

# COMPANY AND SECURITIES LAW JOURNAL

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EDITORIAL – *Editor: Edmund Finnane* ..... 277

## OVERVIEW

**Special Issue on the Australian Law Reform Commission Legislative Mapping Project** – *Justice Sarah Derrington, Rosemary Teele Langford and Andrew Godwin* ..... 278

## ARTICLES

**Legislative Design – Clarifying the Legislative Porridge** – *Andrew Godwin, Vivienne Brand and Rosemary Teele Langford*

Legislative design directly affects the clarity, coherence and navigability of legislation. It is therefore of critical importance to regulated persons and entities as they seek to comply with legislative requirements, and to regulators and courts as they seek to interpret and apply them. Calls over many years for legislation governing corporate and financial services law in Australia to be simplified were reinforced by the Financial Services Royal Commission Final Report of 2019. The report recommended that, as far as possible, exceptions and qualifications to generally applicable norms of conduct be eliminated and that legislation identify expressly the fundamental norms of behaviour in respect of rules. These calls recently culminated in the commencement of a review into the legislative framework for corporations and financial services regulation by the Australian Law Reform Commission. This article examines the context behind these calls and engages with the ongoing debate about legislative design and simplification of law. In addition to outlining the issues, the article provides the context for the articles that follow in this Special Issue. .... 280

**Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law** – *Tess Van Geelen*

This article examines the use and proliferation of delegated legislation with respect to financial services regulation (in particular, the prospectus and product disclosure statement (PDS) disclosure regimes under the *Corporations Act 2001* (Cth)). The article presents data showing that these regimes suffer from inconsistency, excessive fragmentation, and a lack of proper oversight. These defects, which derive in part from the proliferation and under-regulation of delegated legislation, undermine the legitimacy of the regimes by conflicting with Rule of Law principles. This article argues in particular that the current use of delegated legislation in financial services regulation and the limitations of the current scrutiny regime create problems with respect to complexity, the rule of law, and regulatory capture. The lack of effective oversight creates further accountability problems with respect to the separation of powers. The article concludes by suggesting options for reforming the substantive and procedural limits on the delegation of legislative powers, as a contribution to efforts to remedy some of these issues. .... 296

**Disclosure (Dis)content: Regulating Disclosure in Prospectuses and Product Disclosure Statements** – *Phoebe Tapley and Andrew Godwin*

This article considers the regulation of disclosure in relation to the issue or sale of securities and financial products under the prospectus and product disclosure statement (PDS) regimes. The article outlines the general tests, standards and content requirements for prospectuses and PDSs, noting areas of overlap and divergence, and reviewing the background to the existing requirements. Interpretative challenges arise in relation to key standards and tests, while attempts to mitigate the uncertainty of these key standards and tests have generated a complex patchwork of modifications. The extent of modifications effected by delegated legislation raises particular challenges in relation to the navigability of the disclosure regimes. The article concludes by questioning whether the current disclosure regime is coherent and contemplating the approach that the alternative might take. ....

315

**Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks toward the Twin Peaks** – *Cindy Davies, Samuel Walpole and Gail Pearson*

Licensing regimes form an integral part of Australia's Twin Peaks system of financial regulation. This article surveys three of the different licensing regimes that were particularly relevant to the Financial Services Royal Commission: the Australian Financial Services Licence (AFSL); the Australian Credit Licence (ACL); and the Registrable Superannuation Entity (RSE). Taking into account the changes to regulation of superannuation in the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth), the article analyses the structure and content of these three regimes, and their broader regulatory context, to determine whether there is scope to consolidate, rationalise, and harmonise these licensing regimes. From that survey, the article concludes that there is scope for rationalisation of the AFSL and ACL regimes, but that the RSE licensing regime should continue to be separate. ....

332

**Regulating for Loyalty in the Financial Services Industry** – *Samuel Walpole, M Scott Donald and Rosemary Teele Langford*

A series of scandals in the financial services sector over the past 12 years has inspired concerted legislative action to protect customer interests. The Future of Financial Advice, Stronger Super, Protecting Consumers and Member Outcomes initiatives have each sought to reform the duties of loyalty, as variously expressed, owed by the providers of financial advice, superannuation funds and mortgage broking services to their customers. This article compares the legal regimes emerging from those initiatives with each other and with three other, analogous regimes: that applying to registered managed investment schemes, that applying to life insurers, and that applying to corporate directors generally. It finds that, although similarly motivated, both the substance and the modality of the regimes vary. This variation needs to be acknowledged and respected when considering the operation of the regimes. ....

355