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(articles and insolvency law update included in this part are linked to the LexisNexis platform)

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Articles

Shareholders' right of expression is a fundamental right of oversight counterbalancing directors' exercise of power. Companies are not simply economic institutions. They are also social institutions, organisations expressing values including expressions of political views. The views of the company ought to be the views of the members, and not simply another opportunity for directors to express their views as managers. In Australia, corporate political speech has been treated as an ordinary management function, despite its different non-managerial nature. The importance of the right of expression, generally, and the right of political expression, particularly, has been largely ignored, overlooked or otherwise diminished by law. Australian arrangements for the lodgement of shareholder resolutions allow much less scope for public disagreement about matters of corporate governance, strategy and political voice to be addressed in an open, contestable forum. This situation stymies a gradual, non-antagonistic approach and impinges the well-being and effective monitoring and functioning of Australian companies.

This article explores the development of the shareholders' right of expression in Australia and other Anglophone countries. It shows that the 'right of expression', particularly the right of political expression, is lagging in Australia, especially after the 2016 decision of *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*. This article argues that advisory resolutions improve shareholder oversight and the accountability of company boards and provides greater legitimacy in terms of the right of political expression. Consequently, it advocates for reconsideration and reform. This analysis advances the debate and helps to recognise the deficiencies that exist in Australian corporate law with respect to shareholders' rights.

The recent arrests of two former Leighton Holdings executives for their alleged role in the Unaoil bribery scandal has shone a renewed spotlight on individual accountability for foreign bribery. At the same time, there are growing concerns internationally that accountability for corporate crime is being unfairly shifted from corporations onto individuals who are targeted in foreign bribery investigations and prosecutions. This article examines whether the diverging enforcement approaches towards corporations and individuals in foreign bribery cases are consistent with principles of fairness and the rule of law. It argues for a need to revisit enforcement approaches in line with the universal principles set out in the United Nations Convention Against Corruption ('UNCAC'), and outlines some associated measures to promote integrity, fairness, transparency and due process for both corporations and individuals in the criminal enforcement of anti-corruption laws.

Contravention of the Competition and Consumer Act 2010 (Cth) attracts significant pecuniary penalties. The competition and consumer regulator, the Australian Competition and Consumer Commission ('ACCC'), has pursued corporate respondents despite them having been placed in external administration. Not only has the ACCC been prepared to pursue corporate respondents under external administration, it has gone so far as to apply for the reinstatement of deregistered corporate respondents so that proceedings seeking a pecuniary penalty can be commenced or continued against them. The article examines the ACCC's pursuit of pecuniary penalties against corporate respondents in external administration and after they have been deregistered. It explores the attitude of the courts to the enforcement of pecuniary penalties that are unlikely to be recovered in the external administration and to the reinstatement of a corporate respondent with no assets to satisfy any pecuniary penalty that may be imposed.

The Insolvency Law Reform Act 2016 (Cth) introduced significant changes to the disciplinary regime of registered liquidators and registered trustees. One such reform was the transfer of jurisdiction of liquidators from the Companies Auditors and Liquidators Disciplinary Board ('CALDB') to a Part 2 Disciplinary Committee ('Part 2 Committee'). This article presents the findings of a study of publicly available Part 2 Committee referrals and decisions from the period 1 March 2017 to 1 March 2021 to address the research questions: What kinds of conduct matters appear before Part 2 Committees and how is misconduct dealt with by the Committees? The study found that disciplinary matters involved either serious misconduct, or a series of 'low-risk' breaches together amounting to serious misconduct. There were generally consistent outcomes across the Part 2 Committees that were proportionate to the conduct. The study found there was significant improvement in time to resolution of matters compared to CALDB. This article also presents the author's novel findings regarding legal representation and the application of codes of conduct and 'soft law'. Consistent publication of decisions may provide more insight into the functions and processes of the Part 2 Committees which will benefit all stakeholders.

Insolvency Law Update

Litigation funding arrangements have recently been attracting a significant amount of regulatory attention. Recent and proposed changes to regulatory measures focus on aspects such as the requirement for litigation funders to hold an Australian Financial Services Licence; the role of the courts in approving litigation funding agreements; the size of the premium charged by the litigation funder and so forth. Even though commercial litigation funding has its origins in insolvency litigation, it appears as if most of these regulatory measures emphasise litigation funding agreements in the context of class actions, leaving insolvent litigation funding arrangements unregulated to some extent.

This article provides an overview of some of the recent and proposed regulatory changes in respect of litigation funding arrangements, in order to assess their potential impact on and utility for insolvent litigation funding agreements.