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ARTICLES

The Future of Clearing and Settlement in Australia: Part I – The Current System – *Christian Chamorro-Courtland*

This article analyses the current clearing and settlement infrastructure for transferring shares in Australia. It analyses the legal and regulatory regime in Australia and identifies areas of legal uncertainty. Furthermore, it sets the scene for Part II of this article, which analyses the forthcoming upgrade that the ASX proposes to make to the Clearing House Electronic Subregister System using Distributed Ledger Technology. The purpose of Part I of this article is to understand how the system currently works in order to understand the changes that are being proposed for the future. It focuses on legal concepts such as settlement finality and negotiability, and makes recommendations for strengthening the rights of investors. It also examines the important role played by ASX Clear – the central counterparty – in the existing system, which is a role that it will continue to play in the upgraded system. 378

A Civil Law Solution to the Social Licence to Operate and Directors’ Duties Conundrum in Australia – *Julia Dreosti, Bimaya De Silva and Katie Walsh*

It is becoming imperative for companies and their directors to maintain a social licence to operate by taking broader stakeholder and community values into account in the decision-making process. Nevertheless, corporate Australia continues to see failings in this regard despite three parliamentary inquiries, two Royal Commissions and a thwarted attempt by the ASX Corporate Governance Council to cement the concept in “soft law”. In light of this, and the interpretation of s 181(1)(a) of the *Corporations Act 2001* (Cth) as enshrining the doctrine of shareholder primacy, directors are left uncertain as to how to best balance increasing societal and shareholder pressure with their legal obligations. This article traces the evolution of s 181(1)(a) and its interpretation and application by the courts and the inadequacies of Australia’s “soft law” approach in comparison to other jurisdictions. The article posits that the only answer is amendment to s 181(1)(a), and provides a solution by reference to very recent legislative reform in France. 404

Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions under the ASIC Act and Corporations Act: 2009–2018 – *George Gilligan and Ian Ramsay*

An important international debate is whether there is underenforcement of corporate laws that reduces law’s deterrent value. This article examines this issue in the context of Australia by investigating prosecutions under the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth) from 2009 to 2018. The data was

obtained from the Commonwealth Director of Public Prosecutions and had not previously been made available to researchers. Key findings are: limited levels of enforcement; substantial prosecutorial concentration upon a small number of sections in the legislation; low levels of prosecutions against corporations compared to individuals; high rate of successful prosecutions; high proportion of defendants are male; and penalties are limited in their severity. The article is a window upon 10 years of corporate law enforcement in Australia and its findings can act as a comparator empirical baseline regarding future research on enforcement of Australian corporate criminal law. 435