

AUSTRALIAN BUSINESS LAW REVIEW

Volume 37, Number 4

August 2009

EDITORIAL 209

ARTICLES

Employee share ownership in unlisted entities: Objectives, current practices and regulatory reform – *Ann O’Connell*

This article examines the use of broad-based employee share ownership plans (ESOPs) in unlisted entities in Australia and the obstacles they face. One particular obstacle is the lack of a market for the shares or right which presents problems of valuation and makes disposal more difficult. The article considers the objectives and current practices and notes that employee ownership levels tend to be lower for unlisted entities than for listed entities. This article, based on a report that forms part of a larger project examining the use of ESOPs in Australia, also identifies a number of regulatory obstacles and makes some recommendations for reform. 211

Electronic commerce and protecting intellectual property on the internet – *Domenic Carbone*

This article discusses Australian laws that apply to electronic commerce to protect intellectual property on the internet. In doing so, the article outlines the main features of the relevant Australian intellectual property laws and the two other relevant laws of Australian consumer protection legislation and the common law tort of passing off, and notes how those laws can apply to e-commerce and the internet. The article also discusses some recent cases in which those laws have been applied by the courts in the context of e-commerce. It concludes that the “light touch” regulatory approach adopted in Australia of generally allowing existing legal rules to apply to e-commerce, and to the protection of intellectual property on the internet, has not resulted in any significant legal uncertainty, at least not in the courts. Finally, the article highlights some recent Australian government announcements that may have an impact in the near future on e-commerce and intellectual property on the internet. 239

Fair work laws: Good faith bargaining, union right of entry and the legal notion of “responsible unionism” – *Louise Floyd*

The *Fair Work Act 2009* (Cth) predominantly commenced operation on 1 July 2009, with its final provisions (eg minimum entitlements) set to become operative in January 2010. From the perspective of Australian business lawyers, two of the more significant changes that the legislation introduces pertain to the relationship between employers and trade unions; namely, the provisions governing good faith bargaining and union right of entry. This article analyses the new laws on these topics. From a study of the relevant law, the article considers the circumstances in which unions, not just employers, might be found to be in breach of the new s 228 which, for example, requires parties not to bargain in such a way as to undermine freedom of association and collective bargaining. Of relevance to that topic, the article also considers the British decision of *Young, James and Webster* and its pronouncements on the legal concept of “responsible unionism”. It is argued that

“responsible unionism” is relevant to the interpretation of good faith bargaining by unions and union right of entry. The article also posits that “responsible unionism” is relevant to two further issues which are extremely significant, yet have been substantively left to future rounds of reform. The first of these issues relates to the form of the trade union registration and governance provisions. The second issue pertains to the question of what will happen to unions with State and federal branches if a true national system of industrial relations is achieved. The article concludes by arguing that the rights of State businesses, unions and workers should be given due weight. The notions of good faith bargaining, right of entry, responsible unionism and State interests are therefore all interconnected. 255

The duties of in-house counsel: The bold, the bright and the blurred? – *Maxine Evers and Jason Harris*

Recent cases involving in-house and external lawyers have attracted much media attention, from the C7 litigation to the AWB Inquiry. Some of the media commentary and judicial remarks were directed at the role of the internal legal advisers in the conduct of the parties, both before and during litigation. The cases acknowledge the challenges faced by in-house counsel where the duty to client is blended with loyalty to the employer. The requirement for independence is a fundamental principle of the legal profession. The increasing use of in-house counsel challenges this principle. The conflict faced by in-house counsel is predominant in claims for privilege. This article examines the scope for privilege to be claimed in respect of communications involving in-house counsel. 267

BOOK REVIEW – *Peter Lithgow*

Mason and Carter’s Restitution Law in Australia by Mason K, Carter J and Tolhurst G – *Romauld Andrew* 286

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THOMSON REUTERS

© 2009 Thomson Reuters (Professional) Australia Limited

ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 0310-1053

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW