
Index

Access to share registers, 82, 233

- fees, 233
- format, 233
- “proper purpose” test, 82, 233
- Proposals Paper, 82

Accounting

- international standards, 384-386

Administration

- administrator’s function, 399
- voluntary, 398-399

Administrative penalties, 39, 41

- Corporations Act 2001 (Cth), under, 41-42
- infringement notices, 41-42
- quasi-penalties, 42-43
- true, 43

Administrative sanctions

- banning orders, 35-36, 38, 124
- classifying, 43
- Corporations Act 2001 (Cth), under, 35-38, 47-48
- definition, 33-34
- disqualification orders, 36, 38, 124, 125
- enforceable undertakings, 36-37, 38
- infringement notices, 37-38
- internal review, 43-48
- penalties, distinguished, 33-34, 39
- protective, 40

AFL clubs

- membership rights, 507-536

Appeal

- definition, 44
- review, distinguished, 44

ASIC

- accountability, 32-53
- administrative sanctions, 33, 35-39
- ASX, agreement with, 301
- Australian Consumer Law reforms, 301-302
- banning orders, 35-36, 38, 124
- enforceable undertakings, 36-37, 38, 48, 339-340
- financial market supervision, 161, 162, 301, 444-459
- Hearing Practice Manual, 47
- infringement notices, 37-38, 41-42, 60, 87, 338-339, 341, 453

intervention in private litigation, 460-474

- court leave for, 471-473
- s 50, under, 126, 462-466, 470
- s 1330, under, 467-471
- investigations – *see* **ASIC investigations**
- overview, 32-33
- powers, 32, 81, 233
- investigatory – *see* **ASIC investigations**
- market misbehaviour, dealing with, 162
- private litigation, intervention in, 460-474
- proceedings – *see* **ASIC proceedings**
- Regulatory Guide, 37
- regulatory role, 108-109
- review of decisions
- external merits review, 49-52
- internal merits review, 43-48
- stock market supervision, 444-459

ASIC investigations

- abuse of power, 111
- commencement, 109-111
- concealment or destruction of documents, 111
- decision to commence not reviewable, 111
- exclusion of lawyers, 115
- informants, 109-110
- lawyer’s role, 107-122
- accessorial liability, 112-113
- advice to client, 111
- communication with key personnel, 110
- deemed directors, 112
- due care and diligence rule, breach of, 112
- in-house counsel, 110
- involvement in breach, 111-113
- lien over documents, 116
- non-suspect, as, 113
- oral examinations, 113-116
- preservation of documents, 110
- private litigation, use of information in, 121
- production of books, 116
- refusal to give information, 109
- reporting evidence of violation (US), 110
- suggested reforms, 107
- suspect, as, 111-113
- volunteering information, 109-110
- legal professional privilege, 118-120
- notice to produce books, 116
- challenging, 113
- decision to issue reviewable, 111, 113

- freeze, operating as, 116
- lawyer's implied undertaking, 116
- lawyer's lien over documents, 116
- legal or equitable excuse for non-compliance, 117
- privilege, 117-120
- reasonable excuse for non-compliance, 116-117
- oral examinations, 113
 - ASIC overruling choice of lawyer, 115
 - lawyer's role, 113-116
 - legal or equitable excuse for non-compliance, 117
 - legal professional privilege, 118-120
 - notice to attend
 - challenging, 113
 - decision to issue reviewable, 111, 113
 - privilege, 117-120
 - reasonable excuse for non-compliance, 116-117
- penalty privilege, 117
- phone interception, 81, 505
- powers, 32, 81, 108, 233
 - oral examinations, 113, 115
- private litigation, use of information in, 121, 469-470
- privilege, 117-120
 - search warrant, material seized under, 121
- purpose, 108
- reasons for commencing, 111
- regulatory role of ASIC, 108-109
- release of investigative information, 121
- search warrants, 81, 121
 - decision to issue reviewable, 111
 - privileged material seized under, 121
- self-incrimination, privilege against, 117-118
- silence, right to, 117
- ASIC proceedings**
 - administrative, 124
 - civil, 123, 124-128
 - civil penalty, 123
 - commencing, 462-466
 - compensation for impecunious plaintiffs, 463-464
 - contradictor, ASIC as, 470-471
 - corporate collapses, 125-127
 - civil penalty orders, 125
 - compensation for victims, 125-127, 466
 - equitable proceedings, 126
 - lawyer's role, 125-127
 - public interest actions, 126
 - corporate minorities, protecting, 464-465
 - criminal, 123, 128
 - enforcement pyramid, 122
 - evidential rules
 - civil proceedings, 127-128
 - criminal proceedings, 128
 - factors governing types, 122
 - fault elements of contravention, 123
 - information, providing, 469-470
 - interpretation of legislation, for, 465, 467, 472-473
 - intervention in private litigation, 460-474
 - court leave for, 471-473
 - s 50, under, 126, 462-466, 470, 473
 - s 1330, under, 467-471
 - lawyer's role, 122-129
 - physical elements of contravention, 123
 - procedural rules
 - civil proceedings, 127-128
 - criminal proceedings, 128
 - public interest, 126, 462, 470
 - s 50, under, 126, 462-466, 470, 473
 - statutory objectives, furthering, 465, 467-468, 472-473
- ASIC v Rich**, 7, 61, 81, 148, 164-179, 423-428
- Asset-backed securities (ABS)**, 13, 15, 18-19, 22, 28-29, 222
- Associations**
 - incorporated, 199-203
 - legislation, 204
 - non-profit – *see* **Non-profit organisations**
 - unincorporated – *see* **Unincorporated associations**
- Australian Consumer Law reforms**, 301-302
- Australian Financial Services Licence**
 - banning order effect on, 35
 - credit rating agencies, 226
- Australian Law Reform Commission (ALRC)**, 33
 - administrative sanctions and penalties, 33-43
 - external merits review, views on, 50-51
 - internal merits review, views on, 45-46
- Banking**
 - international standards, 378-381
- Bankruptcy**
 - remoteness, 24-25
- Banning orders**, 35-36, 38
 - ASIC proceedings for, 124-125
 - Australian Financial Services Licence, effect on, 35

