

Legal Liability for Financial Advisors in Australia and Singapore: A Comparative Perspective

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This paper considers the legal liability regime for financial advisors, namely certified public accountants and auditors, in Singapore and Australia. Examination of the comparative aspects in which lawsuits against financial advisors are commenced provided an analysis of the legal and commercial environment and the regulatory regimes of the two common law jurisdictions considered. A qualitative, legal case-study method was used to meet the following objectives: (i) description of background information for the lawsuit, (ii) explanation of information collected, and (iii) analysis of the information in the context of the research topic. The law cases were evaluated to consider a range of issues including the court jurisdiction, main issues contributing to the litigation, types of alleged errors and findings of liability. Consequently it appeared that even though the two countries have similar regulatory regimes for financial advisors, there were a surprising range of differences in the legal and commercial environment in which claims were brought by parties. These differences highlighted the positive and negative aspects of the varying approaches and allowed the paper to make a range of recommendations for Australia, Singapore and the accounting profession at large. These recommendations include a strict approach to legal liability for advisors, enacting measures to limit the liability of advisors and the requirement and importance of good corporate governance approaches.

Field of Research: (Business Law and Accounting) - Financial Reporting Errors, Fraud Detection, Negligent Misstatement, Negligent audit, Corporate Governance, Proportionate Liability, Public Accountants, Auditors.

1. Introduction

1.1 Background to the Study

The global financial crisis dramatically highlighted the importance of financially affected parties taking legal actions against financial advisors¹, particularly when the defendant advisors can be held liable for advice and support given to a variety of stakeholders. The crisis has therefore also opened a window of opportunity for academics, and practising accountants and auditors, alike to explore corporate financial disclosure from a legal approach because both corporate reporting and governance are expected to take into account a company's legal relationship with its stakeholders (including employees, customers, shareholders, creditors and regulators). Whilst there have been a range of prior scholarly research studies on professional legal liability of accountants and auditors in Australia, unfortunately there has been very little comparative work in this area. As will be

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discussed in more detail below, this is a concerning gap and something which the current paper aims to address.

The integrity and accuracy of financial statements is vital for good corporate governance because it concerns the relationships between corporate managers, directors and stakeholders (Ghosh, 2007). The assurance in corporate reporting and good governance practices are crucial for stability of financial systems. It is fair to say that some of the major causes of corporate accountability failures during the last two decades have been due to poor accounting and auditing standards, breach of auditing standards, and lack of cohesion between board, external auditors, internal auditors and the rest of management (Jain and Thomson, 2008). This study analyses the financial statement and auditing errors involved in lawsuits against accountants in Australia and Singapore. It examines a number of cases from both jurisdictions, highlighting the similarities and differences in the complaints and legal outcomes. This process allows for an assessment of the regulatory regime and can determine what both countries can learn from each other's treatment of these important issues.

A number of relevant cases from both Australia and Singapore are identified. Each case is then analysed to determine the factors that contributed to the litigation against the financial advisor, including the type of services performed, the financial reporting errors involved and the respective significance of the errors to the matter. Once this information is obtained, it is analysed against the outcome or conclusion of the case. The results of the two jurisdictions are then collated and comparisons observed and analysed to provide an understanding of these similarities and differences between the two legal systems, as well as highlighting any areas in need of reform.

Analysis of factors and evidence is widely considered to be the most difficult aspect of case study research methodology (Tellis, 1997). The evidence obtained by the study is therefore examined to find linkages between the research object and outcomes with reference to the research questions. Each case is analysed in depth and the results were then compared to highlight the different legal and commercial practices of the two countries. The analysis includes a wide range of aspects of the case, including (i) the court jurisdiction, (ii) the main issues that contributed to the litigation against the accountant and/or auditor, (iii) the types of alleged errors involved in the lawsuits (including for example, allegations of inadequacy in the interpretation of accounting and auditing standards, lack of independence of the auditor, especially over-reliance on management representations, inadequate training and proficiency for the engagement undertaken, and improper study and evaluation of the internal control system), (iv) the findings of liability and (v) an analysis of specific issues that arose in the different cases.

The accounting and auditing professions in both Australia and around the world have encountered many difficulties and criticisms in recent years, as a result of corporate collapses being linked to allegations of professional negligence and breaches of statutory duties. An example of high profile collapses occurred in Australia includes the failures of HIH Insurance, Ansett and One Tel. In addition, overseas collapses include Enron Corporation, WorldCom, and Arthur Andersen auditing firm in the United States (Chan, 2002). These allegations illustrate the seriousness of the current legal environment for the accounting and auditing profession, government and third parties (Gill et al, 2001; Nguyen & Rajapakse, 2008; Rajacic, Rajapakse & Webb, 2000). Thus, there is a continuing interest in understanding the factors associated with legal proceedings against financial

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advisors, given the large litigation claims brought by third parties and 'the escalation costs of indemnity insurance cover in Australia' (Free, 1999).

Some examples of major cases involving auditors in Australia include an action under the Trade Practices legislation by the Linter Group against Price Waterhouse, which settled for an estimated \$320 million (Anderson, 1999). In 1996, the Australian Securities and Investments Commission (ASIC) initiated proceedings on behalf of Adelaide Steamship against Deloitte for the faulty audit of financial statements, an action totalling \$340 million (Free, 1999). Another case involving the Victorian Government and Peat Marwick Hungerfords in relation to the audit of the Tricontinental Bank settled for \$136 million (Anderson, 1999). The cases of *Columbia Coffee & Tea Pty Ltd v Churchill*², *Esanda Finance Corp Ltd v Peat Marwick Hungerfords (reg)*³, *AWA Ltd v Daniels T/A Deloitte Haskins & Sells & Ors*⁴, *Brown & Hatton v National Australia Bank*⁵ and *Mackman v Stengold Pty Ltd & Ors*⁶ illustrate the stance in Australia regarding auditors' liability and have examined various financial statement disclosure issues and disparities in the law. All of these cases clearly highlight the excessive legal costs which accountants and auditors are increasingly exposed to.

More recently, a report by the House of Lords Economic Affairs Committee that followed an investigation into *Auditors' Market Concentration and their Role* has revealed several shortcomings in the large-firm audit market in the UK. The Committee's Inquiry unfolded that the 'audit standards are slipping' - the audit standards had been lowered by the adoption of International Financial Reporting Standards (IFRS). These Standards encouraged box-ticking and reduced scope for auditors to exercise judgement to reach a true and fair view. The Committee recommended that prudence be reasserted as the guiding principle of audit. Moreover, the Inquiry found that the breakdown of dialogue between bank auditors and regulators was a 'dereliction of duty' that contributed to the global financial crisis (United Kingdom Parliament Economic Affairs Committee, 2011).

To minimise the chance of similar problems occurring in the future it is important for Australia, and the profession at large, to be aware of the different accounting processes and procedures, and to adopt best practice guidelines that are suited to the unique legal and commercial landscape.

This article therefore examines an issue which has not yet been comprehensively analysed – a comparative consideration of the actions and omissions of financial advisors which give rise to litigation in both Australia and Singapore. Whilst the two countries have a reasonably similar regulatory regime, Singapore is widely regarded as 'regional centre of excellence in accountancy' (The Association of Chartered Certified Accountants, 2010), and therefore provides an excellent basis for comparison. By examining a number of legal cases of alleged negligence against financial advisors in both jurisdictions, the different approaches can be effectively analysed to see what, if any, improvements can be made to the regulatory regimes for financial advisors. There are three Sections to this article. Section 1 provides an introduction to the study including a literature review and an explanation of the methodology of the comparative case analysis and Section 2 analyses the results obtained from the research. Finally, Section 3 provide a range of recommendations to ensure robust and healthy accounting and auditing practices within the profession, and summarises the results of the investigation of financial reporting liability cases in Australia and Singapore.

2. Literature Review

As outlined above, there have been a number of prior scholarly research studies on professional legal liability of accountants and auditors in Australia in the context of common law and statutes (see for example, Nguyen and Rajapakse, 2008; Rajacic, and Rajapakse, 2000; Free, 1999; Anderson, 1999; Greinke, 1997; Davies, 1995; Chau, 1995; Johnson, Stokes, and Watts, 1995; Hogg, 1994; Cooper and Barkoczy, 1991; Baxt, 1990; Davidson and Khan, 1980). These studies mainly focused on analysing the legal issues and concepts under the common law of negligence and legislation in relation to legal liability of accountants and auditors.

