

AUSTRALIAN BUSINESS LAW REVIEW

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ARTICLES

Concurrent liability for breach of contract and breach of section 52 – Derek Neve

The article reviews existing case law relating to concurrent liability for breach of contract and breach of s 52 of the *Trade Practices Act*. It looks particularly at how s 52 exposes defendants in breach of contract cases to unlimited liability, even if a contractual liability limitation regime has been agreed, and why plaintiffs in breach of contract cases are increasingly likely to make claims for breach of s 52 in parallel to claims for breach of contract. The article argues that the extent of the encroachment of s 52 into areas of contract law is contrary to the interests of public policy and probably contrary to the legislative intent behind the *Trade Practices Act*. It proposes an alternative approach to applying s 52 in cases of concurrent contractual liability which would moderate the extent of its encroachment. 249

Franchising, relational contracts and the *vibe* – Andrew Terry

There is increasing recognition, academic and judicial, that traditional classical contract law granting primacy to the written agreement is inappropriate in the case of ongoing, interdependent and cooperative relationships such as business format franchising which exist in a world of “contractual incompleteness and relational complexity”. It is suggested that, in contracts of a relational nature, obligations arise not only from the written contract but from the norms of the ongoing relationship which supplement the express contractual obligations.

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2002] 2 All ER (Comm) 849, an appeal to the Privy Council from the New Zealand Court of Appeal, has provided the first opportunity for judicial analysis at the highest level in Anglo-Australasian jurisdictions of the relational nature of franchising and its implications. Although the invitation to embrace the relational contract model was not accepted – the judgment does not refer to the literature or even use the term “relational” – the Privy Council acknowledges that franchise agreements are “not ordinary commercial contracts”. This article argues that, despite the Privy Council’s failure to expressly adopt relational theory, relational considerations clearly underlie and influence its judgment which supports the primacy not of the narrow contract provisions but of the wider franchising relationship. The relational *vibe* (“dominant quality, mood or atmosphere”: Macquarie Dictionary) is likely to be increasingly influential in franchising litigation. 289

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