- cancellation, 35
 factors governing outcomes for defendants, 124-125
 variation, 35
- Basel Committee**, 378-381
- Business judgment rule**, 7-8, 147-151, 164-179, 424
 American Law Institute principles, 166, 167
 ASIC v Rich, 7-8, 81, 148, 164-179, 423-428
 Australian cases, 168
 business judgment, meaning, 165, 169-171
 common law rule, 177-179
 conflict of interest rule, 173-174
 criteria for, 150
 defence, 166-177
 Delaware law, 167-168
 Discussion Paper, 8, 147-148
 duty of care and diligence, 167, 177
 extension of, 61, 150
 foreseeability analysis, 166
 four-stage process, 166
 global financial crisis, effect, 148
 good faith and proper purpose, 171-173
 lack of successful use, 8
 level of information required, 174-176
 material personal interest, 173
 onus of proof, 168, 169, 192
 rational belief requirement, 176-177, 425
 reasonable care and diligence, 177, 423-428
 Sons of Gwalia decision, 9, 147
 statutory rule, 165
 unreasonable conduct, 166
 US position, 191-192
- Canada Mortgage Bond (CMB)**, 67-68
- China**
 private equity deals, 283-289
 corporate law regime, 288
 minimum registered capital (MRC) rule, 283
 Ministry of Commerce approval, 285, 287
 offshore SPVs, 287
 “round-trip investment” model, 284-287
- Civil penalties**
 ASIC enforcement tools, 39-41, 452-453
 corporate collapses, 125-127
 standard of proof, 452
- Collateralised debt obligations (CDOs)**, 13, 18-19, 28-29, 222, 314
- Commercial trust**
 beneficial interests structure, 25-26
 cost minimisation, 26-27
 donative trust, distinguished, 27
 facilitative, 20-21
 flexibility, exploitation of, 29
 institutional, 20-21
 legal inadequacies, 27-29
 reform, need for, 30
 securitisation vehicles, 10-11, 19-23
 complex, 29
 tax minimisation, 26-27
- Companies**
 constitution – *see* **Constitution of company**
 directors – *see* **Directors**
 documents, access to, 519
 incorporation, 509
 limited by guarantee, 510-511
 limited by shares, 509-510
 share, definition, 510
 limited by shares and guarantee, 510
 meetings, 518-519
 members – *see* **Members**
 name, alteration, 518
 oppressive conduct, remedy of, 519
 sporting organisations, 509-515
- Compensation**
 corporate collapse, victims of, 125-127
 James Hardie litigation, 61, 163
- Complex assets**, 12
- Conflict of interest**
 business judgment defence and, 173-174
 credit rating agencies, 227
 financial advisers, 435-437
 multiple directorships, 496
 nominee director appointor and company, 131-141
 regulation, in, 306
 responsible entity, 569-570
 stock market, 447-448
- Constitution of company**
 AFL clubs “best practice” core rights, 523-534
 annual report, 528
 director, member nomination as, 526-527
 electing directors, 525-526
 equality of votes, 527

