

# Australian Journal of Corporate Law (AJCL)

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(introduction and articles included in this part are linked to the LexisNexis platform)

### CONTENTS

#### Introduction

2020 Annual Corporate Law Teachers Association Conference 273

#### Articles

##### Clarifying terms in the debate regarding 'shareholder primacy'

— *Tim Connor and Andrew O'Beid* 276

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has reinvigorated debate regarding shareholder primacy in Australia. However, this debate has not always been informed by a shared understanding of what this theoretical approach entails. We compare recent Australian papers on this topic with key papers by seven prominent shareholder primacy scholars, dating from the 1930s to the 2010s. Some contributors to the Australian debate appear unaware that prominent shareholder primacy theorists require directors to focus exclusively on shareholders' interests; emphasise shareholders' long-term financial interests; and would not object to the 'enlightened shareholder value' approach. Further, whereas some assume that 'shareholder primacy' is a singular position, we argue it is more accurate to distinguish four categories of shareholder primacy: 'wealth maximisation (shareholder protection)'; 'wealth maximisation (shareholder autonomy)'; 'bounded wealth maximisation (shareholder protection)' and 'bounded wealth maximisation (shareholder autonomy)'. Finally, several aspects of shareholder primacy require further clarification in light of challenges associated with climate change.

##### Metaphysics and the corporation

— *Jonathan Barrett* 305

In *Meridian Global Funds Management Asia Ltd v Securities Commission*, Lord Hoffmann plausibly instructed us to apply rules of attribution, through the interpretation of relevant texts, to determine corporate criminal liability. However, his rejection of the relevance of metaphysics to an understanding of the corporation, and his denial of such a thing as the company — no 'ding an sich' — was a remarkable example of intellectual bait-and-switch. Akin to using the underpinning concepts and language of the scriptures to argue for atheism, to deny the relevance of philosophy in explaining the nature of the corporation, Hoffmann invoked and relied on the language of Kantian metaphysics. Hoffmann's jurisprudential equivalent of a police officer's 'nothing to see here' was sure to pique interest. And, once such an oblique invitation to consider the nature of the corporation is made, various ontological possibilities are suggested; these include the Kantian noumenon and the platonic abstract object. This article presents a humanist, pragmatic approach to the immaterial existence of the corporation. The article asserts the relevance of philosophical inquiry into the nature of the company. Lord Hoffmann's hermeneutic approach is persuasive in attributing liability in a corporate setting, but it is implausible to characterise the corporation as no more than an aggregation of

interpretable texts. Intuition and, indeed, Companies legislation, tell us that the company is something — but what is it? This article does not presume to answer that question conclusively but pragmatically draws on investigations into the ontology of artworks to make suggestions about the nature of the company. Much academic writing on philosophy is impenetrable for readers who are not professionally immersed in that discipline; this article aims to engage with philosophical questions in an inclusive way.

### Utility of relief: The oppression remedy in liquidation

— *Nadia Hess*

320

There are several options available to remediate a breach of officer duties including actions by the Australian Securities and Investments Commission, the company or a liquidator. Shareholders may also seek relief in relation to corporate misconduct via the oppression remedy found in pt 2F.1 of the Corporations Act 2001 (Cth). This remedy is broad and may cover conduct that falls short of a breach of officer duties but is nonetheless oppressive or contrary to the interests of members as a whole. When a company is in financial distress, remediating inappropriate officer behaviour is vital to ensure that wrongdoers are held to account, but can the oppression remedy be used when a company is in liquidation? This article provides an in-depth analysis of several key cases which have considered this issue. While no Australian court has yet granted relief under pt 2F.1 when a company is in liquidation, the possibility has been left open that relief could be awarded in the right circumstances.

### Protecting market integrity through sentencing? The relevance of general deterrence to insider trading

— *Juliette Overland*

344

General deterrence is factor regularly taken into account when imposing a sentence on those found to have engaged in insider trading, in an attempt to deter others who may be tempted to participate in similar conduct. However, it is not always clear on which basis this occurs, and how concepts of general deterrence are balanced with other sentencing considerations. In order to better understand the relevance of general deterrence to the sentencing of convicted insider traders, in this article all Australian insider trading cases which have involved an appeal against the sentence imposed have been examined. The judicial commentary in those appeal cases which relates to the relevance of general deterrence in sentencing convicted insider traders is reviewed and analysed in order to determine the primary reasons why general deterrence is considered to be an appropriate consideration, and how it is balanced against other sentencing considerations.

### Life after the Banking Royal Commission: Is the Royal Commission a 'game-changer' for the financial services sector in Australia?

— *Vicky Comino*

381

With the evidence and scale of misconduct by banks and financial institutions that emerged at the public hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry being far worse than anyone envisaged, commentators described it as a 'game-changer'. In the past, inquiries into bank scandals saw satisfaction with 'apologies', public commitments to making changes to restore customers' trust and banks seeking to explain away widespread wrongdoing as 'bad apples'. Contrastingly, Commissioner Hayne was having none of that. He identified the overbearing sales-driven culture of banks and its associated incentive systems

as directly linked to the misconduct considered. Furthermore, he laid responsibility for that misconduct squarely at the feet of the entities concerned, and their boards and management. Regulators also came under fire. In the case of the conduct regulator, the Australian Securities and Investments Commission, it 'rarely' went to court to enforce misconduct. This article critically examines whether the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is the 'game-changer' many had hoped it would be, including the efficacy of the Australian Securities and Investments Commission's response of committing to a new enforcement strategy, summed up in that much debated phrase 'Why not litigate?' to address misconduct in the financial services sector.