THE IMPACT OF GLOBALISATION ON AUSTRALIAN
FINANCE LAW AND FINANCIAL SERVICES LAW

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This thesis is presented for the degree of Doctor of Philosophy of Murdoch University.

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DECLARATION

I declare that this thesis is my own account of my research and contains, as its main content, work which has not previously been submitted for a degree at any tertiary education institution.

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ABSTRACT

This thesis examines the impact of globalisation on areas of innovative legislative change, policy development and law reform in Australian finance law and financial services law. ‘Globalisation’ has had extensive influence on the law reform and regulation affecting companies and corporations, financial services, fundraising, managed investments, takeovers, finance, disclosure issues, the futures industry and the securities industry. Australian finance law and financial services law reform also impacts on the areas of trusts and equity, property law, secured transactions law, administrative law and takeover law.

Globalisation has been an influential factor since the 1990’s on Australian financial services and corporate law reform development in the context of the global financial system. The origin in the pre-globalisation era of the influence of globalisation on Australian domestic policy and law reform developments in finance law and financial services law is considered in this thesis. Since the 1990’s, a globalisation based focus arose from international banking and corporate developments, which resulted in extensive international statutory and policy changes. These changes have had considerable impact on Australian finance and financial services law reform and related areas of Australian law and policy.

In addition, the role of globalisation and electronic commerce on Australian finance law and financial services law is considered in this thesis. This thesis analyses the nature of
globalisation theory and the process of globalisation, which is designed to ensure a free movement of capitalism so that banking and financial entities would be able to facilitate industry as well as electronic commerce transactions. This interweaving of globalisation and electronic commerce (as a mechanism in globalisation) in the free international movement of capital and labour is intended to bolster international banking systems, economies and industries. In practice, this close relationship between globalisation, electronic commerce and domestic law reform/policy development has caused problems in times of economic crisis since the Global Financial Crisis began in 2007.

The conclusions drawn in this thesis demonstrate the role that globalisation has had on the development of law and policy in Australia in finance law and financial services law.
This thesis is submitted for a Doctor of Philosophy degree (PhD) by publication based on my books *Finance Law of Australia* (LexisNexis Butterworths, 2001) and *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003), which are incorporated by reference as part of this thesis. I wrote these books whilst working as a Senior Lawyer and Special Counsel in the Financial Services Regulation directorate of the Australian Securities and Investments Commission (‘ASIC’) applying the law and policy developments which arose in Australia over the last twenty years.

I also became interested in the impact of globalisation on areas of considerable innovative legislative change, policy development and law reform in Australian finance law and financial services law from my university lecturing in company law and finance law for fifteen years.

From the time of the Financial System/Wallis Committee Inquiry (‘the Wallis Inquiry’), I could see that globalisation would have a particular impact on the law reform and regulation affecting companies and corporations, financial services, fundraising, managed investments, takeovers, finance, disclosure issues, the futures industry and the securities industry. These ongoing legal developments affected both finance law and financial services law reform, international statutory and policy changes and the consequences in these areas of Australian and international law and policy.
The issue of what globalisation means to the financial sector is best illustrated by the extent to which internationalisation/globalisation affects domestic law reform agendas in Australia and other countries. Globalisation remains important as it is a process that ensures capital movement on global markets. It involves the application of international agendas on financial transactions on these global markets. My two books consider the finance law and financial services law areas in the context of constant law reform from the Corporations Law Simplification Program, the Corporate Law Economic Reform Program (‘CLERP’), managed investments law reform and financial services law reform.

My books and this thesis are the result of over twenty years of work researching legal issues relating to Australian finance and financial services law and globalisation in library archives, documents and books. This research is the basis of the referencing of my sources and the analytical development of the relevant concepts and legal issues in this thesis and in my books.

I am very grateful for the academic encouragement, diligence and support of my supervisor Professor Gabriël Moens, Pro Vice Chancellor (Law, Business and Information Technology), Murdoch University. This thesis could not have been possible without his assistance and I wish to express my gratitude for his intellectual guidance and wise counsel. His thoughtful comments and insight into legal developments have been very useful in the writing of this thesis.
I also thank my parents, Francis and Margaret Horgan, for their tremendous commitment and inspiration for my writing and my studies. I appreciate their understanding and support in relation to my books and my thesis.
# LIST OF ABBREVIATIONS

<table>
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<th>NAME</th>
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<tr>
<td>Asset backed securities</td>
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<td>Australian Approved Deposit-taking Institutions</td>
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<td>Australian clearing and settlement facility licence</td>
<td>Australian CS facility licence</td>
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<td>Australian Competition and Consumer Commission</td>
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<td>Australian Law Reform Commission</td>
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<td>Australian Prudential Regulation Authority</td>
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<tr>
<td><strong>Australian Law Reform Commission and the Companies and Markets Advisory Committee (as it is now known) in Collective Investments: Other People’s Money (Report No. 65)</strong></td>
<td><strong>CI Report</strong></td>
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<td><strong>Clearing and settlement facility</strong></td>
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CHAPTER ONE

INTRODUCTION TO THESIS

1. Thesis framework

1.1 Aims of this thesis

This thesis is submitted for a Doctor of Philosophy degree (PhD) by publication based on my books *Finance Law of Australia* (LexisNexis Butterworths, 2001) and *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003), which are incorporated by reference as part of this thesis.

The aims of this thesis are to research, analyse and review areas of considerable innovative legislative change, policy development and law reform in Australian finance law and financial services law. These areas of law are examined in the context of key issues in the law and regulation affecting companies and corporations, financial services, fundraising, managed investments, takeovers, finance, disclosure issues, the futures industry and the securities industry.

This thesis examines the reasons for change and the background to Australian finance law and financial services law reform, which has such significant implications for consumers and the financial services industry. This thesis also considers the thematic legal developments and innovations in law reform arising under the new regulatory structure created in the *Corporations Act 2001 (Cth)* (‘the Corporations Act’). Finance
law and financial services law reform also impact on trusts and equity, property law, secured transactions law, administrative law and takeover law.

1.2 Role of innovative law reform

Law reform innovations often require a number of years for initiation and implementation. The impetus for innovative law reform comes from either external or internal sources with the primary external source being government policy such as the Corporations Law Simplification Program (‘CLSP’) and the Corporate Law Economic Reform Program (‘CLERP’).¹ The changes proposed in these external sources and consequent law reform affect industry, consumers, regulators and other stakeholders in the corporate law process and may constitute a response to outside pressures from industry and affected parties. Internal sources are largely derived from industry and consumer needs which impact on the regulation of law in these areas and submissions to government for law reform.

The three stages of innovative law reform are initiation, implementation and institutionalisation. Initiation is comprised of ideas, decision-making and planning with recommendations for change by industry, consumer groups, regulators and law reform bodies. Implementation of the relevant law reform in these areas of finance law and financial services law is undertaken by corporate law regulators such as the Australian Securities and Investments Commission (‘ASIC’), which regulates amongst other things

¹ Corporate Law Economic Reform Program (‘CLERP’), Policy Framework (AGPS, 1997).
market integrity and consumer protection,\(^2\) and the Australian Prudential Regulation Authority (‘APRA’), which prudentially regulates the financial system\(^3\). There are significant benefits for industry and consumers in having a successful implementation of innovative law reform because these reforms may provide new legislative solutions for problems.

The institutionalisation of innovative law reform occurs after the successful implementation and operation of change which impacts on corporate bodies, industry groups and consumers. The research and review of issues in this thesis focuses on innovative law reform, the characterisation of products and development and integration of finance law and financial services law and in particular, financial services law reform.\(^4\)

1.3 Key theme and research questions

The key theme of this thesis is the impact of globalisation on Australian finance law and financial services law reform. My two books *Finance Law of Australia* (LexisNexis Butterworths, 2001) and *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003) form a predominant part of this thesis and demonstrate the initial pre-globalisation and the beginning of the effect of globalisation on finance law and financial services law. The increasing globalising effect of electronic commerce and

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2 The Office of Consumer Protection was established by the Australian Securities and Investments Commission (‘ASIC’) in February 1999 to advise ASIC on consumer protection issues relevant to the financial services area. ASIC also established the Consumer Advisory Panel in November 1998 to promote the exchange of information between ASIC and consumers.


4 This law reform was introduced on 11 March 2002 in the *Financial Services Reform Act 2001 (Cth)* (the ‘FSR Act’) and the *Financial Services Reform (Consequential Provisions) Act 2001 (Cth)* which became Chapter Seven and Part 10.2 of the *Corporations Act 2001 (Cth)* (‘the Corporations Act’).
law reform on industry and consumers in Australia has resulted in ongoing law reform, which demonstrates the importance of the integration of finance law and financial services law in the *Corporations Act* and the common law.

The following research questions are examined in this thesis:

(a) what does globalisation mean? This question is relevant because of this key theme of the thesis about the impact of globalisation on Australian finance law and financial services law. Globalisation of the movement of capital in global markets applies to both international as well as domestic markets and financial transactions. This conceptual framework of globalisation is discussed further in Chapter Two of this thesis;

(b) why is the impact of globalisation so important to Australian law reform development in the context of the global financial system? The origin of the effect of globalisation on these areas of law is set out in my books *Finance Law of Australia* (LexisNexis Butterworths, 2001) and *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003), which are incorporated by reference as part of this thesis;

(c) what is the effect of globalisation on Australian domestic policy and law reform developments in finance law and financial services law in view of international statutory and policy changes and market developments?; and

(d) how does globalisation and electronic commerce affect Australian finance law and financial services law?
1.4 Methodology

This thesis examines and reviews the law, regulations and policy of finance law and the financial services law reform in Chapter Seven of the Corporations Act from the perspective of the driving force of globalisation affecting legislative innovative change in these areas of law.

1.5 Structure of the thesis

Under Regulation 36 of the Murdoch University Postgraduate Research Degrees Regulations, a thesis may consist predominantly of published work, provided that the thesis also includes material that provides coherence to the thesis as an integrated work.

The structure of my thesis, which is being submitted for a Doctor of Philosophy degree (PhD) by publication based on my books Finance Law of Australia (LexisNexis Butterworths, 2001) and Horgan's Law of Financial Services (Thomsons Reuters, Lawbook Company, 2003) (which are incorporated by reference into my thesis), is as follows:

(a) chapters developing the themes, analysis and conclusions to provide coherence to the thesis as an integrated work;

(b) the two published works:

   (i) Horgan's Law of Financial Services (Thomsons Reuters, Lawbook Company, 2003) which deals with the law, regulations and policy of the financial services law reforms in Chapter Seven of the Corporations Act; and
(ii) *Finance Law of Australia* (LexisNexis Butterworths, 2001) which deals with the law relating to equity, debt, security issues, trade finance, project finance, leasing, securitisation, subordination of debt, factoring, corporate restructuring and share buybacks, the duties and liabilities of financial intermediaries, swaps and derivatives and risk management techniques.

(c) chapters setting out the nature of globalisation and the impact of law reform on Australian finance law and financial services law drawing out the key issues, themes and conclusions in this thesis;

(d) a conclusion analysing the effect of globalisation on Australian finance law and financial services law.

1.6 Conclusion

This thesis and my two books *Finance Law of Australia* (LexisNexis Butterworths, 2001) and *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003) consider the impact of globalisation on Australian legislative innovative change in the law, regulations and policy of finance law reform and the financial services law reform in the *Corporations Act*. 
CHAPTER TWO
GLOBALISATION AS A CONCEPT

1. Globalisation issues

In globalisation theory, the process of globalisation is basically designed to ensure the free movement of capital (that is the movement of money) with banking and financial entities able to facilitate industry as well as electronic commerce transactions.

The issue of what globalisation means to the financial sector is best illustrated by the extent to which internationalisation/globalisation affects domestic law reform agendas in Australia and other countries. Globalisation remains important to many people (whether for or against globalisation) as it is a process which ensures capital movement on global markets and the application of international (or at least non-domestic) agendas on these markets and financial transactions. The need to take into account international as well as domestic concerns is an important element in the ongoing continuing law reform and product development. It means that the regulators and governments will need to facilitate international co-operation in order to retain some degree of control over the activities in their domestic financial markets.

The nature of globalisation has raised extensive debate with many commentators taking positions that globalisation is good or bad or looking at the issue of what does globalisation mean to them? Globalisation has both positive and negative aspects and consequences as the price of free movement of capital in the global markets is associated...
with risks in relation to fundraising fraud, terrorist financing and anti-money laundering activities.\(^5\) In essence, as globalisation is an evolving process in many different counties, it is far too soon to draw any definitive conclusions as ongoing developments have altered the application of globalisation in domestic markets.

In addition, the definitions of globalisation remain fluid and non-definitive as the process is evolving in many countries simultaneously and may be better defined in the future when current law reform agendas and regulatory co-operation have been fully utilised in the global markets. Globalisation is fundamentally concerned with the economics and legal consequences of free movement of capital and labour in the global markets.

2. Nature of globalisation in the finance, banking and financial services areas of industry

The globalisation of the securities and financial markets is demonstrated by:

- the growth of cross-border and cross exchange securities transactions;
- the number of secondary listings of companies on overseas exchanges;
- the emergence of multinational securities firms servicing the business from offices across the world; and
- the increasing number of strategic alliances and other connections between regulated financial markets in different parts of the world.

• the crossing of borders and jurisdictional zones, directly and via the Internet using information technology and electronic commerce.

The nature of globalisation in relation to finance, banking and financial services areas of industry and the law in the global markets is demonstrated by the following factors:

• borrowers, lenders and investors having global options regarding the source of funding from the global markets and the allocation of funds and savings;
• the increasing globalisation of the geographical domain of financial intermediation which would assist in the future development of the global financial system. This system could become a group of financial markets, exchanges and institutions which trade in financial instruments and facilitate the most advantageous risk-adjusted rate of return on investments and the most efficient allocation of financial resources;
• internationally located financial firms who conduct an intermediation business for foreign local, domestic and international customers;
• financial global innovation (involving the creation of new financial instruments, markets and facilities);
• increasingly international shareholdings of both financial and industrial or commercial companies, major banks and financial enterprises;
• financial markets and institutions are in competition nationally and globally particularly for corporate and wholesale business and to a lesser extent in retail business;
• market shocks have international effect; and
• market discipline has improved and the mergers and acquisitions market has become increasingly international particularly in the banking sector and in the securities markets.

In addition, the globalisation of financial markets can be demonstrated by the tremendous increase in cross-border transactions. Cross-exchange and cross-border equity transactions have greatly increased as a percentage of world equity turnover so that one in four stock market trades conducted worldwide involves either a foreign security or a foreign counterparty.

Systemic risk is an important issue in the globalisation of financial markets as the consequence of risk is financial chaos which may spread to both well regulated and poorly regulated financial centres. In addition, there could be an important risk to the law and regulation of an unknown number of foreign jurisdictions for depositors, investors and counterparties with varying degrees of national regulations and global markets affecting financial institutions and markets.

The growing integration of markets calls for international cooperation among supervisors. Accordingly, the Basel Committee on Banking Supervision (‘the Basel Committee’) was established in 1974 and is involved in establishing a common regulatory framework. The Basel Committee and the International Organisation of Securities Commissions (‘IOSCO’) issued co-ordinated guidelines on the risk management of ‘over-the-counter’ derivatives business. IOSCO also adopted the
‘Windsor Declaration’\(^6\) on co-operation between supervisors of futures and options markets. Industry initiatives also aimed at strengthening prudential standards in international financial markets. The Group of Thirty has proposed minimum standards relating to netting arrangements, settlement procedures and managerial oversight of derivatives risks. The International Securities Dealers Association (‘ISDA’) has established good practice guidelines for the management of derivatives and foreign exchange business globally by broker-dealers.

Another key development in international financial markets is the emergence of financial conglomerates which provide a wide range of services including insurance, securities, mortgage lending and banking services, etc. The fusion of different types of business is made possible by deregulation initiatives in major financial centres such as in London. In the European Union, capital adequacy directive's trading-book approach permits banks to engage freely in securities activities.

The *Glass–Steagall Act* (United States (‘US’))\(^7\) had previously prohibited a bank holding company from owning other financial companies. This *Glass–Steagall Act* (US) was repealed in 1999 by the *Gramm–Leach–Bliley Act* (US)\(^8\) which removed:

- the separation between investment banking which involved issuing securities and commercial banks which involved accepting deposits; and

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\(^6\) The ‘Windsor Declaration’ was made by the representatives of regulatory bodies from 16 countries responsible for supervising the activities of the world’s major futures and options markets on 16 and 17 May 1995 at Windsor in the United Kingdom.

\(^7\) The *Banking Act of 1933* (US) (Pub.L. 73-66, 48Stat. 162, enacted June 16, 1933) (US) (known as (‘Glass–Steagall Act’).

\(^8\) The *Financial Services Modernization Act of 1999* (US) (Pub.L. 106-102, 113 Stat. 1338, enacted November 12, 1999) (US) (known as the *Gramm–Leach–Bliley Act*).
• the conflict of interest prohibitions between investment bankers serving as officers of commercial banks.

This repeal of the Glass–Steagall Act contributed to the severity of the Global Financial Crisis which began in 2007 (‘Global Financial Crisis’) by allowing Wall Street investment banking firms to use the money of depositors that was held in commercial banks owned or created by the investment firms.

The Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US)\(^9\) set out an financial regulatory reform agenda which included the ‘Volcker Rule’ (after former Chairman of the Federal Reserve Paul Volcker) by amending the Bank Holding Company Act 1956 (US)\(^10\). This rule aimed to reduce speculative investments on the balance sheets of large firms by limiting the amount of ownership of banking entities in a hedge fund or private equity fund to no more than three per cent of the total ownership interest of the Tier 1 capital of the banking entity. There was also a restriction on banks with a direct or indirect relationship with a hedge fund or private equity fund to ensure they made full disclosure of the relationship with the regulating entity before entering into a transaction with the fund, or with any other hedge fund or private equity fund that is controlled by such fund and to make sure that there was no conflict of interest.

The revolution in information and data processing technology has transformed financial markets and the way financial institutions conduct their operations. In most respects,


these technological advances have enhanced the potential for reducing transaction costs, to the benefit of consumers of financial services, and for managing risks. The ease and cheapness of gathering, processing and disseminating information has encouraged financial innovation in a number of areas, including the development of screen-based trading systems, securitisation and the proliferation of derivative products.

One of the regulatory responses to financial conglomerates is the adoption of consolidated supervision. Regulators considered whether various businesses within a conglomerate (banking, securities, insurance) should be consolidated in an accounting sense for the purpose of calculating capital adequacy and other prudential ratios, and for assessment in general. The more general view expressed, for instance, in European Union Directives and Basel Committee regulatory guidelines is that like activities should be treated identically for supervisory purposes, regardless of the category of institution. It is also important that bank and securities regulators co-operate at the international level.

Financial innovation, for example derivatives trading, creates transparency problems for regulators, because of the speed and complexity of risk transformation. The appropriate response of market transparency is more extensive disclosure of financial information. For management of financial institutions, the main emphasis must be on internal controls. External regulators, such as Basel Committee and IOSCO, have responded and issued detailed guidelines on risk management. Regulatory focus has shifted to assess internal risk models, rather than the instruments held at a point in time, as trading position can be transformed swiftly through the use of derivatives and hence may not be reliable. In
addition to external regulation, the Group of Thirty in its 1993 *Derivatives: Practices and Principles* study made recommendations for stronger risk-management techniques and procedures for derivatives.

In addition, changing consumer behaviour resulting from aging population, for example, calls for new and sophisticated products like pension funds and long term debt instruments and consumers’ expectations are likely to be higher as they now have access to more choices from more diversified markets. Finally, deregulation has occurred because previous regulations have not prevented the massive losses incurred by worldwide bank failures.

3. **Globalisation and the ‘neo-liberal economic reform agenda’**

Finance law and financial services law reform and policy implementing globalisation has mainly arisen from the market-based regulation and accountability in the neo-liberal economic reform agenda of international and Australian governments since the 1980s.

‘Neo-liberalism’ has been defined as follows:

> Initiatives are characterized as free market policies that encounter private enterprise and consumer choice, reward personal responsibility and entrepreneurial initiative, and undermine the dead hand of the incompetent, bureaucratic and parasitic government, that can never do good even if well intended, which it rarely is. \(^\text{11}\)

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‘Neoliberalism’ has been viewed as ‘capitalism with the gloves off’ having a transformative influence on democracy making it an economic concept, not a political concept with a greater focus on possessive individualism. It has been argued that:

To be effective, democracy requires that people feel a connection to their fellow citizens, and that this connection manifests itself through a variety of nonmarket organizations and institutions. Neoliberal democracy, with its notion of the market über alles, takes dead aim at this sector. The corporate model and markets facilitate choice but their focus is on increasing profits and efficiency rather than being democratic.

‘Neoliberalism’ and the neoliberal agenda (or ‘Washington Consensus’) involves a liberal approach to international trade and finance, privatisation, deregulation, foreign direct investment, an exchange rate which is competitive with other rates, fiscal discipline, lower taxation and a reduction in the size of government. The Global Financial Crisis prompted reform which requires ‘prudent’ capital accounts by central banks, an improved regulatory framework, financial standards, and greater enforcement capabilities of regulators.

In regulatory history, there is always a tension between ‘economic freedom’ and ‘regulatory control’ in legal, economic and policy decisions affecting economies and markets. It is always a question of finding the balance between these two concepts at

\[\text{Sharon Horgan}\]
different times of economic outlook. At the time of the Global Financial Crisis, ‘neo-liberalism’ and globalisation were criticised as the intellectual source of some of the worst market excesses of that time. Governments then used economic stimulus and ‘quantitative easing’ to encourage economic growth and employment.

The CLERP papers\(^ {18}\) (which include the *CLERP Paper Number 2 Capital raising initiatives to build enterprise and employment* (‘CLERP Paper Number 2’); the *CLERP Paper Number 3 Directors’ Duties and Corporate Governance* (‘CLERP Paper Number 3’); the *CLERP Paper Number 5 Electronic commerce* (‘CLERP Paper Number 5’); and the *CLERP Paper Number 6 Financial Markets and Investment Products* (‘CLERP Paper Number 6’))\(^ {19}\) reflected the use by the Australian legislators of a primary focus on economic change which was utilised to create legislative change as a consequence of globalisation. There is an ongoing interconnectedness of globalisation in terms of:

> the rapid expansion of scientific and technological innovation in the fields of communication, biotechnology and microelectronics stimulates the forces of globalisation. Technological innovation facilitates exchanges, speeding up production and allowing the sharing of ideas, goods and services worldwide.\(^ {20}\)

Also, the interrelatedness of globalisation in all aspects and parts of society regardless of international or cultural differences has been described as follows:

> the main characteristic of globalisation is the interdependence of its different dimensions. Technological innovation has facilitated the increase in capital flow.

\(^{18}\) CLERP, *Policy Framework* papers above n 1.

\(^{19}\) Ibid. The CLERP papers include the *CLERP Paper Number 2 Capital raising initiatives to build enterprise and employment* (‘CLERP Paper Number 2’); the *CLERP Paper Number 3 Directors’ Duties and Corporate Governance* (‘CLERP Paper Number 3’); the *CLERP Paper Number 5 Electronic commerce* (‘CLERP Number 5’); the *CLERP Paper Number 6 Financial Markets and Investment Products* (‘CLERP Paper Number 6’).

It has weakened economic regions, affecting large numbers of countries. The increase in economic flows concerning all the factors of production has led to a growing interdependence of companies. This is tending to lead to a globalised world, a global society that must continuously produce new forms of social organisation, and assure the production of new knowledge and expertise.\textsuperscript{21}

This discussion of the influence of the ‘neo-economic liberal reform agenda’ is important as an underlying force for change in globalisation as it has motivated governments seeking to promote competition and market efficiency. Again there are many competing arguments as to whether this agenda has been a positive or negative force in globalisation which can only be fully assessed in the future. In the meantime, it is important to consider the ongoing role of this agenda in the development of global markets and electronic commerce in Australia and overseas.

In the current age of financial crises, the problems with the adoption of ‘neo-liberalism’ or ‘economic freedom’ of the market has been demonstrated in the collapse of major US financial institutions, the subprime mortgage crisis, high unemployment and the rise of uncertainty amongst investors and consumers about investing in the financial market. The benefits of ‘neo-liberalism’ of providing free movement of finance and labour on a global market level equally provide a free movement of economic fear of the state of the market, problems with liquidity when banks are reluctant to provide interbank loans and economic uncertainty.

‘Neo-liberalism’ was an ideal ‘free market’ choice at a time of pre-globalisation and economic prosperity in the 1990’s. At this time, the economic boom provided high

\textsuperscript{21} Ibid.
employment, liquidity for banks, cheap housing mortgages, investor confidence and free global trade. ‘Neo-liberalism’ and ‘economic freedom’ theories became unpopular however when globalisation began to be known internationally as an economic and trading force which might adversely affect local economies. The irony is that there was more vocal criticism of globalisation due to the impact of free trade on local prices and employment as globalisation became more internationally effective in assisting trade and economic growth.

