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ARTICLES

Directors' Voting Recommendations in Schemes: Navigating the New Landscape – *Alberto Colla*

In any proposed scheme of arrangement to accomplish a friendly takeover, the target directors' public voting recommendations to shareholders are of central importance. Potentially complicating these recommendations is that one or more target directors are often eligible to receive some form of personal benefit if the scheme proceeds (in addition to the benefit they are entitled to receive under the scheme if they are also shareholders). In terms of how the receipt of an additional, contingent benefit intersects with the director recommendation framework for schemes, this is regulated by a disclosure-based regime under the *Corporations Act 2001* (Cth). The issue of whether disclosure alone is now sufficient has been brought into sharp question by a line of recent, conflicting cases. There is now uncertainty surrounding the ability of directors who stand to receive a contingent personal benefit to make voting recommendations in schemes and, if they do, the level of disclosure required about any benefit. This article explores that uncertainty and offers practical guidance to navigate it. 162

Sport Australia's Governance Principles for National Sporting Organisations: The Triumph of Managerialism over Accountability and Representation in Australian Sport – *Lloyd Freeburn*

This article analyses the good governance principles of Sport Australia, the Commonwealth Government's sports administration agency. These governance principles are applied to national sporting organisations (NSOs) that govern Australian sports. NSOs adopt federated membership structures with their only effective members being State and Territory associations. While Sport Australia is critical of these structures as contributing to poor governance and notwithstanding that it insists upon NSOs adopting other structural reforms, the agency abdicates seeking membership reform for reasons of expediency. Instead, Sport Australia pursues behavioural change as the remedy for the defects of federated NSOs. It is argued that the accountability of federated NSO boards is defective. Real accountability is defeated when accountability is owed to a membership that is unrepresentative of those who are governed by NSO boards. Moreover, in the absence of accountability, Sport Australia's governance principles invest NSO boards with a form of absolute control wholly inconsistent with principles of good governance. 181

Social Licence to Operate and Directors' Duties: Is There a Need for Change? – *Rosemary Teele Langford*

Directors' duties have received renewed focus in the aftermath of the Banking Royal Commission, with questions arising as to whether directors need more leeway – or increased obligations – to take stakeholder interests into account. At the same time, the

concept of social licence to operate was omitted from the final fourth edition of the ASX Corporate Governance Principles and Recommendations, issued in February 2019. In the United Kingdom a new Corporate Governance Code and a new Guidance on Board Effectiveness were enacted in July 2018 with emphasis on the long-term sustainability of companies. Questions arise as to exactly what the contested concept of social licence to operate entails, whether embracing social licence to operate would necessitate reform of directors' duties and whether any lessons can be learnt from the UK experience in these respects. This article addresses these questions, arguing that the UK model of increased reporting and adoption of a Guidance on Board Effectiveness may provide solutions for Australia. 200

BOOK REVIEW

Company Directors' Duties and Conflicts of Interest, by Rosemary Teele Langford – *Reviewed by JH Farrar* 214

CORPORATE FINANCE – *Editor: Matthew Broderick*

Case Note: *Re O'Keeffe Heneghan Pty Ltd (in liq)* (No 2) [2018] NSWSC 1958 – *Ganesh Jegatheesan*

The recent decision of the New South Wales Supreme Court in Re O'Keeffe Heneghan Pty Ltd (in liq)1 is an important reminder of the advantages offered under the *Personal Property Securities Act 2009* (Cth) (PPSA) to perfection of a security interest by control, in circumstances where application of the default priority rules in the PPSA would otherwise award priority to a competing security interest. The decision also highlights the pre-eminent status awarded by the PPSA to an Authorised Deposit Taking Institution (ADI) with respect to security over a bank account in credit. Financiers should remain cognisant of the risks of entering secured transactions where security is taken in competition with an ADI. Further, despite statutory intervention, a detailed understanding of the operation of relevant equitable principles may remain critical to the resolution of commercial disputes. 215

Widely-held Proprietary Companies: Opportunities and Challenges for Australian Craft Brewers – *Matt Vitale*

The recent extension of the crowd-sourced funding (CSF) regime to proprietary companies means it is now possible for proprietary companies to be widely held, having a potentially unlimited number of shareholders. Although it is now possible for proprietary companies to use the CSF regime, it may not be suitable for some proprietary companies to be widely held. This article will demonstrate how the liquor licensing regimes of South Australia and Western Australia rely on the principle that proprietary companies are closely held, and will highlight some of the barriers that exist for proprietary companies wanting to use the CSF regime in those States. 220

CORRECTION

Please note that in the article "Company Disclosure of Climate-Related Reputation Risks" by Andrew Belyea-Tate in the previous issue of C&SLJ, Vol 37 No 2, there was an incorrect reference to a speech. As a result:

- footnote 89 should read: Geoff Summerhayes (Executive Board Member, Australian Prudential Regulation Authority), "The Weight of Money: A Business Case for Climate Risk Resilience" (Speech delivered at the Centre for Policy Development, Sydney, 29 November 2017) 8.
- footnote 90 should read: Summerhayes, n 89, 8.