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EDITORIAL

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ARTICLES

The Use of Public Warning Notices By ASIC – Should the Law Be Reformed? – *Lloyd Freeburn and Ian Ramsay*

Public warning notices are issued by regulators with the objective of preventing harm to the public. They do this by identifying conduct that is causing harm or may cause harm. The Australian Securities and Investments Commission (ASIC) has published only 12 public warning notices since it was given the power to publish these notices in 2010. The authors explore the use of public warning notices by ASIC and the Australian Competition and Consumer Commission and consider why public warning notices have been little used by these regulators. Other issues discussed by the authors include the benefits and concerns associated with these notices, factors that may be considered in the making of notices and the form of notices, and whether ASIC's public warning notices power should be broadened, as recommended in a 2022 report of the Senate Economics References Committee. 87

A Matter of Opinion: Statements of Opinion, Implied Representations and Liability for Misleading or Deceptive Conduct – *Seung Chan Rhee*

The misleading or deceptive conduct provisions enable the actioning of representations of fact, which often take the form of statements of opinion. Although by nature an opinion is not factual, it can convey implied representations of fact. The general position is that an opinion represents only two things: (1) that it is honestly held, and, (2), perhaps, that there is a reasonable basis for it. This means representors cannot be liable merely for the incorrectness of their opinions. However, it is unclear what “perhaps” entails – when will an opinion imply that it is founded on some basis, such that its absence renders it misleading and deceptive? The courts have laboured under this uncertainty since the introduction of the trade practices legislation. The author argues that the courts have, in response, fashioned a largely implicit approach based on reliance, and concludes by suggesting that this reasoning should be expressly articulated rather than retaining the loose and unhelpful language of “perhaps”. 97

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