- mergers, 531-534
- name of club, 529
- publication of constitution, 528
- publication of voting rights, 526
- quorum, 527-528
- relocation of team, 530-531
- team colours, 529-530
- voting at general meetings, 525-526
- alteration, 518
- members rights under, 509, 511, 523
- Consumer protection**
 - financial services, 487-490
- Continuous disclosure**, 84-106
 - assessment of information for, 85, 90, 97-103
 - due diligence, 96
 - materiality, test of, 101-103
 - negative outcome possible, 85, 97
 - relevant information, 98-101
 - supposition distinguished from information, 98
 - ASIC infringement notices, 87
 - ASIC v Chemeq Ltd, 337
 - ASIC v Macdonald (Hardie case), 337
 - ASIC v Southcorp Ltd, 337
 - ASX Listing Rule 3.1, 85, 261, 267, 336, 541
 - exceptions, 85, 103-106
 - knowledge that disclosure required under, 93
 - ASX Listing Rule 3.1A, 85, 103-106
 - Australian regime, 259-268
 - awareness of information, 100
 - CD executive group, 86
 - civil liability for breach, 87
 - class actions, 340-342
 - company liability, 87-89
 - compliance policies, 85, 86
 - court actions, 337-338
 - criminal liability for breach, 87
 - directors' liability, 84, 87-106
 - CEO, CFO or chairperson, 94
 - common circumstances of concern, 86
 - decision-making process, involvement in, 94
 - defences for directors, 90-97
 - due diligence defence, 89, 95-97
 - failure to exercise due diligence, 89
 - inaction, 93
 - involvement in breach, 90-95
 - knowledge, 91-93
 - misleading and deceptive conduct, 90, 91
 - participation, 93-95
 - enforceable undertakings, 339-340
 - enforcement of regulations, 336-342
 - court actions, 337-338
 - essential requirement, 85
 - exceptions, 85, 103-106
 - ASX Listing Rule 3.1A, 85, 103
 - breach of law to disclose, 104
 - confidential information, 104
 - incomplete proposal or negotiation, 104
 - insufficiently definite information, 105
 - internal management purposes, information for, 105
 - reasonable person would not expect disclosure, 103
 - supposition, matter of, 98, 105
 - trade secret, 106
 - unreasonably prejudicial information, 103
 - generally available information, 263-266, 267
 - global financial crisis, effect, 84
 - infringement notices, 338-339, 341
 - insider trading and, 263-268
 - materiality, 101-103, 263-266, 267
 - misleading and deceptive conduct, 87-89
 - directors' liability, 90, 91
 - knowledge of directors, 91-92
 - negative development, information leading to, 85, 97
 - periodic disclosure, relationship with, 261-262, 267
 - relevant information, 98-101
 - s 674, breach of, 87
 - selective disclosure and, 266
 - shareholder actions, 340-341
 - trading halts, during, 541
 - unreliable information, 98
- Corporate collapses**
 - civil penalty orders, 125
 - compensation for victims, 125-127, 466
 - lawyer's role, 125-127
 - public interest actions, 126
 - director liability, 61
 - disgorgement funds 126-127
 - equitable proceedings, 126
 - HIH litigation, 302
 - private litigation, 125, 126
- Corporate fault**
 - director liability for, 59-62
- Corporate finance**
 - equity swaps, 142-146
 - private equity – *see* **Private equity**
 - securitisation – *see* **Securitisation**

Corporate governance

AFL clubs, 515-516
 “best practice” core rights, 523-534
 Australian principles, 184-185
 best practice guidelines, 236
 business judgment rule – *see* **Business judgment rule**
 female directors and management, 578
 fiduciary duties, 237
 institutional investors, participation in, 234, 235-242
 multiple directorships, 496
 New Zealand, 494-495
 proposed improvements, 234
 superannuation industry, 235-242
 Cooper Report, issues in, 300-301
 US principles, 184, 191-192

Corporate law theory, 22-23**Corporations Act 2001 (Cth)**

administrative penalties under, 41-42
 administrative sanctions under, 35-38, 47-48
 AFL clubs, application to, 507-536
 ASIC intervention in proceedings under, 467-471
 limitation periods under, 475-493
 norms of conduct, 493
 private rights of action under, 475-493
 s 1322(4)(d), 475-493
 context, 477-480
 historical context, 480-487
 wording, 477-480

Corporations Amendment (Financial Market Supervision) Act 2010 (Cth), 161**Corporations and Markets Advisory Committee (CAMAC)**

code of conduct for directors, proposed, 233
 Information Paper on Executive Remuneration, 297
 Market Integrity Report, 81, 452

