

AUSTRALIAN BUSINESS LAW REVIEW

Volume 41, Number 3

June 2013

EDITORIAL 111

ARTICLES

Appeal rights, access regimes and anticompetitive conduct provisions – are we getting the incentives right? – Richard York

The design of trade practices and access regime legislation creates incentives that influence the decisions of regulators, regulated firms and other market participants. This article considers the different incentives created by anticompetitive conduct and access regime provisions contained in Australian and New Zealand legislation. The author concludes that the Australian Competition and Consumer Commission has been provided with too many powers, and there are insufficient appeal rights, under recent changes to Pt XIC of the *Competition and Consumer Act 2010* (Cth) such that the risk of poor quality regulatory decisions is higher. Conversely, it also concludes that the pathway to access under Pt IIIA of the same Act involves too many stages, too many decision-makers and too many rights of appeal in a way that has the potential to lead to regulatory uncertainty and long drawn-out regulatory decisions.

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Solving the fiduciary puzzle – the bona fide and proper purposes duties of company directors – Rosemary Teele Langford

The recent finding by three judges of the Western Australian Supreme Court of Appeal in *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* (2012) 270 FLR 1; 89 ACSR 1 (Bell Appeal) that the duties of directors to act bona fide in the interests of the company and for proper purposes are fiduciary duties is significant. There has been substantial doubt as to whether these duties can continue to be classified as fiduciary, despite a long history of being so characterised. Indeed Bell Appeal exemplifies a distinct clash between prevalent equity theory and corporate law jurisprudence as concerns fiduciary duties. Bell Appeal is not the final word on the characterisation of these duties given that an appeal will be heard by the High Court. Moreover, aspects of the judgment run counter to statements of the High Court in the seminal case of *Breen v Williams* (1996) 186 CLR 71. A reconciliation of the fiduciary nature of these duties with the High Court's statements is therefore necessary. This article undertakes such reconciliation. It demonstrates the appropriateness of classifying these duties as fiduciary and shows that there is in fact no great clash.

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Trustees' limitation of liability: Myths, mysteries and a model clause – Diccon Loxton and Nuncio D'Angelo

Under Australian trust law, trustees bear unlimited personal liability for trust debts and liabilities. If they want to limit their liability to a creditor (eg to trust assets) they must agree a limit bilaterally with that creditor, to apply as a matter of contract. The law and the issues involved in doing so are complex and not always fully understood. Attempts to deal with them have yielded a wide range of approaches, but on close analysis many may only be partially effective. When typical limitation clauses are analysed, it becomes apparent

that the expectations of trustees and creditors can be frustrated. In this article, the authors explore the legal framework within which these limitations operate, identify common issues in clauses currently in use and suggest and explain in detail a model clause which seeks to address them and place trustees and creditors on a more certain footing. The discussion includes consideration of the position of security trustees, ie trustees acting in a financing context who hold security on behalf of multiple creditors. 142

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