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ARTICLES

Transfer of title by a non-owner: The Personal Property Securities Act 2009 (Cth) exceptions to the nemo dat rule – Denise McGill

The fundamental personal property rule – no one can transfer a better title to property than they had – is subject to exceptions in the Sale of Goods legislation, which aim to protect innocent buyers who are deceived by a seller’s apparent physical possession of property. These exceptions cover a limited range of transactions and are restrictive in their operation. Australia now has national legislation – the Personal Property Securities Act 2009 (Cth) - which will apply to many transactions outside the scope of the Sale of Goods Act and which includes rules for sales by non-owners which will provide exceptions to the nemo dat quod non habet rule for many common commercial transactions. This article explores the effect of the Personal Property Securities Act 2009 (Cth) on the Sale of Goods exceptions, explains that the new provisions are so wide that there is little continuing relevance for the Sale of Goods Act exceptions, and indicates where they may still apply. 209

Good faith in contractual performance and enforcement – Australian doctrinal hurdles – Bill Dixon

In the ongoing and spirited debate about the relative merits of an obligation of good faith in contractual performance and enforcement, widely divergent views have been expressed about the appropriateness and content of the putative obligation. However, relatively less time has been devoted to discussion of the sparseness of tools available to facilitate doctrinal development and the hurdles necessarily imposed by such limited doctrinal resources. This article seeks to examine the Australian doctrinal position against the backdrop of good faith as it finds application in the wider global context. 227

The power and information imbalance in franchising: The role of prior disclosure under the Franchising Code of Conduct – Andrew Terry and Yun Zhang

The recent report of the federal Parliamentary Joint Committee on Corporations and Financial Services, Opportunity not Opportunism: improving conduct in Australian franchising, concluded that while the prior disclosure obligations of the Franchising Code of Conduct were for the most part adequately addressed, there remained concerns because of the “continuing absence of an explicit overarching standard of conduct for parties entering a franchise agreement”. With the government’s rejection of the Committee’s recommendation to explicitly incorporate a good faith obligation in the Code, enhanced prior disclosure has been relied on to address the Committee’s concerns of opportunistic conduct. The recent reforms to the Franchising Code of Conduct were not to eradicate opportunistic conduct but to ensure that franchisees “go into businesses with eyes wide open”. This article focuses on the role of prior disclosure in addressing opportunistic conduct issues and proposes strategies to enhance the effectiveness of prior disclosure. 245

The use of infringement notices by ASIC for alleged continuous disclosure contraventions: Trends and analysis – *Aakash Desai* and *Ian M Ramsay*

The Australian Securities and Investments Commission (ASIC) has several enforcement options available to it where a company breaches its continuous disclosure obligations by not promptly disclosing price sensitive information. The most recent enforcement option made available to ASIC is the use of infringement notices. Infringement notices are designed to be used for less serious contraventions of continuous disclosure obligations. This article reports the results of the first detailed empirical study of ASIC’s use of infringement notices since they were introduced in 2004. One of the findings is that although infringement notices were introduced on the basis they would be a fast remedy, this objective has not been achieved. On average, ASIC takes almost 250 days from the time of an alleged contravention to the issuance of an infringement notice. The authors also compare ASIC’s use of infringement notices with other enforcement measures available to ASIC for breach of continuous disclosure obligations. These measures include enforceable undertakings, civil penalty proceedings and criminal penalty proceedings. 260

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