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| SAI Global Corporate Law Bulletin No. 177**>** |  |

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| **Bulletin No. 177**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, The University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Ashurst](http://www.ashurst.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Piper](http://www.dlapiper.com/Australia/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [King & Wood Mallesons](http://www.mallesons.com/%22%20%5Ct%20%22_new).1.     [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#h1)2.     [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#h2)3.     [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#h3)4.     [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#h4)5.     [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#h5)6.     [Contributions](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#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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| **Detailed Contents**  | own |

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| [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#1)[1.1 Parliamentary Committee report into Trio Capital collapse](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#011) [1.2  Monetary Authority of Singapore releases revised code and guidance on corporate governance](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#012)[1.3  BIS releases data on OTC derivatives market activity end-December 2011](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#013) [1.4  OECD releases essay collection on corporate governance practices](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#014) [1.5  Government announces new ASIC funding](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#015) [1.6  Government releases independent report into compensation arrangements for consumers of financial services](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#016) [1.7  APRA releases proposed MySuper authorisation requirements](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#017) [1.8  EU consultation on possible reforms to the structure of EU's banking sector](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#018)[1.9  IMF releases working paper 'Country Stress Events: Does Governance Matter?'](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#019)[1.10  UK inquiry into governance of systemically important financial institutions](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#110) [1.11  IOSCO consults on money market fund systemic risk analysis and reform options](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#111)[1.12  Disclosure of superannuation fund executive pay and investments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#112) [1.13  APRA response to submissions and draft prudential standards for superannuation](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#113)[1.14  IOSCO consults on principles of liquidity risk management for collective investment schemes](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#114)[1.15  ESMA identifies divergence in Member States' use of sanctions under the Market Abuse Directive](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#115)[1.16  EBA consults on draft guidelines for assessing the suitability of credit institutions' management body members and key function holders](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#116)[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#2)[2.1  Updated guidance for downstream acquisitions](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#021)[2.2  Corporate insolvencies remain high](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#022)[2.3  Updated guidance for investing in mortgage schemes](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#023)[2.4  Consultation on revised financial requirements for electricity derivative issuers](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#024)[2.5  Adviser training and financial requirements' policies for carbon financial products](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#025)[2.6  Warning to financial services licensees using the term 'independent'](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#026)[2.7  Registration and licensing of financial services in emissions units](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#027)[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#3)[3.1 Reports](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#031)[4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#4)[4.1  MacarthurCook Property Securities Fund 01 & 02](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#041) [5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#5) [5.1  High Court confirms James Hardie directors and general counsel breached duties](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#051)[5.2  Members' meeting without quorum: no substantial injustice](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#052)[5.3  Discontinuation of a representative proceeding based on lack of commonality between representative applicant and claims of group members](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#053)[5.4  Beware of oppressive conduct when terminating directors](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#054)[5.5  Parent company owes duty of care to the employees of subsidiary company, but corporate veil intact](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#055)[5.6  Misleading or deceptive conduct in relation to Australian Financial Services Licences: the need to act efficiently, honestly and fairly](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#056)[5.7  Liquidator's duties on winding-up: application to court for directions](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#057) [5.8  Extensions of time for the determination of winding up applications](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#058) [5.9  Validity of agreements entered into in contravention of section 208 of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#059)[5.10  Non-director appoints another as a director; court has no power to validate](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#510) [5.11  Conversion from creditors' to voluntary winding up to enable the avoidance of a floating charge is permissible](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#511)[5.12  Liquidators v secured creditors: securing a bare right to sue](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#512) [5.13  Seeking security for costs: the strength of a claim being stifled](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#513) [5.14  Set-off available for post-liquidation debts that were contingent prior to liquidation](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#514)  |

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

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| **1.1** **Parliamentary Committee report into Trio Capital collapse** On 16 May 2012, the Parliamentary Joint Committee on Corporations and Financial Services released its report on the collapse of Trio Capital. The inquiry by the Joint Committee investigated the collapse of Trio Capital in December 2009, which was the largest superannuation fraud in Australian history. Approximately $176 million in Australians' superannuation funds is lost or missing from two fraudulent managed investment schemes:  $123 million from the Astarra Strategic Fund and $53 million from the ARP Growth Fund. Trio Capital was the 'responsible entity' for both schemes.   Nearly 6,090 Australians invested in Trio and lost their money despite legislation in place under the [Superannuation Industry (Supervision) Act 1993 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "_default) (SIS Act). 5,400 of those Australians had their money invested in Trio through APRA-regulated superannuation funds. Under the SIS Act, investors in APRA-regulated funds received compensation totalling $55 million. However, under the SIS Act, investors in self-managed superannuation funds are not eligible for compensation. Issues covered by the report include:* the merits of a statutory compensation scheme;
* the Trio Capital fraud;
* the ARP Growth Fund;
* missed signals by regulators;
* the need for further criminal investigation by regulators;
* the role of financial advisers;
* the role of auditors, custodians and research houses;
* the need for better disclosure by managed investment schemes;
* the regulation of self managed superannuation funds;
* draft legislation to improve transparency of superannuation assets; and
* better protection of Australians' superannuation savings.

The Committee makes 14 recommendations in the report.   The report is available on the [Parliamentary Joint Committee website](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/trio/report/index.htm" \t "_new).etailed Contents**1.2** **Monetary Authority of Singapore releases revised code and guidance on corporate governance** On 10 May 2012, Singapore's Corporate Governance Council released its 'Risk Governance Guide for Listed Boards'. This follows the release on 2 May 2012 by the Monetary Authority of Singapore (MAS) of the Council's revised Code of Corporate Governance.  Both initiatives aim to strengthen the corporate governance practices of listed companies in Singapore. The Guidance provides key information on risk governance to all Board members. This would include factors which the Board should collectively consider when overseeing the company's risk management framework and policies. The Guidance also sets out the Board's and Management's respective responsibilities in managing the company's risks.  The Guidance is intended as a complement to the Code, and enhances the framework for corporate governance of Singapore-listed companies.  Along with other existing materials such as the handbook for directors published by the Accounting and Corporate Regulatory Authority, the Guidance aims to contribute to better awareness of Board responsibilities within Singapore companies. The key changes to the revised Code are focused on the areas of director independence, board composition, director training, multiple directorships, alternate directors, remuneration practices and disclosures, risk management, as well as shareholder rights and roles.  MAS will make two modifications to the recommendation relating to independence from substantial shareholders.  The revised Code will take effect in respect of Annual Reports relating to financial years commencing from 1 November 2012. The [Guidance](http://www.mas.gov.sg/resource/fin_development/corporate_governance/RiskGovernanceGuidanceforListedBoards.pdf%22%20%5Ct%20%22_new) and [revised Code](http://www.mas.gov.sg/resource/fin_development/corporate_governance/cgcrevisedcodeofcorporategovernance2may2012.pdf%22%20%5Ct%20%22_new) are available on the MAS website, in addition to the accompanying [media release](http://www.mas.gov.sg/news_room/press_releases/2012/MAS_Issues_Revised_Code_of_CG.html%22%20%5Ct%20%22_new).etailed Contents**1.3** **BIS releases data on OTC derivatives market activity end-December 2011** On 9 May 2012, the Bank for International Settlements (BIS) released its latest semi-annual data on OTC derivatives market activity in the second half of 2011.   The objective of the statistics is to obtain comprehensive and internationally consistent information on the size and structure of derivatives markets in the G10 countries and Switzerland.  They provide data on notional amounts outstanding and gross market values and permit the evolution of particular market segments to be monitored.  In conjunction with the banking and securities statistics, they also offer a more comprehensive picture of activity in global financial markets.Data at end-December 2011 are not fully comparable with previous periods because of an increase in the reporting population.  Australia and Spain reported for the first time from December 2011, expanding the number of reporting countries to 13.Notwithstanding the increase in the reporting population, total notional amounts outstanding of OTC derivatives declined between end-June and end-December 2011, to US$648 trillion.  At the same time, gross market values, which measure the cost of replacing existing contracts, increased to US$27 trillion, driven mainly by an increase in the market value of interest rate contracts. The rise in gross market values was the largest since the second half of 2008.  The increase in gross market values is explained largely by the impact on outstanding interest rate contracts of the decline in long-term euro and US dollar interest rates in the second half of 2011. Further information is available on the [BIS website](http://www.bis.org/press/p120509.htm%22%20%5Ct%20%22_new).etailed Contents**1.4** **OECD releases essay collection on corporate governance practices** On 8 May 2012, the OECD released a collection of essays titled 'Corporate governance, value creation and growth: The bridge between finance and enterprise'. The collection examines the role of corporate governance arrangements in providing right incentives to contribute to the value creation process within private enterprises, and the implications of the differences in ownership structures on corporate governance practices and frameworks.  It also addresses these global changes from the emerging markets' perspective and the distinguishing features of these economies that shape their capital markets, corporate structures and corporate governance landscape. Topics in the collection include:* Entrepreneurship and innovation in listed companies: What is the role of corporate governance?
* The impact of an emerging European corporate bond market on corporate governance
* Regulating for value creation: What is the link between market confidence and contractual freedom?
* What makes controlling ownership different?
* Corporate control and incentives in a dynamic perspective
* One size for all? The European Union experience
* Long-term or short-term shareholdership: Does it really count?
* The emerging-market perspective

The key messages emerging from the discussion in the joint meeting and essays include:* financial and corporate sectors have undergone profound changes in the last decade that reshape the policy environment for corporate governance;
* most of the  corporate governance debate has been focused on the dispersed ownership structure rather than corporations with a concentrated ownership structure; and
* the corporate and financial sector structures in emerging markets vary from those of advanced economies.

The essay collection is available on the [OECD website](http://www.oecd.org/dataoecd/57/36/50242938.pdf%22%20%5Ct%20%22_new).etailed Contents**1.5** **Government announces new ASIC funding** On 8 May 2012, the Government announced that it would provide the Australian Securities and Investments Commission (ASIC) with new funding of $180.2 million over four years.ASIC will receive funding of $101.9 million over four years to ensure that it is appropriately resourced to continue its oversight of Australia's financial markets, including surveillance, guidance and education, and the prosecution of breaches of the corporations law. The Enhanced Market Supervision measure provides ASIC with further funding of $43.7 million over four years to replace its real-time integrated market surveillance system and enhance ASIC's market surveillance and supervision systems and tools. This will enable ASIC to continue to perform its market supervision functions, to ensure a level playing field for all investors.ASIC will also receive $23.9 million over four years to facilitate the implementation and enforcement of the Future of Financial Advice reforms. These reforms significantly increase the level of protection for retail investors that seek financial advice on how to invest their savings and will require ASIC to increase the intensity and scope of its regulatory activities.ASIC will further receive $10.7 million over four years to develop and maintain an online registration system for auditors of self-managed superannuation funds (SMSFs). As part of the registration process, ASIC will develop a competency exam and be responsible for the deregistration of non-compliant auditors.  Auditor registration aims to raise the standard of SMSF auditor competency and ensure there are minimum standards across the sector.Further information is available on the [Treasury website](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/023.htm&pageID=003&min=djba&Year=&DocType=0" \t "_new).etailed Contents**1.6** **Government releases independent report into compensation arrangements for consumers of financial services** On 8 May 2012, the Government released a report titled 'Compensation arrangements for consumers of financial services'.The report was commissioned in response to the 2009 Parliamentary Joint Committee on Corporations and Financial Services report 'An inquiry into financial products and services in Australia'.  It examines the existing compensation arrangements available to consumers of financial services and assesses the need for the introduction of a statutory compensation scheme. The report:* found that 'retail clients are generally able to recover compensation for losses attributable to misconduct by licensees' except where the licensee lacks the resources to meet those claims;
* concludes that it would be inappropriate at this point in time, to introduce a 'last resort' compensation scheme, without first strengthening the existing compensation arrangements;
* recommends strengthening the existing compensation arrangements, in particular the holding of adequate professional indemnity insurance cover, greater ASIC monitoring and capital adequacy requirements to ensure that licensees have the financial resources to meet compensation liabilities; and
* suggests that consideration be given to the merits of product issuers being required to take greater responsibility for protecting consumers of their products and recommends a more detailed and targeted review into these arrangements.

The report concludes that if the current arrangements are reinforced then 'it would be open to round them out in due course with a more comprehensive scheme of last resort' but recommends that 'it would be inappropriate and possibly counter-productive to introduce a last resort compensation scheme at this stage'. The Government believes that introducing a last resort scheme without strengthening the existing arrangements first would have the effect of imposing on better capitalised and more responsibly managed licensees the cost of bailing out the obligations of failed licensees.The Government is seeking feedback on the recommendations in the report.  It will also take into consideration any recommendations resulting from the Parliamentary Joint Committee on Corporations and Financial Services' (PJC) inquiry into the collapse of Trio Capital (see [Item 1.1](http://www.law.unimelb.edu.au/bulletins/177-May-2012.html#011) above) before responding to the report. The report is available on the Government's [Future of Financial Advice website](http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/compensation_arrangements_report/default.htm" \t "_new).etailed Contents**1.7** **APRA releases proposed MySuper authorisation requirements** On 3 May 2012, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper on proposed arrangements for the authorisation of MySuper products.Accompanying the discussion paper is a draft authorisation application form together with instructions, as well as draft 'Prudential Standard SPS 410 MySuper Transition' (SPS 410) which sets out requirements for trustees moving member balances into a MySuper product.On 3 November 2011, the Federal Government introduced the [Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=127546" \t "_default) into Parliament, under which a registrable superannuation entity (RSE) licensee intending to offer a MySuper product must seek authorisation from APRA. The MySuper authorisation package builds on APRA's release on 27 April 2012 of draft prudential standards for superannuation.  A number of elements in the draft authorisation application form request the submission of documents that will be required under the prudential standards. The authorisation process for RSE licensees wishing to offer MySuper products will commence from 1 January 2013.  Once authorised, RSE licensees can offer these products from 1 July 2013 onwards.Draft SPS 410 outlines requirements for all RSE licensees during the transition period from 1 July 2013 to 1 July 2017, by which date all accrued default amounts must be in a MySuper product except in limited circumstances.                                                                                Further information is available on the [APRA website](http://www.apra.gov.au/MediaReleases/Pages/12_14.aspx%22%20%5Ct%20%22_new).etailed Contents**1.8** **EU consultation on possible reforms to the structure of EU's banking sector** On 3 May 2012, the European Commission announced the establishment of a High-level Expert Group to examine possible reforms to the structure of the EU's banking sector.   The decision to set up this Group was announced at the European Parliament in November 2011.  Its mandate is to determine whether, in addition to ongoing regulatory reforms, structural reforms of EU banks would strengthen financial stability and improve efficiency and consumer protection, and if that is the case it will make proposals as appropriate.   In formulating any appropriate recommendations, the Group is to pay particular attention to the following:* reduce the risks of the banking system as a whole;
* reduce the risks that individual firms pose to the financial system;
* reduce moral hazard by making market exit also a viable option for the largest and most complex institutions and thereby reduce government guarantees;
* promote competition; and
* maintain the integrity of the internal market.