There have also been a range of prior comparative studies on the liability of auditors and accountants for financial statement and auditing errors in a variety of jurisdictions (see, for example, De Poorter, 2008; Bush, Fearnley and Sunday, 2007; The Treasury, 2006; MacLulich and Sucher, 2004; Stevenson, 2002; Bidin, 2002; Khoury, 2001; Siegel and Fonfeder, 1989). The comparative studies have however generally heavily focused solely on jurisdictions in the Northern Hemisphere. For example, De Poorter (2008) undertakes a comparative analysis of the auditor liability regimes in four countries (namely, the United Kingdom, the Netherlands, Germany and Belgium) and finds that despite the fact that all the jurisdictions are in the European Union, there are large discrepancies in the treatment of auditor's liability in the different legal systems. Bush, Fearnley and Sunday (2007) compare the key features of the legal and regulatory regimes for companies and auditors in the United States of America and the United Kingdom, highlighting the increased complexity of the business practice and auditors' subsequent desirability for lowered liability through law or greater diligence in auditing practices. Stevenson (2002) considers the different approaches to auditor independence in the United Kingdom, France and Italy. MacLulich and Sucher (2004) compare auditor independence in two European emerging economies, the Czech Republic and Poland. Khoury (2001) continues this focus with her detailed comparative analysis of the auditor liability regimes in the United Kingdom and Canada, specifically focusing on the French civil law in Quebec and the different ways in which courts limit liability under the common and civil law systems. Unsurprisingly, there has also been a comparative review of accountant liability within different States in the United States (Siegel and Fonfeder, 1989).

The existing literature largely ignores jurisdictions and regions such as Australia, South America and Asia. There has been limited concentration on alternative jurisdictions, such as Bidin (2002) with a comparison of the legal regimes in Malaysia and the United Kingdom. Despite the physical proximity and close trading links, even Australian based research has trended away from a comparative analysis of Asian countries. For example, The Treasury's comparative review of auditor independence focused on only Canada, the European Union, the United States of America and the United Kingdom (2006). There is therefore an unfortunate and concerning gap in the existing literature, namely, comparative reviews of financial statement and auditing errors associated with lawsuits in Australia and Asia, something which this report attempts to address.

As will be discussed in further detail below, the regulatory regimes for financial advisors in Australia and Singapore have a number of important and strong similarities. For example, both systems are based on the United Kingdom's common law negligent misstatement approach, supplemented by additional legislation and regulations. Both countries are members of international bodies, including the International Forum of Independent Audit Regulators and the International Federation of Accountants. Finally, both regimes have

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strong professional bodies that regulate firms through Professional Codes of Conduct. Notwithstanding these similarities, there have been remarkably less legal actions taken against financial advisors in Singapore than Australia. In addition, Singapore has received highly favourable reports on its approach to financial advice, with the Association of Chartered Certified Accountants⁷ (ACCA) commenting that the country is 'setting out an agenda to position itself as a regional centre of excellence in accountancy' (The Association of Chartered Certified Accountants, 2010). Despite the similarities and positive aspects of the Singapore financial advisor liability regime, there have been no prior studies that have comprehensively analysed the accounting related errors, financial statement fraud and causes for negligent misstatements alleged in the law cases against the practising financial advisors in Australia and Singapore.

This research is therefore the first comprehensive study in Australia and Singapore that investigates the accounting and auditing related issues in litigation. Accordingly, this study seeks to fill the gaps in the existing scholarly literature. As stated above, the purpose of this research is to analyse what factors have caused Certified Practising Accountants (CPAs) and independent auditors to be sued by their clients and third party users of financial reports. The answer to this question is of obvious interest to members of the public accounting profession in Australia, Singapore and many other common law countries around the world.⁸ The major purpose of this study is to make that question more specific and to gather and analyse evidence that might provide answers. Despite the focus of the comparative review being limited to Australia and Singapore, the recommendations and outcomes⁹ of the study have general relevance to all common law jurisdictions that wish to improve the legal regimes associated with financial statement and auditing errors associated with lawsuits against financial advisors.

3. Methodology

A qualitative, legal case-study method was used for this research. The research was conducted using multiple legal case studies to develop an understanding of the complex reasons that initiated the litigation process against the professional accountant or auditor where many variables are not quantifiable and actual causes for legal action significantly vary from one case to the other. The case study research method was used to meet the following objectives: (i) description of background information for the lawsuit, (ii) explanation of information collected, and (iii) analysis of the information in the context of the research topic. The study examined lawsuits against accountants and auditors that were reviewed by the Australian and Singaporean courts over the past two decades. This comparative approach is a unique methodology, which has not been used in the previous papers on this topic. The qualitative, legal case-study method allowed for an in-depth analysis of the two legal approaches of the different jurisdictions, thereby providing an insight into the issues not previously provided for by the existing literature.

We focused our research on two types of cases. The first type of cases refers to those where the practising accountants and auditors were directly sued by their clients, and litigated in a court of law. The second type of cases focuses on the matters where the accountants or chief financial controllers who were employed at banks and other private institutions and summoned as witnesses or third parties in the court proceedings. Accordingly, after a wide search on a number of different legal databases in Australia¹⁰ and Singapore¹¹, eleven and eight relevant cases were found from each jurisdiction respectively. A list of cases analysed in this study is provided in Table 1.

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Table 1: List of Cases

Australia

1. Arthur Young v WA Chip & Pulp Co Pty Ltd [1989] WR 100
2. BGJ Holdings Pty Ltd v Touche Ross & Co (1987) 12 ACLR 481
3. Burns v Grevler [2010] NSWSC 1219
4. Cameron v McMahon [2009] VSC 277
5. Carmody v Priestley [2005] WASC 120
6. Esanda Finance Corporation Limited v Peat Marwick Hungerfords [1997] 188 CLR 241
7. Giourtalis v Vaitsis [2006] NSWCA 371
8. King v Yurisich [2006] FCAFC 136
9. Leda Pty Limited v Weerden & Anor [2007] NSWCA 174
10. Metzke v Sali [2010] VSCA 267
11. NAB v Ward [2004] VSC 128

Singapore

1. Standard Chartered Bank and Another v Coopers & Lybrand (sued as a firm) [1993] 3 SLR 712; [1993] SGHC 215
2. United Project Consultants Pte Ltd v Leong Kwok Onn (trading as Leong Kwok Onn & Co) [2005] 4 SLR 214; [2005] SGCA 38
3. JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm) [2007] 4 SLR 460; [2007] SGCA 40
4. Banque Nationale de Paris v Hew Keong Chan Gary and Others [2001] 1 SLR 300; [2000] SGHC 239
5. Seagate Technology Pte Ltd and Another v Goh Han Kim [1995] 1 SLR 17; [1994] SGCA 128
6. Go Dante Yap v Bank Austria Creditanstalt AG [2010] SGHC 220
7. Ikumene Singapore Pte Ltd & Anor v Leong Chee Leng (trading as Elizabeth Leong & Co) [1993] SGCA 50
8. PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd [2007] 4 SLR 513; [2007] SGCA 41

Finding appropriate Singapore sources proved challenging as there were a smaller number of reported cases on the liability of accountants and auditors, and less success with the few cases that did go to court. This meant that if a case was located which was relevant to the research conducted, it was analysed and included. The result of this is that whilst there are a limited number of Singapore cases that can be commented on, all of the relevant cases are included in the report, meaning that the research 'covers the available field' in relation to auditors and accountant liability.

In contrast, there were a significant number of appropriate cases in Australia in a range of different State and Federal court jurisdictions, and the difficulty was choosing cases that provided a useful and accurate representation of the financial reporting issues in the country. Whilst the original proposal was to analyse the same number of cases in Australia

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and Singapore, due to the relative complexity of the Australian legal hierarchy and court structure, it was felt that this would not provide an adequate reflection of accountant and auditor liability in Australia. A number of potentially relevant cases were therefore considered and eleven relevant reported cases were found so that the different court jurisdictions (State and Federal) and hierarchies, as well as a large range of accountant and auditing liability issues, were included in the analysis. This meant that a wide span of issues were considered and ensured that the results obtained were not skewed towards a specific court jurisdiction or biased towards a particular accounting or auditing issue.

4. Analysis of Results

The regulatory regimes for financial advisors in Australia and Singapore are reasonably similar in that they are both based strongly on the United Kingdom's common law system and supplemented with additional legislation and regulation. It was therefore expected that the legal and commercial approach of the two jurisdictions would be comparable, with minor differences arising due to departures in the specific regulatory approaches. There were however significant differences identified in almost all areas of the study. This section provides an outline of these differences and a summary of the factors identified in the case analysis for both Australia and Singapore. These results are provided in Table 2(A) and (B) below.

