

AUSTRALIAN BUSINESS LAW REVIEW

Volume 46, Number 1

February 2018

EDITORIAL – *Professor Bob Baxt AO* 3

ARTICLES

A Code of Conduct for Supermarket-Supplier Relations: Has it Worked? – *Caron Beaton-Wells and Jo Paul-Taylor*

In 2018 Australia’s first voluntary statutory industry code, the *Food and Grocery Code of Conduct* (FGCC), will be subject to review. Having arisen out of significant concerns about the power imbalance between the two major supermarket chains and their suppliers, it is timely to ask whether and to what extent the FGCC is working and whether reforms – including making the Code mandatory, tightening up some of its provisions, introducing an industry-specific ombudsman, and/or introducing pecuniary penalties – are called for. Drawing on substantial empirical research, including a large number of stakeholder interviews, these questions are examined by reference to the elements that comprise the stated purpose of the FGCC. Key findings are that the major chains have demonstrated strong commitment to compliance and that there have been gains for suppliers in transparency and certainty. However, the cultural change required to secure greater trust, cooperation and good faith generally is likely to be a slower development and will be affected by the highly fluid competitive dynamics in the sector. Moreover, there are reasons to doubt the efficacy of the FGCC dispute resolution processes and, in time, consideration may need to be given to adopting an ombudsman-style scheme similar to the one that has proven so effective in the UK. 6

Non-profit? It’s Not What You Think it Means – *Jason Mitchell*

One criteria for exclusion from the *Income Tax Assessment Act 1997* (Cth) (ITAA) and for election for exclusion from the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) is whether a “body” satisfies the “non-profit” criteria. What constitutes a “non-profit body” is not well articulated, either legislatively or practically. Outside of tax professionals, it is not well understood that for GST (but not ITAA) purposes “body corporates” and other organisations are prima facie within the ATO’s interpretation of “a non-profit body”. This confusion occurs for two reasons: (a) there is a distinction between ITAA and GST concepts of a non-profit body; and (b) the ATO’s interpretations are convoluted. Ultimately for GST purposes, the non-profit nature is determined by where “the body is not carried on for purposes of profit or gain to the individual members”, which in turn is linked to “surrounding circumstances” as to whether various “distributions” have occurred, or are intended. This then leads to more questions, including what constitutes a “distribution” of profit or assets, and what common property income of body corporates qualifies as a distribution. This ambiguity has economic consequences, as once within the non-profit ambit, a body need only register for the GST system when its GST turnover exceeds a higher threshold..... 32

A Critical Assessment of Shareholder Class Action Settlements – The Allco Class Action – Michael Legg

Shareholder class actions have as their primary goal the achievement of access to justice for shareholders so that they may recoup compensation for their losses. This article examines the success of the shareholder class action in achieving compensation through a critique of the Allco class action settlement. The article focusses on two aspects of the Federal Court’s judgment: the settlement structure and the litigation funding fee. The settlement structure sought to distinguish recoveries between shareholder group members based on whether they entered into litigation funding agreements and retainers. The Court approved a structure that saw unfunded group members’ recoveries be heavily diluted which in turn impacted on the compensation achieved for those group members. The Court also adopted a common fund approach to the litigation funder’s fee and determined the fee. While the common fund reduced the fee paid to the funder it also raised questions as to the appropriate criteria and approach for future class actions.

54

COMPANY LAW AND SECURITIES – Editor: Professor Robert Baxt AO

Commentary on Aspects of The Murray Report and the Proposed Whistleblowing Legislation – Professor Bob Baxt AO

67

COMPETITION LAW AND MARKET REGULATION – Editor: Brent Fisse

Ten Years On, There is Still a Need to Modernise Regulation of Australian Business – Professor Bob Baxt AO

69