The Group will present its final report to the Commission in late 2012.   Further information is available on the [EU website](http://ec.europa.eu/internal_market/bank/group_of_experts/index_en.htm%22%20%5Cl%20%22High-level_Expert_Group%22%20%5Ct%20%22_new).etailed Contents**1.9** **IMF releases working paper 'Country Stress Events: Does Governance Matter?'**On 1 May 2012, the International Monetary Fund released a working paper titled 'Country Stress Events: Does Governance Matter?'   The paper analyses the linkages between governance quality and country stress events.  It focuses on two types of events: fiscal and political stress events, for which two innovative stress indicators are introduced.  The results suggest that weaker governance quality is associated with a higher incidence of both fiscal and political stress events.  In particular, internal accountability, which measures the responsiveness of governments to improving the quality of the bureaucracy, public service provision, and respect for the institutional framework in place, is positively associated with fiscal stress events.  However, external accountability, which captures government accountability before the public in general, through elections and the democratic process, seems to be more important for political stress events.  These results hold when using balanced country samples where region, oil-exporter status, income level, and time are taken into account.  The working paper is available on the [IMF website](http://www.imf.org/external/pubs/cat/longres.aspx?sk=25900.0" \t "_new).etailed Contents**1.10** **UK inquiry into governance of systemically important financial institutions** On 28 April 2012, the UK Treasury Select Committee published the terms of reference for a new inquiry into corporate governance in systemically important financial institutions. The terms of reference for the inquiry are as follows:**Board structure and composition**1.  What outcomes should corporate governance in the financial services sector seek to achieve? 2.  Are Board structures effective?  For example, should UK financial institutions consider adopting alternatives to the unitary Board structure? 3.  Does the UK approach to regulation and supervision of financial services incentivise Boards to perform their role effectively?  Is more intrusive regulation a substitute or complement to effective corporate governance?  Is a 'comply or explain' approach an effective framework for governance?**Corporate culture**4.  What type of corporate culture should financial services firms seek to foster?  In what way can this be encouraged?  How effective are Boards at shaping corporate culture within their institutions?**Impact of previous reviews and new regulatory developments**5.  What difference would the proposals in the Independent Commission on Banking's report on the Boards of ring-fenced banks make to corporate governance in these institutions? 6.  What benefits, if any, come from EU regulatory engagement with corporate governance issues?7.  What impact has the Walker Review (2009) had on corporate governance and corporate behaviour in financial services? **Non-Executive Directors**8.  Should non-executive directors bear greater liabilities than under current law?  Should executives in FTSE 100 companies be able to hold non-executive positions in other firms? 9.  Is the existing FSA approval process for significant influence functions (SIF), including non-executive directors, effective?**The role of shareholders**10.  Should shareholders be required to exercise a stronger role in systemically important financial institutions?  What are the key barriers to greater shareholder activism by institutional investors in financial institutions?  What risks are associated with it?11.  Is it realistic to expect sovereign wealth funds and hedge funds to undertake a more active role?**Remuneration**12.  What role should institutional investors, remuneration consultants, employees and others play with respect to remuneration in the financial services sector? 13.  Is there a case for introducing still greater transparency for senior executives with respect to remuneration in the financial services sector? 14.  Should there be further reform of the remuneration arrangements of senior executives in the financial services sector?  Should this extend to those highly paid individuals who sit below executive level?15.  The Chairman of the Financial Services Authority has argued that there may be a case for changing the personal risk return trade-off for bank executives.  He has suggested either a 'strict liability legal sanctions or an automatic incentives based approach.  What are the merits and drawbacks of these proposals?  Are there other ways to achieve the same objective?**Governance of risk**16.  Has the management of risk in firms improved since the financial crisis?**Diversity and background**17.  What is the relationship, if any, between Board diversity and company performance in the financial service sector?Further information is available on the [UK Treasury Committee website](http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/treasury-committee-announces-terms-of-reference-for-corporate-governance-and-remuneration-inquiry/%22%20%5Ct%20%22_new).etailed Contents**1.11** **IOSCO consults on money market fund systemic risk analysis and reform options** On 27 April 2012, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation report titled 'Money Market Fund Systemic Risk Analysis and Reform Options'. The report provides a preliminary analysis of the possible risks that money market funds (MMFs) could pose to systemic stability and consults on an exhaustive range of policy options to address those risks.  With over US$ 4.7 trillion in assets under management as of third quarter 2011, MMFs account for over 20% of the assets of Collective Investment Schemes (CIS) worldwide and are a significant source of credit and liquidity.  MMFs' history of providing daily liquidity and principal preservation have played a significant role in differentiating MMFs from other CIS and have facilitated the use of MMFs as important cash management vehicles.   Their importance and interconnectedness with the rest of the financial system make their safety crucial for financial stability at large.  However the September 2008 run on MMFs alerted regulators to the potential that MMFs have to increase systemic risk.  Although MMFs did not cause the crisis, their performance during the financial turmoil highlighted their potential to spread or even amplify a crisis.  In this regard, the Financial Stability Board (FSB) asked IOSCO to undertake a review of potential regulatory reforms of MMFs that would mitigate their susceptibility to runs and other systemic risks and to develop policy recommendations by July 2012. The FSB's mandate indicated that a key issue to be considered by the review is whether the regulatory approach to MMFs needs to choose between: (i)    encouraging/requiring shifts to Variable Net Asset Value (VNAV) arrangements;(ii)   imposing capital and liquidity requirements on MMFs which continue to promise investors Constant NAV (CNAV); and/or (iii)  whether there are other possible approaches.  To ensure a sound base for evaluation of these options, the FSB asked IOSCO to review: * the role of MMFs in funding markets;
* different categories, characteristics and systemic risks posed by MMFs in various jurisdictions, and the particular regulatory arrangements which have influenced their role and risks;
* the role of MMFs in the crisis and lessons learned;
* regulatory initiatives in hand and their possible consequences for funding flows; and
* the extent to which globally agreed principles and/or more detailed regulatory approaches are required/feasible.

In its report, IOSCO analyzes the features of MMFs that make them vulnerable to risk, and explains some of the implications for policy options that they have:* **Susceptibility to runs:** In general, MMFs are vulnerable to runs because shareholders have an incentive to redeem their shares before others do when there is a perception that the fund might suffer a loss.
* **Importance in short-term funding and contagion effects:** MMFs are important providers of short-term funding to financial institutions, businesses and governments. Due to this intrinsic link of MMFs to the short-term markets, confidence shocks in MMFs can quickly have a broader macroeconomic impact. Confronted with redemption pressures, managers may have to unwind their positions against a declining market, potentially fuelling a liquidity crisis.
* **Importance for investors:** MMFs are often viewed as a diversified and safe alternative to bank deposits and are used as an important cash management tool by institutions and investors.

In the consultation report, IOSCO asks its members and others to comment on options that fall within the following categories and are aimed at reinforcing the robustness and safety of money market funds:* Options regarding a mandatory move to variable net asset value funds, or other structural alternatives, in an effort to lower investor expectations that MMFs are impervious to losses and reduce the potential for heightened run risk when a fund fails to live up to those expectations.
* Options regarding MMF valuation and pricing frameworks that are aimed at increasing price transparency.
* Options regarding liquidity management that seek to ensure that MMF managers are able to face redemption pressure at any time.
* Options to address reliance on ratings, with a view to reduce the herding and 'cliff-effect' that currently arise from rating thresholds being hardwired into laws, regulations and standards, and to encourage the establishment of stronger internal credit risk assessment practices.

The consultation report is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS232.pdf%22%20%5Ct%20%22_new). Editor's Note:  On 11 May 2012, the US Securities and Exchange Commission (the Commission) released a statement that the IOSCO Consultation Report had been published without its agreement.  The Commission stated that the Consultation Report 'cannot be considered to represent the views of the US Securities and Exchange Commission.'  The Commission has urged IOSCO to withdraw it for further consideration and revision.     The press release is available on the [SEC website](http://www.sec.gov/news/speech/2012/spch051112laatapdmg.pdf%22%20%5Ct%20%22_new).etailed Contents**1.12** **Disclosure of superannuation fund executive pay and investments**  On 27 April 2012, the Australian Government released for consultation draft legislation requiring superannuation funds to disclose on their websites:* details of director and executive pay;
* details of what assets the fund has invested in; and
* an up-to-date 'product dashboard', setting out information on target investment returns, past performance against targets, investment risk, liquidity and fees, in relation to each product offered by the fund.

The draft legislation also provides for APRA to undertake enhanced data collection and publish a wider range of superannuation information, including quarterly data on MySuper products. Further, more detailed transparency requirements will be able to be specified in regulations.The draft legislation will also give effect to the Government's commitment that MySuper will be commission-free. The draft legislation also provides the remaining legislative elements relating to MySuper, including provisions relating to intra-fund advice, insurance, and the transition to MySuper.Further information is available on the [Treasury website](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/021.htm&pageID=003&min=brs&Year=&DocType" \t "_new).etailed Contents**1.13** **APRA response to submissions and draft prudential standards for superannuation** On 27 April 2012, the Australian Prudential Regulation Authority (APRA) released its response to submissions on the implementation of prudential standards for the superannuation industry. APRA's response paper details the main issues raised in the 41 submissions received and APRA's response to those issues, as well as 11 draft prudential standards.The response package follows the release in September 2011 of APRA's discussion paper, 'Prudential standards for superannuation', which outlined APRA's approach to the introduction of prudential standards for the superannuation industry.In response to submissions received, APRA has made revisions to some aspects of its proposals, most significantly in relation to the operational risk financial requirement and to the scope of the standard in relation to defined benefit funds.The released draft prudential standards include six standards covering matters common to other APRA-regulated industries, where APRA's approach has been to harmonize its requirements where appropriate.  These standards are: * Prudential Standard SPS 220 Risk Management;
* Prudential Standard SPS 231 Outsourcing;
* Prudential Standard SPS 232 Business Continuity Management;
* Prudential Standard SPS 310 Audit and Related Matters;
* Prudential Standard SPS 510 Governance; and
* Prudential Standard SPS 520 Fit and Proper.

The remaining five prudential standards cover matters that are specific to superannuation.  They include reforms that the Government recommended APRA implement as prudential standards, as well as the relocation of some existing requirements and guidance into new standards. These standards are:* Prudential Standard SPS 114 Operational Risk Financial Requirement;
* Prudential Standard SPS 160 Defined Benefit Matters;
* Prudential Standard SPS 250 Insurance in Superannuation;
* Prudential Standard SPS 521 Conflicts of Interest; and
* Prudential Standard SPS 530 Investment Governance.

APRA's response paper and the 11 draft prudential standards can be found on the [APRA website](http://www.apra.gov.au/Super/Pages/Prudential-Standards-for-Superannuation-April-2012.aspx%22%20%5Ct%20%22_new). etailed Contents**1.14** **IOSCO consults on principles of liquidity risk management for collective investment schemes**On 26 April 2012, the Technical Committee of the International Organization of Securities Commissions published a consultation report titled 'Principles of Liquidity Risk Management for Collective Investment Schemes'. The report outlines a set of principles against which both the industry and regulators can assess the quality of regulation and industry practices relating to liquidity risk management for collective investment schemes (CIS).  The fundamental requirement of liquidity risk management is to ensure that the degree of liquidity that the open-ended CIS manages allows it in general to meet redemption obligations and other liabilities.  IOSCO's principles of liquidity risk management provide details on how compliance with this requirement can be achieved.  Generally, these principles aim to reflect a level of common approach and to be a practical guide for regulators and industry practitioners.  Implementation of the principles may vary from jurisdiction to jurisdiction, depending on local circumstances and legal and regulatory structures. IOSCO's principles of liquidity risk management for CIS are divided into two groups related to the life span of a CIS:  the pre-launch and the day-to-day liquidity risk management.  They include the following:  **Principle 1:** The responsible entity should draw up an effective liquidity risk management process, compliant with local jurisdictional liquidity requirements. **Principle 2:**  The responsible entity should set appropriate liquidity limits which are proportionate to the redemption obligations and liabilities of the CIS. **Principle 3:**  The responsible entity should carefully determine a suitable dealing frequency for units in the CIS.  **Principle 4:**  Where permissible and appropriate for a particular CIS, and in the interests of investors, the responsible entity should include the ability to use specific tools or exceptional measures which could affect redemption rights in the CIS's constitutional documents.  **Principle 5:**  The responsible entity should consider liquidity aspects related to its proposed distribution channels.  **Principle 6:** The responsible entity should ensure that it will have access to, or can effectively estimate, relevant information for liquidity management.  **Principle 7:**  The responsible entity should ensure that liquidity risk and its liquidity risk management process are effectively disclosed to prospective investors. **Principle 8:**  The responsible entity should effectively perform and maintain its liquidity risk management process. **Principle 9:**  The responsible entity's liquidity risk management process must be supported by strong and effective governance.  **Principle 10:**  The responsible entity should regularly assess the liquidity of the assets held in the portfolio.  **Principle 11:**  The responsible entity should integrate liquidity management in investment decisions.  **Principle 12:**  The liquidity risk management process should facilitate the ability of the responsible entity to identify an emerging liquidity shortage before it occurs.  **Principle 13:**  The responsible entity should be able to incorporate relevant data and factors into its liquidity risk management process in order to create a robust and holistic view of the possible risks.  **Principle 14:**  The responsible entity should conduct assessments of liquidity in different scenarios, including stressed situations.  **Principle 15:**  The responsible entity should ensure appropriate records are kept, and relevant disclosures made, relating to the performance of its liquidity risk management process. The consultation report is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS231.pdf%22%20%5Ct%20%22_new).etailed Contents**1.15** **ESMA identifies divergence in Member States' use of sanctions under the Market Abuse Directive** On 26 April 2012, the European Securities and Markets Authority (ESMA) released a report on the use of administrative and criminal sanctions by European Union (EU) national regulators under the Market Abuse Directive (MAD).  The report provides a comparison of the use of administrative sanctioning powers across 29 EEA Member States for 2008-2010. The results of the report will provide input to the legislative process on the new market abuse regime. The MAD is aimed at combating cross-border market abuse across the EU by establishing a common approach amongst Member States which will support clean, fair and orderly markets, and maintain investor confidence in their integrity.  This work supports ESMA's work on achieving consistent regulatory practices across the EU. The report compared Member States market abuse regimes across a number of categories including:* the type of sanctioning powers available to competent authorities (CAs) and against whom and for which offences they were applicable;
* the resources allocated by CAs to this issue; and
* the actual use of sanctioning powers available - settlement, administrative and criminal sanctions and publication.

The reports key findings include:* **Insider dealing fines:** The size of the penalties varied between those imposed on individuals (ranging from ?64 to ?6,000,000) and those imposed on companies (ranging from ?2,545 to ?1,800,000);Market manipulation fines:  The size of penalties varied from ?100 to ?1,500,000 for individuals, and from ?575 to ?5,000,000 for companies;
* **Availability of Sanctions:**  26 Member States provide for both administrative and criminal sanctions;
* **Use of Sanctions:**  24 member states made use of their power to impose sanctions during this period;
* **Imprisonment:**  The length of imprisonment imposed in Member States, for insider dealing violations, varied from under one year to three years.  For market manipulation this varied from one year to four years;
* **Staff:**  The report identifies differences in the organization and the number of authorities' staff dedicated to tackling market abuse, covering market supervision to the imposition of administrative sanctions.  The number of staff dedicated to this range of activities varied from two to 127 staff members;
* **Key criteria to determine the type and the level of sanctions:**  Authorities took into account a range of factors with the most widely used being the seriousness of the violation; the amount of financial benefits; the cooperative behavior; financial strength and/or size; duration; impact on market and consumers; degree of culpability; repetitive nature; and level of responsibility/seniority.
* **Settlements:**  Member States consider this as an efficient way of dealing with market abuse.  However, the concept itself varies to a considerable degree.  For example, in some Member States settlement decisions may be subject to review (administrative or judicial), whereas in others, one of the consequences of closing a case by means of settlement is that a review will be precluded.

The Commission is currently reviewing the EU regime dealing with market abuse and a proposal to enhance the administrative and criminal sanctioning of market abuse. The report is available on the [ESMA website](http://www.esma.europa.eu/news/ESMA-identifies-divergence-Member-States%27-use-sanctions-under-Market-Abuse-Directive?t=326&o=home" \t "_new). etailed Contents**1.16** **EBA consults on draft guidelines for assessing the suitability of credit institutions' management body members and key function holders** On 18 April 2012, the European Banking Authority (EBA) released a consultation paper on the draft guidelines on the assessment of the suitability of members of the management body and key function holders for credit institutions.  The proposed Guidelines set out the process, criteria and minimum requirements for assessing the suitability of those persons.  Once implemented, the Guidelines will help to ensure the quality of the assessments made.   The draft Guidelines contain provisions to be followed by both credit institutions and competent authorities when assessing the suitability of persons.  They set out the criteria for the assessment and documentation requirements for institutions.  They also contain a notification requirement and provide that in cases where a member of the management body is not suitable, the credit institution and, if necessary, the competent authority shall take appropriate action.In order to ensure robust governance arrangements and appropriate oversight, the scope of these Guidelines is not limited to members of the management body but extends to the members of the supervisory function and to key function holders. Moreover, as financial and mixed financial holding companies have significant influence on their credit institutions, they are also included in the Guidelines.The consultation paper is available on the [EBA website](http://www.eba.europa.eu/Publications/Consultation-Papers/All-consultations/2012/EBA-CP-2012-03.aspx%22%20%5Ct%20%22_new).etailed Contents |

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

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| **2.1** **Updated guidance for downstream acquisitions** On 16 May 2012, ASIC released updated guidance on a key part of Australia's takeover regulation. The guidance is set out in Regulatory Guide 71 'Downstream acquisitions' (RG71).A 'downstream acquisition' occurs when a person acquires a relevant interest in more than 20% of the voting securities in an Australian company (downstream entity) as a result of an acquisition in another company, including a foreign body corporate (upstream entity). Acquisitions of this kind can have a significant impact on the control of the downstream entity and therefore its shareholders.The [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) prohibits a person acquiring more than 20% of a company with more than 50 members, a listed company or a listed managed investment scheme, unless an exception applies.Downstream acquisitions are not caught by this prohibition if the upstream entity is:* included in the official list of a prescribed financial market (such as the Australian Securities Exchange), or
* a foreign body conducting a financial market approved by ASIC, as set out in item 14 of section 611 of the Corporations Act.  ASIC's list of approved foreign exchanges is set out in Class Order 02/259 'Downstream acquisitions: foreign stock markets'.

