he lacked contrition, and sought to blame others for the failures in his contraventions; andhis failure in duty was serious, as he was a senior executive in a large public company, disclosure of the DOCI information was firmly within his responsibilities, and he was motivated to avoid disclosure by a desire that the existence of a put option not be disclosed.With respect to the superimposed inflation contravention, the Court agreed with ASIC's submission that it was of equal seriousness to Morley's cash flow analysis contravention. However, a 3 year disqualification period was considered appropriate because public and personal deterrence were "more weighty considerations" in relation to Shafron. This disqualification was subsumed within the other period of disqualification, so Shafron's suspension was unchanged on appeal. **(iii) Pecuniary penalties** Section 1317G of the Act relevantly allows for pecuniary penalty orders in the case of "serious" contraventions of corporation civil penalty provisions. As stated above, these are only expected to be imposed where disqualification is an inadequate remedy. The Court held that a disqualification alone was inadequate in both cases, and both contraventions were considered to be "serious". Shafron was unsuccessful in seeking to draw analogy with other cases, but his penalty was reduced from $75,000 to $50,000 because the penalty for the superimposed inflation contravention was lower than that for the contravention that was overturned on appeal. Morley's penalty was reduced from $35,000 to $25,000 as a result of the finding that the draft ASX announcement was not approved. **(d) High Court appeal** On 13 May 2011, the High Court of Australia granted special leave to appeal in relation to applications brought by ASIC and Mr Shafron. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byHeadline/11-98%20MR%20ASIC%20granted%20special%20leave%20to%20appeal%20James%20Hardie%20decision?opendocument" \t "_new).etailed Contents**5.2 The burden of proving that a controller has taken possession of property for the purpose of section 419A(2) of the Corporations Act** (By Katrina Sleiman and Ben Williams, Corrs Chambers Westgarth) De Vries & Tayeh as joint administrators of Rildean Pty Ltd v Rapid Metal Developments (Australia) Pty Ltd [2011] NSWCA 100, New South Wales Court of Appeal, Hodgson JA, Macfarlan JA and Sackville AJA, 28 April 2011  The full text of this judgment is available at:[http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151426](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151426" \t "_new) **(a) Summary** On 12 July 2002, De Vries & Tayeh (together, "the appellants") were appointed joint voluntary administrators of Rildean Pty Ltd, a scaffolding hire business. On 18 July 2002, the appellants were appointed agents for the mortgage in possession of the assets of Rildean, pursuant to a charge.  Rapid Metal Developments (Australia) Pty Ltd ("the respondent"), brought a claim against the appellants pursuant to section 419A(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"), claiming payment for hire charges and for the value of equipment hired by Rildean. Alternatively, the respondent claimed that the appellants had committed the tort of conversion.  The primary judge found for the respondent both under section 419A and for conversion.  Allowing the appeal, the Court of Appeal found that the respondent failed to prove that all of the equipment hired by Rildean was in Rildean's possession at the date of appointment of the appellants as controllers. **(b) Facts** Rildean operated a business that supplied and erected scaffolding for use on business sites.  It acquired its equipment by either hiring or purchasing from a range of suppliers.  In September 2001, Rildean entered into a hire agreement with the respondent, which included the following clause:   "At the end of any period of hire, [Rildean] will be responsible for replacing all lost or damaged Goods at [the respondent]'s ruling list prices at the time of replacement or repair, in addition to hire charges already rendered." On 12 July 2002, the board of Rildean appointed the appellants as voluntary administrators pursuant to section 436A of the Corporations Act. That appointment was terminated by Court order on 17 July 2002.  On 18 July 2002, Navmost Pty Ltd ("Navmost") appointed the appellants as agents for the mortgagee in possession of Rildean's assets, pursuant to a charge granted to Navmost.  On 25 July 2002, an order was made for the winding up of Rildean and the appointment of an official liquidator.Rildean held a large quantity of scaffolding equipment at the date of the appointment of the appellants as controllers, both at its own yard and on building sites to which it had hired equipment. Some of the equipment was owned by Rildean and some of it had been hired. On 19 July 2002, the respondent demanded the return of all of the respondent's equipment that had been hired to Rildean. A total of 26,731 items remained outstanding. The appellants were contacted by many suppliers, claiming that Rildean was in possession of scaffolding owned by them.  However, the appellants could not identify the owners of all the scaffolding and we unable to come to any agreement with the suppliers. On 8 August 2002, the appellants, Rildean and others entered into a licence deed with Action Construction Services Pty Ltd ("ACS") regarding the scaffolding equipment in Rildean's control.  The appellants had a stocktake undertaken of the equipment in Rildean's yard and on various building sites. The stocktake report found that Rildean held about 154,000 items of equipment, although not all building sites had been accessed for the report. The appellants engaged an expert to attempt to determine the ownership of the scaffolding. The expert's view was that such a determination was virtually impossible and recommended that the scaffolding should be auctioned and the proceeds distributed among the claimants in proportion to the quantities claimed. Despite objections from the respondent, the appellants entered into a sale agreement with ACS, which provided, inter alia, that Rildean was not selling any scaffolding belonging to a third party and Rildean and the appellants gave no warranties that Rildean owned or was capable of transferring title to ACS.  **(c) Decision**The respondent brought a claim under section 419A of the Corporations Act for the payment of hire charges and interest. It also claimed, pursuant to section 419A and the hiring agreement, the value of the goods by reference to the respondent's price sheet.  Alternatively, the respondent claimed damages for the tort of conversion, both for Rildean's own use and for the use by Navmost and ACS by reason of the licence agreement and the sale agreement.  The primary judge found the appellants liable for both claims under section 419A and for conversion.  On appeal, the appellants' primary contention was that the respondent had failed to prove, on the balance of probabilities, that all of the respondent's unreturned scaffolding was in Rildean's possession at the date of the appellants' appointment as controllers. Therefore, section 419A did not apply and conversion could not be made out. That submission was based on the significant number of items that were lost, stolen or returned to other suppliers. The respondent's case was "all or nothing", in that it could only succeed if it showed that all of their unreturned scaffolding was still in Rildean's possession at the date of appointment. While it had been open to the respondent at the trial to pursue an alternative claim based on its entitlement to only a portion of the scaffolding equipment, it chose not to do so and it was not open to the respondent to pursue the appeal on that alternate claim.  **(i) Burden of proof** The appellants argued that the primary judge had reversed the burden of proof with respect to possession such that it fell to the appellants to prove on the balance of probabilities that Rildean had not retained possession of the equipment until the date of the appellants' appointment as controllers. Sackville AJA explained that the respondent indeed bore the legal onus of proof although the appellants bore the onus of adducing evidence sufficient to raise a doubt - the evidential burden. His Honour found that, while the primary judge's reasoning on the matter was not easy to follow, he did not erroneously reverse the onus of proof. **(ii) Was the burden of proof discharged?**As there was no challenge to any findings of credit made by the primary judge, Sackville AJA stated that the Court of Appeal was in as good a position as the primary judge to decide the matter on the facts and that it was open to the Court of Appeal to draw its own inferences from the evidence. His Honour undertook a detailed examination of the evidence and found that the primary judge's reasons indicated that he had failed to pay enough regard to the heavy "all or nothing" burden that the respondent bore, which required the respondent to establish that all the items of equipment were in Rildean's possession.Sackville AJA made reference to various deficiencies in the evidence and found that despite those deficiencies, it was very difficult to conclude that the respondents had discharged the burden of proving that all but an insignificant portion of the equipment remained in Rildean's possession.**(iii) Conclusion** Sackville AJA, with whom Hodgson and Macfarlan JJA agreed, found that the respondent failed to prove that all of the equipment that it had hired to Rildean was in Rildean's possession at the date of appointment of the appellants as controllers. His Honour found that significant quantities of equipment had been lost, stolen or returned to the wrong supplier. Therefore, section 419A of the Corporations Act did not apply and the basis for conversion was not made out. **(iv) Should the primary judge have excused the appellants pursuant to section 419A(7) of the Corporations Act?** Having allowed the appeal on the question of possession, the Court of Appeal was not required to consider this point. However, his Honour stated that where controllers derive a benefit from the use of goods owned by third parties but do not adduce evidence as to the quantum of those benefits, a court would be reluctant to excuse those controllers from liability to pay hire charges. **(v) Does section 419A(2) of the Corporations Act extend a corporation's liability to payments that fall due during a period of hire?** The respondent claimed the value of equipment that had been lost or stolen while in the appellants' possession, pursuant to section 419A(2) and the hire agreement. While not necessary to determine the appeal, Sackville AJA found that section 419A(2) does not extend to a liability under a hire agreement when the liability is not incurred until the end of the period of hire. Although the liability under the hire agreement arose at the end of a period of hire, the nature of the liability was not "attributable to a period" as is required by section 419A(2).etailed Contents**5.3 De facto directors cannot appoint an administrator without resolution of formally appointed directors** (By James Russell, Mallesons Stephen Jaques) Xie v Crisp [2011] VSC 154, Supreme Court of Victoria, Ferguson J, 20 April 2011  The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSC/2011/154.html](http://www.austlii.edu.au/au/cases/vic/VSC/2011/154.html%22%20%5Ct%20%22_new) **(a) Summary** In this case, the Court found that de facto directors cannot resolve to appoint an administrator without the resolution of a majority of the formally appointed directors of the company.  Ferguson J found that there is a "contrary intention" in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) such that the term "directors" in section 436A of the Corporations Act (which deals with the appointment of an administrator) should be limited to directors who have been formally appointed.  This may be contrasted with section 459P(1) of the Corporations Act, where any director, de facto or otherwise, can apply to have a company wound up.  However, despite the procedural defect in the appointment of the administrator (contested by the sole formal director), the Court exercised its power under section 447A of the Corporations Act to enable the administration to continue.  **(b) Facts**In 2008, three people involved in the plastics industry (Mr Anderson, Mr Xin and Ms Xie) decided to start a business importing plastic film.  XYZ Packaging Pty Ltd was formed in December 2008, with Ms Xie and Ms Shi (Mr Xin's wife) registered with ASIC as directors holding equal shares.  Mr Anderson and Mr Xin were not formally appointed as directors because they sought to conceal their involvement in the business, as XYZ would operate in competition with their existing business interests.  Whilst not formally appointed as directors, Mr Xin and Mr Anderson conducted the day to day business and management of XYZ with Ms Xie throughout the company's start up phase. In about January 2009, the three went to China to investigate potential suppliers of plastic film, but they could not find any suitable supplier.  