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ARTICLES

Australian Cartel Law: Recent Developments – First Set of Two Sets – *Brent Fisse*

This article surveys recent developments in Australian cartel law. There are many recent developments. The First Set discusses the following developments. Controversy surrounds the bank cartel case (2018–2022). What was the theory of the case? What would happen in a replay of the prosecution today? Escalated maximum fines and civil monetary penalties came into effect on 10 November 2022 under the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth). These are more huff than puff. Assessment of civil penalties is now subject to the ground-shaking and troubling decision of the High Court of Australia in *Australian Building and Construction Commissioner v Pattinson* (2022). The legislative framework for the assessment of fines under the *Crimes Act 1914* (Cth) remains ill-designed and outmoded. Enforcement strategies are needed to help ensure that corporations take effective precautions against cartel conduct. Is counterfactual analysis relevant to liability for price fixing? The Supreme Court of New Zealand has held "No". Overreach (unjustifiably wide scope of liability) still arises in many situations where the definition of a "cartel provision" in s 45AD of the *Competition and Consumer Act 2010* (Cth) is applied. In *Australian Competition and Consumer Commission v BlueScope Steel Ltd (No 5)* O'Bryan J held that the concepts of "commitment" and "assumption of an obligation" do not apply where an "understanding" is the type of contract, arrangement or understanding alleged. The complexity of the definitions of the cartel prohibitions remains other-worldly and undermines the law. The Second Set of recent developments in Australian cartel law is discussed in a later issue of the Review. 70

ADR and Industry Resolution Schemes: The Issue of Conciliator Accreditation – *Kathy Douglas*

Many large Australian businesses rely on industry dispute resolution schemes to address conflict relating to the provision of services, such as financial complaints and telecommunications disputes. Some of these schemes provide conciliation as part of an attempt to bring about consensual agreement between the complainant and industry member. Many tribunals also offer conciliation, such as the Fair Work Commission. Conciliation is part of the practice of alternative dispute resolution and draws on many of the premises of the field in a manner similar to mediation. However, whereas a voluntary system of accreditation is available to mediators which provides for training, standards and ethics, there is no similar Australian system for conciliators. Recently, a report by the Australian Dispute Resolution Advisory Council, drawing on surveys of organisations offering conciliation and focus groups with conciliators, indicates that an accreditation system for conciliators could be valuable. A 2022 report commissioned by the Mediator Standards Board suggests that conciliators could join the mediation accreditation system. This article

argues that the practice of conciliation, particularly in industry dispute resolution schemes, is too distinct from the practice of mediation to allow for one unified accreditation system. Although there are similarities between the two processes, particularly where evaluative mediation is practiced, the nature of conciliation where practice is generally directive, according to legislation or agreed industry schemes, means that conciliators require their own training, standards and ethics. 97

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