The updates to RG 71 follow a public consultation process.  As foreshadowed through consultation, the update takes into account developments in the law since RG 71 was first published, including amendments to the exception for downstream acquisitions in item 14, the extension of the takeovers regime in Chapter 6 to listed managed investment schemes and developments in recent Takeovers Panel matters.The updated guide provides entities and their advisers with ASIC's views on how the downstream acquisition exemption in item 14 applies and ASIC's approach on relief applications, including when ASIC may grant relief to permit a downstream acquisition that does not fall within the item 14 exemption.Entities that propose making a downstream acquisition that is not exempt under item 14 are encouraged to approach ASIC for relief well in advance of the time the upstream acquisition is to take place. Regulatory Guide 71 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg71" \t "_new).etailed Contents**2.2** **Corporate insolvencies remain high** On 9 May 2012, ASIC released figures showing that the March 2012 quarter was the third consecutive quarter in the current financial year in which external administrations exceeded 2,500 per quarter. The first quarter of the 2012 calendar year saw external administrations (EXADs) increase by 16.7 per cent compared to the same quarter in 2011, which is a rise of 2.5 per cent over the previous quarter. Companies entering EXAD increased from 518 in January 2012 to 1,123 in February 2012, then fell slightly to 1,014 in March 2012.  January 2012 appointments reflect the fall off in activity normally associated with the Christmas/New Year holiday period.Underpinning the March 2012 quarter statistics is a rise in court liquidation and receivership appointments.  Creditors' voluntary liquidator appointments remained relatively steady while voluntary administration appointments fell. ASIC publishes monthly insolvency statistics detailing the number and type of corporate insolvency appointments.  External administrators are obliged by law to notify ASIC of their appointments.  ASIC will provide brief commentary on its statistics quarterly throughout the 2011-12 financial year. Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-92MR%2BASIC%2Bfigures%2Bshow%2Bcorporate%2Binsolvencies%2Bremain%2Bhigh?openDocument" \t "_new).etailed Contents**2.3** **Updated guidance for investing in mortgage schemes** On 9 May 2012, ASIC released revised disclosure benchmarks and separate disclosure principles for unlisted mortgage schemes to improve awareness of the risks of investing in these products.An accompanying investor guide has also been released to assist investors to use the benchmark and disclosure principles in identifying and assessing the risks of unlisted mortgages schemes.  This is set out in Regulatory Guide 45 'Mortgage schemes: improving disclosure for retail investors' (RG 45) and 'Investor Guide: Investing in mortgage schemes'.Since the publication of the original RG 45, the unlisted mortgage scheme sector has experienced a substantial increase in the number of redemption requests where the responsible entities could not realise sufficient assets to satisfy. This resulted in a large scale suspension of redemptions.ASIC responded by making urgent modifications to the law to facilitate partial investor access to funds in cases of hardship and subsequently, to simplify the procedures for periodic withdrawal offers out of available cash.  ASIC also liaised with individual responsible entities of frozen funds to explore options for affected investors and, where possible, facilitate access to funds.ASIC then consulted industry formally through Consultation Paper 141 'Mortgage Schemes: Strengthening the disclosure benchmarks' on extending and strengthening our existing regulatory guidance on disclosure for unlisted mortgage schemes in RG 45 to protect future investors.RG 45 is one of the series of the 'if not, why not' benchmark models of disclosure for sectors that pose particular risk to investors and financial consumers. Unlisted mortgage schemes must disclose whether they meet the benchmarks and if not, why not. This means they must explain how they will deal with the business factor or the issue underlying the benchmark.The revised regulatory guidance follows the publication of new disclosure benchmarks and disclosure principles for other high risk investments in: * Regulatory Guide 46 'Unlisted property schemes: Improving disclosure for retail investors';
* Regulatory Guide 231 'Infrastructure entities: Improving disclosure for retail investors';
* Regulatory Guide 227 'Over-the-counter contracts for difference: Improving disclosure for retail investors'; and
* Regulatory Guide 232 'Agribusiness managed investment schemes: Improving disclosure for retail investors'.

RG 45 also outlines the standards ASIC expects responsible entities to meet when advertising mortgage schemes to retail investors.Responsible entities of existing unlisted mortgage schemes should disclose the benchmark and updated disclosure principle information to investors by 1 January 2013.  For new product disclosure statements, prominent and clear disclosure of the benchmark and disclosure principle information should be included in those PDSs issued on or after 1 January 2013. Regulatory Guide 45 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg45" \t "_new), and 'Investor Guide: Investing in mortgage schemes' is available on the [MoneySmart website](https://www.moneysmart.gov.au/%22%20%5Ct%20%22_new).etailed Contents**2.4** **Consultation on revised financial requirements for electricity derivative issuers** On 4 May 2012, ASIC released a consultation paper on proposed changes to the financial resource requirements of electricity market participants who hold an Australian financial services (AFS) licence.ASIC regulates some electricity market participants (or their related bodies corporate) in relation to over-the-counter (OTC) electricity derivatives used for the purpose of managing financial risks.Some electricity market participants in wholesale electricity markets deal in OTC derivatives, to manage the volatile price in the market for electricity, referred to as the spot or physical market.  These participants are generally required to hold an AFS licence with appropriate authorisations and meet AFS licensee obligations including complying with financial requirements.Consultation Paper 177 'Electricity derivative market participants: Financial requirements' (CP 177) includes proposals for replacing the current financial requirements applying to these electricity derivative issuers with a simpler net tangible asset measure, and new liquidity and cash forecasting requirements.ASIC is not a prudential regulator. Its requirements are not intended to ensure licensees meet financial commitments to counterparties (refer to Regulatory Guide 166 'Licensing: Financial requirements'). However, in releasing its consultation paper, ASIC is  seeking to support fair and efficient markets by developing financial requirements that promote the orderly operation of the OTC electricity derivative market. CP 177 forms part of a more general review of financial requirements that ASIC is undertaking for sectors within the financial services industry. ASIC has already issued revised financial requirements for operators of managed investment schemes and has consulted on revised requirements for entities providing OTC derivatives for retail clients.Comments on the consultation paper are due by 29 June 2012. Consultation Paper 177 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp177-published-4%20May-2012.pdf/%24file/cp177-published-4%20May-2012.pdf%22%20%5Ct%20%22_new).etailed Contents**2.5** **Adviser training and financial requirements' policies for carbon financial products** On 2 May 2012, ASIC released its final policies on adviser training and financial requirements for entities and individuals providing financial services in relation to emissions units following a public consultation (refer Consultation Paper 175 'Carbon markets: Training and financial requirements' (CP 175). The relevant policies are Regulatory Guide 146 'Licensing: Training of financial product advisers' (RG 146), which sets out ASIC's minimum standards for the training of all advisers providing financial product advice to retail clients, and Regulatory Guide 166 'Licensing: Financial requirements' (RG 166), which sets out our current policy on financial requirements for Australia financial services (AFS) licensees. RG 146 now contains guidance on specialist knowledge requirements for advisers providing financial product advice to retail clients on emissions units. This new content will help advisers ensure they are fully trained and competent to provide financial product advice to retail clients on these products.Following consultation, ASIC has determined that no specific updates are required to RG 166 and that AFS licensees providing financial services for regulated emissions units should meet the current requirements of RG 166.As this may be the first time many entities will come under ASIC's regulation, ASIC has also released an updated version of Regulatory Guide 236 'Do I need a licence to participate in carbon markets?'  RG 236 is designed to help entities and individuals understand whether they require an AFS licence to provide financial product advice and other financial services in relation to carbon markets and emissions units, and, if so, details the next steps and where people can find more information. The updated version reflects legislation made since the regulatory guide was first released earlier this year, as well as providing further guidance on when advice provided to liable entities may constitute financial product advice.Regulatory Guides 146, 166 and 236 are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg166" \t "_new).etailed Contents**2.6** **Warning to financial services licensees using the term 'independent'** On 2 May 2012, ASIC issued a warning to financial services licensees about the inappropriate use of the term 'independent'. ASIC has corrected claims made by insurance brokers and financial planners about the independence of their services.In a recent surveillance project, ASIC found 21 instances of insurance brokers and financial planners making statements about the independence of the licensee or the services they provide in breach of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).  The relevant financial services licensees have now voluntarily complied with ASIC's request to remove or amend the statement in each of the 21 instances.  ASIC conducted the survey following a single complaint in order to assess the extent of the problem of inappropriate usage of the term 'independent'.AFS licensees are prohibited from using the terms, 'independent', 'unbiased' or 'impartial' if they receive commission or volume-based payments.   The licensees identified included 17 general insurance brokers, 3 financial planners and 1 life broker. In one instance, the statement was found on the website of an authorised representative.   AFS licensees must ensure that statements made by representatives in any published material comply with the relevant provisions of the Corporations Act.etailed Contents**2.7** **Registration and licensing of financial services in emissions units** On 30 April 2012, ASIC released details regarding the registration and licensing process for those intending to provide financial services in emissions units under the Federal Government's carbon pricing mechanism.   Commencing 1 July 2012, emissions units recognised under Australia's carbon pricing mechanism will be financial products.  Registration will assist providers of financial services meet their licensing requirements under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).Registrations for those involved in either advising, dealing, making a market or providing a custodial or depository service in relation to emissions units can be lodged with ASIC from 1 May until 30 June 2012. From 1 January 2013, it will be an offence to provide financial services in emissions units without a licence, unless exempt.ASIC has developed a regulatory guide, 'Do I need a licence to participate in carbon markets?' (RG 236) to help people determine whether they require an AFS licence to provide financial product advice and other financial services in emissions units. Regulatory Guide 236 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory%2Bguides?openDocument" \l "rg236" \t "_new). ASIC's [registration form](http://www.asic.gov.au/asic/asic.nsf/asic%2BformsdisplayW?readform&code=FS91" \t "_new), 'Application to register to provide financial services in emissions units', is available for downloading via the ASIC website. etailed Contents |

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

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| **3.1** **Reports** On 3 May 2012 ASX released:* the [ASX Group Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Group_Monthly_Activity_Report_-_Apr_2012_-_FINAL.pdf%22%20%5Ct%20%22_new);
* the [ASX 24 Monthly Volume and Open Interest Report](http://www.sfe.com.au/content/notices/2012/notice2012_117.pdf%22%20%5Ct%20%22_new); and
* the [ASX Compliance Monthly Activity Report](http://www.asxgroup.com.au/media/PDFs/ASX_Compliance_Monthly_Activity_Report_-_April_2012_FINAL.pdf%22%20%5Ct%20%22_new)

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

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| **4.1** **MacarthurCook Property Securities Fund 01 & 02** On 9 May 2012, the Takeovers Panel announced that it had consented to a request by Laxey Partners Ltd to withdraw its application to the Panel dated 18 April 2012 (01) and declined to conduct proceedings on an application dated 24 April 2012 from Pelorus Private Equity Limited (02), both of which related to the affairs of MacarthurCook Property Securities fund.The applications concerned a 13 for 15 non-renounceable rights issue, to be fully underwritten by the responsible entity, MacarthurCook Fund Management Limited (the Responsible Entity), and sub-underwritten by AIMS Group Holding Pty Ltd (the parent company of the Responsible Entity).The applications were made concurrently and contained some different allegations, but related to the same facts.  Broadly the applications concerned:    * the structure of the rights issue (01 & 02);
* disclosure deficiencies (02); and
* an alleged association (01 & 02).

The Panel considered that the structure of the rights issue did not minimize the potential control effects. The Panel also had concerns with aspects of the disclosure. The Responsible Entity amended the structure of the rights issue and provided additional disclosure in a form which satisfied the Panel's concerns.After Laxey entered into an agreement to sell all of its units in MacarthurCook to AIMS Group Holding Pty Ltd (on 1 May 2012), Laxey sought the Panel's consent to withdraw its application in (01). The Panel granted its consent after considering the changes to the rights issue structure and additional disclosure.The Panel also declined to conduct proceedings in (02). The Panel considered there was no reasonable prospect that it would make a declaration of unacceptable circumstances in relation to association, this being the remaining issue in Pelorus' application after the rights issue structure and disclosure concerns were addressed.The Panel has published the reasons for its decision on the [Takeovers Panel website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new).etailed Contents |

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

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| **5.1** **High Court confirms James Hardie directors and general counsel breached duties** (By Greg Golding, Joseph Muraca, Diana Nicholson, Kate Johnson and Josh Underhill, King & Wood Mallesons) Australian Securities and Investments Commission v Hellicar [2012] HCA 17, High Court of Australia, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 3 May 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/HCA/2012/17.html](http://www.austlii.edu.au/au/cases/cth/HCA/2012/17.html%22%20%5Ct%20%22_new) Shafron v Australian Securities and Investments Commission [2012] HCA 18, High Court of Australia, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 3 May 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/HCA/2012/18.html](http://www.austlii.edu.au/au/cases/cth/HCA/2012/18.html%22%20%5Ct%20%22_new) **(a)  Summary**  On 3 May 2012, the High Court released its decision in two appeals, ASIC v Hellicar (ASIC Appeal) and Shafron v ASIC (GC Appeal), in relation to an ASX announcement made by James Hardie Industries Limited (JHIL) in February 2001. The High Court confirmed the first instance decision that in approving an ASX announcement, seven non-executive directors of James Hardie breached their duties as directors. The Court also upheld the finding of liability of the general counsel and company secretary for failing to provide proper advice to the board and the CEO. **(b)  Facts** In the ASIC Appeal, ASIC successfully appealed a decision of the Court of Appeal of New South Wales which had set aside the declarations of contravention, pecuniary penalty orders and disqualification orders made at first instance against the seven non-executive directors and the company secretary (and general counsel) of JHIL. The High Court held that the Court of Appeal erred in finding that ASIC had not proved that the ASX announcement was tabled and approved at a pivotal board meeting.  In the GC Appeal, Peter Shafron (JHIL's then company secretary and general counsel) also appealed a decision of the Court of Appeal but was not successful, with the High Court finding no reason to disturb the earlier decision that Mr Shafron had contravened section 180(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) by failing to properly provide advice to the board and CEO. The decisions are very largely driven by factual matters, however the High Court did make some interesting comments on corporate governance matters.   The parties had appealed the trial judge's decision not to relieve the parties from liability under the Corporations Act (section 1317S) and the penalties imposed (for the non-executive directors, banning orders of 5 years and pecuniary penalties of $30,000).  The High Court has remitted those issues back to the Court of Appeal for further consideration.  **(c)  Decision** **ASIC Appeal** Broadly, the key issues in the ASIC Appeal were: (i) whether the Court of Appeal had properly concluded that ASIC had failed to prove that the JHIL directors had approved the misleading ASX announcement; and(ii) whether ASIC breached a duty of 'fairness' by not calling JHIL's external legal advisor who had attended the board meeting to give evidence (the Court of Appeal having found such a duty to exist and breached in the circumstances).**(i)    Did ASIC prove that the directors approved the misleading ASX announcement?** The minutes of the pivotal board meeting recorded that the misleading ASX announcement had been approved by the board.  Nevertheless, the directors argued that the minutes were incorrect and that ASIC had not proved the board approved the announcement at the meeting. The directors' key arguments and the High Court's response are as follows: **Directors' argument:** The minutes were prepared before the meeting, and therefore were inherently unreliable. **High Court's response:** The board subsequently adopted the minutes as an accurate record of the meeting.  The fact that the minutes were drafted before the meeting did not obscure the later decision of the board to adopt them as a correct record at the next board meeting.  The failure to comply with the statutory obligation to sign the minutes within 1 month of the meeting did not of itself diminish their probative value, given that the minutes were approved at the next board meeting. **Directors' argument:** ​The ASX announcement was amended by management after the board meeting, which could not have been done if the board had already approved it. **High Court's response:** The amendments made to the announcement subsequent to the meeting were 'textual, rather than substantive', and not material (see below 'Board approved documents are not set in stone').  The directors did not take issue with the contents of the ASX announcement (which was provided to them) once it had been released. **Directors' argument:** The minutes contained several proven inaccuracies, which further casts doubt over the probative value of the minutes. **High Court's response:** The evidence of some inaccuracies in the minutes did not render the entire minutes inaccurate. The High Court rejected all of the arguments, finding that given the lack of any direct evidence to the contrary, the board minutes were a formal, near-contemporaneous record and evidence of the truth of the matters recorded in them (including that the ASX announcement was tabled and approved).  In a separate judgment, Justice Heydon noted that it was a particularly heavy burden to establish that the board minutes of an ASX listed company that were subsequently adopted as a correct record were incorrect. The Court therefore held that the Court of Appeal had erred in finding that ASIC had not proved that the ASX announcement was tabled and approved at the relevant board meeting and in not giving sufficient evidentiary weight to the minutes. **(ii)  Did ASIC breach a duty of fairness?** The High Court proceeded on the assumption that ASIC was subject to a duty to conduct litigation 'fairly' although the Court expressly reserved judgment as to whether ASIC was actually subject to such a duty.  Failing to call one of JHIL's external legal advisers who was present at the board meeting as a witness did not breach the duty of fairness, particularly as no evidence was led to show that this had denied the respondents 'some advantage or subjected them to some disadvantage'. The Court found it was 'very unlikely' that the legal advisor would testify to the effect that the record of the minutes were untrue, given that he had been actively involved in the preparation of the minutes before and after the meeting and such evidence would be contrary to his interests.  As an aside, the Court noted that if ASIC was under such a duty and had breached the duty by failing to call a witness, the proper remedy would be:* for the trial judge to direct ASIC to call the witness;
* for the proceedings to be stayed until ASIC agreed to call the witness; or
* if the matter proceeded to judgment, determining whether the breach resulted in a miscarriage of justice, in which case a retrial would be ordered.

