COMPANY AND SECURITIES LAW JOURNAL

Volume 33, Number 8

November 2015

EDITORIAL 509

ARTICLES

Can an Australian company use a dispute resolution clause in its constitution to bar shareholder class actions? – *James Emmerig*

This article considers whether it is possible for an Australian company to contractually restrain its members from participating in a shareholder class action against it by relying on a "no class action" clause in its constitution. Recent commentary in the United States (US) suggests that, due to the interplay of decisions of the US Supreme Court and the Delaware Court of Chancery, an analogous approach may now be available to companies incorporated in Delaware. The article considers possible limitations on the efficacy of such a clause under Australian law and how those limitations might be practically surmounted. The article concludes that, in Australia, a carefully crafted "no class action" clause imposing procedural limitations on members' claims could effectively bar class action participation in certain circumstances. 513

Public interest litigation under s 50 of the Australian Securities and Investments Commission Act 2001 (Cth): The case for amendment – *Tony Johnson*

Section 50 of the *Australian Securities and Investments Commission Act 2001* (Cth) provides that where it appears to be in the public interest, the Australian Securities and Investments Commission may begin and carry on civil proceedings on behalf of a person or company. Despite having rarely been used, s 50 has the potential to complement the use of privately funded shareholder and investor claims, and deliver access to justice and regulatory outcomes that privately sourced litigation may fail to achieve. This article examines some of the unresolved practical issues surrounding the interpretation and application of s 50 and considers a number of arguments relating to its constitutional validity. The article concludes with a number of observations about the role of s 50 in the current environment of class actions and litigation funding, and some suggestions for legislative reform to clarify some remaining uncertainties regarding its interpretation and application. 528

Banning, disqualification and licensing powers: ACCC, APRA, ASIC and the ATO – Regulatory overlap, penalty privilege and law reform – *Tom Middleton*

The overlapping regulatory responsibilities of the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority and the Australian Taxation Office reinforce the need for the federal government to adopt a "whole of government" approach to regulatory reform to ensure that, where appropriate, the regulatory laws are uniform across the jurisdictions of each regulator so that "like cases are treated alike" and the regulatory outcomes under each of those laws are consistent in cases involving similar contravening conduct. There should be uniform rules concerning the operation of the penalty privilege (and any associated evidential immunity where that privilege is abrogated) in proceedings for

banning orders, disqualification orders and licence cancellation or suspension orders. The regulators should have equivalent powers (including proactive powers) to make, or to apply to the court for, directors' disqualification orders particularly where the contraventions indicate that the directors are incompetent or unfit to act as directors. Private litigants should be given the power to apply to the court for a director's disqualification order. This would promote greater accountability of directors to the victims of their contraventions. The regulators' powers to make banning orders, or to issue, cancel or suspend licences and to register certain individuals, should be governed by uniform criteria. These reforms would provide better protection for investors and creditors and make them more willing to invest in the Australian markets, thereby advancing the growth of the Australian economy as a whole. 555

CORPORATE INSOLVENCY – *Helen Anderson*

Recovery from Ponzi scheme investors: New Zealand's Fisk v McIntosh [2015] NZHC 1403 – *Trish Keeper* 581

OVERSEAS NOTES: NEW ZEALAND – *Gordon R Walker*

New Zealand rejects peak indebtedness – *Barry Allan* 586

VOLUME 33 – 2015

Table of Authors 591

Table of Cases 593

Index 615