

COMPANY AND SECURITIES LAW JOURNAL

Volume 31, Number 4

June 2013

EDITORIAL 207

ARTICLES

ASIC’s regulatory powers – interception and search warrants, credit and financial services licences and banning orders, financial advisers and superannuation: Problems and suggested reforms – Tom Middleton

The Australian Securities and Investments Commission’s increased regulatory responsibilities, coupled with growth in the range and complexity of the financial products it has to regulate, pose enormous regulatory challenges for ASIC in the future. It is argued that these challenges are exacerbated by the gaps, inconsistencies, uncertainty and weaknesses in the current regulatory framework. A number of problems are highlighted in this article, including ASIC’s inconsistent search warrant powers and its inconsistent regulatory powers relating to superannuation and retirement funds. Regulatory deficiencies or weaknesses are identified in relation to telecommunications interception warrants, ASIC’s powers to regulate credit and financial services licences, its powers to make banning orders and the new statutory duties of financial advisers to act in the best interests of their clients. In some cases, the regulatory laws do not ensure the disclosure of material facts or risks to investors nor do they adequately deal with the problem of “shadow banks”. Some of the regulatory laws do not ensure that ASIC can detect contraventions in a timely manner. The reforms suggested in this article would promote greater harmonisation of the regulatory laws that govern ASIC’s investigative and enforcement powers and reflect “best practice”. Best practice promotes more effective regulation and public confidence in the integrity and credibility of the regulatory system and enhances the economic welfare of all Australians. 208

Systemic risk after the global financial crisis: Covered bonds and retail contracts for difference – Nan Seuffert

The role of systemic risk in contributing to the causes and severity of the global financial crisis (GFC) has been widely recognised. While systemic risk has traditionally been approached as a banking issue, the GFC revealed new levels of interconnections between the banking, financial, real estate and insurance industries (FIRE) with global implications. In response, the International Organisation of Securities Commissions (IOSCO) adopted three new objectives of securities regulation in 2010, the third of which is “reducing systemic risk”, as well as new principles that emphasise the need for processes that monitor, mitigate and manage systemic risk. This article analyses systemic risk in New Zealand from a securities regulation perspective, arguing that in light of the far-reaching implications of systemic risk revealed by the GFC, securities regulators and commentators need to understand systemic risk and its operation. It then argues that two recent developments in New Zealand and Australia’s financial product markets pose potential systemic risks: covered bonds and retail trading in contracts for difference. Drawing on Australian studies and developments in these two areas, the article suggests some regulatory responses for New Zealand, including integrated monitoring. 237

Reform of the financial advice industries in Australia and the United States – *Daniel Mendoza-Jones*

Australia’s *Future of Financial Advice* (FOFA) and the *Dodd-Frank* legislation in the United States represent missed opportunities to finally permit retail investors to receive uniformly professional and conflict-free financial advice. FOFA failed to completely exclude all forms of conflicted remuneration and *Dodd-Frank* contains a counterproductive specific codification of the receipt of commissions by financial advisers as somehow being compatible with the discharge of fiduciary duties. The success of the FOFA statutory best interests duty and the United States Securities and Exchange Commission’s proposed fiduciary duty rules will turn on the willingness of courts in both countries to apply well-established equitable principles to these new statutory obligations. Even under these new attempts at consumer protection, retail investors will continue to be confronted with instances of conflicted remuneration. It now seems that only a true professionalisation of the financial advice industries will improve that situation. 261

DIRECTORS’ DUTIES AND CORPORATE GOVERNANCE – *Geof Stapledon* and *Jon Webster*

The High Court grants leave in an important company law case: The Bell Group decision – *Robert Baxt* 270