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ARTICLES

False or misleading credence claims: What's the harm and why should businesses care? – *Felicity Lee*

This article explores the impact that false or misleading representations about the existence of credence attributes have on consumers and the competitive process. It also offers an analysis of the approaches adopted by the courts in determining and measuring the harm of false or misleading credence claims in particular circumstances, and ultimately in assessing the appropriate penalty to be ordered on contravening businesses. Given the increasing consumer awareness and demand for products that satisfactorily meet standards relating to safety, social and animal welfare, it is in the long-term interests of businesses to develop innovative processes to efficiently achieve high quality credence attributes. 5

The far side of the Pilbara: The Productivity Commission on the wrong track? – *Dave Poddar* and *Angela Flannery*

In considering both the High Court decision in the Pilbara Infrastructure case and the Productivity Commission's review of the statutory regime that permits third party access to private essential infrastructure, this article highlights the difficulties with putting in place a simple, easy to use infrastructure access regime. Part IIIA of the Competition and Consumer Act 2010 (Cth) is complex and it may be a difficult and lengthy process for access rights to be obtained – if only because of the extensive time delays experienced in resolving conflicts. The Productivity Commission's review, with its focus on the federal law, is a missed opportunity to review the State-based access regimes, which are no easier to use than Pt IIIA and which vary on a jurisdiction by jurisdiction basis. With the national focus on productivity, a more certain approach to the availability of essential infrastructure is critical but, it seems, no closer under any Australian statutory regime. 18

Blurring the bright line? Third line forcing revisited – *Justin Lipinski*

Unlike other forms of exclusive dealing, third line forcing is prohibited per se, that is, prohibited irrespective of the effect the conduct has on competition. While this prohibition has been the subject of criticism from courts, parliamentary committees and academics, the way in which the provisions are interpreted has not been the subject of extensive commentary. This article identifies two major problems in the interpretation of third line forcing provisions. First, since the decision in ACCC v IMB Group, there has been a significant shift in the way in which courts characterise whether there are two parties or three to a transaction. As a consequence, it is now more difficult to assess whether courts will treat conduct as third line or full line forcing, which has resulted in a greater degree of

uncertainty in commercial transactions. Secondly, there is no structured approach for assessing whether there is a forcing of one product or two. Neither problem has, by and large, been discussed by commentators. This article seeks to address these problems by providing an alternative approach to the way in which courts characterise conduct in the context of third line forcing. 23

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