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EDITORIAL 165

ARTICLES

Compliance committees under the Managed Investments Act 1998 (Cth) – *Grant Moodie and Ian Ramsay*

Retail managed investments schemes operating in Australia are regulated under the *Corporations Act* through financial services licensing in conjunction with the imposition of statutory duties on scheme operators and their officers. Compliance committees and compliance plans are important parts of the regulatory platform. The compliance committee, similar to the operation of the audit committee in relation to a company, is intended to serve as the primary monitoring and reporting intermediary between the area performing the compliance function and the board of the scheme operator. This article draws upon data from the Australian Bureau of Statistics, the Australian Securities and Investments Commission and other bodies as well as interviews with industry participants to examine the operation of compliance committees in practice. 167

When is bundling illegal in Australia under s 46 or s 47 of the Trade Practices Act 1974 (Cth)? – *Ian Wylie*

Bundling is ubiquitous and of concern to competition regulators. It has, however, received little attention in academia or the courts compared to its prevalence in commerce and the attention which has been directed to related predatory conduct. This article examines the current Australian law and surveys economic and legal theory in other jurisdictions, in particular the intersection between bundling and predation which may arise when powerful firms provide package discounts. It goes on to identify whether there is or can ever be a “bright line” test of illegality for bundling, to suggest when bundling should be a matter for antitrust concern and as a practical matter when it is likely to contravene the *Trade Practices Act*. It concludes in advocating a conservative approach to the assessment of likely contravention. 190

What is the content of the common law obligation of good faith in commercial franchises? – *Bill Dixon*

This article examines how lower courts in Australia have given content to the implied common law obligation of good faith in contractual performance and enforcement in the context of franchise relationships. Specifically, observations are made concerning the impact of the implied obligation on commercial franchisors. While commercial franchisors are not obliged to put aside self-interest, it will be demonstrated that due

regard must be paid to the reasonable expectations engendered by the franchise relationship to avoid allegations of acting in a manner contrary to the implied obligation. Finally, it is suggested that the conclusions reached in the franchise context are consistent with the more general trend of recent Australian lower court authority, namely, that the content of the implied good faith obligation is increasingly likely to be based on the reasonable expectations or legitimate interests of the contractual parties. 207

Predatory lending – *Justin Malbon*

This article critiques mechanisms for dealing with predatory lending. An historical outline is provided of regulatory attempts for dealing with predatory lending practices. Interest rate caps and debt moratoriums (including bankruptcy) have been used for thousands of years. The establishment of charitable lending institutions and building societies are more recent innovations developed over the past few centuries. Modern innovations critiqued in this article include consumer education programs and the requirement for pre-contractual information disclosure. This article argues that pre-contractual disclosure is failing as a regulatory mechanism because it only partially aligns with classical contract and economic theory, which it purports to underpin. That is, pre-contractual disclosure requirements are based on the assumption that providing borrowers with information about loans will promote a more competitive market. However, no real incentives are provided to the lender to ensure that the disclosure is clear, comparable and meaningful. This article proposes regulatory reforms to give incentives for clearer disclosure of loan terms to potential borrowers than presently exist. 224

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