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EDITORIAL 5

ARTICLES

Uncommercial transactions – corporate governance for insolvent companies – *Matthew Broderick and Michael Lenicka*

The uncommercial transaction regime was enacted as part of the *Corporate Law Reform Act 1992* (Cth). Despite being introduced as a new concept, the test imposed for characterising a transaction as uncommercial is remarkably similar to tests adopted by Courts of Chancery over a century ago to ascertain if directors upheld the requisite standards of care and diligence in managing the affairs of a company. This article draws comparisons with the Business Judgment Doctrine, the Business Judgment Rule and other standards of corporate governance to better understand the nature of an uncommercial transaction through a comparative analysis. Other topical issues such as the need to prove insolvency to avoid an uncommercial transaction, the reasons for the slow development of the regime, corporate groups, insolvent trading, defences and remedies are also considered in this article. 7

Trading in financial derivatives: Does it increase market volatility and systemic risk? – *Dr Tony Ciro*

The article examines the legal and non-legal risk factors affecting the markets for financial derivatives. Contrary to popular belief, there appears to be little evidence to suggest that trading in financial derivatives increases the probability of systemic risk or market volatility. The tenuous relationship between financial derivatives and underlying market volatility is further supported by recent empirical studies undertaken by researchers at the Bank for International Settlements. Similarly, other non-legal risk factors appear to have no discernible effect on risk. Instead, it is argued that legal risk and in particular, legal uncertainty creates considerable harm to market participants, and adversely affects market efficiency and market volatility. This is borne out by recent United States legislative initiatives, which are aimed at reducing legal risk through incremental measures designed to improve both legal certainty and systemic stability. 23

Procedural dilemmas for contemporary shareholder remedies – derivative action or class action? – *Michael J Duffy*

Shareholders seeking relief in relation to corporate misconduct or negligence face the basic dilemma of whether the conduct complained of infringes a personal right of the shareholder or a right of the corporation. An important indicator that a right is corporate

in nature will be that the only loss to the shareholder is a diminution in the value of his or her shareholding. Such a loss will generally not be personally actionable by the shareholder though exceptions to this general rule have developed and may develop further. Where there are personal rights of a shareholder, the “class action” procedure in the Federal Court now allows personal rights to be pursued by large numbers of shareholders. It is amenable to a number of types of claim including claims under the Corporations and other Acts and at common law. In the case of infringement of company rights, however, the shareholder will need to seek relief on the corporation’s behalf. This will mean seeking leave to bring a statutory derivative action which since 13 March 2000 has been governed by the statutory provisions in Pt 2F.1A of the *Corporations Act*. In both cases the rules on legal costs are such that there are still significant disincentives to an individual shareholder taking such action. 46

COMPANY LAW

Lifting the corporate veil in industrial disputes 69

OVERSEAS NOTES – NEW ZEALAND

Aussie Rules? “Reform” of New Zealand securities law 73

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