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2023 SCOLA Issue

This article examines four 'questionable' trading practices — short selling, short-term dealing, securities hedging and the holding of margin loans over company securities — and whether listed company directors can engage in those practices. The Australian Securities Exchange (ASX) suggests listed companies consider these practices carefully when drafting securities trading policies but does not recommend that they be prohibited or restricted.

These four trading practices will be analysed, and existing disclosure and corporate governance requirements will be discussed, followed by a study of the securities trading policies of the ASX 100 to determine how companies regulate these practices for company directors and if there are any observable patterns by market capitalisation or industry sector. This article concludes with recommendations for appropriate law reform.

The Corporations Act 2001 (Cth) s 147(1) provides that a name is not available if it is identical to a reserved or registered name for an existing body. The Companies Act 1993 (NZ) s 21 further prohibits reservation of a name that is almost identical to the name of another company. Since the New Zealand provision does not include guidance on almost identicalness, such as likely deceit or public confusion, this additional prohibition adds a hair-splitting consideration for the administrators of a registration process that is predicated on efficiency. How can a company name — a word, phrase or meaningless assemblage of letters or symbols — be almost identical to another?

The article draws on property law to consider the legal nature of a company name and uses a simple model of language to consider its linguistic nature. From a legal perspective, it may be assumed that the prohibition of identical or almost identical names protects honest businesses and vulnerable consumers. From a perspective of language, this ban preserves meaning by ensuring that the relationship between a word (signifier) and thing indicated (signified) is not unduly disrupted and prevents a diminution of the use-value of a registered company name. These are sound policy goals. However, borrowing from copyright theory, the article also employs the 'Lockean exception' as a

potentially conflicting policy objective. John Locke argued that one may claim rights in unowned things to which one has applied labour but only if sufficient resources are left behind for others. Overprotection of almost or nearly identical names may bolster meaning but may be achieved at the cost of reducing the pool of language from which a new business may legitimately expect to draw. Balance needs to be struck between the two conflicting policy goals.

Regulatory complexity and incoherence are an increasing challenge facing many parts of the Australian legal system. Particular issues arise in the regulatory frameworks governing corporations, financial services and charities — areas in which the similarities and differences offer insights into the nature of regulatory complexity and the possible responses. In light of a pressing need to simplify and rationalise these regulatory frameworks, this article critically analyses the issues and suggests potential reforms. In doing so, it draws on the findings from two current projects and academic research by scholars such as Emeritus Professor Stephen Bottomley of the Australian National University College of Law.

The financial services and banking industry has faced significant criticism amidst continuous displays of systematic misconduct and disregard for both consumer welfare and the law. Some of Australia's largest financial institutions have consistently displayed conduct well below community standards and expectations. One of the most high-profile forms of misconduct is 'fees for no service' (FFNS). This article explores the unique corporate governance considerations in the financial services and banking industry and its correlation with misconduct in the industry. It argues that corporate governance failures, particularly financial institutions' oversight, lack of accountability and poor risk management, are key drivers of the FFNS misconduct. It finds that although Australia's prevailing corporate law regime is broad enough to address such issues, the industry still needs to adopt genuine and sustainable governance mechanisms accompanied by strong regulatory enforcement regimes to properly address the challenges around the FFNS misconduct.

Domestic violence is a pervasive problem in Australia and COVID-19 pandemic has exacerbated the problem. In 2022, the Commonwealth and state and territory governments committed to the National Plan to End Violence against Women and Children within one generation. In 2023, the Australian Government initiated an additional plan, the Aboriginal and Torres Strait Islander Action Plan, as the first dedicated plan to address violence against women and children in First Nations communities. Modern corporations, as employers and influential agents in society, can contribute to this worthwhile cause with a particular emphasis on providing domestic violence leave, creating safe workplaces (in line with the director's duties and work health and safety obligations); imposing safeguards against an increase of violence perpetuated by technology; and preventing financial abuse, including the

economic abuse of directors of family-owned companies. Corporations, however, face limitations such as challenges in identifying abuse, resource constraints, difficulties in managing working-from-home environments and addressing emerging forms of technology-related abuse. This article explores the possibilities and limitations of modern corporations contributing to a national plan to end domestic violence, drawing on relevant literature and legal frameworks.

General Articles

The most popular statutory alternative to liquidation in Australia is the regime in Pt 5.3A of the Corporations Act 2001 (Cth), which can be used to rescue companies that are in or near insolvency. After more than 3 decades of operation, a significant number of cases regarding abuse of Pt 5.3A's provisions have accumulated. Drawing on that body of case law, this article discusses five improper purposes that may underpin such abuse; the main legal principles relating to its proof in court; and the remedies that may and may not be appropriate. In particular, a critical analysis of the relief suggested by Parliament in s 447A(2) leads to the contention that ending an administration will often be an incongruous or redundant remedy for abuse of Pt 5.3A's provisions when it is even available.

This article considers the international unification of sustainability reporting standards, as well as domestic developments in the setting of such standards, by the EU and four of Australia's major trading partners — the EU, the USA, the UK, Canada and New Zealand. The conclusion is that mandated sustainability disclosure is inevitable. It further shows that key lessons may be taken from these jurisdictions in the approach to adoption in a scalable and flexible manner. It is, therefore, not surprising that recent consultations by Australian Treasury have focussed on climate change-related disclosures as a first step in mandating sustainability disclosures. It is further highly encouraging that Australia has proposed legislative amendment to enable the setting of appropriate sustainability standards and their accompanying auditing and assurance standards. This article shows how the current Australian proposals are aligned with international developments.