Instead, they decided that they would purchase a plastic film making machine in China and bring it to Australia.  Later, it became apparent that the Commonwealth Bank would not finance the purchase of the machine if purchased by XYZ, and so Olympic Polymers Pty Ltd, a company which Mr Anderson was a director of, instead purchased the machine from a Chinese owner in May 2009 with finance from the CBA (Olympic as borrower, XYZ as guarantor).   In early May 2009, a unit trust was established with XYZ named as the trustee.  Ms Xie was the initial unit holder, holding 100 units, and then later signed forms transferring 51 units to a trust associated with one of Mr Anderson's companies (Rhyll Investments), and 20 units to a trust represented by Mr Xin, with Ms Xie holding the remaining 29 units.  Also in early May, on the instruction of her husband, Ms Shi resigned as director of XYZ and transferred her shares in XYZ to Ms Xie.  Mr Xin's employment with a plastics manufacturer had been terminated and, unaware of the ASIC historical search function, Mr Xin thought it would be best for his wife to resign as director and transfer her shares to Ms Xie to conceal his involvement in XYZ from his previous employer.  At this time, Ms Xie was the sole director and shareholder registered with ASIC. On 2 June 2009, the parties entered into a unit holders agreement.  Under the agreement, any holder of 20% or more of the units would be entitled to representation on XYZ's board, which would be comprised of two unit holders as well as Ms Xie as the initial director.   The agreement also appointed Mr Anderson as Chairperson of the Board.  Whilst not registered with ASIC as directors, it was envisaged that Mr Anderson and Mr Xin would attend directors' meetings and vote as if they were directors representing unit holders. In about November 2009, Mr Anderson and Ms Xie had a falling out.  Mr Xin's relationship with Ms Xie also deteriorated shortly thereafter.  On 19 February 2010, XYZ closed its doors without having manufactured any plastic. On 5 March 2010, Mr Anderson and Mr Xin were recorded with ASIC as directors of XYZ.  The notice of appointment was lodged electronically and signed by XYZ's accountant, but not by Ms Xie.  Also on that date, a purported notice of a meeting of directors to be held on 12 March 2010 was signed by Mr Anderson and circulated.  One of the items on the agenda was to consider whether the company was solvent and whether it was necessary to appoint a voluntary administrator. Ms Xie did not attend the meeting.  She argued that it had not been validly called, as Mr Anderson and Mr Xin had not been validly appointed as directors.  Nevertheless, Mr Anderson and Mr Xin proceeded with the meeting in her absence and, under advice that XYZ was insolvent or likely to become insolvent, resolved to appoint an administrator of XYZ (Mr Crisp).  Ms Xie did not become aware of the appointment of Mr Crisp until 15 March 2010.  The first meeting of creditors was then held on 23 March 2010.  Ms Xie then commenced proceedings on 9 April 2010, seeking to overturn the appointment of Mr Crisp as administrator.**(c) Decision**The most important questions for the Court to consider in this case were: (i) whether Mr Anderson and Mr Xin had been validly appointed as directors; (ii) if not, whether they were "de facto" directors;  (iii) if they were de facto directors, whether a de facto director has the authority to appoint a voluntary administrator under section 436A of the Corporations Act; and (iv) if a de facto director has no such authority, whether the Court should exercise its discretion under section 447A of the Corporations Act to order that the administration continue.  On a preliminary issue, Ferguson J found all witnesses, other than Ms Xie, to be credible.  His Honour formed the view that Ms Xie's evidence ought not be relied upon where it was in conflict with the other witnesses. **(i) Were Mr Anderson and Mr Xin validly appointed as directors?** After finding that the unit holders agreement was valid and binding on the parties, Ferguson J considered whether by executing the agreement, Ms Xie as sole director of XYZ resolved to appoint Mr Anderson and Mr Xin as directors of the company.  Under the unit holders agreement, the board of directors was to comprise an initial director, Ms Xie, with Mr Anderson and Mr Xin also to be present on the board as unitholder representatives.   Ferguson J found that it was the company's constitution, not the unit holders agreement, that governed the internal management of XYZ and that under the constitution, a "director" was defined as a person "formally and legally appointed as a director".  Ferguson J found that, on the evidence, Ms Xie did not decide at the time when the unit holders agreement was executed that Mr Anderson and Mr Xin should be appointed formally and legally as directors of XYZ.  Further, their appointment on 5 March 2010 by electronic lodgment with ASIC was defective, because Ms Xie did not resolve to appoint them formally and legally at that time.**(ii) Were Mr Anderson and Mr Xin "de facto" directors on 12 March 2010?** The definition of "director" in section 9 of the Corporations Act states that, unless the contrary intention appears, a director includes a person who is not validly appointed as director but who nevertheless acts in the position of director.To assess whether a person is in fact a de facto director, Ferguson J stated that "it is necessary to look at what tasks they perform and what decisions they make rather than to consider, in a contextual vacuum, whether they themselves or others subjectively thought they were directors."  In Ferguson J's opinion, it is more likely that directors of a small proprietary company would be involved in day to day operational issues as well as high level management.  As all three were involved in the day to day operations of the company, and all participated in high level management decisions together, Ferguson J found that all three were acting in the role of directors of XYZ.  Whilst not formally appointed, both Mr Anderson and Mr Xin were found to be "de facto" directors under section 9(b)(i) of the Corporations Act. **(iii) As "de facto" directors, were Mr Anderson and Mr Xin authorised to convene a meeting of XYZ and appoint an administrator?**Section 436A of the Corporations Act states that a company may appoint an administrator if the board has resolved to the effect that, in the opinion of the directors voting for the resolution, the company is insolvent or likely to become insolvent.  The question for the Court to consider therefore was whether, by their resolution dated 5 March 2010, Mr Anderson and Mr Xin had validly resolved to appoint Mr Crisp as administrator of the company. Ferguson J found that a "contrary intention" appears in section 436A of the Corporations Act, such that the term "directors" in that provision should be limited to directors who have been formally appointed.  The remedy for appointing an administrator lies with the company, not with individual directors.  Ferguson J contrasted this with section 459P(1) of the Corporations Act, where any director acting alone can apply to have the company wound-up, and this would include a de facto director.  On this finding, as they had not been formally appointed as directors, Mr Anderson and Mr Xin had no authority to appoint an administrator, but would have authority to unilaterally apply for the company to be wound-up.**(iv)  Was XYZ insolvent and if so, should the Court exercise its discretion under section 447A of the Corporations Act?**It was not clear when XYZ was required to repay funds that it had borrowed from Olympic and Ms Xie.  However, on the basis of BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, Ferguson J found that it was necessary to imply a term into the loan agreements such that when XYZ closed its doors, the amounts loaned were immediately due and payable.  Ferguson J found that if XYZ was not insolvent as at 12 March 2010, it was highly likely that it would become insolvent.  In considering whether the Court should exercise its powers under section 447A of the Corporations Act, Ferguson J considered the following factors: (1) the stage that the administration had reached; (2) the financial position of the company; (3) whether the business could continue if it was returned to the control of Ms Xie either alone or in conjunction with Mr Anderson and Mr Xin; (5) whether the continued administration would be in the best interests of creditors; (6) the purpose of Part 5.3A of the Corporations Act and whether that purpose would be best served by making the orders sought; and (7) whether there are any better options available to deal with the company's future.  Ferguson J found that the length of the administration before Court proceedings was not insignificant, that nothing had changed since the appointment of the administrator to improve XYZ's financial position, that Ms Xie would not be able to operate the company without Mr Anderson and Mr Xin, that the business was still in its start up phase and so it had no employees, customers or third parties that would be affected by the administration continuing, and that there would be a good outcome for creditors if the administration continued.  Under these circumstances, Ferguson J was satisfied that the Court should exercise its discretion under section 447A to enable the administration to continue.etailed Contents**5.4 Valid exercise of a chairperson's casting vote in a creditors' resolution for voluntary winding up of a company** (By Andrew Nicholls, DLA Piper) Plumbers Supplies Co-operative Limited v Firedam Civil Engineering Pty Limited [2011] NSWSC 325, Supreme Court of New South Wales, Barrett J, 20 April 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/325.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/325.html%22%20%5Ct%20%22_new)**(a) Summary**The plaintiff, a creditor of the defendant, challenged the decision of the defendant's administrator as chairperson of a creditors' meeting to exercise a casting vote in favour of a voluntary winding up of the defendant. The plaintiff alleged that the administrator had failed to consider the best interests of the creditors as a whole in exercising the casting vote. In assessing the administrator's decision, Barrett J held there was no impropriety on behalf of the administrator and that is was open to the administrator to conclude that a winding up was in the best interests of all the creditors. Barrett J summarised the considerations for the Court when assessing the propriety of a chairperson's exercise of his or her casting vote in a creditors' meeting.**(b) Facts** The plaintiff, Plumbers Supplies Co-operative Limited, provided plumbing supplies to the defendant, Firedam Civil Engineering Pty Ltd. The defendant owed the plaintiff a debt of $48,000 for goods sold and delivered in March 2010. In June 2010 the plaintiff filed an originating process seeking a creditors winding up of the defendant. In October 2010 the defendant was placed into voluntary administration by its sole director.  The second meeting of creditors in the administration commenced on 18 November 2010 and was adjourned to 26 November 2010. Prior to the second meeting the administrator provided creditors with an "information package" containing a report by the administrator, the notice of meeting, a proxy form and a proof of debt form.   The administrator's report disclosed potential recovery claims by a liquidator for a number of voidable transactions including instances of unfair preference. The report mentioned that Old Bawn Pty Ltd ('Old Bawn') had recovered through garnishment $496,868.24 plus GST from the defendant in March 2010. The administrator stated in the report that this prima facie constituted an unfair preference and could be made subject to a liquidator recovery claim. Of concern to the plaintiff was that recovery of an unfair preference payment could only be claimed where the payment was made six months before the date of the appointment of the administrator in an administrator-lead creditor's winding-up. Because the defendant's administrator was appointed on 15 October 2010 the payment by the defendant to Old Bawn in March 2010 was outside the permitted timing of such a claim.  