

# COMPANY AND SECURITIES LAW JOURNAL

Volume 35, Number 2

February 2017

EDITORIAL ..... 73

## ARTICLES

### **Directors of Insolvent Trustees and Trusts: Duties and Liabilities in Respect of Beneficiaries and Trust Creditors** – *Nuncio D’Angelo*

While there has been much discussion of directors’ duties and liabilities, including in and around insolvency of their company, what has not been fully explored is the position of directors of a company that is the trustee of a trust (or responsible entity of a managed investment scheme), particularly when the trust (or scheme) is under financial stress. This article investigates the current state of the law and focuses on the situation where the trust is insolvent or near insolvent but the trustee itself remains solvent, a circumstance that can arise if the trustee has negotiated robust liability limitations when incurring trust debts, and one in which the Corporations Act 2001 (Cth) is all but silent. This article concludes that trustees may owe a duty to trust creditors to consider their interests when a trust is in insolvent circumstances, and that a breach of that duty may, in turn, constitute a breach by directors of their duties to the trustee. .... 75

### **Equity Crowdfunding in Australia: How Far Have We Come and Where to Next?** – *Catie Moore*

Equity crowdfunding is an emerging form of corporate fundraising that allows companies to raise large amounts of capital from a wide pool of investors who individually contribute small amounts. This article argues that the current Australian legislative framework is largely insufficient to facilitate a successful and internationally competitive equity crowdfunding regime. This has been recognised by the Australian Commonwealth Government. A draft Bill (and corresponding regulations) to amend the Corporations Act 2001 (Cth) was put before the House of Representatives and the Senate in late 2015 and debated in 2016. This Bill lapsed due to prorogation of the Senate, however was reintroduced in the House of Representatives in December 2016 with minor amendments. This article analyses the Bill in light of the current legislation and key challenges of equity crowdfunding, and makes recommendations to enhance the commercial application of the Bill by expanding its reach to ensure a larger pool of issuers are able to engage in equity crowdfunding. .... 102

### **Articulating Care, Skill and Diligence Standards for Non-executive Directors** – *Thea Voogt*

Non-executive directors (“NEDs”) dominate listed company boards in Australia, reflective of their crucial role. This article is concerned with the tension in the articulation of their statutory duty of care and diligence in s 180(1) of the Corporations Act 2001 (Cth) and in case law, as compared to the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations. While the functions of directors, their diligence and skills requirements are similar in both articulations, there are significant differences in the requisite standard of conduct. Whereas the objective duty of care and diligence placed on

all directors requires them to have a fundamental understanding of the business and to remain reasonably informed, the ASX Code is premised on oversight and there is the reality that NEDs are not involved in the day-to-day activities of the corporation. Therefore, NEDs who rely on the ASX Code as a benchmark for their standard of conduct are at increased personal risk. .... 128

**Corrigendum**

Please note that there was an administrative error in the February 2017 issue of the *Company and Securities Law Journal*, resulting in minor typographical errors appearing throughout the articles in the printed edition. These errors do not reflect the work put into the articles by their respective authors.

We apologise for any misunderstanding or inconvenience caused. Please note that the online version of the Journal is unaffected.