

# COMPANY AND SECURITIES LAW JOURNAL

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## ARTICLES

### **Share-based remuneration and termination payments to company directors: What are the rules?** – *Colin Fenwick and Kym Sheehan*

Part 2D.2 of the *Corporations Act 2001* (Cth) regulates the making of termination payments to company directors, with the aim of limiting or preventing companies from giving “golden parachutes”. Termination payments are prohibited unless they have shareholder approval, or they fall within prescribed limits. The authors’ analysis suggests that the provisions are not able to deal adequately with the widespread practice of share-based remuneration. Companies must disclose the expense incurred when making a payment, but the gain to the recipient of share-based remuneration is likely to be far greater, and to fall outside the statutory regime. Moreover, the observed practice of some companies in seeking shareholder approval for such payments suggests both that the proper application of the provisions is unclear, and that they do not require disclosure of sufficiently clear information. The authors conclude by considering ways in which the provisions might be adjusted to address these issues. .... 71

### **Sons of Gwalia versus shareholder subordination: Fairness versus efficiency** – *Andrew Bilski and Patrick Brown*

As a matter of general policy, the issue of shareholder subordination is a conflict between fairness and efficiency. The High Court’s decision in *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525; 232 ALR 232; 60 ACSR 292; [2007] HCA 1 is a compelling legal argument that conceptual consistency in the law is enhanced without shareholder subordination. On a practical level also, it is clear that the capital maintenance doctrine as a major justification for shareholder subordination is increasingly irrelevant in modern corporate finance, particularly when the supposed conflict between shareholders and creditors is reconceptualised more accurately as a conflict between shareholders and the market generally. Despite these arguments, however, ranking shareholder claims alongside unsecured creditors is fatal to the efficiency of the insolvency regime. The impact of *Sons of Gwalia* on securities fraud litigation in Australia is analysed in this context. Further weighing against shareholder claims are the potential economic implications that such claims might have. This article advocates the introduction of legislative reform to prevent shareholder claims on the basis that arguments against shareholder subordination are outweighed by the problems that they would cause for Australia’s insolvency regime. .... 93

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