

COMPANY AND SECURITIES LAW JOURNAL

Volume 31, Number 7

October 2013

EDITORIAL 401

ARTICLES

Interaction between statutory and general law duties concerning company director conflicts – *Matthew Conaglen*

This article addresses some aspects of the interaction between statute and the general law duties governing directors' conflicts of interest. In order to understand that interaction fully, it is instructive first to recognise the interaction between different kinds of general law duties owed by directors, as that helps to elucidate the role played by fiduciary doctrine's general conflict principles. The article then explores two aspects of the interaction between the *Corporations Act 2001* (Cth) and those general law duties, investigating in particular the effect of the statutory regime on fiduciary doctrine's profit principle and on the effectiveness of conflicts authorisation clauses in company constitutions. The legislative history of the *Corporations Act* makes it relevant to consider the equivalent position in England as well. 403

Directors' fiduciary duties: The relationship between conflicts, profits and bona fides – *Rosemary Teele Langford*

The duty to act bona fide in the interests of the company is essential to directors' fiduciary loyalty and proscribes a number of forms of disloyalty. These include pursuit of self-interest, non-consideration of the company's interests and conferral of benefits on third parties in the absence of attendant corporate benefit. With respect to the first of these aspects of loyalty, the duty to act bona fide in the interests of the company overlaps with the duties to avoid conflicts and profits. However, the duty to act bona fide in the interests of the company has an independent operation as concerns the second and third forms of disloyalty. This article examines the relationship between the duty to act bona fide in the interests of the company and the duties to avoid conflicts and profits. In so doing, it demonstrates the overarching nature of the duty to act bona fide in the interests of the company and its fundamentality in terms of the fiduciary loyalty exacted of directors. These issues will be of direct relevance in any decision of the High Court in relation to the Bell Group of companies. 423

Corporate crime and officer liability under WH&S legislation now in harmony: But will it please the ear of the indemnified and insured? – *Leigh Howard*

In a commendable act of cooperative federalism, harmonised workers' health and safety legislation has recently been enacted across seven Australian jurisdictions. One of the most important changes brought about has been the imposition of a positive duty upon company officers to exercise "due diligence". This article considers whether the structure of this new duty alters a company's ability to provide an indemnity or insurance policy for the officer's benefit should they be found in breach. Through a process of statutory

interpretation, application of parliamentary intention and common law analysis, it is concluded that no such indemnity or insurance policy could lawfully respond under the law. Possible options open to companies in light of this are considered by way of conclusion. 437

Beck v Weinstock: Preference in name but not in nature? – Kathryn Tomasic

In *Beck v Weinstock* (2013) 87 ALJR 570; 93 ACSR 251, the High Court of Australia considered whether a share in a company could be characterised as a “preference share” notwithstanding that there had never been any other class of shares on issue by the company over which the relevant shares actually enjoyed preferential rights. If the shares could not be characterised as “preference shares”, they would not be capable of being validly redeemed pursuant to the relevant provisions of the *Corporations Act 2001* (Cth). The court found that, although the preferential rights conferred by the shares remained “potential” until other classes of shares were issued, the shares in question could nevertheless be characterised as preference shares because the company’s constitution made provision for the issue of other classes of shares over which the shares could enjoy preferential rights. As such, despite the fact that the shares did not presently confer preferential rights over any other class of shares on issue, the court held that the shares constituted “preference shares” and were therefore liable to redemption. 457