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EDITORIAL 85

ARTICLES

Common law obligations of good faith in Australian commercial contracts – a relational recipe – *Bill Dixon*

A common law obligation of good faith in contractual performance and enforcement is arising in the form of an implied contractual term, with judicial suggestion (both at Supreme Court and Federal Court level) that the implication should be an incident of all commercial contracts. This article examines the potential implications of this broad approach to good faith by the use of two case studies involving contractual opportunism (and a consequent consideration of motive). The case studies raise a number of questions. Assuming good faith is an implied incident of a certain class of contract, is the class of “commercial contracts” an appropriate good faith filter or does the filter need refinement? Are commercial contracts sufficiently homogenous that a good faith obligation should be implied, as a matter of law, in all contracts falling within this class? Is a cooperative contractual model (such as good faith) appropriate in all commercial contract transactions or is there still scope for the operation of the traditional adversarial contractual model? The article proffers a solution whereby the commercial contractual context may be relevant, rather than according all commercial contracts the same contractual treatment regardless of context. 87

Coexistence of fairness and competition under the Trade Practices Act 1974 (Cth) – *Daniel Clough*

The general law concept of unconscionability has been enacted into Pt IVA of the *Trade Practices Act*. However, judicial interpretation of Pt IVA and s 51AA in particular has not clearly determined how Pt IVA ought to be interpreted. Uncertainties remain even after the decision of the High Court in *ACCC v Berbatis Holdings Pty Ltd*. These include whether the concept of unconscionability is broad or narrow, whether special disadvantage may include a situational incapacity to conserve one’s economic interests rather than merely a cognitive incapacity and the degree to which the context of the legislative regime ought to influence the interpretation of the concept. This article is concerned with determining the principles that ought to apply in addressing when justice requires fairness in trade or commerce. The proposal is that “fairness” in this sense refers to economic efficiency when the concept of unconscionability in Pt IVA is interpreted in light of its legislative purpose and context. The article proceeds to examine law and economics analysis of how an economic concept of unconscionability ought to be applied in practice. It is concluded that the appropriate test is non-compliance with an efficient relationship of trust and confidence in trade or commerce. It appears that this does not

diverge significantly from equitable jurisprudence. In particular, it is preferable to focus on procedural unfairness rather than substantive unfairness. The article concludes with practical application of the principles in the context of retail tenancies. 99

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