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Articles

- The lacuna in corporate law: The unwritten role of the chair
— *Andrew Clarke* 125

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The corporate law of Australia provides a set of minimum standards for directors as individuals, but it does not address the role of the board, or of the chair in any systemic manner or method. This article focuses on the role of the chair. The Corporations Act 2001 (Cth) is essentially silent on chairs. The only 21st century case law dealing comprehensively with the liability of chairs is *Australian Securities and Investments Commission v Rich* in 2003. This lacuna of statutory provision and common law is either a clever case of legal minimalism, or an oversight carrying within it serious potential commercial consequences. Given that chairs sit at the apex or head of companies, and are variously and indubitably responsible for leadership, governance, company performance and corporate sustainability roles, this gap would seem to be of profound practical importance. This article poses the question: is the 'set and forget' legal model of Australian chairing apposite and indeed sustainable in the 21st century?

- Enhancing firm sustainability through governance — Part 1:
The challenge of corporate governance
— *Francesco de Zwart* 144

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The 'relational corporate governance approach' presented in this series of two articles is a tool which complements and enhances the explanatory power of the existing principal 'law and economics' theories and models of the firm. It maps the effectiveness of corporate and management structures, mechanisms, processes and protocols (called 'governance variables') in use in corporate governance codes and laws around the world and assesses reform proposals in the field. The principal aim of the relational approach is to describe and evaluate the interrelationships between the most significant fields of corporate governance study and practice, and the governance variables to which these fields give rise. The relational approach can be used to make predictions in relation to the relative importance of governance variables inter se in reducing (or increasing) agency costs and enhancing (or reducing) the long-term efficiency and survival/sustainability of the for-profit firm. Part 1, 'The challenge of corporate governance', consists of an introduction to the challenges of corporate governance for an explanatory approach or model and the phenomenon of the separation of ownership from management of the modern dispersed-shareholding public company. The Part begins with the questions posed by the relational approach for the construction of an explanatory approach or model as an introduction to the balancing of interest of 'insiders' and 'outsiders'. The application of a number

of theories and models to the relational approach is introduced — separation of ownership from management, the neoclassical model, 'nexus of contracts', agency costs, the shareholder wealth-maximisation principle and the shareholder (primacy) model. Part 1 introduces the contribution of the relational approach to these theories — a 'weighing mechanism' which is a theoretical representation of the 'nexus' or 'intersection' itself. Part 1 continues with a submission/hypothesis of the 'core' areas of corporate governance and corporate failures. A number of collapses are referred to with an introduction to two case studies — the pre-GFC Enron collapse and the post-GFC collapse of the Hastie Group Ltd in Australia. In preparation for the construction of the weighing mechanism and framework of the relational approach in Part 2, Part 1 introduces four 'Key Fields' which represent a simulation of the 'real world' sphere of corporate governance discourse. These are the four areas which will be examined in order to construct the relational approach or model to examining the health and sustainability of the corporation.

Market manipulation through false or misleading statements
on social media: Enforcement issues
— *Lynsey Edgar*

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Social media provides an easy platform for rogues to seek to engage in market manipulation, like spreading rumours ('rumourtrage') or engaging in 'pump and dump' schemes. The existing legislative framework in Australia is certainly capable of dealing with market manipulation on social media — a person could readily be pursued under various sections of the Corporations Act 2001 (Cth) including s 1041E — however the issue is one of enforcement. This article considers the practical and conceptual difficulties that social media poses for the enforcement of the prohibitions against market manipulation. It goes on to consider the proactive approach taken by the United States' Securities and Exchange Commission, and suggests that it may be a space that the Australian Securities and Investments Commission targets in future.

Directors' duties of oversight: Insights for Australia from
recent developments in Delaware's *Caremark* jurisprudence
— *Pamela Hanrahan and Rachel Yates*

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In his landmark 1996 opinion in *Re Caremark International Inc Derivative Litigation*, Chancellor Allen of the Delaware Court of Chancery asked: 'what is the board's responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?' Two decades on, that question is even more pertinent. While directors in both Australia and the United States have oversight duties related to their companies' compliance with legal and regulatory obligations, they operate differently. Here, the oversight duty derives primarily from the duty of care, while in the United States it is an aspect of the duty of loyalty. This article suggests some insights for the Australian directors' oversight duty from the well-developed *Caremark* jurisprudence. It concludes that unlike the Delaware law, the Australian law remains largely untested where the directors have failed to respond to emerging compliance issues.

Corporate management and communication of environmental and social risks in Australia: Pressures are mounting

— Gill North

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This article contends that paradigm changes in corporate risk behaviour in Australia are occurring and that the regulatory framework is shifting. An increasing number of listed corporations in Australia are providing risk disclosures and environmental and social information in their reports and on company websites, raising questions concerning the drivers prompting this reporting. The article suggests the reasons are multifaceted and reflect a confluence of emerging factors. There is growing scholarly and other evidence on the associations between sound management of business risks, effective communication of these risks, and superior long term commercial outcomes. This evidence has convinced a growing number of business leaders and investors that proactive management of environmental, social and financial risks is critical for companies to optimise their long term value, to operate sustainably, and to satisfy investor, other stakeholder and community expectations. In situations where companies fail to adequately manage and communicate their environmental and social risks, investors and other actors are collaborating and actively using their market influence and legal powers to promote cultural and behavioural changes. The scale and intensity of this market activism is, in turn, prompting corporate regulators to respond and intervene. Consequently, pressures are mounting on listed Australian companies to engage in more sophisticated analysis of environmental and social risks and to more effectively communicate these risk processes and outcomes.

To assume or not to assume: An analysis of the statutory indoor management assumptions in ss 127–30 of the *Corporations Act 2001* (Cth) and recent cases dealing with them

— Nicholas Saady and Thomas McClintock

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This article analyses two recent cases dealing with the statutory indoor management assumptions: *Correa v Whittingham* and *Caratti v Mammoth Investments Pty Ltd*. It assesses how these decisions have changed the law, to provide guidance to commercial parties and their legal advisors about how the statutory assumptions operate in practice. It also suggests how companies and outsiders should act when dealing with the assumptions, in light of these decisions.

Section 90-15 of the IPS (Corporations) — The new power for
courts to exercise when applications for directions are made
from voluntary administrators, liquidators and others
— *Timothy S Porter and Christopher F Symes*

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Recent changes to the Corporations Act 2001 (Cth) have led to the creation of an even broader general power for external administrators to seek the court's direction than was previously understood and utilised through s 447A or s 1322. Section 90-15(1) of the Insolvency Practice Schedule specifies that '[t]he court may make such orders as it thinks fit in relation to the external administration of a company.' This was inserted by the Insolvency Law Reform Act 2016 (Cth) and came into effect on 1 September 2017. What this article discusses is the new power's broad standing and the first uses that the new power has been put to so far. Then follows some discussion on how the section should be interpreted, arguing that it should not be limited but expansive. The article further argues that in keeping with current understanding it should not be used as a substitute for commercial decision making by the external administrator. Further discussion is made on the pt 5.3A, the Insolvency Practice Schedule objects, the new power and its relationship with other provisions. Finally, the constitutional limitations and the new powers' limitations with the presumption against interference with vested rights are considered.