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ARTICLES

A step too far in consumer credit protection: Are external dispute resolution schemes wielding the sword of Damocles? – *Franci Cantatore* and *Brenda Marshall*

Under existing consumer credit legislation, all credit providers are required to be licensed with the Australian Securities and Investments Commission. Membership of an external dispute resolution scheme – either the Credit Ombudsman Service Limited (COSL) or the Financial Ombudsman Service– is compulsory for license holders. As members, credit providers are subject to the Rules and Constitutions of the respective schemes, a requirement which has far-reaching effects on commercial dealings. This article explores the scope of COSL's powers, finding these to be excessively wide, and inherently unfair towards credit providers. The principal contention of the article is that, instead of providing a dispute resolution service, COSL imposes a "tyranny" on credit providers obliged to comply with the scheme's onerous and oppressive Rules. 322

Advertising by professions and the Competition and Consumer Act 2010 (Cth) – *Anthony Gray*

This article considers whether restrictions on lawyer advertising might be challengeable on the basis that they are inconsistent with the *Competition and Consumer Act 2010* (Cth). It can be difficult to balance legitimate regulation of professions with the demands of competition, but increasingly professions are seen to be businesses, and subject to the same rigours of competition as any other business. Restricting some lawyers from advertising their services is argued to be contrary to the objectives and spirit of the national competition scheme, because advertising increases competition amongst providers, and reduces prices, making services more accessible. Arguments that advertising restrictions improve the quality of services or the perception of the profession are difficult to justify. 336

Do deep pockets have a place in competition analysis? – *Rhonda L Smith* and *David K Round*

The existence of market power is notoriously difficult to prove. Whether financial power, or deep pockets, is related to the possession of substantial market power, is inherently controversial. However, it is arguable that in a small number of cases an understanding of the role played in a firm's financial power is essential in order to determine whether it has used its market power for a proscribed purpose. The authors argue that financial power can indeed provide the ability or the means for a firm to engage in the conduct for which market power provides the incentive. 348

How likely is "likely"? Metcash, counterfactuals and proof under s 50 – *Daniel McCracken-Hewson*

When is a substantial lessening of competition "likely"? This is a critical question in any assessment of whether an acquisition would infringe s 50 of the *Competition and Consumer Act 2010* (Cth) and was a key point of contention in the Metcash cases heard by the Federal Court in late 2011. Unfortunately, those cases produced three conflicting views, so there is now considerable uncertainty on this question. The underlying question – which remains unresolved – is how to construe the standard of proof (ordinarily the balance of probabilities) when the infringement itself incorporates a notion of likelihood (a "likely" effect on competition). Two of the Federal Court judges arguably set out inappropriate formulations in answer to this question. Significantly, they sought to interweave the standard of proof with elements of the "counterfactual analysis", the tool ordinarily used to demonstrate an impact on competition. That approach was called into question in the majority judgment of the Full Federal Court. 363

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