

AUSTRALIAN BUSINESS LAW REVIEW

Volume 48, Number 2

2020

EDITORIAL – *Guest Editor: Dr Victoria Lambropoulos* 103

ARTICLES

COVID-19, JobKeeper and Stand Down under the Fair Work Act 2009 (Cth): A Review of the Law – *Victoria Lambropoulos*

The COVID-19 employment law amendments are a peculiar invention arising out of the unprecedented economic times we are facing as a nation. This article looks at the legislative responses to the COVID-19 pandemic in the area of employment law. It sets out the pre-existing law in relation to stand down and redundancy, and examines it in the light of the recent amendments to the *Fair Work Act 2009* (Cth) contained in the new Pt 6-4C. A number of the new powers given to employers have been curbed by the requirement that they be exercised reasonably; however, it is unclear how reasonableness will be interpreted in these unique times. The article concludes that the amendments were necessary to address the inflexibility of the stand down framework. 104

The Contractual Impact of COVID-19 on Corporate and Financial Transactions – *Andrew Godwin*

During the COVID-19 pandemic, the social isolation measures, the closure of borders and the restrictions on business activity (including the provision of goods and services in the ordinary course of business) have seriously disrupted private contractual arrangements between commercial parties on both a domestic and cross-border basis. This article provides a high-level overview of the contractual impact of COVID-19 on corporate and financial transactions in three areas: material adverse change clauses; force majeure clauses; and the doctrine of frustration. The analysis highlights both the complexities of these concepts and also the extent to which their operation is subject to the specific circumstances, even in the context of the COVID-19 pandemic. 116

The Challenges of Navigating the COVID-19 Pandemic for Australia’s Franchise Sector – *Jenny Buchan and Rob Nicholls*

A pandemic forces franchisors, franchisees and other stakeholders to look with fresh eyes at contracts that usually remain in the bottom drawer. Government light-touch legislation is challenged, and the franchise sector must deal with forcefully drawn contracts and competition from more agile non-franchised businesses. All concerned must come to grips with how contract law addresses a pandemic, if at all, and how courts might interpret established contractual and statutory obligations and legislation enacted to respond to COVID-19. This article reviews franchising through the lenses of force majeure and frustration, and considers how the courts might interpret responses to COVID-19 in the light of the good faith obligation under the Franchising Code of Conduct. It also canvases federal and State regulatory responses in the context of franchising. The article concludes that franchisors will need to depart from a one-size-fits-all response to a more bespoke approach on this occasion. 126

Courts, Mediation and COVID-19 – Tania Sourdin and John Zeleznikow

Fundamental to the practice of law is the need to adapt to the ever-changing circumstances of human society. The COVID-19 pandemic is requiring lawyers, courts, judges and others (such as alternative dispute resolution (ADR) practitioners) involved in the justice system to reassess how they operate in a rapidly changing environment. Responses by courts and ADR practitioners have varied considerably from jurisdiction to jurisdiction, and many have been ad hoc and informed by a crisis-management approach. At the same time, innovation that has often been stalled by inertia across the sector is challenging many to contemplate how technology can support efforts to ensure that the justice system can continue to deliver outcomes without increasing delay and also enable economic recovery in the face of a projected increase in disputes. Noting such pressure, this article explores the ways in which courts and ADR services are responding to the COVID-19 pandemic in view of past technological developments.

138

Commercial Litigation and COVID-19 – the Role and Limits of Technology – Michael Legg and Anthony Song

The COVID-19 pandemic has changed the way society functions. As social distancing measures were enforced across the world, courtrooms and registries, among other public services, were forced to shut their doors to the public to ensure the safety of staff, practitioners and the wider community. However, Australian courts have been able to use technology to deliver the essential service of justice to society remotely, including fully shifting to electronic filing systems and conducting entire hearings online through various audio-visual link platforms. This article examines the experiences of Australian commercial courts using readily available technologies to respond to the crisis. This in turn raises essential questions, such as how can open justice and procedural fairness be maintained when courtrooms close and trials move online? How do we ensure public trust and confidence in the court system and guarantee the essential human element of judicial institutions is not degraded? And how do we address delay and ensure technology is accessible to all? The answers to these questions will be essential to the future of commercial litigation.