The appropriate remedy would not be to 'discount' other evidence. **GC Appeal** The GC Appeal largely confirmed existing statements of the law relating to the standard of care required of an officer under section 180(1).  At the same time, the High Court commented on the application of the definition of 'officer' and the duty of care and diligence to those holding dual roles, in this case as company secretary and general counsel. The key questions raised in Mr Shafron's appeal were:(i)   to what extent was he an 'officer' in the circumstances; and(ii)  having regard to that role, whether he failed to exercise the relevant standard of care in failing to advise the CEO and the board respectively.  **(i)      To what extent was Mr Shafron an 'officer'?** **GC's argument:** Mr Shafron contended that his conduct at issue in the proceedings (ie the failure to give advice to the CEO and board regarding the asbestos fund and ASX announcement) was undertaken in his capacity as 'general counsel' and not as 'company secretary'.  He further asserted that this conduct was not subject to the duties of an 'officer'. **High Court's response:** The High Court dismissed this argument, finding that Mr Shafron was clearly an 'officer' given he was the company secretary and that his duties and responsibilities as general counsel and company secretary could not be divided or distinguished.  The key question in assessing his liability was 'what are his responsibilities within JHIL', not 'what are his responsibilities as company secretary exclusively'.  The Court held that all of the tasks Mr Shafron performed were undertaken in fulfillment of his role in both capacities (general counsel and company secretary). While not necessary to decide, as Mr Shafron was an officer by reason of his company secretarial role, the Court also noted that he had been deeply involved in the preparation of the proposal in any event, and that the definition of officer in the Corporations Act recognizes that a person can be an officer by virtue of participating in decision making without making the actual decision.​ **(ii)     Did Mr Shafron fail to meet the relevant standard of care?** The High Court confirmed that the degree of care and skill required by section 180(1) is an objective standard, identified by reference to two relevant elements: (a)   the corporation's circumstances; and(b)   the office and responsibilities within the corporation that the officer has. The responsibilities in (b) are not confined to statutory responsibilities, and include whatever responsibilities the officer has in the particular circumstances.  As a qualified lawyer, an important part of Mr Shafron's duties was to advise the company on compliance and protect the company from legal risk.  The Court held that because of his qualifications, position and knowledge of the relevant subject matter, his responsibilities as company secretary and general counsel extended to proffering advice about meeting duties of disclosure and the defects in the relevant actuary report being considered by the board and CEO.  Since these issues were neither expressly nor impliedly in the retainer of JHIL's lawyers, Mr Shafron could not rely on the company's lawyers to raise these issues with the CEO and the board. Accordingly, even if Mr Shafron's capacities as company secretary and general counsel could be distinguished, section 180(1) would apply to whatever responsibilities Mr Shafron had in his role at JHIL (regardless of which capacity in which he came to have them). It was specifically noted that Mr Shafron was not required to have an in-depth knowledge of actuarial matters, but was required by section 180(1) to draw the relevant potential issues of which he had knowledge to the attention of the board.  Accordingly, Mr Shafron was confirmed to be an officer subject to the duty of care and diligence, and that he breached that duty by failing to advise the board and CEO on the relevant matters.**(d)  Key corporate governance implications and issues to consider** **(i)  Not game changing decisions** The ASIC Appeal and the GC Appeal are not game changing in assessing the duty of care, skill and diligence of directors and officers. The High Court made no observations that could be construed to expand the nature and scope of that duty.  The decisions are confined to an evidentiary analysis concerning the conduct of the parties in the highly fact specific circumstances of the case. **(ii)  Board approved documents are not 'set in stone'** In the ASIC Appeal, the Court rejected an argument that alterations to the ASX announcement following the board meeting demonstrated that the board had not approved the announcement.  The Court stated that whether a deed or announcement approved by a board is the same document that is later executed or published 'must be determined by more than a literal comparison between texts.  Slips and errors can be corrected.  In at least some cases better (but different) wording can be adopted. The bare fact that alterations were later made does not demonstrate that the document was not approved by the board' (ASIC v Hellicar [2012] HCA 17 at [170]). The clear, and in our view correct, implication is that the High Court believes that a document approved by a board can be subsequently amended for 'slips and errors' and for 'better' (there would be caveats here!) wording, without requiring the document to be re-approved.**(iii)  Care must be taken in preparing and approving minutes of meetings** While the Court accepted the practice of preparing board minutes in advance of meetings, the ASIC Appeal highlights the need to ensure that these minutes are prepared carefully and, to the extent that the meeting deviates from them, amended after the meeting.   Approval of inaccurate minutes not only provides uncertainty but it also raises issues of directors' duties and the statutory obligations to keep proper corporate records (see, for example, section 251A).  In this context, the Court noted that if the minutes of a meeting were false, then adoption of those inaccurate minutes as a correct record exposes directors to a risk of breaching sections 1308(2) and (4), which generally criminalize the making of misleading statements in a document required by the Corporations Act. **(iv)  Careful consideration should be given to the drafting of ASX announcements using convenient terms** One of the non-executive directors gave evidence at the first instance hearing regarding how the misleading term 'fully funded' came to be used in the ASX announcement.  He believed that the term 'fully funded' was used in board discussions as a shorthand way of saying 'sufficient funds according to the actuarial estimate'.   This provides a cogent warning in relation to using shorthand or simplified terms in public documents.  **(v)  An officer's responsibilities can include responsibilities from other roles**  For the purposes of his obligation to discharge his duties as an officer with care and diligence, the Court did not draw a distinction between Mr Shafron's duties as a company secretary and his other duties.  In complying with their duties under the Corporations Act, officers should be mindful of all of their responsibilities and duties, not just those that may be considered falling under their role as an 'officer'. As noted above, as a result of the ASIC Appeal, the matters have been remitted to the Court of Appeal for determinations on relief from liability, penalties and costs.etailed Contents**5.2** **Members' meeting without quorum: no substantial injustice** (By Ashlee Luck, Ashurst) Chalet Nominees (1999) Pty Ltd v Murray [2012] WASC 147, Supreme Court of Western Australia, Le Miere J, 2 May 2012  The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/wa/WASC/2012/147.html](http://www.austlii.edu.au/au/cases/wa/WASC/2012/147.html%22%20%5Ct%20%22_new)**(a) Summary** The Court considered whether a substantial injustice flowed from a meeting of members that occurred without a quorum.   Justice Le Miere held that the resolutions passed at the inquorate meeting, to remove current directors and appoint new directors, were not invalid.   His Honour provides an overview of case law regarding:* whether a deliberately achieved procedural irregularity can be validated; and
* what is meant by a 'substantial injustice', for the purposes of section 1322 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act).

**(b) Facts**    An application was brought by Chalet Nominees (1999) Pty Ltd (Chalet) for orders to invalidate an inquorate shareholders' meeting of James Point Pty Ltd (the Company) and therefore invalidate the resolutions passed at that meeting.   Chalet and Port 1 Pty Ltd (Port 1) were shareholders of the Company.  On 1 December 2011, Mr Buckeridge (a director of the Company and Port 1) issued a notice of meeting of members to be held on 23 December 2011 (the First Meeting).  The notice of meeting outlined resolutions to remove three directors of the Company (the Original Directors) and appoint Mr Buckeridge, Mr Teo (also a director of Port 1) and two other individuals (the New Directors). The constitution of the Company provides that a quorum for a general meeting of members is two members entitled to vote.    The First Meeting was attended by Mr Buckeridge (as proxy for Port 1), a solicitor of Port 1 (and also acting as proxy for Port 1) (the Solicitor), Mr Teo (as secretary of the Company) and one observer.  The Solicitor was appointed chairman of the First Meeting and declared that two proxies were present and a quorum was formed.  The Solicitor and Mr Buckeridge carried the resolutions to remove the Original Directors and appoint the New Directors.  Chalet asserted that the First Meeting did not have a quorum and was invalid. Mr Buckeridge issued notice of a second meeting to be held on 23 February 2012 (the Second Meeting).  The notice of meeting outlined identical resolutions to those proposed at the First Meeting.  The Second Meeting was attended by Mr Buckeridge only (as a proxy for Port 1).  The meeting was adjourned for the reason that there was no quorum, and notice was given to the shareholders of the Company for an adjourned meeting (the Adjourned Meeting).  The Adjourned Meeting was also dissolved for reason of being inquorate.   In early January 2012, the New Directors resolved to undertake a rights issue to raise $15 million.  An offer to subscribe to new shares was sent to the shareholders and none accepted.   **(c) Decision**  Justice Le Miere held that in the circumstances of this case, no substantial injustice was, or was likely to be, caused by the meeting of members that was held without a quorum.  No injustice would be caused by allowing a meeting to proceed where the members vote for and give effect to, resolutions to remove current directors and appoint new directors.  **(i) Can deliberate conduct constitute a procedural irregularity?** Section 1322(1) of the Corporations Act provides that a procedural irregularity includes, among other things, absence of a quorum at a meeting of a corporation and a defect, irregularity or deficiency of notice of time.  A proceeding is not invalidated because of a procedural irregularity unless the Court considers that the irregularity caused, or may cause, a substantial injustice that cannot be remedied by an order of the Court (section 1322(2) of the Corporations Act).  Chalet submitted that the conduct of Port 1 was deliberate and therefore could not constitute a procedural irregularity.  The case law is divided on this point:* In *Re P W Saddington & Sons Pty Ld* (1990) 19 NSWLR 674, it was held that a deliberate choice to convene a meeting, where the parties knew it was invalid, was not a procedural irregularity that could be validated.
* In *McGellin v Mount King Mining NL* (1998) 144 FL 288, Murray J held that an inquorate meeting of directors was not invalidated because the cause of the invalidity, that certain directors had a conflict of interest, was known to the directors at the time.
* The Court in *Re Pembury Pty Ltd* [1993] 1 Qd R 125 regarded that procedural irregularities should not be limited to inadvertent or accidental non-compliance.

Justice Le Miere did not consider it necessary to decide whether a procedural irregularity can be validated if deliberately achieved.  It could not be determined on the evidence whether Port 1 set out to convene a meeting knowing it would be inquorate, or whether the Solicitor had a positive belief that the First Meeting was inquorate.   **(ii) Was there a substantial injustice that could not be remedied by the Court?** It must be the irregularity (the meeting proceeding without a quorum) that causes the substantial injustice, not the proceeding itself (the meeting and its resolutions).  His Honour concluded that no substantial injustice flowed from the inquorate meeting.                           His Honour explained that a common feature of the case law is that members or directors of companies are denied the opportunity to attend meetings and make representations.  The policy behind a quorum requirement is to ensure decisions are not made by a small minority.  Chalet had the opportunity to attend and make submissions on the resolutions that were proposed at the First Meeting, but chose not to.    etailed Contents**5.3** **Discontinuation of a representative proceeding based on lack of commonality between representative applicant and claims of group members** (By Monali Pandey and Jin Ooi, Corrs Chambers Westgarth) Meaden v Bell Potter Securities Limited (No 2) [2012] FCA 418, Federal Court of Australia, Edmonds J, 27 April 2012 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2012/418.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/418.html%22%20%5Ct%20%22_new) **(a) Summary** This case concerned an application by Bell Potter Securities Limited (Bell Potter) for an order, pursuant to section 33N of the [Federal Court of Australia Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "_default) (the Act), that representative proceedings initiated by Jillian Annetta Meaden (Ms Meaden), pursuant to Pt IV of the Act against Bell Potter, no longer continue as representative proceedings.   Edmonds J held, pursuant to section 33N(c) and (d) of the Act, that the representative proceeding would not have provided an efficient and effective means of dealing with the claims of all group members, and it was otherwise inappropriate that the claims be pursued by means of a representative proceeding.   Due to the lack of commonality of issues of fact between Ms Meaden's case and the issues of the group members that Ms Meaden sought to represent, Edmonds J held that having a representative proceeding brought by Ms Meaden would nevertheless require an assessment of the issues that affected the facts of the individual group members.  As this would not be very much different to Ms Meaden and all 56 group members advancing their own individual claims concurrently, Edmonds J held that allowing the representative proceedings to continue would be 'productive of only difficulty and delay'. His Honour made an order that the proceedings no longer continue as representative proceedings under Pt IV of the Act. **(b) Facts** Ms Meaden filed proceedings as a representative applicant pursuant to Pt IVA of the Act against Bell Potter, alleging contraventions of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) and the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), which arose out of Bell Potter's dealings as a stockbroker and in relation to broking activities concerning a listed company known as Progen Pharmaceuticals Limited (PGL).  In her application, Ms Meaden sought various declarations as well as damages or, in the alternative, equitable compensation. The statement of claim alleged that Bell Potter had made representations regarding financial services in circumstances where Bell Potter had not exercised due care and skill, had acted in a position of conflict of interest and had breached its fiduciary duties.  The Statement of Claim defined 'Claimants' to include all persons within a given period who were party to a Financial Products Trading Account Agreement (FPTA Agt), had acquired shares in PGL and who had signed a litigation funding agreement with Litigation Lending Services Limited.  This effectively made the group members the subject of the representative proceedings a closed group. The representations made by Bell Potter were alleged to have been made partly in writing and partly orally. The written representations were alleged to be contained in 10 'Bell Potter Company Update' Reports dated from 13 December 2006 to 23 August 2007.  The oral representations were alleged to have been made during conversations between Ms Meaden and a Bell Potter employee. **(c) Decision** Even though the case had been commenced as a representative action pursuant to section 33 of the Act, in considering the operation of section 33N of the Act, Edmonds J pointed out that a proceeding which satisfied the requirements of section 33C(1) of the Act to proceed by way of a representative proceeding may nevertheless be subject to the operation of section 33N(1), such as to warrant its discontinuance under Pt IVA of the Act as a representative proceeding.  Edmonds J reiterated that the entire theory of representative proceedings was that the trial of one representative action would determine for all group members the common question or questions and that the efficiency of that process depended upon true commonality of issues as between the representative applicant and the group members Ms Meaden sought to represent. Edmonds J noted that, given that the pleadings included allegations of conduct as against the group members as well as Ms Meaden, evidence in relation to the individual circumstances of each particular group member would also be necessary to ensure that the allegations in relation to these group members were made good.  On the basis that the Claimants constituted a closed group, Ms Meaden was ordered to provide particulars regarding the identity of each of the members. Those particulars revealed that the group consisted of, at its highest, 56 individuals, couples and entities.  The respondent contested the inclusion of certain group members within the definition of 'Claimants', and Edmonds J found that in relation to certain individuals, erroneous claims had been made. Bell Potter made submissions as to the degrees of variance between the factual basis of Ms Meaden's claim and that of the Claimants that she sought to represent.  Edmonds J considered whether there were common of issues of law or fact as between Ms Meaden and the group members.  A summary of his analysis follows:* The statement of claim alleged that Bell Potter's representations were made orally and in writing: -  In relation to the written representations, Bell Potter submitted that they were contained in 10 different documents spanning across the period 13 December 2006 to 23 August 2007.  Ms Meaden acquired all her shares by two transactions on 14 December 2006.  Her claim was therefore only in relation to the first of 10 reports prepared by Bell Potter.  Edmonds J noted that this 'hardly provides a representative context for all other written representations alleged to have been made to and received by other group members by the issue of the balance of the reports over the period'. -  In relation to the oral representations, Edmonds J found that, contrary to the statement of claim, 33 of the 56 Claimants did not receive any oral representations.  For those Claimants that did rely on oral representations, the oral representations made to each Claimant were different.  Ms Meaden attempted to submit that the oral representations did not add anything of substance to the written representations and were not dealt with as a common issue.  However, Edmonds J noted that the statement of claim did not confine the common questions of law or fact to the written representations.
* The statement of claim alleged that each Claimant was a consumer and a retail investor.  The particulars provided by Ms Meaden to Bell Potter admitted that at least 8 claimants were not retail clients.
* Ms Meaden also alleged that Bell Potter had been silent as to its obligations as underwriter of PGL's capital raising from 10 May 2007 to 20 June 2007.  Bell Potter submitted that Ms Meaden's case would do nothing to resolve whatever liability Bell Potter has, if any, arising out of the allegations of silence in relation to the underwriting issue.  Edmonds J agreed, stating that, given that Ms Meaden had acquired all her shares in PGL by December 2006, Ms Meaden is a 'totally inappropriate vehicle to adjudicate the impact of these alleged misrepresentations by silence'.