However, if the winding up of the defendant under the administrator could be prevented, and the plaintiff could continue with a claim based on its June 2010 application for a creditors winding up, this would allow a relation-back day that would cover the payments made to Old Bawn in March 2010. At the second creditors meeting, the administrator, as chairperson of the meeting, put forward a resolution calling for a creditors' voluntary winding up of the defendant. The resolution was put to a vote, but failed to achieve the necessary majority by number of creditors voting and majority by value of creditors voting required to pass the resolution under regulation 5.6.21 of the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default). The administrator, as chairperson of the meeting, exercised its power under regulation 5.6.21(4) to exercise a casting vote in such circumstances and voted in favour of winding up the defendant company. The plaintiff challenged the exercise of the administrator's discretion as chairperson to exercise a casting vote under section 600B and section 447A of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The plaintiff asserted that the administrator had improperly exercised its authority by failing to consider the interests of the creditors as a whole. **(c) Decision**  **(i) The role of the Court in assessing an exercise of a casting vote**Barrett J confirmed that the Court's function when assessing the exercise of an administrator chairperson's exercise of the casting vote under section 600B of the Corporations Act is to determine "whether the decision was conscientiously made by reference to all relevant considerations appropriately identified and weighed by [the chairperson]". Barrett J noted authorities that stated it was not the Court's role to judge the wisdom of the exercise of a casting vote by a chairperson, but merely the propriety of its exercise. The Court's assessment would also need to be made in light of all the material available to the chairperson. **(ii) Duty of an administrator when exercising a casting vote** Barrett J canvassed the leading cases regarding the duty of a person enabled by regulation 5.6.21(4) to exercise a casting vote at a meeting of creditors and summarised the key principles arising from these authorities, including the following:An administrator, when exercising a casting vote as a chairperson, is subject to officer's duties including the duty to act for a proper purpose. The chairperson has a discretion to exercise a casting vote, but should only refrain from exercising a casting a vote to resolve a deadlock where there are good reasons for doing so. Failure to exercise the casting vote for some irrational or irrelevant reason is inconsistent with the administrator's duty to act for a proper purpose. The chairperson must take into account relevant matters and leave out of account irrelevant matters based upon the context of the situation, and should exercise their vote according to what they perceive to be the best interests of those affected by the vote. Good faith alone might not be sufficient to prevent a vote being set aside. There is no rule that the chairperson should use their casting vote to favour the majority in value creditors over the majority in number creditors. The chairperson should consider the objectives of Pt 5.3A in exercising their casting vote. Misleading statements or omissions in an administrator's report, or inadequacy or superficiality in an administrator's investigation of a company's business, property, affairs and financial circumstances, may justify setting aside the vote on a resolution at creditor's meeting. Paying a premium to creditors who supported the Deed of Company Arrangement but not to a dissident creditor will justify a setting aside by the Court. **(iii) Had the administrator discharged his duty to consider all relevant interests?** Barrett J concluded there was no evidence produced by the plaintiff to suggest that the report presented by the administrator to creditors was inadequate or superficial, or was apt to mislead the creditors.  In addition, there was sufficient evidence to suggest the administrator acted in good faith and that the administrator held a subjective belief the decision he made was in the best interests of those affected by the vote. There was also no evidence that the administrator had taken into account irrelevant considerations or that he had failed to take into account any relevant considerations. His Honour concluded that although some of the creditors would lose the ability to seek a liquidator's claim for the payment made to Old Bawn through a winding up at the meeting, it was open to the administrator to take the view that a winding up initiated at the meeting was in the best interests of all the creditors. This was because of legitimate concerns that the defendant was insolvent, and that pursuit of liquidator's claims would be uncertain and time consuming and had the potential for adding substantial costs to the creditors through funding the litigation. Barrett J therefore held that the plaintiff had failed to establish a case for an order under section 600B of the Corporations Act 2001 before the Court, and that accordingly there was no basis for making any order under section 447A. The plaintiff's amended originating process from June 2010 was also dismissed.etailed Contents**5.5 Federal Court refuses application for interlocutory injunction to restrain resolutions being put to the Annual General Meeting** (By Caroline Wong, Mallesons Stephen Jaques) Stratford Sun Limited v OM Holdings Limited; In the Matter of OM Holdings Limited [2011] FCA 414, Federal Court of Australia, Foster J, 19 April 2011The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2011/414.html](http://www.austlii.edu.au/au/cases/cth/FCA/2011/414.html%22%20%5Ct%20%22_new)  **(a) Summary**  Justice Foster considered whether OM Holdings Limited should be restrained from putting certain resolutions to the Annual General Meeting.  Applying the principles relevant to whether an interlocutory injunction should be granted, Foster J held that the balance of convenience and justice did not favour granting the injunction.   **(b) Facts** Stratford Sun Limited ('Stratford Sun') is an investment vehicle incorporated in the British Virgin Islands.  Its only interest at the time of the hearing was its shareholding in the defendant, OM Holdings Limited ('OMH').  OMH is a public company incorporated in Bermuda and listed on the Australian Securities Exchange ('ASX').  OMH issued a Notice of Meeting which was also lodged with the ASX.  The Notice of Meeting asked shareholders to pass resolutions to authorise the directors to issue up to 345,000,000 new fully paid ordinary shares in OMH capital at an issue price which was yet to be determined, but which would be at least 80% of OMH shares' volume weighted average market price over the last five days in which they were traded on the ASX ('Resolution 6').  The share issue was to coincide with the dual listing of OMH on the Hong Kong Stock Exchange.  Stratford Sun applied for urgent interim injunctive relief to restrain OMH from submitting some of the proposed resolutions to the shareholders, including Resolution 6.**(c) Decision** Justice Foster applied the principles generally applicable to the granting of an interlocutory injunction.  The plaintiff must show that:there is a serious question to be tried and the plaintiff has made out a prima facie case;unless an injunction is granted, the plaintiff will suffer irreparable injury for which damages will not be an adequate compensation; and the balance of convenience favours the granting of an injunction. **(i) Serious question to be tried** Justice Foster applied the principle that it is sufficient if the plaintiff shows that there is a sufficient likelihood of success to justify preserving the status quo pending the trial.  Stratford Sun claimed that OMH had failed to comply with various sections of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and that the Notice of Meeting failed to comply with ASX Listing Rule 7.3, which outlines the requirements for a valid Notice of Meeting notifying shareholders of proposed resolution(s) to issue new shares.  Stratford Sun submitted that the Notice of Meeting provided inadequate information in relation to Resolution 6.  Justice Foster proceeded on the assumption that there was a serious question to be tried and that the claim for an injunction was sufficiently connected to the claim for final relief that an injunction could be granted if the balance of convenience favoured granting it. **(ii) Irreparable injury** Stratford Sun submitted that it would suffer irremediable prejudice if an injunction was not granted because OMH shareholders would have voted on a fundamental issue on the basis of inadequate disclosure.  Stratford Sun also submitted that once OMH was listed on the Hong Kong Stock Exchange, the rights and remedies available to the parties would be very different because the laws and listing rules of Hong Kong would affect the parties' rights.  OMH submitted evidence that showed that only one shareholder had complained to OMH in relation to the Notice of Meeting and the Explanatory Statement, and the complaint related to the transaction rather than the adequacy of the information provided.  Further, the ASX had confirmed to OMH that it had no objection to their Notice of Meeting.  OMH also submitted that an injunction would be likely to delay the progress of the Hong Kong Stock Exchange listing and could have a detrimental impact on the listing's prospects of success because the delay would make the listing less attractive to investment funds and institutional investors. **(iii) Balance of convenience** Justice Foster assessed and compared the prejudice or hardship likely to be suffered by OMH and any affected third parties if the injunctions were granted with that which was likely to be suffered by Stratford Sun and other shareholders in OMH if no injunction were granted.  He considered that the parties' rights were unlikely to materially alter before the final hearing and there was a very real possibility that the proposed listing on the Hong Kong Stock Exchange and related share issue could be delayed by the interlocutory injunction.  Further, the other shareholders all expected the Annual General Meeting to go ahead, had not attempted to stop the meeting and were ready to vote on the resolutions.  Justice Foster held that, on balance, the application for interlocutory relief should be refused.etailed Contents**5.6 Recognition of foreign liquidators under the Corporations Act post Cross-Border Insolvency Act 2008**  (By Michael Catchpoole, Clayton Utz)  Re Chow Cho Poon (Private) Limited [2011] NSWSC 300, Supreme Court of New South Wales, Barrett J, 15 April 2011 The full text of this judgment is available at: [http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151293](http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151293" \t "_new) **(a) Summary** A Singaporean liquidator sought and obtained from the New South Wales Supreme Court declarations recognising his appointment pursuant to section 581(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Section 581(2)(a) provides that the Court must "act in aid of, and auxiliary to, the Courts of:          (i)  external territories; and          (ii)  States that are not in this jurisdiction; and         (iii)  prescribed countries; that have jurisdiction in external administration matters"   Barrett J held that once the criteria set out in section 581(2) have been met, the Court is obliged to assist the applicant by exercising its general jurisdiction. The Court, in considering whether to make the declarations sought by the Singaporean liquidator was required to consider whether an inconsistency arose between the [Cross-Border Insolvency Act 2008 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=101816" \t "Default) and section 581(2) of the Corporations Act.  The concern in this case was the similarity between the terms of Article 25 (that provides where assistance is sought by a foreign court or foreign representative, the court shall cooperate to the maximum extent possible with the foreign court or foreign representative) of the Model Law as enacted by the Cross Border Insolvency Act and the terms of section 581(2). Section 22(1) of the Cross Border Insolvency Act is to the effect that that Act prevails over the Corporations Act to the extent of any inconsistency.  The Court held that no inconsistency existed between the operation of section 581(2) and the Cross-Border Insolvency Act in this case. The Court also made a number of observations about when the provisions of the Cross-Border Insolvency Act will operate. Specifically, the Court held that a request by an overseas liquidator will not always amount to a request for assistance within the meaning of Article 25 of the Model Law. **(b) Facts** The High Court of the Republic of Singapore ordered Chow Cho Poon to be wound up on "just and equitable grounds" pursuant to the Singapore Companies Act (Cap 50) on 22 November 2007.  On 28 February 2008, the High Court of Singapore made an order authorising the Singaporean liquidator to open, close, redesignate and operate special accounts held with a number of financial institutions, including accounts held with Westpac. The liquidator, in support of the application, deposed to having become aware that the company had money on deposit with Westpac in Sydney, and having requested the release of those funds from Westpac. The evidence disclosed that Westpac refused to recognise the liquidators appointment unless an Australian Court order was obtained confirming his appointment. Accordingly, the liquidator applied, ex parte, to the New South Wales Supreme Court pursuant section 581(2) of the Corporations Act for declarations that:the Court recognise the appointment of the liquidator pursuant to the Singaporean High Court's order on 22 November 2007; the Court recognise the order of the Singaporean High Court of 28 February 2008 with respect to the operation of bank accounts; and the liquidator be entitled to operate the Westpac accounts.  **(c) Decision**  The Court had little difficulty in concluding that the requirements for the Court's assistance in section 581(2) were met by the applicant liquidator. In particular: Singapore is a prescribed country under Corporations Regulation 5.6.74(f); and a compulsory winding up ordered by the Singaporean High Court is an external administration matter within the meaning of section 580 of the Corporations Act.The Court next considered the nature of the assistance it was required to provide. Based on a series of authorities (including *Al Sabah v Grupo Torras* (SA) [2005] UKPC 1, *Ayres v Evans* (1081) 39 ALR 129 and *Re Independent Insurance Co Ltd* [2005] NSWSC 587) the Court described the nature of the assistance as being the exercise of the Court's general jurisdiction to "support the foreign court by causing its orders to have effect and the objectives of those orders to be achieved."  In supporting the foreign court, section 581(2) was held not to contain or involve the exercise of any discretion by the Court. The Court expressly stated that incongruence between the relevant foreign law and the relevant Australian law does not provide any basis for declining to provide assistance.  The Court then turned to the question of whether any inconsistency arose between section 581(2) and Article 25 of the Model Law as enacted by the Cross-Border Insolvency Act.The Court noted that under Article 25 of the Model Law, the Court is required to cooperate to the maximum extent possible with foreign courts or foreign representatives in relation to matters arising under Article 1 of the Model Law.  Article 1 of the Model Law provides that the Model Law applies where assistance is sought by a foreign court or foreign representative in connection with a foreign proceeding. Accordingly, in order for the Model Law to apply it must be established that the applicant is a "foreign representative" authorised in a "foreign proceeding."  Article 2 of the Model Law defines a "foreign proceeding" to mean "a collective judicial or administrative proceeding in a foreign State ... pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." The Court held that a winding up on the "just and equitable" ground may be an insolvency proceeding and hence a "foreign proceeding" for the purpose of the Model Law.  The Court held that the relevant question is not the statutory basis for the winding up order, but rather the objects and nature of the legislation under which the winding up order is made together with the factual basis for the winding up order. In reaching this conclusion the Court placed reliance on the Antiguan and English decisions in *Fundora v Standford International Bank Ltd* [2009] ECarSc 113 and *Re Stanford International Bank Ltd* [2010] EWCA Cviv 137, together with the United States cases of *Re Betcorp Ltd* 40 BR 266 (2009) and *Re ABC Learning Centres Ltd* 2010 WL5439808.  Accordingly, if the Singaporean winding up was a "foreign proceeding" then the Court was prepared to assume the Singaporean liquidator may well be a "foreign representative." The Court then considered what cooperation amounts to for the purpose of Article 25.  The Court held cooperation with a foreign court involves collaboration or a joint enterprise or complementary action between two or more courts each exercising independent jurisdiction. Cooperation did not in the Court's view amount to the enforcement of a foreign Court's order (in that respect the Court relied on the English authorities of *Rubin v Eurofinacne* both at first instance ([2010] 1 All Er (Comm 8) and on appeal (SA [2010] EWCA Civ 895)).  The Court held that a foreign representative seeking to enforce substantive rights in a foreign jurisdiction was not "cooperation" within the meaning of that term in Article 25, and accordingly, the relief sought in this case was not in the form of cooperation within the meaning of Article 25. Accordingly, no inconsistency arose between section 581(2) and Article 25. In this case the Singaporean liquidator was seeking to resolve a dispute about access to property in Australia rather than seeking assistance from the Court to cooperate in the relevant sense with the Singaporean process.  The Court, in passing, observed that aside from section 581, the Court may have the power to make a declaration as to the appointment of a foreign external administrator based on general law principles of comity between the courts of different nations. etailed Contents**5.7 The ability of shareholders to bring statutory derivative actions** (By Nicholas Kefalianos, DLA Piper) Sassine v Mondray Pty Limited [2001] NSWSC 297, Supreme Court of New South Wales, Barrett J, 15 April 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/297.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/297.html%22%20%5Ct%20%22_new) **(a) Summary** Charlie Sassine, a shareholder of Mondray Pty Limited ('Mondray') sought leave from the court to bring a statutory derivative action on behalf of Mondray against George Sassine for improperly directing proceeds from the sale of a property for his own benefit. Simultaneously, Charlie Sassine was also causing another company to bring a claim against the same defendant for the same proceeds in a context where both claims could not succeed. The Court held that the requirements of section 237 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') were not satisfied and so declined the application for a statutory derivative action. **(b) Facts**   Four brothers - Charlie Sassine, John Sassine, Milaad Sassine and George Sassine - were equal shareholders in three companies, Mondray, Ray and Sons Constructions Pty Ltd ('Ray Sons') and Sunrays Constructions Pty Ltd ('Sunrays'). In September 2006, the four brothers being members and directors of Mondray, agreed that Mondray would sell a property, the proceeds of which would be used to reduce the indebtedness of Ray Sons to the National Australia Bank, to which Mondray was a guarantor. The property was sold for $1,374,727, and George Sassine caused the proceeds to be disbursed as follows: (a) $335,000 to George Sassine;(b) 502,000 to Sunrays;(c) $100,000 to Nu-Look Building and Constructions Pty Ltd, a company owned and operated by George Sassine; and(d) $437,457 to Ray Sons. It was alleged these four payments were not referrable to any debt or obligation owed by Mondray, did not benefit Mondray and conferred an improper benefit on George Sassine. Charlie Sassine argued that George Sassine should render equitable compensation or pay damages of $1,374,727 to Mondray. Separate and earlier proceedings were pending during this application ('the 2007 proceedings'). The two proceedings were essentially the same, in that both concerned the same alleged improper disbursement. However, in the 2007 proceedings, it was cross-claimed by Charlie Sassine (and the other defendants) that George Sassine had breached his duty to Ray Sons, such that Ray Sons was entitled to recover from George Sassine. By comparison, in the proposed derivative action, Charlie Sassine alleged George Sassine had breached his duty to Mondray, such that Mondray was entitled to recover precisely the same proceeds as in the 2007 proceedings.It was submitted in the present application that Charlie Sassine cannot bring proceedings in which George Sassine is liable to account to Ray Sons for the net sale proceeds and also have George Sassine account to Mondray for the sale proceeds.**(c) Decision** In considering whether Charlie Sassine could bring a statutory derivative action, Barrett J had regard to section 237 of the Act. There was no doubt that Charlie Sassine, as a shareholder of Mondray, could apply to the Court for leave to bring the action pursuant to section 237(1). The issue was whether Charlie Sassine satisfied the conditions in which the Court could grant an application under section 237(2). These conditions are as follows:"The Court must grant the application if it is satisfied that: (a) It is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and(b) The applicant is acting in good faith; and(c) It is in the best interests of the company that the applicant be granted leave; and(d) If the applicant is applying for leave to bring proceedings- there is a serious question to be tried; and(e) Either:(i)  At least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or(ii) It is appropriate to grant leave even though subparagraph (i) is not satisfied." Sections 237(2)(a) and 237(2)(b) of the Act were not in contention, as it was agreed that these conditions had been satisfied. What was in question, however, was whether sections 237(2)(b), 237(2)(c) and 237(2)(d) of the Act had been satisfied. With regard to section 237(2)(b), Barrett J stated that it was for the applicant to show they were acting in good faith, as opposed to having the opposing party prove the applicant was acting in bad faith. Barrett J followed the earlier judgments in *Swansson v R A Pratt Properties Pty Ltd* [2002] NSWCS 583 and *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52, in stating that 'good faith' consists of an 'honest belief of the applicant that a good cause of action exists and has reasonable prospects of success'.  His Honour concluded that this had not been shown. Charlie Sassine had continued to pursue the 2007 proceedings in which Ray Sons sought compensation from George Sassine, despite his statutory derivative action application in which Mondray would seek compensation for the same proceeds. One of these claims had to fail and both could not be viable claims with good prospects of success. Charlie Sassine had taken no steps to distance himself from the 2007 proceedings and continued to push both proceedings.  Barrett J held that another relevant matter was that Charlie Sassine, despite having known all the relevant facts in early 2007 and having been able to have Mondray bring a claim against George Sassine, instead opted to join in having Ray Sons bring its claim. The fact that the competing claims could not both be sustained indicated, according to Barrett J, that Charlie Sassine could not possibly be acting honestly and in good faith. His Honour further held that the sale matters were relevant in determining whether the granting of the application was in the best interests of the company pursuant to section 237(2)(c). Actively attempting to secure recovery against the same defendant for another party in circumstances where Charlie Sassine acknowledged that one of the claims had to fail indicated granting such an application could not be for the best interests and welfare of the Mondray. Finally, Barrett J did not consider it necessary to have regard to section 237(2)(d) considering the earlier conclusions regarding sections 237(2)(b) and (c). However, his Honour did indicate that this was the least problematic issue from Charlie Sassine's viewpoint. Accordingly, Barrett J held that the requirements set out in section 237(2) had not been made out and the application for a statutory derivative action was denied.etailed Contents**5.8 No derivative suit on behalf of or in name of insolvent company** (By Claire Roberts, Blake Dawson Helena Hu v PS Securities Pty Ltd as trustee of the Joseph Family Trust [2011] NSWSC 303, Supreme Court of New South Wales, Ward J, 14 April 2011The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/303.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/303.html%22%20%5Ct%20%22_new) **(a) Summary** In Helena Hu v PS Securities Pty Ltd as trustee of the Joseph Family Trust, Ward J examined the question whether, and when, a derivative proceeding may be brought in the name of a company when that company is in liquidation.   Ward J held that while it may be appropriate for an individual to bring an action directly against a company in liquidation, it was usually inappropriate for an action to be brought in the name of that company by any party other than the liquidator.  **(b) Facts**  The applicant, Helena Hu, sought leave nunc pro tunc pursuant to section 500(2) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (permitting actions involving insolvent companies with court consent) to bring proceedings against Alphena Pty Ltd ('Alphena'), an insolvent company. Ms Hu also sought to bring a derivative suit on behalf of or in the name of Alphena to enforce its right of indemnity out of trust assets.  Ms Hu was owed a large sum of money by Alphena, the former trustee of the Joseph Family Trust. Ms Hu had been successful in obtaining a freezing order against the new trustee of that trust, PS Securities Pty Ltd. Ms Hu sought to secure the financial position of Alphena so that she, as a creditor, could be repaid.  Ward J granted Ms Hu leave to bring proceedings against Alphena, but refused her application to bring a derivative action.  **(c) Decision** Ward J held that while it was appropriate for Ms Hu to bring an action against Alphena, the fact that the liquidators were willing to bring an action against PS Securities meant that they, because of their special skill set and accountability, were the appropriate parties to bring that action.  **(i) Leave to proceed against a company in liquidation** Ward J noted that the discretion to grant leave to proceed against an insolvent company is 'broad but not absolute.' She highlighted that the reason leave must be specially sought is that multiple expensive and time consuming legal proceedings against a company in liquidation may not be ideal. In this instance, however, Ms Hu was seeking to take steps that would not be available to her under a proof of debt procedure, and as she was owed a large amount of money, and was Alphena's most substantial creditor, it was appropriate that leave be granted here.  **(ii) Leave to join an insolvent company in a derivative proceeding** Ms Hu sought leave to proceed in Alphena's name against PS Securities on two grounds - first, in reliance on the Court's inherent or equitable jurisdiction, and second, pursuant to section 511 of the Corporations Act.   Ward J stated that it would be 'monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill in equity, merely on the allegation that the trustees would not sue.' Ward J highlighted that it is important to look for unwillingness or inability on the part of the trustee to enforce applicable rights. She examined in turn the three key criteria highlighted by Barrett J in Carpenter v Pioneer Park Pty Ltd (2008) 71 NSWLR 577 ('Carpenter'). First, 'whether the proceedings proposed to be pursued have some solid foundation, in that they exhibit such a degree of merit as to be neither vexatious nor oppressive and to present reasonable prospects of success'. Second, 'the attitude of the liquidator to the question whether the proceedings should be pursued'. Third, 'whether 'practical considerations support the initiation of the proceedings' with particular reference to financial protection of the liquidator and the estate of the company by means of indemnity or, if indicated, security.'**(iii) Whether the proceedings proposed have some solid foundation**This matter was not in issue, as the defendants accepted that the proceedings satisfied this test.  **(iv) The attitude of the liquidator** This matter was contentious as the liquidators were of the opinion that they alone should manage the company in liquidation. The liquidators professed willingness to commence and prosecute the proceedings. Counsel for the liquidators argued that the training, special obligations upon, and independence of the liquidators, made them best placed to bring proceedings in such instances. Ms Hu's counsel argued that the delay, the perception that the liquidators were disregarding Ms Hu's interests and the lack of initiative in bringing proceedings were all good reasons to allow Ms Hu to bring a derivative proceeding in the name of Alphena.  Ward J considered both lines of argument at length, and ultimately concluded that the conduct of the liquidators was not 'such as to warrant a departure from the ordinary position (based on sound policy reasons) that the liquidators should have the conduct of proceedings to enforce the company's claim for indemnification in respect of debts incurred by it as trustee.' Ward J stated in her concluding remarks that 'but for' the liquidators' 'willingness and ability to prosecute the claims' she would have 'granted leave to Ms Hu to continue the proceedings.'**(v) Whether 'practical considerations support the initiation of the proceedings'**  As to the third criteria in Carpenter, it appeared clear that Ms Hu had the financial ability to support any undertakings she made. Ward J finally considered some additional discretionary matters - such as the fact that Ms Hu owed no common law or statutory duty to the company or creditors, and that requirements such as those in sections 1321 and 447(2A) of the Corporations Act may not apply to a decision reached by Ms Hu.etailed Contents**5.9 A tax assessment will not be set aside unless there is a 'genuine dispute' between the parties** (By Rosemary Gibson, Freehills)Commissioner of State Revenue Victoria v Gas Ban Pty Ltd (in liq) formerly Capital Securities (Aust) Pty Ltd [2011] VSCA 89, Court of Appeal of the Supreme Court of Victoria, Nettle and Mandie JJA and Hargrave AJA, 6 April 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/vic/VSCA/2011/89.html](http://www.austlii.edu.au/au/cases/vic/VSCA/2011/89.html%22%20%5Ct%20%22_new) **(a) Summary**The Commissioner of State Revenue issued three assessments of Capital Securities' tax liability. Capital Securities did not respond within the required time but subsequently objected to the assessments of wages, commissions and payments to consultants. Capital Securities provided new figures to the Commissioner. The Commissioner issued three reassessments which reflected the new figures, except for the figures relating to consultants and commissions. The Commissioner later issued a Final Notice and served a Statutory Demand for Payment of Debt. Capital Securities sought to have the Statutory Demand set aside. The main issue on appeal was whether there was a 'genuine dispute' between the parties within the meaning of section 459G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The Court held there was no genuine dispute because the notice of reassessment was conclusive evidence of the debt and Capital Securities had not proven otherwise; Capital Securities had failed to respond to repeated demands from the Commissioner to provide a basis on which the exemption was claimed, and Capital Securities had had sufficient notice and time within which to respond to the Commissioner's notices. **(b) Facts**  On 30 October 2007 the Commissioner issued three assessments of Capital Securities' tax liability. Capital Securities could object to the assessments under section 96 of the [Taxation Administration Act 1997](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=2032" \t "Default) within 60 days. Capital Securities did not respond to the assessments.On 10 December 2007 Capital Securities sent to the Commissioner profit and loss statements showing figures for years ended 30 June 2005, 30 June 2006 and 30 June 2007. On 13 December 2007, the State Revenue Office (SRO) asked Capital Securities to advise whether 'Consultancy Fees' and 'Commission Paid' were payments to contractors and if so, whether they were taxable or exempt. Capital Securities sent tables of figures to the SRO but it did not advise on the issue of contractors.  On 13 February 2008 Max Warlow of Max Warlow and Associates Pty Ltd emailed the Commission, on behalf of Capital Securities, listing corrected figures of 'assessed wages' as well as unverified 'payments to consultants and commissions'. He requested an extension of time in which to lodge the objection. On 25 March 2008, Mr Warlow emailed the Commissioner objecting to the assessments.On 15 August 2008 the SRO advised that Capital Securities' objection was not valid and time would not be extended. However, the Commission would issue reassessments of the wage and superannuation figures and commission and consultancy payments for the period 1 May 2005 to 30 June 2007. In relation to the default assessments, a reassessment may be issued if Capital Securities provided actual taxable wages. On 11 September 2008 the Commissioner issued three reassessments. The reassessments reflected the figures provided by Mr Warlow except for 'Commission Paid' and 'Consultancy Fees'. The reassessments were payable on 25 September 2008. Capital Securities did not pay any of the reassessment by the due date. On 7 October 2008 Mr Warlow provided accurate 'taxable wages' to the SRO. He noted that not all the 'payments to contractors' were taxable but did not elaborate. On 9 October 2008 the Commissioner issued a Final Notice stating payment of the reassessments was overdue. On 13 November the Commissioner issued an Urgent Notice Legal Action Pending. Client Securities did not respond to either notice. On 9 December the Commissioner served a Creditor's Statutory Demand for Payment of Debt for the total amount due under the reassessments. On 19 February 2009 the Commissioner requested invoices of the payments subject to the exemption sought. Capital Securities never provided the documents to the Commission. It offered to settle the matter by paying the outstanding sum 'under protest' if the Commissioner granted an extension of time in which to lodge fresh objections and set aside the statutory demand. On 17 March 2009 the Commissioner made an offer for Capital Securities to consent to an adjournment for a reassessment of the contractor payment exception and/or to give Capital Securities time to lodge an out of time objection in relation to the reassessment. Capital Securities did not accept this offer. The matter was listed to come before the court on 18 February 2009. Capital Securities applied for the Statutory Demand to be set aside. **(c) Decision**  At first instance, Associate Justice Efthim dismissed Capital Securities' application to set aside the statutory demand and extended time for compliance with the demand until 4 pm on 9 June 2009. Capital Securities appealed to the Judge, who held the assessments themselves were valid but found there was otherwise a genuine dispute as to whether the reassessments were valid. The Judge allowed the appeal and set aside the statutory demand. The Commissioner appealed to the Court of Appeal.The Court of Appeal first considered the issue of the validity of the reassessments. Section 9 of the Taxation Administration Act 1997 (Vic) allows the Commissioner to make 'one or more reassessments of a tax liability of a taxpayer'.  The Court upheld the Judge's findings that a notice of reassessment replaces the initial or previous assessment, without the need for the Commissioner to provide further notice to the taxpayer or to withdraw the initial assessment. The fact the Commissioner was considering the possibility of further reassessment did not, in the words of the trial Judge, render the reassessment 'tentative or provisional'. The second issue was whether there was otherwise a genuine dispute as to whether the reassessments were invalid. A company may apply to the Court to have a statutory demand set aside under section 459G of the Corporations Act 2001. Section 459H provides that the Court may set aside a statutory demand where the Court is satisfied 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'. A taxpayer is entitled to dispute the substantive liability to tax in review or appeal proceedings but bears the onus of doing so. Under section 127 of the Taxation Assessment Act 1997 (Vic), the production of a notice of assessment is conclusive evidence in all proceedings, except review and appeal proceedings, of the existence of the debt. The Court adopted and adapted the words of Mason and Wilson JJ in F J Bloemen Pty Ltd v Federal Commissioner of Taxation [1981] HCA 27 in observing that the intention of section 127 was 'to make it impossible for a taxpayer, in proceedings other than appeal against it, to challenge an assessment on any ground'. The Court held that the Commissioner's notice of reassessment was conclusive evidence that the reassessment had been duly made and that the amount and all particulars of the reassessments were correct. The Court also found the Judge had erred in concluding there was a 'glaring error' in the reassessment of the taxable wages from 1 May 2005 to 30 June 2005.  The reassessment recorded the taxable wages for those two months as the yearly wages for the year 1 June 2004 to 30 June 2005 as given by Mr Warlow on 13 February 2008. The Commissioner was entitled to reassess the tax payable by Capital Securities. The Commissioner repeatedly requested Capital Securities to provide particulars of the basis on which a tax exemption was claimed for commissions and consultants fees but none were provided. The Court of Appeal concluded there was a 'rational basis' for the Commissioner's assessment and reassessment for the period May to July 2005 and there was no 'blatant error'.The Court also rejected a finding of the Judge that the SRO's letter on 15 August 2008 invited Mr Warlow to provide correct wage and superannuation figures and commission and consultancy payments so that reassessment could be issued for the relevant periods. There was no question of further information to be provided in relation to those reassessments and none was provided. There was no suggestion Capital Securities did not receive the reassessments or the notice to lodge an objection within 60 days The Court of Appeal concluded that the Judge should have held the tax debt the subject of the Commissioner's statutory demand was outside the area for genuine dispute for the purposes of section 459H(1) of the Corporations Act 2001.The final issue, which Capital Securities raised for the first time on appeal, was whether or not the Court should set aside the demand under section 459J(1)(b) of the Corporations Act on the basis there was 'some other reason' why the demand should be set aside. Capital Securities argued that it had not had an opportunity of contesting the Commissioner's assessment. The Court of Appeal rejected this argument. First, the email sent on 20 December 2007 attaching the relevant tables was not an objection but a response to the SRO's request for information. Second, the reassessments in fact took into account the information provided in that email such that Capital Securities was not