

# COMPANY AND SECURITIES LAW JOURNAL

Volume 28, Number 3

May 2010

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## ARTICLES

### **The business judgment defence: Insights from ASIC v Rich – Andrew Lumsden**

In *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 Austin J provided the first comprehensive judicial analysis of the statutory business judgment defence in s 180(2) of the *Corporations Act 2001* (Cth). The judgment addressed important, mostly unanswered, questions for directors and officers around the use of the business judgment defence: What is a business judgment? Who bears the onus of proof? What is the relationship between the defence and the primary duty of care and diligence in s 180(1)? What is the role of the common law business judgment rule? What does the business judgment defence require? What is the effect of the requirement for a “rational belief”? This article analyses the judgment and extracts some general guidance about how the defence can be usefully applied by managers taking defensible commercial risks. .... 164

### **The lure of private equity: Financial arrangements with target directors – Yee Ben Chaung**

One of the more contentious issues arising from the boom in private equity activity during the period leading up to the emergence of the sub-prime credit crisis in late 2007 was that regarding the compliance of target company directors with their duties to the target company. Characterised by their friendly nature, private equity transactions routinely include target director involvement through both ancillary benefits arrangements and participation in the bid consortium. Unsurprisingly, at various times, this resulted in an erosion of shareholder confidence in the ability of target directors to effectively safeguard their interests. This article considers the issues in relation to target directors’ duties to the target company arising from private equity transactions as they arise in Australia and compares the relevant principles of corporate governance in Australia with equivalent principles in the United States. .... 180

### **Unincorporated associations as entities: A matter of balance between regulation and facilitation? – Myles McGregor-Lowndes and Frances Hannah**

Small non-profit organisations play a vital role in the creation of social capital and the resilience of civil society in Australia. A number of government inquiries have recently been commissioned to propose reform of non-profit enterprise and it is timely to examine the suitability of legal structures available for small non-profit organisations. This article reviews the characteristics of small Australian non-profit organisations and the legal treatment of similar associations in New Zealand, the United Kingdom, Europe, Canada and the United States to inform possible reform strategies. Reforms are then proposed for small Australian unincorporated organisations which will allow them access to the benefits of separate legal entity status, but with regulation proportionate to the risks posed to the broader community. .... 197

CORPORATE FINANCE – *Paul U Ali*

**Is there a change in the regulation landscape of credit rating agencies?** – *Geneviève Brunner* ..... 222

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**THOMSON REUTERS**

© 2010 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 0729-2775

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW