

AUSTRALIAN BUSINESS LAW REVIEW

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ARTICLES

The uncertain application of competition law in health care markets – *Stephen Corones*

Increasingly, competition and an expanded private sector are seen as having an important role to play in reducing costs and improving efficiency in health care markets. Competition and economic efficiency are two separate concepts for the purposes of the *Trade Practices Act 1974* (Cth). This article draws attention to a number of market failures and imperfections in health care markets which are likely to have a bearing on conventional competition analysis. The existence of these market failures such as imperfect information, agency relationships and the role played by government intervention in occupational licensing for health care professionals and the regulation of pricing through the Medicare rebate schedule, may impede competition on the merits. In some cases these market imperfections give rise to inefficiencies that can only be cured by professional intervention to protect consumers. They are, however, a matter of degree. Each case calls for an analysis of the extent to which the particular health care market departs from the neoclassical economist's ideal. This article considers the way in which the courts, the Tribunal and the ACCC have applied conventional competition analysis in recent health care cases and examines the categories of market defects that may justify professional intervention to give effect to improvements that qualify for authorisation. 407

Exemplary damages for breach of fiduciary duty – *Jeremy Birch*

Exemplary damages are awarded in response to torts where the defendant's conduct requires either punishment or deterrence and the quantum of compensatory damages is inadequate to fulfil this need. Exemplary damages have never been awarded for breach of fiduciary duty in Australia. This article argues that the rationales that underpin exemplary damages, principally deterrence and punishment, are consistent with Australian courts' equitable jurisdiction to award damages. Furthermore, it is submitted that the extension of exemplary damages to breach of fiduciary duty can be made on a principled basis that fills a gap in equity's remedial arsenal without creating any legal anomaly. To allow exemplary damages for grossly dishonest and deceptive breaches of fiduciary duty would serve to mould a more coherent, logical and effective system of remedial responses in our private law. 429

Customer testimony and other evidence in Australian antitrust assessments – searching for the oracle – *Caron Beaton-Wells*

In *United States of America v Oracle Corporation* 331 F Supp 2d 1098 (ND Cal 2004) the United States Government failed in its bid to enjoin the acquisition by Oracle Corporation of one of its largest rivals, PeopleSoft Inc, under the antitrust laws of that country. To a significant extent, the government's failure was attributable to weaknesses in its evidentiary case. In particular, the court was not persuaded by the testimony of software customers, called as witnesses to express a view on the scope of the relevant market and the likely anticompetitive effects of the proposed acquisition in that market. The approach taken by the court to the customer testimony, as well as to expert evidence adduced in the proceeding, provides useful insights for those dealing with Australian merger cases under the *Trade Practices Act 1974* (Cth). These insights will be relevant to litigation in the Federal Court, as well as to decisions made by the Australian Competition and Consumer Commission and the Australian Competition Tribunal in relation to the clearance and authorisation of merger proposals. 448

Bob McComas and the Trade Practices Commission: Doing it his way – *Stephen Corones, David Merrett and David Round*

As part of a wider research project on the history of competition law and its enforcement in Australia from 1973 to 2003, the authors interviewed the four Chairmen who guided the Trade Practices Commission and the Australian Competition and Consumer Commission over this period, in order to get their views of their role in its history. Given the untimely death on July 27 2005 of Bob McComas, the second Chairman who held office for three years from February 1985 to February 1988, it was thought fitting to publish a brief record of parts of the interview with him (which took place on 24 January 2005), in which Bob discussed the background, agenda, legacies and disappointments of his term in office. He was contemplating writing his memoirs, and so he had thought in detail about many of the issues raised during the interview. He regarded himself as significantly different from the other three Chairmen, and made no apologies for his relatively non-litigious approach to preserving the competitive process in Australian markets. 475

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