disadvantaged. Further, Mr Warlow's letter of 7 October 2008 was self-evidently not an objection to the reassessments. Capital Securities' offer of a without prejudice payment of the amount of the tax debt was coupled with conditions which were 'understandably' unacceptable to the Commissioner. Finally, Capital Securities never provided the documents the Commissioner requested on 19 February 2009 and refused the Commissioner's offer of reassessment.etailed Contents**5.10 Definition of 'subsidiary' under section 736 of the Companies Act 1985 (UK) in the context of a commercial contract** (By John O'Grady and Joanne Tassone, Corrs Chambers Westgarth) Farstad Supply A/S (Respondent) v Enviroco Limited (Appellant) [2011] UKSC 16, UK Supreme Court, Lord Hope (Deputy President), Lord Rodger, Lord Mance, Lord Collins and Lord Clarke, 6 April 2011 The full text of this judgment is available at: [http://www.bailii.org/uk/cases/UKSC/2011/16.html](http://www.bailii.org/uk/cases/UKSC/2011/16.html%22%20%5Ct%20%22_new) **(a) Summary** Enviroco Limited ('Enviroco') appealed the decision handed down by the English Court of Appeal in Enviroco Limited v Farstad Supply A/S [2009] EWCA Civ 1399, where it was held that a subsidiary ceases to be the subsidiary of its parent company if the parent company provides security over the shares of its subsidiary, through the assignment of legal title of those shares. This is the case even when the parent company retains the right to vote and appoint or remove a majority of directors from the board. In the appeal to the UK Supreme Court, the critical question was whether at the time of the fire on board the *MV Far Service* ('vessel'), Enviroco was a subsidiary of Asco plc ('ASCO') in terms of section 736(1)(c) of the Companies Act 1985 (UK) ('Companies Act 1985') and as such entitled to the benefit of an indemnity given to the Aberdeen Service Company (North Sea) Ltd ('Asco UK Ltd') and its subsidiaries by Farstad Supply A/S ('Farstad'). As the contract arrangement ('contract') (referred to as a 'charterparty' in the judgment) between Farstad and Asco UK Ltd incorporated the statutory definition of subsidiary, the court was not prepared to interpret the meaning of 'subsidiary' proposed by Enviroco, as such an interpretation would amount to 'an impermissible form of judicial legislation'. The court unanimously dismissed the appeal and prevented Enviroco from relying on the indemnity clauses contained in the contract between Farstad and Asco UK Ltd, as at the relevant time, Enviroco was not a subsidiary of ASCO. **(b) Background** Farstad owned a vessel which was chartered by Asco UK Ltd under a contract which was entered into on 4 February 1994 and continued until December 2005. Asco UK Ltd was a wholly owned subsidiary of its parent company ASCO, a major oil and gas logistics company. Enviroco, whose business included the industrial cleaning of vessels, was until 1999 also wholly owned by ASCO. Both Enviroco and ASCO were registered in Scotland.The 1994 contract between Farstad and Asco UK Ltd contained a regime for risk allocation in the event of liabilities arising between the two companies. Under clause 33.5, Farstad was required to defend and hold harmless Asco UK Ltd, its Affiliates and Customers, in respect of any loss to the vessel or to Farstad's property. Clause 1(a) provided that 'Affiliate' means any subsidiary of the Charterer [ASCO UK Ltd] ... or a company of which the Charterer ... [is] a Subsidiary or a company which is another Subsidiary of a company of which the Charterer ... is a Subsidiary. For the purposes of this definition, 'Subsidiary' shall have the meaning assigned to it in Section 736 of the Companies Act 1985.'Pursuant to section 736 of the Companies Act 1985, a company is a 'subsidiary' of its holding company if the holding company:a) holds a majority of the voting rights in it; orb) is a member of it and has the right to appoint or remove a majority of its board of directors; orc) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, ord) if it is a subsidiary of a company which is itself a subsidiary of that other company.In November 1999, as part of a joint venture between Stoneyhill Waste Management Ltd ('Stoneyhill') and ASCO, all of the shares in Enviroco were converted into equal numbers of A and B ordinary shares, with ASCO retaining the A shares and Stoneyhill retaining the B shares. Under this revised arrangement, ASCO could appoint a majority of directors and could exercise a majority of the voting rights in Enviroco, now a joint venture company.A further transaction occurred in May 2000, when ASCO executed a Deed of Pledge (governed by Scots law) in favour of the Bank of Scotland (the 'Bank'), in which ASCO pledged, charged and assigned the Bank all of its A shares in Enviroco as security. In order to reflect the Deed of Pledge and adhere to Scots law, which provided that a security over shares is only created when the security holder is registered as a member in the relevant company, these shares were registered under the Bank of Scotland Branch Nominees Ltd (the 'Nominee') on 18 May 2000, and ASCO's name was removed from the register.  The shares in Enviroco would continue to be registered under the Nominees' name until such time as ASCO repaid the secured liabilities. Only upon discharging their liabilities under clause 11 of the Deed of Pledge would ASCO be restored to Enviroco's register. However, at the time of the incident on 7 July 2002 this had not taken place. On 7 July 2002, Enviroco was employed to clean oil tanks on the vessel. A fire broke out causing extensive damage to vessel and the death of one Enviroco employee.On 26 March 2007, Farstad commenced proceedings in Scotland against Enviroco, claiming £2.7 million in damages for purported losses suffered as a result of the fire. Enviroco sought to rely on the mutual exception and indemnity clauses contained in the 1994 contract between Farstad and Asco UK Ltd in an attempt to avoid liability. Enviroco argued that it was an 'Affiliate' of Asco UK Ltd as both Asco UK Ltd and Enviroco were subsidiaries of ASCO, and that ASCO was a 'member' within the meaning of section 736(1)(c) of the Companies Act 1985. In December 2007, Enviroco commenced proceedings in England, and sought to establish that the contract between Farstad and Asco UK Ltd created a situation where, at the time of the fire, Enviroco was an Affiliate (and therefore also a subsidiary) of ASCO.  The main question asked was whether or not Enviroco was a subsidiary of ASCO at the time of the fire on 7 July 2002 and more specifically whether the fact that the Enviroco shares were registered in the Nominee's name (who was therefore a 'member' of Enviroco) at the relevant time, meant that Enviroco was not a subsidiary of ASCO and consequently not an Affiliate under the contract. **(c) Decision** Lord Collins, Lord Hope, Lord Roger, Lord Mance and Lord Clarke unanimously dismissed Enviroco's appeal in the UK Supreme Court and held that Enviroco was not a subsidiary of ASCO with regard to section 736(1)(c) of the Companies Act 1985 as ASCO was not a member of Enviroco at the relevant time. Consequently, Enviroco could not rely on the indemnity clauses contained in the contract between Farstad and Asco UK Ltd. Lord Collins provided the main judgment. Despite the unanimous decision, Lord Collins nevertheless acknowledged the 'unusual' circumstances of this case where 'the legislation does lead to a result which is certainly odd and possibly absurd'.  The appeal case turned on two main points: the statutory definition of 'subsidiary' (section 736 of Companies Act 1985); and the construction of the contract between Farstad and Asco UK Ltd.  The court held that section 736 of the Companies Act 1985 was sufficiently clear and the ordinary statutory definition of 'subsidiary' should apply to the interpretation of the contract. According to Lord Collins, as section 736 of Companies Act 1985 was specifically referred to in the contract ' the contract has to be read as if the words of the statute are written out in the contract and construed, as a matter of contract, in their contractual context: see *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, 152, 184'.  The fact that the statutory definition of 'subsidiary' included a reference to 'member', which according to section 22 of the Companies Act 1985 means the legal person entered into the company's register of members, meant that Enviroco could not be found to be a subsidiary of ASCO at the relevant time, as ASCO was no longer listed on Enviroco's register. Rather, the Nominee was the registered member with regard to the A shares in Enviroco. ASCO transferred all of its shares in Enviroco to the Bank as security for its obligations, despite retaining certain powers in relation to the shares pursuant to clause 5(A) of the Deed of Pledge. Lord Clarke summarised the situation stating, '... when ASCO transferred its shares to the Nominee, it must be taken to have transferred them absolutely and without any qualification of all the rights of membership attached to the shares that were previously vested in ASCO'. The court suggested that a deeming provision similar to section 258(3)(b) of the Companies Act 1985 may have been mistakenly omitted from sections 736 and 736A. Section 258(3)(b) provided that an undertaking was to be 'treated as a member of another undertaking ... if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings'. If added to section 736, such a provision would have the effect of attributing membership rights to both ASCO and the Nominee. However, the court was unwilling to engage in what Lord Collins termed an 'impermissible form of judicial legislation' to correct such a drafting error. etailed Contents**5.11 No shareholders entitled to vote - grounds for winding up?**  (By Jeff Hollindale, Clayton Utz) Beck v L W Furniture Consolidated (Aust) Pty Ltd [2011] NSWSC 235, Supreme Court of New South Wales, Barrett J, 1 April 2011 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/235.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/235.html%22%20%5Ct%20%22_new) **(a) Summary** This case considered a situation where none of the shareholders had a right to vote at a general meeting and there were no validly appointed directors remaining on the board of the company.  An application was made by one member to wind up the company on the just and equitable ground under section 461(k) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) and an alternative application was made by other members for a declaration under section 1322(4)(a) of the Corporations Act to validate a purported appointment of a director who had acted in the belief she was a director. Barrett J opted to dismiss the winding up application and instead made an order under section 1322(4)(a) to validate the purported appointment of a director. **(b) Facts** The plaintiff, Mrs Beck, is a shareholder in the defendant, L W Furniture Consolidated (Aust) Pty Limited (Company).  The second defendant, AD Weinstock, also a shareholder in the Company, is the brother of Mrs Beck.  The third defendant, H Weinstock, is the wife of AD Weinstock.  Mrs Beck and AD Weinstock are the children of the late Mr Weinstock and the late Mrs Weinstock. Mrs Beck sought an order for the winding up of the Company and an order that a liquidator be appointed on the ground that it is just and equitable that the Company be wound up under section 461(k) of the Corporations Act.  The basis of Mrs Beck's application was that the Company had no directors, none of the Company's members had the power or right to vote at a general meeting of the Company and there was no way to remedy these deficiencies.  It was argued that there was an entire absence of governance relating to the Company and therefore, it was just and equitable to wind up the Company.AD Weinstock and H Weinstock also filed an interlocutory process applying for a declaration that they were validly appointed directors of the Company and, alternatively, relief under section 1322(4)(a) of the Corporations Act.  This section allows the Court to make orders declaring that any act purporting to have been made under the Corporations Act is not invalid by reason of any contravention of the Corporations Act. The background relevant to these proceedings is as follows: The Company was incorporated on 30 April 1971 under the Companies Act 1961 (NSW) (1961 Act) with a share capital of 20,000 shares divided into 14 classes, each denoted by a letter of the alphabet. The Company's initial share capital consisted of 5 "A" shares held beneficially by the late Mr Weinstock and the Company's initial directors were the late Mr and Mrs Weinstock. On or about 1 April 1972, three "C" shares were issued, one each to Mrs Weinstock, Mrs Beck and AD Weinstock. The Company had only ever issued "A" shares, "C" shares and perhaps "D" shares.  None of these classes of shares had the right to vote at a general meeting.At what was purported to be an extraordinary general meeting of the shareholders on 29 June 1973 a special resolution was passed appointing Mrs Beck and AD Weinstock as directors of the Company until the holding of the next annual general meeting.  