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Articles

An Analysis of the Social Licence to Operate (SLO) – Jean J Du Plessis and Benjamin B Saunders

This article argues that the concept of the social licence to operate is theoretically incoherent and practically unworkable, which likely explains why proposals to introduce social licence into law or corporate governance codes have not been successful. The theoretical basis of the social licence is often thought to be the concept of social contract in political theory, but the social contract does not readily translate to the concept of social licence, resulting in key theoretical problems. The duty of care and diligence imposes obligations which are broadly analogous (although not identical) to the concept of a social licence. Beyond this the social licence is too uncertain and vague to admit of codification. The social licence to operate is a useful slogan, but it is impossible to define the social licence in a sufficiently precise manner that it is susceptible of codification or enforcement. 198

Administrative Sanctions, Civil Penalties and Casino Regulation: the \$100 million Question – Arie Freiberg

This article critically examines the imposition of massive administrative sanctions – up to \$100 million – on Australian casino operators following revelations of systemic misconduct. It explores three sanctioning models: criminal, civil, and administrative, highlighting the tension between deterrence and proportionality. The article critiques the prevailing reliance on general deterrence, arguing that it is speculative and lacks empirical support. It advocates for proportionality as a core principle in administrative sanctions, emphasising fairness and reasonableness. It also suggests that transformative compliance orders and individual accountability may be more effective than monetary penalties in achieving regulatory goals. Ultimately, the article calls for legislative reform to embed proportionality into sanctioning frameworks, and questions whether current deterrence-based approaches can truly prevent corporate misconduct. 214

Sanctioning schemes of arrangement involving third-party release: a Law and Economic Analysis – Charles Zhen Qu and Yuqing Liu

This article evaluates, through an economic analysis, two judge-made tests, namely, the sufficient nexus test and the necessity test, on judges' jurisdiction to sanction creditors' schemes of arrangement involving third-party releases. The scheme of arrangement is a court-controlled statutory procedure for restructuring a company's relationship with its shareholders or creditors. It is a collective decision-making device for binding dissentients to the majority's decision. Creditors' schemes facilitate, inter alia, corporate restructuring, liquidation, and dispute resolution. A release of the creditors' claims against a third party is

often imperative for achieving the purposes of a scheme. Rules on third-party release is therefore economically consequential. Schemes of arrangement regimes are typically silent on the court’s jurisdiction to sanction schemes involving a third-party release. Hence the need for a judge-made test. Our analysis concludes that, in terms of maximising wealth and controlling transaction costs, the sufficient nexus test is superior to the necessity test. 229

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