In this way, the theory of ‘neo-liberalism’ which supported the free market forces of globalisation became tainted with the reality of global pressures on local economies. The consequences of this dichotomy are apparent in the ongoing Global Financial Crisis where the condition for the ‘bailout’ loans of sovereign debt by European financial institutions since 2010 have been the introduction of ‘austerity’ programs by governments to reduce public expenditure.

This consequence raises the philosophical problem of ‘neo-liberalism’ and globalisation that the local interest is necessarily sacrificed to the global free trade interest. This consequence is the result of countries agreeing to the free trade treaties and debt agreements with international financial institutions. This can lead to unrest by local workers and pensioners whose pay and conditions may have been affected by global deals. In this way, global free trade can only fully operate if countries agree to at least in part limit their local interest so that the national economy of these countries can be boosted by global trade and investments. The current Global Financial Crisis in the
‘Eurozone’ since 2010 has demonstrated that governments will introduce austerity programs which affect local economies so that the international debt owed to banks by these governments can be ‘bailed out’.

In times of prosperity, such as from 2000 to 2007, globalisation and ‘neo-liberalism’ can provide extensive economic benefits to local economies and stimulate investment, trade and employment. The downside of easily accessible international debt however is the current sovereign debt problem of the Eurozone countries which has been part of the ongoing Global Financial Crisis since 2010. The problem with sovereign debt (unlike a credit crisis) is that countries continue even with ongoing economic problems whilst financial institutions would close if they have such severe financial debt. The negative effect of globalisation therefore lasts a considerable longer time in a sovereign debt crisis than in a credit crisis involving bank debt.

4. Competing views of globalisation

Globalisation has been viewed in different competing ways by various authors22 (both positively and negatively) as:

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22 Globalisation has been viewed in different ways by various authors, who have been cited in Jan Aart Scholte, "A. Globalizing World" in John Baylis and Steve Smith, The Globalisation of World Politics; an introduction to international relations, (Oxford University Press, 1997) 15.
(a) those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it;  

(b) the way in which the global does not always exclude the local, but rather interacts in very complex and potentially contradictory ways. It is necessary to distinguish between ‘globalised localism’ where localised phenomena are successfully globalised such as the ‘spread of the English language or Coca Cola’, and ‘localised globalism’ where ‘local conditions, structures and practices change in response to transnational influences, such as the impact of tourists on local crafts or wildlife, ecological dumping, or the adaptation of local commercial law to deal with transnational transactions or deforestation to pay for foreign debt; 

(c) the phenomenon in which the degree of global human interaction increases to such an extent that both its primary effects and the reactions it provokes give rise to numerous new developments. Globalisation is caused by three prime movers: technological globalisation, political globalisation and economic globalisation. The three prime movers initiated a process in which geographic distance becomes less a factor in the establishment and sustenance of border crossing, long distance economic, political and socio-cultural relations and which are called globalisation. This potential internationalisation of relations and dependencies causes democratic, environmental, security and social deficits and rebound effects, like a change in attitudes and administrative shortcomings. Globalisation is not only negative. It also includes people in

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24 Ibid 5.
the world community and gives rise to new systems of global governance and a global civil society;\textsuperscript{26}

(d) having various aspects of globalisation such as:

- ‘globalisation’ referring to all those processes by which the peoples of the world are incorporated into a single world society, global society (Martin Albrow, 1990).

- ‘globalisation’ being defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa (Anthony Giddens 1990).

- global networking that has welded together previously disparate and isolated communities on this planet into mutual dependence and unity of 'one world' (Emanuel Richter).

- the characteristics of the globalisation trend including the internationalising of production, the new international division of labour, new migratory movements from South to North, the new competitive environment that generates these processes, and the internationalising of the state which makes states into agencies of the globalising world (Robert Cox, 1994).

- the way the world is becoming a global shopping mall in which ideas and products are available everywhere at the same time (Rosabeth Moss Kanter, 1995).

- ‘globalisation’ not only referring to the objective process of increasing interconnectedness. It also refers to conscious and subjective matters (namely the

\textsuperscript{26} Prof. Ruud F.M. Lubbers, The Globus Institute for Globalisation & Sustainable Development, Tilburg University, The Netherlands from Globalisation Studies website, \url{www.globalize.org} which is included in Healey Justin (ed), Globalisation (Spinney Press, 2001) 4-5.
scope and density of the consciousness of the world as a single place) (Roland Robertson, 1992).

- ‘globalisation’ being a new variation of ‘colonisation’ in the Third World for several centuries (Martin Khor, 1995).
- ‘globalisation’ referring to the process whereby social relations acquire relatively distanceless and borderless qualities, so that human lives are increasingly played out in the world as a single place (Jan Aart Scholte, 1997).
- a time and process for living through an age of radical transformation which involves an emerging global civilisation combined with diverse sub-civilisations/cultural pluralism/cultural conflict (Yehezkel Dror, 1998).
- ‘globalisation’ involving an accelerating rate and/or a higher level of economic interaction between nation states and national economies (Baker, Epstein and Pollin, 1998).  

It has been argued that society must reform international financial institutions to deal with the challenges of globalisation, and close the gap between politics and economics as otherwise the fulfilment of globalisation may be threatened by a growing nationalism that may be anti-globalisation.  

The basic concept of globalisation is that competition will sift the efficient from the inefficient in order to remain competitive. Domestic protest will be generated in many

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countries as their governments will be obliged to modify their social legislation in order to meet the requirements of globalisation. In industrialised countries, globalisation will impact on domestic politics with improved productivity, higher unemployment and a migration away from less attractive jobs which are then filled by overseas workers. International companies, which are connected by the Internet to other global industrial and financial institutions, support free trade and free movement of capital. This can cause conflict with national companies and trade unions who then become proponents of protectionism. The international system is therefore dependent upon globalisation but the moral hazard of globalisation needs to be balanced by the regulation and supervision of financial institutions to protect taxpayers, investors and consumers.\(^{29}\)

In conclusion, it has been argued that financial crises occur regularly and ongoing recommendations for reform of the financial architecture of the international economic, banking and trading system. These reform recommendations arose from the liberalisation of domestic finance since the 1970’s when banks were able to successfully create with the new computer technology innovative financial instruments such as mortgage backed securities and junk bonds which increased the turnover of foreign securities, debt and equity markets:

The ideological shift towards free markets in the developing economies, coupled with their need for external capital, drew new participants into the international financial arena. Today’s capital markets are international, yet they are supervised and regulated largely on a national basis. The problem with international financial reform has been identified as the ‘impossible trinity’ in that a policymaker trying to design the ideal financial system has three incompatible objectives: national

\(^{29}\) Ibid.
sovereignty; financial markets that are regulated, supervised and cushioned; and the benefits of global capital markets.  

5. Conclusion

Globalisation by its nature is controversial and sometimes contradictory in its effect on various participants in a global market. As a consumer, globalisation may be judged harshly when it is blamed for the increase in food, oil and resources prices and for companies laying off staff on an international level. For industry operators, globalisation brings the substantial benefits of global freedom of capital and a lessening of the domestic constraints of a particular country. However, this positive effect may be argued to be outweighed by the increased costs of regulation in all of the countries in which the operator engages in business as a result of the Global Financial Crisis.

For this reason, it is difficult to answer the question of whether globalisation is mainly positive or negative in its effect as views on globalisation are influenced by the interpretation of the beholder. Globalisation therefore is best seen as a market force which needs regulatory controls to ensure the best balance of competing interests of consumers, industry operators and domestic governments.

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CHAPTER THREE

PRE-GLOBALISATION AND AUSTRALIAN FINANCE LAW AND FINANCIAL SERVICES LAW: FINANCE LAW OF AUSTRALIA AND HORGAN’S LAW OF FINANCIAL SERVICES

1. Pre-globalisation

‘Pre-globalisation’ was the time from the mid-1980s to the mid-1990s where there was great change in the Australian financial system in response to financial innovations, changes in the financial markets and the framework of regulation. There was a number of major government deregulation initiatives which eliminated controls over bank lending, facilitated the entry of foreign banks into the banking system (which facilitated the beginning of globalisation in Australia at a time of pre-globalisation) and floated the Australian dollar in 1983. There was significant change in this pre-globalisation Australian economy due to government policy changes to remove tariff protection and control of banks and industries. This liberalisation of tariff protection and banking controls impacted on the Australian financial system because of financial and industry deregulation of the industry and the entry by foreign banks.

Deregulation of the Australian financial system in the 1980’s, after a property crash, which affected many financial institutions, led to the Campbell Committee’s implementation.31 The Campbell Committee Final Report assumed that a competitive financial system would be the best for Australia. The Campbell Committee’s assessments

of deregulation, in view of the ‘roaring nineteen-eighties’ and subsequent crash, was problematic due to financial losses in the financial system. The concept of competitive financial innovations was intended to allow financial transactions to be undertaken more efficiently with reduced transaction time and fewer financial blockages. These financial innovations involved a broader range of financial assets and a higher rate of return on those assets.

2. Financial System Inquiry/Wallis Committee Inquiry

The Financial System Inquiry/Wallis Committee Inquiry (‘the Wallis Inquiry’) chaired by Stan Wallis was appointed by the Commonwealth Treasurer in May 1996 and issued a final report in March 1997. The basic objectives of the Wallis Inquiry were similar to those of the Campbell Committee at the beginning of the 1980s. Both address efficiency, competitive concerns, consumer interests and the regulatory framework. However, the period pre-Campbell Committee was characterised by the obvious ineffectiveness of controls and structural implications noted earlier. There were less obvious, but still nonetheless pressing, reasons for review as there was a changing economic and legal environment which was enduring the effects of active but insufficiently coordinated development of the regulatory framework. There were also concerns expressed generally about Australia's standing in regional and global markets, especially in comparison with other financial markets in the Asia-Pacific region.

The larger financial enterprises called for regulatory relaxation to encourage international competitiveness in accordance with the so-called ‘six pillars policy’ (at that time), which was an informal prohibition upon mergers amongst the six largest financial groups, and the creation of a ‘mega-regulator’, the Australian Prudential Regulation Authority (‘APRA’), to take over supervision by the Reserve Bank and the Insurance and Superannuation Commission.

Most of the current regulation of the financial system arose from the proposals of the Wallis Inquiry. An explanation of the recommendations of the Wallis Inquiry is important as the issues raised in these proposals were the catalyst for the legislative response by the government. The Wallis Inquiry released a Financial System Inquiry Discussion Paper (‘Wallis Inquiry Discussion Paper’) in November 1996 and a Financial System Inquiry Final Report (‘Wallis Inquiry Final Report’) in March 1997, which looked at financial regulation particularly the conduct of the market and disclosure, stability, safety, competition and competitiveness. The Wallis Inquiry Final Report examined financial regulation in relation to the market and disclosure, stability, safety, competition and competitiveness. The role of the Wallis Inquiry was to analyse the financial deregulation system since the early 1980’s and the forces creating changes, particularly technological development. The Wallis Inquiry was to make recommendations on the regulatory arrangements which would result in a competitive,  

33 The members of the Financial System Inquiry/Wallis Committee Inquiry (‘Wallis Inquiry’) were Mr S Wallis (Chairman), Mr B Beerworth, Professor J Carmichael, Professor I Harper and Mrs L Nicholls.  
36 Ibid.
flexible, efficient and responsive financial system having regard to the need for stronger economic performance, integrity, fairness, prudence and financial stability.\textsuperscript{37}

The \textit{Wallis Final Report}\textsuperscript{38} noted that the financial system had entered a period of rapid change, resulting from globalisation and the information regulation and suggested that the regulation of financial markets participants needed to adapt to changes in those markets. The Commonwealth Treasurer subsequently announced a number of reforms to the regulation of the financial markets in response to the \textit{Wallis Final Report}. Also following the recommendations of the \textit{Wallis Final Report}, \textit{CLERP Paper Number 6}\textsuperscript{39} argued that a more efficient regulatory framework for the investment industry would be achieved by focusing on functions of financial markets and products. The \textit{CLERP Paper Number 6} noted that a functional approach to regulation considers the economic functions served by financial markets and instruments and searches for the best regulatory structure to facilitate performance of those functions, and suggested that this would be achieved by focussing on activities rather than particular instruments or the nature of institutions which engage in these activities. The \textit{CLERP Paper Number 6} also argued that functionally equivalent or similar products should be afforded similar regulatory treatment. \textit{CLERP Paper Number 6} also recommended that a new regulatory regime for financial markets and investment products should be based on several principles, including providing comparable regulation of all financial products, including securities, derivatives, superannuation, life and general insurance and bank deposit products; licensing financial markets and providing consistent and comparable regulation for

\textsuperscript{37} Ibid vi.
\textsuperscript{38} Ibid.
\textsuperscript{39} \textit{CLERP Paper Number 6} on \textit{Financial Markets and Investment Product}, above n 19.
similar financial products; licensing all financial intermediaries and imposing harmonised statutory obligations designed to protect retail investors; and ensuring that promoters or issuers of financial products provide comprehensive disclosure documents which assist investors to make informed decisions. The recommendations of CLERP Paper Number 6 are reflected, at least in broad terms, in the Financial Services Reform Act 2001 (Cth) (‘the FSR Act’).\(^{40}\)

The Chapter entitled ‘Overview (The Financial System: Towards 2010)’ in the Wallis Inquiry Final Report of the Wallis Inquiry covered the Wallis Inquiry’s philosophy towards regulation, vision of the future and recommendations for regulatory reform.\(^{41}\) The Wallis Inquiry Final Report detailed the rationale for the recommendations of the Inquiry, reviewed some financial legislation and reviewed some of the consequences of financial deregulation.\(^{42}\) The recommendations of the Wallis Inquiry concentrated on:

- the flexibility and responsiveness of the regulatory structure;
- the goals of regulation;
- conduct and disclosure;
- agencies’ accountability;
- the consistency and comparability of the regulation of like financial products;
- competitive neutrality of the financial system;
- the reduction of costs to consumers by financial markets being fairer, more efficient and contestable;
- the regulation of financial conglomerates; and

\(^{40}\) FSR Act, above n 4,
\(^{41}\) Wallis Inquiry Final Report of the Wallis Inquiry, above n 32.
\(^{42}\) Ibid ix.
• the international competitiveness of the Australian financial system.\textsuperscript{43}

The Wallis Inquiry identified the effect of various forces driving change:
• the needs and profiles of customers that is the ageing of the population, greater life and work experiences, better access to information and use of technology;
• technologies and skills as technology increases the accessibility of markets and products; and
• changes to the regulatory framework particularly the globalisation of the Australian economy, compulsory superannuation, the removal of the role of government as an owner of financial institutions and the taxation system.\textsuperscript{44}

It was also recognised by the Wallis Inquiry that the financial system has been affected by:
• the highlighting of the need for efficiency and competition;
• the globalisation of financial markets;
• the increased use of conglomerates and market broadening; and
• change from intermediations to disintermediation, particularly securitisation.\textsuperscript{45}

These suggested reforms in the \textit{Wallis Inquiry Final Report} were based on the theory of ‘neo-liberalism’ that globalisation would increase competitiveness and economic prosperity that would benefit the local economy. The problem with the theory of ‘neo-liberalism’ and globalisation is that these benefits are available in times of prosperity as

\textsuperscript{43} Ibid 2.
\textsuperscript{44} Ibid 3-5.
\textsuperscript{45} Ibid 5-8.
in the 1990’s. When global financial crises arise because of the ease of trade and debt, then globalisation can still benefit the local economy by stimulating investment and trade but may also create disadvantages for the local economy such as unemployment and government cutbacks in public expenditure.

The Wallis Inquiry was planning ahead in the mid-1990’s for a time of economic prosperity to ensure that Australia would be able to participate fully in the economic growth offered by globalisation. These Wallis Inquiry recommendations became law reform in the FSR Act and allowed a more flexible regulation of economically similar products (even if legally different) to allow uniform disclosure and licensing obligations. To this extent, the financial services law reform that originated with the Wallis Inquiry and CLERP led to more uniform regulation of investment products. This is a positive example of law reform undertaken to assist with globalisation and economic growth also assisting the local statutory regulation of investment products with a uniform legislative regime in Chapter Seven of the Corporations Act.

It is important in assessing the impact of globalisation on Australian law reform to look both at the policy intention of the legislation to further globalisation in the Australian economy as well as the legislative outcome in the Corporations Act which created a uniform disclosure and licensing regime to protect Australian and international investors.

46 Ibid.
47 CLERP, above n 1.
48 Chapter Seven of the Corporations Act, above n 4.
Disintermediation in markets

Disintermediation in markets dealing with credits is the process whereby persons or organisations enter financial markets without the use of anyone acting as an intermediary. These persons and organisations may be sufficiently large so that lenders may be able to assess their creditworthiness directly without the need for an intermediary. Smaller organisations and persons may have to rely on the credit ratings of financial intermediaries to raise funds from lenders. An example of disintermediation is securitisation which is the use of assets with an income stream (such as mortgages and receivables) but without a ready market. These assets are turned into paper in the financial markets. The paper is then able to be bought and sold by parties in the financial markets. This process allows a financial institution (such as a bank) to sell that asset for money. The Inquiry questioned the long term use of securitisation in view of the potential limit of using only relatively risk-free assets. Securitisation and factoring do have the potential effect of making illiquid assets more liquid with securitisation being used for larger institutions with bigger transactions and financing notes, whilst factoring is use for smaller entities using debt collection procedures. In the case of securitisation, a person goes to a bank for finance (for example for a mortgage over a house) and the bank then securitisers the illiquid mortgage and receives a form of liquidity which financially assists the bank in making further loans to individuals. This process has been significantly affected by the Global Financial Crisis as liquidity has been harder to achieve and there have been financial restrictions on the interbank market.

In this way, the use of securitisation in mortgage securities in US contributed to the creation of the credit bubble and subsequent Global Financial Crisis. The role of innovative financial techniques in financial firms causing the development of securitisation debt instruments of increasing complexity involving a multiple of investors, mortgage lenders and financial firms providing the mortgage securities led to the complacency about the levels of risk and quality of investments in these transactions. Securitisation whilst intending to increase liquidity for investors actually resulted in a decrease of liquidity in the financial markets due to the significant losses and defaults on these debt instruments.

Different views of change (slow versus revolutionary) in the financial system were discussed by the Wallis Inquiry with its focus being on the need for change in the regulation of finance in Australia. The Wallis Inquiry analysed the development of technology and bundling of services, the role of new players and conglomerates and the way household wealth will be held. The philosophy of the Wallis Inquiry was that regulation should encourage competition and efficiency. The recommendations of the Inquiry related to the need for flexibility and adaptiveness of the regulatory structure and consistent regulation of like financial products. Neutrality of technological regulation was also established by the Wallis Inquiry as an important factor for competitiveness in the financial system.

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52 Ibid 11-12.  
3. The Corporations Act 2001 (Cth)

On 1 January 1991, a national scheme (the ‘Corporations Law’\(^{54}\)) was enacted by the Australian federal and state parliaments began regulating companies and securities law after the High Court's ruling in *New South Wales v The Commonwealth*.\(^{55}\) In this national scheme, the states were required to create legislation in relation to the formation of corporations. In this national scheme, the states had to vest state jurisdiction in the Federal Court to allow the Commonwealth to have effective judicial control over corporations law. In 1999 and 2000, the High Court of Australia undermined the constitutional basis for this national scheme of laws in two decisions (*Re Wakim; Ex parte McNally*\(^{56}\) and *R v Hughes*\(^{57}\) where the High Court held that no amount of Commonwealth-State cooperation could supply a power that did not exist.\(^{58}\) The High Court found that the heads of power contained in sections 75 and 76 of the *Constitution* was the only source of the jurisdiction that may be conferred on a federal court. This decision limited the nature of the national scheme and resulted in the states and the Commonwealth legislating to allow for the affirmation of federal decisions by the state Supreme Courts.

In 2001, this led to the federal, state and territory governments agreeing to a national scheme of laws in the *Corporations Act* (which replaced the *Corporations Law*) and the

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\(^{54}\) The ‘*Corporations Law*’ was a national scheme which was enacted by the Australian federal and state parliaments on 1 January 1991. In 2001, the federal, state and territory governments agreed to a national scheme of laws in the *Corporations Act* which replaced the Corporations Law.

\(^{55}\) (1990) HCA 2; (1990) 169 CLR 482; 90 ALR 355.

\(^{56}\) (1999) 198 CLR 511; 163 ALR 270; 31 ACSR 99; BC9903189; [1999] HCA 27.


Australian Securities and Investments Commission Act 2001 (Cth)\(^{59}\). The Corporations Act is an Act of the Commonwealth Parliament and applies throughout Australia by force of state legislation pursuant to which the states referred to the Commonwealth (under section 51(xxxvii) of the Constitution), the constitutional powers necessary to regulate corporations.

Since 2001, the Corporations Act has undergone significant amendment, particularly as a result of the Corporate Law Economic Reform Program Act 1999 (Cth) (‘CLERP Act’), the FSR Act\(^{60}\), the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) (CLERP 9) and the Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 (Cth)\(^{61}\).

4. Two books which form part of this thesis for a Doctor of Philosophy degree (PhD) by publication.

My two books Finance Law of Australia (LexisNexis Butterworths, 2001) and Horgan’s Law of Financial Services (Thomsons Reuters, Lawbook Company, 2003) were written at this time of pre-globalisation in the 1990’s and subsequently in 2000 to 2003 when globalisation began to arise as a major initiator of law reform in Australia.

\(^{59}\) The Corporations Act, above n 4 (which replaced the Corporations Law) and the Australian Securities and Investments Commission Act 2001 (Cth) were enacted in 2001 as a national scheme of laws for corporations and securities in Australia.

\(^{60}\) The FSR Act, above n 4.

\(^{61}\) The Corporate Law Economic Reform Program Act 1999 (Cth) (‘CLERP Act’), the FSR Act, above n 4, the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) (CLERP 9) and the Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 (Cth) have reformed the Corporations Act, above n 4, since 2001.
The discussion of globalisation in the *Wallis Inquiry Discussion Paper and the Wallis Inquiry Final Report* reflected the role of globalisation as a driver of change in Australian government policy and financial services law reform.

Since 2003 (when *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003) was published), globalisation has become increasingly a world concern which has impacted upon international law reform, regulatory and policy developments during the Global Financial Crisis. Australian policy and regulation has therefore broadened its focus in this period and taken account of international law reform and policy proposals to deal with the consequences of globalisation. These consequences include market manipulation and fraud, terrorist financing and anti-money laundering in the global markets (not just Australia). These two books also show changes in the regulation of electronic commerce under Australian finance law and financial services law as consequence of globalisation.

These books interconnect with the issue of globalisation in the policy development, legislative reform and regulation processes in the last fifteen years. The first book *Finance Law of Australia* (LexisNexis Butterworths, 2001) dealt with reforms proposed in the Inquiry in relation to the financial system and finance law generally and the Australian background to proposals for globalisation affecting Australian economy. This resulted in Australian policy and legal developments which were set out in the second book *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003). This book dealt primarily with financial services law as this is the later book and
there were legislative developments focussing on financial services as a result of the proposals of the Wallis Inquiry, the Corporate Law Simplification Program and CLERP (particularly economic functionalism tests) and the financial services legislation.


This book examines the law affecting transactions between Australian financial entities and international financial institutions from the time of pre-globalisation in the 1990’s (that is before the international impact of the movement of capital upon domestic agendas) onwards. In the 1990’s, there was government consideration of the impact of early changes in and application of pre-globalisation concepts which resulted in the Wallis Inquiry. The Wallis Inquiry analysed the application of these initial concepts in globalisation and made recommendations for change in Australian law and policy in order to facilitate these changes.

This book was set in the context of innovative financing techniques which evolved to cope with increasingly sophisticated international and domestic financial transactions which were influenced by these early pre-globalisation ideas. This resulted in subsequent law reform as the government undertook a process of legislative and policy ‘catch-up’ to regulate these new techniques.

These changes in finance law and transactions demonstrated the need for a book specifically about finance law incorporating all of the areas of debt, equity, security for finance, leasing, derivatives and risk management techniques and related issues.
Previously, books had generally concentrated on discrete topics such as company law, business law, directors’ duties, insolvency, shares and debt. My book *Finance Law of Australia* (LexisNexis Butterworths, 2001) incorporated the issues raised in the Wallis Inquiry and the CLERP process to address finance law as a whole integrating pre-globalisation and the new globalised ideas that were contained in the developing law and policy.


