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EDITORIAL 5

ARTICLES

What directors need to consider before calling in an administrator – and it's not just solvency... – *Nuncio D'Angelo*

Most directors would (and, indeed, all should) be aware of the potential for personal liability for insolvent trading under s 588G of the *Corporations Act 2001* (Cth). Most would also be aware that they can protect themselves from this by putting the company into voluntary administration as soon as they form the opinion that the company has become or is likely to become insolvent. But is it as simple as that? Even apart from the initial (but by no means straightforward) inquiry into the company's solvency, what else must directors take into account before calling in an administrator? What is a "proper purpose" for putting the company into voluntary administration, and is seeking safe harbour from personal liability, without more, a proper purpose? What role, if any, have the other directors' duties to play? What duties do directors owe in respect of creditors in these circumstances? This article concludes that voluntary administration is not necessarily always in the best interests of the company (or its creditors), that the formation by directors of the requisite opinion regarding solvency is a necessary, but not a sufficient, condition to the directors being entitled properly to put the company into voluntary administration, and that the entire range of directors' duties will apply in the decision to place a company into voluntary administration. Directors who wrongfully put a company into voluntary administration may face personal consequences at the suit of aggrieved stakeholders. Fortunately, there are some practical steps directors can take to protect themselves. 7

Outrage + camouflage: The utility of the managerial power approach in explaining executive remuneration – *Kym Sheehan*

This article looks at the outrage constraint and the related issue of camouflage in practice to suggest that there are limits to the ability of outrage to constrain executive remuneration. Recommendations for reform suggested by Lucian Bebchuk and Jesse Fried are examined from an Australian legal perspective. The fact that many of their suggestions are already in place in this jurisdiction does not necessarily mean that we have resolved the problems with executive remuneration. 24

Statutory injunction – call for amendment to s 1324 of the Corporations Act – *Lang Thai*

It is well documented that s 1324 is a useful tool for restraining a person from engaging in conduct that contravenes the *Corporations Act 2001* (Cth). Without examining the

provision, one tends to agree with that statement. In practice, however, the provision does not often provide the outcome that is expected. The author argues that the lack of use of s 1324 is due to the uncertainty and ambiguity in the application of the provision. Unlike with ASIC, the test that a person must satisfy when applying for an injunction is not clear cut. Whether damages could be claimed under s 1324 in place of an injunction is also unclear. The article sets out to argue that some integration with the equitable principles is vital for the survival of s 1324, as injunctions are traditionally a remedy conferred in equity and the Parliament has adopted the concept. 41

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