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Table 2 (A) - Analysis of Singaporean Case Data - Summary

Number	SINGAPORE - Case Name	Jurisdiction	Type of Services Performed by Accountant/Auditor	Financial Reporting/Advice Errors	Outcome of the Case	Notes (General Comments)
1	Standard Chartered Bank and Another v Coopers & Lybrand [1993] 3 SLR 712; [1993] SGHC 215	High Court (single judge)	Preparing and auditing of company financial reports.	Negligently preparing and auditing accounts / inadequacy in the preparation of the report. The auditor's report was used by a third party when determining whether to extend a loan to the company in question.	No liability for auditors	Strictly followed UK law regarding third party liability.
2	United Project Consultants Pte Ltd v Leong Kwok Onn [2005] 4 SLR 214; [2005] SGCA 38	Court of Appeal	Engaged as appellant's auditor and tax agent.	Failure to warn company in question about potential illegal tax minimisation processes / failure to warn of the consequences of the filing an incorrect return / inadequate training and proficiency for the engagement undertaken.	Liability for auditor / tax agent	Court of Appeal held that there was a duty for auditors / tax agents to warn of potential illegal actions if they were aware (or should reasonably have been aware) of the surrounding circumstances.
3	JSI Shipping (S) Pte Ltd v Teofoongwongcloong (a firm) [2007] 4 SLR 460; [2007] SGCA 40	Court of Appeal	A firm of CPA which provided services including statutory auditing, special auditing, accounting and tax and corporate advisory services.	Failure of auditors to pick up employee fraud in a company when they prepared the audit reports of the firm; Lack of required independence of the auditor, especially over-reliance on management representations.	Partial liability for auditor	The Court were limited in the responsibilities they wished to enforce on auditors. The auditor was only found liable for one aspect of the loss, relating to failure to verify the director's remuneration.
4	Banque Nationale de Paris v Hew Keong Chan Gary [2001] 1 SLR 300; [2000] SGHC 239	High Court (single judge)	Employed as assistant Vice President of the de Paris Private Banking Accounts Department.	The plaintiff attempted to find bank customers liable for actions of bank employee when there was a relationship between the customers and the employee/ Weakness in Forex internal control system, inadequacy of compliance process and judgmental failures of the management of the Bank.	Bank was liable for unauthorised transactions in the customers' accounts. Court ordered Forex losses were to be borne by the Bank.	Court was hesitant to enforce liability on bank customers and was generally very critical of bank's auditing processes for not picking up employee fraud earlier. The case followed the English law regarding the liability of third party customers closely.

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Number	SINGAPORE - Case Name	Jurisdiction	Type of Services Performed by Accountant/Auditor	Financial Reporting/Advice Errors	Outcome of the Case	Notes (General Comments)
5	Seagate Technology Pte Ltd and Another v Goh Han Kim [1995] 1 SLR 17; [1994] SGCA 128	Court of Appeal	Auditing of company financial records - auditor appeared as witness in the trial.	Lack of independence and a failure of internal control systems. Alleged conspiracy between employee and supplier - audits of company did not pick up fraud for 11 months.	The respondent supplier was not liable to pay the loss due to lack of documentation and formality and it was not sufficient to show an intention to defraud.	The case makes some important comments regarding the role of auditors in situations of employee fraud. When firms are subject to employee fraud, there auditing systems must determine whether there were any systematic issues that may have allowed the fraud to continue unnoticed.
6	Go Dante Yap v Bank Austria Creditanstalt AG [2010] SGHC 220	High Court (single judge)	Accountant employed as Vice President of the Bank of Austria.	The plaintiff alleged that 16 investments made by the VP were not authorised by him. The drawing of investments and loans without permission / the failure to warn of the specific risks of having the particular investment portfolio / failure to keep proper records of the meetings.	No liability for Bank or its Vice President.	The accountant VP did not breached her standard of care imposed in performing her services. It was held that the appellant was a commercially experienced and sophisticated customer and the investment losses effected due to Asian financial crisis. Therefore the alleged accounting errors were not considered in-depth.

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Number	SINGAPORE - Case Name	Jurisdiction	Type of Services Performed by Accountant/Auditor	Financial Reporting/Advice Errors	Outcome of the Case	Notes (General Comments)
7	Ikumene Singapore Pte Ltd & Anor v Leong Chee Leng (trading as Elizabeth Leong & Co) [1993] SGCA 50	Court of Appeal	Auditing of company financial records.	Failure to exercise reasonable care and skill when auditing the reports / auditor certified the accounts without 'adequate checking or verification'. Negligence of auditor when signing off on accounts resulting in damage suffered by company, shareholder and guarantor.	Court held that auditor did breach duties but no liability owed to the appellant who was a third party guarantor because the causation of loss was not established.	Strictly followed UK law regarding third party liability. For the 'special relationship' of proximity to exist, it must be found that the advisor was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a third party for the purposes of a particular transaction.
8	PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd [2007] 4 SLR 513; [2007] SGCA 41	Court of Appeal	A firm of CPA engaged by the respondent to conduct statutory audits.	Failure to exercise due care and skill during the audit / lack of independence of the auditor and an over-reliance on management representations / failure to adequately scrutinise the internal systems. Negligence of auditor when signing off on accounts resulting in damage suffered by company as there was a failure to detect fraud by an employee	The CPA firm/Auditor was liable	Auditors' liability for damages was reduced by 50% because of contributory negligence of the respondent company directors.

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TABLE 2(B) - Analysis of Australian Case Data - Summary

Number	AUSTRALIA - Case Name	Jurisdiction	Type of Services Performed by Accountant/Auditor	Financial Reporting/Advice Errors	Outcome of the Case	Notes (General Comments)
1	Arthur Young v WA Chip & Pulp Co Pty Ltd [1989] WR 100	Supreme Court of Western Australia (Full Court)	Auditing of a company financial records	Failure to warn directors of inappropriate use of company funds by an officer	Auditor was liable	Held that an auditor's duty goes beyond examining accounts presented
2	BGJ Holdings Pty Ltd v Touche Ross & Co (1987) 12 ACLR 481	Supreme Court of Victoria (single judge)	Auditing of a company financial records	Failure to warn that speculative currency transactions entered into by managing director were outside scope of the company policy	Auditor was not liable	Auditors do not owe a duty to investigate and report on the prudence or imprudence of entry into speculative currency transactions or transactions which expose the company to risk of exchange rate changes affecting cost of overseas purchases
3	Burns v Grevler [2010] NSWSC 1219	Supreme Court of New South Wales (single judge)	Provided investment advice for the restaurant business and involved in investments.	Failure to warn plaintiff of worthlessness of guarantees obtained by certain investors in the syndicate	Accountant was liable	Very interesting case. The judge focused on the vulnerability of the plaintiff as opposed to the actions of the accountant
4	Cameron v McMahon [2009] VSC 277	Supreme Court of Victoria (single judge)	Engaged as accountant for advising on investment opportunity	The defendant accountant allegedly made representations to the plaintiff about financing the business and prepared inadequate loan documents for the business	Accountant was liable	Similar to above case. The judge focused on the trust the plaintiff had in the defendant
5	Carmody v Priestley [2005] WASC 120	Supreme Court of Western Australia (single judge)	Provided taxation advise to the plaintiff family business	Failure of the defendant to provide adequate advice to the plaintiff about the potential tax consequences of the purchase of a property	Accountant was liable	The case involved a very detailed analysis of conflicting evidence on the nature of the alleged advice to the plaintiff

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Number	AUSTRALIA - Case Name	Jurisdiction	Type of Services Performed by Accountant/Auditor	Financial Reporting/Advice Errors	Outcome of the Case	Notes (General Comments)
6	Esanda Finance Corporation Limited v Peat Marwick Hungerfords [1997] 188 CLR 241	High Court of Australia	Auditing of a company financial records	Alleged negligence in auditing accounts and declaring that they were a true and correct of the company	Auditor was not liable	No consideration of alleged financial reporting errors as the case focused on a strike out application by the defendants
7	Giortalis v Vaitsis [2006] NSWCA 371	New South Wales Court of Appeal	Accounting advice about an investment opportunity	Representations made by the appellant to the respondent about the security of a loan provided by the respondent to a business venture	Accountant was liable	Limited discussion on the financial reporting errors as the case was an appeal where the appellants had admitted breach and were only appealing against quantum of damages
8	King v Yurisich [2006] FCAFC 136	Full Federal Court	Auditing of accounts for participation in Travel Compensation Fund	Auditor had made several false representations in relation to the audit of the fund/ The failure to recognise that the travel agency company in question was insolvent when the audit report was written	Accountants and auditor were liable	Interesting case about liability of both an auditor and accountant - includes consideration of failure to audit in accordance with the Australian accounting and auditing Standards
9	Leda Pty Limited v Weerden & Anor [2007] NSWCA 174	New South Wales Court of Appeal	Engaged a taxation expert from Price Waterhouse to advise on taxation liability for an investment	The failure to reinforce the requirement to undertake a complete due diligence review prior to providing advice and the failure to provide adequate qualifications for the respondent's advice	Taxation advisor not liable	Interestingly different approaches of the trial judge and the Court of Appeal even though the overall findings were the same
10	Metzke v Sali [2010] VSCA 267	Victorian Court of Appeal	Ongoing accounting advice	The failure of the accountants to advise the claimant to discontinue putting money into a failing company	Liability for accountant	Liability was reduced by 30% due to contributory negligence and then 70% due to concurrent liability with another director
11	National Australia Bank v Ward [2004] VSC 128	Victorian Supreme Court	Production of an Auditor Certificate to the Bank about the loan accounts. Auditor was called as witness to the case.	The production of an Auditors Certificate and the failure to verify or check certain transactions and fees	No liability for auditor	Negligence was found but no award of damages made because of inability to show loss had been caused by the auditor.