This book considers the effect of policy and legislative developments and proposed law reform and in particular in the following chapters of the book:

- an overview of the current issues and law reform affecting legislative developments;
- the various forms of finance used such as debt (Chapter Two), equity (Chapter Three), leasing (Chapter Four), factoring (Chapter Five), project finance (Chapter Six) and trade finance (Chapter Seven);\(^{62}\)

\(^{62}\) All of these Chapter references are to Chapters in this book.
• issues common to the forms of finance used that is particularly the protection of security and the use of set-off and subordination of debt in financial transactions;
• corporate restructuring arrangements for finance for example capital reductions and share buybacks;
• risk management of finance particularly the use of swaps, on-exchange and ‘over-the-counter’ derivatives products and securitisation;
• the use and role of financial intermediaries including liability for financial advice; and
• a consideration of the common themes which affect financial transactions.

In addition, for background purposes the financial system is analysed in Chapter One of this book which is important as there was a substantive emphasis in corporate law reform on the requirements and pressures upon the financial system. The financial system involves arrangements for funds and ownership of financial assets and claims to be transferred between borrowers and lenders 63 using intermediaries and payments systems.

The *Financial Services Reform Bill 2000* (‘FSR Bill’) was based on *CLERP Paper Number 6 on Financial Markets and Investment Products* (‘CLERP Paper Number 6’) 64 and the *CLERP Number 6 Consultation Paper, Financial Products, Service Providers and Markets - An Integrated Framework* 65 (‘the CLERP 6 Consultation Paper’). This

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63 The Reserve Bank of Australia (‘RBA’) submission to the Committee of Inquiry into the Australian Financial System (‘the Campbell Committee’), *Reserve Bank of Australia Occasional Paper Number 7*, (December 1979) –(1).
65 CLERP, above n 1. See also *CLERP 6 Consultation Paper, Financial Products, Service Providers and Markets - An Integrated Framework* (AGPS, 1999), (‘CLERP Number 6 Consultation Paper’) which was issued on 3 March 1999.
FSR Bill proposed reforms in relation to the use and regulation of financial products, service providers and markets. This law reform aimed to regulate functionally similar financial products and markets including securities under Chapter 6D and Chapter Seven of the Corporations Act. The FSR Bill proposed an integrated regulatory framework for all functionally similar products. This regulatory framework would cover the licensing of financial product markets and service providers, financial product disclosure and the conduct and disclosure of service providers. The FSR Bill was also discussed in Chapters Three, Thirteen and Fifteen of this book in relation to equity fundraising, swaps, on-exchange and ‘over-the-counter’ derivatives products and licensing requirements of financial intermediaries.

Debt is considered in Chapter Two of this book whilst equity including prospectuses and managed investment schemes is dealt with in Chapter Three of this book. Other general topics in finance law are also considered in this book including: leasing in Chapter Four of this book; factoring in Chapter Five of this book; project finance in Chapter Six of this book; and trade finance in Chapter Seven of this book. In addition, security for financing (which underlies financial decision making) is considered in Chapter Eight of this book together with set off in Chapter Nine of this book and subordination of debt in Chapter Ten of this book. Restructuring arrangements for finance are dealt with in Chapters Eleven of this book (‘Capital Reduction’) and Twelve of this book (‘Buy-backs’). Swaps and derivatives are examined in Chapter Thirteen of this book and securitisation in Chapter Fourteen of this book. The duties and liabilities of financial intermediaries and advisers are analysed in Chapter Fifteen of this book.
In particular, Chapter One of this book deals with the overview of the financial system in Australia and the effect of globalisation on the domestic law agenda of the government. This Chapter is important as it deals with recent changes in financial law reforms which have substantially altered the regulatory framework of the Australian financial system. This Chapter also reviews the regulation of the financial system in Australia and areas of major financial and corporate law reform relevant to the financial regulatory framework.

Due to the substantial nature of recent law reform, most aspects of the financial system have been affected in some way by legislative developments. These legislative developments in response to law reform will be examined in this thesis. All of these areas of change affect the whole of this book and reflect fundamental changes in the legislative regulation and control of the financial system. In addition, Chapter One of this book reviews the current issues of electronic commerce, netting and the payments system. Some of these issues of concern have an intertwined application throughout this book. For example, electronic commerce is relevant to this Chapter One as well as Chapter Three of this book on equity. Netting is also discussed in Chapter Nine of this book in relation to set-off of financial transactions. This Chapter should be read together with Chapter Sixteen of the book which sets out the common themes in the new regulatory structure created by the *Corporations Act*.

In addition, Chapter Sixteen of the book provides background for financial law transactions by discussing the appropriate financing techniques for the financing

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66 *FSR Act.* above n 4, (now Chapter Seven of the *Corporations Act,* above n 4).
objectives of the parties to the transaction. There are a variety of issues to be considered by the parties to the transaction when planning a financial action, for example the need, amount, timing and the parties involved in any fundraising activity. The form of security sought by the lender is also important as the secured financing technique used will substantially influence the financial transaction and the roles of the parties involved in this transaction. Common forms of structures for financing techniques have developed to facilitate the use of finance. Debt and equity have developed a variety of structures to enable a choice of financing techniques for parties seeking finance. The various options in a financial transaction will create the need for a decision to use either debt or equity or hybrid financing techniques to facilitate the raising of monies for a fundraising activity.

In Chapter Two of this book, the use of a variety of debt mechanisms such as bills of exchange, leasing, syndicated loans, guarantees, bonds and debentures enables the use of debt by companies. Debt involves a consideration of the nature of debt financing, the advantages and disadvantages of using debt and the forms, features and methods of debt. Debt has numerous advantages over equity particularly in terms of liquidity and repayment in an insolvent situation. In deciding to use debt, a company undertakes a financing decision based on a review of the financial objectives and needs (short term and long term) of the company together with a review of the appropriate forms of debt. Debt enables the company to raise finance without having to comply with the equity fundraising provisions of the Corporations Act. There are regulatory requirements on different forms of debt such as the regulation of debentures of the Corporations Act but
the choice of debt enables a different approach to the regulatory obligations of the company seeking to raise finance.

Debt raising in Chapter Three of this book is inextricably intertwined with issues raised in other chapters of this book that is the consideration of security issues (Chapter Eight of this book) together with the use of set-off (Chapter Nine of this book) and subordination of debt mechanisms (Chapter Ten of this book).

Chapter Three of this book examines the nature and regulation of equity capital raising with particular reference to the areas of prospectuses, managed investment schemes and fundraising in the *Corporations Act*. Law reform in the area of prospectuses and fundraising had been introduced into Chapter 6D of the *Corporations Act* by the *CLERP Act* and *CLERP Paper Number 2 ‘Capital raising initiatives to build enterprise and employment’* (‘*CLERP Paper Number 2’*).

Chapter Three of this book examines the role of equity as it is regulated by the *Corporations Act* and by the common law. Chapter Seven of the *Corporations Act* deals with the regulation of the acquisition of securities and the securities industry. This strong legislative and common law emphasis on the regulation of equity raising reflects the importance placed by legislators and courts on protection of investors and adequate disclosure in the raising of equity capital in a fair and informed market. Chapter Three in this book considers the various legislative concepts such as securities and managed
investments in the context of equity fundraising and regulation. In addition, some aspects of electronic commerce are examined in Chapter Three of this book.

The use of equity fundraising by a company enables finance to be raised from investors who may not otherwise have chosen to invest in the company. The prospectus provisions in Chapter 6D of the Corporations Act and the use of managed investment scheme regulation in Chapter 5C of the Corporations Act ensures a greater degree of protection for investors. While debt involves a company raising finance by loans and other means by parties who become creditors of the debtor company, equity allows investors a degree of control and management because of their ownership of share capital in the company. The CLERP process and managed investments legislation substantially reforms the regulation of equity fundraising in Australia. The raising of equity is an important part of company financing and as such has been the subject of substantial and ongoing law reform by government.

The statutory and policy developments in Chapter Three on Equity are also considered in my other book Horgan’s Law of Financial Services (Thomsons Reuters, Lawbook Company, 2003) as the legislative and regulatory regime affecting financial products and financial services are examined in that book. These crucial areas of equity form an important area of corporate and finance law in their own right.

Leasing in Chapter Four of my book and factoring in Chapter Five of my book Finance Law of Australia (LexisNexis Butterworths, 2001) are more relevant to the examination
of the policy background to Australian finance law in this book than necessarily the legislative impact of law reform in these areas. A lease involves an agreement between the owner of a property and the person who wishes to acquire the use of the property, and generally the lessor remains the owner of the assets in the lease arrangement and the lessee does not acquire any equitable or beneficial interest in the assets.

Factoring is a process involving the sale of certain assets (that is debts - the accounts receivable of a business to a third party) arising from the trading activities of a company to a factor or finance house. This is a short term arrangement for companies to sell debts (that is accounts receivables) to a factor (being a third party) to allow the company to receive the immediate payment of the debt (at a discount) from the factor as soon as the factoring agreement is entered into by the parties. Factoring is used for the purpose of controlling credit risk and the use of debt collection procedures by companies. It may also be used in trade financing arrangements to control risks in payment for international sales ensuring that there is an efficient settlement of the sales transaction. In this situation, the exporter organises the sale and shipment of the goods with sales invoices being forwarded to both the purchaser of the goods and the factor. The exporter is then paid by the factor and subsequently the purchaser of the goods pays the factor. The *UNIDROIT Convention on International Factoring 1988* was drafted because of the importance of providing uniform rules for the practice of international factoring. The *UNIDROIT Convention on International Factoring 1988* deals with the major matters of law affecting its jurisdiction such as the assignment of receivables, the relationship
between the company, the factor and the debtor and the issue of subsequent assignments.  

‘Forfaiting’ may also be used (in a similar way to factoring) in a trade financing transaction as it gives the exporter upfront guaranteed payment at fixed times with fixed cash flow which is off the exporter’s balance sheet in that it cannot be seen on the balance sheet. Both finance mechanisms (factoring and forfaiting) involve fixed cash flow payments which are guaranteed. Various bills of exchange and promissory notes are provided by the bank of the purchaser on a guarantee basis.

The difference between forfaiting and factoring is that forfaiting often involves ‘one off’ trade transactions, while factoring is generally an ongoing arrangement between the exporter and the factor with the export factor being able to ensure (through contacts with an import factor in a different country) that the buyer of the goods is creditworthy.  

In this way, factoring is a financial transaction of a business which sells its accounts receivable (that is invoices) at a discount, whilst forfaiting involves a business purchasing of receivables from exporters and then sell one of its transactions.

Project finance in Chapter Six and trade finance in Chapter Seven of this book demonstrate the immediate effect of globalisation in areas of finance law in Australia.

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Project finance allows a lender (or lenders) to lend money to a borrower for purposes of a project with the lending decision being based upon the ability of the project to act as a stand-alone economic unit in creating enough project revenue to repay the debts of the project with or without recourse to the sponsor. 69 In a project finance arrangement, the project finance venture with its cash flows and assets is a separate entity from the promoters or sponsors of the project. This separation allows an independent assessment of the creditworthiness of the cash flows and assets of the project itself. 70 There are various types of project finance depending upon whether or not the sponsors of the project remain liable for the debts of the project if the project is not completed. Project finance is primarily used in resource and infrastructure projects. The reasons why project finance arrangements are used despite the risks involved are that:

• the flexibility of the financing structure to meet the needs of a variety of project and party needs;

• the large amount of finance required by the project may be beyond particular companies so a project finance structure enables the use of a large amount of capital to develop the project;

• the syndicate lenders will assess the credit risk of the project (as a separate economic unit) by reviewing the cash flows and assets of the project rather than the balance sheets of the borrower companies;

• the borrower may not have the skills, management experience, administrative resources to develop a large project;

• the project is a separate economic unit with its own assets and cash flows;

70 Ibid 1.
• the security of the syndicate lenders is in the assets of the project;
• the cash flows of the project will be used for the purposes of the project rather than other borrower purposes;
• the funds lent by the syndicate lenders will be for the term of the project which may be a longer term of financing than most forms of financing;
• there will be risk sharing with the customers of the project, the developers and co-participants in the project bearing some of the risks. The sponsor of the project may not be liable at all for any outstanding debt in a non-recourse financing (where no recourse can be made to the sponsor for debts owing in the project) or may only be liable for a limited amount of outstanding debt in a limited recourse financing (where only a limited amount of previously agreed recourse can be made to the sponsor for debts owing in the project).

In addition, international financial projects may utilise syndicated financing which involves a group of lenders providing monies to a borrower using an agent to act as intermediary between the parties to the agreement. This agent acting as intermediary between the syndicated financing parties may be involved at different times in the syndication.\textsuperscript{71} Co-financing may also be used to assist with project finance as it involves loans being made individually to the borrower by different lenders but on identical terms. The borrower has an obligation to each lender to fulfil the independent obligations of the loan.\textsuperscript{72}

\textsuperscript{71} T. Lennox, \textit{Australian Corporate Finance Law}, (Legal Books, 1994) 4-1.
\textsuperscript{72} Mallesons Stephen Jaques, \textit{Australian Finance Law}, (Thomsons Reuters, Lawbook Company, 6\textsuperscript{th} ed, 2008) 283.
Trade finance is the process where finance is provided to the parties to a trade transaction so that the seller can give the purchaser of the goods or services credit in the form of extra time to facilitate the payment of the goods and services. Third parties such as export-import companies or international trading companies may also become involved in the trade finance transaction by means of the provision of finance to the purchaser or seller of the trade goods or services or because of their legal rights over title to the goods. In addition, trade finance may also be recourse or non-recourse. Recourse means the ability of the financier or other participant in the trade financing transaction to seek to be reimbursed for unpaid debts. In the context of an export trade financing transaction, recourse is provided for by means of an export credit insurance policy so that a claim may be made on the policy by an exporter if the exporter is not paid for the export of the goods. Non-recourse means that the financier or other participant in the trade financing transaction cannot seek to be reimbursed for unpaid debts. One alternative in a non-recourse trade financing transaction is to have an agreement on a non-recourse basis that would enable the discounting of invoices with no capacity to the exporter if the purchaser does not pay for the goods.

Also, foreign currency financing and invoicing arrangements may be advantageous for parties to a trade financing transactions as these arrangements enable the parties to fix the exchange rate of the foreign currency in which loans are to be repaid. There are several types of letters of credit, bills of exchange and bonds used by banks and beneficiaries in

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74 Ibid 215-216.
trade financing. Each type of technique will grant differing entitlements and potential limitations on the parties involved in the transaction.

Chapter Eight of the book examines security issues in financing transactions. The importance of security is most important when the borrower company is insolvent as the choice of security can ensure whether a creditor receives payment in priority to other creditors or at all. Security considerations are paramount in any debt capital raising to ensure repayment of the debt upon demand or at maturity. Particular considerations such as the authority of the party incurring the debt, the form of debt and the type of security given are important in deciding the form of the debt and the legal rights and obligations of the parties involved in the debt transaction. Security is a mechanism to secure performance of the payment of debts. There are many different forms of security such as lien, pledge, mortgage, charge (including floating charge). There are also other types of security such as the rights of combination and set-offs.

Chapter Nine of the book examines the nature and regulation of set-off which is an important mechanism to allow different debts of different parties to a debt transaction to take account of other debts owing between the parties. Chapter Ten of the book (‘subordination of debt’) in contrast allows creditors to arrange to postpone claims for payment from the borrower between agreed senior and junior creditors.

Chapters Eleven of the book (‘capital reductions’) and Twelve of the book (‘share buybacks’) deal with statutory corporate restructuring techniques which may be less
relevant to the financial services law reform as they relate primarily to the corporations areas of law in the *Corporations Act*. The purpose of these corporate restructuring techniques is to eliminate the minority holdings in order to reduce capital and to gain control over the company.

Chapter Thirteen of the book analyses financial instruments such as swaps and derivatives, which involve a transaction where the value of the financial instrument is derived from an underlying physical commodity, currency, index, interest rate, financial asset or other derivative product.\(^7\) Swaps and derivatives are used for the purpose of managing risk in financial instruments and to balance the risk of change in commodities prices, currency exchange rates or interest rates. The derivatives chapters of both books can be read together to understand the current statutory regulation of derivatives and swaps, even though the statutory provisions in this chapter of the *Finance Law of Australia* (LexisNexis Butterworths, 2001) book have now been superseded by the financial services legislation in the *Corporations Act*.

Chapter Fourteen of the book examines securitisation which is a financial technique involving assets (with an income stream\(^7\) such as mortgages and receivables but without a ready market) which are turned into ‘paper’ and on-sold in the financial markets. This ‘paper’ is then able to be bought and sold by the parties to the transaction. This process allows a financial institution (such as a bank) to sell an asset for money so allowing the

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bank off-balance sheet liquidity. In comparison a cash loan would be on-balance sheet.
This process of securitisation as well as derivatives in Chapter Thirteen of the book appears commonly in financial transactions in the global financial system.

The duties and liabilities of financial intermediaries in Chapter Fifteen of the book reinforces the other legislation in financial transactions. Financial intermediaries, particularly in a globalisation context, play an essential role in introducing, utilising and maintaining financial techniques with companies. These financial intermediaries facilitate the flow of capital in the financial system by bringing together financial institutions and clients to create new avenues for investment. This is an important area of financial services law reform which is also dealt with in my other book *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003).


This book sets out financial services law reform with all of the inherent and diverse impacts which are informed by globalisation and Australian law reform/policy developments. In this way, the book arose at the time of the adoption of globalisation which influenced legislation and policy. The legislative intention of the financial services law reforms in Chapter Seven of the *Corporations Act* and associated *Corporations Regulations 2001 (Cth)* (‘Corporations Regulations’) (which was created by the *FSR Act*) was to provide a uniform and consistent framework of regulation for financial products, financial services and financial markets. This uniform regulatory framework imposes consistent licensing and disclosure requirements upon a broad
number of financial products such as securities, managed investments, superannuation, general and life insurance, basic deposit accounts, derivatives and non-cash payments. In addition, Chapter Seven of the Corporations Act provides for flexible financial market and clearing and settlement (‘CS’) facility authorisations for operators. This new area of financial regulation has significant implications for the financial services and markets industry and operators.

Historically, legal and policy developments of products such as securities and derivatives (discussed in Chapter One of this book) led to the introduction of the FSR Act. The theme of uniform and consistent regulation is the hallmark of Chapter Seven of the Corporations Act. The focus on consistent regulation of economically functionally similar products has resulted in the combination of many different types of products (such as securities, derivatives, managed investment schemes, superannuation, general and life insurance products, basic deposit accounts and non-cash payments) being marketed and offered by financial services businesses. This development of a wide range of uniformly regulated products has had significant ramifications for financial services operators.

Chapter One of this book sets out the background to the new area of financial services regulation, which has significant implications for the financial services and markets industry and operators. Chapter Three of this book should be read first to assess if these operators (‘person/ entity/body’) are offering or issuing a financial product as part of a financial services business, financial market or Australian Clearing Settlement facility
If these operators are offering a financial product then the person/entity/body should read Chapter Two of the book to examine whether they are providing a financial service or carrying on a financial service business. If the person/entity/body is carrying on a financial service then they must comply with the licensing obligations in Part 7.6 (which are set out in Chapter Nine of the book) and the disclosure obligations in Parts 7.7 and 7.9 (which are discussed in Chapters Ten and Eleven of the book).

If however the person/entity/body operates a financial market, then the person/entity/body operating a financial market must assess its need to have an Australian markets licence in Part 7.2 of the Corporations Act. These financial market licensing requirements are discussed further in Chapter Five of the book as well as the compensation regime for financial markets in Chapter Six of the book. Also if the person/entity/body operates an Australian Clearing and Settlements facility then the person/entity/body operating a financial market must have an Australian Clearing and Settlements facility licence in Part 7.3 (as is discussed in Chapter Seven of the book). The limits on involvement with financial market operators and Australian Clearing and Settlements facility operators licensees are set out in Chapter Eight of the book. Transitional issues for licensees of financial markets, Australian Clearing and Settlements facilities and financial services operators are also considered in Chapter Four of the book.

The conduct, misconduct and enforcement and penalties provisions are considered in Chapters Twelve and Thirteen of the book. The operators of financial markets, CS facilities and financial services will need to consider the civil and criminal consequences
of breaches of the financial services provisions in operating their businesses. In addition, there are other obligations and requirements in various miscellaneous matters such as title and transfer (Chapter Fourteen of the book) and the use of qualified privilege, approved codes of conduct and delegations which are set out in Chapter Fifteen of the book.

Also, any consideration of the obligations of operators of financial markets, Australian Clearing and Settlements facilities and financial services will require the use of the index, the list of abbreviations and the tables of cases and statutes in utilising this book.

There is an important theme of consistency of the regulation of uniform products which has been emphasised throughout the long development of the FSR Act through the Wallis Inquiry, CLERP and finally as Chapter Seven of the Corporations Act. The fundamental economic functional underpinnings of this law reform process marked an important shift away from legal differences separating the regulation of products (such as securities and derivatives) to a process of identification of similar financial products.

5. Reflection on two books which are part of this thesis

My reflections on the books Finance Law of Australia (LexisNexis Butterworths, 2001) and Horgan’s Law of Australia (Thomsons Reuters, Lawbook Company, 2003) for the purpose of researching and writing this thesis have led me to question how I would examine corporations, finance and financial services law reform if I was writing these books today within the present policy context of global and national law reform. In particular, I would expand the analysis in these books on the impact of policy and the
implementation and regulation of this law reform together with an analysis of the beneficiaries of this policy reform. I would also consider the broader contexts of reform in terms of political, economic and social change occurring globally, nationally and locally in relation to corporate and finance law reform in view of the current world events in the global financial ‘meltdown’. There would not be any further emphasis on case law developments in these books and this thesis as the focus has been on law reform and policy developments.

These two books would now be written in view of the extensive developments in globalisation, electronic commerce, further legislative change and policy development. This is particularly important as the influence of globalisation is even more clearly apparent in the statutory and policy developments in these areas of law. As the Global Financial Crisis and globalisation have contributed to the current global economic problems, these books would consider any possible changes to Australian finance law and financial services law in the context of financial turmoil as well as growth.

The first book *Finance Law of Australia* (LexisNexis Butterworths, 2001) focussed on the review of the financial system which resulted from the *Wallis Inquiry’s Final Report* on the drivers for change including globalisation. In particular, Chapter One of this book considered the impact of globalisation on the Australian financial system using the analysis in the *Wallis Inquiry’s Final Report* to support law reform in relation to a broad range of finance law issues including equity and securitisation.
The second book *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003) set out the primary legal and policy issues in Chapter Seven of the *Corporations Act*. Chapters One and Sixteen of this book raise the issues in globalisation as a major source of concern for Australian law reform. The legal and policy rationale behind the regulation of financial products and financial services is an important area which would be developed if I were to re-write both of these books now. The juxtaposition of ‘economic functionality’ and ‘legal characterisation’ of financial instruments, products, services and markets would warrant a more extensive examination of the principles and legal issues in a different context. In this thesis, which focuses on domestic and international law reforms and influences, these developments in financial techniques are less relevant and would therefore not be expanded upon in any further discussion.

These new financing techniques and subsequent law reform link the first book *Finance Law of Australia* (LexisNexis Butterworths, 2001) to the second book *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003). These two books again interconnect where the innovative financing techniques and law reform reflect government, consumer and industry concerns which leads to society’s change of policy and domestic law reform. These two books also demonstrate the development of law reform and policy simultaneously with the growth of globalisation as an agent of change in modern legal and economic thinking and government and markets decision making.
This Australian law reform discussed in these two books was also influenced by international policy developments and law reform (the Joint Forum and Banking International Settlements and overseas regulators such as the US Securities and Exchanges Commission), which involves the regulation of law which affects industry and consumers which then starts the circle again.

Disclosure (particularly for retail clients) is another crucial area of law reform and ongoing policy development as both books highlighted the impact on investors of having a wider range of access to investments due to considerable technological change and the impact of globalisation which has resulted in increased competition in the financial services area. This has resulted in greater accessibility of retail investors into financial investments. There has been considerable emphasis on disclosure in the law reform relating to the Wallis Inquiry, CLERP and the FSR Act (which is discussed in Chapter One of this book). Disclosure is utilised to assist investors (retail clients in Chapter Seven of the Corporations Act) in better understanding financial investment in financial products and services.

This regulatory theme has a long history throughout the corporate law reform relating to prospectuses and fundraising in the 1990's where the concepts of general disclosure were developed as a tool to ensure better information for investors. The regulatory emphasis on disclosure in relation to prospectuses and fundraising generally is retained for securities in this Chapter Seven of the Corporations Act as securities are still regulated by
Chapter 6D of the *Corporations Act* whilst all other financial products are regulated for disclosure in Part 7.9 of the *Corporations Act*.

