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EDITORIAL 327

ARTICLES

Uncovering the roots of Australia's misuse of market power provision: Is it time to reconsider? – *Katharine Kemp*

Australia's misuse of market power provision has been the subject of debate throughout its 40-year existence. It is presently in the spotlight again, receiving consideration as part of the "Root and Branch Review" of the competition law. Despite consideration by numerous earlier reviews, the prevailing view has been that little (if any) amendment of the provision is needed. This article examines the legislative origins of the three most distinctive features of the provision, namely that it does not permit an efficiency defence (or authorisation); it does not incorporate an effects-based test; and it relies on a firm making use of its market power. The analysis reveals that these elements were shaped in significant respects by superseded theories and apparent inattention to their implications, giving rise to weaknesses in the reach and operation of s 46(1). There is good reason to question the protected status which these elements have enjoyed in Australia's unilateral conduct law. 329

Corporate whistleblowing: Public lessons for private disclosure – *Sulette Lombard* and *Vivienne Brand*

Whistleblowing regulation in Australia has entered a significant new phase with the passage of the Commonwealth's long awaited *Public Interest Disclosure Act 2013* (Cth). However, this legislation focuses on public sector whistleblowing and there has not been a concurrent development of private sector regulation. Part 9.4AAA of the *Corporations Act 2001* (Cth), which provides specific protection to corporate sector whistleblowers, was inserted in the corporations legislation in 2004. In the decade since its introduction it has been rarely relied upon and has been widely criticised as inadequate. The new Commonwealth *Public Interest Disclosure Act 2013* (Cth) provisions suggest the need to review the private sector regime. The authors suggest that changes brought about in the public sector whistleblowing context would be useful if adapted to suit the corporate whistleblowing environment. 351

"Flogging a dead horse": Artificial insemination, breeding standards and anti-trust – *Shirley Quo*

This article looks at an Australian case, *McHugh v Australian Jockey Club*, in which the court had to determine whether the requirement for a thoroughbred horse to be conceived by "natural service" (as opposed to artificial insemination) in order to be eligible to compete in thoroughbred horse races conducted in Australia was anti-competitive and therefore unlawful. It is suggested that there may be a valid argument for a limited standard-setting exemption similar to s 51(2)(c) of the *Competition and Consumer Act 2010* (Cth) on the premise that voluntary standards set by sports regulatory bodies are reasonably necessary to promote legitimate objectives to maintain the integrity of

competition in sports. A rule-of-reason analysis incorporating the test in *Gunter Harz Sports Inc v United States Tennis Association*, a United States sports equipment standard-setting antitrust case, may be a useful methodology for distinguishing between pro-competitive and anti-competitive standard-setting conduct. 367

Should the practical benefit principle extend to contract formation? – *Mark Giancaspro*

In 2012 the Federal Government commenced a comprehensive review of the Australian law of contract, with the aim of identifying those aspects of this legal framework which were not conducive to its efficient and effective operation for businesses and consumers. This article seeks to add to this live discussion by contemplating whether the highly controversial practical benefit principle, famously expressed by the English Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, should apply not only to contract variations but also to contract formation. It is argued on three grounds that, if the principle remains an established feature of the doctrine of consideration in this jurisdiction, the principle should not be extended in this manner as this will only give rise to issues of the kind being targeted in the government's review. 389

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