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4.1 Court Jurisdiction

The judicial system in Singapore for hearing cases pertaining financial advisors is relatively straightforward. The cases are initially heard by a single judge in the High Court. If one of the parties appeals the High Court's decision, the cases are sent to the Court of Appeal to be heard by a panel of three judges. This court exercises appellate jurisdiction and is the final court of hearing; there are no further appeals available. The cases analysed were therefore divided between single judge High Court matters, in which 37% of the cases were heard, and the Court of Appeal, which heard the remaining 63% of the cases.

In contrast, the judicial system in Australia for examining financial reporting cases relating to financial advisors is significantly more complicated. There are two potential jurisdictions that these cases can be commenced in – the State-based courts in each State / Territory or the Federal Court system. If the party chooses the State-based system, the specific court that the matter is commenced in will depend on the value of the claim, with the Supreme Court hearing the claims with the highest value. These cases can then be appealed to either a Full Bench Supreme Court or the State's Court of Appeal (depending on the approach taken by the State the matter is being heard in), both of which usually have three sitting judges. If the parties commence the matter in the Federal Court, it will initially be heard by a single Federal court judge and can be appealed to the Full Bench of the Federal Court, consisting of three judges. Matters in both the State and Federal jurisdictions can then be appealed to the High Court, Australia's highest appellate court. The majority of the financial reporting cases analysed were dealt with in the State-based system, with 45% heard by single judges in the Supreme Court and 36% by the Full Bench or Court of Appeal. In contrast only 9% of the cases were heard in the Federal Court. Relatively few cases made it to the High Court, with only 9% of the cases reaching the final level of appeal.

4.2 Summary of the Main Issues

One of the areas where Singapore and Australia differed to the largest extent was the main issues of the cases considered in the study. These issues are summarised in Table 3 below. In Singapore there were a wide variety of main issues for the courts. Employee fraud was the most common issue, with 38% of cases considered involving an alleged failure of the defendant financial advisor to identify employee fraud in a company when it either audited the company or prepared reports for the firm. In the cases of this type that reached the courts, the plaintiff company was unable to recover the lost money from the employee (or was only able to recover a small amount of the money) and therefore sued the financial advisor for failing to identify the fraud and therefore allegedly causing the firm loss.

The second most common issue in Singapore involved the failure of the financial advisor to adequately inspect the accounting and other records of the defendant company under the relevant provision of the Singapore *Companies Act* 1965. This accounted for 25% of all cases analysed. The remainder of the cases dealt with a wide range of issues, including the:

- Use of auditor's report by a third party when determining whether to extend a loan to a company;

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- Failure to warn the plaintiff company about potential illegal tax minimisation processes; and
- Plaintiff alleged that a number of investments made by the defendant financial advisor were not authorised by him; and/or the defendant failed to adequately warn him of the risk to his investment portfolio.

There was some minimal overlap in Australia and Singapore of the main issues that the courts were required to consider, but significantly less than expected. For example, 188 of the Australian cases analysed dealt with financial advisors being held liable for employee fraud; whereas this was the main issue in Singapore.

The main areas where there was some overlap in the two jurisdictions were with the provision of auditing services and advice on taxation liability. As outlined above, 25% of the Singaporean cases involved a failure to adequately inspect records as required by the *Companies Act* 1965. This was also a major issue in Australia (albeit under different legislative and common law obligations) and involved 36% of all considered cases. In addition, 9% of Australian cases involved allegedly negligent advice on taxation consequences, compared with 13% of matters in Singapore.

The other main issue in Australia (and something that did not appear in the Singaporean cases considered) was the general provision of negligent advice, which accounted for 27% of Australian cases analysed. In addition, 9% of Australian cases involved the negligent involvement of an accountant in an investment opportunity – something that also did not arise in the Singaporean cases. There was also 10% of Australian cases that relate to the auditing of accounts for participation in the Travel Compensation Fund, however this was to be expected as the auditing regulatory obligations under this scheme are unique to Australia.

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Table 3: Main Issues and Reporting Errors Identified by the Cases

Main Issues	Australia	Singapore
Employee fraud	Nil	38%
Failure to adequately inspect accounting records	36%	25%
Negligent advice on taxation consequences	9%	13%
Negligent involvement in and failure to warn of risks of an investment opportunity	9%	12%
Auditing of accounts for participation in the Travel Compensation Fund	10%	Nil
Reporting and Auditing Errors		
Errors in performance of audit	36%	38%
Lack of independence of auditor	18%	38%
Failure of internal control mechanisms and inadequacy of the compliance process	18%	25%
Inadequate training and proficiency for the engagement	9%	14%
Inadequacy in the preparation of a financial report	27%	13%
Failure to warn of the consequences or risks of transactions	64%	25%
Inability to fully understand and appreciate the relevant legal requirements	36%	13%
Directors' breach of fiduciary duties	Nil	12%

4.3 Financial Statement and Auditing Errors Identified

Unlike the main issue of the case (considered above), there was considerable overlap in the reporting errors identified by the Australian and Singaporean cases.¹² A summary of the reporting and auditing errors are depicted in Table 3 above. There were a number of reporting errors identified in approximately the same percentage of cases in both jurisdictions. For example, negligently preparing an audit report (including errors in the execution of the audit) was a significant issue in both Australia and Singapore, accounting for 36% and 38% of cases respectively. Both jurisdictions also experienced issues with the alleged lack of required independence of the auditor (especially over-reliance on management representations). This arose in 38% of Singaporean cases and 18% of Australian cases.

There was also a common issue of the failure of the financial advisor to adequately scrutinise the internal system of the business in question. This was raised in 13% of Singaporean cases and 18% of Australian cases. In Singapore, the failure of internal control mechanisms and inadequacy of the compliance processes in place was a common problem – accounting for 25% of matters in Singapore and 18% of matters in Australia. Inadequate training and proficiency for the engagement undertaken was also identified as an issue in both jurisdictions although not a major one, arising in 14% of Singaporean cases and 9% of Australian cases.

Some issues were experienced by both countries, but more prevalent in Australia. For example, the alleged inadequacy in the preparation of a financial report occurred in only

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13% of Singaporean cases but 27% of Australian cases. Failure to warn of the consequences or risks of certain acts and omissions was also a common issue – although it was a lot more frequent in Australia (64%) than Singapore (25%). Similarly, the inability of the financial advisor to fully understand and appreciate the relevant legal requirements (under both common law and legislation) arose in 36% of Australian cases, but was not a major issue in Singapore and was alleged in only 13% of matters.

There were a number of alleged reporting errors that only arose in the Singaporean cases considered and did not appear in any Australian cases. These include allegations that the directors in question were acting or were about to act in breach of their fiduciary duties to the company, the drawing of investments and loans without permission and the failure to keep proper records of meetings that the financial advisor was involved in. These issues were all raised in 12% of the analysed Singaporean cases.

4.4 Findings of Liability

The findings of liability were also dramatically different in the two jurisdictions considered. These findings are summarised in Table 4 and Figure 1 (see below). The most significant difference is the number of cases where the courts held that the financial advisor in question was completely legally liable for the harm suffered by the plaintiff/claimant and therefore awarded full damages. This occurred in 54% of Australian cases but only 13% of Singaporean cases. This statistic alone highlights that it is much harder to run successful cases of this type in Singapore than Australia. The disparity of outcomes could be linked to the fact that in Singapore, the courts follow the strict approach to third party liability that is found in the United Kingdom jurisdiction; see for example, *Standard Chartered Bank and Another v Coopers & Lybrand (a firm)*.¹³ This issue is discussed in more depth in Section 3 below.

