

# AUSTRALIAN BUSINESS LAW REVIEW

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## ARTICLES

### **The regulation of insurance intermediaries in the Australian financial services market – Julie-Anne Tarr**

The insurance industry discharges a critical role in the Australian economy and is a significant part of the Australian financial services market. The industry relies upon intermediaries, the principal types being brokers and agents, to promote, arrange and distribute their products and services in the market. The pivotal role that they play in this context and sensitivities associated with the consumer oriented products, such as house and contents insurance, has ensured close regulatory attention. Of particular importance was the passage of the *Insurance (Agents and Brokers) Act 1984* (Cth), a comprehensive attempt to address the responsibilities of intermediaries as well as particular problem areas associated with the handling of money. However, with the introduction of financial services and market reform early in the new millennium this insurance intermediary specific regulatory approach was abandoned in favour of a market-wide strategy; that is, market reform was based upon across-the-board licensing, disclosure, conduct and fairness standards, and all financial products and services are now regulated at a generic level under Ch 7 of the *Corporations Act 2001* (Cth). This article briefly explores the categories of insurance intermediaries and the relevant distinctions between them but focuses mainly upon the regulatory context in which they operate. This context transcends a strictly legal framework as the regulatory body, the Australian Securities and Investments Commission (ASIC), has sought to inform and guide the market through Policy Statements and Regulatory Guides. The usefulness of these guides as an adjunct to the legislation in explaining the scope and operation of regulatory framework is examined. In addition, the article looks at the self-regulatory and dispute resolution practices in this area and their impact. In conclusion an assessment of this across-the-board regulatory regime is advanced. .... 332

### **The relevance of scientific uncertainty and commercial morality to schemes of arrangement: *Re CSR Ltd* – David Nguyen**

*Re CSR Ltd* (2010) 183 FCR 358 confirms that where court approval is sought for a scheme of arrangement involving a capital reduction, the critical consideration is whether there is a material increase in the risk that a company will not be able to pay its creditors. The decision is significant for three reasons. First, it gives guidance as to the proper scope of the first court hearing in the scheme approval process (where a company seeks orders to convene a meeting of its members or creditors to vote on the scheme). Secondly, it suggests that a court cannot rely on scientific uncertainty by itself to refuse to convene such a meeting. Thirdly, although the decision confirms the relevance of “commercial morality” to schemes jurisprudence, the author will argue that the concept of public policy renders commercial morality redundant in this context. The decision’s broader implications (namely, regarding the law’s approach to scientific uncertainty and

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    - <sup>1</sup> Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
    - <sup>2</sup> Hayton, n 1, p 286.
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    - <sup>3</sup> Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
    - <sup>4</sup> Trindade and Smith, n 3 at 358–359.
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