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EDITORIAL	173
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ARTICLES

Intention to create legal relations: The end of presumptions? – Nadine Courmadias

Traditionally, courts have presumed that commercial parties intend to create legal relations when entering into agreements and that family members do not. Although not without their critics, until recently these twin presumptions appeared immutable. This article examines the trend to reduce the emphasis on these presumptions by some members of the judiciary in a selection of Australian and New Zealand cases and proposes that as a consequence of the High Court's decision in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 the intention to create legal relations presumptions should no longer be used in any context. It concludes by considering the implications for this area of law. 175

Mergers without markets? Unilateral effects analysis in the United States and its prospects in Australia – Caron Beaton-Wells

In both the United States and Australia an initial but crucial step in the analysis performed for the purposes of merger regulation has been definition of the relevant market(s) in which competition may be affected. In recent years, the federal agencies in the United States have adopted an approach that excludes this step. Instead, their approach has been to examine the potential unilateral effects of a merger by assessing "directly", using empirical techniques, the possibility of a supra-competitive price increase by the merged firm. This has been seen as a preferable approach in many ways to the traditional structural analysis to which market definition is integral. Is it likely that Australian regulators and courts would adopt a similar approach? This article addresses that question, concluding that there are good reasons for regarding such a prospect as remote. 186

Joint venture regulation under Australian competition law: An update – Nicole Tyson

This article examines the Australian approach to joint venture regulation. The focus is on whether and how joint ventures are regulated by type and factors relevant to determining joint venture legality. Despite lacking a detailed and sophisticated framework for determining the competitive impact of specific types of joint ventures, the Australian approach is, on the whole, permissive of joint venture activity as it lacks a profound substantive and procedural divide in legal treatment based on arrangement type and is receptive to efficiency and public interest-based justifications for otherwise anticompetitive collaborations. 211

The use of empirical methods in merger investigations – *Stephen P King*

Empirical analysis is a useful input for merger analysis. It can help to clarify issues, particularly relating to market definition and competitive effects. It is a necessary input, in the sense that little if any sensible competition analysis can be brought to bear on merger evaluation in the absence of at least some quantitative information. While empirical analysis will rarely be definitive in its own right, it can help to support market inquiries and to assist the authorities in reaching an appropriate conclusion. Empirical techniques are widely used for merger evaluation in the United States, the European Union and other jurisdictions. These techniques range from relatively simple analysis of market concentration through to complex econometric data analysis and sophisticated computer simulation modelling. However, there has been a perceived reluctance by some parties in Australia to utilise empirical analysis when considering mergers. As a result, submissions to the Australian Competition and Consumer Commission regarding proposed mergers often contain little if any empirical market analysis. This article provides background and guidance for the use of empirical analysis for merger evaluations in Australia. It discusses the range of empirical techniques that can be used for merger evaluation. The article also considers standards that have been proposed for good empirical analysis and the reasons for these standards. Empirical analysis is only useful if it satisfies certain high standards. To this end the article presents guidelines for the preparation and communication of empirical analysis for merger evaluation in Australia. These guiding principles are not unique to Australia but are developed from international experience and the approaches that have been adopted by experts and authorities overseas. While the principles set high standards, these standards are appropriate if the authorities are to make important legal decisions on the basis of empirical analysis. 227

CONTRACTS AND RESTITUTION – *Sharon Erbacher*

Draconian legislation brings plaintiff down to earth 237

RESTRICTIVE TRADE PRACTICES – *Stephen Corones*

Court upholds an injunction that prohibits an otherwise lawful activity 241

BOOK REVIEWS

Fisher and Lightwood's Law of Mortgage by ELG Tyler, PW Young and Clyde Croft 245

Principles of Contemporary Corporate Governance by Jean J du Plessis, James McConvill and Mirko Bagaric 246