### 6. Conclusion

The key theme of this thesis is the impact of globalisation on Australian finance law and financial services law reform. My two books *Finance Law of Australia* (LexisNexis Butterworths, 2001) and *Horgan’s Law of Financial Services* (Thomsons Reuters, Lawbook Company, 2003) form a predominant part of this thesis and demonstrate the initial pre-globalisation and the beginning of the effect of globalisation on finance law and financial services law. The ongoing law reform process and policy development to assist globalisation is examined in these books.

The increasing globalising effect of electronic commerce and law reform on industry and consumers in Australia has resulted in ongoing law reform which demonstrates the importance of the integration of finance law and financial services law in the *Corporations Act* and the common law.

If I were to amend these two books now, I would focus on the Australian and international widening chain of law reform, market and policy developments which impact on finance law and financial services law in Australia. As globalisation is a fundamental driver for change in these Australian and overseas legislative, regulatory and policy developments, I would develop these two books to integrate the growing demands
of ‘sophisticated’ investors and major financial transactions in utilising finance law and financial services law products and services.

The circular manner in which consumer needs and industry demands can drive both new finance law techniques and financial services products or markets demonstrates how intertwined these two books are and how important the growing impact of globalisation is to the remaining areas of law reform. It is clear over the last twenty years that there is no immediate end of the ongoing law reform process. The style of reform may change for example, Corporations Law Simplification Program to CLERP (‘economic functionalism’) to FSR Act (uniform regulation) but the drivers and policy motivations by the government to ensure disclosure, protect investors and maintain investor confidence in the markets remain intact.
CHAPTER FOUR

GLOBALISATION AND ITS IMPACT ON AUSTRALIA

1. Relevant globalisation issues and Australian finance law and financial services law

This chapter of the thesis is not case law based as law reform and policy development in Australia and overseas has been the primary driver for change in domestic finance law and financial services law. In this way, the extensive financial services law reform in Australia has been a consequence of the concept of globalisation adopted by legislators and policy makers. In particular, the reform of managed investments schemes and financial services and markets was aimed at facilitating Australian business competitiveness in the international markets whilst ensuring compliance to protect consumers at the local level.

Australian law reform has influenced corporate structures and offerings so an operator of a financial services business, a company or body corporate (‘person/entity/body’) needs to assess if they are offering or issuing a financial product, a security, share, debenture or managed investment scheme. If they are offering these products, then the person/entity/body will be impacted by the statutory regulation of fundraising products depending upon whether they are providing a financial service or carrying on a financial service business and the general fundraising regime. If the person/entity/body is carrying on a financial service, then they will have to comply with the licensing

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77 See chapter seven of Corporations Act, above n 4.
obligations and the disclosure obligations in the Corporations Act\textsuperscript{78} (both of which are discussed in Chapter Three of this thesis\textsuperscript{79} and the attached books). The conduct, misconduct and enforcement and penalties provisions for fundraising of companies and financial service businesses are considered in the books attached as part of this thesis. Companies and the operators of financial services will also need to consider the civil and criminal consequences of breaches of the fundraising and financial services provisions in operating their businesses. All of these obligations extend beyond merely domestic regulation to international financial transactions\textsuperscript{80}.

2. Common themes in Australian finance law and financial services law and globalisation

The common themes in the Corporations Act\textsuperscript{81} and associated Corporations Regulations relate to:

- investor protection, which is particularly reflected in the development of the concept of retail clients;
- the use of licensing gateways to facilitate this investor protection;
- extensive disclosure requirements for financial services licensees and in relation to financial products, which are designed to facilitate the understanding by retail clients of the complexities of financial investment; and
- the regulation of conduct and market misconduct requirements\textsuperscript{82}.

\textsuperscript{78} The licensing obligations are in Part 7.6 and the disclosure obligations are in Parts 7.7 and 7.9 of the Corporations Act, above n 4.

\textsuperscript{79} Chapter Three of this thesis which is about pre-globalisation and Australian finance law and financial services law as well as my books Finance Law of Australia and Horgan’s Law of Financial Services.

\textsuperscript{80} See Chapter Seven of the Corporations Act, above n 4.

\textsuperscript{81} Ibid.

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Chapter Seven of the *Corporations Act* was particularly created to provide a uniform and consistent framework of regulation for financial products, financial services and financial markets. This legislative intention of uniformity and consistency was motivated by a perceived need by government to ensure an efficient movement of financial instruments due to their functional uniformity and consequent ease of regulation. The creation of consistent licensing and disclosure requirements for a wide range of financial products such as securities, managed investments, superannuation, general and life insurance, basic deposit accounts, derivatives and non-cash payments was the motivation for this uniform regulatory framework on both domestic and global markets. ASIC regulates these requirements in the *Corporations Act*. The implications of the historical, legal and policy development of products such as securities and derivatives (which is discussed in Chapter One of this thesis) led to the introduction of the financial services law reform.

The theme of uniform and consistent regulation is the centrepiece of the *Corporations Act*. The legislative and policy need for regulation of economically functionally similar products in a consistent manner has resulted in the combination of many different types of products (such as securities, derivatives, debentures, managed investment schemes, superannuation, general and life insurance products, basic deposit accounts and non-cash

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82 Ibid.
83 Ibid.
84 Ibid.
85 *FSR Act*, above n 4.
86 Chapter 7 of the *Corporations Act*, above n 4.
87 See ASIC Regulatory Guide 69 “Debentures – improving disclosure for retail investors” (October 2007) which aims to improve disclosure to retail investors to assist them to assess debentures whilst maintaining the flexibility of the public fundraising process for debentures.
payments) being marketed and offered by financial services businesses. This development of a broad range of uniformly regulated products has had significant implications for financial services operators in terms of disclosure and licensing requirements. Uniformity of regulation is achieved by consistent licensing and disclosure requirements, so that there will be:

- licensing of financial markets;
- licensing of all financial intermediaries as financial services licensees; and
- uniform disclosure by promoters or issuers of financial products to give consistent disclosure documents, particularly for retail clients to allow them to make informed decisions. The importance of the need for consistency in regulation of uniform products arose in the legislative and policy background to the financial services law reforms.\(^\text{88}\)

In addition, economic functionalism for legal products is a crucial policy rationale and underpinning for this law reform process. This economic emphasis was an important step away from the debate about legal differences in characterisation which separated the regulation of products (such as securities and derivatives) to a means of identification of similar financial products.\(^\text{89}\)

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\(^\text{88}\) These reforms arose out of the *FSR Act*, above n 4, the Wallis Inquiry, CLERP and Chapter Seven of the *Corporations Act*, above n 4.

\(^\text{89}\) Chapter Seven of the *Corporations Act*, above n 4.
Disclosure has an important legislative and policy role in the law reform relating to the background to the financial services law reforms\(^9\) (discussed in Chapter Three of this thesis). Disclosure is designed to assist investors (retail clients in the *Corporations Act*)\(^{91}\) to understand financial investment in financial products and services.

The need for disclosure to help protect investors has been an important theme in corporate law reform relating to prospectuses and fundraising in the 1990s, where the concepts of general disclosure were developed in order to ensure better information for investors. The regulatory importance of disclosure in relation to prospectuses and fundraising has been retained for securities in the *Corporations Act*\(^{92}\), as securities are still regulated separately from all other financial products.\(^{93}\) Operators of financial services, markets and Australian Clearing Settlement facilities, and issuers of financial products have to comply with the extensive disclosure regime in the *Corporations Act*.\(^{94}\) Retail clients (investors) will receive Financial Services Guides, Statements of Advice and Product Disclosure Statements (where appropriate) under this regulatory disclosure focussed framework. This is intended to clarify financial investment decisions for retail clients by providing them with the necessary information required to make such decisions.

Licensing is the threshold for operators in the financial services and markets industry

\(^{90}\) *Corporations Act*, above n 4.
\(^{91}\) Chapter Seven of the *Corporations Act*, above n 4.
\(^{92}\) Ibid.
\(^{93}\) Disclosure for securities is regulated under Chapter 6D of the *Corporations Act*, above n 4 whilst disclosure for all other financial products is regulated in Part 7.9 of the *Corporations Act*, above n 4.
\(^{94}\) Parts 7.7 and 7.9 of the *Corporations Act*, above n 4.
to operate in Australia under the *Corporations Act* to allow the entry of financial services providers, financial market operators and Australian Clearing Settlement facility operators.

### 3. Law reform

John Howard, former Prime Minister of Australia, who was instrumental in this law reform commented in his autobiography that he had brought a philosophical road map to government involving various themes.\(^96\)

In its broadest iteration, that road map was one of economic liberalism and social conservatism. That duality was no politically convenient contrivance. I believed in it. From the late 1970s onwards, Australia needed major economic reforms to set it up for a transformed world economic environment. Those reforms had to be built on freedom and openness, not regulation and protection. That meant a lot of change, some of it quite bewildering. The more an individual's world of work and business changed, the more he or she would seek continuity and reassurance in other aspects of life. That is why social conservatism complemented rather than mocked economic liberalism.

A key determinant of our economic future will be Australia's willingness to persist with economic change and reform, and to resist any regression to protectionism and over-regulation in the totally mistaken belief that the global financial plunge of 2008 represented a failure of market capitalism.\(^97\)

Despite the much-trumpeted return of Keynesianism in the wake of the financial crisis, the lasting economic development of the past years has been that tens of millions of people were lifted from poverty by forces of globalisation and market capitalism. Government played a subsidiary role. The ongoing debate is about the mechanics of that market system, not the benefits of the system itself. In the process, the centre of gravity of the world's middle class began to shift to Asia. By 2030, it is likely that the majority of the world's middle class will be in Australia's region of the world.\(^98\)

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\(^{95}\) Chapter Seven of the *Corporations Act*, above n 4. Licensing requirements have an extensive legislative history in the previous Chapter Seven (for securities) and the previous Chapter Eight (for futures products) of the previous *Corporations Law* and *Corporations Act*, above n 4 in the regulatory regime in existence before the commencement of the *FSR Act*, above n 4.


\(^{97}\) Ibid 656.

\(^{98}\) Ibid 657.
3.1 Corporate Law Economic Reform Program

Australian company and securities law, embodied in the *Corporations Act*, has been significantly reshaped as a result of the Federal Government's corporate law reform program. The stated objective of the reform process, known as CLERP\(^99\), is to ensure that business regulation is consistent with promoting a strong and vibrant economy and provides a framework which assists business in adapting to change. In March 1997, CLERP was created as a corporate law reform program to review regulation which relates to business and investment activity.\(^{100}\) The goals of the program are to create a corporate regulatory regime which is consistent with economic objectives, facilitates investment, employment and wealth creation by companies and protects investors and maintains confidence.\(^{101}\) These changes were created for the purpose of assisting the raising of funds by small business, the use of shorter prospectuses, electronic commerce, the examination of prospectuses, the use of advertising and the application of the liability provisions.

Law reform was also developed in *CLERP Paper Number 6* to resolve the regulatory confusion arising from the old *Corporations Law* (prior version of the *Corporations Act*)

\(^{99}\) See *Corporate Law Economic Reform Program Act 1999* (Cth) (*‘CLERP Act’*) based on various *CLERP Papers*, above n 1.

\(^{100}\) See the analysis of Dr M J Whincop, ‘Rules, Standards and Intransitive Statutes: What the Economic Reform of Corporate Law Might have Looked Like’ (February 1999) 17 *Company and Securities Law Journal*, 11.

\(^{101}\) The Commonwealth Government proclaimed the *CLERP Act* based on various *CLERP Papers*, above n 1, in the areas of directors' duties and corporate governance (discussed further in this Chapter), fundraising, accounting standards and takeovers. *CLERP Paper Number 6* on ‘Financial Markets and Investment Products’ (*‘CLERP Paper Number 6’*), above n 19, and the Consultation Paper ‘Financial Products, Service Providers and Markets - An Integrated Framework’ (*‘the CLERP Number 6 Consultation Paper’*) recommended law reform for consistent regulation of financial products, service providers and markets. The *CLERP Paper Number 6* and the *CLERP Number 6 Consultation Paper* law reform process led to the enactment of the financial services law reform in the *Corporations Act*, above n 4. The focus of these *CLERP Act* changes to the fundraising part of the Corporations legislation was the minimisation of fundraising costs and the protection of investors.
statutory regulation of securities and futures products\textsuperscript{102}. Issues of legal distinction between the transfer of title to securities by securities exchanges and the contractual transfer and risk management of prices in futures exchanges were overtaken in law reform by the need to create consistent regulation of functionally similar products (CLERP Paper Number 6) after the creation of the Australian Stock Exchange Limited (‘ASX’) and the Sydney Futures Exchange Limited (‘SFE’) trading of futures and derivative products and hybrid products\textsuperscript{103}. Consistent licensing and disclosure\textsuperscript{104} of financial products and services arose from the thinking of the Wallis Inquiry about the need to enable financial promises to be exchanged in the financial system. The CLERP Paper Number 6 noted that the functions of financial markets included mobilising and directing savings to their most productive uses; providing price discovery through exchange and evaluation of information; facilitating management of pricing risk; assisting individuals in assessing and making investment decisions by reflecting risk in the pricing of financial instruments; and facilitating capital raising by a diverse range of firms.\textsuperscript{105} The CLERP Paper Number 6 noted that, while the function of price discovery was traditionally associated with liquid markets which were highly transparent, both securities and derivative markets performed price discovery functions through the

\textsuperscript{102} See CLERP Paper Number 6 on ‘Financial Markets and Investment Products’ (‘CLERP Paper Number 6’), above n 19.  
\textsuperscript{103} Ibid.  
\textsuperscript{104} The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) (which amended the Corporations Act, above n 4) generally enacted the proposals in the CLERP Paper Number 9, Proposals for Reform - Corporate Disclosure. See above n 1. This CLERP Paper Number 9 developed the concepts in the prior CLERP law reforms by proposing further regulation and enforcement of corporate behaviour particularly in relation to audit regulation and accounting standards and practice; disclosure for shares and debentures; continuous disclosure; conflicts of interest in relation to the provision of financial product advice; and shareholder participation.  
\textsuperscript{105} CLERP Paper Number 6 on ‘Financial Markets and Investment Products’, above n 19, 21.
exchange and evaluation of information\textsuperscript{106}. Thus, prices of underlying assets and related derivative contracts were simultaneously determined due to arbitrage, so that differences in one market were quickly transmitted to related markets. In this context, arbitrage is a technique developed to assist financial transactions and as such is driven by the forces of globalisation\textsuperscript{107}. The \textit{CLERP Paper Number 6} observed that derivative transactions on Sydney Futures Exchange contributed to price discovery in related markets, including the Australian stock exchange.\textsuperscript{108}

3.2 Other law reform

The \textit{Corporations Legislation Amendment (Simpler Regulatory System) Act 2007}\textsuperscript{109} (the ‘\textit{Simpler Regulatory System Act’}) also attempts to reduce regulatory burden on businesses and improve the efficiency of corporate and financial services regulation. The legislation implements the Federal Government's response to several recommendations made in the ‘\textit{Rethinking Regulation report of the Taskforce on Reducing the Regulatory Burden on Business}’.\textsuperscript{110} The \textit{Simpler Regulatory System Act} is aimed at facilitating consumer access whilst maintaining investor protection, minimising compliance costs for business, removing regulatory overlap, facilitating access to capital and enhancing the accountability of regulators. In particular, the \textit{Simpler Regulatory System Act} simplifies regulation and reduces compliance costs in the areas of financial services, company

\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid 46, 62.
\textsuperscript{108} Ibid.
\textsuperscript{109} \textit{Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 (Cth).}
\textsuperscript{110} \textit{Rethinking Regulation report of the Taskforce on Reducing the Regulatory Burden on Business (Cth).}
reporting, auditor independence, related party transactions, fundraising and the telephone monitoring obligations during takeovers.\textsuperscript{111}

The\textit{Corporations (NZ Closer Economic Relations) and other Legislation Amendment Act 2007}\textsuperscript{112} amends the\textit{Corporations Act} to support closer economic relations between Australia and New Zealand through greater coordination of business law by introducing a number of initiatives, including provisions which enable mutual recognition of securities offerings. The mutual recognition of securities offerings is achieved by enabling entities from New Zealand to offer securities in Australia on the basis of compliance with New Zealand fundraising requirements with minimal additional requirements imposed by Australian law, facilitating investments between Australia and New Zealand. This scheme implements the Agreement between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings which came into force on 13 June 2008.\textsuperscript{113}

3.3 Financial services law reform

From 11 March 2002, the\textit{FSR Act}\textsuperscript{114} (as Chapter Seven of the\textit{Corporations Act}) regulated the licensing and disclosure requirements of financial product markets and

\textsuperscript{112}\textit{Corporations (NZ Closer Economic Relations) and other Legislation Amendment Act 2007 (Cth)}.
\textsuperscript{113}\textit{ASIC/NZSC Joint Regulatory Guide 190: Offering securities in New Zealand and Australia under mutual recognition}, provides users of the mutual recognition arrangement with guidance on the workings of the regime and Report 174 ‘Effects of the Australia–New Zealand mutual recognition regime for securities offerings’ (October 2009) which described the research that ASIC conducted into the effects on industry of the operation of the Australia–New Zealand regime for mutual recognition of securities offerings.
\textsuperscript{114}\textit{The Financial Services Reform Bill} (which was enacted as the\textit{FSR Act}, above n 4) proposed reforms in relation to the use and regulation of financial products, service providers and markets. This law reform aimed to regulate functionally similar financial products and markets including securities and futures contracts under the previous version of the\textit{Corporations Law}. This\textit{FSR Bill} and its\textit{Commentary on the}
service providers, financial product disclosure and the conduct and disclosure of service providers.\(^{115}\)

3.3.\((a)\) Legal characterisation

Important issues of legal characterisation and the economic rationale behind financial products in finance law and financial services law were initially considered in *CLERP Paper Number 6* and the *CLERP Number 6 Consultation Paper* which recommended law reform for consistent regulation of financial products, service providers and markets which led to the *FSR Act*. The impetus for this law reform which was to be developed from *CLERP Paper Number 6* was the need to resolve the regulatory confusion arising from the old *Corporations Law* (prior version of the *Corporations Act*) statutory regulation of securities and futures products. Issues of legal distinction between the transfer of title to securities by securities exchanges and the contractual transfer and risk management of prices in futures exchanges were overtaken in law reform by the need to create consistent regulation of functionally similar products (*CLERP Paper Number 6*) after the creation of ASX and SFE trading of futures and derivative products and hybrid products. The Wallis Inquiry emphasised the need for consistent licensing and disclosure of financial products and services in order to facilitate the exchange of financial promises in the financial system.

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\(^{115}\) Under this financial services law reform, parts of the *Corporations Act*, above n 4; the *Australian Securities and Investments Commission Act 2001* (Cth); the *Superannuation Industry (Supervision) Act 1993* (Cth); the *Retirement Savings Accounts Act 1997* (Cth); the *Insurance Contracts Act 1984* (Cth); and the *Insurance Act 1973* (Cth); and the *Life Insurance Act 1995* (Cth) were amended to enable the enactment of these financial services law reforms.
3.3.(a).1 Financial product

Financial products are regulated under the *Corporations Act* which separates the definition of ‘financial product’\(^{116}\) into a general definition; specific inclusions; and overriding exclusions.\(^{117}\) However, some parts of the *Corporations Act* relating to the disclosure of financial products do not apply to securities.\(^{118}\) In this way, the term ‘financial product’ is used to cover every financial right, interest or product to be regulated whilst the term ‘security’ is used to excise a class of financial products for regulation in specific contexts such as takeovers and fundraising.\(^{119}\) There are a number of specific inclusions\(^{120}\) and exclusions\(^{121}\) to the definition of ‘financial product’.

A financial product will consist of an arrangement or facility (pursuant to an agreement or contract between the parties) whereby a person invests in a financial investment; takes

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\(^{116}\) Chapter 7 and particularly Division 3 of Part 7.1 of the *Corporations Act*, above n 4.


\(^{118}\) See Commentary on the Draft Provisions of the FSR Bill which became the *FSR Act*, above n 114, 8. The relevant parts of the *Corporations Act*, above n 4, are Chapter 7 and Part 7.8.

\(^{119}\) Subsections 92(3) and 700(1) of the *Corporations Act*, above n 4.

\(^{120}\) The definition of ‘financial products’ includes the kinds of facilities that, subject to overriding exclusions, are financial products (whether or not they are within the general definition) such as: a security (including shares in, and debentures of, a body); an interest in a registered managed investment scheme; a derivative; a general insurance product; a life risk insurance product or an investment life insurance product; a superannuation interest; a retirement savings account; any deposit taking facility made available by an authorised deposit taking institution in the course of its banking business; a debenture, stock or bond issued or proposed to be issued by a government; some foreign exchange contracts; and anything declared by the *Corporations Regulations* to be a financial product. See section 764A of the *Corporations Act*, above n 4.

\(^{121}\) Specific products are excluded from the general definition of ‘financial product’ such as: health insurance; reinsurance; credit facilities within the meaning of the *Corporations Regulations* (including credit cards); retirement village schemes; and funeral benefits. All financial products, whether retail or wholesale are regulated by this regime. Wholesale financial service providers holding dealer’s licences are facilitated as:

- the prudential regulation of the applicant was taken into account by ASIC in assessing financial resources;
- some conduct and disclosure requirements were not used such as the use of professional indemnity insurance or fidelity fund arrangements, complaints handling mechanisms, requirements to provide the Financial Services Guide, suitability requirements and product disclosure.

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financial risks; and makes but does not receive non-cash payments. 122 A person makes a financial investment 123 if the investor gives money or money’s worth (called the ‘contribution’) to another person and any of the following apply: (1) the other person uses the contribution to generate a financial return, or other benefit, for the investor; (2) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); (3) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and the investor has no day-to-day control over the use of the contribution to generate the return or benefit. Also, a person manages financial risk if they manage the financial consequences of particular circumstances happening or avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates). 124 A person makes a non-cash payment if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency. 125

3.3.(a).2 Security

A ‘security’ is also a financial product under the Corporations Act 126 and is defined as a share in a body; a debenture of a body; a legal or equitable right or interest in a share in or debenture of a body; or an option to acquire, by way of issue, any of those things. The

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123 Section 763B of the Corporations Act, above n 4.
124 Section 763C of the Corporations Act, above n 4. In addition, the Notes to the legislation give as example of managing a financial risk as taking out insurance or hedging a liability by acquiring a futures contract.
125 Section 763D of the Corporations Act, above n 4.
126 See Chapter 7, section 761A and subsection 764A(1)(a) of the Corporations Act, above n 4.
term ‘security’ may also include a managed investment product but does not include an ‘excluded security’.

3.3.(a).3 Interest in a registered scheme or in a managed investment scheme

Managed investments in a registered scheme is a financial product and as such driven by the same law reform forces of globalisation that is law reform developed to assist financial transactions in Australia. An interest in a registered scheme, a legal or equitable right or interest in an interest in such a scheme, and an option to acquire, by way of issue, any of those things is a financial product. The term ‘registered scheme’ is defined as a managed investment scheme which is registered under the Corporations Act. The term ‘managed investment scheme’ is:

(a) a scheme that has the following features:

(i) people contribute money or money's worth as consideration to acquire rights (‘interests’) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people

127 See subsection 764A(1)(b) and Part 7.11 of the Corporations Act, above n 4.
128 An ‘excluded security’ is defined in section 9 of the Corporations Act, above n 4, as:

• a share or debenture or a unit in a share or debenture where a right to participate in a retirement village is attached to the share or debenture, and where each of the other rights and any interest attached to the share or debenture is merely incidental to the right to participate in the retirement village scheme; or

• an interest in a managed investment scheme constituted by a right to participate in a retirement village scheme.
129 See Chapter 7 and subsection 764A(1)(b) of the Corporations Act, above n 4.
130 A managed investment scheme which is registered under section 601EB of the Corporations Act, above n 4, is a ‘registered scheme’.
131 Section 9 of the Corporations Act, above n 4, defines a ‘managed investment scheme’.
(the ‘members’) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions). The term ‘managed investment scheme’ also includes a time sharing scheme and schemes such as listed and unlisted investment trusts, property syndicates, film schemes and agricultural schemes.

The definition of ‘security’ includes options to acquire by way of issue for fundraising for securities and financial services and markets. Other options would appear to be derivatives or fall within the general definition of ‘financial product’. Options to acquire by way of issue or transfer (excluding derivatives and market traded options) are securities for the purposes of takeovers. Managed investment products are also securities for the purposes of the title and transfer provisions of the Corporations Act.¹³²

3.3(b) Fundraising disclosure requirements

The Corporations Act regulates¹³³ the issue and on-sale (or indirect issue) of financial products to retail clients in the course of a business offering financial products, other than, generally, securities or debentures, stocks or bonds issued or proposed to be issued by a government by means of disclosure in a Product Disclosure Statement.