Ms Meaden's repeated submissions in response to these divergences was that the divergences did not, as a matter of law, or having regard to the remainder of the claims, take the case outside section 33C of the Act.  That section requires: (a) seven or more persons to have claims against the same person; (b) the claims of all the persons are, in respect of, or arise out of, the same or similar related circumstances; and (c) the claims of all the persons give rise to a substantial common issue of law or fact. His Honour noted that Ms Meaden had confused the requirements set out in section 33C of the Act, in relation to the commencement of representative proceedings, with the discretion in section 33N of the Act, for the Court to order that the proceeding no longer continue as representative proceedings.  Edmonds J stated that section 33C of the Act provides the criteria for the commencement of a proceeding but has no role to play in relation to the task imposed on the Court under section 33N of the Act. In conclusion, Edmonds J found it impossible in this case to see how the trial of an action based on evidence from and concerning only Ms Meaden would have determined any issue of sufficient significance as regards the rest of the group members in the representative proceedings.  The lack of commonality between the claims of each of the group members and Ms Meaden would render the representative proceeding as being 'productive of only difficulty and delay'.  Given that, in any case, there would need to be individual appearances by all remaining group members under section 33R of the Act to determine their remaining individual issues, the process would not have been very different than if all the group members simply proceeded to advance their claims concurrently. Based on his Honour's analysis of the facts of Ms Meaden's case, the allegations and the range of facts in issue in respect of the group members, his Honour was satisfied that it was in the interests of justice that the proceeding no longer continue under Pt IVA of the Act as a representative proceeding, on both the 'inefficiency' and 'inappropriateness' grounds, being sections 33N(1)(c) and 33N(1)(d) respectively.etailed Contents**5.4** **Beware of oppressive conduct when terminating directors** (By Jessica Bounds, King & Wood Mallesons)  Wain v Drapac [2012] VSC 156, Supreme Court of Victoria, Ferguson J,  26 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/156.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/156.html%22%20%5Ct%20%22_new) **(a) Summary** Mr Wain and Mr Murchie (employees and directors of the Drapac Group) sought orders against Mr Drapac under section 233 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), which provides for relief where the conduct of a company's affairs is oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member of the company. Mr Wain and Mr Murchie were issued shares in two companies, Endoline Pty Ltd and Drapac Management Ltd, and units in trusts that form part of the Drapac Group. Their relationship with Mr Drapac deteriorated, resulting in Mr Wain's employment being terminated in October 2009 and Mr Murchie resigning in December 2009.  Mr Wain and Mr Murchie sought orders for the purchase by Mr Drapac of the shares and units they legally owned.  However, Mr Drapac argued that they did not have a beneficial interest in the shares and units.  He submitted that they were held on trust for the Drapac Group until ten years of employment had been served.  Ferguson J held that the shares and units issued to Mr Wain and Mr Murchie were held beneficially by them (and therefore they had standing in proceedings on oppression).  Further, the conduct of Endoline and Mr Drapac towards them was oppressive and unfairly prejudicial in breach of section 233 of the Corporations Act 2001.  Ferguson J considered that Mr Wain and Mr Murchie had not breached their employment agreements or their duties as directors (as asserted by Mr Drapac). Mr Wain and Mr Murchie were therefore entitled to orders for Mr Drapac to purchase their interests at fair value. **(b) Facts** Mr Wain began working for the Drapac Group in February 1996 and Mr Murchie in 1999.  Both of their roles involved sourcing and investigating new development and investment opportunities. In mid-2004, Mr Drapac told a number of the Drapac Group's key employees, including Mr Wain and Mr Murchie, that they would be entitled to equity in the Drapac Group.  This would include a share of ongoing profits at the end of the period in addition to salaries and bonuses. Mr Wain and Mr Murchie (directly or through companies that they controlled) were issued with shares in Endoline Pty Ltd and Drapac Management Ltd (both part of the Drapac Group), and units in trusts that form part of the Drapac Group.  Mr Wain held a 13.5% interest and Mr Murchie a 3.5% interest in the relevant entities.  There was some dispute as to whether the issue of shares and units was subject to a condition that the relevant employees remain employed for a period of ten years. **(i) Were Mr Wain and Mr Murchie beneficially entitled to the shares and units that they hold?** Although Mr Wain and Mr Murchie had legal ownership of the shares and units, Mr Drapac argued that they did not have beneficial ownership of the shares and units because the arrangement was subject to their continued employment with the group for ten years.  Until the end of the ten year period, the shares and units were to be held on trust for the Drapac Group.  Mr Wain and Mr Murchie denied that a ten year condition had been imposed or that they had agreed to such a condition.  **(ii) Was there oppressive conduct?** In September 2009, Mr Drapac had decided that Mr Wain 'had to go' and arranged for an IT investigation to search for evidence of misconduct by Mr Wain.  An external consultant conducted the search.  The report concluded that there were areas of potential conflict of interest, but that these would require further investigation. On 29 October 2009, Mr Drapac terminated Mr Wain's employment.  The reasons given for his termination were that:* Mr Wain had dishonestly attempted to secure benefits at the Drapac Group's expense in breach of his obligations of good faith and fidelity.  Mr Drapac asserted that Mr Wain had diverted, or attempted to divert, potential property purchases for the Drapac Group for Mr Wain's own benefit (relating to dealings with three properties in Victoria);
* Mr Wain had been destabilising the Drapac Group for his 'own perceived interests' with a view to shutting it down by, among other things, attempting to procure an assignment of the lease of the premises from which the Drapac Group operated and persuading staff to leave their employment with Drapac; and
* Mr Wain had breached various duties as a director and employee of entities in the Drapac Group.

Shortly after the termination of Mr Wain, Mr Murchie resigned from the Drapac Group.  Mr Murchie gave evidence that he had a number of discussions with Mr Drapac who believed that he was 'attempting to destroy the Drapac Group'.  From these discussions, Mr Murchie formed the view 'that he could no longer stay with the Drapac Group and that his employment was untenable'.  Mr Drapac later gave notice of an extraordinary general meeting to remove Mr Wain as a director of Endoline. The resolution was passed. Mr Wain and Mr Murchie submitted that Mr Drapac had intended to dilute their interests in the Drapac Group and pointed to a notice of extraordinary general meeting which referred to diluting their shares. Mr Wain and Mr Murchie also submitted that Mr Drapac's conduct relating to investment in a project ('Le Boulevard') in mid-2009 was oppressive.  Funding was provided by Camindu, a company Mr Drapac controlled, and the property was purchased by Drapac Management.  Mr Drapac's private family trust was the ultimate beneficiary. Mr Drapac asserted that the offer was made by Camindu on the basis that the beneficiary of the trust would be changed (and that he was acting as an officer of Camindu). **(c) Decision**  **(i) Were Mr Wain and Mr Murchie beneficially entitled to the shares and units that they hold?** Documents exchanged between Drapac Group's external accountant and legal advisors indicated that Mr Wain and Mr Murchie would only have full beneficial ownership at the end of a ten year period.  Many of the early documents included references to a 'ten year handcuff period'.  However, Ferguson J held that there was no documentary evidence supporting a contention that the units and shares issued to Mr Wain and Mr Murchie were held on trust for Mr Drapac or the entities controlled by him. There was nothing in the resolutions for the transfer, issue or allotment of shares and units to Mr Wain and Mr Murchie, nor the share and unit certificates, which indicated that the shares and units were not held beneficially.  Consideration was given by Mr Wain and Mr Murchie for the shares and units.  Further, distributions were made to Mr Wain and Mr Murchie from the trusts (a strong indicator that they held the units beneficially). Ferguson J did not accept Mr Drapac's submission that these distributions were advances against proposed future entitlements as there was no indication that the distributions were 'anticipatory, conditional or otherwise than normal entitlements that one might expect as a unit holder'.  Accordingly, Ferguson J held that the shares and units were held beneficially by Mr Wain and Mr Murchie. **(ii) Was there oppressive conduct?** Ferguson J considered that sections 232 and 233 of the Corporations Act needed to be read broadly and that an objective test must be applied.  On the facts, Ferguson J held that Mr Drapac's conduct had been oppressive. The termination of Mr Wain's employment was not based on proper grounds and Mr Drapac had used his power as the majority owner unfairly to exclude Mr Wain from management.  Mr Murchie's continued employment was untenable.  There was no offer to purchase their interests and their equity was therefore 'trapped', even though they would no longer participate in management of the business. Ferguson J stated that these were all 'hallmarks of oppression'.  When considered as a whole (together with Mr Drapac's plans to dilute Mr Wain and Mr Murchie's interests and having regard to Mr Drapac's conduct in relation to the Le Boulevard project), the conduct was oppressive. Ferguson J held that Mr Wain and Mr Murchie were entitled to orders for Mr Drapac to purchase their interests at fair value. The valuation of the shares and units is to be determined at a future hearing.etailed Contents**5.5** **Parent company owes duty of care to the employees of subsidiary company, but corporate veil intact** (By Jacqueline Christie, Clayton Utz) Chandler v Cape plc [2012] EWCA Civ 525, England and Wales Court of Appeal (Civil Division), Arden LJ, Moses LJ and McFarlane LJ, 25 April 2012 The full text of this judgment is available at:[http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html%22%20%5Ct%20%22_new) **(a) Summary** On appeal, the UK Court of Appeal (Civil Division) upheld a decision that Cape plc ('Cape') had breached a duty of care owed to an employee of its wholly owned subsidiary, Cape Building Products Ltd ('Cape Products').  In order to determine whether Cape had assumed responsibility for the health and safety of Cape Products' employees and thereby owed a duty of care, the Court at first instance applied the three-stage test formulated in *Caparo Industries PLC v Dickman* [1992] 2 AC 605 which requires that:* the injury was foreseeable;
* there was a relationship of proximity between Cape and the employees of Cape Products; and
* it is fair, just and reasonable to impose liability.

The appeal by Cape challenged, amongst other alleged errors in both law and fact, the use of the Caparo test at first instance. The Court rejected the appeal, approving the use of the Caparo test and reaffirming that Cape owed the employees of Cape Products a duty of care on the basis of the common law concept of assumption of responsibility. The Court 'emphatically rejected' that the case was an example of piercing the corporate veil.  The Court acknowledged that Cape and Cape Products were separate legal entities and the imposition of responsibility on Cape was not only by reason of being the parent company of Cape Products.   The impact of the decision is that the law can impose on a parent company responsibility for the health and safety of the employees of its subsidiaries in circumstances where: * the businesses of the parent and subsidiary are in a relevant respect the same;
* the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
* the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
* the parent knew, or ought to have foreseen, that the subsidiary or its employees would rely on it using that superior knowledge for the employees' protection.

**(b) Facts**  The appeal was brought by Cape against the original decision by Wyn Williams J in the High Court of Justice Queen's Bench Division (UK), who found Cape liable in tort for injuries suffered by Mr Chandler while employed at Cape Products. Mr Chandler contracted asbestosis as a result of exposure to asbestos dust during a period of employment with Cape Products between 24 April to 9 October 1959 and from 24 January 1961 to 9 February 1962 (the 'relevant period') at its Uxbridge Middlesex site (the 'Site'). Asbestos was produced on the Site in a factory which had open sides, allowing the asbestos dust to escape into the open air and to the area in which Mr Chandler worked.  Cape conceded that Cape Products failed to protect its workforce from the effects of exposure to asbestos dust. Cape had previously manufactured asbestos products at the Site before Cape Products became a wholly owned subsidiary and took over production before the relevant period.  Cape Products became a member of a group of companies which had a core business of the production of asbestos-based products, with Cape as its parent company ('Group Companies'). Cape Products at all times retained a separate legal personality, was the owner of its assets, handled its own sales and conducted dealings with third parties.  Cape had common directors with Cape Products, hosted Cape Products board meetings at its premises, approved capital expenditure, discussed and authorised aspects of Cape Products' production process, issued product specifications for manufacture and approved separate administration of Group Companies 'in accordance with company policy'. While certain matters were subject to parent company direction, Cape did not have absolute control over Cape Products. During the relevant period, Cape employed a doctor as Group Medical Advisor who was responsible for the health and welfare of all the employees of the Group Companies.  Cape also employed a Chief Scientist during the relevant period who was involved in exploring options to suppress asbestos dust at Group Company factories.   Cape Products has since been dissolved and did not have an insurance policy that would indemnify it against claims of asbestosis.  Cape is still in existence. **(c) Decision**  The Court affirmed the use of the Caparo test to determine whether a parent company owes a duty of care to the employees of its subsidiaries.  After examining the circumstances, the Court cited the following relevant facts which suggested that Cape had assumed responsibility for the health and safety of Cape Products' employees and owed them a direct duty of care:* Cape passed on production of asbestos products to Cape Products and had actual knowledge of the 'systemic failure' to provide safe systems of work at the Site;
* Cape maintained a certain level of control over the asbestos production of Cape Products at the Site;
* Cape had superior resources and knowledge about the asbestos business and the nature and management of asbestos risks; and
* Cape employed a Group Medical Advisor and Group Scientist who retained overall responsibility for the health and safety policy at the Cape Products Site, despite not being responsible for the actual implementation of the health and safety measures.

The direct duty of care owed to Cape Products' employees by Cape was breached by its failure to advise on, and provide, a safe system of work at the Site to prevent the migration of asbestos dust. Acknowledging that there is no general duty in the law of negligence to prevent third parties causing damage to one another, the Court cited *Smith v Littlewoods Organisation Ltd* [1987] AC 241 as authority for an exception to this principle in situations where a special relationship exists between the parties.  Despite not having complete control over Cape Products' business, Cape's control over the health and safety policies of Cape Products was found to be a special relationship which gave rise to an assumption of responsibility.  The Court 'emphatically rejected' that the case was an example of piercing the corporate veil, or established a general principle that parent companies are liable for the negligence of their subsidiaries.  The Court acknowledged that Cape and Cape Products were separate legal entities and confirmed that there is no imposition or assumption of liability by reason only that a company is the parent company of another company.  Instead, the Court found that Cape owed a direct duty of care to Cape Products' employees and was liable in tort for the injuries suffered by those employees.etailed Contents**5.6** **Misleading or deceptive conduct in relation to Australian Financial Services Licences: the need to act efficiently, honestly and fairly** (By Sophie Payton, DLA Piper) Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (In Liquidation); In the Matter of Camelot Derivatives Pty Limited (In Liquidation) [2012] FCA 414, Federal Court of Australia, Foster J, 23 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/414.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/414.html%22%20%5Ct%20%22_new) **(a) Summary**    The Court made declarations substantially in the form agreed between the Australian Securities and Investments Commission ('ASIC') and Camelot Derivatives Pty Limited ('Camelot') that the latter had engaged in misleading or deceptive conduct and failed to provide financial services efficiently, honestly and fairly.    **(b) Facts**    From 24 November 2004 to 28 July 2011, Camelot held an Australian Financial Services Licence ('AFSL'), which authorised Camelot to engage in options trading investments on behalf of its clients.  Neil King ('Mr King') was the sole director of Camelot and the sole 'responsible person' for the purpose of Camelot's AFSL. From March 2008 to October 2010, 66 of Camelot's 71 clients suffered significant losses as a result of Camelot's trading activities.  Those clients complained to ASIC who served notices on Camelot requiring it to provide information.  On 7 December 2010, ASIC commenced proceedings against Camelot and Mr King. ASIC sought declarations that both Camelot and Mr King: * had engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in contravention of section 1041H of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) and section 12DA of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) (the ASIC Act);
* had failed to do all things necessary to ensure that the financial services provided under Camelot's AFSL were provided efficiently, honestly and fairly in contravention of section 912A(1)(a) of the Corporations Act; and
* had failed to comply with the conditions of Camelot's AFSL.

Alternatively, ASIC alleged that Mr King was liable as an accessory in respect of Camelot's contravening conduct. ASIC alleged that Camelot and Mr King had made false or, at least, misleading or deceptive representations at seminars and presentations conducted by Mr King, on Camelot's website and in promotional material provided to prospective clients to the effect that:* Camelot's clients had generated significant returns by investing in an options trading market;
* Camelot's clients could generate, or have an expectation of generating, significant returns by investing in an options trading market;
* Camelot had experience in implementing a successful strategy, methodology, formula or concept to generate significant returns from investments in an options trading market; and
* Camelot was able to show potential clients how they could achieve significant returns by investing in an options trading market.

ASIC also alleged that Camelot and Mr King had made misrepresentations to prospective clients about how Camelot's options trading strategy would be implemented, including that the strategy:* generally involved one or two trades per month;
* generally resulted in the majority of trades expiring worthless; and
* included using the income stream from premiums for short-dated (four weeks to expiry) options to purchase long-dated options (with a different expiry date).

On 13 March 2012, the Court ordered ASIC to specify in writing the findings of facts it intended to rely on.  The Court ordered Camelot and Mr King to specify in writing which facts specified by ASIC were disputed and any additional facts that they intended to prove.  Neither Camelot nor Mr King complied with this request.   On 13 April 2012, the Court was informed that the matter had been settled.  The Court was provided with Short Minutes of Order dated 16 April 2012 signed by the solicitor for ASIC and by Counsel for Mr King ('the Consent Orders').  At a hearing on 16 April 2012, Counsel for Mr King informed the Court that:* Mr King had nothing to put against the contentions of fact advanced by ASIC;
* the contentions of fact advanced by ASIC were made out by ASIC's evidence; and
* Mr King consented to the declarations and orders set out in the Consent Orders.

**(c) Decision**   The Court made the findings of fact sought by ASIC and made declarations and orders substantially in the form agreed between ASIC and Mr King in the Consent Orders.  The Court granted injunctive relief against Camelot and against Mr King pursuant to section 1324 of the Corporations Act. **(i) Misleading and deceptive conduct** The Court declared that, by making the following representations, Camelot engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 1041H of the Corporations Act and section 12DA of the ASIC Act:* Clients of Camelot had earned significant returns from options trading;
* Potential clients of Camelot could expect to earn significant returns from options trading;
* Camelot had experience in implementing a successful strategy, methodology, formula or concept to generate significant returns from investments in an options trading market; and
* Camelot is able to show potential clients how they can achieve significant returns by investing in an options trading market ('the representations').

The Court held that the trading engaged in by Camelot was not consistent with the strategies it promoted.  Contrary to the representations made to prospective clients, Camelot's strategy usually involved:* Additional put or call trades with the same expiry date;
* far greater than 1 or 2 trades per month; and
* the majority of trades not expiring worthless.

