

## Monthly E-Briefing (Issue 36 – September/October 2012)

The **Commercial Law Committee** has two vacancies to fill as a result of the resignation of two existing members and is therefore seeking applications from prospective new members. [Click here](#) for details. Applications close on 30 November 2012.

The **Company Law Committee** of the Law Society of England and Wales and the City of London Law Society Company Law Committee jointly commented on the FSA Primary Markets Bulletin Issue 2 ([Read paper](#)). The consultation related to the UKLA Technical and Procedural Notes and the newly created UKLA Knowledge Base. The response raised a concern about the quantity of existing guidance (formal and informal) that has not been replicated in the new notes. The submission stated that it did not think it desirable for useful information on FSA practice and FSA views that was formerly in List! or in the Technical Notes to be withdrawn without an explanation. The paper also mentioned that it would, in addition, make it easier for users (in particular issuers) if the Technical Notes could be grouped together by Rule Book (as was previously the case) and by chapter/rule.

The Takeovers Joint Working Party of the CLLS Company Law Committee and the Law Society of England & Wales Company Law Committee recently responded to three consultations issued by the Takeover Panel's Code Committee:

- PCP2012/1 ("Profit forecasts, quantified financial benefits statements, material changes in information and other amendments to the Takeover Code"). ([Read paper](#)) In the consultation, the Code Committee of the Takeover Panel proposed amendments to the provisions of the Takeover Code (the "Code") which relate to profit forecasts, merger benefits statements and material changes in information previously published during an offer period. The response welcomed the aims of the paper but raised some technical concerns.
- PCP 2012/2 ("Pension Scheme Trustee Issues") ([Read paper](#)). As the response stated, the stated aim of the PCP was to extend the provisions of the Code which apply to employee representatives so as to apply to the trustees of the offeree company's pension schemes. The submission *inter alia* argued against the proposed extension.
- PCP 2012/3 ("Companies Subject to the Takeover Code") ([Read paper](#)). The Committee responded in detail to the specific questions contained in the PCP, and its general comments included the following:

"We agree with the arguments set out in the PCP in favour of removing the residency test as currently applied and agree with its removal. We are in favour of a regime which provides certainty in enabling shareholders and the market to determine whether the Code applies to a company without the need to consult the Panel in every case.

However, we do not agree with the proposal that the test should simply be deleted, with the consequence that many additional companies are brought within the regime with very little notice or time to prepare or contrary to the expectations of the shareholders.

We believe that the Code Committee should carefully consider a transitional period, or a grandfathering regime, as well as considering changing the proposed deletion of the residency test to allow for different approaches for different types of company within the

## Introduction to the Code.”

The **Financial Law Committee** recently responded to the HMT White Paper "*Banking Reform: delivering stability and supporting a sustainable economy*". ([Read paper](#)). The paper explained the government's detailed proposals for implementing Independent Commission on Banking (ICB) recommendations to fundamentally reform the structure of banking in the UK, and sought views on the proposals in the white paper. The Financial Law Committee response endorsed the Law Society's more detailed submission. The CLLS submission raised a number of concerns, particularly with regard to the potentially serious adverse effects arising from seeking to limit the choice of law used for ring-fenced banks, which it stated would be "unnecessary and counterproductive". The response also expressed deep concern at the possible other unintended consequences and costs to UK regulated banks and their customers, and, indeed the economy as a whole, if the ring-fencing arrangements were to take the shape proposed.

The Committee also responded to the HMT consultation "The Scotland Act 2012 – Bond Issuance by the Scottish Government". ([Read paper](#)). The consultation focused on the potential benefits and disadvantages (for both Scotland and the rest of the UK ) of bond issuance by Scottish ministers. The response raised concerns about the proposals' potential affect on the UK as a federal state and as a currency union; and about the potential cost of borrowing for Scotland.

The Committee also responded to the HMT consultation on the future of building societies ([Read paper](#)). The consultation paper set out the Government's aim "to maintain the distinctiveness of the sector while creating a level playing field and removing unnecessary barriers to growth." The Committee responded in general terms and argued, *inter alia*, that building societies mirror the activities of retail banks and that in principle any regulation of the conduct and activity restrictions should apply equally to building societies and retail banks, with appropriate differentiation to reflect existing "nature limits" and the mutual structure.

The Committee also responded to the HMT consultation "Financial sector resolution: broadening the regime" ([Read paper](#)). The consultation focussed on proposals to ensure that if parts of the financial system other than banks run into trouble, they can fail in a way that does not threaten financial stability, without requiring taxpayer support. The response raised a number of issues in response to the consultation questions.

The Committee also responded to the HMT consultation "Sanctions for the directors of failed banks" ([Read paper](#)). The consultation sought comments on a proposal to introduce a "rebuttable presumption" that the director of a failed bank was not suitable to be approved by the regulator to hold a position as a senior executive in a bank. The submission responded in detail to the consultation questions, and noted generally that the definition of what constitutes a "failed bank" in the context of the consultation remained vague, and that the exact scope of the application of the proposals remained unclear.

The **Intellectual Property Law Committee** recently responded to the IPO consultation "Reform of the UK Designs Legal Framework" ([Read paper](#)). The consultation focused on proposals to improve the enforcement regime and enable people to understand more fully what rights are held by others, to help avoid disputes, resolve uncertainties around the scope of protection and simplify the laws surrounding the ownership of and qualification for design right. The submission responded to the specific consultation questions.

