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ARTICLES

A World-Leading Sanitation System for Our Digital Economy: The Consumer Data Right – *Natalia Jevglevskaja and Ross Buckley*

Sanitation engineers have saved far more human lives than doctors. The Consumer Data Right (CDR) regime introduced in Australia in 2019 is a "water supply and sanitation system" for Australia's digital economy. It provides the pipes through which data will flow securely, and ensures that waste data is disposed of safely. Thinking of the CDR in these terms provides a useful analogy for understanding the regime's pivotal role in driving innovation and competition in Australia while rigorously protecting consumer data and ensuring the system's trustworthiness. We currently have the only data-sharing regime in the world that extends beyond banking to other sectors. Yet few of us appreciate how far ahead we are of other nations, and how imperative it is that we continue to build on this lead. 194

Investor-state Arbitration Implicating Breaches by a State-owned Enterprise of an Investment Contract – *Seunghun Lee*

An investment contract breach by a state-owned enterprise cannot be the basis of an umbrella clause claim, while such a breach of sovereign character can be the basis for a claim of an expropriation or of fair and equitable treatment. Thus, at the jurisdictional phase of treaty arbitration, an umbrella clause claim should be dismissed. At the merits phase, it is essential to examine the attributability and sovereignty of such a breach, and whether it amounts to an expropriation or a violation of a fair and equitable treatment obligation. To find attribution, a de facto state organ under Art 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), acta iure imperil under Art 5 of the ILC Articles, and instructions, direction, or effective control under Art 8 of the ILC Articles should be considered in sequential order where there is no lex specialis. In the meantime, during an examination of such attributability, a determination is also made as to whether that breach is a sovereign act. 213

Private Litigation Following Criminal Cartel Prosecutions – In Need of Assistance? – *Michael Gvozdenovic*

Criminal cartel prosecutions remain relatively rare under Australian law. As a result, limited consideration has been afforded to various aspects of the underlying legislative scheme. This article explores one aspect of the relevant statutory labyrinth: how Pt VI of the Competition and Consumer Act 2010 (Cth) may operate in respect of private proceedings that are brought following a criminal cartel prosecution. The analysis is principally concerned with the meaning of, and relationship between, ss 82, 83, and 87 of the statute. By reference to a conceivable hypothetical, the author concludes that while

private parties will likely be unable to bring an action under s 87(1) or s 87(1A), an action could be brought under s 82. However, whether that private litigant could then rely on findings and admissions made in the original criminal proceeding pursuant to s 83 is a significant consideration that remains unresolved and in need of clarification. 223

Prepayments for Goods or Services and the Australian Consumer Law – *Philip H Clarke*

Paying for goods or services before they are delivered (prepayment) is a feature of many consumer and business transactions. Almost invariably, it will occur when the supply contract is made via the internet. However, it is also common in face-to-face transactions when performance is to occur in the future (such as in the case of an airline flight), or when stock is not available on site (requiring subsequent delivered from a warehouse), or when by its very nature, supply is spread over time (such as a club membership). This article examines the application of the *Australian Consumer Law* (ACL) to prepayments in situations such as these when the goods or services are not supplied on time or at all. It argues that the ACL's response is currently inadequate and that this is especially so when supply is prevented or delayed through no fault of the supplier. This situation became prevalent during the COVID-19 pandemic when public health restrictions throughout Australia prevented, or delayed, suppliers from providing the goods or services they had agreed to supply. Although there have been calls for reform, spurred by the experiences of airlines passengers, action is yet to be taken. The author suggests how the ACL could be amended to provide a solution. 239

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