¹³² Subsection 92(3) and Chapter 7 of the Corporations Act, above n 4.
¹³³ Sections 706 and 1010A(1) as well as chapter 6D of the Corporations Act, above n 4, for securities; and Division 2 of Part 7.9 for financial products other than securities.
3.4 Legal and policy rationale for law reform

The legal and policy rationale behind finance and financial services legislation¹³⁴ is to regulate the registration, licensing, disclosure and conduct of issuers and operators who raise funds from investors whether in domestic or global markets. The intertwined themes of investor protection and effective disclosure affect various financial products such as managed investment schemes, shares and debentures as well as financial services. The drive for uniform regulation was the source of the consistent licensing and disclosure requirements in the Corporations Act, which reinforces the registration and disclosure requirements of this Corporations Act,¹³⁵ so that there would be uniform disclosure by promoters or issuers of financial products to investors so that investors could make informed decisions. The legislative priority was to allow operators of financial services businesses to save on administration costs even though fundraising may mean the use of a significant amount of the resources of a company or financial services business.

3.4 (a) Economic functionality

Chapter Seven of the Corporations Act was created to regulate the performance by Australian financial markets in fundamentally similar economic activities by encouraging the use of savings and managing investments. Investment products such as securities and derivatives may have an economically similar function of investment, even though these products constitute legally different types of interests.¹³⁶

¹³⁴ See Chapters 5C, 6D and 7 of the Corporations Act, above n 4.
¹³⁵ See Chapters 5C, 6D and 8 of the Corporations Act, above n 4.
¹³⁶ See Chapter 7 of the Corporations Act, above n 4.
This aim of achieving ‘economically functional’ investments in a uniform legislative regime of licensing and disclosure obligations on financial service providers to assist investors and consumers is an example of the positive way in which the economic purpose of an investment vehicle can assist the regulation of financial products and services.

3.4 (b) Flexible regulation

This regulatory regime\textsuperscript{137} was designed to attempt to encourage financial innovation and competition through providing a flexible framework. Financial markets and intermediaries required uniform but flexible regulation to allow for the use of hybrid products, disintermediation (as in securitisation) and general increase in size of financial investments.

3.4(c) Technological developments and globalisation

Investors have a wider range of access to investments due to considerable technological change and the effect of globalisation, which has provided increased competition in the financial services area. This has resulted in greater accessibility of retail investors to financial investments.

\textsuperscript{137} Chapter 7 of the \textit{Corporations Act}, above n 4.
3.4.(d) Consistent uniform regulation

Consistent and uniform regulation of a multitude of products, such as securities, derivatives, superannuation, life and general insurance and bank-deposit products underlies the regulation of financial services and products.\textsuperscript{138}

3.4.(e) Licensing and disclosure

The important mechanisms to achieve this uniformity of regulation are based in consistent licensing and disclosure requirements so that there will be:

• licensing of financial markets;

• licensing of all financial intermediaries as financial services licensees; and

• uniform disclosure by promoters or issuers of financial products, requiring them to provide consistent disclosure documents, particularly for retail clients to allow them to make informed decisions.

This was designed to save on costs so that unnecessary duplication of administration of different products would be prevented.\textsuperscript{139}

3.5 Integration of Australian finance law and financial services law reform

3.5(a) Equity and debt raising

Equity and debt raising have been the source of the extensive legal and regulatory requirements in the Corporations Act and the common law which have integrated aspects of both company and finance law reform.\textsuperscript{140}

\textsuperscript{138} Chapter 7 of the Corporations Act, above n 4.

\textsuperscript{139} See the Treasury Department (Cth) website, www.treasury.gov.au (Financial Services Reform) and the discussion in CLERP policy papers. However, the breadth of products regulated still requires a wide use of the resources of licensees and issuers of financial products.
3.5.(b) **Nature of equity**

Equity is created when the members of a company become shareholders of a company and therefore contribute capital for a company. These members become shareholders in the company as a consequence of their equity contribution to the company. The company allots and issues shares to the person contributing to the company.\(^{141}\) The shareholding in the company gives the member of the company voting rights, dividend rights and the right to attend meetings. The contribution of members to the capital of a company is subject to the right of the company to ask for full payment of this contribution upon the insolvency of the company. In the event of insolvency, a member has only limited rights of repayment of equity capital after all debts have been paid by the company.

3.5.(c) **Fundraising and capital raising**

Fundraising or capital raising involves the seeking of funds by a company or a financial services business operator from investors (and in particular retail clients)\(^{142}\). This form of raising money for a company or business by means of equity capital allows shareholders in a company (with certain rights) or investors in a financial services business to be used to create capital for these entities. There are advantages to equity capital being created rather than debt when the company or financial services business needs to acquire money or capital. In particular, a company has a separate legal personality and shareholders in a company have limited liability for debts whilst being owners of a company.

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\(^{140}\) Chapter 7 of the *Corporations Act*, above n 4.  
\(^{141}\) Ibid.  
\(^{142}\) Ibid.

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Financial services business operators also raise funds and capital from investors under disclosure documents to ensure that these businesses have sufficient funds to continue operations of the financial service.\textsuperscript{143}

\textit{3.5.(d) Nature of debt}

Debt may be individual debt, company debt or government debt. There are various types of debt products:

(a) short term debt products and some types of short term debt products include overdrafts, short term loans, bills of exchange, promissory notes, factoring, letters of credit and short term eurocurrency funding;

(b) long term debt products. Some examples of such long term debt products include corporate bonds, eurobonds, eurocurrency floating rate notes, leasing, project finance, transferable loan certificates and convertible notes; and

(c) transferable loan certificates are a medium to long term financing technique involving a loan certificate which is basically used as a proof of debt by companies and banks. The transferable loan certificates have maturity periods of three to five years and may be traded by the certificate holders after being issued.\textsuperscript{144}

In addition, convertible notes which are debt and equity hybrids may be used by debt market participants. These notes involve the issuing of a convertible note (usually seen as a debt instrument) which may become capital of a quasi nature upon certain events

\textsuperscript{143} Ibid.

\textsuperscript{144} Transferable loan certificates may be traded by the certificate holders after being issued and have maturity periods of three to five years.
such as the inclusion of clauses that repayment may only occur in a winding up and the removal of the last maturity date.

Various features of the debt being raised by the company assist in establishing: the form of security and rights in a winding up; the rights to income in priority to equity; the redemption/maturity terms; and the currency of obligations.¹⁴⁵ In contrast, equity will give parties rights to participate in profits with some finance instruments having convertibility from debt to equity (or options). There can also be hybrids or quasi-equity which allows some flexibility in a funding decision as the parties can utilise features of debt and equity in these financing techniques.

Risk management products have been developed in order to deal with the risks in debt raising and equity capital raising. For example, hedging, options and swaps are available to modify the economic risks to either the issuer or investor in securities or loans further increasing the range of forms of funding which may be appropriate. This may also result in the need for secured debt (fixed and floating charges) and unsecured debt. The secured nature of some debt will be useful to parties to a financing transaction who will wish to be able to enforce the debt and be paid in priority to the unsecured debt.

The use of a variety of debt mechanisms such as bills of exchange, leasing, syndicated loans, guarantees, bonds and debentures enables the use of debt by companies. Debt has numerous advantages over equity particularly in terms of liquidity and repayment in an

¹⁴⁵ Company debt raising creates the form of security and the rights and obligations in a winding up, the rights to income in priority to equity and the terms of redemption and maturity.
insolvent situation. A company undertakes a debt financing decision based on a review of the financial objectives and needs (short term and long term) of the company together with a review of the appropriate forms of debt.

In addition, debt enables the company to raise finance without having to comply with the equity fundraising provisions in the Corporations Act. There are regulatory requirements on different forms of debt such as the regulation of debentures in the Corporations Act but the choice of debt enables a different approach to the regulatory obligations of the company seeking to raise finance. Also providers of debt will be concerned with the repayment of debt whilst a debtor is solvent and the priorities of repayment in the insolvency of the debtor (depending on the level of security held by the financier).

4. Conclusion

This chapter deals with the impact of globalisation and the consequences for Australian law reform and policy developments under this major legal and economic influence. In this way, the financial services law reform in the FSR Act is aimed (amongst other things) at improving investor protection, ensuring adequate disclosure of material information known to the parties in the transactions and maintaining adequate liabilities and duties of parties to a transaction. These statutory protections are important bearing in mind the breadth of choice of financing techniques available to parties in a fundraising situation (whether debt or equity, security techniques or risk management techniques). These

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146 Chapter 6D of the Corporations Act, above n 4.  
147 Chapter 2L of the Corporations Act, above n 4.
techniques allow parties to financing transactions greater flexibility in structuring transactions which may impact upon the rights of investors. They also reflect the importance of disclosure and market and investor protection in a globalised world.

The impact of globalisation upon these areas of law reform in Australian finance law and financial services law was demonstrated in the original policy changes in the Wallis Inquiry which were based on ‘neoliberal’ reform agendas. The CLERP law reform process confirmed this approach by applying statutory regulation of economically functional (even if legally different) financial products such as derivatives, insurance and equity.

This statutory process, which evolved into the current provisions in the Corporations Act was based on the adoption by the Australian government at the time of the enactment of the legislation148 (through the Wallis Inquiry and the following corporate reform programs) of ‘economic liberal reform’ agendas that were markets based whilst emphasising investor protection and market regulation.

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148 See John Howard, above n 96.
CHAPTER FIVE

GLOBALISATION AS AN INTERNATIONAL FORCE

1. Domestic policy developments and law reform in globalisation

There has been a long process of policy developments and law reform being driven by globalisation (which began with the Wallis Inquiry in the 1990’s). Domestic law reform and policy has also been affected by European, American and Australian global policy changes in response to movements in the global markets. There has been an ongoing tension between flexibility and regulation in any global financial transaction, particularly in view of anti-money laundering/terrorism financing legislative and policy developments.

Changes in international financial markets have altered the jurisdiction, regulation and enforcement of global markets particularly international enforcement of breaches of legislation. International enforcement is facilitated by existing legislation, policy and procedures such as the Mutual Assistance in Business Regulation Act 1992 (Cth), the Mutual Assistance in Criminal Matters Act 1987 (Cth), section 127 of the ASC Act 2001 (Cth), Regulatory Guides, memorandum of understanding and ASIC’s relationship

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150 The changes in policy development and regulation of global financial transactions will affect anti-money laundering/terrorism financing legislative and policy developments.
152 Section 127 of the ASC Act 2001 (Cth).
with the Australian Federal Police assist with information sharing and international assistance with investigations.\textsuperscript{153}

Policy and legislation based on globalisation may have unforeseen negative consequences as the basis for decision making changes over time, particularly at times when globalisation loses its gloss when economic boom times end and there are financial difficulties domestically in times of global collapses and loss of investor confidence in the global markets. Sovereign debt and banking problems are global as well as national concerns as they increasingly have global impact on economies in the United States (‘US’), Europe, Asia and Australia. The increased use of global bond markets and debt raising by banks has caused many governments considerable fiscal difficulty.\textsuperscript{154} This negative experience must in time become the basis for more conservative regulation and policy and law reform development to ensure greater regulation, disclosure and capital banking standards and control of the markets.

2. Electronic commerce policy developments and law reform

Electronic commerce is another element of globalisation which has arisen from the same legal and economic forces for changes and as such has developed considerably since the late 1990’s due to the growth of financial transactions conducted over the Internet together with the use of new products, new technology and cross-border financial activity. Financial transactions undertaken electronically are perceived to be

\textsuperscript{153} Regulatory information sharing and international assistance with global investigations by regulators would assist in the international enforcement of breaches of legislation.

\textsuperscript{154} Greater reform and regulation of sovereign debt raising and banking activities by governments would create a more effective regulation of global markets.
advantageous due to quick access speeds, low cost and response times.\textsuperscript{155} These types of electronic transactions include the use of computer networks and disks, electronic mail and facsimile, cloud computing and digital infrastructure support for businesses. Enforcement of the financial transactions electronically and over the Internet has demonstrated the need for legislative change to telephone and paper-based statutory provisions.\textsuperscript{156}

Electronic commerce has specific characteristics which differ from physical trade and commerce\textsuperscript{157} for example:

(a) Intelligent, interactive and capable presence in cyberspace;\textsuperscript{158}.

(b) Intangibility using the Internet for access;\textsuperscript{159}

(c) Irrelevance of geographic boundaries due to the element of intangibility in these transactions and the ability of enterprises to engage in global marketing using the Internet. In \textit{Dow Jones & Co Inc, v Gutnick},\textsuperscript{160} Gaudron J stated that:

\begin{quote}
There are significant commercial advantages in electronic financial transactions on the Internet which cause an increase in the amount of global electronic commerce activities.
\end{quote}

\begin{quote}
The regulation of electronic transactions and traditional paper based financial transactions would be improved by more consistent and technologically neutral legislation and policy to recognise both types of transactions.
\end{quote}

\begin{quote}
See Niv Tadmore, “The Interaction between tax treaties and e-commerce re-examined” dissertation, Deakin University 2004 Chapter 1 for an examination of all of these specific characteristics.
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
\end{quote}
It is ubiquitous, borderless, global and ambient in its nature. Hence the term ‘cyberspace’. This is a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge.\textsuperscript{161}

(d) Digitisation – the ability to communicate and deliver goods, services, software and other things by converting information and transferring over the Internet and then stored, copied or otherwise processed by computers;\textsuperscript{162}

(e) Low costs;\textsuperscript{163}

(f) Accessibility;\textsuperscript{164}

(g) Anonymity;

(h) Improved communication.

(i) Disintermediation;\textsuperscript{165}

(j) Integration of business functions;\textsuperscript{166}

(k) Integration with brick and mortar that is physical trade;

(l) Development of new business models selling a broad range of products, rights and services;\textsuperscript{167}

\textsuperscript{160} 2002] HCA 56; 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002).
\textsuperscript{161} Ibid (80).
\textsuperscript{164} \textit{OECD Round Table}, above n 159, 6; US Treasury, above n 159, (3.2.9).
\textsuperscript{167} Organisation for Economic Co-Operation and Development (‘OECD’), Technical Advisory Group on \textit{Treaty Characterisation of Electronic Commerce Payments, Tax Treaty Characterisation Issues Arising}

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(m) Electronic order processing of tangible goods;\textsuperscript{168}

(n) Electronic ordering and downloading of digital goods;\textsuperscript{169}

(o) Application service provider who has software applications hosted on computer servers owned and operated by provider;\textsuperscript{170}

(p) Data warehousing where the customer stores computer data on computer servers owned and operated by providers and retrieve data remotely;\textsuperscript{171}

(q) Customer support over computer network;\textsuperscript{172}

(r) Electronic access to professional advice;\textsuperscript{173}

(s) Access to interactive websites with subscribers paying a fixed periodic fee for access to the website;\textsuperscript{174}

(t) Sales referral program where the online provider pays sales commission to the website operator for referring sales leads to the online provider;\textsuperscript{175}

(u) Streamed web-based broadcasting using the database for the user and broadcaster subscription and advertising.\textsuperscript{176}

This is an important theme in this thesis as globalisation and electronic commerce have had a substantial impact on policy making in Australia since the 1990s. The \textit{Wallis Inquiry} is a specific example of this review by government of national and global trends

\textsuperscript{168} OECD Characterisation Report, Category 1, Annex 2, above n 167.
\textsuperscript{169} OECD Characterisation Report, Category 2, Annex 2, above n 167.
\textsuperscript{170} Ibid, OECD Characterisation Report, Category 9, Annex 2 above n 167.
\textsuperscript{171} OECD Characterisation Report Category 13, Annex 2. above n 167.
\textsuperscript{172} OECD Characterisation Report Category 14, Annex 2, above n 167.
\textsuperscript{173} OECD Characterisation Report Category 18, Annex 2, above n 167.
\textsuperscript{174} OECD Characterisation Report Category 21, Annex 2, above n 167.
\textsuperscript{175} OECD Characterisation Report Category 24, Annex 2, above n 167.
\textsuperscript{176} OECD Characterisation Report Category 26, Annex 2. above n 167.
before instigating significant law reform. Various international agencies such as the Organisation for Economic Cooperation and Development (‘OECD’)\textsuperscript{177}, the United Nations Educational, Scientific and Cultural Organisation (‘UNESCO’)\textsuperscript{178}, World Bank and the International Monetary Fund (‘IMF’)\textsuperscript{179} have influenced Australian policy and law making with the rise of neo-liberalism and market based reform of financial products on a global and national scale. The United Nations Commission on International Trade Law (‘UNICITRAL’) Working Group on Electronic Commerce developed the Model Law on Electronic Commerce in 1996 and 2001\textsuperscript{180}.

2.1 Impact of electronic commerce on finance law and financial services law

Electronic commerce is merely a subset and an example of globalisation and is not the same as globalisation. Australian law reform in \textit{CLERP Paper Number 5} on ‘Electronic Commerce’ (‘\textit{CLERP Paper Number 5’}) contained proposals\textsuperscript{181} to reform electronic commerce and ensures the flexible operation of the Law to such commerce. The

\textsuperscript{177} The Organisation for Economic Cooperation and Development (‘OECD’) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. It is a forum of countries promoting democracy and the market economy, providing a platform to compare policy experiences, finding answers to common problems, identifying good practices, and co-ordinating domestic and international policies of its members.

\textsuperscript{178} The United Nations Educational, Scientific and Cultural Organisation (‘UNESCO’) is a United Nations (‘UN’). Its purpose is to assist peace and security by encouraging international collaboration through education, science, and culture so as to create universal respect for justice, the rule of law, and human rights together with fundamental freedoms proclaimed in the UN Charter "UNESCO History". www.unesco.org.

\textsuperscript{179} The International Monetary Fund (‘IMF’) is “an organization of 188 countries (as of April 2012), working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty.” The organization's stated objectives are to promote international economic cooperation, international trade, employment, and exchange rate stability, including by making financial resources available to member countries to meet balance of payments needs, \textit{IMF Articles of Agreement of the International Monetary Fund, Article 1 – Purposes}.


\textsuperscript{181} Most of these proposals have been inserted in the electronic commerce provisions of the fundraising reforms of the \textit{CLERP Act}, above n 61, the CLRA and the \textit{Payment Systems and Netting Act 1998} (Cth).
economic impact of electronic commerce is considered in CLERP particularly in the areas of market freedom, investor protection, information transparency, cost effectiveness, regulatory neutrality and business ethics and compliance.\textsuperscript{182} Electronic commerce is becoming increasingly important in all aspects of corporate and financial transactions. Recent law reform and ASIC policy reflect this growing trend to rely upon electronic means of doing business and engaging in business communication.\textsuperscript{183} ASIC will regulate and enforce developments in electronic commerce in fundraising in Australia\textsuperscript{184} and will continue to participate in the International Organisation of Securities Commission (‘IOSCO’) in relation to electronic commerce and the Internet.

2.2 Use of electronic technology by companies

The Corporations Act allows companies to use electronic ways and paper-based means of communication with their members and ASIC. The Corporations Act will specify the information that must be lodged or permitted to be inspected by ASIC, whilst the method

\textsuperscript{182} CLERP Paper Number 5 on Electronic Commerce (AGPS, 1997) (‘CLERP Number 5’), above n 19, 6-8.
\textsuperscript{184} ASIC Regulatory Guide 107 on Electronic Prospectuses, Centre for Professional Development and the ASIC Regulatory Guide 141 on Offers of Securities on the Internet, Centre for Professional Development. In this Regulatory Guide, ASIC states that it is not intended for ASIC to regulate offers, invitations and advertisements of securities on the Internet if the offer, invitation or advertisement is not aimed at people in Australia, there are substantial disclaimers which have meaning as to jurisdiction and there is no misconduct or significant effect on consumers or markets in Australia. See ASIC Class Order 99/0043. Also, ASIC Regulatory Guide 150 on Electronic Applications and Dealer Personalised Applications, Centre for Professional Development grants relief from the Law so that issuers use an electronic system to receive securities applications without any need to use the electronic copies of the paper version of the applications forms in a paper prospectus. In 2001, ASIC released IR 01/08 Electronic applications for life insurance and superannuation products which facilitated the use of electronic disclosure documents and electronic applications by life companies and superannuation trustees (issuers).
of communication will be specified in the Corporations Act. Documents will be able to be received, fees collected and requests for service dealt with by ASIC electronically. The Corporations Act recognises the retention of company records electronically.

Meetings can be held using electronic technology if members have a reasonable opportunity of participation in the meeting. The Corporations Act sets out the results of a member not being given a reasonable opportunity to participate at a meeting of the company. Facsimile methods may be used to serve notices of members' meetings. Meetings of the company can involve participants located at different places. This does not require authorisation in accordance with the constitution of the company as long as some requirements are met. The constitution of the company may however limit the use of electronic technology at meetings of the company. A directors’ meeting may be held using any form of electronic technology provided that all directors have approved.

2.3 Electronic Transactions Act 1999 (Cth)

The Electronic Transactions Act 1999 (Cth) was based on the recommendations of the Electronic Commerce Expert Group which had been set up by the Attorney General to discuss legal issues raised in electronic commerce and assists in expanding paper-based

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185 In 1998, ASIC started an Electronic Company Registration pilot project to review the introduction of the registration fully in electronic form of new Australian companies on the Internet. This Electronic Company Registration allows clients of ASIC to prepare documents for registration electronically, digitally sign the documents using private keys stored on cryptographic smart cards and then send them electronically to ASIC via the Internet. ASIC would then authenticate and process the electronic documents and then forward back a certificate of registration to the client with ASIC’s electronic lodgment system (‘EDGE’).

186 Section 249S of the Corporations Act, above n 4.

187 Section 1322 of the Corporations Act, above n 4.

188 Under section 248D of the Corporations Act, above n 4.

rules to technology-neutral transactions. For this reason, this legislation is relevant to
electronic commerce transactions regulation.

This Electronic Commerce Expert Group recommended to the Attorney General that the
Commonwealth Government should enact legislation establishing a broad framework for
electronic commerce based upon the *UNCITRAL Model Law on Electronic Commerce* in
1996\(^{190}\). This *Electronic Transactions Act 1999 (Cth)* allowed for the legal recognition of
electronic transactions with electronic communications effectively meeting the legal
requirements for signature, writing, document production and document retention\(^{191}\). The
two principles of the *Electronic Transactions Act 1999 (Cth)* were functional equivalence
or media neutrality (that is involving equality of treatment for paper-based transactions
and electronic documents based transactions) and technology neutrality (that is no
discrimination in the law against different forms of technology).\(^{192}\)

The general rule in this *Electronic Transactions Act 1999 (Cth)* was that the use of
electronic communication in a transaction would not invalidate the transaction. The legal
obligations of persons would be met with some exceptions by the use of electronic
communication in transactions. Electronic communication would generally be able to be
used to satisfy requirements under Commonwealth legislation for a person to:

- give written information;
- sign a document;

\(^{190}\)The United Nations Commission on International Trade Law (‘UNCITRAL’) Working Group on
Electronic Commerce Model Law on Electronic Commerce was developed in 1996.

\(^{191}\) *Electronic Transactions Act 1999 (Cth).*

\(^{192}\) Gabriël A. Moens, ‘Bank Confidentiality and Governmental Control of Exchange Operations and of
their Unlawful Effects, Australia”, above n 5.
produce a document; or
• retain a document.\textsuperscript{193}

\section*{2.4 ePayments Code}

In 2011, a new \emph{ePayments Code} was released by ASIC which provides a best practice consumer protection regime for electronic payment products with a transition period ending on 20 March 2013.\textsuperscript{194} The \emph{ePayments Code} provides key consumer protections in cases of fraud and unauthorised transactions and plays an important role in the regulation of electronic payment facilities in Australia.\textsuperscript{195}

This new ePayments Code has been released after a review of the previous \textit{Electronic Funds Transfer Code of Conduct} (‘\textit{EFT Code}\textsuperscript{196}’) to ensure the Code covers all consumer electronic payment products, not just those from traditional banking organisations. This \textit{Electronic Funds Transfer Code of Conduct} (‘\textit{EFT Code}\textsuperscript{197}’) was a voluntary Code which covered all financial institutions in Australia. This \textit{EFT Code} dealt with Automatic Teller Machines (‘ATMs’) and EFTPOS facilities used by financial institutions.\textsuperscript{198} This review suggested changes to the \textit{EFT Code} including ‘light touch’

\begin{footnotesize}
\textsuperscript{193} \textit{Electronic Transactions Act 1999} (Cth), above n 191.
\textsuperscript{194} In 2011, ASIC released a new \emph{ePayments Code} which provides a best practice consumer protection regime for electronic payment products.
\textsuperscript{195} Ibid.
\textsuperscript{196} The previous code was the \textit{Electronic Funds Transfer Code of Conduct} (‘\textit{EFT Code}\textsuperscript{196}’).
\textsuperscript{197} Ibid.
\textsuperscript{198} In 2010, ASIC released \textit{Report 218 Electronic Funds Transfer Code of Conduct Review: Feedback on CP 90 and Final Positions}, which summarised the outcome of the recent review of the \textit{Electronic Funds Transfer Code of Conduct} (‘\textit{EFT Code}\textsuperscript{196}’). The \textit{EFT Code} was the voluntary code that provided protection for consumers using electronic payments (including ATMs, EFTPOS, credit cards, online payments, internet banking and BPAY). The code provides key consumer protections in cases of fraud and unauthorised transactions. Previously, an ASIC Working Group recommended in a \textit{Discussion Paper on the Expanded EFT Code of Conduct} on 26 July 1999 that the Electronic Funds Transfer Code of Conduct be expanded to cover all forms of electronic banking. This ASIC Working Group Discussion Paper
\end{footnotesize}
requirements for low value products (with a maximum balance of $500); with the agreement of consumers allowing electronic delivery of code-disclosures (for example notices of changes to fees and periodic statements); and a new regime to resolve mistaken ‘internet banking’ payments.199

2.5 Australian Guidelines for Electronic Commerce

The Australian Guidelines for Electronic Commerce were released in 2006200 by the Australian Government to encourage consumer confidence in electronic commerce by providing guidance to businesses on how to deal with consumers when engaged in business to consumer electronic commerce. These guidelines updated and replaced the previous Australian E-Commerce Best Practice Model, which had been released by the Australian Government in May 2000 and reviewed in 2003201.

