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FORREST V ASIC: A “PERFECT STORM”

John Humphrey and Stephen Corones

The policy objectives of the continuous disclosure regime augmented by the misleading or deceptive conduct provisions in the Corporations Act 2001 (Cth) are to enhance the integrity and efficiency of Australian capital markets by ensuring equality of opportunity for all investors through public access to accurate and material company information to enable them to make well-informed investment decisions. This article argues that there were failures by the regulators in the performance of their roles to protect the interests of investors in *Forrest v ASIC*; *FMG v ASIC* (2012) 247 CLR 486: ASX failed to enforce timely compliance with the continuous disclosure regime and ensure that the market was properly informed by seeking immediate clarification from FMG as to the agreed fixed price and/or seeking production of a copy of the CREC agreement; and ASIC failed to succeed in the High Court because of the way it pleaded its case. The article also examines the reasoning of the High Court in *Forrest* and whether it might have changed previous understandings of the *Campomar* test for determining whether representations directed to the public generally are misleading. 26

BREACH ORDINARILY NO BAR TO TERMINATION

Thomas O’Brien

When both contractual parties are in breach of contract, the prevailing view is that one such party will only be able to exercise a right of termination if their breach was of an inessential obligation. This article suggests that the prevailing view is incorrect; while breach of an essential term may prevent a party from recovering substantial damages it should not prevent them from terminating the contract. It is suggested that as a general rule a party should be able to exercise a right to terminate regardless of whether they have breached an essential term of the contract. There should be two exceptions to that general rule, whereby a party in breach will be restricted from terminating the contract: (1) where the terms breached by the parties are dependent; and (2) where the breach by the party seeking to terminate caused the breach by the other party, upon which the terminating party relies to justify their right to terminate. 38

KABLE, PREVENTATIVE DETENTION AND THE DILEMMAS OF CHAPTER III

James Stellios

The High Court's decision in *New South Wales v Kable* (2013) 87 ALJR 737; [2013] HCA 26 has significant implications for the way in which preventative detention is to be characterised in Australia. Although the High Court's decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 was generally regarded to have characterised preventative detention as non-judicial in nature, the court in the more recent *Kable* case appears to have reconsidered this understanding. This article explores the possible bases for this development and the implications of such a reconceptualisation for a range of Ch III dilemmas. 52

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