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EDITORIAL 271

ARTICLES

Whole-business securitisation in the post-financial crisis context: An overview of regulatory frameworks, incentives and structures – *Sven Fedorow*

The role of securitised financial instruments in contributing to the global financial crisis has left many with doubts as to the future of securitisation, in particular in the context of deals involving a high degree of complexity. The risk aversion that gripped financial markets in the aftermath of the financial crisis resulted in little to no new securitisation activity for a substantial portion of the past decade, from which we only now seem to be emerging. As some firms have now found enough courage to once again attempt whole-business securitisations, the substantially higher degree of complexity of these transactions and their relative rarity makes outcomes, in some senses, even more difficult to predict than the collapse of the somewhat simpler mortgage-backed securities market recently witnessed in the United States. To evaluate what the future of whole-business securitisation might yield, this article discusses three separate dimensions of whole-business securitisation transactions: (i) the basic existing regulatory and structural framework characterising whole-business securitisations, including some jurisdiction-specific issues; (ii) environmental or market-based incentives that impact whole-business securitisation activity, including macroeconomic and financial incentives; and (iii) an evaluation of some structures that are being used in practice, accompanied by a brief discussion of potential changes that could influence those structures. Among the sources consulted are academic literature on securitisation and whole-business securitisation from several fields, empirical studies on securitisation generally, rating agency criteria, and the recent comprehensive report published by the Basel Committee on Banking Supervision. 274

Superannuation trustees: Governance, best interests, conflicts of interest and the proposed reforms – *Daniel Mendoza-Jones*

The complex relationship between the general law and statutory aspects of the superannuation governance regime has resulted in uncertainty for superannuation trustees. Superannuation trusts should be treated similarly to traditional trusts, while taking into account relevant background and commercial facts, when assessing the extent of trustees' powers and duties. In examining the duty of a superannuation trustee to act in beneficiaries' best interests, the general law understanding of "best interests" is crucial to the proper interpretation of the corresponding statutory provision. There are a number of factors affecting the ability of trustees to properly discharge their duties, including the uncertainty in defining the "beneficiary" group, as well as the extent to which those duties are impacted by the existence of member investment choices within superannuation funds. Directors of trustee companies are subject to a different range of duties and liabilities compared to those of the natural trustee, the clarity of which will be increased by the proposed new s 52A duties. There are inherent conflicts of interest that arise under many trustee company arrangements, especially in relation to retail managed and corporate

master funds, due to their arrangements with related entities. A number of the Stronger Super reforms represent missed opportunities, and others seem to do little more than articulate well-established principles of general law. 297

The role and value of independent directors in modern Australian corporate governance – *Neil Dunbar*

The role of the independent director in the governance of public companies has been highlighted as a result of the recent collapse of a number of well-known companies. What role can the independent director reasonably expect to play within the company structure to prevent the likelihood of further corporate failures taking place? This article describes what can be reasonably expected of independent directors and identifies those areas that companies need to address to ensure that they employ suitable independent directors and utilise their skills appropriately. 312