These Guidelines provide guidance on electronic commerce transactions with consumers in relation to: fair business practices; accessibility and disability access; advertising and marketing; engaging with minors; disclosure of the identity and location of a business; disclosure of the terms and conditions of a contract; the introduction of mechanisms for concluding contracts; adopting privacy principles; using and disclosing information about

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199 See the 2010 Report 218 Electronic Funds Transfer Code of Conduct Review: Feedback on CP 90 and Final Positions which reviewed the EFT Code, above n 198.
200 The 2006 Australian Guidelines for Electronic Commerce provide guidance to businesses on how to deal with consumers when engaged in business to consumer electronic commerce.
201 These 2006 Australian Guidelines for Electronic Commerce updated and replaced the previous Australian E-Commerce Best Practice Model, which had been released by the Australian Government in May 2000 and reviewed in 2003.
payment, security and authentication mechanisms; creating fair and effective procedures for handling complaints and resolving disputes; and the law and forum for the resolution of contractual disputes.$^{202}$

The Checklist for Business-to-consumer E-commerce in Australia was issued by the Australian Government in 2006 to improve business awareness of the key issues to be considered when dealing with consumers through electronic commerce.$^{203}$

### 2.6 Electronic transfer of legal titles to debt securities

The transfer of legal title to debt securities$^{204}$ will be undertaken electronically under new amendments to the Commonwealth Inscribed Stock Act 1911 (Cth)$^{205}$ and regulations.

The disclosure requirements in the Corporations Act$^{206}$ applies to offers of securities that are received in Australia regardless of where any resulting issue, sale or transfer occurs and whether the securities were issued outside Australia or in bodies located outside Australia$^{207}$. Therefore offers electronically transmitted internationally into Australia are regulated under the Corporations Act.$^{208}$ Offers of securities received outside Australia

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$^{202}$ Ibid.

$^{203}$ See the Checklist for Business-to-consumer E-commerce in Australia.

$^{204}$ Debt securities are either bearer securities (such as bills of exchange, certificates of deposit and promissory notes) or registered securities (such as Commonwealth Government Securities). CLERP Number 5 Paper, above n 19, 47.

$^{205}$ Commonwealth Inscribed Stock Act 1911 (Cth) and regulations.

$^{206}$ Chapter 6D of the Corporations Act, above n 4.

$^{207}$ See subsections 5(4) and 700(4) of the Corporations Act, above n 4; and the case of Australian Securities Commission v Cooke (1996) 22 ACSR 580; 15 ACLC 435.

$^{208}$ Chapter 6D of the Corporations Act, above n 4, and Explanatory Memorandum to the Corporate Law Economic Reform Program Act 1999 (Cth) 8.59–8.64.
will therefore not be regulated by the *Corporations Act*\textsuperscript{209} even if the securities are issued or sold in Australia or are securities in bodies with an Australian location.

**2.7 Electronic prospectuses and application forms**

Disclosure documents may be used electronically (as envisaged in the *Corporate Law Economic Reform Program Act 1999 (Cth)*) under the *Corporations Act*.\textsuperscript{210}

**3 ASIC policy on international issues in finance law and financial services law**

Australian regulation of financial products and financial services is influenced by international trends particularly due to the global nature of the financial markets where firms and institutions are represented in many jurisdictions and are able to move their operations quickly between regulatory regimes. For example:

\textsuperscript{209} Chapter 6D of the *Corporations Act*, above n 4.

\textsuperscript{210} Under section 720 of the *Corporations Act*, above n 4, all directors must consent in writing to the issue of the disclosure document. Part 2N.2 of the *Corporations Act*, above n 4, applies to the lodgment of disclosure documents so:

- a document may be lodged and electronically authenticated if agreed to by the person lodging the document and ASIC under section 352 of the *Corporations Act*, above n 4. This approval may be given by ASIC pursuant to subsection 352(1)(b) for the electronic lodgment of disclosure documents (ASIC Regulatory Guide 152 paragraph 26);
- the application form may be included in, or accompanied by the disclosure document: subsection 723(1) of the *Corporations Act*, above n 4;
- offers received in Australia regardless of where the securities are transferred or issued are subject to Chapter 6D and subsection 700(4) of the *Corporations Act*, above n 4;
- there is a prohibition on securities hawking by the making of unsolicited offers of securities, whether by meeting with another person or by a telephone call (and not by any eligible telecommunications services which could have prevented electronic dissemination of offers) under subsection 736(1) of the *Corporations Act*, above n 4;
- there are specific exclusions from the prohibition on the hawking of securities for offers of quoted securities by licensed dealers, offers by dealers to their clients, offers to professional investors and offers to sophisticated investors under subsection 736(2) of the *Corporations Act*, above n 4; and
- there will be remedies for the securities to be returned and refunds issued to persons who acquire securities because of an unsolicited offer under section 738 of the *Corporations Act*, above n 4.
• *ASIC Regulatory Guide 72 ‘Foreign Securities Prospectus Relief’* which allows to exercise its powers to allow the offering in the Australian market of securities issued by foreign companies by means of foreign prospectuses with additional information necessary to meet local disclosure requirements\(^{211}\);

• ASIC Regulatory Guide 141 ‘Offer of Securities on the Internet’ where ASIC (like other securities regulators in different jurisdictions) focuses on those securities offered on the Internet for Australian investors. This means that ASIC is not endeavouring to regulate all offers placed on the Internet on a global basis that could possibly be accessed by Australian investors;\(^{212}\)

• ASIC ‘Market Stabilisation’ policy to allow persons in significant initial public offerings to stabilise markets where they acquire the securities on the secondary market for a support the price of the securities\(^{213}\);

• ASIC ‘Multi Jurisdictional Takeover Bids’ which allows takeover offers for some ‘stapled’ securities comprising of a share of an Australian company and a share in an overseas entity.\(^{214}\)

### 3.1 ASIC Regulatory Guide 150

If an offer of securities requires a disclosure document, the securities may only be issued or transferred where the issuer or transferor of the securities had reasonable grounds to believe that an application form was included in, or accompanied by, the disclosure

\(^{211}\) See the *ASIC Regulatory Guide 72 ‘Foreign Securities Prospectus Relief’*.

\(^{212}\) See the *ASIC Regulatory Guide 141 ‘Offer of Securities on the Internet’*.

\(^{213}\) ASIC Information Release 05-13 on market stabilisation replaced Information Release 00-31 ASIC interim guidance on market stabilisation in relation to overseas developments and legislative changes.

document when the form was distributed by the issuer or transferor; and the form was
copied or directly derived by the applicant from the original form.\textsuperscript{215}

In ASIC Regulatory Guide 150 ‘Electronic applications and dealer personalised
applications’ paragraph 41, a disclosure document which is required to be distributed to
the applicant is a 'substantially faithful copy' of the disclosure document lodged with
ASIC. Where an investor receives an electronic version of a disclosure document lodged
in paper form, the question is:

- whether the electronic version of the disclosure document is a copy of the disclosure
document that was lodged; and
- whether an electronic application form distributed with the disclosure document
which is in electronic form, or copied by an investor from the electronic application form,
meets the requirements of the \textit{Corporations Act}.\textsuperscript{216}

\section*{3.2 Product Disclosure Statement and electronic commerce}

A Product Disclosure Statement may be issued electronically and in paper form\textsuperscript{217} as a
Product Disclosure Statement may be made available to a person in any way agreed to by
the person or the agent of the person.\textsuperscript{218}

\footnotesize{\textsuperscript{215} Section 723 of the \textit{Corporations Act}, above n 4.\
\textsuperscript{216} Section 723 of the \textit{Corporations Act}, above n 4. Also, ASIC Class Order 00/44 grants relief from the
requirements of section 723 where an issuer lodges a paper disclosure document whilst distributing an
electronic version of the disclosure document with an electronic application form due to the differences
between the paper and electronic versions and ASIC Regulatory Guide 150 ‘Electronic applications and
dealer personalised applications’ (42).\
\textsuperscript{217} Section 1015C of the \textit{Corporations Act}, above n 4.\
\textsuperscript{218} Corporations Regulation 7.9.02A and subsection 1015C(4) of the \textit{Corporations Act}, above n 4. Also
under Corporations Regulation 7.9.02B, a Product Disclosure Statement may be electronic under section
1015C(5)(b) of the \textit{Corporations Act}, above n 4, in that a statement that is to be given in electronic form}
3.3 Regulation of offers on the Internet

An offer of securities for subscription or purchase on the Internet by an Australian or foreign issuer or seller may be accessed by potential investors in Australia and overseas. If an Australian investor accesses the offer of securities on the Internet in Australia then the offer is received in Australia even though such an offer may not have any links or intention to be marketed in Australia.219

In ASIC Regulatory Guide 141, ASIC allows offers of securities, invitations and advertisements on the Internet in relation to securities that can be accessed on the Internet in Australia if:

- the offer is not aimed at persons in Australia;
- the offer has a meaningful disclaimer as to jurisdiction;
- the offer will have little effect on Australian investors; and
- there is no misconduct by the offeror.220

ASIC Class Order 00/97 exempts offers or invitations made on the Internet by a ‘telegraphic, telephonic or other like service’ which are available to or received by persons in Australia.221 The effect of this exemption is that such offers or invitations would not breach the Corporations Act222 where the offers or invitations are not directed

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219 Chapter 6D of the Corporations Act, above n 4.
220 ASIC Regulatory Guide 141.
221 ASIC Class Order 00/97.
222 Sections 727 or 734 of the Corporations Act, above n 4.
towards and cannot be accepted by persons in Australia. This relief may be varied or revoked if notices are published on the Internet in order to overcome this objective.

3.4 ASIC Regulatory Guide 176

ASIC Regulatory Guide 176\(^{223}\) outlines how ASIC will use its powers under the Corporations Act to facilitate entry into the Australian market of foreign providers of wholesale financial services who are regulated by overseas regulatory authorities. In PS 176, ASIC refers to these wholesale providers as 'foreign financial services providers' ('FFSPs') and explains how ASIC may, as contemplated by the legislation and subject to certain conditions, provide relief from the AFS licensing requirements where a wholesale FFSP is regulated by an overseas regulatory authority approved by ASIC.\(^{224}\) Relief from the AFS licensing requirements may be granted to a wholesale FFSP where they can satisfy a two-pronged equivalence test. For an applicant to fulfil this equivalence test, ASIC must be confident that:

- the applicant's overseas regulatory authority delivers sufficiently equivalent regulatory outcomes to the Australian regulatory regime; and
- there are effective co-operation arrangements between ASIC and that overseas regulatory authority.\(^{225}\)

\(^{223}\) ASIC Regulatory Guide 176.
\(^{224}\) Ibid.
\(^{225}\) Ibid.
3.5 ASIC Regulatory Guide 72 ‘Foreign securities prospectus relief’ for foreign companies offering securities in Australia

ASIC grants relief in some circumstances in Regulatory Guide 72 from the prospectus provisions in Ch 6D of the Corporations Act for foreign companies that offer securities in Australia (where the cost of compliance with the Australian prospectus provisions would be greater than the regulatory benefits of compliance)\textsuperscript{226}. This policy recognises that the disclosure requirements of some other countries can be adequate to allow Australian investors to make an informed decision whether to participate in securities offerings without an Australian prospectus or without the foreign company complying with all Australian prospectus requirements.\textsuperscript{227} This has the advantage for Australian shareholders in that they can participate in offers of securities and rights issues that might not otherwise be extended to them because of the costs of meeting the regulatory requirements of multiple jurisdictions.

In Regulatory Guide 72 paragraphs 7, 8 and 9, ASIC grants relief from the obligations in the Corporations Act that require that a prospectus must accompany an offer of securities received in Australia (unless there is an exemption) and rights issues regardless of the place of incorporation of the offeror. This relief is granted where:

(a) a foreign offeror has complied with a disclosure regime offering similar levels of investor protection to the Australian prospectus requirements; or

(b) very few offers are made to Australians.\textsuperscript{228}

\textsuperscript{226} ASIC Regulatory Guide 72 ‘Foreign securities prospectus relief’ for foreign companies offering securities in Australia.

\textsuperscript{227} Ibid.

\textsuperscript{228} Ibid 7-9.
3.6 ASIC Regulatory Guide 72 ‘Foreign securities prospectus relief’ for disclosure relief for foreign scrip takeovers

ASIC Regulatory Guide 72 paragraphs 13 and 24 states the substantive disclosure relief granted by ASIC for foreign scrip takeovers. A foreign scrip takeover is a foreign regulated takeover where scrip forms all or part of the consideration being offered for securities in the bid class. If there was no relief available, an offer of scrip to Australian holders under a foreign scrip takeover may require a prospectus or a Product Disclosure Statement (‘PDS’).229

ASIC Class Order [CO 09/68] Prospectus and PDS relief for foreign scrip takeovers230 gives relief from the prospectus and PDS provisions in Parts 6D.2 and 6D.3 and s1012A, 1012B and 1012C for offers of securities or interests in managed investment schemes under foreign scrip takeovers where:

(a) Australian residents hold no more than 10% of the bid class securities or interests (determined at a time, fixed by the bidder, in the 30-day period before offers are first made under the takeover);

(b) the bid class securities or interests are quoted on an approved foreign market and the takeover is regulated in the jurisdiction of an approved foreign market. The scrip offered as consideration for the acquisition of bid class securities or interests does not have to be in a class that is quoted on an approved foreign market.

(c) for a bid document provided to foreign offerees:

229 ASIC Regulatory Guide 72 ‘Foreign securities prospectus relief’ for disclosure relief for foreign scrip takeovers.

230 ASIC Class Order [CO 09/68] Prospectus and PDS relief for foreign scrip takeovers.
(i) an English version of the bid document; or

(ii) if no English version of the bid document is available, the bid document in the language typically used by the target to communicate with holders of bid class securities or interests, is given or made available to Australian offerees;

(d) the offer made to Australian offerees is on terms that are at least as favourable as offers that are made to foreign offerees; and

(e) the person relying on the relief takes all reasonable steps to ensure that the foreign scrip takeover is carried out in accordance with the relevant foreign regulatory requirements.\(^{231}\)

The requirement in paragraph 1012A(e) is replaced with a requirement that the licensee has no reason to suspect that the foreign scrip takeover is not made in accordance with the relevant foreign regulatory requirements where a financial services licensee who is not an associate of the bidder wishes to rely on relief from section 1012A.\(^{232}\)

Whether securities are held by Australian residents for the purposes of ASIC Regulatory Guide 72.14(a) will be decided by reference to:

(a) the address of the beneficial owner of the securities where this is revealed by:

(i) reports of beneficial ownership in the jurisdiction of incorporation of the target or in the jurisdiction of an approved foreign market on which the securities are quoted, where the reports:

(A) are publicly available; and

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\(^{231}\) Ibid.

\(^{232}\) Ibid.
(B) have been lodged with the regulator or market operator in the relevant jurisdiction; or

(ii) information otherwise known to the bidder or a related body corporate; or

(b) where the address of the beneficial owner is not included in such publicly available reports or otherwise known to the bidder or its related bodies corporate, the address recorded in the register of members of the target in respect of the securities.233

The reason for this relief is that the requirement to prepare an Australian prospectus or PDS may prevent a bidder from offering securities to Australian members of a target as an alternative to cash consideration. Australian members could therefore be prevented from receiving their consideration in the form of securities. To assist international business, there should not be excessive costs or obstacles in Australian regulatory requirements on foreign business transactions unless there is a clear need for Australian investor protection. The requirement to prepare a prospectus or PDS imposes costs on a foreign business transaction which are not justified when the transaction is subject to comparable regulation in another jurisdiction, and only a small number of the target securities are held by Australian investors. Investment in a foreign market constitutes acceptance by Australian investors of the jurisdiction of the foreign law.

4. International Regulatory Developments

Due to the rapidly growing nature of electronic transactions on the global markets, it is essential that domestic legislators and regulators review and incorporate where applicable overseas statutory and regulatory developments.

233 Ibid.
4.1 IOSCO

The International Organisation of Securities Commissions (“IOSCO”) has a membership of securities and futures regulators from many overseas jurisdictions and affiliate members such as exchanges and industry associations.234

4.1(a) Principles of Securities Regulation

IOSCO published in September 1998 a set of Objectives and Principles of Securities Regulation which recognises the varying manner in which different jurisdictions carry out regulation.235 These principles however provide for the practices of securities regulation which IOSCO considers form the basis for effective securities regulation. The Task Force on the Implementation of the IOSCO principles considered the process for assessing compliance with the principles amongst its members. The Task Force also liaised with international financial institutions (such as the World Bank and the IMF) in their use of the Principles. 236

4.1(b) IOSCO Internet Policy

An IOSCO Technical Committee report entitled ‘Securities Activity on the Internet’ in 1998 stated that the aims of international securities regulations and regulators are:

• the protection of investors;

• making sure that securities markets are fair, efficient and transparent; and

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234 International Organisation of Securities Commissions (“IOSCO”).
235 IOSCO published in September 1998 a set of Objectives and Principles of Securities Regulation (available on its website at www.iosco.org) which recognises the varying manner in which different jurisdictions carry out regulation.
236 Ibid.
• reducing systemic risk.  

IOSCO was of the view in this report that the fundamental principles of securities regulation can, and should, apply to securities activity on the Internet. These principles would not be altered by the medium used on the Internet. The Internet is regarded as beneficial to the conduct of securities business particularly as it provides greater availability of information. Securities regulators should not limit the legitimate use of the Internet by participants in the securities markets and there should be transparency and consistency in the regulation of the Internet. Regulators and self regulatory organisations should assist market participants and markets to understand the way in which registration, licensing and other regulatory requirements apply to offers and advertisements made on the Internet. There were two further IOSCO Technical Committee reports being ‘Securities Activity on the Internet II’ in 2001 and ‘Securities Activity on the Internet III’ in 2003.  

4.2 Other International Standards

4.2 (a) Joint Forum

The Joint Forum on Financial Conglomerates was created in 1996 by IOSCO, the Basel Committee and the International Association of Insurance Supervisors (‘IAIS’) to deal with the supervision issues affecting financial conglomerates that operate internationally. The Joint Forum consists of bank, insurance and securities supervisors representing

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237 An IOSCO Technical Committee report ‘Securities Activity on the Internet’ which was released in 1998.
238 Two IOSCO Technical Committee reports being ‘Securities Activity on the Internet II’ in 2001 and ‘Securities Activity on the Internet III’ in 2003.
each supervising constituency with many countries represented on the Joint Forum.239

4.2 (b) Basel Core Principles of Effective Banking Supervision

These Basel Core Principles of Effective Banking Supervision principles set out the underlying elements for effective banking supervision, licensing and structure, prudential regulations and requirements, methods of ongoing banking supervision, information requirements, formal powers of supervisors and cross-border banking.240

4.2(c) IAIS Core Principles

The IAIS Core Principles enable the evaluation and improvement by Member and non-Member governments of the legal, institutional and regulatory framework for corporate governance in their countries. Also these Principles assist stock exchanges, investors, corporations and other parties in developing corporate governance. These Principles provide benchmarks to allow an understanding of the comparability of countries which adopt these standards.241

5. Conclusion

This Chapter examined how electronic commerce (as a manifestation of one of the forms of globalisation) has influenced and changed Australian finance law and financial services law. This legislative and policy impact on these important areas of law demonstrates the range of consequences that have resulted from the increasing effect of

239 Joint Forum on Financial Conglomerates was created in 1996 by IOSCO, the Basel Committee and the International Association of Insurance Supervisors (‘IAIS’).
240 The Basel Core Principles of Effective Banking Supervision principles.
241 IAIS Core Principles.
globalisation on Australian domestic law reform in finance law and financial services law.

In addition, international policy and statutory developments (which quite commonly are the source of Australian policy and statutory developments) are also strongly influenced by globalisation and electronic commerce. The changes in the international financial system have formed the basis of the various law reform Reports, Inquiries and legislative reform in Australian finance law and financial services law.
CHAPTER SIX

GLOBALISATION AND THE GLOBAL FINANCIAL CRISIS

1. Global Financial Crisis

The Global Financial Crisis is a credit and debt crisis which arose in 2007 from a loss of confidence of investors in the value of US securitised mortgages. This caused a liquidity crisis for financial institutions and financial markets. The government response by the US Federal Reserve, Bank of England and the European Central Bank was to inject capital into financial markets and provide economic stimulus payments for consumers.242 In 2008, the crisis resulted in stock markets worldwide crashing and a period of high volatility, which resulted in a considerable number of banks, mortgage lenders and insurance companies failing in the following weeks.

Securitisation of the US subprime mortgages allowed the development of a financial banking crisis that began in the US in 2007 to 2009 but eventually affected most of the global economy. Failures of investors, banks and governments ensured individual and collective losses that developed into a systemic crisis which became the Global Financial Crisis.243

This Global Financial Crisis caused fear in the credit markets because of the ongoing defaults on subprime mortgages once the higher interest rates on the mortgages had to be paid by the customers. These mortgages had been bundled with other loans and on-sold as collateralised debt obligations (‘CDO’) to regional banks and municipal authorities. Claims of high ratings for these on-sold products were misleading as these mortgages were not as safe as US Treasury bonds.\textsuperscript{244} The bubble burst on these subprime mortgages once the higher interest rates began to apply to these mortgage holders. This caused problems for the banks and investment vehicles set up to deal with these mortgages. It particularly caused difficulties with the ability of banks to borrow from each other which was an important problem for the liquidity of the banks.\textsuperscript{245} This caused problems with the capital ratio of a bank to its assets which was similar to the problems suffered in the Great Depression between 1929 and 1933.\textsuperscript{246}

This financial crisis affected global markets generally as other economies were dependent on exporting to the United States and demonstrated how financial history was changing as financing techniques increasingly reflected global uncertainties in financial products.\textsuperscript{247}

In the period from 1998 and 2007, there had been an economic cycle of over exuberance which led to increased risk taking and increased leverage seeking higher returns. Large surpluses in some countries created excess global liquidity, which together with low

\textsuperscript{245} Ibid 9.
\textsuperscript{246} Ibid.
\textsuperscript{247} Ibid, 233.
interest rates increased the US current account deficit. There were also some regulatory failures, problems in the pricing of risks and bad lending practices in the US subprime mortgage market large number of bad loans not being repaid which created the Global Financial Crisis. Many investors, market participants and some credit rating agencies did not appear to understand the risks of their investment products. There was also an increased level of complexity in financial techniques and risks in on-selling parts of the securities in the financial system which led to many of the problems in the financial ‘meltdown’. 

The tremendous growth investment by banks in housing finance created a housing boom in many countries by 2005. In the context of the Global Financial Crisis, the problem for borrowers was that their security against foreclosure of their property was their income. This income became insecure with increased unemployment with the loss of the price of real property inhibiting borrowers from selling their properties easily in order to move to other areas that had more employment opportunities.

There were problems with both mortgage-backed securities as well as ‘over-the-counter’ credit derivatives markets which caused further problems as these ‘over-the-counter’ derivatives contracts were privately negotiated and traded in non-transparent and largely

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248 There were a number of causes of the Global Financial Crisis including excess liquidity increasing the US current account deficit; regulatory failures; and bad lending practices in the US subprime mortgage market which resulted in the non-payment of mortgages.

249 There were also problems with the pricing of the risks of the mortgages in the US subprime mortgage market.

250 There was too much complexity and risk in the financial techniques used during this period which caused poor investment decisions and bad losses during the Global Financial Crisis.