**(ii) Failure to conduct financial services business fairly, efficiently and honestly** The Court declared that Camelot had engaged in an options trading strategy in circumstances where it knew or ought to have reasonably known that it was furthering Camelot's interests in earning commissions and not acting in the interests of its clients.  In doing so, Camelot failed to do all things necessary to ensure that its financial services were provided efficiently, honestly and fairly in contravention of section 912A(1)(a) of the Corporations Act. **(iii) Mr King's accessorial liability**  The Court held that ASIC had established that Mr King made all of the representations at Camelot's seminars and presentations and was directly responsible for the drafting of material on Camelot's website and in its promotional materials.  Consequently, the Court declared that Mr King caused Camelot to:* make the representations, knowing that those representations were misleading or deceptive, or likely to mislead or deceive; and
* engage in the conduct in contravention of section 912A(1)(a), knowing that Camelot would thereby fail to do all things necessary to ensure that the financial services provided by Camelot, as covered by the AFSL, were provided efficiently, honestly and fairly.

The Court held that Mr King was therefore an accessory in respect of Camelot's contravening conduct and, by consent, ordered that Mr King be restrained:* for a period of two years from, directly or indirectly, making any of the representations;
* for a period of six years from providing, directly or indirectly, any financial services; and
* for a period of two years from, directly or indirectly, soliciting or enticing any person to invest in an options trading market.

**(iv) Declaratory relief by consent** The Court held that it was entitled to make the declarations substantially in the form agreed between the parties based on:* ASIC's very detailed and specific contentions as to the findings of fact which should be made;
* The substantial body of evidence which supported ASIC's contentions; and
* The fact that ASIC's contentions were not challenged by either Camelot or Mr King.

In doing so, the Court distinguished *Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609, which held that declarations of right should not be made on the basis of submissions alone.etailed Contents**5.7** **Liquidator's duties on winding-up: application to court for directions** (By Brenton Clarke, Ashurst)                         Gerah Imports Pty Ltd v The Duke Group (in liquidation) [2012] SASC 63, Supreme Court of South Australia, Sulan J, 18 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/sa/SASC/2012/63.html](http://www.austlii.edu.au/au/cases/sa/SASC/2012/63.html%22%20%5Ct%20%22_new) **(a) Summary** This was an application by the liquidator of The Duke Group Ltd (in liquidation) for directions under section 379(3) of the Companies (South Australia) Code, as to the liquidator's obligations in winding up the Duke Group (in liquidation) in which a surplus of funds was available for distribution.  It was held that a liquidator has no duty to advise shareholders in respect of their individual claims, but is required to provide shareholders with sufficient information to lodge a proof of debt.  The liquidator was ordered to provide shareholders of The Duke Group with further information in respect of lodging a proof of debt. **(b) Facts** The liquidator of The Duke Group Limited (in liquidation) ('the Duke Group') applied to the court for directions pursuant to section 379(3) of the Companies (South Australia) Code ('the Code).  At the date of liquidation, the liquidator had successfully brought proceedings which enabled all creditors' claims to be paid in full.  However, there remained a surplus of funds in the liquidation.  Seven creditors had made claims for post-liquidation interest which in total exceeded the surplus funds held by the liquidator.  Following a court direction, these creditors received a dividend in partial settlement of their claim.  In respect of the remaining surplus funds, the liquidator sought directions regarding the potential claims of company shareholders which, if proven, would take priority over outstanding creditors' claims for post-liquidation interest. Following court orders, the liquidator called for proofs from the potential shareholder claimants on two separate occasions. Of the shareholders who responded to the liquidators notice seeking proof of debt, there were a number of shareholders who had either failed to make clear their intention to make a claim, or who did not intend to make a claim on the basis of misapprehension as to the procedure for proof of debts.In the current case, the liquidator sought directions as to his obligations in respect of:* whether further communication must be made to the shareholders whose response to the liquidator was deficient or in error, and whether this communication related to providing general advice as to the formal procedure for lodging claims, or whether the communication extended to providing personal advice to the individual shareholders (such as answering questions);
* whether the Duke Group could be wound up without including any shareholder claims not formally lodged by a specified date, and whether there was any further obligation to notify shareholders of any right to prove in winding up;
* whether it is appropriate to publish a notice of intention to declare a dividend in the Gazette; and
* whether it is appropriate for the legal costs of the potential shareholder claimants in hearing the current matter to be funded by the liquidator.

**(c) Decision** Justice Sulan rejected the argument that the liquidator was justified in taking no further action other than making determinations on the proofs of debt already received.  His Honour noted that shareholders had received limited information on which to make a claim, evidenced by the level of confusion among the shareholders regarding potential proofs of debt. In relying upon *Re ION Ltd*, Sulan J held that the liquidator has no duty to advise an individual shareholder of their right to claim in the liquidation.  To do so was considered by his Honour to be contrary to the liquidator's duty of impartiality as between creditors.  In the present case, it was held that the liquidator has a duty to provide potential shareholder claimants with sufficient information without answering specific questions. His Honour directed that the potential shareholder claimants be given further information.  It was considered appropriate that a further notice be provided to all the potential shareholder claimants, with the exception of those who had already lodged a formal proof of debt. As to the form of information to be given, his Honour directed the liquidator to:* publish general advice on the liquidator's website as to the formal procedure for lodging a proof of debt with the liquidator, together with the Company's share register as at the date of liquidation;
* provide a minimum period of 28 days after posting the notice in which potential shareholder claimants could lodge their proof of debts.  After this period, the liquidator is not obliged to take further action with respect to potential claims; and
* publish a notice of intention to declare a dividend in the Gazette and on the liquidator's website.

The court also ordered that all costs of the parties involved in the application, including the shareholder representatives, form part of costs of the liquidation. etailed Contents**5.8** **Extensions of time for the determination of winding up applications**  (By John O'Grady and Jason Bernard, Corrs Chambers Westgarth) Deputy Commissioner of Taxation v Bayconnection Property Developments Pty Ltd [2012] FCA 363, Federal Court of Australia, Robertson J, 16 April 2012 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2012/363.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/363.html%22%20%5Ct%20%22_new) **(a) Summary** Bayconnection Property Developments Pty Ltd ('Bayconnection') owed the Deputy Commissioner of Taxation ('DCT') outstanding amounts under the Business Activity Statement ('BAS') taxation provisions.  The DCT issued a statutory demand for payment, which was challenged unsuccessfully by Bayconnection.  As the debt continued to remain unpaid, the DCT commenced proceedings to have Bayconnection wound up on the grounds of insolvency. The application was opposed by Bayconnection on the basis that proceedings were already underway in the Administrative Appeals Tribunal ('AAT') disputing the existence of the debt.  Bayconnection submitted that the disputed debt was the only reason for the company's alleged insolvency, and therefore sought an adjournment of the winding up proceedings until the AAT matter was resolved. Robertson J held that an extension to the period of time in which the winding up application needed to be determined could be granted in circumstances where there was no prejudice to the tax revenue, Bayconnection had a 'reasonably arguable' case before the AAT, and that case was soon to be heard. His Honour held that Bayconnection had proven each of these elements on the balance of probabilities.  The DCT also argued that Bayconnection should prove its solvency; however his Honour was satisfied with proof of the absence of third party creditors, indicating Bayconnection's solvency but for the disputed tax debt. This conclusion further justified an adjournment, as resolution of the AAT dispute was likely to impact the outcome of the winding up proceedings. On this basis, his Honour granted a four month adjournment as well as a four month extension to the period for determining the application for winding up. **(b) Facts** Bayconnection owed the DCT a debt known as a 'Running Balance Account deficit debt' which comprised amounts due under BAS provisions as well as additional administrative penalties and general interest charges.   On 1 April 2011, the DCT served a statutory demand on Bayconnection for the payment of this debt in the amount of $145,922.55.  Bayconnection applied under section 459H(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act) (existence of a genuine dispute between the parties) and section 459J of the Corporations Act (substantial injustice to the debtor) to the Supreme Court of New South Wales to have the demand set aside.  The application was rejected by the Court on 8 September 2011.  The debt remained outstanding and the DCT filed an application in the Federal Court on 4 November 2011 to have Bayconnection wound up on the ground of insolvency (under section 459P of the Corporations Act).  The DCT submitted an affidavit to the court stating that the tax debt had increased to $162,344.41.  The case was adjourned four times until it came before Robertson J on 21 March 2012 and was listed for hearing on 5 April 2012.   Bayconnection accepted that it was insolvent but submitted that the application to wind up the company should be adjourned (pursuant to section 459R of the Corporations Act) pending resolution of simultaneous proceedings in the AAT challenging the existence of the debt.  Bayconnection submitted that the disputed debt was the only reason for its insolvency, and that the Federal Court proceedings should be placed on hold until the AAT proceedings were resolved.   Bayconnection provided an affidavit from its sole director (Ms Caporale) showing a total income of zero for the years 2003 to 2011, 'business development costs' for 2006 of $504,515, total assets of $818.98, and various liabilities to Ms Caporale.  Ms Caporale stated that she did not intend to seek repayment of the monies owed to her until the company had sufficient cash flow.  Accordingly, the only creditors of the company were the DCT and Ms Caporale. The key issue was whether his Honour considered that there were special circumstances, under section 459R of the Corporations Act, justifying an extension of time to the period in which the application for winding up should be determined.  **(c) Decision**  His Honour considered a number of previous decisions to identify relevant considerations.  His Honour found no doubt that there is discretion, and that principles relevant to the exercise of the discretion are:* the collection of the revenue should not be prejudiced or any such prejudice should be insubstantial (see section 14ZZM of the [Taxation Administration Act 1953 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "_default) (the Taxation Administration Act));
* the debtor company should have a 'reasonably arguable' case in proceedings under Pt IVC (Taxation Objections, Reviews and Appeals) of the Taxation Administration Act; and
* those proceedings are soon to be heard.

His Honour considered that the principle that collection of the revenue should not be prejudiced is a matter to be given substantial weight in exercising the discretion under section 459A of the Corporations Act.  However, his Honour found that no prejudice to the revenue was identified, in terms of the timing of recovery or otherwise.  Bayconnection was not trading and had not been trading for six years and it had no assets.  His Honour further found that Bayconnection had a 'reasonably arguable' case in proceedings under Pt IVC of the Taxation Administration Act, and those proceedings were to be heard before long.  His Honour agreed with Bayconnection that although the company was insolvent it had no third party creditors apart from the DCT.  No such creditors had come forward in the proceedings, and in the circumstances of the company not trading for the last six years, his Honour considered that it was unlikely that there were any such creditors.  Bayconnection's documentary material showed no such creditors and there was no challenge to this evidence by the DCT. His Honour made this finding despite accepting the submission on behalf of the DCT that Bayconnection had not adduced the 'fullest and best' evidence.  This is because Bayconnection was not attempting to prove that the company was solvent but merely that it had no other third party creditors. His Honour considered that the appropriate test was the balance of probabilities and found that even though Bayconnection's evidence was not the 'fullest and best', the balance of probabilities had still been satisfied in that Bayconnection had established the absence of any third party creditors. Finally, his Honour accepted that the only or substantial effect of refusing the application for an adjournment would be that control of the company would pass to a liquidator. A liquidator may elect not to challenge the tax debt, and therefore, no advantage, apart from the bare fact of liquidation, could be suggested on behalf of the DCT.  For the above reasons, his Honour saw it as being appropriate to order a four month adjournment of the case as well as a four month extension to the period within which the application for winding up must be determined.  The orders were conditional on Bayconnection taking all steps available to it to have the AAT case heard as soon as possible. etailed Contents**5.9** **Validity of agreements entered into in contravention of section 208 of the Corporations Act** (By Linda Sweeney, Freehills) Re Summit Resources (Aust) Pty Ltd [2012] WASC 125, Supreme Court of Western Australia, Martin CJ, 12 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/wa/WASC/2012/125.html](http://www.austlii.edu.au/au/cases/wa/WASC/2012/125.html%22%20%5Ct%20%22_new)    **(a) Summary** The applicant entered into a deed of settlement and release of the principal proceedings with two other companies, one of which was a related party of the applicant.  The Court found that entry into the deed was a contravention of section 208 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act).  The Court established that the effect of the Act was to prefer certainty over invalidity and, despite the contravention, the deed of release was valid.  The Court reasoned that as the deed of release had already extinguished all the applicant's claims in the principal proceedings, it was appropriate to make orders dismissing those proceedings as it was no more than an administrative step giving effect to an inevitable result, and conferred no further financial benefit on the related party. **(b) Facts**   The applicant, Summit Resources (Aust) Pty Ltd (SRA) was a wholly owned subsidiary of Summit Resources Ltd (Summit), a company listed on the Australian Stock Exchange (ASX).  In 2001, SRA entered into a joint venture with Resolute Ltd (Resolute) for the purpose of exploring and potentially developing uranium mining tenements near Mount Isa.  In 2005, Resolute resolved to move its uranium interests into a separate company, Valhalla Uranium Ltd (Valhalla), which was to be floated.  Resolute assigned its interest in the joint venture to a wholly owned subsidiary of Valhalla, Mount Isa Uranium Pty Ltd (MIU).  After the issue of the prospectus for Valhalla, SRA asserted that Resolute had breached the joint venture agreement by providing information that was confidential to the joint venture partners for inclusion in the prospectus. In 2006, Paladin Energy Ltd (Paladin) successfully undertook a takeover of Valhalla. SRA claimed that there had been further disclosure of confidential information in connection with Paladin's takeover bid.  In late 2006, SRA commenced proceedings against Resolute and MIU (the SRA proceedings).  SRA claimed that pursuant to the default provisions of the joint venture agreement, it was entitled to acquire MIU's interest in the joint venture at a discounted value. In early 2007, Paladin announced a takeover bid for Summit.  Paladin's bid was substantially successful and it acquired a little over 80% of Summit.  At this point the parties to the joint venture, SRA and MIU, had each become subsidiaries of Paladin. In mid 2007, a deed of settlement and release was entered into which compromised the SRA proceedings.  On 3 August 2007, SRA lodged a memorandum of consent orders with the Court.  However, on 6 August 2007, Areva NC (Australia) Pty Ltd (Areva), Summit's second largest shareholder with around 10% of its shares, commenced proceedings seeking leave pursuant to section 237 of the Act to intervene and take over responsibility for the SRA proceedings (Areva proceedings).  One of the assertions made in the Areva proceedings was that entry into the deed of release constituted a breach of section 208 of the Act and that making orders giving effect to the deed of release would relieve the parties to the contravention of any potential consequences, by bringing their actions within the scope of section 216 of the Act.   In response to the commencement of the Areva proceedings, Martin CJ made orders that no order dismissing the SRA proceedings be settled, signed or sealed until either judgement in the Areva proceedings or further order.  The Areva proceedings were subsequently settled. In the present case, SRA sought an order permitting it to give effect to the deed of settlement and release between itself, Resolute and MIU.  Summit's third largest shareholder, Revelation Special Situations Fund, with around 5% of its shares, opposed the relief sought by SRA. The provisions of the Act considered in the case are summarised below.* Section 208 states that for a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company, the public company must either obtain approval from its members or the benefit must fall within one of the exceptions set out in sections 210 to 216 of the Act.
* Section 209 states that the contravention of section 208 does not affect the validity of any contract or transaction connected with the giving of the benefit.
* Section 103 states that an act, transaction, agreement, instrument, matter or thing is not invalid merely because of a contravention of section 208 or 209 (among other sections).
* Section 216 states that member approval is not needed to give a financial benefit under an order of a court.