Covered bonds

Canada, 68
 Germany, 66-67

Credit default swaps (CDS)

definition, 14

Credit rating agencies

Australian Financial Services Licence, 226
 competition, 227
 conflict of interest, 227
 disclosure of information, 227

fraud, 222-224

false and misleading representation, 223
 knowledge of falsity, 224
 reliance, 224
 scienter, 224

independence, 227

licensee obligations, 226

NRSROs, 225, 227

protection from liability, 222

regulation, 222-228

 AISC amendments, 226

 EU amendments, 226

 recent and proposed changes, 224-228

 SEC amendments, 225

regulatory use of ratings, 227

transparency, 227

Criminal offences

ASIC enforcement tools, 39-41, 451-452

ASIC proceedings, 123, 128

 evidential rules, 128

 lawyer’s role, 128

 procedural rules, 128

complexity, 451-452

fault elements, 128

CSR Ltd, Re, 82, 163, 411-415

Damages – *see* **Securities damages**

Deed of indemnity

reimbursement of legal costs under, 163

Demerger

CSR Ltd, Re, 411-415

s 411 application, 411-415

Derivatives

equity swaps, 142-146

hedge funds dealing in, 305-306

Directors

business judgment rule – *see* **Business judgment rule**

code of conduct, proposed, 233

disqualification, 36, 38, 124

duties – *see also* **Corporate governance**

 best interests of company, acting in, 161, 192, 357, 360, 363-364, 424-428

 care and diligence, 424

 individual shareholders, to, 234

 insolvent trading, preventing, 396-397, 423

Revlon duties, 420-421
 takeover context, 185, 420-421
 female, New Zealand, 496, 577-579
 financial incentives to target directors, 184-196
 insolvent trading, defences, 396-410
 interlocking, New Zealand, 496-498
 liability for corporate fault, 59-62
 business judgment rule – *see* **Business judgment rule**
 continuous disclosure breaches – *see* **Continuous disclosure**
 criminal, 87
 misleading and deceptive conduct, 90, 91
 nominee – *see* **Nominee directors**
 oppression, whether breach of duty by, 302
 removal, 518
 remuneration – *see* **Executive remuneration**
 shadow directors, 234
 liability for insolvent trading, 163, 234
 unfair or oppressive conduct, 517-518

Disclosure

AFL clubs, 516, 534-535
 ASIC commentary, 345-348
 ASIC Guidance Rules, 345-346
 ASX commentary, 344-345
 company briefings, 355
 company framework, 259-268, 331-356
 continuous – *see* **Continuous disclosure**
 co-regulatory model, 333
 enforcement record, 332-344
 evidence-based regulation, 354-355
 insider trading and – *see* **Insider trading**
 International Organisation of Securities
 Commissions (IOSCO) standards, 382-383
 ongoing requirements, 259
 periodic – *see* **Periodic disclosure**
 preventative regulation, 352-354
 regulation, 259-260, 331-356
 risk-based regulation, 350-352
 selective, 260, 266, 355
 continuous disclosure and, 266
 insider trading and, 266

Disqualification orders, 36, 38

ASIC proceedings for, 124-125
 factors governing outcomes for defendants, 124-125
 permission to manage corporation, 36

Donative trust

commercial trust, distinguished, 27

Enforceable undertakings, 36-37, 38, 48, 339-340

Equity swaps

attribution of disclosable interest, 145
 cash-settled, 143-146
 distorting voting results, potential for, 142-143
 documentation, 144
 hedging arrangements, 143
 locking up shares, 144
 physically-settled, 143
 regulation of, 142-146
 Takeovers Panel approach, 144, 145

Executive remuneration

bonuses, 162
 CAMAC Information Paper, 297
 no vacancy rule, 161
 Productivity Commission recommendations, 161-162
 remuneration reports, 162
 two strikes rule, 162

External merits review

ASIC decisions
 limiting, 50-52
 tribunal, by, 49-50

False and misleading representation

credit rating agency, 223

False registration statements

civil liability, 256

Fiduciary duty

financial advisers, 435-443

Financial advisers

conflict of interest, 435-437
 duties
 best interests, 441-442
 fiduciary, 435-443
 reasonable care and skill, 436-438
 Ripoll Report, 7, 435-443
 suitability rule, 436

Financial markets

ASIC responsibility, 161, 162, 301, 444-459
 CHI-X Australia Pty Ltd licensing, 161, 448
 conflict of interest, 447-448
 co-regulation, 445-449
 cross-market surveillance, 454-455
 demutualisation, 447-449