251 Niall Ferguson, above n 244, 236.

252 Niall Ferguson, above n 244, 268.
unregulated markets.\textsuperscript{253} The inadequate risk assessment mechanisms led to complications with ratings by credit rating agencies which affected the ability of investors to make informed decisions based on the risks involved in the product.

Mortgage backed securities were used where the underlying assets were the mortgages utilised in the process of securitisation which involved packaging illiquid assets (such as mortgages) into tradeable securities and then on-selling them to investors.\textsuperscript{254} Each of these sales provided liquidity for further lending by borrowers. Investors in the securities received a claim on the mortgage assets and a share in the cash flow. In this way, securitisation provided an alternative source of funding for financial institutions and distributed credit risk more broadly to a number of third parties. Securitisation also enabled financial institutions to package credit into either a lower risk security which could be created on the basis that another party had accepted a greater proportion of the risks for a higher interest rate or a higher-grade ‘AAA’ or super senior investments to replace government bonds which had previously provided a low risk investment. This process provided a source of funding for non-bank lenders. The problem was however that prior to the sub-prime crisis, there was an increase in the amount and variety of these securities and an underpricing of the risk attaching to them in order to attract investors seeking a higher yield.\textsuperscript{255} Credit rating agencies gave these securities investment grade

\textsuperscript{253} During the Global Financial Crisis, ‘over-the-counter’ derivative products caused problems because of their lack of regulation and transparency in the financial markets.

\textsuperscript{254} There were problems with the liquidity of mortgage backed securities during the Global Financial Crisis.

\textsuperscript{255} The use of securitisation techniques and the underpricing of risks for these investments caused many defaults and losses in the financial markets during the Global Financial Crisis.
ratings and included the 'higher risk' portions, which were taken on by investment banks, with the remainder being classified as lower risk.\textsuperscript{256}

There was a substantial re-pricing of these securities by the market during the US sub-prime crisis in late 2007 to early 2008, as there was a large amount of defaults in the mortgages behind the securities.\textsuperscript{257} Credit ratings agencies had to amend the ratings of all of the investment grade portion and many holders sold these securities as their investment mandates did not permit them to hold lower grade securities. Due to these factors, there was a liquidity crisis emerged in the market for these securities which created uncertainty about the value of these securities and caused further illiquidity for the banks.

In this financial crisis, there were three common factors which influenced the decision making of the parties in the transaction. These three factors were:\textsuperscript{258}

(a) complexity which resulted in a lack of understanding of the risks involved in the product;

(b) a lack of transparency in the trading on market (for example the securities were not traded in transparent or well-regulated markets and the accounting rules permitted the liabilities to be regarded as off-balance sheet). This contributed to the problem as it shielded investments in such securities from accounting and audit regimes normally applicable to banking institutions; and

\textsuperscript{256} Ibid.
\textsuperscript{257} Ibid.
\textsuperscript{258} There decision making of the parties in the transactions were affected by: too much complexity of the products; too little transparency of the price of the products and its risks; and the use of incentives by mortgage brokers.
(c) the use of incentives with no risk of loss for mortgage brokers which encouraged the creation of more mortgages with little regard to the quality of the mortgages as the mortgage brokers made their commission on the volume of loans originated. Investment bank executives were also given incentives to earn short-term profits and take risks particularly in securitisation transactions which resulted in little regard for longer-term consequences. These problems with the capital and risk management practices of banks resulted in a major market crisis for interbank funds and reductions in credit supply which then led to a credit crisis. The problem with this type of risk-based decision making by US banks, particularly with high incentives for bankers, was the substantial amounts of mortgage-backed securities which involved exposure to subprime risk in the US being kept on bank balance sheets. In addition, the banks used short term borrowing in the markets to finance these assets with their inherent risks. This loss of confidence in the credit and the ability of banks to roll over short-term loans against these securities meant that banks had to sell these assets which resulted in decreases in the prices of these assets. This devaluation of assets caused further funding problems for banks and bank borrowers as the banks limited the loans to borrowers to preserve liquidity. This loss of liquidity and creditworthiness of banks resulted in a financial crisis that affected economies nationally and globally.\textsuperscript{259}

Some solutions to these financial problems and risky behaviour by banks were to:

- mandate higher bank capital standards;

\textsuperscript{259} Ibid.
• reform corporate governance and management of conflicts of interests by banks;
• developing incentive structures and internal bank controls to limit risky behaviour;
• use regulation to encourage banks to hold more equity than debt in its balance sheets. The problem with this measure is that short term creditors have greater credit protection than shareholders whose equity holdings may be greatly affected by bank performance;
• lower bank leverage imposed in a higher capital requirement for banks. This will reduce the risk of bank defaults. This could raise the cost of equity raising for banks.\(^{260}\)

2. US Financial Crisis Inquiry Commission

The US Financial Crisis Inquiry Commission (‘US Financial Crisis Inquiry’)\(^ {261}\) was a ten member commission which investigated the causes of the financial crisis of 2007 to 2010. The US Financial Crisis Inquiry was created to analyse the failings of the Global Financial Crisis and to make findings about the nature of the crisis.\(^ {262}\)

After its examination of the issues, the US Financial Crisis Inquiry concluded that the crisis was avoidable and was caused by various factors:

\(^{260}\) These are some of the possible reforms and suggested regulatory changes to manage the liquidity problems and risk taking speculation and limited transparency or accountability of these financial techniques during the Global Financial Crisis.

\(^{261}\) The US Financial Crisis Inquiry Commission (‘US Financial Crisis Inquiry’) was created by section 5 of the Fraud Enforcement and Recovery Act of 2009 (Public Law 111-21) (US) in 2009.

\(^{262}\) The US Financial Crisis Inquiry was created by section 5 of the Fraud Enforcement and Recovery Act of 2009 (Public Law 111-21) (US) on May 20, 2009.
• widespread failures in financial regulation, including the Federal Reserve’s failure to stem the tide of toxic mortgages;

• dramatic breakdowns in corporate governance including too many financial firms acting recklessly and taking on too much risk;

• an explosive mix of excessive borrowing and risk by households and Wall Street that put the financial system on a collision course with crisis;

• key policy makers ill prepared for the crisis, lacking a full understanding of the financial system they oversaw; and

• systemic breaches in accountability and ethics at all levels.263

The US Financial Crisis Inquiry criticised the belief about the ability of markets to self-correct whilst financial institutions were allowed to self-regulate their own activities.264 This issue of self-regulation by financial institutions and the lack of key safeguards caused great risk to the banking system and ‘over-the-counter’ derivatives markets. Also, the fact that the financial firms could choose their regulator and supervisor of their activities allowed further weakness in the markets.265

The US Financial Crisis Inquiry found that the regulators lacked the political will to apply their powers to prevent misuse in the US securitised markets and were often pressured by financial institutions.266 The Securities and Exchange Commission could have prevented risky practices by the large investment banks by requiring the banks to

264 Ibid xviii.
265 See the findings of the US Financial Crisis Inquiry, above n 263.
266 Ibid.
have more capital. The Federal Reserve Bank of New York and other regulators could have limited the excesses of Citigroup before the financial crisis. Various government policy areas and regulators could also have more effectively regulated mortgage securitization. The failure of regulators to restrain these problems and to adequately rate these institutions contributed to the financial crisis.\textsuperscript{267}

The US Financial Crisis Inquiry was concerned by the degree to which the nation did not have the strength and independence of oversight of these financial institutions.\textsuperscript{268} In addition, this weak corporate governance and poor risk management of major financial institutions was found by the US Financial Crisis Inquiry to be a cause of this crisis. Prior to this financial crisis,\textsuperscript{269} the control of risk had been portrayed by these financial firms as an unnecessary limitation on the innovation of the finance industry. The large banks and bank holding companies took risks in having large exposures to subprime mortgage-related securities including synthetic financial products which used mathematical models as risk predictors.\textsuperscript{270}

These financial institutions had compensation systems for employees that favoured high risk products; thin capital arrangements; excessive borrowing; and breaches of corporate governance by financial institutions. There was leveraging by the banks in derivatives positions, as well the use of off-balance-sheet entities and inaccurate financial reporting to investors. These leverage arrangements and excessive borrowings applied to both

\textsuperscript{267} Ibid.
\textsuperscript{268} Ibid.
\textsuperscript{269} Ibid.
\textsuperscript{270} Ibid xix.
financial institutions such as Fannie Mae and Freddie Mac (the two government-sponsored enterprises) as well as families.\textsuperscript{271} The financial institutions had both high debt and risky assets in the mortgage markets.

A ‘shadow banking system’ that was not transparent and had high levels of short term debt was allowed to grow without investors having the protections of the traditional banking system.\textsuperscript{272} This shadow banking system involved multi-trillion dollar repo lending market, off-balance sheet entities, and the use of ‘over-the-counter’ derivatives with little safeguards.\textsuperscript{273} At the beginning of the Global Financial Crisis when there were difficulties in the US housing market and mortgages, these problems ensured a crisis as investors had too little information about the corporate difficulties, lack of transparency and high risk assets of the financial institutions. This lack of transparency also ensured that the regulators and policy makers (the Treasury Department, the Federal Reserve Board, and the Federal Reserve Bank of New York) did not have the full information about the developing crisis and so had difficulties with the ‘containment’ of the crisis.\textsuperscript{274}

There was a systemic breakdown in accountability as there was a weakening of standards of responsibility and ethics that worsened the financial crisis. The subprime mortgage crisis was made worse by mortgage fraud with lenders making loans to borrowers who

\textsuperscript{271} Ibid.
\textsuperscript{273} US Financial Crisis Inquiry Report, above n 263, xx.
\textsuperscript{274} Ibid xxi.
did not have the capacity to pay with the subsequent default by borrowers causing major losses to investors in mortgage securities.\textsuperscript{275}

Many of the problems in this financial crisis were caused by the failure by the financial firms, the markets and the regulators to account for the mistakes and poor judgments that resulted in systemic failures that caused major losses. In a collective fashion, a systemic set of policies was accepted by financial firms, investors, the market and regulators that gave rise to the financial crisis.\textsuperscript{276}

The US Financial Crisis Inquiry found that there were problems with the standard of mortgage loans which led to the securitisation of mortgages contributing to the financial crisis.\textsuperscript{277} These financial institutions, investors, and regulators mistakenly believed in the profitability of these highly rated mortgage securities. The participants in these mortgage securities including the speculators, the mortgage brokers, the lenders who issued the mortgages to the financial firms and the firms who then created the mortgage-backed securities collateralized debt obligations (‘CDOs’) (including CDOs squared and synthetic CDOs) assumed that the borrowers would continue to pay their mortgage payments. When these mortgage payments ended, systemically significant losses were incurred by the large financial institutions.\textsuperscript{278}

\begin{flushleft}
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\textsuperscript{275} Ibid xxii. \\
\textsuperscript{276} Ibid xxiii. \\
\textsuperscript{277} Ibid xxiii. \\
\textsuperscript{278} Ibid xxiv.
\end{flushleft}
In addition, unregulated ‘over-the-counter’ derivatives contributed significantly to this crisis due to their leverage and lack of transparency, capital, and collateral requirements.\textsuperscript{279} Credit default swaps (‘CDS’) facilitated mortgage securitizations as CDS were sold to investors to protect against the default or decrease in value of mortgage-related securities backed by risky loans. CDS also assisted with the development of synthetic CDOs which were bets on the mortgage related securities performance. These CDOs\textsuperscript{280} allowed multiple bets on the same securities which spread the risk of losses across the mortgage securities market. This speculative ‘betting’ increased the risk of the flow of loss across the market once defaults by investors started to occur in this speculative market in mortgage securities.

The credit rating agencies were ‘key enablers of the financial meltdown’ as their ratings on these speculative and risky investments misled investors and contributed to the financial crisis.\textsuperscript{281}

The US Financial Crisis Inquiry also outlined three other issues: capital availability and excess liquidity, the role of Fannie Mae and Freddie Mac and government housing policy.\textsuperscript{282} The Inquiry found that excess liquidity, low interest rates, widely available capital, and international investors seeking to put their money in US real estate assets were the essential prerequisites for a ‘credit bubble’.\textsuperscript{283} Participants in the market, government policy makers and regulators should have seen the possibility of these factors

\textsuperscript{279} Ibid.
\textsuperscript{280} Ibid.
\textsuperscript{281} Ibid xxv.
\textsuperscript{282} Ibid.
\textsuperscript{283} Ibid.
creating a financial crisis involving credit. The US Financial Crisis Inquiry found that excess liquidity did not by itself need to cause a crisis.\textsuperscript{284} It was the failures to prevent the excesses in the mortgage and financial markets that were the principal causes of the financial crisis.

The US Financial Crisis Inquiry also found that the government-sponsored enterprises Fannie Mae and Freddie Mac had a flawed business model as publicly traded corporations with an implied government backing and a public mission.\textsuperscript{285} They had the same failures of corporate governance and risk management and contributed to the financial crisis, but were not a primary cause. Their mortgage securities basically maintained their value throughout the financial crisis and did not cause the significant financial firm losses that were central to the financial crisis.\textsuperscript{286}

In conclusion, the US Financial Crisis Inquiry found that the US financial system is still unchanged from what existed prior to the financial crisis. The U.S. financial sector is now more concentrated than ever in several large, systemically significant\textsuperscript{287} institutions. The US Financial Crisis Inquiry found corporate governance breakdown, lapses in regulatory oversight and important flaws in the US financial system which could have been foreseen and prevented.\textsuperscript{288}

\textsuperscript{284} Ibid.  
\textsuperscript{285} Ibid.  
\textsuperscript{286} Ibid xxviii.  
\textsuperscript{287} Ibid.  
\textsuperscript{288} Ibid xxviii.
3. European sovereign debt crisis

The Global Financial Crisis subsequently became a sovereign debt crisis in 2010 involving certain European countries in the Eurozone (such as Portugal, Italy, Spain and Greece) as the credit and debt crisis of investors and financial institutions broadened to include a government fiscal debt problem. Since the Global Financial Crisis, there has been a period of economic recovery and greater global financial stability but this growth period has been recently affected since 2010 by concerns over sovereign risks in certain European countries.289 There are concerns about significant market and liquidity risk as well as sovereign debt risk if the ‘bailout’ loans given to various European countries did not succeed in preventing a further crisis in relation to sovereign debt and the Euro currency. In this sense the ongoing financial crisis involving the Eurozone is a sovereign debt crisis involving the fiscal position of countries as well as a banking crisis of financial institutions.290

Recent issues about the Eurozone relate to a steady loss of confidence and a drain on credibility which affected stock and bond markets of these European countries. Two years after the euro crisis began with concerns about the solvency of Greece291, further issues have been raised in relation to Spain and Italy’s sovereign debt. This sovereign debt crisis is worsening the Global Financial Crisis as most European banks have large losses on their sovereign debt loans to Portugal, Italy, Spain and Greece. Fears have been raised that Greece could default on its ‘bailout’ loans and end up with its own national

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289 The sovereign debt crisis in the Eurozone has worsened the ongoing effect of the Global Financial Crisis on global financial markets.
290 Ibid.
291 Ibid.
currency outside the euro zone.\footnote{Ibid.} This could potentially be followed by a collapse in Portugal with problems in the Spanish and Italian bond markets. There has been widespread volatility in the markets over concerns of possible European (or global) recession with capital problems in these countries. Equity markets could however benefit from such a global crisis if it involved the release of a large amount of global capital into the banking system with more ‘quantitative easing’ by governments to provide excess liquidity.\footnote{Ibid.} This could produce more sovereign risk of the governments however in the longer term.

European financial turmoil is currently affecting the financial markets of various countries other than Portugal, Italy, Spain and Greece. This may cause future problems for the common Euro currency in the Eurozone. The current financial crisis relates to the sovereign debt of governments rather than exclusively being the debt of banks and financial institutions.

The proposed remedy for this sovereign debt crisis by the European regulators and the International Monetary Fund is fiscal austerity measures with cutbacks in social services and government pensions.\footnote{Ibid.} The problem with this remedy is that it impacts disproportionately on individuals in society who receive a government pension or allowance or works in the public sector. These austerity measures can impact on living standards and be the catalyst for social unrest and market turbulence. These measures are

\footnote{Ibid.}

\footnote{Ibid.}

\footnote{Ibid.}

\footnote{Ibid.}
also in direct contrast to the economic stimulus and ‘quantitative easing’ actions of
governments after the Global Financial Crisis.²⁹⁵

These European countries are facing a crisis in confidence in the debt of their
governments as well as financial institutions. This can cause problems with investors
buying the bonds of the country affected with higher interest rates for the bonds with
some investors defaulting on their obligations.²⁹⁶ In this way the sovereign debt crisis
could become a banking crisis as the banks have invested in the debt of the
government.²⁹⁷

This lack of confidence also affects the ability of banks to engage in interbank lending
which makes the banks more dependent upon government and European Union ‘bailout’
loans. These concerns also contribute to an increased price for financial assets which
could lead to a further loss of confidence of investors and losses in financial transactions.

The Euro currency was meant to lower intra-area exchange rate risk and increase fiscal
and economic union of the Eurozone member countries. These problems with the
sovereign debt risk of certain European countries have increased fears of a slide in the
general value of the Euro currency. The Euro currency needs to be strengthened by
stronger economic governance and fiscal stability in the Euro currency countries.²⁹⁸

²⁹⁵ Ibid.
²⁹⁶ Ibid.
²⁹⁷ Ibid.
²⁹⁸ Ibid.

Sharon Horgan
The role of the European Financial Stability Facility and the European Central Bank (‘ECB’) in buying securities is aimed at easing the Euro currency area bond market pressures. These ‘bailout’ loans are aimed at improving financial stability of the European banks,\textsuperscript{299} who have been greatly exposed to sovereign debt, particularly in the use of European bank credit default swap (‘CDS’) spreads with sovereign CDS spreads.\textsuperscript{300} Sovereign risk has been made worse by cross-border bank exposures and consequent interbank funding strains and concerns about increased counterparty concerns which results in limited liquidity amongst banks across borders.

There is a need for greater liquidity support for secondary bond markets and the restructuring or recapitalizing of weaker banking institutions. Also, strategies to lower fiscal deficits and to encourage fiscal consolidation would improve market confidence. The use of ‘quantitative easing’ by central banks may be of assistance but it may also devalue the national currency.

Developments by European countries such as Germany and France to encourage and maintain ‘fiscal union’ and improvements in budgetary practices of certain European governments may assist in controlling and containing the ongoing financial crisis in Europe since 2010. The problem lies in the uniting of diverse countries with various budgetary practices and capital into one common currency. European union by its nature is an ongoing process as sovereign debt and a crisis of confidence in government and banking debt will continue to test the fiscal union and the resolve of European nations.

\textsuperscript{299} Ibid.
\textsuperscript{300} Ibid.
4. Financial market regulation after the Global Financial Crisis

The impact of the Global Financial Crisis has led to different approaches to regulatory change and financial developments.301 One approach was the immediate process of ‘containment’ which was designed to restrain on a short term basis the immediate impact of a financial crisis and create processes that will limit the crisis in that time period.302

This ‘containment’ approach appeared to be successful in the aftermath of the Global Financial Crisis and led to a period of economic prosperity in 2009 to 2010 with increased ‘stimulus’ economic spending and the creation of greater regulatory controls by governments. Unfortunately, the Global Financial Crisis as a credit crisis involving financial institutions and investors evolved into a sovereign debt crisis involving the governments of European countries. There Global Financial Crisis has continued due to the ongoing problems in the US and Europe since 2010.

The Global Financial Crisis is therefore no longer solely based on a banking crisis involving ‘bad’ debt and poorly regulated mortgage markets and financial instruments. It has also become the sovereign debt crisis of certain European countries since 2010. The new era of financial crisis is based on a more fundamental problem of sovereign debt as well as banking debt. This sovereign debt crisis of European governments in the European Union has involved different tactics as European central banks and European

301 There were various approaches used by governments and regulators such as ‘containment’ and regulatory reform to remedy the problems of the Global Financial Crisis, which includes the sovereign debt crisis in Europe.
Union representatives have turned to austerity measures and budgetary cutbacks as the major mechanism of reining in government debt. This mechanism bears its own risks of flattening national growth and consumer confidence and is a reversal of the government stimulus measures that were used after the Global Financial Crisis.

Regulatory controls have remained, however the uniform regulatory proposal of European governments to ensure this sovereign debt as well as banking debt does not continue to be a problem in the future.\textsuperscript{303} In this way, the various types of financial crisis in the Global Financial Crisis since 2007 have consistently involved proposals for regulatory controls and limits on financial markets and investments.

5. Economic freedom

5.1 Theory of ‘economic freedom’

‘Economic freedom’ or ‘economic liberty’ is based on historical liberal traditions which emphasise free markets, the freedom of economic initiative, the rule of law, freedom of contract and private property rights.\textsuperscript{304}

The ‘rule of law’ has been argued to contribute to the economic prosperity of countries as it ensures that all legal rules apply equally to everybody.\textsuperscript{305} Economic freedom is also argued to be a necessary condition for political freedom. In this view, centralised control

\begin{footnotesize}
\textsuperscript{303} In the current sovereign debt crisis, improvements to regulatory controls and the development of limits on financial markets have been considered by various governments since 2010 as a method of restraining the high risk speculation strategies of financial institutions that occurred during the Global Financial Crisis.
\textsuperscript{305} Ibid.
\end{footnotesize}
of economic activities is interpreted as necessarily involving political repression.\textsuperscript{306} Voluntary economic power balances political power and allows competitive capitalism to prosper in and provide freedom from political control.\textsuperscript{307} Economic control is also argued to be the control of the means of everyone’s ends.\textsuperscript{308}

5.2 ‘Economic freedom’ and pre-globalisation

The history of the global financial economy since the 1990’s answers some of these questions. The period of pre-globalisation in the 1990’s involved the advocacy by western governments and economic organisations of the merits of ‘neo-liberalism’ to encourage market forces and growth even if it resulted in some adverse consequences for the economy.\textsuperscript{309} This focus on ‘neo-liberalism’ was a partial reaction to prior financial problems in the 1980’s and 1990’s and the perceived need by policymakers to encourage the growth of national economies on a more global level.\textsuperscript{310} Competition, market forces and the increased acceptance of the concept of globalisation began in the 1990’s and subsequently developed in the time of economic prosperity in the early 2000 to mid 2007 period.\textsuperscript{311}

\textsuperscript{306} Ibid.
\textsuperscript{308} Friedrich Hayek, \textit{The Road to Serfdom} (University Of Chicago Press, 50th Anniversary edition, 1944) 95, ISBN 0226320618.
5.3 ‘Economic freedom’ and globalisation from 2000 to mid-2007

Many of the problems of the Global Financial Crisis originated in this earlier period from 2000 to mid-2007 which was a time of financial innovation, banking prosperity, market competition and global banking.

Financial innovation, which was the consequence of the need for market growth and the development of new financial techniques, resulted in the use of securitisation of mortgages and the use of derivatives.\textsuperscript{312} These financial instruments\textsuperscript{313} led to a disjunct between the originator of the debt and the financial institutions on-selling the instruments. Decisions made about the mortgage market were increasingly being undertaken by remote financial institutions who concentrated on the investment return of the debt instruments rather than the impact on mortgage holders. These financial developments, combined with unemployment, made the US subprime market unstable and easily impacted by higher interest rates and economic changes.\textsuperscript{314}

5.4 ‘Economic freedom’ and the Global Financial Crisis

The Global Financial Crisis required government intervention and regulatory controls to endeavour to restrain the current losses and to prevent future failures and ensure market confidence. The issue is whether there was too much regulatory control after the Global Financial Crisis from 2007 to 2009 and whether these regulatory controls should be

\textsuperscript{312} The securitisation of mortgages and the use of derivatives were common factors in the problems of the Global Financial Crisis due to the complex, non-transparent and speculative nature and the limited regulation of these financial techniques at that time.

\textsuperscript{313} The Global Financial Crisis, which includes the sovereign debt crisis in the Eurozone since 2010, involves financial transactions using a variety of financial instruments which were affected by high risk investments, losses and economic uncertainty in the financial markets.

\textsuperscript{314} Ibid.
continued in view of the current sovereign European debt crisis and the restrictions of these controls on the economic liberty of investors and financial markets.  

The Global Financial Crisis led to an initial policy of ‘containment’ to prevent immediate loss followed by a period of regulatory reform and economic stimulus to improve the economy.  

It has been argued that the regulatory responses to the US subprime mortgages crisis in the US housing market that began the Global Financial Crisis affected the ‘economic liberty’ of investors and the financial markets. These arguments about the nature of this regulatory reform relate to concepts of ‘economic freedom’ which had been the source of the ‘neo-liberalism’ thinking in the 1990’s and early 2000 to 2007 period.  

