

# COMPANY AND SECURITIES LAW JOURNAL

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## ARTICLES

### **Has directors' liability gone too far or not far enough? A review of the standard of conduct required of directors under sections 180-184 of the Corporations Act – Neil Young QC**

This article considers whether ss 180-184 of the *Corporations Act* should be reformed in light of perceptions that the standards and potential liability imposed by those sections cause directors to act in a manner that is detrimentally risk-averse and may discourage good candidates from taking up board positions at all. The counterpoint is that the central role of directors in company management means that directors should act as ss 180-184 require: reasonably, diligently, with good faith and for proper purposes in carrying out their responsibilities and exercising their power. While directors may be exposed to significant personal liability if they do not conduct themselves with appropriate levels of care and loyalty in accordance with their statutory obligations, and while this may cause directors to be concerned about their exposure to liability, the existence of potentially significant civil liability for breach of directors' duties, and the possibility of criminal sanctions in some cases, is a useful deterrent against suspect conduct and an incentive for reasonable care. The corollary is that directors who conduct themselves with reasonable care and honesty are unlikely to be found liable; and a close look at the relevant case law concerning ss 180-184 supports this view. As such, it appears that ss 180-184 of the *Corporations Act* strike a sensible balance between too much directors' liability and not enough. .... 216

### **Shareholder litigation after *Sons of Gwalia Ltd v Margaretic* – Elizabeth Boros**

A number of corporate law developments coincided in the decision of the High Court of Australia in *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525; [2007] HCA 1. They include the imposition of continuous disclosure obligations on listed entities; the availability of statutory remedies for false or misleading conduct in the corporate context; the introduction of class action procedures in the Federal Court and the Victorian Supreme Court; the emergence of professional litigation funders assisting this type of action; and, of course, the ultimate decision that claims brought by shareholders under the statutory remedies referred to above rank with (rather than behind) the claims of other unsecured creditors. It is the latter issue that has attracted most academic and media commentary because of its implications for the returns to other unsecured creditors and the practical difficulties it potentially poses for administrators. However, this article argues that this issue must be understood within the wider factual matrix that includes all the above developments. This approach has implications for future shareholder litigation and for any law reforms that might be proposed in response to the decision. .... 235

**Negotiating the third way: Developing effective process in civil penalty litigation – Peta Spender**

Civil penalties are a product of regulatory law and they fit uneasily within the civil-criminal procedural divide. Disputes about procedure in civil penalty litigation are frequently resolved by resort to criminal rather than civil analytical frameworks, due to conflation of the privilege against exposure to a penalty with the privilege against self-incrimination. Two recent cases, *Macdonald v Australian Securities and Investments Commission* [2007] NSWCA 304 and *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32; [2007] FCA 1620, regarding the proper ambit of disclosure in a defence, demonstrate the further embrace of the criminal model and the concomitant complication of the plaintiff's case. The area is ripe for law reform, though incremental change is difficult to achieve in case law, where judges focus upon the individual rights of defendants. Instead, a paradigm shift is required which reconsiders the bifurcation of civil and criminal procedure to accommodate regulatory law and statutory remedies effectively. .... 249

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