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Introduction

Articles

Directors must act in the best interests of the company. This has traditionally been interpreted to mean acting in the best interests of the shareholders. Recently, however, it has been suggested that the words should be interpreted as meaning what they say, with the focus being on the company itself. Whatever the theoretical model favoured this article suggests that wider interests than those of the shareholders must be taken into account by directors. This is for both legislative and practical reasons. Other interests include those of employees, customers and creditors, as well as the wider community. The article also makes the case for diversity in organisations in order to meet the challenges posed by the modern world of business.

Artificial intelligence systems are rapidly improving their capabilities, leading some companies to incorporate them into their business decision-making processes (even at the boardroom level). This article analyses and compares three different approaches in respect of the directors' reliance defence in corporate law and offers some tentative suggestions as to the applicable legal principles when directors rely on information and advice from an artificial intelligence system. It argues that a statutory reliance defence is not necessary, because whether or not it exists, reliance is always a relevant factor in the analysis of whether a director's conduct meets the applicable reasonableness standard. Where the advice and information is offered by AI, certain issues with AI (such as non-transparency, explainability, and narrowness) may arise. This article discusses how each of these problems may affect the reasonableness analysis and recommends boards consider using Algorithmic Impact Assessments to assess the suitability of implementing an AI system prior to relying upon its recommendations.

Incorporating a company under the Companies Act 1993 (NZ) is a simple and low-cost process. The result is that New Zealand has a high per capita incorporation rate — 1 company for every 8 humans. Most of these companies are small enterprises with less than 20 employees. The Act allocates the management of a company’s business and affairs to its board of directors, but at the same time constrains directors’ discretion in respect of matters of business judgment in order to protect creditors from abuses of management power. This article reviews the scheme of the Act as it applies to protect creditors’ interests both before and after a company’s entry into insolvent liquidation and the available evidence as to its efficacy. The results of the review are compared with the findings of an empirical study analysing the publicly available information about the outcomes of 177 liquidations advertised in the New Zealand Gazette in March 2018. A majority of the liquidations in the empirical study were insolvent liquidations of one-person companies. Likely reported recoveries for creditors were also low. A small core of the directors of the companies in insolvent liquidation had also been directors of multiple other companies entering insolvent liquidations. Although the initial review suggests that the content of the creditor protection mechanisms are not unsuitable for small enterprise companies, there are reasons that are endemic to insolvencies of companies of this kind that limit the likelihood of enforcement action in the event of directorial misconduct and so the practical efficacy of the current framework. The findings of the empirical study are consistent with this.

Our everyday lives are being increasingly altered by advances in the availability and use of technology, including the ways in which we communicate, access information, and undertake commercial activities. This article considers the ways in which those technological advances are changing the nature of insider trading, with ‘outsiders’ becoming more likely to be able to engage in this form of criminal conduct without contact or connection to an ‘insider’, particularly through hacking and other unlawful activity facilitated by technology. As a result, this article considers the impact of this change on the regulation and enforcement of insider trading and whether the current legislative provisions are sufficient to address this issue.

A growing body of literature in the United States is raising concern about common ownership of corporations by the largest money market funds. In particular, concerns have been raised that funds operated by large institutions such as BlackRock or Vanguard have the capacity to reduce competition and competitiveness in concentrated sectors by their use of corporate actions. The antitrust concerns over common ownership partly reflect increased ownership concentration in the US and the apprehension that this also limits the contribution of shareholder wealth growth to consumer welfare. This article examines the potential common ownership effects flowing from the structure of Australian corporate ownership; specifically, in the context of superannuation funds (‘super funds’). It places this analysis in the new framework created by the November 2017 changes to competition law, which prohibit concerted practices, and the rise of shareholder activism by super funds. The article first analyses the international literature on common ownership before focusing on the Australian context.

It then turns to the distinctive aspects of super funds as investors with an emphasis on their roles as trustees and the use of custodian banks. The article finally conducts a competition law analysis, with reference to the new concerted practices prohibition in s 45 of the Competition and Consumer Act 2010 (Cth), before drawing conclusions. The work demonstrates that calls for shareholder activism, especially in the superannuation sector, may lead to risks that flow from both trustee obligations and the 2017 changes to Australian competition law.

Voluntary administration, professional innovation and dissenting creditors — *Mighty River International* in the High Court of Australia

— Jenny Fu and Roman Tomasic 230

The enactment of pt 5.3A of the Corporations Act 2001 (Cth) introduced a flexible non-judicial mechanism for the administration of companies in distress in Australia. In the place of the courts, the management of a voluntary administration is largely placed in the hands of one or more registered company administrators and the company's creditors. Part 5.3A created tight timelines for the holding of creditors' meetings and the preparation of a deed of company arrangement ('DOCA'), a binding agreement between the company and its creditors governing how the future affairs of the company will be managed. Extensions of these narrow legislative time limits are available only from the court upon application by the administrator. Recent practices in the conduct of large and complex administrations have seen insolvency practitioners utilise the DOCA process to develop an alternative mechanism for obtaining more time. This mechanism, known as the 'holding DOCA', allows the deed administrators to maintain the status quo while completing investigations into the company's affairs and/or exploring options for restructuring, which may be realised through a future variation to the deed. However, the language of pt 5.3A does not specifically provide for a holding DOCA, although its development is arguably consistent with the broader framework of the Corporations Act. In a narrow 3:2 majority decision arising out of the voluntary administration of Mesa Minerals Ltd, the High Court of Australia in 2018 approved the use of the 'holding' procedure to allow for extensions of time to finalise investigations by the administrators. It is argued that legislative changes to impose minimum standards for the use of a holding DOCA would be prudent, as this procedure will not always be available. Whilst the High Court decision will be reassuring to insolvency practitioners in the short term, in the longer term, legislative clarification is necessary to remove residual uncertainty in this area.

Which law governs dispute involving corporations?

— Sagi Peari 252

This article considers the question of applicable law to disputes involving corporations. Which law, for example, governs a dispute between Delaware and Australian corporations with respect to delivery of goods in Brazil? An examination of the relevant case law and legislative provisions suggests that a large portion of the contemporary corporate jurisprudence has kept pace with conceptual changes occurring within both corporate law and applicable law doctrine. Areas that lag behind need to be updated to better reflect the contemporary developments.