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Providing Financial Services “Efficiently, Honestly and Fairly”: Part 2 – Paul Latimer

This article updates the author’s 2006 article which examined the statutory obligation of a financial services licensee to act “efficiently, honestly and fairly” as required by s 912A(1)(a) of the *Corporations Act 2001* (Cth). The article examines new case law since 2006 on the meaning of this obligation. The weight of authority supports interpreting the conjunction “and” to confirm this is a single, composite and omnibus obligation rather than three separate obligations. The failure of those in the financial services industry to act efficiently, honestly and fairly was cited repeatedly in the context of the evidence of widespread misconduct revealed by the Banking Royal Commission. Some of the limits to enforcing this law are raised, and the article concludes with an introduction to the new civil penalties in financial services regulation introduced in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). These have strengthened penalties for breaches of corporate laws, including s 912A(1)(a), and should enhance, and will support, ASIC’s new “why not litigate” approach. The Royal Commission was clear that acting efficiently, honestly and fairly is the “right” thing to do. 382

Reconsideration of the “Good Faith” Requirement in Statutory Derivative Actions in Australia – Lang Thai

In Australia, an applicant applying for leave to bring a statutory derivative action (SDA) is required to satisfy the court, among other things, that he or she is acting in good faith. This article discusses the “good faith” requirement under the *Corporations Act 2001* (Cth) and argues that while “good faith” is a relevant consideration for determining the leave application, the inclusion of good faith as a prerequisite in the Act is redundant. Its inclusion could do more harm to the company than good; some shareholders may be reluctant to apply for leave when their good character is being questioned. There would just be too much to lose and too little to gain. This article draws on experiences from other jurisdictions and suggests removal of the “good faith” requirement from the Act in order to encourage wider use of the SDA and to bring about enhancement of directors’ accountability and corporate governance. 403

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