

---

# Index

---

## Agency

governing law, 235

## Aircraft

security, as  
choice of law and jurisdictional issues, 236

## Australian Prudential Regulation Authority (APRA)

payment facilities, regulation of, 338-339

## Australian Securities and Investments Commission (ASIC)

payment facilities, regulation of, 337-338  
policy statements  
investor-directed portfolio service schemes, 225-226  
managed discretionary account service schemes, 226  
mortgage investment schemes, 224-225  
strata schemes, 223-224

## Autonomy principle

payment instruments, application to *see* **Payment instruments**

## Bank guarantees *see* **Payment instruments**

## Bankruptcy

Japan, in  
law reform, 83-85  
jurisdictional issues, 232

## Banks

fiduciary cheque fraud *see* **Fiduciary cheque fraud**

## Bills of exchange

choice of law and jurisdictional issues, 236

## Bonds

issue of  
choice of law, 235

## Book debts

charges over, 253-258, 266-270, 314-316  
New Zealand, in, 316

## BPAY

payment system, 139

## Business

sale of *see* **Sale of business**

## Canada

claims by shareholders for share losses, 363

## Capital gains tax

foreign residents  
changes to rules relating to, 153-155  
Hong Kong, in, 386  
Thailand, in, 386

**Carry-forward tax losses**

*Commissioner of Taxation v Linter Textiles*, 356-358

**Cash**

payment system, as, 137-138

**Cash flow statements** *see* **Statement of cash flows**

**Change of position defence**, 149-151

**Charges**

book debts, over *see* **Book debts**

fixed *see* **Fixed charges**

floating *see* **Floating charges**

New Zealand, in, 316

UK, registration of in, 160-161

**Cheques**

choice of law and jurisdictional issues, 236

conditional payment, 149

conversion, 57-60, 351

defences, 58-60

countermanded, payment of, 150-152

fiduciary fraud *see* **Fiduciary cheque fraud**

met on presentment, meaning, 149

mistake of fact, paid under, 159-152

payment by, 149

in due course, 149

payment facility, as, 138

third party *see* **Third party cheques**

**China**

securitisation law in, 280-2

**Choice of law**

agency, 235

bond issues, 235

borrower's law, danger in choosing, 234

characterisation difficulties, 238-239

contract, in, 233

corporate matters, 238

exchange contracts, 234

monetary obligations, 235

powers of attorney, 235

property, in, 236-237

**Choses in action**

choice of law and jurisdictional issues, 236

**Clearing services**, 136

**Collecting bank**

fiduciary cheque fraud, liability for *see* **Fiduciary cheque fraud**

- 
- third party cheques, liability for collection of
    - Oris* case, 351-355
  - Commissioner of Taxation**
    - reasonable grounds for suspecting insolvency, 61, 65-66
    - tax payments arrangements and, 63-66
  - Conflict of laws**
    - choice of law *see* **Choice of law**
    - foreign judgments *see* **Foreign judgments**
    - issues, 227
    - jurisdiction *see* **Jurisdiction**
  - Construction**
    - commercial contracts, of, 164
    - contractual indemnities, of, 163-166
  - Consumer Credit Code**
    - disclosure requirements
      - empirical research, 7-16
      - financial table, 6-7
      - surveys regarding, 7
  - Consumer credit contracts**
    - New Zealand, in *see* **New Zealand**
  - Consumer protection**
    - payment facilities, in relation to *see* **Payment facilities**
  - Contractual indemnities**
    - construction of, 163-166
      - Andar* case, 165-166
      - Pacific Carrier* case, 164-166
    - drafting tips, 166-169
    - rights of, 163
  - Conversion**
    - cheque, 57-60, 351
    - defences, 58-60
  - Corporations**
    - governing law, 238
  - Credit contracts**
    - New Zealand, in *see* **New Zealand**
  - Credit data**
    - Hong Kong, in
      - sharing and use of, 178-179
  - Creditors**
    - transferee shareholders, status as
      - Media World* case, 171-174
      - Sons of Gwalia* case, 359-363

