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EDITORIAL 201

ARTICLES

A rapid response to questionable trading: Moving towards better enforcement of Australia's securities laws – Janet Austin

The global financial crisis has acutely exposed the global nature of the markets for securities and their impact on the economy. Confidence in the Australian securities markets is at its lowest level in most people's memory and trading volumes have fallen significantly. Confidence has been further eroded by stories that some market participants have been spreading false or misleading information to profit from the volatility. Part of restoring confidence must be an increased effort by regulators to improve enforcement of existing laws prohibiting market misconduct. Can more be done to ensure that the Australian Securities and Investments Commission (ASIC) and the Australian Securities Exchange (ASX) improve their enforcement of Australia's securities laws, in particular the prohibitions against insider trading and market manipulation? ASIC has recently undertaken a review of its structure in an effort to become more market focused. The ASX has established a separate company to undertake supervision of its markets. However, both ASIC and the ASX operate under existing laws and procedures that divide the supervision of the markets between them. This article considers whether changes are needed to both their enforcement tools and this division of regulation to prompt a quicker enforcement response. 203

Australian court shoots down British Eagle – Michael Lishman

Where the provisions of an insolvency statute conflict with contractual arrangements between parties, the statute prevails. But there is no basis for reading into such statutes a broader "anti-deprivation principle" based on public policy as suggested by the decision of the House of Lords in *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758. The recent decision of the High Court of Australia in *International Air Transport Assoc v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 has clarified that no such principle exists in Australian law. That being the case, parties are at liberty to structure arrangements to avoid the impact of insolvency laws on particular assets. Whether or not such arrangements are successful depends on the application of contractual and property law principles, the express terms of the insolvency statutes and the skill of the lawyer who drafts the arrangements. 219

The insider trading "generally available" and "materiality" carve-outs: Are they achieving their aims? – Gill North

The article outlines and critiques Australian insider trading case law dealing with the "generally available" and "materiality" carve-outs. It explores the potential links from these elements to the economic efficiency and market fairness goals. Ultimately, it suggests that Australian policy-makers, regulators and the judiciary may need to take a step back to reconsider the intended rationales and operations of the insider trading

regime. Community and market participant views on enforcement of market abuse in Australia are already very negative. Moreover, it is difficult to reconcile some of the case law with the achievement of economic efficiency and equal access in the marketplace. 234

Litigation funding at another cross-roads – Robert Baxt AO

The interesting comments of the New South Wales Court of Appeal in *Hall v Poolman* [2009] NSWCA 64 in relation to the role of litigation funders, and the unwillingness of the court to interfere with a liquidator’s use of litigation funders in seeking recovery from directors for insolvent trading, highlight the growing importance of litigation funding in the Australian litigation scene. The *Fostif* decision (*Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386) has come “home to roost”. While there have been some questions raised as to how litigation funders should be used, and what controls may be imposed on them (as, eg, noted by a different New South Wales Court of Appeal decision in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105), it seems that litigation funding is generally regarded favourably by our courts. But, do we need regulation in the way in which litigation funders should operate? If so, should this be done by rules of court or by legislation? This short article discusses some of the relevant issues and indicates some potential avenues for the development of guidelines. 255

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