

**FINANCIAL MARKETS CONDUCT BILL
SUBMISSION ON EXPOSURE DRAFT**

Minter Ellison Rudd Watts

Clause Number	Clause heading	Submission
Part 7	Enforcement and liability	
Clause 432	Directors also treated as contravening in certain circumstances	<p>We recommend that this clause either be deleted, or alternatively, that the “or” between clause 432(1), sub-paragraphs (a) and (b), be replaced with “and”.</p> <p>Either of these changes would ensure that directors were held liable in relation to a contravention by a body corporate only where they knew or should have known of the contravention. This would avoid innocent directors being held liable in circumstances where they had no knowledge (and no reason to have knowledge) that an act or omission of a body corporate that they authorised or to which they consented constituted a contravention.</p> <p>Clause 432 as presently drafted would impose strict liability upon directors in circumstances where, under the present law, a <i>mens rea</i> element is required.</p> <p>The present law is reflected in Clause 431, the effect of which is that, where a body corporate contravenes a provision, its directors will also have contravened it if they:</p> <ul style="list-style-type: none"> • aided, abetted, counselled or procured; • induced or attempted to induce; • were knowingly concerned in or a party to; or • conspired with any other person to achieve; <p>the contravention.</p> <p>These provisions appropriately impose liability upon directors only where they are personally culpable. We consider this sufficient and that the extension of liability that clause 432 would impose is unnecessary and inappropriate.</p> <p>Clause 432(1)(a) would have the effect that a director would be liable for an “act or omission that constituted a contravention” by a body corporate by reason only that the director signed or consented to a resolution relating to that act or omission.</p> <p>This would have the effect of imposing liability upon innocent directors who had no knowledge, and no reason to know or suspect, that the act or omission by the body corporate constituted a contravention. Such directors may be liable, for instance, where a contravention by a body corporate has occurred by reason of facts known to it (or other directors) but not to the director concerned.</p> <p>We consider that this would be unjust and would be likely to discourage competent directors from accepting appointments.</p> <p>Clause 432(1)(b) would impose liability upon a director only where that director knew or should have known that the contravention was to be or was being committed and failed to take all reasonable steps to stop it. We consider this appropriate as it fairly reflects the circumstances in which directors ought to be culpable. However, because of the disjunctive “or” between sub-paragraphs (a) and (b), this sub-clause does not protect directors caught by sub-paragraph (a).</p>