It also follows that there are significantly more cases where the courts found that there was no liability in Singapore than in Australia, with 50% and 27% of cases respectively. The reasons that the courts found no liability in the cases also varied significantly. In Singapore the main reasons were a lack of proximity between the parties or that the defendant financial advisor did not breach the duty that was owed. In contrast, the main reasons in Australia were that there was no breach of duty and/or causation of financial loss to the plaintiff or that there was no harm suffered by the party making the claim.

Contributory negligence or partial liability of the plaintiff/claimant is also an issue that arises in both jurisdictions. In Singapore, 25% of the cases resulted in a finding of partial liability on the grounds of contributory negligence and 18% of Australian cases involved this type of finding. The basis of the findings may be slightly different however, for example in one of the Singaporean cases the court highlighted that it was important auditors did not 'become scapegoats' for the actions of the plaintiffs and others (*JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)*).¹⁴

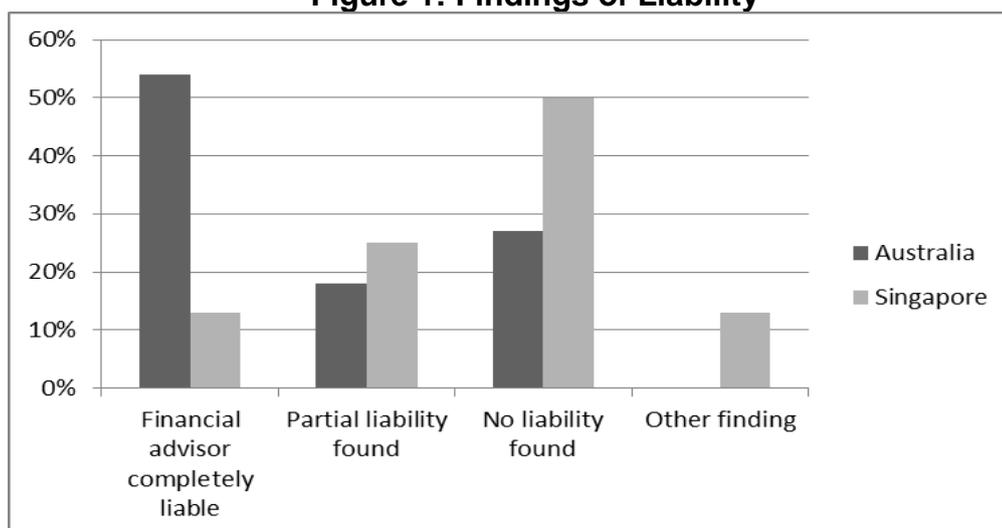
In Australia, the only orders made by the courts were about financial liability. In contrast, in one of the Singaporean cases the order sought did not relate to financial liability as it was an application by the plaintiff to inspect the accounting and other records of the defendant company under section 167(6) of the *Companies Act 1965*. In this case, the court allowed the order.

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Table 4: Findings of Liability

Outcome of the Case	Australia	Singapore
Financial advisor completely liable	54%	13%
Partial liability found	18%	25%
No liability found	27%	50%
Other findings: application by the plaintiff to inspect accounting records of the defendant company	Nil	13%

Figure 1: Findings of Liability



4.5 Significance of the Reporting Errors

The significance of the reporting errors largely reflects the outcomes of the findings of liability (discussed above). In Singapore, only 13% of the financial reporting errors were identified as significant and resulted in full damages being awarded. In contrast, in 54% of Australian cases the financial reporting errors were considered significant and resulted in awarding full damages to the plaintiffs. Both of these figures correspond with the above findings of liability. However, in Australia these cases were divided into two main categories. In 36% of cases, the financial reporting errors were considered very significant the court focused on the actions of the defendant financial advisor and was critical about what had been done by the party. In 18% of the cases where the court found liability and criticised the actions of the financial advisor, the alleged financial reporting errors were not considered as significant as the vulnerability and specific characteristics of the claimant.

In both jurisdictions, the court found the financial reporting errors significant and criticised the actions of the financial advisor in a number of other cases, but then reduced the damages awarded on the grounds that the plaintiff/claimant had contributed to the financial loss suffered. This occurred in 25% of Singaporean cases and 18% of Australian matters and corresponds with the findings of contributory negligence discussed above. In 50% of the Singaporean cases, the financial reporting errors were not considered to be of any significance by the courts. There were two main reasons for this. Firstly, in 37% of all the Singaporean cases, the courts enforced the strict United Kingdom approach to third party liability and held that there was not sufficient proximity between the two parties and therefore the alleged financial reporting errors were not considered significant. In the

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remaining 13%, the court held that there was no liability because whilst there was proximity and a duty of care owed, this duty had not been breached by the defendant financial advisor.¹⁵

In Australia the financial reporting errors not considered to be of any significance also varied quite significantly from the reasons given by the Singaporean courts. None of the analysed cases considered the issue of proximity between the parties. In 18% of cases the financial reporting errors were not significant because the claimant could not show that the alleged duty had been breached or that the alleged breach had caused harm. In 9% of cases, the errors were not significant because the defendant had admitted breach and the cases focused on other issues.

4.6 Specific Issues Raised by the Cases

The findings above present some interesting issues arising in both of the jurisdictions considered. Firstly, the legal approach in the Singaporean courts follows the strict third party liability approach from the United Kingdom. This meant that in 38% of cases considered failed on the grounds that the plaintiff/claimant could not show adequate proximity between the parties. This was not an issue that arose in any of the Australian cases analysed. Interestingly, it appears that Singapore and Australia have a similar approach to allegations of contributory negligence. This was found in approximately the same number of cases (25% and 18% respectively) and the courts appeared to deal with the issue in largely the same manner.

In Singapore, only 13% of the cases resulted in a finding of full liability for the financial advisor. Therefore the courts did not often have the opportunity to consider the financial advisor's duty to the client. In contrast, full liability was found in 54% of Australian cases. This gave the court the ability to provide a detailed consideration of the defendant financial advisor's duty to the client in different circumstances. This opportunity was taken by the courts in the vast majority of these cases and 45% of all Australian cases analysed include a discussion of the nature of a financial advisor's duty to their client. Courts undertaking this exercise provide significant utility to financial advisors as it clearly outlines their obligations to stakeholders and the court's expectations for the profession, something that was lacking in the Singaporean jurisprudence on this topic.

One of the most interesting points of difference that arose between the two jurisdictions was in relation to the approach taken by the courts to the individual characteristics of the claimant/plaintiff. In Singapore, there appears to be a strongly objective standard of duty owed to the client and the courts will therefore focus only on the alleged actions of the financial advisor. In contrast, in Australia the judge would often consider (sometimes in considerable depth) the specific characteristics of the client and how vulnerable they were to the actions of the financial advisor. For example, in *Burns v Grevler*¹⁶ the court stated that:

'[the claimant] was without doubt commercially unsophisticated and naïve ... I think that her lack of sophistication is the reason she was drawn into what [the defendant financial advisor] knew was a very un-commercial arrangement'.

The individual characteristics were of such importance that it was the main reason for a finding of liability in almost 20% of Australian cases analysed.

4.7 Summary of Comparative Results

As outlined above, in terms of a regulatory regime the legal systems overseeing the work of financial advisors in Australia and Singapore are remarkably similar. They are both based strongly on the United Kingdom's common law negligent misstatement approach, with additional requirements outlined in legislation and regulations. In addition, both countries are members of a number of international bodies, including the International Forum of Independent Audit Regulators and the International Federation of Accountants, and have professional bodies that regulate firms through Professional Codes of Conduct. However, as would be expected, both jurisdictions have developed unique processes and procedures that involve financial advisor liability – an example of this is the Travel Compensation Fund in Australia, as outlined in *King v Yurisich*.¹⁷

The results obtained from this study provide an interesting insight into the different approaches taken to these issues in Australia and Singapore, and the impact this has on the legal and commercial environment where these matters are being addressed, something which has not been addressed adequately by the previous literature. Firstly, there were significantly less claims initiated against financial advisors in Singapore, and the cases that were commenced had far lower chances of success; 54% of Australian cases resulted in full liability for the defendant financial advisor, compared with only 13% of Singaporean cases. The Australian court system is also more complicated and provides legal parties with multiple opportunities to appeal, whereas the Singaporean court system is a simple two-tiered structure with only one appeal available. Whilst there was limited overlap between the main issues and reporting errors identified in the two jurisdictions, there were also substantial differences experienced in both areas. For example, the most common issue in Singapore, financial advisor liability for employee fraud, was not raised in any of the Australian cases considered. Another of the most notable differences was the approach taken by the courts in relation to the individual characteristics of the claimant or plaintiff. Singaporean courts focused on a very objective standard of duty, whereas in Australia the court would often consider specific characteristics of the client and how vulnerable they were to the actions of the financial advisor.

