

# Australian Journal of Corporate Law (AJCL)

## Volume 36 Part 1

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

### CONTENTS

**Editorial** 1

#### Articles

[‘Legitimate expectations’ and the oppression remedy](#)  
— *Stephanie CB Brenker and Ian Ramsay* 3

Should a shareholder’s legitimate expectations form part of the test employed by courts to decide if the shareholder has been oppressed? The term ‘legitimate expectations’ was first used by an Australian court in an oppression claim more than 40 years ago. Yet there remains disagreement among courts regarding whether the use of the term assists or impedes them in deciding oppression claims. This is an important issue given that the oppression remedy is widely used by shareholders. To advance the debate, the authors examined the 51 Australian judgments in which there is substantive discussion of the term. The analysis undertaken reveals five different approaches to the use of the term in these judgments and no consistent approach adopted by the courts. The evaluation by the authors leads to the conclusion that use of the term ‘legitimate expectations’ has not aided the analysis by courts of whether oppression has occurred, its use has been inconsistent, and therefore it should not be used in cases where oppressive conduct is alleged.

[The corporate constitution as a statutory contract: Artifice or anachronism?](#)  
— *Jason Harris* 25

A company’s constitution provides the legal foundation for the relationship between a company and its directors and members. That relationship is deemed by statute to have effect as a contract between the company and the directors and between the company and its members, and amongst members between themselves. This statutory deeming of the constitution as a contract has been a feature of company law across the common law world since the 1850s, but the application of contract law to the construction and operation of the constitution raises difficult conceptual problems. In this article, it is argued that the deeming of the constitution as a contract is an anachronism based on a 19th century conception of a company as the embodiment of a group of incorporators. It is argued that changes in 1998 in Australia have removed this conceptual foundation and now formally recognise the company as a distinct legal entity arising from registration, rather than the legal embodiment of the collective members. It is argued that the constitution should be recognised as having statutory force, rather than continuing to deem it to have contractual force.

## Corporate law for the digital age: Blockchain and the corporate form

— *Myles Bayliss*

49

Since the introduction of the Corporations Act in 2001, the emergence of innovative technologies has led to a fundamental shift in the way business is conducted. Whilst innovation is a positive from a consumer welfare perspective, these rapid changes can give rise to issues in the legal and regulatory spheres, particularly where the emergent technology or practice is 'disruptive' in nature. Some recent technologies may even go as far as to challenge the very fundamental concepts of corporations law. On this basis it may be pertinent to examine the potential impact of technology and its place in the Australian corporate law framework.

## Corporations and their contributions to public debates

— *Anthony Gray*

66

Corporations are increasingly contributing to controversial public debates. This raises important questions regarding the purpose of a corporation, where a range of views have been expressed, including the shareholder primacy theory, stakeholder primacy theory, communitarian notions, and concepts of corporate social responsibility. This article argues that there are real questions surrounding the legitimacy of such contributions. It also considers directors' legal responsibilities under the Corporations Act, and considers arguments that directors may be in breach of these obligations by devoting company resources in pursuit of social ends. It also considers arguments that corporations have a protected freedom to contribute to political discussion, before concluding that if parliament so wished, it could legislate to make it clear that corporations are, or are not, legally entitled to devote resources towards the pursuit of non-profit objectives, including social causes. In the absence of such clarification, there are significant legal doubts over the efficacy of such behaviour.

## Regulatory Update

### Individual liability for being 'knowingly concerned'

— *Andrew Eastwood*

99

## Insolvency Law Update

Cross-border insolvency in Australia is bringing about international judicial collegiality: Cooperation with foreign courts and foreign representatives is now mandatory and contemporary

— *Christopher Symes*

103