

AUSTRALIAN BUSINESS LAW REVIEW

Volume 43, Number 5

October 2015

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Good faith in Australian contract law after *Barker* – *Anthony Gray*

In a 2014 High Court employment law decision, the possibility that Australian law should embrace the doctrine of good faith in relation to contracting was again countenanced, but dismissed by the court on the basis that it had not been argued by the parties and so should not be considered further. The doctrine of good faith has been recognised by lower courts, but has never been the basis, at least expressly, of any High Court decision. Worse, the lower court authorities are in conflict regarding key aspects of the doctrine of good faith, such that the need for High Court clarification on the existence and precise contours of the doctrine in Australian law is pressing. This has occurred in other common law systems recently. In 2014, the Supreme Court of Canada accepted good faith as an organising principle, and the Supreme Court of the United Kingdom accepted that contractual discretion would ordinarily be conditioned upon good faith principles. This article attempts to answer three key questions: (a) whether the High Court should accept the doctrine as part of Australian contract law, and if so, (b) whether the clause includes concepts of reasonableness, or is confined to honesty, and (c) whether it is best seen as an implied term, axiom of construction, or assumption or expectation underlying a contract. 358

“Re-thinking” the influence of regulatory capture in the development of government regulation – *Kerrie Sadiq and Janet Mack*

On 30 March 2015 the Australian Federal Government launched its “Re:think” initiative with the objective of achieving a better tax system which delivers taxes that are lower, simpler and fairer. The discussion paper released as part of the “Re:think” initiative is designed to start a national conversation on tax reform. However, inquiries into Australia’s future tax system, subsequent reforms and the introduction of new taxes are nothing new. Unfortunately, recent history also demonstrates that reform initiatives arising from reviews of the Australian tax system are often deemed a failure. The most prominent of these failures in recent times is the Minerals Resource Rent Tax (MRRT), which lasted a mere 16 months before its announced repeal. Using the established theoretic framework of regulatory capture to interpret publically observable data, the purpose of this article is to explain the failure of this arguably sound tax. It concludes that the MRRT legislation itself, through the capture by the mining companies, provided internal subsidisation in the form of reduced tax and minimal or no rents. In doing so, it offers an opportunity to understand and learn from past experiences to ensure that recommendations coming out of the Re:think initiative do not suffer the same fate. 379

Regulating unilateral supermarket misconduct as customer/acquirer of goods and services – Stephen Corones

Supermarkets in Australia may have substantial market power as buyers in wholesale markets for grocery products. They may also have substantial bargaining power in negotiating contracts with their suppliers of grocery products. The *Competition and Consumer Act 2010* (Cth) (CCA) regulates unilateral misconduct by supermarkets as customer/acquirers in three ways. First, s 46(1) of the CCA prohibits the “taking advantage” of buyer power for the purpose of damaging a competitor, preventing entry or deterring or preventing competitive conduct. Secondly, s 21 of the Australian Consumer Law prohibits unconscionable conduct in business-to-business transactions. Thirdly, Pt IVB of the CCA provides for the promulgation of mandatory and voluntary industry codes of conduct. Since 1 July 2015 the conduct of supermarkets as customer/acquirers has been regulated by the *Food and Grocery Industry Code of Conduct*. This article examines these three different approaches. It considers them against the background of the misconduct at issue in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* which the ACCC chose to litigate as an unconscionable conduct case, rather than a misuse of market power case. The article also considers the strengths and weaknesses of each of the three approaches. It questions the effectiveness of s 46 as a consumer protection measure and argues that the “taking advantage” element of s 46 should be removed and replaced with a “substantial lessening competition” (slc) test. 400

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