COMPANY AND SECURITIES LAW JOURNAL

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EDITORIAL 81

ARTICLES

Continuous disclosure in volatile times – *Damian Reichel*

The global financial crisis and its continuing impacts have created a particularly anxious environment for directors and senior executives striving to ensure that their companies comply with their continuous disclosure obligations while seeking to preserve value for shareholders. In these volatile times, often the premature disclosure of circumstances which could lead to a negative development will, of itself, fulfil the negative prophecy, yet the failure to give forewarning of an adverse development before it occurs may be criticised. To what extent can directors and senior executives rely on their judgment in determining whether circumstances which may (but may not) lead to adverse developments should be disclosed by their company under the continuous disclosure requirements, and whether any exemption from the disclosure requirements applies? 84

The role of lawyers in the context of ASIC's investigative and enforcement powers – *Tom Middleton*

The role of lawyers in the context of ASIC's investigative and enforcement powers is significantly different from their role in a private litigation context. This article examines the lawyer's role in providing advice to clients who are the subjects of ASIC's investigations and proceedings. The lawyer may become the subject of ASIC's investigation as either a suspect or non-suspect. This article explores the potential civil liability of lawyers under the due care and diligence rule in s 180 of the *Corporations Act 2001* (Cth), and their potential accessorial civil and criminal liability in relation to their clients' contraventions of the corporations legislation. Reforms are suggested in this article to clarify the lawyers' role in ASIC's investigations, particularly their role in ASIC's oral examinations. There is also a need to clarify the operation of legal professional privilege under the *Australian Securities and Investments Commission Act 2001* (Cth). This article also suggests that there should be more effective laws to enable the victims of corporate collapses to recover their losses. The reforms suggested in this article would produce a more effective corporate regulatory regime. 107

Nominee directors: The need for board protocols – *Michael Lishman*

As a matter of commercial reality, there are many instances where directors are appointed to boards to represent the interests of a particular shareholder. For listed companies, this often occurs where the listed company is either a subsidiary or has a significant shareholder, who seeks representatives on the company's board. Nominees are seen by the other directors as representing their appointor and will be expected by the appointor to report back on the appointor's investment in the company. While nominee directors are subject to the same legal obligations as other directors, the fact that they are nominees can give rise to particular issues. These include dealing with conflicts of interest (not just between the director and the company, but also between the appointor and the company)

and the circumstances in which information can be withheld from the nominee director and when it can be passed back to the appointor. These issues can be better managed by the board adopting appropriate protocols. Properly drafted, protocols are in the interests of the company and the nominee. Protocols can establish processes for identifying where conflicts may arise and how they should be dealt with, can set out when information can be withheld from a nominee director and set out when the nominee director is permitted to pass back information to the appointor. 130

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