**(c) Decision**  **(i) SRA's submissions** SRA provided evidence of advice received from counsel that the SRA proceedings had no realistic prospect of success, and submitted that this supported two alternative conclusions.  First, that neither entry into the deed of release, nor giving effect to it, would constitute the giving of a financial benefit to MIU because SRA's claims had no value.  Alternatively, the fact that the SRA proceedings had no prospect of success justified the Court making the orders sought and bringing the settlement within the scope of section 216 of the Act because it would not cause any prejudice to the interests of Summit or its shareholders. **(ii) Jurisdiction** Martin CJ examined the nature and effect of section 216 of the Act.  He found that the section did not confer any general jurisdiction on the Court to exempt a public company from the operation of section 208 of the Act.  However, the Court clearly had jurisdiction to make orders dismissing the SRA proceedings.  **(iii) The deed of release and contravention of section 208** Martin CJ examined the deed of release and found that the mutual releases and discharges in it were not conditional on any orders being made by the Court, rather they operated immediately upon execution of the deed. In addition, all steps required to be taken by the parties under the deed had already been performed. Martin CJ found that despite SRA's submission regarding the weakness of its claims, entry into the deed of release did confer a financial benefit upon MIU because the focus of Chapter 2E of the Act is on the financial benefit received by the related party, not on the net loss of the public company.  SRA's case was not so hopeless as to be vulnerable to summary dismissal and, while SRA maintained its claim, MIU was obliged to incur legal expenses defending itself, some of which would be unlikely to be recovered even if MIU was successful.  Martin CJ found that the extinguishment of SRA's claim did confer a financial benefit on MIU and concluded that entry into the deed of release did contravene section 208 of the Act. **(iv) Effect of contravention of section 208** After considering the terms of sections 209 and 103 of the Act and a number of previous cases, Martin CJ held that despite his conclusion that section 208 of the Act had been contravened, the deed was nevertheless valid and there was no action or step remaining to be taken under the terms of the deed that could be subject to an injunction pursuant to section 1324 of the Act. Martin CJ found that an order dismissing the SRA proceedings was simply an administrative step giving effect to a result that was inevitable once the deed of release was entered into and fully performed.  SRA would be unable to revive its claims in the SRA proceedings as it had entirely released all relevant causes of action. Martin CJ reasoned that, as the defendants to the SRA proceedings would probably obtain indemnity costs if SRA were so foolhardy as to attempt to take any further steps in the proceedings, orders dismissing the SRA proceedings gave no financial benefit to MIU and therefore did not affect the operation of section 208. **(v) Other findings** While the conclusion that orders dismissing the SRA proceedings should be made did not depend on the merits of those proceedings, Martin CJ went on to make the following findings:* the SRA proceedings had no realistic prospect of success and thus making orders dismissing them would not be prejudicial to the interests of Summit or its shareholders as a whole; and
* it would be impractical to refer the decision as to whether the SRA proceedings should be compromised to a meeting of shareholders.

etailed Contents**5.10** **Non-director appoints another as a director; court has no power to validate**  (By Jack Hill, King & Wood Mallesons) Beck v LW Furniture Consolidated (Aust) Pty Ltd [2012] NSWCA 76, New South Wales Court of Appeal, Campbell and Young JJA and Sackville AJA, 5 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/76.html](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/76.html%22%20%5Ct%20%22_new) **(a) Summary** This decision analyses the ambit of the operation of section 1322(4)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Corporations Act), and assesses the power of a court to validate an attempt by a person who is not a director of a company to appoint another person as a director, such that the other person becomes a director de jure.  It confirms that not every invalid action is a contravention that can be validated under section 1322.  For an impugned action to be validated, the action must be able to be performed under the Corporations Act or the company's constitution.  If it is not possible to perform the action or achieve the accompanying result under the Corporations Act or the constitution, section 1322 cannot assist. **(b) Facts**   The decision concerned a dispute over the directorship in LW Furniture Consolidated (Aust) Pty Ltd ('LWF'), a family company incorporated in 1971.   LWF was founded by Leo Weinstock and his wife, Hedy, who were the founding directors.  Leo and Hedy were the first directors of LWF.  Unusually, all the issued shares of LWF were preference shares that conferred no right to vote.  Therefore, there was no mechanism for shareholders of LWF to appoint additional directors. In June 1973, in accordance with LWF's constitution, Leo and Hedy (as directors) appointed their two children, Tami and Ami, as directors.  Ami's ongoing appointment as a director was an issue both at first instance and during the appeal.     By 30 July 2003, Tami had purportedly resigned as a director, Leo had died and Hedy had become incapable of performing her duties as a director.  Consequently, Ami purported to appoint his wife, Helen, as an additional director. Tami brought proceedings in the Supreme Court contending that Ami was not a director of LWF on 30 July 2003, and therefore the appointment by him of Helen as a director was invalid.  Tami sought to wind up LWF.  In a cross-claim, Ami and Tami sought a declaration that they were validly appointed as directors of LWF, or alternatively orders under section 1322 to regularise the governance of LWF. Pursuant to section 1322(4)(a) of the Corporations Act, a court may make an order declaring that any act, matter or thing purported to have been done under the Act or in relation to a corporation is not invalid by reason of any contravention of a provision of the Act or a provision of the constitution of the corporation. At first instance, Barrett J made an order under section 1322(4)(a) validating the appointment of Helen as a director.  He held that validation was necessary as Ami was not a director on 30 July 2003, and therefore Helen's purported appointment was invalid. Tami appealed against the order validating the appointment of Helen, and again sought orders that LWF be wound up.  Ami and Helen also appealed, challenging Barrett J's finding that Ami did not hold office as a director on 30 July 2003. **(c) Decision**   The court held that Tami's appeal should succeed (Campbell JA on the basis that the primary judge failed to accord natural justice when making the validation order).  It looked at six issues.  Most significantly, the court held (with Campbell JA dissenting) that the purported appointment of Helen as director was not an appointment that could be validated by an order made under section 1322(4)(a).  The court also unanimously held that Ami was not a director of LWF on 30 July 2003, and therefore did not have the power to appoint Helen.  The matter was remitted to the primary judge to determine whether LWF should be wound up. **(i) Ami's appointment as a director** The court scrutinised LWF's constitution to determine whether Ami was a director on 30 July 2003. Ami was initially appointed as a director under the casual vacancy provision in LWF's constitution.  Directors appointed under that provision hold office only 'until the next following AGM'.  The court unanimously upheld the primary judge's finding that under the terms of the constitution, Ami ceased to hold office at the moment the 1973 AGM began.  In doing so, the court rejected Ami's submission that a director who ceases to hold office pursuant to the casual vacancy provision is a 'retiring director' for the purpose of  LWF's constitution, and therefore eligible for a deemed re-election (being a re-election not requiring the approval of shareholders) under the constitution. The court also rejected the submission that Helen's appointment could be validated by article 92 of the constitution.  Article 92 provides that all acts done by a person acting as a director shall, notwithstanding that there was some defect in the appointment of the director or person acting as a director, be as valid as if the person had been duly appointed.  The court held that the article does not cure the lack of any appointment, but operates in respect of an appointment that is defective in some relevant way. **(ii) The validation issue - what the majority held**  Tami submitted that there was no power to make a validation order concerning Helen's purported appointment because such an order would not fall within the words of section 1322(4)(a). The critical issue was whether the purported appointment of Helen as a director was invalid by reason of a contravention of a provision of the Corporations Act or the constitution of LWF.  While acknowledging that the word 'contravention' for the purpose of section 1322 is to be read very widely and has been construed to extend to a failure to take advantage of a provision in a constitution, both Sackville AJA and Young JA held that it was not possible to hold that Ami's act of appointing Helen was a 'contravention'.  To do so would be 'stretching the language to breaking point'.   Their Honours agreed with Tami's submission that where a power is exercisable only by a person holding a particular office, and that power is purportedly exercised by a person who does not hold that office and whose appointment to that office cannot be validated, there is no contravention.  In reaching their conclusion their Honours noted that Ami had attempted to exercise a power limited to a lawfully appointed director and that at no stage after the 1973 AGM did LWF purport to appoint Ami as a director, nor was there any mechanism available, general meeting or otherwise, to appoint Ami as a director.  As explained by Sackville AJA, 'it is one thing to apply s 1322(4)(a) of the Corporations Act to the purported acts of an invalidly appointed director and another to apply the provision to the purported acts of someone who has never been validly appointed as a director and cannot be so appointed'. Their Honours' approach makes it clear that not all invalid actions can be validated under section 1322.  An invalid action must be able to be performed under the Corporations Act or a company's constitution.  If this is the case, then when the action is performed in a different and invalid way, it may be validated under section 1322.  However, if it is not possible to perform the action or achieve the accompanying result under the Corporations Act or the company's constitution, section 1322 cannot assist. **(iii) The validation issue - dissenting judgment** In his dissenting judgment, Campbell JA placed emphasis on High Court authority that provisions granting powers to a court are not to be read by making implications or imposing limitations which are not found in the express words.   His Honour held that there is nothing in the text, nor anything in the purpose, of section 1322 that suggests the word 'contravention' should not be given its full meaning.  Specifically, Campbell JA held that 'there is nothing in the wording of s 1322(4) that restricts the court's power under s 1322(4)(a) to being used only in cases where all the steps have resulted in the invalidity that is in question could themselves be validated.  All that is required for there to be a contravention of the constitution is that something have happened that is different to what the constitution of the corporation requires.  For Ami to appoint Helen as director, when he had no power to do so, is a contravention in this sense'.  His Honour found support for his findings in the decision of *Nece Pty Ltd v Ritek Incorporation* (1997) 24 ACSR 38.    etailed Contents**5.11** **Conversion from creditors' to voluntary winding up to enable the avoidance of a floating charge is permissible** (By Alissa Crittenden, Clayton Utz) Walker and Moloney v CBA Corporate Services (NSW) Pty Limited [2012] FCA 328, Federal Court of Australia, Nicholas J, 5 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2012/328.html](http://www.austlii.edu.au/au/cases/cth/FCA/2012/328.html%22%20%5Ct%20%22_new)  **(a) Summary**The first plaintiffs were the liquidators of ZYX Learning Centres Limited (in liquidation) ('Liquidators'), formerly known as ABC Learning Centres Limited, and 38 other related companies (together the 'Companies').  The Companies were the second plaintiffs to the proceedings.  Prior to the proceedings, the nature of the liquidation of the Companies was a creditors' voluntary winding up.   The defendants were a syndicate of lenders who had advanced monies to the Companies and taken security in the form of charges ('Banks').  The Banks had appointed receivers and managers to the Companies pursuant to their security. By the proceedings, the plaintiffs applied for:* pursuant to section 588FF(3) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), an extension of time in which to bring any voidable transaction application (including, to the extent necessary, an extension of time to commence an application under section 588FJ of the Act); and
* pursuant to section 459A of the Act, an order that the Companies be wound up in insolvency.

The purpose of the section 459A application was to enable the Liquidators to make any application under section 588FJ of the Act, which (at the relevant time) renders void as against a liquidator a floating charge created during the six-month relation-back period.  In order for section 588FJ to apply, the Companies must be being wound up in insolvency, as distinct from being wound up by way of (inter alia) a creditors' voluntary winding up. The Court granted the plaintiffs the relief sought.  In respect of the section 459A application, the Court determined that it was permissible to convert a liquidation from a creditors' voluntary winding up to a winding up in insolvency to confer on the Liquidators the benefit of section 588FJ of the Act. **(b) Facts**    On 10 December 2007, the Banks and the Companies entered into a lending facility which was subsequently refinanced.  On 10 July and 27 October 2008, a number of the Companies granted security to the Banks in the form of charges. 6 November 2008 marked the day when both the Companies went into voluntary administration and receivers and managers were appointed by the Banks.  On 2 June 2010, the creditors of the Companies resolved that the Companies be voluntarily wound up. The period within which the Liquidators could bring an application under section 588FF(1) of the Act for relief in relation to a voidable transaction is the later of three years from the "relation-back" day or 12 months after they were appointed, unless that time is enlarged by the Court.  The time limit had expired.  Although the Liquidators had not formed a view as to whether the relevant transactions pursuant to which the Banks had received monies were voidable under the Act, they sought to preserve their rights by applying for an enlargement of time under section 588FF(3) of the Act. In respect of section 588FJ of the Act, the Liquidators sought an extension of time to bring an application under that section, to the extent necessary (presumably to the extent that the Court deemed it to be a voidable transaction provision to which section 588FF(3) applied).  However, the bigger hurdle faced was that the Companies were in voluntary liquidation, and were not being wound up in insolvency, the latter of which was a condition for section 588FJ to apply.  As already noted, although the Liquidators had not yet formed a view as to whether the monies received by the Banks were the proceeds of assets the subject of a floating charge which might be void, the Liquidators wished to preserve the Companies' position by applying for an order under section 459A of the Act that the Companies be wound up in insolvency.  Section 459A of the Act provides that, on an application under section 459P of the Act, the Court may order that a company be wound up in insolvency. **(c) Decision**   **(i) The section 588FF enlargement of time application** Applying well established principles, the Court found that there were three matters it was required to consider when determining the enlargement of time application, namely:* the explanation for the delay in commencing the proposed proceeding;
* the merits of the proposed proceeding.  (However, applying *Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608, his Honour found that if the purpose of the enlargement of time application was to allow the Liquidators time to determine whether to bring the proposed proceedings, this consideration may not be relevant); and
* any prejudice likely to be suffered if time was enlarged.

The Liquidators submitted that the enlargement of time was warranted, given the complex structure of the group of Companies, the complexity of the relevant transactions, the problems they encountered in obtaining access to the books and records of the Companies (they had been placed in the custody of the Receivers and the Liquidators were dependent on the Receivers granting them access as and when the Liquidators requested access), and delays in funding in respect of the proposed proceeding. The Banks submitted that they would be prejudiced by the enlargement by reason of the departure from the Banks' employment of certain personnel and the Liquidators' insufficient explanation for the delay.   The Court was not satisfied that the Banks had established any prejudice and granted the enlargement of time sought.  The Court found that no enlargement of time was necessary in respect of any section 588FJ application. (**ii) The section 459A application that the Companies be wound up in insolvency** The parties were in agreement that, for an order to be made under section 459A of the Act, the Companies must have been insolvent at the date of the section 459A application and at the date of the hearing of that application.  An issue in contention was the relevance of the insolvency (or otherwise) of the Companies as at the relation-back day.  The Banks argued that the Liquidators were required to establish insolvency as at that date because:* if a person with standing had applied to wind up the Companies in insolvency on the relation-back day, that person would have had to establish insolvency at that date; and
* it would be 'unjust' for the Liquidators to obtain the advantage of an order under section 459A of the Act unless they could establish the insolvency of the Companies as at the relation-back day.

The Banks led no evidence that the Companies were solvent on the relation-back day, nor did they submit that this was the case. The Liquidators argued that the insolvency of the Companies on the relation-back day was irrelevant.  In their submission, the relevant times to establish insolvency were at the time of the section 459A application and the time of the hearing of that application. The Court accepted the Liquidators' submissions, finding that insolvency on the relation-back day was not required to be established in this matter.  However, the Court envisaged two scenarios where the insolvency of a company at the relation-back day may be relevant, namely:* section 588FJ(3) of the Act provides that a floating charge is not void if 'it is proved that the company was solvent immediately after that time'.  The Court found that the 'time' referred to is when the floating charge was created.  If it was established that a company which had given a floating charge was solvent immediately after it was given, in relation to which issue evidence of solvency as at the relation-back day could assist, the Court would decline to make an order under section 459A of the Act because the section 588FJ application would be doomed to fail; and
* where there is prejudice to the potential defendant by reason of the loss or destruction of evidence which showed the circumstances in which the charge was given, including the company's solvency at or subsequent to that time.  In those circumstances, the Court may refuse to make an order under section 459A where there had been significant delay on the part of the liquidator in moving for that order.

The Court found that it had not been established that a proposed application under section 588FJ was without merit, nor that the delay in bringing the section 459A application was a reason in this instance to deny relief.  It granted the application under section 459A for the sole purpose of enabling the Liquidators to rely upon section 588FJ if they decided to commence such a proceeding against the Banks, noting that the creditors stood to benefit significantly if such an application were successfully made.etailed Contents**5.12** **Liquidators v secured creditors: securing a bare right to sue**  (By Marianna Parry, Freehills) Australian Property Custodian Holdings Ltd v Capital Finance Australia Ltd [2012] VSC 124, Supreme Court of Victoria, Ferguson J, 4 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/124.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/124.html%22%20%5Ct%20%22_new) **(a) Summary** The liquidators of Australian Property Custodian Holdings Ltd ('APCHL') and its related entities ('Liquidators') sought declarations that they were entitled to bring certain proceedings against third parties in relation to all assets of APCHL, including assets covered by security agreements.  Some of the secured creditors counterclaimed seeking declarations that the Liquidators were not entitled to bring any proceedings directly associated with their secured assets, and that some other proceedings instituted or contemplated by the Liquidators comprised part of their secured assets. Ferguson J held that the right to institute proceedings formed part of the secured assets and granted all declarations sought by the Secured Creditors, while dismissing all applications made by the Liquidators.   **(b) Facts**    The case presents a dispute between the Liquidators and the secured creditors of APCHL - Capital Finance Australia Ltd ('CFAL'), Industry Funds Management (Nominees 2) Pty Ltd ('IFM') and Suncorp-Metway Ltd (together, the 'Secured Creditors') - about the right to sue various third parties.  The Liquidators proposed to institute proceedings claiming damages of up to $173 million against Lend Lease Primelife Ltd ('LLP'), a lessee and manager of the retirement villages, many of which were subject to charges by the Secured Creditors (the 'Proposed Proceeding' and 'Proposed Claim'). The plaintiff initially argued that the Proposed Proceeding did not form part of the secured assets.  In addition, in order to fund the Proposed Proceeding, the Liquidators sought approval to enter into a litigation funding agreement with a litigation funder controlled by a former director and shareholder of APCHL, Mr Lewski ('Litigation Funding Agreement').  It was noted that Mr Lewski was also a defendant in a separate proceeding brought against him and other directors of APCHL by the Liquidators in relation to an alleged breach of directors' duties ('Related Proceeding').  The Secured Creditors contended that the Proposed Proceeding was subject to their securities and/or that it would interfere with their receivership.  CFAL counterclaimed, seeking declarations that the Proposed Proceeding, the Related Proceeding and a claim relating to the sale of management rights ('Management Rights Claim') were subject to CFAL's securities.  IFM counterclaimed, seeking a declaration that the Proposed Proceeding was subject to IFM's securities.   The Secured Creditors, LLP, as a creditor of APCHL, and the Australian Securities and Investments Commission ('ASIC'), as amicus curiae, made submissions opposing approval of the Litigation Funding Agreement.  Ferguson J granted all declarations sought by the Secured Creditors holding, inter alia, that the Secured Creditors between them had a charge over the whole of the Proposed Claim, and dismissed all applications made by the Liquidators.  **(c) Decision**   Ferguson J considered the following issues:* Do the security agreements extend to the Proposed Claim?
* Is the Proposed Claim property that was charged under the securities?
* Are the Liquidators entitled to prosecute the Proposed Claim in any event?
* Are the Related Proceeding and/or the Management Rights Claim subject to the CFAL's and/or IFM's securities?
* May the Litigation Funding Agreement lead to a perception of conflict?