5. Recommendations and Conclusion

The accounting and auditing professions in Australia and Singapore can benefit from a greater understanding of the regulatory regimes and legal approaches of other jurisdictions, as this allows the professions to consider and develop best practice guidelines and processes. It should however be noted from the outset that the Singapore system of accounting and auditing is highly regarded; this is reflected in both the small number of legal claims against financial advisors and the low level of success of the claims that do end up in court. Singapore should generally be complimented on their approach to this issue, with the ACCA commenting that the country is 'setting out an agenda to position itself as a regional centre of excellence in accountancy' (The Association of Chartered Certified Accountants, 2010). This does not however mean that a comparative analysis is not required or that improvements cannot be made; it is important for all countries to be aware of the developments that are occurring in different jurisdictions and to be open to improvements to their own regulatory regimes. This section considers the information obtained from the Australian and Singaporean case analyses above, in conjunction with recent publications and reports on financial advisor liability. It provides concluding remarks about the paper, as well as recommendations for minimising litigation risks and maintaining

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audit quality and internal control systems, and documents recent regulatory developments regarding professional liability of financial advisors.

5.1 Recommendations

5.1.1 Strict Approach to Third Party Liability

One of the most significant and interesting differences between the two jurisdictions was the comparative lack of success of claims against financial advisors in Singapore. As outlined above, 54% of Australian cases resulted in full liability of the financial advisor compared with only 13% of Singaporean cases. Whilst this is likely to be influenced by a number of different factors, the main reason noted for this disparity was that in Singapore the courts appear to have followed the strict approach to third party liability that is found in the United Kingdom.¹⁸ A number of Singaporean cases cited the English case of *Caparo Industries plc v Dickman & Ors*¹⁹, where the House of Lords severely limited the situations where auditors can be held liable to parties who base investment decisions on the audited accounts (Kan, 2010). This means that there is no duty of care owed, regardless of whether the auditors acted negligently. Whilst this case is regularly cited in Australian decisions on the case, it does not appear to be followed as strictly and the courts have developed a more flexible approach to third party liability.

Kan however notes that in the more recent Scottish case of *Royal Bank of Scotland v Bannerman Johnstone Maclay*,²⁰ the Court of Sessions created a legal precedent with 'potentially explosive consequences' as they enforced a duty of care on an auditing firm notwithstanding the lack of a contractual relationship with the claimant (Kan, 2010). If Singaporean courts follow this expansionist approach to third party liability, it could result in a significant widening of instances of successful suits against auditors and other financial advisors. This type of approach appears to have taken ground in the United States, and Goldwasser (1988) highlights the threat that it plays to the continuity of the financial advisory services in the country. The approach taken by the courts to this issue will depend on the focus of the legislature and judiciary. If the overriding aim of the regulatory regime is to minimise actions against financial advisors and instances of litigation, countries should follow the approach taken in *Caparo Industries plc v Dickman & Ors* and retain or implement a strict approach to third party liability, such as that in Singapore. In contrast, if there does not appear to be any concern over the number of third party financial advisor cases commenced and the aim is to allow parties who may have been financially affected by the actions of accountants and audits to have their 'day in court', it may be preferable to follow the more flexible approach of *Royal Bank of Scotland v Bannerman Johnstone Maclay*. If the latter method is preferred, there should however be specific limitations in place to avoid the difficulties experienced in the United States (Goldwasser, 1988).

5.1.2 Measures to Limit Auditor Liability

One of the continuing concerns of financial advisors is the threat of liability for potential losses suffered by clients. The ACCA has noted that this may be one of the consequences of the lack of competition in the industry and the market control of large 'mega-firms' (The Association of Chartered Certified Accountants, 2011). The potential quantum in these cases can be very large and have a significant impact on the financial viability of the

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defendant financial advisor. The size and potentially devastating impact of these large claims was discussed in depth in Section 1 above.

In response to these issues, ACCA reports that a number of international jurisdictions have processes in place to limit the liability of financial advisors. It does not protect the claimants from legal claims, but instead puts a 'cap' on the damages that can be obtained in the event of a successful case against them.

In the United Kingdom, corporate firms and auditors can enter into voluntary agreements that limit the amount of damage that can be claimed in respect of negligent work. ACCA however notes that there has been limited use of these types of contracts. Some jurisdictions have opted for a direct monetary cap. For example in Germany there is a limited of €4 million in respect to audits for listed companies (The Association of Chartered Certified Accountants, 2011). In other countries, such as the members of the European Union, and the United States, legislation has been enacted to replace the traditional joint and several liability with proportionate liability.

In Australia, the Professional Standards Act is in place in all States and Territories²¹ and it provides that members of the accounting professional bodies (ICAA, CPA, IPA)²² must set up an occupational scheme to reduce the potential financial liabilities of members by enhancing professional standards. The provisions of these Acts are compulsory and the professional accounting bodies must apply the legislation to its members. Currently, the statutory capping figure imposed under the scheme for Category 1 services – i.e. financial statement reporting and auditing is \$75 million.²³ It appears that the national system of statutory capping introduced by the Australian parliament may be effective in limiting liability of members of professional accounting bodies, with regard to economic loss for damages arising from occupational and civil liabilities.

Despite benefits to the auditing profession in implementing a system of statutory capping, it is important to consider the associated policy implications. First, third parties may be disadvantaged by not being able to claim the full amount of their damages. Secondly, as the capped amount will be calculated as the multiple of the audit fee, this may act as an incentive for auditors to charge lower audit fees (and premium amounts for other work) in anticipation of their liability to third parties (Chua, 1995). Finally, the imposition of a cap would represent an unwarranted intrusion by the State, and could encourage other professions to seek similar concessions (Gill, et al., 2001). In this regard, caution must be taken in reforming the law to balance the interests of the auditing profession as well as third parties.

5.1.3 Proportionate Liability

The system of joint and several liability is unjust as it 'imposes a liability on a defendant out of all proportion to that defendant's actual responsibility for the damage suffered' (Free, 1999). Therefore, all States in Australia²⁴ and the Australian Federal Parliament²⁵ have amended the law of contribution to introduce proportionate liability in relation to claims for economic loss under contract, tort and statute.²⁶ Under proportionate liability, the financial advisor cannot be held liable for more than her or his proportionate share of responsibility for the loss suffered by the plaintiff. The proportionate liability regime allows financial advisors to redistribute the risk to the plaintiff. Finally, the most important aims for the enactment of proportionate liability legislation is the 'deep-pockets' argument. The reason

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auditors are regarded as having 'deep pockets' is because they are required by law to carry professional indemnity insurance. Auditors are targeted by third parties because there is little advantage in bringing proceedings against a company that is insolvent, or whose assets are difficult to locate or realise. This is despite the fact that there may be good arguable claims against a company, especially where the directors and management are clearly at fault (Duffy, 2003).

When apportioning liability under the system of proportionate liability, the courts will consider what is just and equitable, having regard to the extent of the financial advisor's responsibility for the loss. Thus the financial advisor can reduce her or his liability by persuading the court that another party (tortfeasor) was at least partly to blame for the loss suffered by the plaintiff. For example, in *Frank Metzke and Russell Allen v Sam Selami Allen*²⁷, the Court of Appeal (Vic) upheld the trial judge's decision on the reduction of the defendant accountant's liability for the plaintiff by 70% on the basis of the operation of the proportionate liability provisions. The plaintiffs had sued only the accountant and not their (negligent) co-director of the company in which they also held interests. Overall, the new system will provide 'a regime of full proportionate liability between all the parties responsible for the loss' which will hopefully deal with the litigation and insurance crisis suffered by the auditing profession (Hayford, 2010).

At present, not all States have implemented identical schemes of proportionate liability therefore it is proposed that the Australian parliament introduce uniform legislation in response to pressure from the auditing profession (Cooper, 2010). The lack of uniformity between the States, as well as the slight variations that occur between State and Federal proportionate liability regimes is a complicating issue overall, can be vexing and leaves litigants with quite a lot of uncertainty in particular cases. Therefore it is proposed that the Australian parliament introduce uniform legislation in response to pressure from the auditing profession.

