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ARTICLES

The Penalty Quantum for Non-compliance with Corporate Disclosure: Solace for the Market – *Larelle (Ellie) Chapple, Thu Phuong Truong and Michelle Welsh*

In June 2014 a significant event happened in securities regulation and compliance – the New Zealand market operator used its enforcement power to discipline a major corporate player with a penalty (NZ$150,000) for its breach of the disclosure rules. The market disclosure rules have been in operation since 2002 but until then there had been no instances where compliance has been enforced so overtly and to such a magnitude. Australia operates a similar system of disclosure regulation to New Zealand, but its enforcement record stands in stark contrast, where around the same time, a major Australia company agreed to a penalty of AU$1.2 million for two contraventions of similar laws. This article reviews the New Zealand regulatory landscape in mandatory disclosure and compliance and reflects on the relevant market operators' and regulators' power and appetite for enforcement. These contrasting examples raise interesting questions in corporate law as to the effectiveness at enforcing market discipline in relation to disclosure, and whether quantum matters. 292

An Analysis of Challenges to ASIC's s 920A Banning Orders against Financial Services Providers in the AAT and the Courts – *Dr Robin Bowley*

Section 920A of the *Corporations Act 2001* (Cth) provides the Australian Securities and Investments Commission (ASIC) with a flexible power to ban individuals from the Australian financial services industry on a number of grounds. The objective of this power is to protect consumers through upholding compliance with the law and adherence to professional standards. Banned individuals may apply to the Administrative Appeals Tribunal (AAT) to review the merits of such decisions, and on limited points of law such cases may be further appealed to the Federal Court of Australia (FCA). This article analyses the practice of the AAT and the FCA in determining challenges to s 920A banning orders. The 50 AAT cases examined in the article provide interesting examples of misconduct by financial advisers, stockbrokers and traders, insurance brokers and operators of investment schemes. The article shows that while the AAT has shown a flexible approach in considering the circumstances of each banning (setting aside four bans and varying the length of 15 bans), it has nevertheless exhibited a firm approach in the other 31 cases in affirming bans following serious misconduct. The article concludes by suggesting some minor reforms to further enhance the range of protective enforcement tools available to ASIC. 307

Related Party Dealings Out of Managed Investment Schemes: Four Quandaries Addressed – *Tom Clarke*

The Federal Court's decision in *Australian Securities and Investments Commission v Avestra Asset Management Ltd* provided a rare opportunity for judicial guidance on the interpretation and application of the Pt 5C.7 framework governing related party dealings

out of the scheme property of managed investment schemes (MISs). The judgment considered and clarified four issues with Pt 5C.7 that arose on the facts in that case: (i) Is a cross-investment into a related party's MIS caught by s 208(1)? (ii) Can the responsible entity (RE)'s acquisition of bare legal title in shares acquired by the scheme amount to a "financial benefit" to the RE? (iii) How does Pt 5C.7 apply to financial benefits given indirectly, through an interposed scheme that is unregistered? and (iv) Who are the related parties of entities (other than the RE itself) whose giving of financial benefits is caught by s 208(1)(a)? 342

Risky Business and the Safe Harbour: Evaluating the Insolvent Trading Reform from a Creditor Perspective – *Emma Norton*

On 18 September 2017, the *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth) passed into law. This amendment introduces a safe harbour carve out into the *Corporations Act 2001* (Cth) (*Corporations Act*), available to company directors who may otherwise be personally liable for insolvent trading under s 588G. The reform is the result of a decades long debate on the effect of Australia's strict insolvent trading provisions; and allows company directors access to an articulated reprieve from liability where they have honestly and reasonably pursued informal restructuring of their company, in violation of the prohibition on insolvent trading set out in the *Corporations Act*. This article will present an argument for the reform from the perspective of creditor protection, using contractual theory as a framework through which to assess the necessity of reform. 353

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A Reconsideration of s 1324(10) of the Corporations Act 2001 (Cth): Damages in Lieu of an Injunction – *Dr Katy Barnett* 370