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EDITORIAL 77

ARTICLES

Information exchange, hub and spoke arrangements and collusion – *Rhonda L Smith* and *Arlen Duke*

The Harper Report, released 31 March 2015, places concerns about price signalling into the broader category of information exchanges. The aim of this article is to consider a particular mechanism which can be used to exchange information, a hub and spoke arrangement, in order to discover whether such arrangements, when anticompetitive, can be relatively easily identified. The article discusses the current legal framework and the Harper Report. Then the nature of hub and spoke arrangements and the purpose of such arrangements are outlined. The means by which these arrangements may damage competition is then discussed, as are the conditions required for such an outcome. Consideration is then given to whether the introduction of a prohibition against "concerted practices" is the best way to regulate information exchanges. Finally, the potential for the prohibition suggested in the Harper Report to be over-inclusive is considered and refinements to the current wording of s 45 are suggested. 81

Reinvigorating the trade and commerce power – *Anthony Gray*

Reform of the federal system appears high on the Federal Government's agenda, with the Commission of Audit Report of 2014 recommending major reforms to our federal system. Hopefully, one area of reform will be business regulation. Access Economics has earlier documented the significant costs imposed on Australian business by the myriad of State and federal regulation to which they are subjected. One piece of the puzzle is the scope of the Federal Government's constitutional power with respect to trade and commerce. In some respects, that head of power has been interpreted relatively narrowly. Currently, the orthodox position is that laws with respect to production and manufacture are not laws within the scope of trade and commerce, and so not able to be regulated under that head. It will be argued in this article that such an approach is unduly narrow, reflecting tainted reserved powers reasoning and may be based on misguided suggestions of State sovereignty. An Australian regulatory environment for business must reflect the reality that Australia's future lies in global trade, not perpetuating subnational regulatory differences for the sake of it. 101

Could Canadian-style interest arbitration work in Australia? – *Anthony Forsyth*

The collective bargaining framework in Australia's *Fair Work Act 2009* provides only limited options for mandatory arbitration of collective bargaining disputes (also known as interest disputes). Experience in the first six years of the legislation's operation shows that these avenues for arbitration are rarely utilised, because the statutory tests to activate them are so difficult to meet. Eight federal and provincial Canadian labour law statutes contain provisions for first contract arbitration (FCA), enabling the relevant labour relations board

to determine a first collective agreement. This article concludes that FCA in Canada works as a vehicle to promote collective bargaining; and therefore has considerable potential to address the failure of the *Fair Work Act* effectively to address employer "surface bargaining" tactics and long-running agreement disputes. A variation of British Columbia's extended mediation model of FCA is recommended as the most suitable for adaptation, with Australia's Fair Work Commission given discretion to assess whether bargaining disputes should move from conciliation to interest arbitration. This reform would assist in the attainment of the FW Act's stated objective to encourage collective bargaining, and give more workers access to above-award wages and employment conditions through collective agreements. 121

The duty to act in the best interests of the public entity – a regulatory analysis – *Marco Bini*

The duty to act in good faith and in the best interests of the company is a duty which is well traversed judicially and understood amongst corporate lawyers and directors. The duty has developed as a rule designed to prevent directors from benefiting themselves out of company assets. In a number of Australian jurisdictions, this duty is also imposed on government-owned corporations and in Victoria, on a wide range of non-company public sector entities established by statute or Ministers. In the public sector, the meaning and purpose of the duty from a regulatory perspective is far less clear. This article examines the possible effect of the duty in the public sector using regulatory analysis and contrasting its effect in the private sector. The analysis concludes that the effects of the duty in the public sector are far less certain and are unlikely to be the same as those in the private sector. 138

Issues at the end of a franchising relationship – *Andrew Terry* and *Maree Chetwin*

This article considers issues that may arise on a termination or expiry of the franchise relationship. The meanings of the terms "expiry" and "termination" may not be clear from the agreement and may give rise to different consequences. The legal nature of a continuing relationship post expiry before an agreement is renewed, abandoned or otherwise brought to an end may also be an issue. Renewal may be on the terms of the franchisor's then current franchise agreement which may be quite different from the original franchise agreement. Covenants in restraint of trade must protect a legitimate interest of the franchisor and may have to be tested for reasonableness between the parties and in the public interest. 152

INSURANCE LAW – *Professor Julie-Anne Tarr*

Accountability of insurers under s 54: Striking the balance between commerciality and consumer protection 167