**Cross-border financing transactions**

choice of law and jurisdictional issues *see* **Conflict of laws**

**Debts**

assignment of  
choice of law and jurisdictional issues, 237  
book *see* **Book debts**

**Deed of company arrangement**

transferee shareholders' claims for misleading conduct  
*Sons of Gwalia* case, 359-363

**Derivatives**

definition, 115  
duplicate definition compared, 126-129  
*Financial Services Reform Act 2001*, 114  
future time requirement, 115-116  
suggested amendments to, 124-125  
duplicate definition  
Act's definition compared, 126-129  
need for, 119  
problems with, 120-123  
solution to, 123  
intraday contracts, 118-119  
short term contract carveout, 115  
less than one day minimum, 116-118  
one day minimum, 116  
types of, 116

**Directors**

breach of duty, personal liability for  
sale of business, on *see* **Sale of business**

**Disclosure**

Consumer Credit Code, under *see* **Consumer Credit Code**

**Duties Amendment (Land Rich) Act 2004 (NSW)**, 67-72

**EFTPOS**

payment system, 140

**Electronic funds transfers**

fraudulent, 242-247  
deception, concept of, 242-246  
*Holmes* case, 244  
*Predgy* case, 243-244

**Embezzlement**

cheque fraud *see* **Fiduciary cheque fraud**

**European Union**

payment facilities, regulation of, 339

**Exchange contracts**

enforcement issues, 234

**Fiduciary cheque fraud**

cheques drawn by fiduciary, 19

collecting bank, liability for

assistance action, 23

common law, at, 21-22

conversion, 21

equity, in, 22

money had and received, 22

reform proposals, 36-38

liability regimes, 21-26

reform proposals, 33-39

misuse of third party cheques, 19

paying bank, liability for

common law, at, 23-24

equity, in, 24

inconsistent dealing, 25

knowing receipt action, 24-25

reform proposals, 35-36

types, 18-20

reform proposals, 37-39

UK, in *see* **United Kingdom**

US, in *see* **United States**

**Financing transactions**

choice of law and jurisdictional issues *see* **Conflict of laws**

**Fixed charges**

book debts, over, 253-257, 266-270, 314-316

monitoring, 50-51

operation, 50

priority, 49, 253

re-characterisation, 50-51

registration, 50

UK, registration in, 160

**Fixed trusts**

foreign investment in

changes to capital gains tax rules, 153-155

**Floating charges**

book debts, over, 253-257, 266-270, 314-316

crystallisation, 51-54

monitoring, 52-54

priority, 49, 52, 253

re-characterisation, 54

## Index

---

- restrictive covenants, 52
- UK, registration in, 160
- what are, 51

### **Foreign corporations**

- jurisdictional issues *see* **Conflict of laws**

### **Foreign investors**

- Australian managed funds, investment in, 153-155
- capital gains tax
  - changes to rules relating to, 153-155

### **Foreign judgments**

- bars
  - to enforcement, 240
  - to recognition, 240
- enforcement and recognition of, 239-241

### **Fraud**

- autonomy principle, exception to, 206-211
  - English position, 209-210
  - US position, 210
- equitable, 207
- fiduciary cheque *see* **Fiduciary cheque fraud**

### **Hedge funds**

- Hong Kong, in *see* **Hong Kong**

### **Hong Kong**

- capital gains tax exemption, 386
- commercial credit data
  - sharing and use of, 178-179
- fund managers, licensing requirements, 382
- hedge funds
  - revised guidelines, 277-278, 382-384
- income tax agreement with Thailand
  - avoidance of double tax, 385-386
- money brokers, licensing requirements, 382
- money laundering, prevention of
  - new guidelines, 179-182, 275-277
- offshore funds
  - profits tax exemption, 384-385
- prospectus regime
  - changes to, 182-184
- real estate investment trusts
  - investment in, by HK Retail Funds, 184-185
  - managers, licensing of, 381-382
  - overseas investment by, 278-280
- retail hedge funds

- revised guidelines, 382-384
- Securities and Futures Commission
  - bilateral agreements with other regulators, 380-381
- securities and futures ordinance
  - changes to, 185-186
  - licensing requirements, 381-382
- terrorist financing
  - new guidelines, 181, 275-277