The legal and policy reforms which resulted from this crisis were essentially crisis management which has been argued to have restricted the ‘economic freedom’ or (the Adam Smith term) the ‘natural liberty’ of nations to allow market growth and banking prosperity.  

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316 Global Financial Crisis, above n 303.
317 Ibid.
5.5 Balance between ‘economic freedom’ and regulatory control

In regulatory history, there is always a tension between ‘economic freedom’ and ‘regulatory control’ in legal, economic and policy decisions affecting economies and markets. It is always a question of finding the balance between these two concepts at different times of economic outlook. At the time of the Global Financial Crisis, the concepts of ‘neo-liberalism’ and ‘globalisation’ were criticised as the intellectual source of some of the worst market excesses of that time. Governments internationally used economic stimulus and ‘quantitative easing’ at the time of this crisis to encourage economic growth and employment.

The argument therefore that ‘economic freedom’ or ‘natural liberty’ is being fettered by these regulatory proposals reflects the changing intellectual and economic arguments that underlie government legal and policy decision making. In times of economic prosperity and increased globalisation, ‘neo-liberalism’, ‘economic freedom’ or ‘natural liberty’ arguments have support as the instinct of markets and governments is to encourage the freedom of financial institutions and financial innovation. Market growth is given a greater precedence over regulatory control in such an environment.

When economic crisis results from these freer financial markets, then governments and investors turn to the need for greater regulation and control of the market.

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320 The Global Financial Crisis has led to a questioning of the role of ‘neo-liberalism’ and the free market in the global economy in view of the failures of the financial markets and economic losses of this time.
321 Ibid.
322 Ibid.
323 Ibid.
natural counterpart to ‘boom and bust’ to have the need for regulation being weighed against the need for economic growth.  

The US Financial Crisis Inquiry summarises the problems that arise from looser financial regulation and economic liberty and makes recommendations for regulatory improvements which would limit the liberty of the market.

Individual choices in financial markets always needs to balanced by government regulation so that financial crisis can be averted in the future. In this way, financial regulation is a necessary counterweight to the growth of financial markets. ‘Economic liberty’ is only restrained to a degree by financial regulation and not prevented as financial innovation will outstrip current regulatory controls and there will be continual financial change in the markets. Systemic risk is argued to be an economic, not a political, definition and therefore not to be applied to every financial crisis.

There is always a balanced choice to be made weighing up the need for regulation against the economic freedom necessary for future market growth. The tension lies in interpreting in different economic times the appropriate balance between economic freedom and regulatory control.


In times of prosperity such as the pre-globalisation time of the 1990’s or the early globalisation period from 2000 to 2007, there was the luxury of choice in encouraging innovation whilst improving regulation of financial markets and financial products.\textsuperscript{326} The legislative CLERP\textsuperscript{327} reform process in Australia utilised ‘economic functionalism’ in the regulation of financial products and services such as shares, derivatives, managed investment products, superannuation and insurance. The important issue with these financial products and services is that they were statutory and regulatory products based on economic similarity rather than legal characterisation. So various products such as shares, derivatives, managed investment products, superannuation and insurance which were legally distinct could have similar licensing and disclosure statutory requirements as these products were judged to be economically functional.

After the Global Financial Crisis began in 2007, there was a greater need by governments to rein in the ‘economic freedom’ and re-apply regulatory controls. This led to a further period of sovereign debt crisis since 2010, which involved the debt of certain European countries and the need for austerity programs in order to repay the ‘bailout’ loans of Europeans regulatory banks and institutions.

\textbf{6. Conclusion}

This Global Financial Crisis has had a dramatic impact on the perceptions of investors and governments about the appropriate role of globalisation in regulating financial services and markets. The boom time growth of the last ten years influenced bank and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{326} Ibid.
\item \textsuperscript{327} CLERP, above n 1.
\end{itemize}
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investor practices and resulted in an international credit crisis and a US housing crisis. The problems which arose in the Global Financial Crisis have had an ongoing influence on European sovereign debt and bank liquidity which is affecting government policies.

Australia\textsuperscript{328} has been protected during this period by strong commodities market growth but issues of market confidence and banks lending overseas may continue to be a problem and require ongoing regulation and control of banking capital requirements and investor protection. This may influence future law reform and policy developments in Australia.

\textsuperscript{328} The Australian commodities market growth has sustained the Australian economy during the Global Financial Crisis but problems with market confidence and Australian banks lending overseas has meant that Australian banks and the economy are affected by these global economic problems.
CHAPTER SEVEN

CONCLUDING REFLECTIONS ON GLOBALISATION
AND THE FINANCIAL SECTOR

This thesis has considered the nature of and the impact of globalisation on global and domestic market participants. There are competing views (depending upon the perspective) as to whether globalisation is a positive or negative force in domestic economies and markets. The global movement of capital and a lessening of the domestic constraints of a particular country may be balanced by increased costs of regulation (particularly disclosure) as domestic governments try to keep control over international financial transactions. However, this positive effect may be overridden by the increased costs of regulation in all of the countries in which the operator engages in business. As a market force, globalisation requires regulatory controls to ensure the best balance of competing interests of consumers, industry operators and domestic governments.

My two books Finance Law of Australia (LexisNexis Butterworths, 2001) and Horgan’s Law of Financial Services (Thomsons Reuters, Lawbook Company, 2003) form part of this thesis and show the effect of pre-globalisation and subsequent globalisation on Australian finance law and financial services\textsuperscript{329} law particularly in view of global policy and statutory developments in electronic commerce. These two books were written when globalisation began to influence law reform in Australia. The Wallis Inquiry Discussion

\textsuperscript{329} Ibid.
Paper and Wallis Inquiry Final Report\textsuperscript{330} analysed the nature of globalisation and reflected on the role of globalisation as a driver of change in Australian government policy and financial services law reform.

In the last decade, globalisation has significantly broadened its impact upon overseas law reform, regulatory and policy developments in both good and bad economic times as was demonstrated in the recent Global Financial Crisis. Australian policy and regulation has taken account of international law reform and policy proposals as influenced by globalisation including market manipulation and fraud, terrorist financing and anti-money laundering in the global markets. These two books also considered how Australian finance law and financial services law regulated electronic commerce requirements as a consequence of globalisation and electronic developments. The goal of this regulation and law reform was to facilitate international trade whilst protecting Australian consumers and markets.

These books interconnect with the issue of globalisation in the policy development, legislative reform and regulation processes in the last fifteen years. The first book Finance Law of Australia (LexisNexis Butterworths, 2001) dealt with reforms proposed in the Wallis Inquiry in relation to the financial system and finance law generally and the Australian background to proposals for globalisation affecting Australian economy. This resulted in Australian policy and legal developments which are set out in the second book Horgan’s Law of Financial Services (Thomsons Reuters, Lawbook Company, 2003).

\textsuperscript{330} The Wallis Inquiry Discussion Paper, above n 34 and Wallis Inquiry Final Report, above n 32.
This book dealt primarily with financial services\textsuperscript{331} law as this is the later book and there were legislative developments focussing on financial services as a result of the proposals of the Wallis Inquiry, the Corporate Law Simplification Program and CLERP with its economic functionalism tests in developing the financial services legislation.

In addition, globalisation and the ‘neo-economic liberal reform agenda’ has influenced and changed Australian finance law and financial services law and this has been reflected in the analysis in my two books. This statutory process evolved into the current provisions in the \textit{Corporations Act}. It was based on the adoption by the Australian government (through the Wallis Inquiry and following corporate reform programs) of markets based ‘neo-economic liberal reform agendas’ which emphasised investor protection and market regulation.

These changes in the international financial system with the ongoing economic global boom and crisis developments have motivated the various law reform reports, Inquiries and legislative reform in Australian finance law and financial services law. This law reform is aimed at providing uniform and consistent regulation, investor protection, adequate disclosure of material information known to the parties in the transactions and the maintenance of adequate liabilities and duties of parties to a transaction. These statutory protections are important bearing in mind the breadth of choice of financing techniques available to parties in a fundraising situation (whether debt or equity, security techniques or risk management techniques) and greater flexibility in structuring transactions which may impact upon the rights of investors.

\textsuperscript{331}\textit{Horgan’s Law of Financial Services} (Thomsons Reuters, Lawbook Company, 2003).
The Global Financial Crisis demonstrated the depth of the problems in the debt and deficit of banks, financial entities and governments. Recent stockmarket volatility and the slowing of economic growth have affected the ability of governments to react to ongoing global financial changes affecting their economies. The problems in the Eurozone with ‘bailout’ loans of debt in Portugal, Spain, Italy and Greece have also resulted in unpopular austerity solutions by governments to pay for these ‘bailout’ loans. There has been ongoing criticism and protest of the austerity solutions of various governments and the effect of globalisation on national economies. These economic problems of the Eurozone countries have resulted in concern about the ongoing future of the European monetary system. These economic problems have also been reflected in the US in increasing debt levels, high unemployment and loss of economic confidence in the financial system and government responses to the ongoing effects of the Global Financial Crisis.

The impact of these tests of globalisation on national economies in times of financial crisis has been widespread due to the interrelationships of banks, financial institutions and governments globally. Even though Australia\textsuperscript{332} is in a comparatively good economic shape, any decrease in consumer confidence affects the economy and the perception of globalisation as a positive force in government decision making. These economic and financial limitations may affect future legislative and policy decision

\textsuperscript{332} The impact on Australian financial markets of the financial turmoil in global financial markets may affect the development of law reform and policy in finance law and financial services law created to deal with these problems in Australia, above n 328.
The role of ‘neo-liberalism’ and market forces in the economy has been tested in the last three years in legal and economic thinking. In essence, this time of review is part of the relatively normal process of ‘boom’ and ‘bust’ that has always delineated national and international financial and market developments. The difference this time is the length of time of prosperity in the 1990’s to 2008 and the constant market fluctuations since 2007. Government and bank ‘bailout’ loans have not resolved economic and financial market fears as the financial problems continue and require more financial ‘bailout loans. Consumer confidence and employment figures have been greatly affected by these ongoing financial market woes and have resulted in restrictions on consumer spending which has impacted on economic growth.

In conclusion, globalisation as a theoretical concept adopted internationally by banks, financial conglomerates and governments has been greatly tested by the Global Financial Crisis which includes the subsequent sovereign debt crisis since 2010 which affected government debt particularly in Europe. In many ways, the creation and operation of international financial conglomerates using globalisation principles cannot now be substantially changed other than by legislative and policy limitations on the activities of financial markets. Globalisation will continue to influence national economic agendas as financial institutions and governments operate internationally (as well as nationally) and
may be dependent on international financial assistance from organisations such as the International Monetary Fund in the Eurozone ‘bailout’ loans.

Globalisation therefore will continue to be a present reality in government decision making on a national and international level. Concepts such as ‘neo-liberalism’ may be amended by financial market reform and regulation but in time with future economic prosperity there is likely to be government reviews of current restrictions and the removal of limitations on the role of globalisation in a national economy such as Australia. The ‘boom and bust’ model of economic changes over time may result in government legislative agendas enacting lesser regulation and then subsequently greater regulation depending upon the economic times.

Globalisation will therefore always play an ongoing role in Australian legislative and policy developments in finance law and financial services law as the market changes will require appropriate government regulation depending upon the economic times. Current financial market reform and regulation is aimed at improving disclosure and market effectiveness but when times of prosperity return industry may demand deregulation of the market and the ability to innovatively respond to new investment opportunities internationally. The Australian law reform process in the 1990’s demonstrated the history of this pattern of regulatory reform.
The dangers of this type of financial innovation has been shown in the past in the areas of derivatives and securitisation but it is the nature of financial operators to find new ways of trading to respond to global opportunities for growth in the markets.

The balance for governments therefore is to find the appropriate level of ongoing regulation to endeavour to limit the impact of a future financial crisis whilst allowing the market to innovatively respond to new market needs. Governments can find this balance by reviewing other law reform in the US or Europe and use international regulatory institutions such as IOSCO to investigate the policy alternatives available for regulation of different areas of the financial markets. Once policy options have been proposed, the government can seek industry and consumer consultation to assess whether the regulatory controls proposed need to be adjusted. After the legislation is passed, corporate regulators can give ongoing feedback to the government about possible changes to new areas of law reform and policy affecting the financial markets. This process of law reform discussion and practical testing of implementation of the reform allows the opportunity to assess the successfulness of new policy on the financial markets. Law reform can also be amended or repealed if economic freedom has been too greatly affected by regulatory control.\footnote{Karen B. Brown, A Comparative Look at Regulation of Corporate Tax Avoidance, (2012) 12 Jus Gentium, Comparative Perspectives on Law and Justice, Springer, 25 which undertakes a comparative regulation of tax avoidance which is a similar law reform review process.}

Legislative change and policy developments in Australia therefore needs to retain the role of disclosure and the regulation of financial markets and products to ensure that finance law and financial services law protects the consumer without limiting future economic
growth. This is an uneasy balancing act which will be constantly reviewed in future reform inquiries and government review of legislation in Australia and overseas.

Globalisation will continue to influence Australian financial law and policy whether in the time of financial crisis or boom as Australia as a trading nation is inextricably linked to the problems and prosperity of other countries. The financial connectedness of institutions, banks and governments will ensure that global financial markets will continue to have a dominant impact on national economies such as Australia.
ANNEXURE

RELEVANT LEGISLATION USED IN THIS THESIS

(Extracts from Parts 7.6, 7.7 and 7.9 of the Corporations Act 2001 (Cth))

Part 7.6—Licensing of providers of financial services
Division 2—Requirement to be licensed or authorised

911A Need for an Australian financial services licence
(1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

911B Providing financial services on behalf of a person who carries on a financial services business
(1) A person (the provider) must only provide a financial service in this jurisdiction on behalf of another person (the principal) who carries on a financial services business if one or more of the following paragraphs apply:

(a) these conditions are satisfied:
   (i) the principal holds an Australian financial services licence covering the provision of the service; and
   (ii) the provider is an employee or director of the principal or of a related body corporate of the principal; and
   (iii) the provider is not an employee or director, or authorised representative, of any other person who carries on a financial services business and who is not a related body corporate of the principal; and
   (iv) the provider is not an employee or director, or authorised representative, of a related body corporate of a person of the kind mentioned in subparagraph (iii);

(b) these conditions are satisfied:
   (i) the principal holds an Australian financial services licence covering the provision of the service; and
   (ii) the provider is an authorised representative of the principal; and
   (iii) the authorisation covers the provision of the service by the provider; and
   (iv) in the case of a provider who is an employee or director of any other person (the second principal) who carries on a financial services business, or of a related body corporate of such a second principal—if the provider provides any financial services in this jurisdiction on behalf of the second principal, the provider does so as an authorised representative of the second principal;
911D When a financial services business is taken to be carried on in this jurisdiction

(1) For the purposes of this Chapter, a financial services business is taken to be carried on in this jurisdiction by a person if, in the course of the person carrying on the business, the person engages in conduct that is:

(a) intended to induce people in this jurisdiction to use the financial services the person provides; or

(b) is likely to have that effect; whether or not the conduct is intended, or likely, to have that effect in other places as well.

Division 3—Obligations of financial services licensees

912A General obligations

(1) A financial services licensee must:

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

(b) comply with the conditions on the licence; and

(c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(d) unless the licensee is a body regulated by APRA—have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients—have a dispute resolution system complying with subsection (2); and

(h) unless the licensee is a body regulated by APRA—have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

Part 7.7—Financial services disclosure

941A Obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client

(1) A financial services licensee (the providing entity) must give a person a Financial Services Guide in accordance with this Division if the providing entity provides a financial service to the person (the client) as a retail client.
941B  Obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client

(1) An authorised representative (the providing entity) of a financial services licensee (the authorising licensee), or of 2 or more financial services licensees (the authorising licensees), must give a person a Financial Services Guide in accordance with this Division if the providing entity, as a representative of the authorising licensee, or one or more of the authorising licensees, provides a financial service to the person (the client) as a retail client.

Division 3—Additional requirements for personal advice provided to a retail client

944A  Situation in which Division applies

This Division applies in relation to the provision of personal advice (the advice) in the following circumstances:

(a) the advice is provided:
   (i) by a financial services licensee (the providing entity); or
   (ii) by a person (the providing entity) in their capacity as authorised representative of a financial services licensee (the authorising licensee), or of 2 or more financial services licensees (the authorising licensees); and

(b) the advice is provided to a person (the client) as a retail client.

945A  Requirement to have a reasonable basis for the advice

(1) The providing entity must only provide the advice to the client if:

(a) the providing entity:
   (i) determines the relevant personal circumstances in relation to giving the advice; and
   (ii) makes reasonable inquiries in relation to those personal circumstances; and

(b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and

(c) the advice is appropriate to the client, having regard to that consideration and investigation.

945B  Obligation to warn client if advice based on incomplete or inaccurate information

(1) If:

(a) the advice is based on information relating to the client’s relevant personal circumstances that is incomplete or inaccurate; and

(b) the providing entity knows that the information is incomplete or inaccurate, or is reckless as to whether it is incomplete or inaccurate;

the providing entity must, in accordance with subsections (2) and (3), warn the client that:

(c) the advice is, or may be, based on incomplete or inaccurate information.
relating to the client’s relevant personal circumstances; and
(d) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client’s relevant personal circumstances.

**Subdivision C—Requirement for a Statement of Advice to be given**

**946A Obligation to give client a Statement of Advice**

(1) The providing entity must give the client a Statement of Advice in accordance with this Subdivision and Subdivision D.

(2) The Statement of Advice may be:

(a) the means by which the advice is provided; or
(b) a separate record of the advice.

**Subdivision D—Content of Statement of Advice**

**947B Statement of Advice given by financial services licensee—main requirements**

(1) This section applies if the providing entity is a financial services licensee.

(2) Subject to subsection (3) and to the regulations (see subsection (4)), the Statement of Advice must include the following statements and information:

(a) a statement setting out the advice; and
(b) information about the basis on which the advice is or was given; and
(c) a statement setting out the name and contact details of the providing entity; and
(d) information about any remuneration (including commission) or other benefits that any of the following is to receive that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice:

(i) the providing entity;
(ii) a related body corporate of the providing entity;
(iii) a director or employee of the providing entity or a related body corporate;
(iv) an associate of any of the above;
(v) any other person in relation to whom the regulations require the information to be provided; and
(e) information about:

(i) any other interests, whether pecuniary or not and whether direct or indirect, of the providing entity or of any associate of the providing entity; and
(ii) any associations or relationships between the providing entity or any associate of the providing entity and the issuers of any financial products;

that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice; and

(f) if section 945B requires a warning to be given to the client in relation to the advice—a statement setting out, or recording, the warning required by that section; and

(g) any other statements or information required by the regulations; and

(h) unless in accordance with the regulations, for information to be
disclosed in accordance with paragraph (d) and subparagraph (e)(i), any amounts are to be stated in dollars.

(3) Subject to subsection (4), the level of detail about a matter that is required is such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client.

949A General advice provided to retail client—obligation to warn client that advice does not take account of client’s objectives, financial situation or needs

(1) This section applies in relation to the provision of general advice if:
(a) the advice is provided:
   (i) by a financial services licensee (the providing entity); or
   (ii) by an authorised representative (the providing entity) of a financial services licensee, or of 2 or more financial services licensees; and
(b) the advice is provided to a person (the client) as a retail client; and
(c) the advice is not provided in circumstances specified in regulations made for the purposes of this paragraph.

(2) The providing entity must, in accordance with subsection (3), warn the client that:
(a) the advice has been prepared without taking account of the client’s objectives, financial situation or needs; and
(b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client’s objectives, financial situation and needs; and
(c) if the advice relates to the acquisition, or possible acquisition, of a particular financial product—the client should obtain a Product Disclosure Statement (see Division 2 of Part 7.9) relating to the product and consider the Statement before making any decision about whether to acquire the product.

Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

1012A Obligation to give Product Disclosure Statement—personal advice recommending particular financial product

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
(a) the regulated person provides financial product advice to the person that consists of, or includes, a recommendation that the person acquire the financial product; and
(b) the person would acquire the financial product by way of:
   (i) the issue of the product to the person (rather than the transfer of the product to the person); or
   (ii) the transfer of the product to the person in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); and
(c) the financial product advice is provided to the client as a retail client; and
(d) the financial product advice is personal advice to the client.
1012B Obligation to give Product Disclosure Statement—situations related to issue of financial products

Section sets out issue situations in which Product Disclosure Statement required. The main issue situations

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
(a) the regulated person:
   (i) offers to issue the financial product to the person; or
   (ii) offers to arrange for the issue of the financial product to the person; or
   (iii) issues the financial product to the person in circumstances in which there are reasonable grounds to believe that the person has not been given a Product Disclosure Statement for the product; and
(b) the financial product is, or is to be, issued to the person as a retail client.

Receiving offer to acquire financial product

(4) A regulated person must give a person a Product Disclosure Statement for a financial product if:
(a) the person makes an offer to the regulated person to acquire the financial product; and
(b) the person would acquire the financial product by way of the issue of the product to the person (rather than the transfer of the product to the person); and
(c) the financial product is to be issued to the person as a retail client.

1012C Obligation to give Product Disclosure Statement—offers related to sale of financial products

Sale offers that require a Product Disclosure Statement

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
(a) the regulated person offers to sell the financial product to the person; and
(b) a sale of the product to the person pursuant to the offer would take place in circumstances covered by subsection (5), (6) or (8); and
(c) the financial product is to be sold to the person as a retail client.

(4) A regulated person must give a person a Product Disclosure Statement for a financial product if:
(a) the person makes an offer to the regulated person to acquire the financial product; and
(b) the person would acquire the financial product by way of the transfer of the product to the person; and
(c) a sale of the product to the person pursuant to the offer would take place in the circumstances described in subsection (5), (6) or (8); and
(d) the financial product is to be sold to the person as a retail client.

Off-market sale by controller

(5) This subsection covers the circumstances in which:
(a) the seller controls the issuer of the financial product; and
(b) either:
   
   (i) the product is not able to be traded on any licensed market; or
   
   (ii) although the product is able to be traded on a licensed market, the
        offer is not made in the ordinary course of trading on a
        licensed market.

Sale amounting to indirect issue

(6) This subsection covers the circumstances in which:

(a) the offer is made within 12 months after the issue of the financial
    product; and

(b) the product was issued without a Product Disclosure Statement for the
    product being prepared; and

(c) either:

   (i) the issuer issued the product with the purpose of the person to
       whom it was issued selling or transferring the product, or
       granting, issuing or transferring interests in, or options or
       warrants over, the product; or

   (ii) the person to whom the product was issued acquired it with the
        purpose of selling or transferring the product, or granting,
        issuing or transferring interests in, or options or warrants
        over, the product.

Sale amounting to indirect off-market sale by controller

(8) This subsection covers the circumstances in which:

(a) the offer is made within 12 months after the sale of the financial product
    by a person (the controller) who controlled the issuer of the
    product at the time of the sale; and

(b) either:

   (i) at the time of the sale by the controller, the product was not able to
       be traded on any licensed market; or

   (ii) although the product was able to be traded on a licensed market at
        that time, the sale by the controller did not occur in the
        ordinary course of trading on a licensed market; and

(c) a Product Disclosure Statement was not prepared by, or on behalf of, the
    controller before the sale of the product by the controller; and

(d) either:

   (i) the controller sold the product with the purpose of the person to
       whom it was sold selling or transferring the product, or
       granting, issuing or transferring interests in, or options or
       warrants over, the product; or

   (ii) the person to whom the controller sold the product acquired it with
        the purpose of selling or transferring the product, or
        granting, issuing or transferring interests in, or options or
        warrants over, the product.
1013C  Product Disclosure Statement content requirements
(1) A Product Disclosure Statement:
   (a) must include the following statements and information required by this Subdivision:
      (i) the statements and information required by section 1013D; and
      (ii) the information required by section 1013E; and
      (iii) the information required by the other provisions of this Subdivision;

1013D  Product Disclosure Statement content—main requirements
(1) Subject to this section, subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product:
   (a) a statement setting out the name and contact details of:
      (i) the issuer of the financial product; and
      (ii) if the Statement is a sale Statement—the seller; and
   (b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided; and
   (c) information about any significant risks associated with holding the product; and
   (d) information about:
      (i) the cost of the product; and
      (ii) any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and the times at which those amounts will or may be payable; and
      (iii) if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund—any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and
   (e) if the product will or may generate a return to a holder of the product—information about any commission, or other similar payments, that will or may impact on the amount of such a return; and
   (f) information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product; and
   (g) information about the dispute resolution system that covers complaints by holders of the product and about how that system may be accessed; and
   (h) general information about any significant taxation implications of financial products of that kind.
LEGISLATION

List of legislation

Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth)

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Corporate Law Economic Reform Program Act 1999 (Cth) and Explanatory Memorandum to the Corporate Law Economic Reform Program Act 1999 (Cth)

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