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EDITORIAL 85

ARTICLES

Difficulties with indemnities between business entities – *Daniel Gosewisch*

Indemnity clauses are within the common contracting experience of Australian business. Despite this commonality, there is little consistency in drafting, and their meaning is often misunderstood. It is only once loss has been suffered that the difficulties associated with indemnities become apparent. This article investigates the nature of these difficulties and why they are so prevalent. Some problems relate to wrongdoing, but others are systemic within the normal business environment. Despite attempts to apply special rules to indemnities, the higher courts have restricted the remedies available to the use of inflexible rules of construction. This restrictive approach leaves untreated the underlying factors which cause the difficulties to arise, and remedial legislation only addresses those difficulties related to wrongdoing. 89

Decision-making by the Takeovers Panel in its first five years – *Emma Armson*

The Takeovers Panel reached its fifth anniversary of resolving takeover disputes in place of the courts in March 2005. As a result, there has been a fundamental change to the processes of dispute resolution in Australian takeover law. This article provides an empirical analysis of the Panel's decision-making over the five year period. It analyses the decisions in relation to the material referred to, the areas of law and policy that have been discussed and the circumstances in which the Panel has made declarations of unacceptable circumstances and consequential orders. A number of interesting trends emerge from this analysis, particularly in relation to the basis upon which declarations and orders have been made. 105

Will apportionment of responsibility for misleading conduct erode the consumer protection potency of the Trade Practices Act 1974 (Cth)? – *Sharon Christensen and Amanda Stickley*

In the past arguments advocating the stemming of the ever arching reach of the misleading and deceptive conduct provisions of the *Trade Practices Act 1974* (Cth) (TPA) by limiting damages awards to loss for which the contravenor is responsible, has fallen largely on deaf judicial ears. While some members of the judiciary have advocated a fair and just remedial response to misleading conduct based on responsibility of others, while accepting responsibility should play an integral part, they have not been prepared to take this step without express legislative authority. The landmark High Court decisions of *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37 and *I&L Securities Pty Ltd v HTW*

Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; 192 ALR 1 rather than dampening past criticisms added further impetus to the calls for legislative reform, which have been answered by the introduction of the concepts of contributory negligence and proportionate liability to the TPA. While the new provisions provide the courts with discretion to distribute liability for loss based upon responsibility, the judicial attitudes expressed in previous decisions raise new questions about how the existing consumer protection policy of the TPA will interact with the new apportionment provisions. This article aims to examine how, in light of past judicial utterances, a fair and just remedial response will be maintained consistent with the consumer protection purposes of the Act. 119

Civil penalties: Emphasising the adjective or the noun – Anne Rees

In this article the writer argues that recent civil penalty cases demonstrate that a hybrid third way is evolving where the procedure shares some of the features of criminal and civil proceedings. The writer notes the recommendation of the Australian Law Reform Commission that Federal Parliament enact a Regulatory Contraventions Statute of general application and argues that such a statute might assist to provide greater consistency and clarity. The writer notes the debate about whether the courts' approach is in line with legislative intention, but argues that where there are substantive law protections such as the privilege against a penalty, Parliament must do more than merely refer to the "rules of evidence and procedure for civil matters" and must expressly abrogate these protections if they are not to be available to defendants in such hearings. 139

COMPANY LAW AND SECURITIES

Auditor independence and criminal liability under CLERP 9 156

RESTRICTIVE TRADE PRACTICES

New guidelines for the debt collection industry 165

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5. Austin, n 4, p 56.

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