**Indemnities**

- contractual *see* **Contractual indemnities**

**Insolvency**

- balance sheet test, 98
  - problems with, 102-103
- cash flow test, 97-98
  - problems arising from application 99-102
- defences, 111-113
- determining, 94
- financial statements, 94
- foreign corporations, involving
  - jurisdictional issues, 231-232, 240-241
- insolvent trading *see* **Insolvent trading**
- jurisdiction, 231-232
- reasonable grounds for suspecting, 61, 65-66
  - Commissioner of Taxation, 63-66
  - statements of cash flows, 110-111
- statement of cash flows to determine, 110-111
  - defences, 111-113
- UK, in, 305-307
- US, in, 307-308
- what is, 61

**Insolvent trading** *see also* **Insolvency**

- duty to prevent, 93

**Insolvent transaction**

- what is, 301

**Investor-directed portfolio service schemes**

- ASIC policy statement, 225-226

**Japan**

- bankruptcy law reform, 83-85

**Judgments**

- foreign, enforcement and recognition of *see* **Foreign judgments**
- prospective effect of, 268-270
- retrospective effect of, 269

**Jurisdiction**

- bankruptcy matters, in, 232
- contractual submission to, 229-231
- discretion of courts, 228-229
- forum non conveniens, 228-229
- insolvency matters, in, 231-232
- service, by, 228
- sovereign immunity, 232

**Land rich vendor duty**

- disposal of interests, 69
- Duties Amendment (Land Rich) Act 2004* (NSW), 67-72
- duty, payment of, 69
- exemptions and concessions, 69-71
- GST liability and, 71
- land holdings, 68
- landholders affected, 67-68
- liability to pay, 68
- significant interest, 68
- threshold, 68
- transitional provisions, 69, 71
- unit trust schemes, 71

**Lenders**

- liability of, 55-56

**Letters of credit** *see* **Payment instruments**

**Liquidator**

- provisional, appointment of
- Exception Holdings* cases, 259-261

**Liquidity**

- insolvency distinguished, 95

**Managed discretionary account service schemes**

- ASIC policy statement, 226

**Managed funds**

- foreign investment by, 153-155

**Managed investment scheme**

- ASIC policy statements, 223-226
- concept
  - interpretation of, 213-214
- contribution to acquire rights requirement, 215-218
  - money, 215
  - multi-party participation, 215
  - produced rights, 215-218
- investor-directed portfolio service schemes, 225-226
- managed discretionary account service schemes, 226



mortgage investment scheme, 224-225  
pooling or common enterprise requirement, 218-222  
    benefits for group, 219-221  
    causal connection, 221-222  
    prospective requirement, 218  
product disclosure statement, requirement for, 213  
registration, 213  
scheme requirements, 214-223  
separation of ownership and control requirement, 222  
strata schemes, 223-24

**Misfeasance**

director, by, on entering into sale transaction  
    *MDA Investment Management*, 369  
meaning, 369

**Misrepresentation**

claims by transferee shareholders  
    *Media World* case, 171-174  
    *Sons of Gwalia* case, 359-363

**Money laundering**

Hong Kong, in  
    guidelines for prevention of, 179-182, 275-277

**Mortgage investment schemes**

ASIC policy statement, 224-225

**Mortgage refinancing**

stamp duty concession (NSW)  
    cap on limit, 252

**New Zealand**

charges in, 316  
    book debts, over, 316  
consumer credit contracts, new legislation, 283-288  
    key changes, 284-287  
credit contracts, new legislation, 283  
transaction, setting aside by liquidator, 387-288  
    netting arrangements, 388  
    payment of money, whether, 387  
    set-off, 388  
unclaimed money, holders of  
    recent decisions, 86-87, 347-350

**Payment**

change of position defence, 149-150  
definition, 131  
facilities *see* **Payment facilities**  
instruments *see* **Payment instruments**

