
Index

Agency relationships

lifting the corporate veil in *see* **Corporate veil**

ASIC

investigation and enforcement powers of, 503-530

access power, 517-519

implied, 517

statutory, 518

cease and desist orders, 527-530

civil proceedings against third parties, 523-525

compensation orders, 523-524

injunctions, 523-525

public interest action, 525

disclosure of information, 515

informants, 504-510

detrimental employment consequences, protection from, 509-510

identity of, protecting, 506

liability of, 507-509

protection of, 505

voluntary, protection regime for, 505

infringement notices, 519-523

CLERP (Audit Reform and Corporate Disclosure) Act 2004, 519

criticisms of, 520-523

hearing process, 519

injunctions, 523-527

s 1324 *Corporations Act 2001*, 523-527

mutual investigative assistance, 510-515

foreign regulators, powers to assist, 510-512

foreign regulators' powers to assist ASIC, 512-514

Mutual Assistance in Criminal Matters Act 1987, 513

recommendations, 514-515

search and seizure without warrant, 516-517

emergency situations, 517

Proceeds of Crime Act 2002, 517

search warrants, 516

ASX Corporate Governance Council Best Practice Recommendations *see* **Corporate governance**

Audit

auditor independence and rotation *see* **Auditors**

CLERP (Audit Reform and Corporate Disclosure) Bill 2003, 205-207, 280-283, 506

audit partner rotation, 282

auditing standards, legislative backing for, 280

auditor competency, 282

auditor independence declaration, 281

Index

- auditor liability, 282
- Companies, Auditors and Liquidators Disciplinary Board (CALDB), 282
- director appointments and cooling off periods, 281
- functions and powers of FRC, changes to, 280
- independence, definition of, 281
- non-audit services, provision of, 281
- s 311 reporting requirements, expansion of time limit, 282
- statements by registered company auditors, 282

Auditors

- independence and rotation, 341-344
 - CLERP, 341
 - mandatory audit partner rotation, 342-344
 - advantages, 342
 - disadvantages, 342
 - survey findings, 343-344
- Ramsay report, 341

Bidders *see* **Takeovers**

Bills of exchange *see* **Financial products**

Book reviews

- ASIC Corporate Investigations and Hearings*, Thomas Middleton, 223

Breach of trust

- Hanel v O'Neill*, 322

Break fees

- agreement, 440
- asset sales, in, 453-456
 - desirability of application of Takeover's Panel Guidance Note, 455
 - inapplicability of Takeovers Panel's Guidance Note, 453-455
 - quantum of break fee in, 455
 - unacceptable circumstances, declaration of, 453-454
- directors' duties in relation to, 440-441
 - bid solicitation, 441
 - exiting bids, 440-441
- fixed, 448
- Inducement criterion, 442, 452-453
- profit offset, 447-448
- purpose, 440
- quantum of, 443-448
 - assessment of, 448
 - Ausdoc Group Ltd*, 444-446
 - Ballarat Goldfields NL*, 447
 - National Can Industries 01*, 446
 - Normandy 03*, 443-444, 447

- Sirtex Medical Ltd*, 447
- Takeovers Panel
 - Guidance Note, 439-459
 - policy on, 442-443
 - application of, 443
 - cap for fees, 442
 - Competitive Neutrality criterion, 442
 - Inducement criterion, 442
 - Non-coercion criterion, 442
 - opportunity costs, 442
 - reasonable bid costs, 442
 - triggers for payment of, 448-452
 - withdrawal of recommendation, 450-452

Canada

- continuous disclosure regime *see* **Continuous disclosure**
- floating charges in *see* **Floating charges**

Capital raising

- ceiling on share issues, 304
- data and research on, 305-311
 - results, 306-311
- external sources, 302-303
- placements, 301-312
 - benefits of, 304
- rights issues, 301-312
 - benefits of, 303
 - “voluntary”, 310
- shareholder approval, 304

Chairmen

- ASIC v Rich*, 181-193, 196, 198-204, 553-555
 - ASIC’s allegations in, 200-201
 - delegation and reliance, 192-193
 - expert directors, 201
 - facts, 183-184
 - guidance for chairmen, 198-200
 - role of chairman, 189-192
 - AWA Ltd v Daniels*, 189
- audit committee, 202
 - Sarbanes-Oxley Act 2002*, 202
- Daniels v Anderson*, 185, 187-188, 554
- duties of *see* **Directors’ duties**
- personal qualities of, 183-189, 555
- qualifications and experience, 554

quasi-executive, as a, 203
responsibilities, 186-188, 555-557
 ASIC's list of duties, 557
 "contemporary community expectations", 556-557
 pre-ASIC v *Rich*, 555
 s 180(1) *Corporations Act 2001*, 185-188
role of, 193-198, 555-557
 ASX corporate governance guidelines, 195-196
 Higgs Review, 193-195
 HIH Royal Commission report, 196-197
 Sir Adrian Cadbury's Corporate Governance and Chairmanship, 197-198
 UK Combined Code on Corporate Governance, 193-195, 556
standard of care of, 184-186, 553-554
 Corporations Act 2001, 554-555