However, there are problems associated with implementing proportionate liability as the full recovery of economic loss from wrongdoers by third parties will become increasingly rare. Thus, based on similar arguments regarding statutory capping, the system of proportionate liability should be reformed to ensure third parties are not disadvantaged.

There have been no moves to directly limit the potential liability of financial advisors in Singapore, although the *Limited Liability Partnership Act 2005* (LLP) was passed in January 2005. This Act made limited liability partnerships available to 'two or more persons associated for carrying on a lawful business with a view to profit'. This allows financial advisors to create a separate legal entity; the firm and negligent partners will be liable to the full extent of their assets, but it protects the non-negligent members of the partnership (Kan, 2010).

Whilst both Australia and Singapore have made initial steps forward to limit the liability of financial advisors, the legislatures in both countries may wish to consider additional amendments. A cap on legal liability similar to jurisdictions discussed above would have a number of benefits, including an increased focus on settlement. Especially in light of the number of cases in Singapore where claimants have sued financial advisors for failing to pick up or report employee fraud (see, for example *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)*,²⁸ the system may also benefit from a proportionate liability regime similar to that in Australia (The Association of Chartered Certified Accountants,

2011). Australia may wish to consider instituting a limited liability partnership regime similar to that in Singapore. This would be particularly beneficial non-negligent members of small businesses and may encourage growth of these types of organisations.

There are a number of different methods that legislatures can use to limit auditor and accountant liability whilst also provide a robust and healthy legal framework for people who have been adversely affected by the actions of negligent parties. It is important for all countries to consider the developments occurring in different jurisdictions and determine whether these could be beneficial for implementation in their own regulatory regimes. This is supported by ACCA which notes that the increased complexity of auditors' roles may mean that a public debate or consultation on this issue is required in the near future.

5.1.4 Good Corporate Governance Requirements

The recent global financial crisis and the collapse of a number of large public companies have highlighted the importance of good corporate governance structures (The Australian Treasury, 2010). There have been moves in a number of countries, including both Australia and Singapore, to increase and enhance corporate governance structures; however it is possible that further amendments could be made to ensure that all parties providing financial advice have clear and transparent governance structures in place. In both countries, compliance with corporate governance codes was initially voluntary, and there have been recent moves to make these mandatory for certain types of entities.

In Australia the Top 300 listed companies are required to comply with the requirements of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* on the composition, operation and responsibility of the audit committee. It has been suggested recently that this be extended to include all listed companies, which would create a more uniformed approach to corporate governance in Australia. In Singapore, corporate governance requirements are already mandatory for all listed companies. The 2001 Singapore Code of Corporate Governance was replaced by the *Code of Corporate Governance 2012* ('the Code') which requires all listed companies to have an audit committee, to disclose their corporate governance practices and to explain any deviations from the Code.²⁹ There is still the ability for companies to deviate from the Code provided they explain these deviations. This loophole could be open to abuse and therefore should be carefully monitored. Therefore both jurisdictions, and the accounting and auditing profession as a whole, could benefit from enhanced corporate governance requirements to ensure that there are have clear and transparent governance structures in place.

6. Conclusion

This paper analysed the legal and commercial environment for accountants and auditors in Singapore and Australia. It developed the findings of earlier research papers on the topic, by providing a comparative perspective to these important issues; determining the similarities and differences between the regimes in Australia and Singapore, as well as what the two countries can learn from one another. There were some slight limitations to the research methodology used. As outlined above, the case analysis in this area is restricted by the relatively few Singaporean cases that firstly have been litigated and secondly have been reported. Whilst this has been a challenge in terms of providing quantitative empirical findings, it has meant that the current research can easily and

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effectively 'cover the field' for Singaporean financial reporting cases which is a significant benefit.

In terms of a regulatory regime, the legal systems overseeing the work of financial advisors in the two countries are remarkably similar. Regardless of these similarities, there are a number of significant differences in the way the courts have approached claims against financial advisors in the two countries. These differences were used as a basis for recommendations for Australia, Singapore and the accounting profession in general that can be implemented to minimise litigation risks and maintain audit quality and internal control systems. The first recommendation is that countries should consider whether to implement (or if like Singapore this approach is already in place, retain) a strict approach to third party liability as outlined in *Caparo Industries plc v Dickman & Ors*, as this one of the main factors for the low success rate of legal cases. Alternatively, if a more flexible approach is preferred, the countries can choose to follow the case of *Royal Bank of Scotland v Bannerman Johnstone Maclay*, however this approach has been implemented in the United States and has caused difficulties for the financial certainty of the profession. Secondly, countries should consider instituting reforms to limit auditor liability, such as cap on the liability of financial advisors or a proportionate liability regime. Finally, the companies must specifically adhere to the accountability, audit, risk management and internal control provisions of the new *Code of Corporate Governance 2012*, and ensure the integrity of the financial statements. This will ensure there are clear and transparent governance structures in place and hopefully avoid or limit any future financial crisis. These recommendations as a whole will have significant impacts on the way in which legislatures, professional bodies, financial advisors and clients approach this area of the law, and is therefore important for future development of the accounting and auditing regulatory regimes around the globe.

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End Notes

- ¹ For the purpose of this study, a 'financial advisor' means both the practising accountants and auditors who engage in private practise as individuals or through a firm of accountants in Australia and Singapore. Financial advisors perform many functions, including auditing financial statements, designing financial accounting systems, assisting in managerial accounting function, providing managerial advisory services, and tax preparation. They may perform services for corporations, partnerships, individuals, and other organisations.
- ² (1993) 9 ACSR 415.
- ³ (1997) 142 ALR 750.
- ⁴ (1992) 10 ACLC 933.
- ⁵ Unreported, Supreme Court of New South Wales, 12 February 1987) As cited in Free 1999, at 129.
- ⁶ (1991) ATPR ¶41-105
- ⁷ The Association of Chartered Certified Accountants (ACCA) is the global body for professional accountants offering the Chartered Certified Accountant qualification and is located in London.

- ⁸ Common law legal system developed in England was later inherited by the Commonwealth of Nations. Common law is currently in practice in the United Kingdom, Ireland, Canada (excluding Quebec), New Zealand, Norway, Hong Kong Bangladesh, Fiji, India, Pakistan, Singapore, South Africa, United States, and many other countries.
- ⁹ See Section 3 'Recommendations'.
- ¹⁰ The databases used included Case Base, LexisNexis (Butterworths), Legal Online (Thomson Legal & Regulatory, Sydney, Australia), Australian Legal Information Institute (AUSTLII), and Attorney General's Information Service (AGIS).
- ¹¹ The databases used included WestLaw, Asian Legal Information Institute, Legal Workbench (Singapore) and Singapore Academy of Law.
- ¹² Please note, the numbers used are the percentage of cases where this issue arose. If there was only one alleged reporting error in each case, the percentages for each jurisdiction would equal 100%. However, most cases involved multiple alleged reporting errors (i.e. failure to adequately prepare report *and* lack of adequate independence etc.). Therefore when adding the percentages stated for each jurisdiction, it will equal more than 100%.
- ¹³ [1993] 3 SLR 712.
- ¹⁴ [2007] 4 SLR 460 at [69].
- ¹⁵ In 11% of Singapore cases, there was no consideration of the significance of reporting errors as the order sought by the claimant was access to certain financial documents and not a finding on the legal liability of the defendant.
- ¹⁶ [2010] NSWSC 1219 at [59].
- ¹⁷ [2006] FCAFC 136.
- ¹⁸ See, for example, *Standard Chartered Bank and Another v Coopers & Lybrand (a firm)* [1993] 3 SLR 712.
- ¹⁹ [1990] UKHL 2.
- ²⁰ Unreported, 23 July 2002.
- ²¹ *Professional Standards Act* 1994 (NSW); 2004 (NT); 2004 (QLD); 2004 (SA); 2005 (Tas); 2003 (Vic); 1997 (WA).
- ²² The Institute of Chartered Accountants Australia, Institute of Certified Practising Accountants, and Institute of Public Accountants, Australia. See also, <http://www.charteredaccountants.com.au/Industry-Topics/Practice-management/Limitation-of-liability-schemes/Liability-capping-framework-and-PI-reform-process.aspx> (September 2012); Standing Committee of Attorney General (NSW) available at http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_consultdraftmodel (March 2012).
- ²³ 'Category 1 services' means: all services required by Australian law to be provided only by a registered company auditor: for further details of statutory capping scheme, see Professional Standards Council of Australia, available at http://www.lawlink.nsw.gov.au/lawlink/psc/ll_psc.nsf/pages/psc_icaa, (September 2012).
- ²⁴ *Civil Liability Act* 2002 (NSW), ss 34 - 39; *Civil Liability Act* 2003 (Qld), ss 28-33; *Civil Liability Act* 2002 (Tas), Pt 9A; *Civil Law Wrongs Act* (ACT, Ch 7A; *Law Reform Contributory Negligence and Apportionment of Liability Act* 2011 (SA); *Wrongs Act* 1958 (Vic), Pt IVAA; *Civil Liability Act* 2002 (WA), Pt IF; and *Wrongs and Limitation of Actions (Insurance Reform) Act* 2003 (Vic).
- ²⁵ *Competition and Consumer Act* 2010 (Cth) ss 137, 236; *Australian Securities and Investment Commission Act* 2001 (Cth), ss12GP to 12 GW; *Corporations Act* 2001 (Cth) ss 1041L to 1041S. These provisions apply in relation to 'misleading and deceptive conduct' by financial advisors.
- ²⁶ *Civil Liability Act* 2002 (NSW), ss 34 - 39; *Civil Liability Act* 2003 (Qld), ss 28-33; *Civil Liability Act* 2002 (Tas), Pt 9A; *Civil Law Wrongs Act* (ACT, Ch 7A; *Law Reform Contributory Negligence and Apportionment of Liability Act* 2011 (SA); *Wrongs Act* 1958 (Vic), Pt IVAA; *Civil Liability Act* 2002 (WA), Pt IF; and *Wrongs and Limitation of Actions (Insurance Reform) Act* 2003 (Vic).
- ²⁷ [2010] VSCA 267.
- ²⁸ [2007] 4 SLR 460).
- ²⁹ See, Monetary Authority Singapore, <<http://www.mas.gov.sg/en/News-and-Publications/Press-Releases/2012/MAS-Issues-Revised-Code-of-CG.aspx>