- enforcement of regulations
 - importance of, 450-451
 - international, 455-456
- fragmentation, 454
- globalisation, 304, 316-317, 455
- history, 446-447, 487-488
- international information-sharing, 455-456
- licence to operate, 448
- manipulation – *see* **Market manipulation**
- market failures
 - agency paradigm, 306-307
 - externalities paradigm, 307
 - mood swings paradigm, 307
- market integrity
 - hedge funds impact on, 312-314
 - measuring, 457-459
 - rules, 452-453
- market misconduct, 308
 - ASIC powers, 162
 - regulation, 487-490
- regulation approaches, 306-311
- self-regulatory organisations, 449
- supervision
 - ASIC, 161, 444-459
 - ASX, 444-448
 - cost recovery, 457
- Financial service providers**
 - registration, New Zealand, 574-577
 - application for, 575
 - definitional cascade, 575-576
 - enforcement, 575
 - purpose, 574
 - qualifications for, 574-575
 - territorial scope, 577
- Financial services**
 - consumer protection, 487-490
 - fiduciary duty, 435-443
 - globalisation, 304-306, 316-317
 - hedge funds – *see* **Hedge funds**
 - markets – *see* **Financial markets**
 - providers – *see* **Financial service providers**
 - Ripoll Report, 7, 435-443
- First in, first out (FIFO) accounting**
 - securities damages, estimating, 243-258
- Fraud**
 - credit rating agency, 222-224
 - fraud-induced inflation, 243
 - damages, estimation of, 243-258
- Global financial crisis**
 - business judgment rule and, 148
 - continuous disclosure and, 84
 - IOSCO task force on unregulated financial entities, 389-390
 - lessons from, 27-29
 - market failures, 306-307
 - securitisation, role in, 10-11, 17-19, 27-31, 63, 74-75
 - subprime mortgage market, 17-18
- Globalisation**
 - financial markets, 304, 316-317, 455
 - financial services, 304-306, 316-317
 - international relations theory – *see* **International relations theory**
 - overview, 316-317
 - regulation, of, 317
- Hall v Poolman**, 396-410
- Hedge funds**
 - characteristics, 305
 - externalities, 308
 - highly leveraged institutions (HLIs), 315, 387
 - individual collapses, impact of, 314-315
 - international standards – *see* **International standards**
 - market integrity, impact on, 312-314
 - market misconduct, 308
 - minimum capital requirements, 392
 - regulation – *see* **Regulation**
 - need for, 311-315
 - systemic risk, 308, 314-315
- Hong Kong**
 - privatisation via scheme of arrangement, 152-156
- Infringement notices**, 37-38, 41-42, 60, 87, 338-339, 341, 453
- Insider trading**
 - analysis test, 264
 - civil action for damages, 257
 - continuous disclosure regime and, 263-268
 - covered short selling, 547
 - enforcement, 342-344
 - generally available information, 263-268
 - intermediaries, 257
 - materiality of information, 263-268
 - Position and Consultation Paper, 264

- prohibition, 262
 - published information test, 264
 - readily observable matter test, 264
 - selective disclosure and, 266
 - sentencing principles, 233
 - trading on non-disclosed information, 260
- Insolvent trading**
- administration
 - restructuring in place of, 398
 - voluntary, 398-399
 - business judgment rule, 147-151, 423-428
 - defences to liability, 400-403
 - absence from management, 402-403
 - reasonable grounds to expect solvency, 400-402
 - reasonable reliance on information from others, 402
 - reasonable steps to prevent incurring debt, 403
 - s 588H inadequacies, 403
 - Discussion Paper, 147-148, 409-410
 - duty to prevent, 396-397
 - fraudulent trading, 397
 - Hall v Poolman, 396-410
 - legislation, 397-398
 - liability
 - defences to, 400-403
 - directors, 396-397, 423-428
 - order granting relief from, 403-409
 - reckless trading, 398
 - s 1318 relief, 403-409
 - “acted honestly”, 405-406
 - inadequacies, 408-409
 - “ought fairly to be excused”, 406-408
 - scope, 404-405
 - shadow directors, liability, 163, 234
 - Sons of Gwalia decision, 147, 162
 - voluntary administration, 398-399
 - wrongful trading, 397-398
- Institutional investors**
- collective action, 241
 - corporation governance, participation in, 234, 235-242
 - proxy advisers, use of, 239-240
 - superannuation entities, 235-242
- Internal merits review**
- ASIC decisions, 43-48
 - banning orders, for, 47
 - disqualification orders, for, 47
 - enforceable undertakings, for, 48
 - inappropriate use, 46-47
 - infringement notices, for, 48
 - procedural protections, 48-49
- International Accounting Standards Board (IASB), 384-386**
- International Organisation of Securities Commissions (IOSCO), 381-384**
- hedge fund standards, 389-391
 - process and politics, 393-394
 - task force on unregulated financial entities, 389-392
- International relations theory**
- functional theory, 319-320
 - Basel Accord, 378
 - globalisation – *see* **Globalisation**
 - institutionalism, 319-320
 - liberal, 316, 318
 - realist, 316, 318
 - regime theory, 319
- International standards**
- Basel Committee, 378-381
 - case studies, 377-386
 - enforcement, 393
 - financial services, 372
 - hedge funds, 304-330, 370-395
 - development, 386-391
 - European developments, 388
 - history, 387-388
 - IOSCO
 - ongoing work, 391-392
 - reports, 389-390
 - standards, 390-391
 - overview, 386-387
 - US developments, 389
 - implementation, 393
 - information asymmetry effect on, 372
 - International Accounting Standards Board (IASB), 384-386
 - International Organisation of Securities Commissions, 381-384
 - overview, 326-327
 - “prisoner’s dilemma”, 374
 - race to the bottom, 373-375
 - race toward the hegemon, 376-377
 - regulatory competition, 372-373
- James Hardie litigation, 61, 163, 337**