Charges *see* **Company charges**

CLERP

ASIC's investigative and enforcement powers, reforms to *see* **ASIC**
Audit Reform and Corporate Disclosure Bill 2003, 205-207, 280-283, 506
Audit Reform and Corporate Disclosure Act 2004, 545, 547-548, 550-552
auditor independence and rotation, 341-344
 Ramsay report, 341
continuous disclosure requirements, changes to *see* **Continuous disclosure**
directors' duties
 conflict and profit rules, 267, 269
directors' remuneration, reforms to, *see* **Directors' remuneration**
disclosure, 205-207
financial reporting reforms *see* **Financial reporting**
minimum price rule and, 89-93

Company charges

interpretation of, 427-428, 431-432
 Agnew v Commissioner of Inland Revenue, 427, 431
 National Westminster Bank plc v Spectrum Plus Ltd, 427, 431
two-stage process of analysis, 427-428

Continuous disclosure

Canadian regime, 424
 Continuous Disclosure Obligations, 424
Continuous Disclosure Requirements, 386-387, 390-391, 393-397, 399-412
 CLERP changes to, 403-408
 contravention of, 393-397, 400-403
 enforcement of, 408-412
 Crown enforcement action, 408
 subsequent enforcement action, 410-412
 AMP Limited, 410

- Aristocrat Leisure, 412
- GPG case, 410
- Southcorp decision, 411
- 2001 regulatory challenges, 409
 - AMP Limited, 409
 - Brambles Industries Limited, 409
 - WMC Limited, 409
- CLERP, changes to Continuous Disclosure Requirements, 403-408
 - accessory liability, enhancement of, 404
 - due diligence defence, 404
 - penalties, increase in, 403
 - power to fine, introduction of, 405-408
 - disincentives to pay penalty, 406-407
 - infringement notice procedure, 406
 - opposition to, 405
- definition of, 385
- existing regime, analysis of, 390-403
 - accessory liability, 397-400
 - knowledge element, 399-400
 - participation element, 397-399
 - civil liability, 396-397
 - discretionary nature of orders, 396
 - civil penalty liability, 394-395
 - Criminal Code*, 393-394
 - culpability, 393
 - intention and recklessness, 394
 - materiality and the reasonable investor, 390-393
 - general availability requirement, 390
 - materiality, concept of, 391-393
 - misleading and deceptive conduct provisions, 401-403
- Hong Kong regime, 424
- immediate disclosure obligation, 386
- international comparison, 412-425
- New Zealand regime, 423-424
- periodic disclosure distinguished, 385
- requirements, 385
- selective disclosure, 388-390
 - Better Disclosure Policy, 388
 - definition of, 388
 - insider trading provisions, 388
- Singapore, 425
 - Code of Corporate Governance, 425
- United Kingdom regime, 421-423

- Financial Services and Markets Act 2000*, 421
- Financial Services Authority, enforcement record, 421-423
 - Marconi plc, 421-423
- United States regime, 412-421
 - continuous disclosure, 416
 - insider trading, regulating, 412-413
 - market impact, 413
 - Regulation FD, impact of, 412-414
 - SEC enforcement record, 417-421
 - Motorola Inc*, 419
 - Raytheon Company*, 417
 - SEC v Schering-Plough Corporation*, 420
 - Secure Computing Corporation*, 418
 - Siebel Systems Inc*, 418-419
 - selective disclosure, 412-414
- Corporate contracts**
 - unauthorised *see* **Unauthorised corporate contracts**
- Corporate governance**
 - ASX Corporate Governance Council Best Practice Recommendations, 208-217
 - ASIC v Rich*, 211-213
 - contemporary community expectations, 212-213
 - facts, 212
 - “special responsibilities” of chairman, 212
 - standard of care, 212-213
 - Criminal Code Act 1995*, 213-214
 - corporations, criminal liability of, 213-214
 - fault elements of offence, 213
 - onus, 213
 - physical elements of offence, 213
 - enforcement powers and remedies, 214-216
 - ASX enforcement, 215-216
 - court’s jurisdiction, 214
 - “person aggrieved”, 214-215
 - s 793C Corporations Act 2001*, 214-216
 - flexibility, 208
 - response to, 208
 - s 249D Corporations Act 2001*, 209-211
 - 100 member rule, 209-210
 - voluntary compliance, 209-210
 - employee stock options, implications for *see* **Employee stock options**
 - fundraising *see* **Fundraising**
 - New Zealand, developing principles for *see* **New Zealand**

