EDITORIAL ........................................................................................................................................ 81

ARTICLES

Continuous disclosure in volatile times – Damian Reichel

The global financial crisis and its continuing impacts have created a particularly anxious environment for directors and senior executives striving to ensure that their companies comply with their continuous disclosure obligations while seeking to preserve value for shareholders. In these volatile times, often the premature disclosure of circumstances which could lead to a negative development will, of itself, fulfil the negative prophecy, yet the failure to give forewarning of an adverse development before it occurs may be criticised. To what extent can directors and senior executives rely on their judgment in determining whether circumstances which may (but may not) lead to adverse developments should be disclosed by their company under the continuous disclosure requirements, and whether any exemption from the disclosure requirements applies? ....... 84

The role of lawyers in the context of ASIC’s investigative and enforcement powers – Tom Middleton

The role of lawyers in the context of ASIC’s investigative and enforcement powers is significantly different from their role in a private litigation context. This article examines the lawyer’s role in providing advice to clients who are the subjects of ASIC’s investigations and proceedings. The lawyer may become the subject of ASIC’s investigation as either a suspect or non-suspect. This article explores the potential civil liability of lawyers under the due care and diligence rule in s 180 of the Corporations Act 2001 (Cth), and their potential accessorial civil and criminal liability in relation to their clients’ contraventions of the corporations legislation. Reforms are suggested in this article to clarify the lawyers’ role in ASIC’s investigations, particularly their role in ASIC’s oral examinations. There is also a need to clarify the operation of legal professional privilege under the Australian Securities and Investments Commission Act 2001 (Cth). This article also suggests that there should be more effective laws to enable the victims of corporate collapses to recover their losses. The reforms suggested in this article would produce a more effective corporate regulatory regime. ................................................................. 107

Nominee directors: The need for board protocols – Michael Lishman

As a matter of commercial reality, there are many instances where directors are appointed to boards to represent the interests of a particular shareholder. For listed companies, this often occurs where the listed company is either a subsidiary or has a significant shareholder, who seeks representatives on the company’s board. Nominees are seen by the other directors as representing their appointor and will be expected by the appointor to report back on the appointor’s investment in the company. While nominee directors are subject to the same legal obligations as other directors, the fact that they are nominees can give rise to particular issues. These include dealing with conflicts of interest (not just between the director and the company, but also between the appointor and the company)
and the circumstances in which information can be withheld from the nominee director and when it can be passed back to the appointor. These issues can be better managed by the board adopting appropriate protocols. Properly drafted, protocols are in the interests of the company and the nominee. Protocols can establish processes for identifying where conflicts may arise and how they should be dealt with, can set out when information can be withheld from a nominee director and set out when the nominee director is permitted to pass back information to the appointor.
Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, Company and Securities Law Journal, at LAT.csij@thomsonreuters.com for forwarding to the Editor.

Licences

• It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at http://www.thomsonreuters.com.au/support/as_contributors.asp and emailed with the submission or mailed separately to the Production Editor, Company and Securities Law Journal, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

Letters to the Editor

• By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

• Manuscript must be original, unpublished work that has not been submitted or accepted for publication elsewhere, including for online publication.
• Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
• Manuscript should not exceed 15,000 words for articles or 3,000 words for section commentary or book reviews.
• An abstract of 100-150 words must be included at the head of articles.
• Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
• Graphics (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

Peer review

• This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases**:
   • Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
   • Authorised reports must be cited where published, and one other reference can be used in addition.
   • For “at” references use media-neutral paragraph numbers within square brackets whenever available.
   • For international cases best references only should be used.
4. **Legislation** is cited as follows:
   • Trade Practices Act 1974 (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
   • In footnotes do not use ibid or op cit. Repeat author surname and add footnote reference to first mention.
6. **Journals** are cited as follows:
   • In footnotes do not use ibid or op cit. Repeat author surname and add footnote reference to first mention.
   1 Hayton, n 1, p 286.
7. **Internet references** are cited as follows:
   • Wherever possible use official journal title abbreviations.

(2010) 28 C&SLJ 77

79
SUBSCRIPTION INFORMATION

The Company and Securities Law Journal comprises eight parts a year.

The journal is available for subscription via paper and/or online. An online subscription can include access to archived volumes of the journal dating back to 1982 and has the following benefits: all content is fully searchable; PDF versions are provided for convenience; and users can subscribe to an RSS feed to be instantly informed of updates.

For further information on how to subscribe:
Visit www.thomsonreuters.com.au
Tel: 1300 304 195
Email: LTA.Service@thomsonreuters.com

Advertising inquiries:
Contact Andrew Parsons on (02) 8587 7462 or email a.parsons@thomsonreuters.com

Editorial inquiries: Tel: (02) 8587 7000

Customer service and sales inquiries:
Tel: 1300 304 195 Fax: 1300 304 196
Web: www.thomsonreuters.com.au
Email: LTA.Service@thomsonreuters.com

Head Office
100 Harris Street PYRMONT NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100

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

80 (2010) 28 C&SLJ 77