Last in, first out (LIFO) accounting

securities damages, estimating, 243-258

Lawyers

ASIC investigations, role in, 107-129

ASIC proceedings, 122-128

Legal professional privilege

ASIC investigations, 118-120

search warrant, material seized under, 121

Leverage

hedge funds, 305-306

Limitation periods

rights of action under Corporations Act 2001, 475-493

cases, 490-492

internal provisions, 492

Newtronics Pty Ltd v Gjergja, 490-492

Liquidator

litigation funding, 302

Listed companies

company interlocks, New Zealand, 496-498

continuous disclosure – *see* **Continuous disclosure**
disclosure

company briefings, 355

regulatory framework, 259-268, 331-356

nominee directors, 131-141

periodic disclosure – *see* **Periodic disclosure**

Litigation funding, 54-58**Managed investment schemes**

responsible entity – *see* **Responsible entity**

Mark-to-market accounting

securities damages, estimating, 248-258

Market failure

regulation based on, 307-309

Market manipulation

artificial price, transactions creating, 547-548

artificial transactions, 549

ASIC powers, 233, 444-459

ASIC v Soust, 163

beneficial owner, no change in, 549

Citigroup “Dr Evil” scandal, 313-314

fictitious transactions, 549

matched orders, 549

reducing, 451-454

short sales – *see* **Short sales**

wash sales, 549

Market misconduct

ASIC powers, 162

overview, 308

regulation, 487-490

Markets – *see* Financial markets**Masel principle**

acquisition of control, 417-418

competitive, 417

efficient, 417-418

informed, 418

Members

definition, 512

obligations, 511

register of, 519

rights, 517-523

case study, 520-522

common law, under, 522-523

company constitution, under, 523

Corporations Act, under, 517

Merits review

ASIC decisions, 43-52

external, 49-52

internal, 43-48

Misleading and deceptive conduct

ASIC v Citrofresh, 163

continuous disclosure breaches, 87-89

directors’ liability, 90, 91

knowledge of directors, 91-92

false registration statements, 256

securities damages, estimation of, 243-258

Mortgage-backed securities (MBS), 13, 28

residential (RMBS), 18, 67, 222

Mortgages

Canada, 67-68

Malaysia, 68

mortgage-backed securities (MBS), 13

Canada Mortgage Bond (CMB), 67-68

residential (RMBS), 18, 67

originate and distribute model, 18

Philippines, 69

subprime mortgage market, 17-18

Viet Nam, 71-72

Nationally Recognised Statistical Rating Organization (NRSRO)

amendments to regulation, 225
regulatory use of ratings, 227

Newtronics Pty Ltd v Gjergja, 490-492

Nominee directors

access to company information, 135-137
appointor, 131
 conflict of interest with company, 131-141
 nominee passing information to, 137-139
board protocols, need for, 130-141
conflict of interest between appointor and company, 131
 difficulty for nominee, 133
 disclosure obligations of nominee, 134-135
 listed company policies for handling, 139-140
 modification of duties by constitution, 133-134
 nominee passing information to appointor, 137-139
 nominee's access to company information, 135-1137
 potential for, 131-132
 reconciliation of, 132
definition, 131
directors not to withhold information from, 135-137
disclosure of interests, 134-135
examples, 131
listed company policies, 130-141
major shareholders nominating, 131

Non-profit organisations

Business Activity Statement, 200
companies limited by guarantee, 200
compliance costs, 198
drivers to incorporation, 201
GST registration, 200
incorporated associations, 199-203
legislation, 204
micro organisations, 199-203
nature of, 199-203
reducing red tape, 198
unincorporated associations, 197, 203-221

Oppression

breach of duty by directors, whether, 302

Oral examinations – see ASIC investigations

Penalties

administrative, 39, 41-43, 125
ASIC proceedings, 124-125
civil penalties, 39-41, 125-127, 452
corporate collapses, 125-127
criminal penalties, 39-41, 451
factors governing outcomes for defendants, 124-125
procedural protections, 39-40
retributive, 39
sanctions, distinguished, 33-34, 39

Periodic disclosure

ASIC enforcement, 336
ASX Listing Rules, 261, 334-336
continuous disclosure and, 261-262, 267
enforcement record, 333-334
listed companies, 333-336
requirements, 261, 333
statutory regime, 336