Corporate trustees

directors of, liability of, 313-331

Hanel v O'Neill, 313-331

breach of trust, 322

directors' duties, breach of, 323

facts, 314

Full Court decision, 314

implications for directors, 324-325

implied trusts, 325

indemnity, right of, 324

insurance, 324

special purpose vehicles, use of, 325

wider potential liability, 324

insolvent trading, 323

voidable transactions, 323

indemnity, right of, 320-322, 324

express, 324

legal position, 320-321

policy considerations, 321-322

s 197 *Corporations Act 2001*, 315-322, 325-331

Companies and Securities Legislation (Miscellaneous Amendments) Bill (No 2) 1984

proposals, 316

"entitled", meaning of, 317

explanation of, 315-316

legislative background, 317

redraft of, 325-331

"this is so even if the trust does not have enough assets...", interpretations of, 317-320

CLERP simplification, 319-320

inferring legislative intent, 319

meaning of words, 317-318

Corporate veil *see also* **Separate legal entity doctrine**

directors of corporate trustees, liability of *see* **Corporate trustees**

lifting the, 69-72

Burswood v Catering and Entertainment Pty Ltd v ALHMWU, 69-72

decision on appeal, 71

facts, 69

Western Australian Industrial Commission decision, 69-71

Creditors

meetings of *see* **Voluntary administration**

Deregistered companies

reinstatement of, 531-534

court's legislative power, 531

- implications, 533-534
- judicial consideration, 532-533
 - Future Life Enterprises Pty Ltd*, 532-533
 - Queensland Building Services Authority v Dragonstone Pty Ltd*, 532-533

Derivatives *see* **Financial derivatives**

Directors

- corporate trustee, of *see* **Corporate trustees**
- duties of *see* **Directors' duties; Government boards and authorities**
- government boards and authorities, on *see* **Government boards and authorities**
- liability of *see* **Corporate trustees; Government boards and authorities**
- remuneration *see* **Directors' remuneration**

Directors' duties

ASIC v Rich, 181-193, 196, 198-204 *see also* **Chairmen**

- ASIC's allegations in, 200-201
- delegation and reliance, 192-193
- expert directors, 201
- facts, 183-184
- "personal qualities" of chairman, 183-189
 - Daniels v Anderson*, 185, 187-188
 - responsibilities, 186-188
 - s 180(1) *Corporations Act 2001*, 185-188
 - standard of care required, 184-186
- role of chairman, 189-192
 - AWA Ltd v Daniels*, 189

breach of, action by shareholders *see* **Shareholders**

break fee agreements, in relation to, 440-441

- bid solicitation, 441
- exiting bids, 440-441

chairmen *see* **Chairmen**

committee members, 202

conflict and profit rules, 259-279

- comparison of equitable and legislative duties, 269-274
 - conflict rule, 269-270
 - consent and ratification, 274
 - "declaration of contravention", 272-273
 - persons owing duty to corporation, 273
 - profit rule, 271
 - related party transactions, 271
 - remedies, 274
 - standing, 272-273
 - type of interest, 270
- equitable background, 259-263
 - conflict, extent of, 261-262

- conflict rule, 260-261
- consent or ratification, 262-263
- fiduciary relationship, 261
- origin of duties, 260
- personal interest, 262
- profit rule, 261
- remedies, 263
- third parties, 263
- legislative history, 264-269
 - civil penalties, 268
 - Companies Act 1936 (NSW)*, 264
 - Companies Act 1938 (Vic)*, 264
 - Companies Act 1958 (Vic)*, 264-265
 - Companies Code*, 265-266
 - Corporate Law Economic Reform Program Act 1999*, 267, 269
 - Corporate Law Reform Act 1992*, 266-268
 - Corporations Act 1989*, 266-267
 - Corporations Act 2001*, 268-269
 - uniform company scheme, 265
- reform, 276-279
 - Australia, in, 278
 - United Kingdom, in, 276-277
- regulator, role of, 275-276
- fiduciary, breach of *see* **Fiduciary duty** *see also* **Shareholders**
- Hanel v O'Neill*, 323
- letters of appointment, 203

Directors' remuneration

- Australian companies, legal requirements for, 545-547
 - "benefit", 546
 - disclosure to shareholders, 546
 - shareholder approval, 546-547
 - exceptions to, 546-547
- Corporate Law Economic Reform (Audit Reform & Corporate Disclosure) Act 2004*, 545-552
 - key criteria, 548-552
 - disclosure to shareholders, 548-549
 - external intervention, appropriate level of, 551
 - institutional shareholders, level of responsibility for, 551-552
 - pre-termination remuneration, control by shareholders over, 549-550
 - termination payments, mechanisms for shareholder approval of, 550
- non-binding vote on remuneration report, 547
- remuneration reports, 547
 - information to be included in, 547
- shareholder approval of termination payments, 547