159

Frustratingly Unclear? The Interplay Between Common Law, Statute and the ACL in Assessing Consumer Rights in a Time of Crisis – Alex Jane and Jeannie Marie Paterson

The spread of COVID-19 and subsequent government regulation have substantially impacted service-providing industries. State and federal regulations concerning social gatherings and travel have, in many instances, rendered performance of contracts illegal, economically unworkable or futile. This article considers the remedies available to consumers for service contracts affected by the COVID-19 crisis, with a particular focus on the response of the airlines, and the commonly offered option of credit vouchers. In these unprecedented circumstances, it examines the complex interaction of contract law, including the doctrine of frustration and accompanying statutory incursions on remedy, and consumer rights under the *Australian Consumer Law*. The article calls for a consistent approach by service providers and the Australian Competition and Consumer Commission that gives consumers a consistent and fair remedy, without the need to resort to the labyrinthine interplay of common law and statute.

169

Prepayments, the ACL and the ASIC Act – Philip H Clarke

COVID-19 has resulted in the cancellation or postponement of sporting and entertainment events and fixtures, the virtual cessation of domestic and international air travel, and the closure of schools and most entertainment, exercise and sporting venues. What are the rights under the *Australian Consumer Law (ACL)* of those who have prepaid to attend

events, or receive services, such as these? A significant part of the answer can be found in s 36 of the *ACL*. This article outlines the operation of that provision and applies it to COVID-19 scenarios. It also highlights the value of the provision to online shoppers, who frequently make prepayments for the goods or services they seek, as a precedent for reforms to address the “fees for no service” scandal highlighted by the 2019 Banking Royal Commission. 180

COVID Collaboration and Competition Policy: Authorisation vs Forbearance as Crisis Responses – *David Howarth and Harriet Alexander*

The COVID-19 pandemic created immediate and novel challenges for health professionals. Not as immediate but almost as significant have been the extreme disruptions to supply chains, distribution arrangements and demand conditions that have forced many industries to consider collaborative responses. The Australian Competition and Consumer Commission (ACCC) and competition regulators overseas have been called on to balance short-term measures designed to ensure businesses remain viable and can supply goods and services efficiently and fairly, with long-term efforts to preserve competition. This article outlines the ACCC’s approach of granting urgent interim authorisations and reviews the content and increasingly strict conditions on collaborative activity. It compares this approach to those adopted by competition regulators overseas before briefly addressing an alternative mechanism open to the ACCC in the (as yet untested) class exemption power. The article concludes by observing that the problems faced in the early adjustment period of the pandemic are likely to be very different to those that may emerge during post-pandemic economic contraction and recovery. 189

Transport, Drones and Regulatory Challenges: Risk Accountability Meets COVID Fast Tracking of a Critical Industry – *J Tarr, A Tarr and K Paynter*

Drone use in commercial contexts has increased exponentially over the last several years. In the context of COVID-19 contagion and isolation restrictions, use and deployment technology has benefitted multiple users and operators as well as the wider community. While bringing new horizons in efficiency, the rapid upswing in use hastens the need for well thought out and properly integrated regulation. This article provides an overview of fast-tracked legislation in the form of the *Civil Aviation Safety Amendment (Remotely Piloted Aircraft and Model Aircraft – Registration and Accreditation) Regulations 2019* (Cth). Promulgated in July 2019, in response to recommendations from the 2018 Senate Inquiry into drone operations, the legislation responds in limited ways to drone registration and training requirements. The article outlines the current landscape, proposed changes and additional essential steps to achieve optimal outcomes both in terms of safety and cost for drone operators and the wider community. 202