Private equity, 180-196

arrangements between target and acquirer, 180-196, 269-272
background, 180-186, 269-270
break fee arrangements, 270-272, 357-360
China, 283-289
 corporate law regime, 288
 minimum registered capital (MRC) rule, 283
 Ministry of Commerce approval, 285, 287
 offshore SPVs, 287
 “round-trip investment” model, 284-287
conflict of interests, 183
corporate governance principles, 184-185, 191-192
exclusivity arrangements, 270-272, 360-363
financial incentives, 184-196
firms, 181, 182, 269
friendly arrangements, 269-172, 357-364
managed investments, 182
meaning, 182
proper purpose, duty to act for, 270-272
regulatory issues, 181
takeovers, 183-196, 269-270, 357-364

Privatisation

scheme of arrangement (Hong Kong), 152-156

Privilege

ASIC investigations, 117-120
 legal professional privilege, 118-120
 penalty privilege, 117
 search warrant, material seized under, 121

self-incrimination, 117-118
 use evidential immunity, 118, 119

Regulation

business, 306-311
 conflict of interest in, 306
 definition, 306
 financial services, 306-307, 330
 globalisation, 317, 394
 hedge funds, 305, 386-391
 need for, 311-315
 international standards – *see* **International standards**
 Joint Forum, 392
 market-failure-based, 307-309
 market misconduct, 487-490
 overview, 304-305
 prudential, 392
 public choice theory, 309-311
 public interest theory, 309
 regulatory convergence, 327-330, 377
 regulatory coordination, 327-330
 regulatory economics, 306-307
 regulatory networks, 320-330, 377, 386
 bilateral arrangements, 322
 network effects, 328-329
 peak bodies, 322
 practice, in, 323-326
 principal-agent theory, 323
 trans-governmentalism, 320-323

Residential mortgage-backed securities (RMBS),
 18, 67, 222

Residual interest

non-third-party ownership, 11, 23
 third party investors, 28-29

Responsible entity

associates, 568
 acting in concert, 567-568
 business or professional relationship, 568-569
 custodian arrangement, 571-572
 definition, 567-568
 exclusion, 568
 Australian Olives Ltd v Livadaras, 567, 572
 conflict of interests, 569-570
 Everest Capital Ltd v Trust Co Ltd, 567, 569-570
 removal of, 566
 responsible entity and associates voting on,
 567-569

role of chair, 566, 572-573
 s 253E, 569-571

Review

appeal, distinguished, 44
 ASIC decisions
 external, 49-52
 internal, 43-48
 merits, 43-52
 definition, 44

Rights of action

limitation periods under Corporations Act 2001,
 475-493

Ripoll Report, 7, 435-443

Risk

systemic, 308

Scheme of arrangement

commercial morality, 411-415
 court intervention in reviewing proposals, 163, 411
 CSR Ltd, Re, 163, 411-415
 explanatory statement, 411
 material risk of non-payment of creditors, 411-415
 privatisation via (Hong Kong), 152-156
 Re PCCW Ltd, 152-156
 share splitting, 153-154
 substantive unfairness, 154-155
 vote manipulation, 154

Search warrants

ASIC investigations, 81, 121
 decision to issue reviewable, 111
 privileged material seized under, 121

Secondary capital raisings

covered short selling preceding, 545-550
 issue price, regulation regime effect on
 short sales prohibited, 559-564
 short sales restricted for subscribers, 556-558,
 561-564
 short sales unrestricted, 551-556, 561-564
 placement offerings, 537
 trading halts, effect on, 537-565
 ASX Listing Rule 17.1, 540-541
 continuous disclosure during, 541

Securities

international standards, 381-384

Securities damages

- estimation of, 243-258
- false registration statements, 256
- first in, first out (FIFO) accounting, 244-248, 252-258
- fraud-induced inflation, 243
- fungibility of securities, 256-257
- insider trading, 257
- last in, first out (LIFO) accounting, 244-248, 252-258
- mark-to-market accounting, 248-258
 - LIFO and FIFO compared, 252-254
- misleading and deceptive conduct, 243
- short sales, 254
 - secondary offering, shares purchased in, 257