Disclosure

CLERP (Audit Reform and Corporate Disclosure) Bill, 205-207

continuous *see* **Continuous disclosure**

financial services and products, for, 128-150

content of disclosure, 134-139

documentation to be provided, 134-139

exceptions to obligation to provide documentation, 136-138

“retail client” and “wholesale client” distinction, 135

timing for providing documentation, 138

“due diligence”, 129, 139-146

corporate compliance system, implementation of, 144-146

defence, 143, 145

standards of disclosure required, 139-146

Financial Services Guides, 134, 136-148

factors “fleshing out” standard of disclosure, 142

factors reducing standard of disclosure, 141

formal requirements, 139

particular items of disclosure required, 140-141

presentational requirements, 140

“taking reasonable steps” defence, 143-146

liability for, 146-148

alternative dispute resolution, 148

ASIC’s stop order power, 146-147

civil liability, 148

criminal liability, 147-148

meaning of, 130

Product Disclosure Statements, 134-148

factors “fleshing out” standard of disclosure, 142

factors reducing standard of disclosure, 141-142

formal requirements, 140

particular items of disclosure required, 140-141

presentational requirements, 140

“taking reasonable steps” defence, 143-146

single disclosure regime, 130-134

comparability of products and services, 132

focus on compliance, improved, 133

reduced complexity, 131

regulatory coordination, improved, 132-133

Statements of Advice, 134-148

factors “fleshing out” standard of disclosure, 142

factors reducing standard of disclosure, 141

formal requirements, 140

particular items of disclosure required, 140

presentational requirements, 140
 “taking reasonable steps” defence, 143-146
Financial Services Reform Act 2001, 128, 131, 133-134, 136, 139, 142, 147-148
 fundraising, requirements for *see* **Fundraising**
 New Zealand securities law, reform of continuous disclosure regime, 75-76
 takeover funding arrangements, obligations in, 233-235, 238-243, 257

Eggleston principles *see* **Takeovers** *see also* **Takeover funding arrangements**

Employee stock options (ESOs)

accounting treatment of, 333
 fair value, 333
 intrinsic value, 333
 Australian developments, recent, 334
 directors’ reports, 334
 financial reports, 334
 characteristics of, 332
 corporate governance implications for, 335
 valuation methodologies, 332
 binomial model, 332
 Black-Scholes model, 332

Fiduciary duty

directors, of, owed to shareholders, 536-542
 general rule, 536
 Percival v Wright, 537
 scope and breach of, 542
 special facts giving rise to fiduciary relationship, 537-541
 closely held companies, 539
 director purchasing shares from shareholder, 537
 share issue power, improper use of, 540
 wound up, company about to be, 538

Financial derivatives

Barings Bank, collapse of, 35, 39-40
 empirical studies on, 38-41
 Bank for International Settlements, recent study by, 40-41
 international exchange traded derivatives markets, 38
 market volatility and systemic risk research in Australia, 39-40
 OTC derivatives markets, 38-39
 future directions for reform, 41-43
 Australia, 41-42
 definitional blur, 41
 Re Buckland; ANZ Executors & Trustee Co Ltd v AG (Vic), 42
 ultra vires and trusts, 41

Index

- United States, 42-43
 - Derivatives Market Reform Act 1999*, 42
 - Over-the-Counter Derivatives Systemic Risk Reduction Act 2000*, 42
 - President's Working Committee, 42
- Group of Thirty survey on derivatives industry, 23, 25-28, 30, 34-36
- legal risk and legal uncertainty, 26-38
 - costs of, 29-38
 - credit risk, 31-33
 - Financial Services Reform Act 2001*, 30-31
 - liquidity risk, 34-35
 - market linkages, 37-38
 - market risk, 33-34
 - market transparency, 36-37
 - markets, size and growth of, 37
 - operational risk, 35-36
 - settlement risk, 33
 - inefficient and misguided regulation, 28
 - nature and meaning of term "derivative", 27-28
 - netting and cross-border insolvency, 29
 - UNCITRAL Model Law, 29
 - ultra vires, 27
- meaning of "derivatives", 27
- risk and regulation, 24-26
 - contagion effects, 25
 - default by major dealer, 24-25
 - legal risk, 26
 - market concentration, 25-26
 - systemic risk, 24
- Financial products**
 - Australian Financial Services Licence (AFSL), 124-126
 - bill facilities, other, 116
 - bills of exchange, 110-119, 124-126
 - cheque facilities, 118-119
 - financial investment, as a, 113-114
 - identifying the relevant facility or facilities, 111-113
 - incidental product, as a, 115
 - policy considerations, 118
 - recommended legislative amendments, 119
 - separate credit facility, as a, 115-116
 - disclosure obligations *see* **Disclosure**
 - Financial Services Reform Act 2001*, 103, 105, 111, 117-120, 122-123, 125-127
 - promissory notes, 119-126
 - credit facility, as a, 122