Mr and Mrs Weinstock, the only directors of the Company prior to this meeting, attended as shareholders and voted in favour of the appointments.At the annual general meeting on 31 December 1973 (and also in 1974, 1975 and 1976) there was supposedly a resolution passed that any director retiring in accordance with the provisions of the Company's articles be reappointed.A resolution was passed at the annual general meetings from 1977 to 1982 that "Directors retiring by rotation be and are hereby reappointed". Mrs Beck purportedly resigned as a director on 8 January 1982.From 1 July 1982, as a result of the introduction of the [Companies Act 1981 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7358" \t "Default), no company was required by the 1961 Act to hold an annual general meeting and that any annual general meeting in fact held could not properly be described as "held in accordance with the provisions of" the 1961 Act.Mr Weinstock died on 29 July 2003 and Mrs Weinstock died on 6 July 2004.  It was admitted in evidence that Mrs Weinstock was mentally incapacitated on or before 29 July 2003 and therefore was not a director post 29 July 2003. On 30 July 2003, a directors' resolution was purportedly passed by AD Weinstock as sole remaining director of the Company "to appoint H Weinstock as an additional director."(**c) Decision**  Barrett J considered a number of issues in reaching his conclusions which are discussed in further detail below. **(i) Members' voting rights** His Honour found that voting at general meetings of the Company was dealt with by article 56 of the Company's articles which provided a general rule that, on a show of hands, every member has one vote and, on a poll, every member has one vote for every share held.  However, this was subject to "any special rights or restrictions ... attaching to any special class of shares in the capital of the Company". The articles provided that the "A" shares, "C" shares and "D" shares issued by the Company carried no right to vote at a general meeting.  Therefore this specific provision displaced the general voting entitlement under the articles and those classes of share had no right to vote at a general meeting of the Company. The Judge held there was not however a permanent vacuum where no resolution of shareholders could be passed as the directors were given the power under the articles to allot other classes of shares which did carry the right to vote at a general meeting. **(ii) References to 1961 Act**Barrett J considered whether the Company had actually held annual general meetings at all.  Whilst the Company had purported to do so, his Honour found at law that it had not actually done so after 1982. The articles required the Company to hold annual general meetings in accordance with the provisions of the 1961 Act.  Barrett J noted that the 1961 Act was superseded by the Companies Code effective from 1 July 1982 which meant that after that date, there was no longer a requirement for the Company to hold an annual general meeting under the 1961 Act.  Therefore it followed that any annual general meetings held by the Company after 1 July 1982 did not comply with the articles. This had the consequence that the various automatic retirements and appointments of directors at purported annual general meetings after 1982 were a nullity.  Mr and Mrs Weinstock, who were found to be the only directors in office in 1982, therefore continued in office until their deaths. **(iii) June 1973 meeting - directors meeting or shareholders meeting?** As noted above, none of the shareholders of the Company in fact had voting rights at a general meeting of the Company.  However, in June 1973, Mr and Mrs Weinstock, who were shareholders (and who were also the only directors of the Company), purported to hold a general meeting of shareholders and appoint new directors, AD Weinstock and Mrs Beck, to hold office until the next annual general meeting. Barrett J held that even though Mr and Mrs Weinstock thought they were acting as shareholders at a general meeting, their actions were also capable of being interpreted as actions in their capacity as directors.  As the directors of the Company they were empowered by the articles to appoint other persons as directors, and therefore the appointments of AD Weinstock and Mrs Beck were valid but only until the next annual general meeting. **(iv) Lack of voting rights at annual general meetings** The Company held an annual general meeting in December 1973 at which the members purported to re-appoint AD Weinstock and Mrs Beck as directors.  However, it was held that as no shareholders had the right to vote at a general meeting, this purported re-appointment was invalid and those directors had therefore not continued in office.  Barrett J held that whilst they had no right to vote at the annual general meeting, the shareholders did have the right to attend such a meeting.  Therefore it was held that the various meetings which were purported to be annual general meetings were actually annual general meetings even though it was impossible for any resolution to be passed at them by the members as they did not have the right to vote. **(v) The application under section 1322(4)(a) of the Corporations Act** His Honour considered the application of section 1322(4)(a) to various acts that had occurred and found that the only act that could be validated under this section was the act on 30 July 2003 by which AD Weinstock purported to appoint H Weinstock as a director of the Company.  His Honour acknowledged that AD Weinstock was acting as a de facto director at this time (and that Mrs Beck had acted as a de facto director up to her purported resignation on 8 January 1982).  His Honour noted that AD Weinstock was a member (one "C" share), a former director whose appointment, validly made, had expired and who then functioned as a de facto director for some 30 years.  His Honour held therefore the position of H Weinstock as director should be validated by an order under section 1322(4)(a) unless substantial injustice has been caused or is likely to be caused to any person (referring to section 1322(6)(a)).  Barrett J found that on the material before the Court there could not be any basis for concluding that prejudice had occurred or would occur to anyone from H Weinstock's actions in the performance of her functions of a director. His Honour noted that this validating order would have no effect on AD Weinstock's directorship.  However, the limitation of tenure until the next annual general meeting for newly appointed directors ceased to have effect in 1982 when the 1961 Act ceased to have effect and therefore H Weinstock's appointment was not subject to any time limit under the articles and was a continuing appointment. **(vi) The winding up application** Barrett J finally held that the application for an order to wind up the Company on the just and equitable ground should be disposed of because the order under section 1322(4)(a) would result in H Weinstock validly holding the office of director.  This would mean that an additional director could be appointed by H Weinstock and the directors could then exercise their powers to issue new shares, including shares carrying voting rights.  Therefore the Company would not be "affected by incurable paralysis making it impossible for it to function."etailed Contents**5.12 Setting aside a statutory demand under section 459H or 459J(1)(b) of the Corporations Act** (By David Plant, Blake Dawson) Re King Furniture Australia Pty Ltd; King Furniture Australia Pty Ltd v Higgs [2011] NSWSC 234, Supreme Court of New South Wales, Ward J, 30 March 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/234.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/234.html%22%20%5Ct%20%22_new) **(a) Summary** In this case the court considered an application to set aside a statutory demand under section 459H and section 459J(1)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), as well as the effect of filing an affidavit in support of the application outside of the required 21 day period.   **(b) Facts**  From 2001 to 2010 Steven Higgs (Higgs) was employed by King Furniture Australia Pty Ltd (King) as a manager.  From 2003 to 2008 Higgs was awarded a bonus which was calculated as a percentage of profit of the business. In March 2010, Higgs resigned from King, citing family reasons.  King claimed that Higgs had not returned to work when he was due to return after an injury.  In April 2010, a schedule was prepared by King which calculated bonus back pay owing to Higgs, which was forwarded to Higgs.  The 2009 bonus figure of $367,210.55 was qualified by the fact that it was based on draft accounts and subject to change. The schedule calculated total bonus back pay to be $1,733,278.17.  Although Higgs believed he was owed more than this amount, he made a demand for the $1,733,278.17 on the basis that this amount was not in dispute between the parties.   When the demand was not met, Higgs issued a statutory demand.  The statutory demand also included amounts for annual leave and superannuation entitlements, but King subsequently paid these amounts. King then sought to set aside the statutory demand, disputing the 2009 bonus figure.  However, it was only after the 21 day period for lodging an affidavit in support of the section 459G of the Corporations Act 2001 application that King raised the issue that Higgs may have been paid an amount exceeding the unpaid bonuses (Payments).  It was unclear what the Payments related to.   **(c) Decision**  The Court refused to set aside the statutory demand, but amended it so that the 2009 bonus figure was not included.  **(i) Graywinter principle** The Court considered *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund* (1996) 70 FCR 452, in which Sundberg J held that the failure of an affidavit to meet the minimum requirements for a 'supporting affidavit' is a jurisdictional impediment to a section 459C of the Corporations Act 2001 application.   Ward J then went on to say that although an applicant can supplement their affidavit, they cannot rely on a ground not raised in any affidavit filed within the 21 day period.  In this case, the supporting affidavit within the 21 day period made no reference to any potential offsetting claim (either in relation to a possible a breach of the employment contract by Higgs or the Payments).  An email from King asserting shock at Higgs' sudden resignation was not sufficient to support the breach of contract claim.  Her Honour held that any potential damages claim was not adequately identified, as no information was given as to the basis on which loss arose and how it was to be calculated (citing Palmer J in Macleay Nominees Pty Ltd v Belle Property East Pty Ltd [2001] NSWSC 743). The supporting affidavit also did not disclose any genuine dispute through the attachment of the schedule calculating back pay, other than in relation to the 2009 figure which was stated to be subject to change. **(ii) Genuine dispute as to existence or amount of debt** Section 459H of the Corporations Act 2001 allows for the amendment or setting aside of a statutory demand on the basis of a genuine dispute.  During the course of the hearing, Higgs conceded that there was a genuine dispute as to the 2009 bonus, and so accepted that the statutory demand should be amended on that basis. After reviewing the law in the area, her Honour stated that a genuine dispute is 'one which is bona fide, which exists as a matter of fact and which is not spurious, hypothetical, illusory or misconceived'.  There must be a 'plausible contention which places the debt in dispute and which requires further investigation'. In this case, the supporting affidavit filed within the 21 day period did not raise any basis for disputing Higgs' claim.  Therefore, the issue was not that the claims by King were spurious, hypothetical, illusory or misconceived.  Instead, it was that no claim by Higgs was disclosed in the 21 day period. **(iii) Setting aside a demand on other grounds**  King also sought to set aside the statutory demand on the basis of section 459J(1)(b) of the Corporations Act 2001 (i.e. on the basis of 'some other reason why the demand should be set aside'.  King submitted that Higgs knew (or must have known) at the time the statutory demand was issued that it was incorrect, based on the receipt of the Payments.  Therefore King claimed that the issuing of the statutory demand was an abuse of process.  Her Honour held that it was unclear whether Higgs knew that the Payments were referable to his bonus entitlements, meaning that the mere fact that Higgs may have received extra amounts was not enough to conclude that there was abuse of process. Her Honour found that a number of cases focussed on the conduct of the creditor in relation to the events in question to determine if there was 'some other reason'.  There was also nothing to suggest that Higgs had been responsible for the Payments or that he knew of the Payments and that they were not included in the schedule calculation.   In any case, the 'some other reason' ground requires something beyond and separate to the grounds in sections 459H and 459J(1)(a) of the Corporations Act 2001 (Barrett J in *CP York Holdings Pty Ltd v The Food Improvers Pty Ltd* [2009] NSWSC 409).  