Securities loans

- distorting voting results, 142

Securitisation, 10-31, 63-76

- Asia, 68-69
- asset, 15
- asset-backed securities (ABS), 13, 15, 18-19, 22, 28-29, 222
- bankruptcy remoteness, 24-25
- Canada, 67-68
- collateralised debt obligations (CDOs), 13, 18-19, 28-29, 222, 314
- commercial trusts – *see* **Commercial trust**
- definition, 12-14
- disintermediation, 16, 18
- Germany, 66-67
- global financial crisis, role in, 10-11, 17-19, 27-31, 63, 74-75
- history, 12, 63
- legal considerations, 70-71
- Malaysia, 68-69
- mechanics of, 15
- mortgage-backed securities (MBS), 13, 28
- off-balance sheet purposes, 17, 25
- originator, 15, 18, 22, 24, 65
- overcollateralisation, 15, 22
- overview, 10, 65
- Philippines, 69
- pool of receivables, 15, 24
- reasons for, 16-17
- receivables, 15
- residential mortgage-backed securities (RMBS), 18, 67, 222
- risk transfer, 16
- special purpose vehicles (SPVs), use in, 10-31, 65
- synthetic, 14

Thailand, 69

- transactional properties, 11, 21-22, 24-27
- transition economies, adapting to, 69-75
- true sale, 12-14, 16, 25
- uncomplicated financial assets, 23-24
- United States, 64-66
- Viet Nam, 71-73

Self-incrimination, privilege against

- ASIC investigations, 117-118
 - search warrant, material seized under, 121

Shadow directors

- insolvent prohibitions, application, 163
- liability for insolvent trading, 234

Share registers

- access to, 82, 233

Short sales

- covered
 - false trading, as, 547-550
 - insider trading, as, 547
 - market manipulation, as, 547-550
 - prohibition on, 543-544
- naked, prohibition on, 543-544
- restrictions on, 540, 543-547
- secondary offering
 - pre-issue period, in, 539-565
 - securities damages, estimation of, 257
 - securities damages, estimation of, 254
 - secondary offering, shares purchased in, 257
- US restrictions, 550

Silence, right to

- ASIC investigations, 117

Sons of Gwalia decision, 9, 147, 162

Special purpose vehicles (SPVs)

- commercial trust – *see* **Commercial trust**
- offshore, Chinese regulation, 287
- securitisation, use in, 10-31, 65

Sporting organisations

- membership rights, AFL clubs, 507-536

Stock market – *see* **Financial markets**

Superannuation industry

- Cooper Report, 297-301
- corporate governance, 235-242, 300-301
 - best practice guidelines, 236
- Cooper Report, issues in, 300-301
- institutional investors, participation by, 235-242

proxy advisers, use of, 239-240
 fiduciary duties, 237
 MySuper model, 299
 portfolio management, 237
 principles underpinning, 297-298
 reform of system, 235
 statutory covenants, 237, 238

Takeovers and acquisitions

anti-competitive, 418
 Babcock and Brown Communities Group, 416-422
 break fee arrangements, 270-272, 357-360
 “bright line” test, 419
 chilling effect, 416-422
 coercive, 418
 conflicts of interest, protocols to address, 190
 Consolidated Minerals Ltd 03, 416-422
 directors’ duties, 420-421
 Revlon duties, 420-421
 exclusivity arrangements, 270-272, 360-363
 fiduciary carve out provisions, 361-362
 financial incentives to target directors, 184-196
 Australian legal position, 188-191
 US position, 191-195
 lock-up arrangements, 359, 418-419
 management participating in bidding consortium, 190
 Masel principle, 417-418
 no-talk agreements, 361, 363
 private equity arrangements, 180-196, 269-272, 357-364
 reverse takeovers, 273-282
 ASX listing rules, 274-275
 definition, 273
 fiduciary outs, 278-280
 Gloucester Coal case, 273-282
 legal regime, 274
 lock-up device, 276, 278, 279
 protecting shareholder interests, 280
 shareholder approval, 277
 superior proposal conditions, 280-281
 target strategies for successful bid, 184
 top-up note, 416, 418-419, 421
 unacceptable circumstances, 190, 276, 416-422

Telecommunications interception

ASIC powers, 81

Trading halts

secondary capital raisings, 537-565

Tranches

definition, 13
 senior, 13

Transactional property

bankruptcy remoteness, 24
 non-third-party ownership of residual interest, 11

Trans-governmentalism, 320-323

Transnational regulatory networks, 320-330

Tribunal

merits review of ASIC decisions, 49-50

Uncomplicated financial assets, 23-24

Unincorporated associations, 197, 203-221

Canada, 212-214
 common law, subject to, 203
 England, Wales and Northern Ireland, 207-208
 European Union, 210-211
 incorporation, reasons for, 201, 203
 issues meriting statutory intervention, 204-206
 lack of legal personality, 203, 205, 206
 New Zealand, 207
 number in Australia, 203
 reform options, 217-221
 Scotland, 208-210
 small non-profit organisations, 197, 203-204
 United States, 214-217

Viet Nam

consumer lending, 72-73
 financial assets market, 71-73
 housing loans, 71-72
 securitisation in, 71-73
 share trading, 73

Waterfall payment structure, 13