- financial investment, as a, 120-122
- negotiable certificates of deposit, 123
- policy considerations, 123
- recommended legislative amendments, 124
- three-part definition of, 103-110
 - general definition, 104
 - interaction of three parts, 109-110
 - specific exclusions, 106-109
 - “credit”, 107
 - “credit facility”, 107-109
 - specific inclusions, 105-106
 - “debenture”, 106
 - “security”, 105

Financial reporting

- CLERP (Audit Reform and Corporate Disclosure) Bill*, 205-207
- CEO and CFO certification, 205-206
- Financial Reporting Panel, proposed establishment of, 206-207
 - composition of, 206
 - referrals to, 207
 - reports of, 207
 - structure and operation of, 207
- operating and financial review, 206
- “true and fair” view of financial position and performance, 205

Financial services

- disclosure obligations *see* **Disclosure**

Financial services reform

- disclosure obligations *see* **Disclosure**
- financial products *see* **Financial products**
- financial services *see* **Financial services**

Financial Services Reform Act 2001

- disclosure *see* **Disclosure**
- financial derivatives *see* **Financial derivatives**
- financial products *see* **Financial products**

Floating charges

- development of, 481
- Australia, in, 489-491
 - Australian Law Reform Commission report, 491-492
 - recommendations, 492
 - summary of deficiencies, 491-492
 - Corporations Act 2001*, 489-490
 - priority principles, 490-491
 - proprietary interest, creation of, 490-491
 - review and possible legislative reform, 491

Index

- Wily v St George Bank*, 490-491
- Canada, in, 484-487
 - Access Advertising Management Inc v Servex Computers Inc*, 486
 - Canadian Imperial Bank of Commerce v Otto Timm Enterprises Ltd*, 486
 - Credit Suisse Canada v 1133 Yonge Street Holdings Ltd*, 487
 - distinction between fixed and floating, abolishing, 485-486
 - Personal Property Security Act 1967 (Ont)*, 484-486
 - Royal Bank of Canada v Sparrow Electric Corp*, 487
- New Zealand, in, 487-489
 - Agnew*, 487-489
 - PPSA, 488-489
 - Re New Bullas Trading*, 488
- United States, in, 481-484
 - Benedict*, 482-484
 - early developments, 481-483
 - Mitchell v Winslow*, 482
 - statutory intervention, 483-484
 - Article 9, 484
 - 20th century developments, 483
- Fundraising**
 - disclosure document, extension of time to lodge quotation application, 336-340
 - court's discretion to grant relief, 339
 - Re Insurance Australia Group Ltd*, 336-340
 - facts, 337
 - Re Wave Capital Ltd*, 336-340
 - facts, 337
 - implications of, 339
 - statutory framework, 336-337
- Gifts**
 - interpretation of, 428-429
 - Countess of Bective v Federal Commissioner of Taxation*, 428-429
- Government boards and authorities**
 - directors on, duties and liabilities of, 460-480
 - common law, at, 468
 - Commonwealth model, 460-462, 469, 471, 476-478
 - Commonwealth Authorities and Companies Act 1997*, 460, 476
 - Corporations Act 2001*, 460-461, 471, 476-478
 - comparisons of models, 465, 480
 - Corporations Act 2001*, 460-461, 467-468, 471, 476-478
 - generic vs specific approach to imposition of duties, 468-471
 - Public Services (State Sector Management) Bill (NZ)*, 470-471, 475
 - Ministers, position of under models, 475-478

- accountability, 475
 - administrative review of ministerial direction, 477
 - individual boards, 475
 - potential liability, 476-477
 - shadow directors, 476, 478
- New South Wales model, 462-463, 469, 471-472, 476-478
 - State Owned Corporations Act 1989* (NSW), 462-463, 469, 476
 - State Owned Corporations Amendment Act 1995* (NSW), 463
 - statutory State owned corporations (SSOC), 462-463, 471-472, 476-478
- position of across Australian jurisdictions, 471-473
 - Bennetts v The Board of Fire Commissioners of NSW*, 473
- role of directors, 473-475
 - business judgment rule, 474
 - conflicting duties, 473-474
 - non-commercial functions, entities carrying out, 474-475
- shadow directors, 476, 478
 - liability of Ministers as, 478
- Victorian model, 463-465, 469, 472-473, 476-478
 - Audit Act 1994* (Vic), 464, 469
 - Financial Management Act 1994* (Vic), 464, 469
 - State body, 464
 - State Business Corporation, 464
 - State Owned Company, 464
 - State Owned Enterprises Act 1992* (Vic), 464, 469, 472, 476, 478
- explanation of, 465-466
 - key structures and organisational principles, 466
 - advisory committees, 466
 - committees of management, 466
 - corporations, 466
 - statutory body corporate, 466
 - unincorporated bodies, 466
 - public sector, 465
- Minister, role and powers of, 466-467

