

# AUSTRALIAN BUSINESS LAW REVIEW

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## ARTICLES

### **Free Speech and Secondary Boycott Activity in Australia** – *Anthony Gray*

There has been an increase in activism and a change in how it has been conducted in recent times, particularly in relation to environmental issues. Some activists have resorted to unusual measures to seek to prevent economic activity from occurring. Secondary boycott activity is prohibited in Australian law. This article considers whether some of the activity might conceivably breach existing prohibitions on secondary boycott activity. It is possible that the implied freedom of political communication might also be relevant, with protesters arguing they have a protected freedom to engage in political activity. Case law in this area from Australian and the United States is considered, and precedent from the latter is considered relevant to consideration of the balance between free speech and protecting legitimate economic activity in the former. Further, existing secondary boycott provisions make distinctions based on the content of speech that are arguably incompatible with the implied freedom. .... 382

### **An Examination of Legal Values in Statutory Unconscionable Conduct** – *Peter Toy*

Among the many topics of legal theory covered by jurists, theorists and judges, there are two theoretical approaches to understanding statutory interpretation and application that are frequently utilised in the expression of judicial reasoning in Australian case law – the “legal standard” and the “normative” function of the law. This article identifies cases in which these aspects of legal theory are deployed in the reasoning for judicial decisions made under legislation regulating business conduct, with a focus on recent cases on statutory unconscionable conduct as the exemplar provision. It also inquires into the legal value judgments that inform the interpretation and application of statutory “normative standards”. It is important that legal practitioners, business regulators and policy-makers have an informed understanding of these theories, their origins and their potential implications when used in courts to explain the interpretation and application of the law. .... 406

### **The Illusion of Control** – *Radha M Pull ter Gunne*

This article explores the use of consent in privacy and data protection regimes of the European Union, California and Australia, drawing on insights from behavioural economics. The concept of consent is based on informational self-determination/privacy self-management, which is founded on the notion that an individual has control when there is sufficient choice and information. However, the learnings from behavioural economics show that sufficient choice and information do not lead to better decisions around granting consent to share personal data. Biases and heuristics skew the decision-making process, as humans have bounded rationality. This article recommends relying less on consent and the

knowledge of the individual to ensure appropriate privacy protection, and instead focusing more on the regulation of companies and their data processing activities (downstream use of personal data). ..... 424

**Social Enterprise and Equity Crowdfunding – A Proposal to Share Legal Infrastructure**  
– *Akshaya Kamalnath*

Australia introduced equity crowdfunding as a mode of financing in 2017. Developments in 2020 indicates that a legal regime for social enterprises will be considered. The social enterprise movement shares some goals and ethos with the equity crowdfunding movement. This article outlines these shared goals and ethos, and argues that, because of these similarities, the respective legal regimes should be able to share infrastructure to ensure that both industries are able to develop. .... 444

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