## Index

---

mistake, by, 140-150  
what are, 242

### **Payment facilities**

account-based facilities, 145-147  
APRA, regulation by, 338-339  
ASIC, regulation by, 337-338  
Australian Paper Clearing System, 136  
authorised deposit-taking institutions, 135  
BPAY system, 139  
Bulk Electronic Clearing System, 136  
card-based, 140-141  
cash, 137-138  
cheques, 138  
clearing services, 136  
closed systems, 141  
Consumer Electronic Clearing System, 136  
consumer protection  
    inequality of power, 330-331  
    mispurchasing, 329-330  
    product failure, 332  
    regulation, 335-337  
    risks, 329-333  
    transactional failure, 332-333  
contractual arrangements, 142-143  
credit risk, 327-328  
debit and credit transfers, 139-140  
debt, circulation of, 144  
deception, obtaining financial advantage by, 242-247  
    *Holmes* case, 244  
    *Preddy* case, 243-244  
direct payments, 131  
disclosure  
    need for, 335-336  
    regime, 337  
    suggested regulation, 342-343  
dispute resolution processes, 336  
efficiency  
    regulation, 335  
    risk, 328-329  
EFTPOS system, 140  
Exchange Settlement Accounts, 135  
gift vouchers, 141  
High-Value Clearing System, 136

- history and development, 131-134
  - infrastructure, 134-137
  - interbank payment system, 136
  - intermediated payments, 142
    - early, 131-133
    - modern, 133-134
  - layered facilities, 147-148
  - legal implications of, 142-148
  - licensing, 337
  - loyalty scheme providers, 142
  - misuse of, 242
  - mobile phone companies, 141
  - money transfer services, 139
  - non-cash, 337
    - regulation of, 337-338
  - prudential regulation, 334, 338
  - purchased, 338
  - registration, 337
  - regulation of
    - current position, 337-339
    - EU, in, 339
    - need for, 333-337
    - suggested models, 341-346
    - UK, in, 340
    - US, in, 340-341
  - Reserve Bank of Australia, regulation by, 338
  - rights, circulation of, 143-144
    - debt, 144
    - goods or services, 143
  - risks associated with, 326-333
  - smart cards, 140
  - software-based, 141
  - stored value
    - facilities, 145
    - products, 140-142
  - systemic stability
    - regulation, 334
    - risk, 326-327
  - types, 137-142
- Payment instruments**
- account party, 211
  - autonomy principle, 197-199
    - breach of faith exception, 209-210

## Index

---

- exceptions to, 200, 206-211
  - fraud exception, 206-211
  - “fraud in the transaction” exception, 210
  - bank guarantees as, 197
  - beneficiary, 211
  - commercial arrangements under, 198-199
  - issuer, 212
  - letters of credit as, 197
  - performance bonds as, 197
  - purpose, 197
  - unconscionable conduct under TPA, 198
    - application by courts, 203-205
    - Boral Formwork* case, 201-202
    - evidence of, 205
    - fraud exception, 206-211
    - Olex Focas* case, 200-201
    - s 51AA, 202-203
    - s 51AC, 202-203
  - what constitutes, 197
- Performance bonds** *see* **Payment instruments**
- Personal property**
- security, as
    - choice of law and jurisdictional issues, 236
- Powers of attorney**
- choice of law issues, 235
- Private international law** *see* **Conflict of laws**
- Prospectus**
- Hong Kong, new regime in, 182-184
- Provisional liquidator**
- appointment of
    - Exception Holdings* cases, 259-261
- Publications**
- recent, 79-82, 175-177, 262-265, 364-367
- Real estate investment trusts (REITs)**
- Hong Kong, in
    - investment by HK Retail Funds in , 184-185
    - managers, licensing of, 381-382
    - overseas investment by, 278-280
  - Singapore, in *see* **Singapore**
- Real property**
- security, as
    - choice of law and jurisdictional issues, 236

**Receiver and manager**

- repudiation of pre-receivership contracts
  - limits on, 74
  - mandatory performance contracts, 75-76
  - personal liability, 77
  - repudiable contracts, 76-77