Hong Kong

- continuous disclosure regime *see* **Continuous disclosure**

Indemnity

- corporate trustees, right of *see* **Corporate trustees**

Independent experts *see* **Takeovers** *see also* **New Zealand**

Insider trading

- New Zealand, in *see* **New Zealand**
- takeovers

competing bidders, equality of information to, 352-353

Insolvent companies

uncommercial transactions *see* **Uncommercial transactions**

Insolvent trading

Hanel v O'Neill, 323

Interpretation

company charges *see* **Company charges**

gifts *see* **Gifts**

mortgages *see* **Mortgages**

Quistclose trusts *see* **Quistclose trusts**

two-stage approach to, 427-432

Investors

prospectuses, use of by *see* **Prospectuses**

Lock up devices

break fees *see* **Break fees**

Takeover Panel's Guidance Note, 439-459

acceptability of, 441-442

Competitive Neutrality criterion, 442

Inducement criterion, 442

Non-coercion criterion, 442

Meetings

creditors, of *see* **Voluntary administration**

members, of *see* **Voluntary administration**

Mortgages

interpretation of, 427-428

New Zealand

corporate governance principles, developing, 286-292

NZX Listing Rules, 287-289

Best Practice Code, 288

changes to, 287-288

Richmond Ltd v PPCS Ltd, 286-287

Securities Commission, 289-291

nine key principles of, 290

floating charges in *see* **Floating charges**

government boards and authorities

directors on, duties and liabilities of,

Public Services (State Sector Management) Bill, 470-471, 475

securities law, reform of, 73-80

continuous disclosure regime, 75-76

central rule, 76

- enforcement, 76
- information “generally available” to the market, 76
- “material information”, 75
- NZX Listing Rules, 75-76
- Securities Markets Act*, Pt 2, 75
- four phases of, 73
- insider trading, 77-79
 - “inside information”, 77
 - market efficiency and market fairness, 79
 - present rules, 77-78
 - “primary insider”, 77
 - proposed changes, 78-80
 - “secondary insider”, 77
- Securities Amendment Act 2002*, 73
- Securities Markets Amendment Act*, 74
- Takeovers Act*, 74
- Takeovers Code, 363-384
 - Edison Mission Energy’s bid for Contact Energy, 364, 371-374, 380
 - evaluation of fairness objectives in practice, 371-379
 - equal price and participation, 374-377
 - equal treatment and partial bids, 377-378
 - pause and publicity provisions, 372-374
 - fairness objectives, 366-368
 - fairness and fair treatment, definitions of, 366
 - increased participation and equal treatment of shareholders, 366-367
 - fairness provisions, 368-371
 - equal price and equal participation provisions, 368-369
 - London City Code, 370
 - partial pro-rata bids, 370
 - pause and publicity provisions, 368-369
 - serial partial offers, 370
 - takeover notice, disclosure requirements, 369
 - target company statements, 369
 - independent advisers’ reports, 379-384
 - “fair and reasonable”, 380, 383
 - “fair value”, 382
 - full underlying value, 383
 - full underlying value applying minority discounts, 383
 - inconsistencies in, 380-382
 - “merits” of takeover, 379
 - pre-Code regime, fairness problems with, 364-371
 - Companies Amendment Act 1963*, 365
 - Lion Nathan’s bid for Montana Group, 363-364, 371, 374-378
 - Takeovers Act 1993*, 366

Professional advisers

prospectuses, use of by *see* **Prospectuses**

Promissory notes *see* **Financial products**

Prospectuses

use of by investors and professional advisers, 151-156

investor survey, 151-153

analysis of, 153

background to, 151

general results, 152

managed investment fund prospectuses, 152

shares owned directly, 151

professional adviser survey, 153-156

analysis of, 155

background to, 153

general results, 154

managed investment fund prospectuses, 154-155

share prospectuses, 154

Quistclose trusts

interpretation of, 429-431

Quistclose case, 429-431

Re Australian Elizabethan Theatre Trust, 429-431

Remuneration

directors, of *see* **Directors' remuneration**

Schemes of arrangement

sanctioning, 218-222

Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd, 218-222

decision and comments, 218-222

facts, 218

issues, 218

Securities

New Zealand law, reform of *see* **New Zealand**

Separate legal entity doctrine *see* **Shareholder remedies** *see also* **Corporate veil**

