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Corporate Accountability for Extraterritorial Misconduct: An Emerging Risk for Australian Multinational Corporations – *Corey Byrne*

The conduct of multinational corporations that operate in high risk offshore jurisdictions has come under significant scrutiny in recent years. This article considers the increasing risks for Australian multinational corporations whose agents or employees engage in misconduct in foreign jurisdictions. It is argued that, although the attribution and jurisdiction provisions under the Commonwealth Criminal Code are broad enough to allow the Crown to bring criminal proceedings against a corporation engaged in certain types of extraterritorial misconduct, a number of often insurmountable practical and legal challenges face Australian prosecutors seeking to bring a case. This article then outlines how, as a response to these challenges, policymakers and private actors are embracing new methods of holding MNCs accountable for extraterritorial corporate misconduct, and explores three emerging forms of corporate accountability: criminal liability under the "failure to prevent" model, corporate regulatory regimes which mandate disclosure or investigation of human rights risks and private action by victims or shareholders. 329

Frustration, Unjust Enrichment and the Fibrosa Problem: Charting a Clearer Path – *Zamir R Golestani*

The doctrine of frustration provides a clear path for contractual parties to avoid future performance where the surrounding circumstances have radically changed. By contrast, the remedial consequences of frustration offer significantly less clarity. The common law rule requiring a "total failure of consideration" in order to recover payments made in pursuance of the contract has been subjected to substantial criticism, and in response several jurisdictions have enacted legislation governing the consequences of frustration. However, none provide a comprehensive resolution to the problems presented by the common law. This article proposes that the remedial consequences of frustration are best explained, both normatively and doctrinally, by a system of restitution for unjust enrichment. Accordingly, it is argued that the problems posed by the remedial consequences of frustration do not require legislative intervention and are best left to the common law. 363

Neutrality Matters: Lease Payments by Lessees in Australian Taxation – *Christina Allen*

Although Australia's federal income tax rules have gone through several reforms since the beginning of the 20th century, they remain inadequate in several important respects for a 21st century market economy. One key aspect of current deficiencies is that the tax law does not observe the important principle of tax neutrality, whereby similar characterisations of property should not lead to wildly different tax outcomes. Another characteristic is complexity, as it is a sine qua non of tax law that greater complexity is directly related to

more tax evasion, greater inefficiency, and eventual failure of specific rules. Both aspects are especially problematic in relation to lease payments in the Australian tax system. This article provides a historical and legal analysis of Australia's tax law, laying out the principles and methods by which tax neutrality and simplicity can be achieved. It shows the inconsistencies in the rules related to leases and how these undermine tax neutrality and how specific rules and misconceived accounting principles create unnecessary complexity in the tax law. These issues can, however, be mitigated, if not entirely resolved, by incorporating the risk-free rate of return into any rule affecting leases and all transactions related to them. The recommendations that follow this approach include adding deferred allowances to the existing capital gains tax regime or a newly implemented capital allowance scheme for lease payments, and removing the loss quarantine rule. Although trade offs between tax neutrality and simplicity may occur in some instances, reforms based on these recommendations will at least be an improvement on the present tax situation in Australia. 385

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