Her Honour found that the Payments were not of this nature, and that the Graywinter principle seemed to preclude the application of section 459J(1)(b) of the Corporations Act 2001.  The evidence suggested that King was not aware of the Payments until after the 21 day period for the supporting affidavit.  Her Honour stated that in those circumstances it may seem harsh to rely on the statutory demand, but the outcome of an application in a case such as the current one was 'not to be determined by the judge's subjective view of what is fair in the circumstances'.  etailed Contents**5.13 Drawing implications from share surrender agreements** (By Steven Grant, Minter Ellison) McLaughlin v Dungowan Manly Pty Ltd [2011] NSWSC 215, Supreme Court of New South Wales, Pembroke J, 25 March 2011 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/215.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/215.html%22%20%5Ct%20%22_new) **(a) Summary** This case involved the construction and interpretation of a series of individual agreements in identical form between the first defendant, Dungowan Manly Pty Ltd (the Company) and all but two of its shareholders.  The shareholders who had not entered into the agreements were the two individual plaintiffs, Patrick and Jennifer McLaughlin, and Beacon Properties Pty Ltd.  Each agreement was formally entitled 'Agreement for Surrender of Shares and Taking Strata Title' but were referred to as share surrender agreements (Agreements).  The case demonstrates the manner in which a court may consider the terms of a share surrender agreement and the surrounding circumstances in order to determine whether a term can be implied. **(b) Facts**  The Company owned land on which a residential apartment building at Manly was located and the shareholders in the Company were entitled to occupy their apartments in the building under a system of title known as company title.  The Agreements were entered into and completed as part of the process by which the company title was converted to strata title. When the Agreements were entered into, the Company was a judgment debtor to the plaintiffs in the sum of approximately $212,000 plus costs pursuant to orders that were made by Ward J against which an appeal was filed by the Company. The plaintiffs contended that the effect of the Agreements was that all rights of each shareholder who entered into such an agreement were immediately extinguished on completion.  It was submitted that upon completion, each shareholder surrendered its shares and took in lieu a transfer of the strata unit to which it was entitled and paid all moneys due by it to the Company, save for any residual liability that may subsequently arise pursuant to clauses 7 and 8 of the Agreement.  On this basis, the plaintiffs contended that they and Beacon Properties Pty Ltd were the only remaining shareholders and the only remaining persons entitled to notice or to vote at meetings of the Company.  Acting on this basis, the plaintiffs requisitioned an extraordinary general meeting of the Company, gave notice to Beacon Properties Pty Ltd as the only other shareholder they contended required notice, and caused a series of resolutions to be passed by the Company in general meeting on 6 January 2011, principally to the effect that:all persons purporting to act as directors of the Company were recognised as having ceased to hold office and were removed; the plaintiffs were appointed as directors of the Company in place of the then named directors; and the new directors were authorised on the Company's behalf to take steps to dismiss the appeal.Purporting to act as the sole directors of the Company, the plaintiffs then terminated the retainer of the Company's solicitor, appointed their own solicitor in his place, and instructed the new solicitor to consent on behalf of the Company to the dismissal of the appeal.  The plaintiffs relied on the following provisions of the Agreements:Recital G provided that the Shareholder desires to surrender the Shares and take in lieu a transfer of the Strata Unit in accordance with section 258B of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default); Clause 1(a) provided that on or before the Completion Date the Shareholder shall relevantly pay certain amounts including the Net Indebtedness and surrender the certificate(s) for the Shares.  The Company shall tender in exchange an executed transfer in registrable form of the Strata Unit; Clause 6 provided that save as provided in the Agreement, from completion neither party shall be liable or indebted to the other on any account in connection with their former relationship of shareholder and company or arising from their dealings pursuant to that relationship; Clause 7 provided that save as provided in clauses 7 and 8, the sole debt and liability which either party may have to the other following completion will be on the basis of a reconciliation of all assets and liabilities of the Company as at 28 February 2010.  If on the said reconciliation, the assets of the Company exceed its liabilities, the Company shall pay the surplus to the persons who were its members; Clause 8 provided that notwithstanding clause 7, the Company may from time to time perform a further reconciliation taking into account, among other things, moneys owing or to become owing between the parties to the proceedings in the Court of Appeal.  If on any such further reconciliation, a balance is owing in favour of the Company, the Company shall distribute the same to the persons who were its members; Clause 10 provided that the Shareholder warrants that as at the Completion Date the Shareholder shall give good title to the Shares to the Company; Clause 12 provided that if following completion, some further step or steps is or are reasonably required to achieve the object of the agreement, the parties agree to cooperate and do all things necessary for that purpose.  The plaintiffs further contended that these provisions also triggered the provisions of Division 2 of Part 2J.1 of Chapter 2J of the Corporations Act 2001 (Cth) (Act) which govern share buy backs and accordingly once the Company had entered into the Agreements to buy back the shares, all rights attaching to the shares subject to the Agreements were suspended pursuant to section 257H(1) of the Act. The defendants contended that the Agreements did not amount to share buy back agreements relying on apparent omissions from the language which the parties had chosen to adopt.  For instance, the Agreements did not include any express reference to a shareholder giving up all rights solely by reason of the fact of completion or any express reference to a shareholder's membership of the Company being extinguished upon completion. **(c) Decision**  **(i) Implication in the Agreements** Pembroke J was not satisfied that the implication for which the plaintiffs contended was established, namely that a shareholder would not after completion, claim to retain or exercise any right to the shares or right, qualification or office arising from the surrendered shareholding.In reaching this conclusion, Pembroke J had regard to the collateral consequences of such an implication before considering the precise terms of the Agreements.  Pembroke J observed that: a construction of the Agreements that leads to the plaintiffs being in a position to control the Company and dismiss the appeal against the decision of Ward J, has the appearance of being capricious, certainly inconvenient, and perhaps also unreasonable; an outcome that leads to the progressive disqualification of directors with no replacement so that the last persons standing became the plaintiffs and Beacon Properties Pty Ltd, with the remaining business of the Company including the prosecution of the appeal against the judgment in favour of the plaintiffs, does not seem likely to have been intended by the directors holding office at the time the Agreements were entered into; the Company's Articles of Association provided that the transferor would remain the holder of the shares proposed to be transferred 'until the name of the transferee was entered in the register of members'; and no steps contemplated by the buy back provisions of the Act were undertaken and the Agreements did not refer to those provisions.  Pembroke J then noted that the terms of the Agreements did not state that immediately upon completion a shareholder shall lose all rights in his capacity as a shareholder, rather the parties refrained from identifying a precise point in time when the shareholder will cease to be a shareholder.  Indeed, if the parties wished to achieve the consequences for which the plaintiffs contend, it would have been a simple matter for the issue to be addressed in the share surrender agreements.  Furthermore, Pembroke J considered that the specific language of the Agreements did not compel a different result: Recital G was merely expressed in terms of a futurity. The fact that clause 1(a) required the Shareholder to surrender his certificate(s) for his Shares on or before the Completion Date was neutral.  Physical surrender pursuant to an agreement, although ordinarily a significant factor, does not necessarily equate in all cases, without more, to the loss of all rights in respect of the Shares. The fact that clause 6 referred to the 'former relationship of Shareholder and Company' in the context of releases from further liability that were intended to operate from Completion, were not independently conclusive.  It was consistent with an expectation that, except as provided for in clauses 7 and 8, there will be no further occasion after Completion for any liability or indebtedness to arise. The fact that clauses 7 and 8 use the words 'to the persons who were its members' was not determinative.  It merely assumes that by the time the contemplated reconciliations take place, the persons to whom distributions are required to be made will have ceased to be members.  It does not indicate that the cessation of membership was necessarily intended to occur immediately upon completion. The warranty of title to the shares in clause 10 is not by itself determinative of the essential proposition for which the plaintiffs contend.  Accordingly, Pembroke J considered that the provisions of the Agreements were individually and collectively ambiguous when considered against the overall context, including the known background facts, the probabilities, the absence of direct language, the impractical and inconvenient consequences that would otherwise follow and the express acknowledgement in clause 12 that further steps may be required to achieve the objects of the agreement (for example, cancellation of the share certificates and registration in the register of members).  On this basis, Pembroke J refused to find in favour of the implication contended by the plaintiffs. **(ii)  Share buy back** Pembroke J found that the share buy back provisions of the Act did not apply to the Agreements on the following basis: none of the requirements for share buy backs set out in the Act were followed before or after entry into the Agreements; the express reference to section 258B of the Act in the Agreements made it reasonably clear that, for what it was worth, the parties thought that the Agreements were not buy back agreements governed by the Act; and Pembroke J was reluctant to characterise the Agreements as buy back agreements, with the consequence that section 257H applied, having construed the Agreements to mean that shareholders did not lose all rights on completion.  **(iii) Oppression** The plaintiffs further submitted that the conduct of the affairs of the Company was oppressive, or unfairly prejudicial to, or unfairly discriminatory against them.  Whilst there was little evidence provided in support of this contention, Pembroke J noted the Company's assertion that until the indebtedness of the plaintiffs could be agreed and stated, the Agreements could not be finalised and the Company would not be in a position to transfer their Lot in the building. Pembroke J considered this view was wrong. Although the Company's solicitors asserted that the final indebtedness of the plaintiffs could be established, that assertion was based on an incorrect premise given that the Agreement could have provided for an adjustment of the balance owing as between the Company and the plaintiffs in the event that the appeal was determined in the Company's favour and the plaintiffs' judgment for $212,000 was overturned.  On this basis, Pembroke J found in favour of the plaintiffs on this point.   **(iv) Orders**In the absence of guidance from the parties on the orders which should be made (in particular with regard to the oppression finding), Pembroke J:declared that the asserted inability to finalise the indebtedness of the plaintiffs, by reason of the Company's unresolved appeal from the decision of Ward J, was not a valid basis for the Company refusing to finalise the terms of the plaintiffs' proposed Agreement; and subject to that declaration, found against the plaintiffs on the question of construction, dismissing the summons.etailed Contents |

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