Shareholder remedies

class action, 50, 66-67

company rights and personal rights, 50-56

Barings PLC (Administration) v Coopers & Lybrand, 52

Christensen v Scott, 52-54, 56

double recovery, problem of, 54-56

George Fischer (GB) Ltd v Multi Construction Ltd, 53-54

Gerber Garment Technology Inc v Lectra Systems Ltd, 53-54

- Johnson v Gore Wood & Co (a firm)*, 52-53
- Lee v Sheard*, 53-54
- principles of loss, 53
- Prudential Assurance v Newman Industries Ltd (No 2)*, 51-57
 - Court of Appeal decision, 51
 - difficulty in assessing loss, 56
 - exceptions to principle, 53-56
 - company does not sue, 55
 - former shareholders, 55
 - insolvent companies, 56-57
 - facts, 51
 - recent authorities, 52-53
- costs issues, 66-68
 - class action proceedings, 66-67
 - derivative action proceedings, 67-68
- derivative action, 49, 64-68
 - statutory, 64-66
 - good faith and best interests of the company, 65-66
 - investigations, 65
 - Metyor Inc v Queensland Electronic Switching Pty Ltd*, 65-66
 - serious question to be tried, 64-65
- fiduciary duty, breach of *see* Shareholders
- Foss v Harbottle*, 48, 50, 57, 63, 535
 - internal management aspect, 50
 - proper plaintiff principle, 48, 50, 535
 - separate legal entity doctrine, 50, 535
- increasing stock market participation, 47-48
 - de-mutualisation, 47
 - large scale compulsory superannuation contributions, 47
 - large scale privatisation, 47
- personal rights, 57-59
 - constitution, right to enforce, 58
 - misleading or deceptive statements, 58
 - rights of action, 57
- representative action, 49
- representative proceedings, 49-50, 59-64
 - causation, 62
 - class action, 50
 - derivative action, 49, 64-67
 - existing remedies, application to, 63-64
- Federal Court Act 1976*, 59
- Federal Court of Australia Amendment Act 1991*, 59-60
- “fraud on the market” theory of reliance, 62

- individual calculations of damages, 62
- multiple respondents, 60-62
 - King v GIO*, 60-62
- oppressive behaviour, 63-64
- representative action, 49

Shareholders

- actions against company directors, 535-544
 - breach of fiduciary duty, personal action for, 536-542
 - fiduciary relationship, existence of, 536-537
 - scope and breach of fiduciary duty, 542
 - special facts creating fiduciary relationship, 537-541
- derivative action, 535-536
- loss, recovery of, 542-544
 - “reflective loss” doctrine of, 542
- “proper plaintiff” principle, 535
- ratification of breach of duty, 544
- corporate entity theories, 46-47
- directors’ remuneration and *see* **Directors’ remuneration**
- remedies *see* **Shareholder remedies**

Singapore

- Companies (Amendment) Act 2004*, 345-349
 - book entry securities, treatment of, 348
 - company powers, 345-346
 - constructive notice of company documents, 345
 - Memorandum of Association, 346
 - ultra vires doctrine, 345
 - corporate governance, 347-348
 - audit and audit committees, 347
 - directors’ reliance on professional and expert advice, 347
 - electronic distribution of statutory reports, 347
 - one member/director companies, 347
- continuous disclosure regime *see* **Continuous disclosure**

Takeover funding arrangements

- background to statute and case law, 232-237
 - disclosure obligation, 233-235
 - Eggleston principles, 236
 - prohibition, 233-234
 - s 636(1) *Corporations Act 2001*, 232
- declaration of unacceptable circumstances, 237, 239, 241, 243-244
- disclosure obligation, 233-235, 238-243, 257
- financing conditions, 244-248
- illusory bids, 239

- sanctions, adequacy of, 254-256
 - false bid, 254-255
 - insolvent trading, 255-256
 - personal liability of directors, 256
 - Takeovers Panel decisions, 237-253
 - Re Brickworks Ltd (No 2)*, 237-238
 - Re Goodman Fielder Ltd*, 244-249, 251-252, 257
 - Re Goodman Fielder Ltd (No 3)*, 249-250
 - observations on Panel decisions, 250-253
 - Re Pinnacle VRB Ltd (No 4)*, 238-239, 251, 256-257
 - Re Pinnacle VRB Ltd (No 6)*, 239-240, 251, 257
 - Re Taipan Resources NL (No 3)*, 238
 - Re Taipan Resources NL (No 10)*, 240-241, 251
 - Re Taipan Resources NL (No 11)*, 241-244, 251, 257
 - Takeovers Panel Guidance Note, 231-234, 236, 240, 244, 246-247, 250-255, 257-258
 - withdrawal rights, 245-246, 249
- Takeovers**
- access to information *see* competing bidders *below*
 - break fees *see* **Break fees**
 - competing bidders, equality of information to, 350-356
 - efficient, competitive and informed market principle, 351-352
 - Goodman Fielder Ltd (No 2)*, 350-356
 - decision, 350-351
 - Takeover Panel's determination, assessment of, 354-356
 - insider trading prohibition, 352-353
 - UK City Code*, 353-354
 - Eggleston principles, 87-88, 92-95, 351-352
 - efficient, competitive and informed market principle, 351-352
 - history of, 93-94
 - Masel principle and, 95
 - relevance of, 94
 - equal opportunity principle, 88-94
 - benefits of, 90
 - costs of, 90-91
 - funding arrangements for *see* **Takeover funding arrangements**
 - independent experts, 493-496
 - In the Matter of Aulron Energy Ltd*, 493-496
 - facts, 493
 - Takeovers Panel's observations and decision, 494-496
 - lock up devices *see* **Lock up devices**
 - minimum price rule, 88-102
 - anomalies with the, 100
 - ASIC policy on, 92

