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EDITORIAL 69

ARTICLES

Employee share ownership plans: Evaluating the role of tax and other factors using two case studies – *Andrew Barnes*, *Tanya Josev*, *Jarrod Lenne*, *Shelley Marshall*, *Richard Mitchell*, *Ian Ramsay* and *Cameron Rider*

Employee share ownership (ESO) has recently been the subject of significant public policy debate in Australia and internationally. In these debates, ESO plans are usually said to be implemented for a variety of reasons including alignment of employer and employee interests, increased employee productivity, improved workplace harmony, and increased employee remuneration. This study explores, through case studies of ESO plans at two Australian companies, three key issues relevant to the implementation of, and the policy and regulation applicable to, ESO plans. These issues are: (1) whether ESO plans better align the interests of employees with those of their employer, leading to better enterprise performance; (2) whether the objectives of companies in implementing ESO plans are primarily "ownership objectives", "remuneration objectives" or "workplace change objectives"; and (3) whether the concessional taxation treatment of ESO plans provides an incentive for the implementation of plans in a way that leads to improved enterprise performance. 73

The indemnity: It's all in the drafting – *Nuncio D'Angelo*

The word "indemnity" is a term of broad meaning embracing a wide range of possible structures. It does not describe a single, specific and universally recognised document with defined and certain characteristics and remedies (unlike, say, a letter of credit or even a guarantee). Indemnities are frequently used in Australian commerce, and yet wide usage has not generated a common understanding or approach. A precise meaning seems to have evaded consensus, despite much judicial and academic discussion. This article does not seek to provide a conclusive definition. Rather, by addressing a number of key issues, the objective is to show that the negotiation and drafting of indemnities is critical in determining fundamental matters like the scope of the protection offered the indemnified party (and the corresponding scope of liability of the indemnifier), the type of action the indemnified party must take to make a claim and, consequently, the amount it may ultimately recover. These matters are perhaps more complex than many would suspect, and uninformed drafting can lead to unexpected consequences. Arising out of the discussion are lessons on how to negotiate and draft better indemnities. 93

Can the common law obligation of good faith be contractually excluded? – *Bill Dixon*

Academic discussion about the meaning and content of the implied common law obligation of good faith continues to flourish. However, relatively little attention has been paid to the drafting implications of the implied obligation, and, in particular, whether it is possible to successfully exclude the implied obligation by contractual provision. This article analyses a range of possible judicial responses to this issue in the context of

differing commercial contractual provisions. The article seeks to demonstrate that a majority of Australian lower court decisions are consistent with the underlying basis of the good faith obligation being the reasonable expectations of the contractual parties and considers the wider implications this holds for those drafting commercial documentation. 110

Sustainable development law and the mining sector – *Meg Lee*

"Sustainability law" is an emerging and evolving area of law. This article focuses on its emergence in and application to the mining sector as "soft law" and "hard law" at both the Australian and international levels. It concludes that the legislature and some members of the judiciary are giving increasing attention to sustainable development principles and that any remaining laggards in the mining sector will soon be compelled to turn their minds to sustainable development and the downstream impacts of their activities. 122

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