**Recent publications**, 79-82, 175-177, 262-265, 364-367**Reserve Bank of Australia (RBA)**

- payment facilities, regulation of, 338

**Sale of business**

- related entities, dividing sale proceeds between
  - fiduciary duty, breach of, 369-370
  - MDA Investment Management*, 368-373
  - misfeasance, 369
  - transaction at undervalue, 370-372

**Secured finance**

- combined theory, 42
- global theory, 42
- monitoring, 41-56
  - efficiencies of, 45-47
  - extent of, 47-49
  - fixed and floating charges, 49-54
  - risks of, 54-56
  - role of, 45

**Securities**

- choice of law and jurisdiction issues, 236-237
- UK, registration in *see* **United Kingdom**

**Securitisation**

- China, in, 280-282
- market in Australia, 297
- setting aside transaction, 301
- special purpose vehicle, 301
- US, in, 298
- vehicles for, 301-302
- what is, 294-295
- whole business *see* **Whole business securitisation**

**Service**

- jurisdiction by, 228

**Share sale agreements**

- stamp duty payable
  - consideration, what constitutes, 155-158
  - Dick Smith* case, 155-158

**Shareholders**

- creditors, status as
  - Media World* case, 171-174
  - Sons of Gwalia* case, 359-363
- trading trusts, of
  - position of, 173
- transferee *see* **Transferee shareholders**

**Shares**

- choice of law and jurisdictional issues, 237

**Ship mortgages**

- choice of law and jurisdictional issues, 236

**Singapore**

- real estate investment trusts, regulation of, 374-379
  - borrowing limits, 379
  - corporate governance, improving, 375
  - foreign properties, 375
  - interested party transactions, 376-377
  - managers of, 374
    - admission criteria, 374
    - payment of property acquisition/disposal fees to, 376
    - removal of, 375
  - partial ownership of property, 377-378
  - property development activities, 378-379
  - tenant profile disclosure, 378
  - trustee, 377
  - unitholders' meetings, 375
- SGX Listing Manual, proposed changes to, 271-274
  - board of directors, composition of, 271
  - compliance adviser, 273
  - confirmation of approvals, 272
  - directors' obligations, notification of, 272
  - directors, qualifications of, 271
  - disclosure of accounting firms, 273
  - disclosures, additional, 273-274
  - internal controls, 272
  - negative assurance confirmations, 272
  - shareholder approval, 272-273
  - sponsorship disclosure, 274

**Smart cards**

- EFT Code of Conduct, 348
- payment system, 140
- residuals, 349
  - unclaimed money, 349-350

what are, 348

**Solvency**

cash flow test, 96-98

problems arising from application, 99-102

definition, 93, 95

determining, 96-97

liquidity distinguished, 95

statement of cash flows to determine

benefits of, 103-105

use of statements, 105-109

**Sovereign immunity, 232****Stamp duty**

mortgage refinancing concession (NSW)

cap on limit, 252

share sale agreements, on

*Dick Smith* case, 155-158

**Statement of cash flows**

insolvency, use in determining, 110-111

defences, 111-113

standard of proof, 109-110

preparation and use

guidelines for, 95

solvency, determining, 103-105

use of, 105-109

standard of proof, 109-110

use of, 105-109

cash balances, to determine, 106

courts, by, 106-108

trading losses, to determine impact of, 105-106

**Strata schemes**

ASIC policy statement, 223-224

**Tax liabilities**

deferral of, 62

insolvency, reasonable grounds for suspecting

payment arrangements and, 61-66

instalments, payment by, 62

payment arrangements

reasonable grounds for suspecting insolvency and, 61-66

unfair preferences, 63

**Taxation**

capital gains tax *see* **Capital gains tax**

carry-forward loss provisions

*Commissioner of Taxation v Linter Textiles*, 356-358

## Index

---

Hong Kong, in *see* **Hong Kong**

liabilities *see* **Tax liabilities**

### **Terrorist financing**

Hong Kong, in  
new guidelines, 181, 275-277

### **Thailand**

capital gains tax position, 386  
income tax agreement with Hong Kong  
avoidance of double tax, 385-386

