COMPANY AND SECURITIES LAW JOURNAL

Volume 36, Number 3

2018

EDITORIAL – *Editor: Paul Ali* 183

ARTICLES

Parent Company Liability in the Extractive Industries: A New Frontier for Business and Human Rights – *Elizabeth Brumby*

A series of cases in England and Canada have indicated an increasing judicial willingness to hold parent companies directly liable in negligence for acts or omissions of foreign subsidiaries. Although this area of law remains in its infancy, this article argues that these trends may have significant implications for corporate accountability for human rights violations across common law jurisdictions. Its aims are twofold: first, to provide a comprehensive overview of the evolving case law in this field, drawing together the themes and factual features which have emerged as legally significant in such cases; second, to illustrate that these trends are, in fact, a principled development of the law of negligence and should be embraced. In its most powerful form, direct parent company liability may emerge as an effective litigious tool that provides access to a remedy for those whose rights have been violated while promoting and incentivising the responsible behaviour of corporations across jurisdictions. 185

Should Chapter 6C of the Corporations Act Be the Model for Beneficial Ownership Disclosure Regulation of Private Companies? – *Dr David Chaikin*

The Australian Government is considering whether to increase the transparency of beneficial ownership of companies so as to counter the abuse of the corporate form for money laundering and other financial crime purposes. The current law is limited in that Chapter 6C of the *Corporations Act* imposes a regulatory regime of disclosure of beneficial ownership of listed public companies, but no such equivalent disclosure regime applies to private companies. The justification for this differential treatment is that the owners of private companies should be entitled to financial privacy and not be subjected to the imposition of unnecessary regulatory costs. The conundrum is that it is small private companies that are frequently the major vehicle for carrying out financial crimes. One option for legislative reform is to adapt and apply the current disclosure regime applicable to listed public companies so as to encompass private companies. A critical analysis of Chapter 6C is undertaken so as to assess whether any new regulatory measures will be effective in combating financial crime where private companies are misused. 204

Strange Bedfellows? Climate Change, Carbon Risk, and the Regulation of Corporate Disclosure – *Cary Di Lernia*

The corporate disclosure of risks, potential impacts, and strategies around climate change leaves much to be desired. A recent Senate Economics References Committee report states that there exist significant opportunities to improve carbon reporting, which would "benefit businesses, investors and the economy". The extent to which periodic and continuous disclosure requirements – and the exposure of corporations and their officers to liability for poor disclosure practices – can be relied upon to exert influence at these three sites is an important regulatory issue in the context of the UNFCCC Paris Agreement on Climate Change

and Australia's commitments pursuant to it. With the release of the recommendations of the G20 Financial Stability Board's Task Force on Climate-related Financial Disclosures in June 2017, the Commonwealth Government's climate policy review in December 2017, and shareholder action against Australia's largest corporation for its alleged failure to disclose climate risks in its financial reports, changes in this space are rapidly gathering pace. This article analyses the periodic and continuous disclosure requirements of the *Corporations Act 2001* (Cth) in the context of the Paris Agreement, highlighting the limitations of market-based regulatory initiatives in assisting its successful achievement. 221

Stepping-Stone Liability and the Directors' Statutory Duty of Care and Diligence – *Maeve McGregor*

Long gone are the days that the duty of care and diligence required of company directors turned on the low standard of crassa negligentia. Today there is no doubt the law has reached a point where it recognises a core irreducible content to the standard of care. In recent times, however, a series of so-called "stepping-stone" decisions have attracted criticism in some quarters for having raised the standard of care in a manner contrary to statutory scheme. The concern of this article is to caution against too ready acceptance of such a view. Stepping-stone decisions neither give rise to an unprincipled expansion of the statutory duty of care nor depart from the fundamental principle the duty is owed to the company. This point assumes added significance when it is recognised that the criticisms levelled at stepping-stone decisions are ultimately reducible to issues of judicial legitimacy. On the other hand, the debate, as framed, helpfully focuses attention on the place occupied by public wrongs or rights under s 180 of the *Corporations Act 2001* (Cth). Beyond this, it raises for consideration the question whether the received understanding that s 180 is not concerned to ensure the company's compliance with the law requires revisiting in light of stepping-stone decisions. 245

Third-Party Litigation Funding in Australia: More External Regulation and/or Enhanced Judicial Supervision? – *Professor Julie-Anne Tarr and Dr AJ George*

Third-party litigation funding continues to generate debate in relation to its merits and demerits, but there is no doubt it is, and will continue to be, an important part of the Australian legal landscape. This article examines case law in the appellate courts, such as the decisions of the High Court of Australia in Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd and the Full Federal Court in Money Max Int Pty Ltd v QBE Insurance Group Ltd, that support the evolution of the legal framework in which litigation funding operates. Extensive reference is made to the Victorian Law Reform Commission's, Access to Justice – Litigation Funding and Group Proceedings Consultation Paper (July 2017), the Australian Law Reform Commission's Discussion Paper, Inquiry into Class Action Proceedings and Third-Party Litigation Funders (June 2018), and other regulatory reform proposals and initiatives. In the absence of hard evidence that litigation funding is fuelling an avalanche of frivolous or unmeritorious claims, caution is suggested against the adoption of any new external regulatory regime without the actual, quantifiable costs and benefits of the proposed regulation, as well as the risks of unintended consequences, being fully assessed. This is particularly the case given the High Court's view of a court's capacity to protect its processes, and the increasing willingness of the courts to bring flexibility and nuance to oversight and supervisory roles in relation to litigation funding. 262

SECURITIES INDUSTRY AND MANAGED INVESTMENTS – *Editor: Pamela Hanrahan*

Judicial Advice: A Trustee's Safeguard from Breach of Trust – *Hayden Fielder* 275

DIRECTORS' DUTIES – *Editor: Dr Rosemary Teele Langford*

Is a Conflict of Interest Under the General Law the Same as a Material Personal Interest Under the Corporations Act? – *Rosemary Teele Langford and Ian Ramsay* 284