AUSTRALIAN BUSINESS LAW REVIEW

Volume 48, Number 6

2020

EDITORIAL – *General Editor: Michael Terceiro* 469

ARTICLES

Doing Wrong for the Right Reasons: ASIC and Foreign Language Business Names – *Timothy Magarry*

Under the *Business Names Registration Act 2011* (Cth), it is an offence to carry on business under an unregistered business name. A name is only registrable if it is "available" under the Act, and the Australian Securities and Investments Commission (ASIC) bears responsibility for applying the availability criteria to registration applications. However, ASIC rejects all applications for names with non-English characters, thereby making it an offence to carry on business under a foreign language business name (FLBN). This article analyses the legislation and ASIC's role within it, concluding that there is no authority for ASIC's uniform refusal to register FLBNs. The article canvasses several factors which may explain why this problem has gone unnoticed for nearly a decade. These include IT implementation problems, legislative language without discernible meaning, lacking enforcement, confusing overlaps with trademarks, and the imperceptibility of reviewable error in computer decisions. Ultimately, though, the author considers ASIC's current approach to have sound policy justifications, and proposes concrete reforms to legitimise it. 472

Off-duty Misconduct and the Employment Relationship: A Review of the Case Law – *Giuseppe Carabetta*

For many employees, the time when there was a physical and temporal distinction between periods at work and away is a thing of the past. Instant communications over the internet and by mobile phones, including using social media, mean employers can monitor employees' time on and off the clock. Courts and tribunals have responded to policies that seek to control employees when they are not at work. Seminally, in *Rose v Telstra Corp Ltd* (Rose), Ross VP gave three, alternate, criteria to determine if an employees' conduct outside of work justified dismissal. This article examines the application of those criteria by courts and tribunals. It then critically analyses their operation in three fields where contract and statute particularly blur the line between on- and off-duty conduct – police, public sector workers and elite athletes – concluding that, although employees are generally entitled to treat their personal acts as personal, that protection can disappear in the face of an employer with a particular interest in its own reputation. 497

Criminalising Wage Theft – Some Observations on Deterrence, Enforcement and Compliance – *Mark Lewis*

The proposal to reform federal workplace laws to introduce criminal sanctions for illegal "wage theft" has been the subject of much debate in recent years. It follows several high-profile wage underpayment scandals and a number of recent disclosures

by leading ASX-listed companies covering significant underpayments of worker wages and entitlements. This has revealed systemic levels of corporate non-compliance with workplace laws which has strengthened calls for increased penalties under the *Fair Work Act 2009* (Cth), including the introduction of criminal sanctions. At the State level, new laws in Victoria and Queensland have now introduced significant criminal penalties for wage theft, including jail terms of up to 10 years, and similar proposals are currently being considered in Western Australia. In light of the growing public and political shift towards criminalisation, this article examines whether criminal penalties will be effective in deterring wage theft. It argues that criminal sanctions will have limited deterrent value unless there is a perceived risk that wage theft will be detected and enforcement action pursued. This will rely heavily on other supporting measures designed to enhance detection and enforcement efficiencies, and to ensure that large companies and responsible third parties are held to account for wage theft in their business models and supply chains. 512

COMPANY LAW AND SECURITIES – *Editor: Olivia Dixon*

"Carrying on Business in Australia": A Study of Court Judgments – *Ian Ramsay and Mihika Upadhyaya* 531

COMMERCIAL LITIGATION – *Editor: Michael Legg*

A More Assertive Approach by ASIC to Using Information-Gathering Powers and Challenging Privilege Claims? – *Michael Legg and Daniel Faber* 538

VOLUME 48 – 2020

Table of Authors – Articles 545

Table of Authors – Sections 549

Table of Cases 551

Index 569