### **Third party cheques**

collection by bank, 351-355  
*Oris* case, 351-355  
ss 128 and 129 *Corporations Act*, 354-355  
“without negligence” defence, 353-354  
conversion of, 351  
misappropriation, 353  
what are, 351

### **Trading trusts**

creditors of, position of, 173  
shareholders in, position of, 173

### **Transferee shareholders**

claims for non-disclosure or misleading conduct during company administration  
Canadian position, 363  
*Media World* case, 171-174  
*Sons of Gwalia* case, 359-363  
UK position, 362  
US position, 363

### **Trusts**

claims for access to assets, 363  
fixed *see* **Fixed trusts**  
trading *see* **Trading trusts**  
unit *see* **Unit trusts**

### **Unclaimed money**

legislation governing, 348  
New Zealand, in  
recent decisions, 86-87, 347-350  
smart card residuals and, 349-350  
time periods, 348  
types of card effected, 349-350

### **Uncommercial transaction**

what is, 301

### **Unconscionable conduct**

payment instruments



exception under TPA *see* **Payment instruments**  
special disability, 247-250  
TPA, under (s 51AA)  
    *Berbatis* case, 248  
    *Oceana* case, 250  
    payment instruments, involving *see* **Payment instruments**  
    *Spira* case, 249-250  
    test, 247

**Unfair loan**

what is, 301

**Unfair preferences**

tax-related liabilities, 63  
what are, 61, 301

**Unit trusts**

land rich vendor duty and, 71

**United Kingdom**

cheques

    fraud *see* fiduciary cheque fraud  
    negotiability of, 20

fiduciary cheque fraud

    collecting bank, liability of, 21-23  
    examples, 20  
    liability, 21-26  
    paying bank, liability of, 23-26  
    reform proposals, 33-39

fraud

    exception to autonomy principle, as, 209-210  
    fiduciary cheque *see* fiduciary cheque fraud

insolvency regime, 305-307

payment facilities, regulation of, 340

registration of securities in, 159-162

    charges, 160-161  
    extending current system, 161-162  
    legislation, 159  
    new system, 159-161  
    notice-filing system, 159-162

sale of business, personal liability of director for

*MDA Investment Management*, 368-373

shareholder claims for share losses, 362

voluntary administration

    claims by transferee shareholders, 173

whole business securitisation in *see* **Whole business securitisation**

**United States**

- cheques, negotiability of, 21
- fiduciary cheque fraud
  - bad faith, 29
  - examples, 21
  - good faith, 32
  - knowledge of defendant, 28
  - liability, 26-33
  - reform proposals, 33-39
  - Uniform Commercial Code, 30-33
  - Uniform Fiduciaries Act, 26-29
- fraud
  - exception to autonomy principle, as, 210
- insolvency regime, 307-308
- payment facilities, regulation of, 340-341
- securitisation in, 298
- shareholder claims for share losses, 363

**Vendor duty**

- land rich *see* **Land rich vendor duty**

**Voidable transactions**

- defences, 61
- what are, 61

**Voluntary administration**

- CAMAC Discussion Paper, 310-313
- creditors, status of, 171-172
- substantial chargee, 308-309
  - CAMAC Discussion Paper, 310-313
- transferee shareholders' claims for misleading conduct
  - Media World* case, 171-174
  - Sons of Gwalia* case, 359-363

**Whole business securitisation**

- advantages, 317-319
- confidentiality, 319
- disadvantages, 319-320
- future of, 323-324
- legal basis/methodology, 299-305
- likelihood of in Australia, 298-299
- principal legal assumption, 299
- rating agency requirements, 321-322
- requirements, 321-323
- secured loan structure, 302-305
- security package, 313-317
  - book debts, security over, 314-317

- borrower, security from, 313
  - issuer, security from, 314
- special purpose vehicle, 304-305
- substantial chargee, rights of, 305-313
  - CAMAC Discussion Paper, 310-313
- suitable businesses, types of, 322-323
- true sale, 299-302
- UK, in, 296, 298, 320
  - capital market arrangement, 307
  - insolvency regime, 305-307
  - principal legal assumption, 299
  - secured loan structure, 302-304
- US insolvency regime, 307-308
- what is, 295-296