These issues are discussed in detail below. **(i) Do the security agreements extend to the Proposed Claim?** The Liquidators argued that their right to sue LLP was based on the following propositions:* the Proposed Claim was a future chose in action and the definitions of 'Property' and 'Secured Assets' in the security agreements did not include any future choses in action; and
* the Proposed Claim embraced all retirement villages held by APCHL directly and as a trustee of the Prime Retirement and Aged Care Property Trust ('Trust'), and could not be split into individual actions.

However, both propositions failed.  First, her Honour interpreted broadly the various definitions of 'secured assets' in the relevant security agreements, as including 'any business conducted on the relevant land by the chargor, any management rights in relation to land or business, the right to deal with the land ... and the right to sue arising out of any contract relating to the land or business' and, hence, any future chose in action.  Second, Ferguson J held that the Proposed Claim was 'not one claim but rather many individual claims' on the basis that APCHL was the owner of only some of the retirement villages while being an ultimate holding company of the owners of the other retirement villages.  According to her Honour, APCHL would be suing a third party for loss in value of the shares of APCHL's subsidiaries, which was not permitted.   **(ii) Is the Proposed Claim property that was charged under the securities?** The Liquidators submitted that a right to sue constituted a future chose in action, which was not assignable, and that a security could not be granted over a non-assignable chose in action. In the alternative, they argued that it was 'not even a future chose in action, but merely a bare right to sue for damages' which could not be assigned and to which none of the exceptions to the prohibition on assignment applied. However, her Honour held that 'there was no reason why a charge cannot secure an asset that comes into existence after the date of the charge, regardless of whether it is tangible or intangible property . [The Liquidators' argument] would undermine the system of corporate finance and security in this country which relies heavily on the ability of floating charges to effectively secure future property.'  Ferguson J further held that it did not matter whether the future property was assignable or not and that, in any case, several exceptions to the prohibition on assignment of a bare right to sue applied: * first, the assignees had a genuine commercial interest in taking the assignment arising at the time of entering into the facility agreement, and there was no trafficking in litigation by the Secured Creditors; and
* second, the right to sue was incidental to the transfer of an interest in property, as, in the Proposed Claim, it related to an action for breach of leases and operating and managing contracts.

**(iii) Are the Liquidators entitled to prosecute the Proposed Claim in any event?** Having been defeated on previous issues, the Liquidators argued that they had a residual power to enforce claims on behalf of APCHL where it would not impinge prejudicially on the position of the Secured Creditors.  Ferguson J held that, as the Secured Creditors had not abandoned their assets, the Liquidators did not have such power.  Further, her Honour stated that 'if the prosecution of a claim would have a negative effect on the charged assets or their realisation, then the liquidators must stay their hand'.  Her Honour also found that there was a high degree of likelihood that the Proposed Claim, if instituted by the Liquidators, would interfere with the receivership.  **(iv) Are the Related Proceeding and/or the Management Rights Claim subject to CFAL's and/or IFM's securities?** Ferguson J held that both the Related Proceeding and the Management Rights Claim were available to CFAL and potentially to other Secured Creditors as both actions fell within the broad definition of 'secured assets'.  For example, the Related Proceeding involved breaches of directors' duties in relation to an amendment of the Trust constitution to make a payment to APCHL personally rather than as a trustee of the Trust.  The  definition of 'secured assets' relevantly encompassed 'the chargor's right of indemnity arising from the Trust assets'.  Her Honour rejected the Liquidators' contentions that within the right of indemnity CFAL was only entitled to the right of reimbursement and not to the right of exoneration and that not all Trust assets were charged but only those relating to the villages named in the security agreement.  **(v) May the Litigation Funding Agreement lead to a perception of conflict?** Ferguson J held that entering into the Litigation Funding Agreement would create an impression that the Liquidators were 'in a compromised position' in relation to the relevant prosecutions, as the litigation funder was a defendant in the Related Proceedings and a potential defendant in the Management Rights Claim.  In addition, the terms of the Litigation Funding Agreement required the Liquidators to consult with the litigation funder and enabled the latter to withdraw funding. etailed Contents**5.13** **Seeking security for costs: the strength of a claim being stifled**  (By Steven Grant, Minter Ellison) Australian Equity Investors, an Arizona Limited Partnership v Colliers International (NSW) Pty Ltd [2012] FCAFC 57, Full Court of the Federal Court of Australia, Jacobson, Besanko and Perram JJ, 3 April 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/57.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/57.html%22%20%5Ct%20%22_new) **(a) Summary** This case considers the circumstances in which the court will make an order for security for costs.  In particular, it considers the strength of the claim being made and whether the order will stifle the claim. **(b) Facts**   The appellants, Australian Equity Investors and The 258 Nest (collectively 'AEI') were both limited partnerships under Arizona law and sought leave to appeal from an order of a judge of the Federal Court of Australia that they provide $250,000 by way of security for the costs of the respondent, Colliers International (NSW) Pty Limited (Colliers).  The proceedings arose out of AEI's involvement in the redevelopment of premises at 258 Pacific Highway, Crows Nest, Sydney, whereby AEI claimed that, in becoming involved with the redevelopment, it relied upon an appraisal of the value of the premises given to it by Colliers on 8 July 2004.  The appraisal was found to have been misleading and deceptive contrary to sections 52 and 53A of the former [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default), which prohibited misleading and deceptive conduct. In short, the events leading to this application were as follows:* The initial proceedings were commenced in 2009 and on 11 December 2009 Colliers demanded $100,000 by way of security which was agreed to by AEI.
* Following the vacation of the original trial dates in June 2010, Colliers sought further security for its costs and on 5 November 2010 the primary judge ordered that a further $250,000 be provided.
* AEI was unable to provide that sum and on 15 December 2010 moved to vacate the order whilst at the same time seeking to have the question of whether the appraisal letter of 8 July 2004 was misleading and deceptive tried as a preliminary issue.
* That application of 15 December 2010 was dealt with as follows on 15 February 2011 when the primary judge ordered AEI to provide a further $100,000 (rather than the original $250,000) by way of security, found that the appraisal was misleading and ordered Colliers to pay the costs of determining the separate question on an indemnity basis.  In addition, AEI successfully applied for the return to it of the $100,000 it had previously put up as security.
* A further application for security for costs was made by Colliers on 27 July 2011, to which the primary judge then acceded.  In that application, the primary judge received evidence from AEI directed to proving that it would not be able to meet any further orders for security.  The primary judge found that those who stood to benefit from the proceedings were AEI's creditors and that there was no evidence that these creditors were unable to provide security.  Accordingly, applying *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1 (Bell Wholesale), the primary judge concluded that it was not shown that the claim would be stifled.  The primary judge considered the strength of AEI's claim and was plainly aware of the fact that AEI had been successful on the separate question.  However, the primary judge concluded that there were potentially complicated defences relating to causation and reliance and that it was inappropriate to reach any conclusion on the strengths or weaknesses of AEI's claims.  The primary judge ordered AEI to provide $250,000 by way of security.  In doing so he took into account the $100,000 already provided which, we assume, had not at that stage been returned.

It is from the orders of 27 July 2011 that AEI sought leave to appeal.   AEI submitted that there were two errors in the primary judge's reasoning:* The primary judge failed to take into account, in assessing the strength of the matter, the fact that AEI had already succeeded on the separate question and was, therefore, that much closer to ultimate success and correspondingly less likely to suffer an adverse costs order; and
* The primary judge had erred in concluding that AEI needed to prove that its creditors could not put up security in order to make good its argument that the litigation would be stifled by an order for security.  According to this submission, the creditors concerned were not assisting AEI in the litigation and, properly understood, Bell Wholesale did not apply to creditors in that position.

**(c) Decision** The Full Court accepted that AEI demonstrated that Colliers engaged in misleading and deceptive conduct and that it was much closer to establishing Collier's liability to damages than an applicant in recently commenced proceedings.  Likewise, the court acknowledged that it ought to be accepted that the chances of Colliers ultimately obtaining a costs order in its favour might to some extent be seen as having been reduced.  However, the court also noted that there were non-trivial issues involved which were yet to be decided in a matter which sought to hold Colliers liable for losses which were not directly connected to the misleading nature of the appraisal letter.  In addition, the fact that the development which proceeded was not the one upon which the appraisal was originally based may generate substantial factual debates about reliance. On that basis, the court ordered that leave to appeal be granted and the appeal be dismissed, thereby required AEI to provide $250,000 by way of security for Colliers' costs.   A more detailed consideration of the two submissions in these proceedings follows below: **(i) The strength of AEI's claim** AEI's principal submission was that the primary judge had erred in failing to appreciate that its success in demonstrating that Colliers had engaged in misleading and deceptive conduct at the trial of the separate question meant that the chances of Colliers ultimately securing a costs order against it was reduced.  However, the court held that the primary judge was certainly cognisant of the fact that AEI had already succeeded on the question of whether Colliers had engaged in misleading and deceptive conduct.  Indeed, the primary judge recorded AEI's submission that this fact made it less likely that Colliers would ultimately be awarded a costs order.   The court also noted that no error was to be discerned in the primary judge's conclusion that the reliance and causation defence proposed by Colliers might give rise to complex issues and although the primary judge did not explain what the complexities were, it was not necessary for the primary judge to do so. **(ii) Stifling AEI's claim** Although the evidence before the primary judge established that AEI had no assets or resources from which to meet an order for security and the primary judge accepted that generally a court would not make an order for security if the making of that order would prevent the litigation from continuing, the primary judge nonetheless ordered that security be provided.  The principle reason for this order was the primary judge's reliance upon what was said by the Full Court in Bell Wholesale.  In that case, the Full Court considered that 'a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholder or creditors or, as in this case, beneficiaries under a trust) are also without means.' During the cross-examination of the directing mind of AEI, Mr Moore, it emerged that AEI had six creditors, each of whom held promissory notes issued by AEI.  The primary judge noted that no attempt had been made to prove the asset position of those creditors and that this led the primary judge to conclude, by directly applying Bell Wholesale, that an order for security on the basis that the claim might be stifled should not be declined. On appeal AEI submitted that it was not sufficient that the creditors might benefit ultimately from the litigation, rather that also had to 'stand behind it' with the conclusion that those who stand behind it and who will benefit from the litigation are also without means. The court did not accept AEI's arguments.  The passage in Bell Wholesale does not require that the class of those benefited by the litigation be divided into two further sub-classes being those standing behind the applicant and those standing, presumably, elsewhere.  The principle at play is simply that those who stand to share the benefits of litigation cannot shirk its burdens.  It follows that the concepts of 'benefiting from' and 'standing behind' are elements in the same concept.  However, it does not follow that in every case where stifling is said to be the result of an order for security that the position of those benefitted by the litigation needs to be proved by an applicant.  Each case depends on its own facts and an assessment of what is reasonable in the circumstances.  In this case, however, the court held that it was far from obvious that all of the present creditors were, in truth, at arm's length at all.  Indeed, several of the creditors were related in some form or another.  Furthermore, it was relevant that the time for payment of the promissory notes had long passed without any apparent attempt to enforce the notes by the noteholders, which suggested a degree of accommodation to AEI by its creditors which in turn might well permit them to be characterised as having a more than a merely passive role. In these circumstances, the court concluded that there was no error in the primary judge's approach to this set of issues.etailed Contents**5.14** **Set-off available for post-liquidation debts that were contingent prior to liquidation** (By James Brownstein, DLA Piper) Grapecorp Management Pty Ltd (in liq) v Grape Exchange Management Euston Pty Ltd [2012] VSC 112, Supreme Court of Victoria, Sifris J, 30 March 2012 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/vic/VSC/2012/112.html](http://www.austlii.edu.au/au/cases/vic/VSC/2012/112.html%22%20%5Ct%20%22_new) **(a) Summary** The Victorian Supreme Court has held that under section 553C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act), the right of set-off exists in respect of debts incurred by a company after liquidation has commenced, provided those debts were contingent prior to litigation. The Court also applied the 'liquidation expenses principle' to hold that work performed for a company in liquidation was work performed for the purposes of liquidation, and that debts arising out of that work were entitled to priority under section 556(1)(a) of the Act. **(b) Facts**    Grapecorp Management Pty Ltd (in liq) ('Grapecorp') was appointed to manage two grape projects on the Bella Vista Vineyard, on behalf of Timbercorp Securities Limited ('TSL').  In 2008, Grapecorp subcontracted its obligations in respect of these projects to Grape Exchange Management Euston Pty Ltd ('Grape Exchange') under a Management Agreement. As well as managing the Bella Vista Vineyard, the Management Agreement required Grape Exchange to market and sell the grapes as Grapecorp's agent.  The 'Net Proceeds' of any sales ('Gross Proceeds' less marketing costs incurred) were to be paid to Grapecorp.  In return, Grapecorp was to pay Grape Exchange a Management Fee, and any Direct Costs and Expenses incurred through providing its services. Between February and December 2009, Grape Exchange collected $2,831,796.87 from the sale of grapes.  However, the Timbercorp group went into voluntary administration on 24 April 2009, and into liquidation two months later.  As such, it was unable to pay Grape Exchange the Management Fees and Direct Costs and Expenses it owed under the Management Agreement.  Grape Exchange therefore paid Grapecorp only $475,313.48 of the Net Proceeds from its sales, retaining the balance to offset amounts it was owed. Grapecorp sued Grape Exchange to recover the unpaid Net Proceeds.  Grape Exchange asserted a right to set-off under section 553C of the Act, and argued that in any case it was a priority creditor of Grapecorp under section 556 of the Act. **(c) Decision**   The Court held that:* Grape Exchange was entitled to exert its right to set-off under section 553C; and
* even if it were not, the Management Fees and Direct Costs and Expenses it was owed were liquidation expenses, the recovery of which took priority over Grapecorp's other unsecured debts under section 556(1)(a).

Grapecorp also made a claim for moneys it had received, which the Court did not consider, concluding that any money received had been taken into account by Grape Exchange's set-off calculation.**(i) Set-off under section 553C**  Section 553C provides that where there have been mutual dealings between two parties and one is insolvent, the sum owed by one party can be set off against the sum owed by the other, and only the balance is payable. Grapecorp raised three arguments as to why Grape Exchange should be unable to assert a right of set-off.  The Court dismissed each argument, and held that Grape Exchange was indeed entitled to set-off. First, Grapecorp argued that the Net Proceeds held by Grape Exchange were trust moneys, which could not be the subject of a set-off.  For the following reasons, the Court was satisfied that there was no trust in place:* the Management Agreement did not state that there was a trustee/beneficiary relationship between Grapecorp and Grape Exchange;
* the Net Proceeds were not held in a separate bank account, but rather were mixed with Grape Exchange's other funds;
* Grape Exchange was entitled to deduct its marketing fees from the proceeds, and was only required to remit the Net Proceeds back to Grapecorp; and
* Grapecorp did not own the Bella Vista Vineyard (it was leased by another Timbercorp entity), and had no proprietary interest in the proceeds from the sale of grapes.

Second, Grapecorp argued that Grape Exchange was not entitled to set-off Direct Costs and Expenses incurred after the date on which it went into administration (noting that Grapecorp had paid all Direct Costs and Expenses incurred prior to that date).  The Court considered a number of authorities suggesting that debts incurred after winding-up has commenced are capable of set-off if they existed as contingent liabilities prior to winding-up.  Further, the Court noted a contingent liability or right exists where 'there is a vested or existing right or obligation out of which, on the happening of a contingency ... there will arise a right to be paid or an obligation to pay a sum of money'.  The fact that the Management Agreement was executed long before Grapecorp went into administration meant that the liabilities were contingent prior to administration. Third, Grapecorp argued that because Grape Exchange had knowledge of Grapecorp's insolvency, it was precluded from relying on set-off under section 533C(2).  However, the Court held that the appropriate time at which a party must have notice of insolvency is when the obligation arises, rather than when the debt becomes payable.  In this case, the obligation arose when the Management Agreement was signed, and there was no way for Grape Exchange to know of Grapecorp's financial difficulties at that time. **(ii) Liquidation expenses under section 556(1)(a)** Under section 556(1)(a) of the Act, expenses incurred by liquidators and administrators in 'preserving, realising or getting in property of the company, or in carrying on the company's business' take priority over the company's unsecured debts. Grape Exchange relied on the 'liquidation expenses principle' to successfully argue that the Management Fees and Direct Costs and Expenses it incurred under the Management Agreement from 24 April 2009 onwards were liquidation expenses. That principle, stemming from a number of English cases, states that where a liquidator makes use of company property for the purposes of the liquidation, any liabilities incurred in respect of that property prior to the liquidation commencing are treated as liquidation expenses. In this case, the Court was satisfied that the Management Fees and Direct Costs and Expenses were incurred for the purposes of the liquidation.  The Management Agreement survived the winding-up of Grapecorp, and Grape Exchange continued to provide its services at Bella Vista Vineyard with the knowledge of the liquidators.  In fact, the Court noted the liquidators had made a deliberate choice to continue to cultivate the grapes on Bella Vista Vineyard until winding-up was completed, for the benefit of Grapecorp's creditors and the creditors of the other members of the Timbercorp group.  As such, these debts took priority over any of Grapecorp's unsecured debts.  This result was largely academic, though, because of the Court's finding with regard to set-off above.etailed Contents |

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