

# HARTNELL COLLOQUIUM 2009

## CALL IN THE LAWYERS: LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS



31 JULY 2009  
THE AUSTRALIAN NATIONAL UNIVERSITY  
CANBERRA

## PROGRAM

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31 July 2009	<b>COLLOQUIUM</b> Venue: Sparke Helmore Theatre, ANU College of Law, Fellows Road, ANU, Canberra
9.00–9.20	Registration
9.20–9.45	Welcome by Dr DANIEL FITZPATRICK, Director of the Centre for Commercial Law Opening remarks by Mr TONY HARTNELL AM
9.45–10.45	Continuous Disclosure Requirements in Times of Market Instability Mr BERNARD MURPHY, Chariman of Maurice Blackburn <i>Chair: Professor Stephen Bottomley, ANU College of Law</i>
10.45–11.15	Morning tea
11.15–12.15	Class Action Litigation in the Wake of the Financial Crisis Dr PETER CASHMAN, University of Sydney <i>Chair: Professor Peta Spender, ANU College of Law</i>
12.15–1.15	Lunch
1.15–2.15	The New Short Selling Regime: An exercise in regulation by market effect Mr ROBERT STRONG, Barrister <i>Chair: Mr Daniel Stewart, ANU College of Law</i>
2.15–3.15	'Consumer' or 'Investor'? Individuals and the Global Financial Crisis Professor DIMITY KINGSFORD SMITH, University of New South Wales <i>Chair: Ms Anne McNaughton, ANU College of Law</i>
3.15–3.45	Afternoon tea
3.45–4.15	Concluding discussion on key themes of the day <i>Chair: TBA</i>

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The Centre for Commercial Law thanks Tony Hartnell for his generous donations to the annual Hartnell Colloquium series.

# ABSTRACTS & BIOS

## Continuous Disclosure Requirements in Times of Market Instability

BERNARD MURPHY

The continuous disclosure regime in the Corporations Law is a vitally important tool for the protection of the integrity of the capital markets. It has been the launching pad of several prosecutions by the regulator in recent years, and several successful class actions brought by aggrieved shareholders. In general, and particularly in times of market instability, is it of real assistance to investors, or is it just another bureaucratic burden for companies to shoulder leading to a 'tick the box' approach rather than real compliance?

Bernard Murphy is the Chairman of Maurice Blackburn and is the senior principal of its Major Projects Department, which is Australia's largest class action legal practice. He has 29 years experience in litigation practice and has acted in, supervised or advised on the conduct of 24 class actions, including 11 shareholder or investor class actions and four cartel class actions. The shareholder class actions based on breaches of the continuous disclosure regime include the first successful action of that type, and the largest class action settlement in Australia. He has given lectures at Melbourne, Monash, Stanford (USA) and Oxford (UK) Universities regarding class action litigation.

## Class Action Litigation in the Wake of the Financial Crisis

PETER CASHMAN

This paper examines some recent Australian and international class action litigation in the wake of the financial crisis. It focuses on claims by shareholders and investors and examines the extent to which improvements in corporate governance may be achieved as a by-product of class action litigation, with particular reference to litigation in the United States. There is also a consideration of recent price fixing class action litigation in Australia.

Dr Peter Cashman is a barrister and Adjunct Professor of Law at the University of Sydney. He was formerly: Commissioner in charge of the civil justice enquiry with the Victorian Law Reform Commission; Commissioner jointly in charge of the reference on class actions with the Australian Law Reform Commission; founding Director of the Public Interest Advocacy Centre; founder and senior partner of the firm Cashman & Partners which merged with the Melbourne firm Maurice Blackburn & Co to form the national firm Maurice Blackburn Cashman (now re-named Maurice Blackburn); Governor of the American Trial Lawyers' Association (now the American Association for Justice) and National President of the Australian Plaintiff Lawyers' Association (now the Australian Lawyers Alliance). He holds a degree in law and a diploma in criminology from the University of Melbourne and a Master of Laws degree and a PhD from the University of London. He has practised law in the United Kingdom, the United States and Australia.

## The New Short Selling Regime: An exercise in regulation by market effect

ROBERT STRONG

Relatively simple amendments made by the *Corporations Amendment (Short Selling) Act 2008* restricted the exceptions to the long-standing prohibition on short selling and expanded, or maybe just clarified, the existing modification powers of ASIC in this regard. This paper will consider the history and scope of the short-selling provisions, and the extent and purpose of the 'ban' that ASIC imposed on short selling in 2008, and considers the impact of the new provisions, with particular reference to securities lending and similar practices.

Robert Strong has practised as a company and commercial lawyer for over 35 years. His career has included service as general counsel at the former National Companies and Securities Commission and as director in an investment banking business. He has been a member of the Victorian Bar since 1990 and his practice is focused particularly on company and banking law. In recent years he has appeared in a number of proceedings on behalf of ASIC, and for the liquidators of the Opes Prime companies as well as several major banks.

## 'Consumer' or 'Investor'? Individuals & the Global Financial Crisis

DIMITY KINGSFORD SMITH

This presentation will argue that the GFC shines the spot-light more brightly than ever on an aspect of financial regulation which has been sending mixed-messages: the distinction between 'consumers' and 'investors'. Regulation as a 'consumer' conveys the idea that capital preservation is more or less guaranteed. The term 'investor' does not, while the attendant risk has been underplayed. Using the well publicised collapse of 'Storm Financial' as a spring-board, this presentation will consider the related legal ideas of 'reasonable basis for advice' (s945A CA) and 'defective disclosure' of financial advice (s952B CA) to investigate why individuals often see themselves as consumers entering riskless financial transactions, not investors. Reverting to the litigation theme of the Hartnell Colloquium, the analysis will conclude that the prospects of individuals seeking recovery are, like the messages they receive, mixed.

Professor Dimity Kingsford Smith joined the University of New South Wales Law Faculty in January 2005. She was professor of law and Director of the Centre for Law in the Digital Economy at Monash University between 2000–04. She previously held appointments at the University of Sydney and in the UK at University College London and Warwick University. Professor Kingsford Smith teaches in the areas of corporations law and regulation of securities and financial products. Recent publications include: 'The Same Yet Different: Australian and US Online Investing Regulation' *University of Toledo Law Review* (2006) 37(2) 461-95; 'Beyond the Rule of Law? Decentred Regulation in Online Investment' (2004) 26:3 *Law & Policy* 439-76; 'Is Due Diligence Dead? Financial Services Disclosure Under the Financial Services Reform Act 2001' (2004) 22 *Company & Securities Law Journal* 128-50.

