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Contrary to fact: Competition, market power, and the use and abuse of the counterfactual test in s 46 – *Ian B Stewart*

Section 46(1) of the *Competition and Consumer Act 2010* (the Act) is a complex provision, and one of its difficult issues is whether a corporation took advantage of its substantial market power. The counterfactual test is used to answer this issue, yet its result is only relevant and cogent if the test is framed consistently with the language of s 46(1). After considering the concepts of competition, market power, and taking advantage of market power, the article examines how the counterfactual test should be applied, what assumptions it requires as to the nature of a competitive market, and whether a material distinction exists between the words "could" and "would" when the test is applied. 6

A view of the macrocosm of international cartel enforcement: How the boomerang of cross-border disclosure springs back to its domestic context – *Laura Guttuso*

This article aims to explore Australia's role on an international cartel enforcement stage increasingly characterised by cross-border disclosure challenges in both public and private cartel proceedings. The task will be approached from a number of perspectives, including that of claimants and leniency applicants, either of domestic or foreign origin, finding their way into the Australian courts and disclosure processes. The practice in other jurisdictions, such as the European Union and the United States, will be set against the Australian experience, again viewed through the international lens. This multilayered inquiry provides useful insights into what are ultimately the challenges of how best to accommodate the wider interplay between public and private enforcement. This inevitably raises the question whether the response provided to these challenges at national enforcement level in Australia is still adequate. Now, given the backdrop of the current Harper Review, might be a good time to consider this question. 27

Stamping out rubber-stamped penalties? Determining an appropriate judicial response to agreed penalties in civil penalty settlements – *Samantha Teong*

This article examines the role of judges in relation to penalties that regulators and defendants negotiate and present to a court in a civil penalty settlement for breaches of competition and corporate law. The "favoured" Federal Court approach states that courts will accept a proposed penalty if it falls within the "permissible range" of a given case. This has recently been "challenged" by the Victorian Supreme Court of Appeal in its decision of *Australian Securities and Investments Commission v Ingleby*: the court called for greater judicial participation in the penalty determination process by requiring judges to treat agreed penalties as mere submissions only. The nature of judicial independence and civil penalties are explored, and an approach for judges that optimally balances the just and expedient resolution of civil penalty cases is proposed. 48

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