

COMPANY AND SECURITIES LAW JOURNAL

Volume 32, Number 7

October 2014

EDITORIAL 451

ARTICLES

Injunctions and damages under s 1324 of the Corporations Act: Will McCracken v Phoenix Constructions revive the narrow approach? – Victoria Schnure Baumfield

Is s 1324(10) of the *Corporations Act 2001* (Cth) the corporate lawyer’s secret weapon or a damp squib? On its face, s 1324(10) would appear to allow a court to award damages to any person with standing to apply for an injunction under the Act. There has been some debate, however, about the extent to which s 1324(10) must be limited by its apparent contradiction with other portions of the Act. This article examines *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2013] 2 Qd R 27; [2012] QCA 129 in light of the previous case law interpreting s 1324 to see what opening remains for affected parties, in particular creditors, to access damages or injunctions under s 1324. The article concludes that while McCracken presents compelling reasons for not awarding s 1324(10) damages to creditors, arguments remain in favour of a broad interpretation of s 1324 for creditors in certain scenarios. 453

Kumarina and bidders voting in transfer schemes – JS Humphrey

Transfer schemes are an alternative means of acquiring control of a company to making a takeover bid under the provisions in Ch 6 of the *Corporations Act 2001* (Cth). The recent decision *Re Kumarina Resources Ltd* [2013] FCA 549 overturned long-standing practice in relation to a certain type of transfer scheme. If followed, the decision would allow a “bidder” to vote at scheme meetings where the scheme consideration for the acquisition of the target shares are shares in another company, and the scheme results in a merger. But the bidder is not allowed to vote where the scheme consideration is cash. The article points out the difficulties arising from this decision and argues that it should not be followed. In providing a “no objection” statement, the Australian Securities and Investments Commission (ASIC) has created uncertainty as to the approach it will take towards the bidders being allowed to vote at scheme meetings where the scheme consideration for the acquisition of target shares are shares in another company. The article also points out that in providing the no objection statement in *Kumarina*, ASIC appears to have ignored breaches of s 606(1) of the *Corporations Act*. There is a pressing need for ASIC to clarify its position and, in particular, whether or not it will provide a no objection statement in respect of future transfer schemes where a bidder (or its parent company) votes at the scheme meeting. 473

“Unashamedly more interventionist” courts and the fading significance of a director’s state of mind – Kane Loxley

Arguably the defining development in modern corporate governance is the increased responsibility that the law ascribes to boards of directors. That development has been achieved in large part through approaching directors’ conduct through the objective lens of the “reasonable director” and eschewing the subjective judgment of the particular director whose conduct is impugned. While the shift toward a strict approach is in line with the community expectation that those responsible for corporate decision-making be held to account for their actions, it seems that the rather rapid shift in attitude in recent times has reached a point where courts are paying lip service to the relevance of a director’s state of mind and commercial judgment, and instead finding a way to have recourse to the nominal “reasonable director” as the touchstone against which all conduct is assessed. This article analyses how the relationship between the subjective and objective is applied to each of the duties of a director in ss 180 to 184 of the *Corporations Act 2001* (Cth). 486

OVERSEAS NOTES: HONG KONG, SINGAPORE AND MALAYSIA – Say Goo

Corporate social responsibilities in the context of confucianism – Charles Lam and SH Goo 512