- CLERP, 89-93
 - collateral benefits prohibition, amendment of, 91
 - judicial consideration of, 99-100
 - Re Ranger Minerals Ltd; Ex parte Ranger Minerals Ltd*, 99-100
 - legislative history of, 88-89
 - Companies and Securities Advisory Committee (CASAC), 88-89
 - Corporations Law*, 88
 - Panel decisions, 97-99
 - In the Matter of Email Ltd*, 97
 - In the Matter of Normandy Mining Ltd (No 4)*, 98-99
 - In the Matter of Taipan Resources NL (No 8)*, 98
 - Panel Guidance Note on, 92
 - proposals for reform, 100-102
 - independent expert's report on fairness and reasonableness, 100
 - mandatory bid rule, limited application to, 101-102
 - opt-in approach to equal opportunity, 101
- New Zealand Takeovers Code *see* **New Zealand**
- pre-bid stake, importance of, 96-97
 - Pompilio's findings, 96-97
- threshold, 93
- Trust**
 - breach of *see* **Breach of trust**
- Trustees** *see* **Corporate trustees**
- Trusts**
 - Quistclose *see* **Quistclose trusts**
- Unauthorised corporate contracts**
 - policy considerations, 560-561, 564-566
 - agents acting beyond authority, 560
 - competing considerations, 560-561
 - ss 128 and 129 *Corporations Act 2001*, 559-567
 - assumptions, 559-560
 - exception to, 560
 - legislative policy behind, 561-564
 - business efficiency, policy of, 561-562
 - common law "inquiry" exception, 562-563
 - "knew or suspected" test, 561, 563-564
 - policy concerns, 564-566
- Uncommercial transactions**
 - benefits to other parties, assessing, 12-13
 - Business Judgment Doctrine, 7-8
 - Business Judgment Rule, 7, 12, 14-15
 - "company's circumstances", assessing, 9-10

- financial circumstances, 9
- valuations, 10
- corporate groups, 13-14
 - derivative benefits, 13
- defences, 17-18
 - parties to transaction (s 588FG(2) *Corporations Act 2001*, 17-18
 - receiving property (s 588FG(1) *Corporations Act 2001*, 17
- factors, 10-12
 - “balancing exercise”, 10-12
 - benefit and detriment to company, 10
 - Lewis v Cook*, 11-12
 - Tosich Construction Pty Ltd v Tosich*, 10-11
- insolvency (s 588FC *Corporations Act 2001*), 14-16
 - causation test of, 15-16
 - three presumptions of, 14
 - two year avoidance period, 14-15
- insolvent companies, for, 7-22
- insolvent trading, 14
 - extension of liability for, 14
- meaning of (s 588FB(1) *Corporations Act 2001*), 7-8
 - objective inquiry, 8
- remedies (s 588FF *Corporations Act 2001*), 19-21
 - constructive trust claims, 19
 - payment of fair representation of benefit received, 20
 - specific return of property, 19
- time periods, 16
- United Kingdom**
 - continuous disclosure regime *see* **Continuous disclosure**
- United States**
 - floating charges in *see* **Floating charges**
 - periodic disclosure regime *see* **Continuous disclosure**
- Voidable transactions**
 - Hanel v O'Neill*, 323
- Voluntary administration**
 - creditors’ meetings, legal issues in calling and arranging, 166-180
 - first meeting of creditors, 166-168
 - functions of, 167
 - timing of, 167-168
 - investigations and reporting to creditors, 175-176
 - large companies, special rules for, 170-171
 - automatic extension of time limits, 170
 - second meeting of creditors, 166, 168-170

- convening period, 168-170
 - time limits for, 168-170
- timeframes, 166
- voting procedures at, 171-175, 177-179
 - administrator, role of, 172-173
 - casting votes, 173
 - challenges, 171-172
 - Corporations Regulations 2001*, uncertainty in, 174-175
 - opposition by creditors, 174
- decision making in a (Pt 5.3A *Corporations Act 2001*), 163-180
 - background to, 164-166
 - Harmer Report, 164-166
 - economic analysis of decision making by creditors, 176-179
 - administrator, role of, 176-177
 - voting, 177-179
- members' meetings (s 508 *Corporations Act 2001*), 284-285
 - Re Centaur Mining & Exploration Ltd (in liq)*, 284-285
 - cost of convening meeting, 284
 - extension of time to hold meeting, 285
 - facts, 284
 - liquidator's arguments, 284