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ARTICLES

Pre-contractual Due Diligence by Franchisees and Independent Small Business Buyers – *Lorelle Frazer, Jenny Buchan, Scott Weaven, Binh Tran-Nam and Anthony Grace*

The role of pre-commitment due diligence in small business has received little academic attention to date. This is of particular concern given the reported high rate of failure in small business that is often attributed to a lack of adequate pre-contractual assessment of the small business opportunity. Data collected from a sample of 610 current and former franchisees and independent small business owners in Australia was used to empirically examine relationships between due diligence effort, business performance, owner satisfaction and relationship health. The analysis reveals different patterns of behaviour between current and former franchisees and independent business owners. In particular, franchisees spend more time and commit greater effort than their independent counterparts when conducting due diligence. Implications for theory and practice are discussed. 157

The Enterprise Risk Theory of Vicarious Liability – *Anthony Gray*

While the law of vicarious liability has existed for centuries, a satisfactory rationale or explanation for it has proven to be elusive. United States courts began asserting a theory of "enterprise risk" based on economic principles, seeking to allocate the costs associated with doing business to the enterprise. On this basis, the fact that an employee or other worker commits a wrong, and causes a third party injury or loss, is a "cost of doing business" which should properly be allocated to the business activity. This doctrine has apparently been accepted in Canada and the United Kingdom, including seeing child abuse committed within an educational institution as effectively a cost of doing business. While the Australian courts at one point seemed to accept such reasoning, more recently they have turned away from it. This article argues the Australian courts were right to do so, and should continue to not accept such a basis of vicarious liability. 178

Lessons for Market Definition from Air Cargo – *Rhonda L Smith and Arlen Duke*

The *Air Cargo* case provided the first opportunity for the High Court to interpret the phrase "market in Australia" in s 4E of the *Competition and Consumer Act 2010* (Cth). Unsurprisingly, this focus shaped the way in which market definition was approached. Yet, market definition in the context of the supply of air cargo services is of interest in its own right, especially as it highlights the issue of how to identify the relevant product supplied by the airlines and, as a transport service, illustrates how the product dimension of the market may incorporate a geographic element. It also highlights the overlap between the various dimensions of market. Having identified the origin and destination in a generic sense in relation to the product dimension, to identify the geographic dimension of the market the various judgments in the *Air Cargo* case should have considered the inter-changeability of routes and whether network effects might have created a global market. However, these issues

received scant attention as they were subjugated to the discussion of application of s 4E. The judgments linked the functional dimension of the market to an important consideration in relation to "market in Australia" but did not (at least explicitly) define it. 197

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