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ARTICLES

Finding the Balance between Profit and Purpose: Should Australia Create a Legal Structure for Social Enterprise? – *Alice Klettner*

Social enterprises take a line that falls somewhere between traditional commercial enterprise and not-for-profit organisations: their primary aim is not to make profits for shareholders but to reinvest a large proportion of profits to further a social or environmental mission. In some countries new legal business structures have been developed to facilitate this kind of enterprise and to clarify the governance model and duties of directors of social businesses. This article explores whether Australia should consider implementing a legal structure dedicated to social enterprise. It reviews data on the legal structures currently chosen by social entrepreneurs in Australia and compares this to the situation in the United Kingdom and United States where new hybrid corporate forms are available. It concludes that there is no immediate need for legislative intervention, as companies are able to voluntarily commit to a social mission and use certification schemes to signal their intentions to stakeholders. 335

Sponsor Pressure to Discipline Employees Who Have Expressed Unwelcome Views and Reform of the Business Torts in Australia – *Anthony Gray*

This article focuses on a suggestion that the current litigation involving footballer Israel Folau may involve an action by him against sponsors of his employer, if it could be shown that there was some link between sponsor concerns about public comments made and Mr Folau’s eventual termination. The article cannot answer the question specifically about Mr Folau’s case, but the suggestion raises important questions about Australia’s current regime of business torts. The article considers two important questions in this regard. First, whether Australian business law should recognise a tort of unlawful, intentional interference with trade or business, and secondly, if it does, how that tort would sit with the existing business torts of inducing breach of contract, conspiracy and intimidation. The article suggests that Australian business law should adopt the tort of unlawful, intentional interference with trade or business, and that an Australian court should also take the opportunity to subsume existing business law torts within this new tort, to simplify the law in this regard. 349

Proof of Collusion: The Evidentiary Options When There Is No “Smoking Gun” – *Genevieve Rahman and Tina Sun*

The recent failures by the Australian Competition and Consumer Commission to establish the requirement of commitment in contested cartel matters has highlighted the difficulties of proving collusion in cartel cases where the evidence is largely circumstantial. This article examines the historical trends of civil cartel litigation and explores the challenges of “proof of collusion” from a practitioner’s perspective. It is directed towards practitioners, both prosecuting and defending, who may be assessing the strength of a cartel case and

provides some early observations on how these challenges and limitations may play out in the criminal setting. 364

“Fair in All the Circumstances”: AFCA’s Discretion to Resolve Disputes – Nick Beaumont SC

The Australian Financial Complaints Authority (AFCA) is now the designated external resolution body for financial services complaints. For non-superannuation disputes, its duty is to do what it considers is fair in all the circumstances, having regard to four specific matters. This article explores the extent to which AFCA may and does depart from the law in deciding what is “fair in all the circumstances”, and discusses the meaning of the term itself. The article also examines the potential scope to challenge a decision by AFCA, having regard to the contractual, rather than statutory, source of its power. 384

FRANCHISING AND SMALL BUSINESS – Editor: Jenny Buchan

Australia’s Franchising Code of Conduct Review – a Continuation Down the Path of Jamming a Square Peg into a Round Hole? – Jenny Buchan 393