References

- ACCA, 2010, *The Value of Audit: views from Audit Committee Chairmen*, London, The Association of Chartered Certified Accountants, viewed 9 May 2013, <<http://www.accaglobal.com>>.
- ACCA, 2011, *Accountancy Future, Audit Reform: Aligning Risk with Responsibility*, London, The Association of Chartered Certified Accountants, viewed 19 August 2013, <<http://www.accaglobal.com>>.
- Anderson, H 1999, 'Auditors' Liability: Is Misleading and Deceptive Conduct an Alternative to Negligence?' *Companies and Securities Law Journal*, vol 17 (6), pp 350-359.
- Australian Treasury. March, 2010, *Audit Quality in Australia: A Strategic Review*, viewed 8 October 2013, <<http://www.archive.treasury.gov.au>>.
- Baxt, R 1990, 'The Liability of Auditors – The Pendulum Swings Back.' *Company and Securities Law Journal*, vol 8, pp. 249-57.
- Bidin, A 2002, 'Liabilities of Auditors to Third Parties - A Comparative Analysis between the Position under Common Law and in Malaysia' *Jurnal Undang-undang* 6, viewed 22 October 2013, <<http://www.ukm.my/juum>>.
- Bush, T, Fearnley, S and Sunder, S 2007, 'Auditor Liability Reforms in the UK and the US: A Comparative Review', viewed 19 August 2013, <<http://papers.ssrn.com>>.
- Carl, P, William, H, and David, S 2000, 'Auditor liability to third parties: an international focus' *Managerial Auditing Journal*, vol 15(8), pp 394 – 407.
- Chua, S 1995, 'More Thoughts on the Auditor's Liability in Negligence in respect of the Audit Report' *Company Lawyer*, vol 16 (7), pp 195-201.
- Chan, A. 2003, 'The Modern Role of the Auditor in Corporate Governance: Auditor Independence and the Proposals for Reform' *Australian Law Students' Association Academic Journal*, vol 2, pp 20 - 32.
- Cooper, B, J and Barkoczy, M L 1994, 'Third Party Liability: The Auditor's Lament' *Managerial Auditing Journal*, vol 9(5), pp 31 – 36.
- Cooper, K 2010, 'Proportionate Liability- 5 years on' *A paper presented for The Continuing Professional Education Department of the College of Law, Sydney, NSW*, pp 8 - 15.
- Davidson, A and Khan, A 1980, 'Contractual Liability of an Auditor.' *Australian Business Law Review*, vol 8(5), pp 300-309.
- Davies, M 1991, 'The Liability of Auditors to Third Parties in Negligence.' *University of New South Wales Law Journal*, vol, 14 (1), pp 171 – 192.
- De Poorter, I 2008, 'Auditor's liability towards third parties within the EU: A comparative study between the United Kingdom, the Netherlands, Germany and Belgium.' *Journal of International Commercial Law and Technology*, vol 3 (1), pp 68 – 75.
- Duffy, M 2003, 'Proportionate Liability: A Disproportionate and Problematic Reform' *Plaintiff*, vol 60(8), pp 11-20.
- Free, C 1999, 'Limiting Auditors' Liability' *Bond Law Review*, vol 11 (1), viewed 7 September 2013, <<http://epublications.bond.edu.au>>.
- Ghosh, S 2007, 'Looking beyond Corporate Governance Code' *The Chartered Accountant*, vol, 56(5), pp 819-826.
- Gill, G et al 2001, *Modern Auditing in Australia*, 6th ed, John Wiley and Sons, Sydney, NSW.
- Goldwasser, D 1988, 'Policy Considerations in Accountants' Liability to Third Parties in Negligence' *Journal of Accounting, Auditing & Finance*, vol 3, pp 217 – 231.

- Greinke, A 1997, 'Auditors' Liability to Third Parties: The View of the High Court' *Company and Securities Law Journal*, vol 15 (5), pp 309-313.
- Hayford, O 2010, 'Proportionate Liability – it's Impact on Contractual Risk Allocation' *Building and Construction Law Journal*, vol 26, pp 11 - 22.
- Hogg, K 1994, 'The Tortious Liability of Auditors to Third Parties: A Reassessment.' *University of Queensland Law Journal*, vol 18 (1), pp 79-93.
- Jain, A and Thomson, D 2008, 'Corporate Governance, Board Responsibilities and Financial Performance: The National Bank of Australia' *Corporate Ownership & Control*, vol 6 (2), pp 99-113.
- Johnson, R B, Stokes, D J and Watts, D G 1995, 'Auditor preferences for liability limitation' *Accounting and Finance*, vol 35(2), pp 135 – 153.
- Kan, E 2010, *Audit and Assurance – Principles and Practices in Singapore 2nd edn*, CCH Asia Pte Limited, Singapore.
- Khoury, L 2001, 'The Liability of Auditors Beyond Their Clients: A Comparative Study', *McGill Law Journal*, vol 46, pp 413 - 472.
- MacLulich, K K and Sucher, P 2004, *A Comparative Analysis of Auditor Independence in Economies in Transition*, The Institute of Chartered Accountants of Scotland, viewed 22 September 2013, <www.icas.org.uk>.
- Monetary Authority of Singapore, *Code of Corporate Governance 2012*, viewed 14 October 2013, <<http://www.mas.gov.sg>>.
- Nguyen, V and Rajapakse, P 2008, 'An Analysis of the Auditors' Liability to Third Parties in Australia' *Common Law World Review*, vol 37, pp 9–24.
- Pacini, C, Martin, M, and Hamilton, L, 2000, 'At the Interface of Law and Accounting: An Examination of a Trend toward a Reduction in the Scope of Auditor Liability to Third Parties in the Common Law Countries' *American Business Law Journal*, vol 37(2), pp 171 – 236.
- Rajacic, M, Rajapakse, P and Webb, E 2000, 'The Impact of the Trade Practices Act (1974 (Cth) on the Auditors' Liability' *University of Tasmania Law Review*, vol 19, pp 205-236.
- Siegel, J G and Fonfeder, R 1989, 'Accountants' legal liability requirements in twenty-six states' *Journal of Corporate Accounting and Finance*, vol 1(2), pp 153 - 165.
- Stevenson, J 2002, 'Auditor Independence: A Comparative Descriptive Study of the UK, France and Italy', *International Journal of Auditing*, vol 6(2), pp 155 - 182.
- Tellis, W 1997, 'Introduction to Case Study' *The Qualitative Report*, vol 3(2), viewed 12 October 2013, <<http://www.nova.edu/ssss/QR/QR3-2/tellis1.html>>.
- The Treasury. 2006, '*Australian Auditor Independence Requirements*', viewed 10 October 2013, <<http://archive.treasury.gov.au>>.
- United Kingdom Parliament Economic Affairs Committee 2011, '*Auditors: Market concentration and their role*', viewed 12 October 2013, <<http://www.publications.parliament.uk>>.