

# AUSTRALIAN BUSINESS LAW REVIEW

Volume 34, Number 6

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## ARTICLES

**The competition law analysis of collaborative structures** – *Andrew Harpham, Donald Robertson and Philip L Williams*

Collaborative activity is ubiquitous and many forms of collaborative activity involve arrangements to do with prices or arrangements that may contain provisions which exclude competition. For many of these arrangements, it is not clear whether they fall within those contraventions of the *Trade Practices Act 1974* (Cth) which do not depend for their operation on a substantial anti-competitive effect (the so-called per se contraventions). When confronted by these difficult cases, the courts should first examine the conduct at issue to discover “what is really going on”. The reasoning in the decision of Lockhart J in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437, provides a lead. If the conduct is of a kind that is obviously monopolistic, it should be characterised as falling within the per se prohibition. If it is not of that kind, it should not be so characterised and, in this latter case, should only be condemned if it substantially lessens competition. This article examines the concept of screening devices, in particular the doctrine of ancillary restraints, as a means of characterising conduct worthy of deeper analysis prior to condemnation. .... 399

**Civil or criminal penalties for corporate misconduct: Which way ahead?** – *Vicky Comino*

The Treasurer’s announcement in February 2005 that the Federal Government would amend the *Trade Practices Act 1974* (Cth) (the TPA) to introduce criminal penalties for serious or hard-core cartel conduct focuses attention on the debate whether civil or criminal penalties are more appropriate ways to regulate corporate misconduct. This change to the TPA is yet to be enacted. However, in 1993, fundamental reforms were made to the regime of sanctions for enforcement of the statutory duties of corporate officers in Australia when the civil penalty regime, currently contained in Pt 9.4B of the *Corporations Act 2001* (Cth) (the *Corporations Act*), was introduced. By adopting this approach, it was hoped that the Australian Securities and Investments Commission (ASIC) could more effectively deal with corporate misconduct and that civil penalties would be a significant enforcement tool. ASIC has had success recently in using the civil penalty regime, particularly against directors in high profile cases. Nevertheless, to ensure that it is regarded as a credible regulator, this article argues that, in the light of the adverse press and perceptions surrounding ASIC’s failure to institute criminal proceedings against Stephen Vizard and the difficulties in bringing civil penalty proceedings resulting from the majority decision of the High Court in *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129, ASIC should consider shifting the balance away from civil penalty proceedings to criminal prosecutions in serious cases of corporate wrongdoing. This is especially so now with the recent victory of its United States counterpart, the Securities and Exchange Commission (SEC) in the Enron case. The

criminal convictions of former top two executives, Jeffrey Skilling and Kenneth Lay (now deceased) on 26 May 2006 and the subsequent sentencing of Skilling to 24 years and four months in prison, bring to a close a four-year investigation into the largest corporate fraud in United States history and should buoy corporate regulators around the world, including ASIC, to pursue criminal cases. ....	428
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**Catching up with consumer realities: The need for legislation prohibiting unfair terms in consumer contracts – Nicola Howell**

In the policy debate about the need for legislation to prohibit the use of unfair terms in consumer contracts, substantive unfairness is often distinguished from procedural unfairness. Current consumer protection laws appear to offer the potential for relief on substantive unfairness grounds alone, however, a review of cases involving credit contracts shows this potential is rarely realised. This reluctance to provide relief for substantive injustice reflects a preoccupation with freedom and certainty of contract, the notions underpinning classical contract theories. As a class, consumers are vulnerable in the marketplace, and they do need protection from substantively unfair terms. A new framework for regulating consumer contracts is needed, one that relies less on classical contract theories and takes the reality of consumer contracting and consumer behavior as its starting point. Unfair contract terms legislation will be a step on the path towards this new framework. ....	447
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