

COMPANY AND SECURITIES LAW JOURNAL

Volume 35, Number 7

October 2017

EDITORIAL – *Editor: Bob Baxt AO*

Special Issue on Protections in the Financial Services Industry – BB 403

ARTICLES

Whither Customer Protection in Financial Services? – M Scott Donald 404

Regulating for Fairness in the Australian Funds Management Industry – M Scott Donald

This article examines the use and role of the concept of “fairness” in the regulatory regime applied to trustees in the Australian funds management industry. It identifies that the concept of fairness is applied in two ways in this context: fairness as impartiality between the interests of customers inter se and fairness as a form of corporate morality in the relationship between service provider and customer. This latter application, in particular, is increasingly seen as a means of providing a regulatory setting between the extremes of caveat emptor, on the one hand, and fiduciary obligation, on the other. 406

Fairness and Financial Services: Revisiting the Enforcement Framework – Pamela Hanrahan

In 2014, the Financial System Inquiry concluded that the Australian regulatory framework was not sufficient to achieve fair treatment for financial consumers. Among other things, it recommended a re-examination of ASIC’s enforcement tools and powers, including the available penalties for contraventions of the financial services laws. This article considers options for reforming the enforcement framework, having regard to pathways, outcomes and targets. It concludes that while changes in these areas might go some way to restoring community confidence in the regulatory framework and its capacity to deter misconduct by corporations, it will not resolve the more fundamental design problems with the regime. 420

The Fairness Rationale for Customer Advocacy in the Financial Sector – Dimity Kingsford Smith

This article looks at an experiment, the introduction of Customer Advocates by Australian banks. The central argument is that fairness, the ability to understand and respond to the circumstances of another and what they need, is necessary for trust and confidence in the financial system. The article evaluates the reasons for having financial sector Advocates, their features and functions and the obstacles to Advocate success. The article also considers what Customer Advocates might achieve given that they should operate at several levels: the customer relationship, institutional processes and values and finally, contributing to trust and confidence in the financial system. 444

Suitability – *Gail Pearson*

This article argues that financial services should be sold subject to a suitability standard. Algorithmic design should enable selection of products suitable, even most suitable, for individuals as well as target groups. The idea of suitability is linked to other notions such as fairness, purpose and safety. Suitability standards have been adopted in numerous jurisdictions, and an additional obligation proposed for Australian financial services to complement those existing in advice and credit. The article examines how the content of a suitability obligation is being constructed in Australian jurisprudence through objective and subjective factors relating to an individual and through community expectations. The analysis distinguishes attitude to risk from capacity to deal with risk (through repaying or bearing loss.) It comments on automated calculation of risk profiles and ability to repay and concludes that algorithmic calculation, which is central to a suitability standard, should also reflect community expectations of acceptable risk. 464