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ARTICLES

Accountability of the Australian Securities and Investments Commission and the Establishment of the Financial Regulator Assessment Authority – An Evaluation – *Lloyd Freeburn and Ian Ramsay*

For 25 years a debate has unfolded regarding the adequacy of the accountability framework that applies to the *Australian Securities and Investments Commission* (ASIC). This debate culminated in the establishment in 2021 of the Financial Regulator Assessment Authority (FRAA), following the Australian Government's acceptance of a recommendation in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The FRAA is required to assess the effectiveness and capability of ASIC. The authors evaluate the accountability framework that applied to ASIC prior to the establishment of the FRAA and argue that the substantial growth in ASIC's responsibilities and powers, which has occurred while accountability mechanisms have remained largely unchanged, make the case for additional oversight of ASIC compelling. The authors then analyse the functions of the FRAA, identify a series of challenges for the FRAA and argue that whether it succeeds in ensuring greater accountability for ASIC will depend on the processes and methodology adopted by the FRAA in its reviews of ASIC's performance. 6

Contested Mergers and the ACCC'S Proposed Merger Reforms – *Holly Cao, Stephen King and Graeme Samuel AC*

The *Australian Competition and Consumer Commission* (ACCC) has recommended extensive legislative reforms to the merger provisions in s 50 of the *Competition and Consumer Act 2010* (Cth), arguing that current legal interpretation and regulatory requirements are skewed towards clearance. However, a review of the merger case history suggests that the ACCC's problems are self-imposed, relying on economic theories that are not backed up by factual evidence or commercial realities. The proposed reforms' focus on structural conditions draws consideration away from the end purpose of s 50, which is to prevent mergers that substantially lessen competition. The core issue is that the ACCC's merger analysis and litigation strategy fails to identify mergers that meet the requisite legal and economic standard as being likely to be substantially anti-competitive. As such, the ACCC should review its litigation strategy and its review processes and guidelines in its application of the existing legal test. 34

Multinational Enterprise and Corporate Governance of Foreign Subsidiaries Post-Vedanta: Responsibility or Risk Management? – *Alice Klettner*

This article analyses three recent United Kingdom (UK) court cases that examine circumstances where the veil of incorporation might be pierced using tort law. Each case involves environmental or human rights abuses alleged to be caused by African

subsidiaries of large multinational companies headquartered in the United Kingdom (*Lungowe v Vedanta Resources plc*, *Okpabi v Royal Dutch Shell plc* and *AAA v Unilever plc*). The cases are analysed from a business perspective to explore their implications for subsidiary governance and corporate responsibility. The analysis reveals that the current decisions in the three cases provide unfortunate incentives for multinational corporations to wind back their efforts towards group-wide governance of social and environmental responsibility. Although the cases are based on English law they have strong parallels with the Australian situation and are useful in throwing light on the challenges of subsidiary governance structures. They prompt a reconsideration of the interaction between corporate and tort law in the context of increasing reporting frameworks for corporate social responsibility. 63

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