The **Land Law Committee** recently responded to the Law Commission's consultation paper on the Electronic Communications Code. ([Read paper](#)). The consultation paper considered all the main provisions of the current Code (the regime that governs the rights of electronic communications operators to install and maintain infrastructure on public and private land). The response discussed some aspects of the proposals in detail and concluded that the Commission's paper was thought provoking and made many sensible suggestions, which should improve the relationships between the property industry and electronic communication operators, and the way landlord and tenant legislation and the Code interact.

The Committee also recently published the updated CLLS Land Law Committee Certificate of Title and Note to Users (Seventh Edition 2012) ([Review document](#)) and the accompanying Letter to Company seeking confirmation on draft CLLS Certificate of Title 7th Edition ([Read letter](#)) and Letter to Company seeking confirmation on final draft of CLLS Certificate of Title 7th Edition ([Read letter](#))

The **Planning & Environmental Law Committee** recently responded to the DCLG consultation “Renegotiation of Section 106 planning obligations”. ([Read paper](#)). The purpose of the consultation was to set out details of how the proposals contained in the Government’s Housing Strategy “Laying the Foundations: A Housing Strategy for England (2011) would work in practice, and to seek views on this. The submission responded to the consultation questions in detail, and raised some concerns about the mechanics of the proposals.

The Committee also responded recently to the Defra document “Habitats Directive: consultation on draft guidance on the application of Article 6(4)”. ([Read paper](#)). As the consultation noted, Article 6(4) allows plans or projects which may have an adverse effect on the integrity of a European site to go ahead on grounds of “imperative reasons of overriding public interest” (IROPI) when there are no alternative solutions and compensatory measures have been secured. The response agreed in the main that the draft guidance set out the factors that must be taken into consideration when investigating a potential derogation under Article 6(4) of the Habitats Directive to enable development to proceed on protected sites. However the Committee remained concerned that the opportunity had not been taken to provide definitive and practical guidance, supported by extant European case law and guidance.

The **Regulatory Law Committee** recently responded to the ESMA consultation on “Guidelines on sound remuneration policies under the AIFMD” ([Read paper](#)). The Committee’s submission responded to certain specific questions raised in the consultation paper, and raised two general issues relating to the interpretation and application of the relevant parts of the AIFMD on which ESMA did not invite responses but which were relevant to these issues.

The **Revenue Law Committee** recently responded to the HMRC paper on the General Anti-Abuse Rule (GAAR) ([Read paper](#)). The consultation paper sought views on the details of the proposal to introduce a GAAR, including draft legislation, and the submission responded in detail to the questions in the paper.

The Committee also responded to the HMRC consultation “High-risk areas of the tax code: The Stamp Duty Land Tax “transfer of rights” or “subsale” rules” ([Read paper](#)). The consultation focused on the Stamp Duty Land Tax (SDLT) rules on a “transfer of rights” in section 45 of the Finance Act 2003. The apparent policy aim driving the proposals in the consultation was to improve the rules to stop sales of SDLT avoidance schemes that attempt to rely on the transfer of rights rules, but ensure the rules give appropriate relief where commercially important. The Revenue Law Committee responded in detail to the consultation questions, and noted that it “did not agree that erroneous views taken by a minority of advisors was a good reason to add further conditions and/or restrictions to the current rules, on the basis that this would add unnecessary complexity for no benefit and at worst could adversely affect genuine commercial transactions.”

The Committee also responded to the HMRC consultation “Foreign currency assets and chargeable gains” ([Read paper](#)). The consultation concerned the simplification of the chargeable gains rules for companies which use a currency other than sterling for accounting purposes. The Committee responded in detail and noted that it generally supported the proposal.

The Committee also recently responded to the HMRC consultation “Lifting the Lid on Tax Avoidance Schemes” ([Read paper](#)). The consultation described options for improving public information about tax avoidance schemes and the risks of using them, as well as proposals for revising and extending the Disclosure of Tax Avoidance Schemes (DOTAS) regime. The Committee responded to the specific consultation questions, and made the general point that some form of mass marketability test should need to be satisfied as a necessary condition for the operation of many aspects of the proposed extensions to the DOTAS rules. It also argued that the review of the DOTAS process should be more closely integrated with the ongoing work on the GAAR.

The Committee also responded to the HMRC consultation into the Taxation of Controlling Persons ([Read paper](#)). The consultation concerned the engagement practices of controlling persons, and proposed that a provision is introduced to ensure that controlling persons have income tax (PAYE) and National Insurance deducted at source by the engaging organisation. The submission responded in detail to the specific consultation questions.

The **Training Committee** recently responded to the BIS document Richard review of apprenticeships:

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call for evidence ([Read paper](#)). The submission responded to the specific consultation questions, and in general terms noted that “trainees receive instruction, do supervised work and spend time observing what senior lawyers do. We think this is the essence of apprenticeships.” The response also noted that trainees are a critical part of the legal process, and that “apprenticeships work best when the employer is in a position to continue to employ apprentices once they have qualified”. It urged that “the issue of what happens to apprentices when they qualify is at the centre of the review and not regarded as a merely peripheral issue”.

The Committee also recently responded to the Legal Education and Training Review (LETR) discussion paper “Key issues II: Developing the detail” ([Read paper](#)). The response built on the CLLS’s earlier consultation responses, and raised a number of concerns. These included that the discussion paper appeared “to proceed on the relatively unexamined proposition that there are major performance issues with solicitors and other legal service professionals which could be improved, but are unaddressed, by legal education. Little evidence is produced to support that contention”, and that “This is compounded by an approach by the LETR executive which appears to place little weight on the value to professionals of experience, of doing legal tasks themselves (with supervision at the early stages) and watching others do so. “

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