AUSTRALIAN BUSINESS LAW REVIEW

Volume 34, Number 4

August 2006

EDITORIAL 253

ARTICLES

Small business reforms to section 46: Panacea, placebo or poison? – *Geoff Edwards*

The government is proposing to introduce a number of "small business" reforms to s 46 of the *Trade Practices Act 1974* (Cth). These reforms are likely to closely reflect the government's response to the Senate Economics References Committee's 2004 report on reforms to better protect small businesses from the abuse of market power by larger rivals. Unfortunately, the proposed reforms demonstrate that good policy is often the victim of the political process; from a policy perspective, Australia would be better served by avoiding further codification of s 46. What is surprising is that rather than the panacea small businesses have been calling for, the proposed reforms would make small business claims of anticompetitive harm under s 46 even more difficult to prosecute. 255

Escaping New Zealand's monopolisation quagmire – *Rex Ahdar*

A monopolist is entitled to compete like everyone else. That is true, and it is untrue. It may compete like any other firm so long as it does not draw upon its market strength to deliberately eliminate rivals and subvert competition. This article argues that a well-intentioned, but misplaced sympathy for the plight of dominant firms is at the root of the ineffectiveness of s 36 of the *Commerce Act 1986*, New Zealand's monopolisation prohibition. The courts are to be commended for seeking not to stifle vigorous, "hard" competition by powerful companies (rivalry that enhances efficiency and benefits consumers), and for endeavouring to provide guidance for monopolists' future action. But they have overcompensated by devising stringent standards for violation – especially the hypothetical, "counterfactual" test constructed to illuminate the "take advantage of" element – that have greatly circumscribed the effectiveness of the section. The way ahead is to return to a nuanced and focused understanding of proscribed "purpose" as the litmus test for contravention. 260

Basel II's effect on the Australian market – *Siobhan Sweeney*

Basel II is scheduled to be available for implementation at the end of 2006, except for the most advanced approaches which will be available at the end of 2007. The stated objectives of the regulations are to improve financial stability and competition equality (neutrality) domestically and internationally. It is highly questionable whether either of these objectives is achieved by the model. There has been very little quantitative assessment by APRA and no comment from Australia's competition watchdog. This Australian perspective seeks to assess the extent to which it is sound economic regulation. 284

COMPANY LAW AND SECURITIES – *Robert Baxt* AO

Breach of directors' duties and the piercing of the corporate veil 304

RESTRICTIVE TRADE PRACTICES – *Stephen Corones*

Statutory severance under section 4L of the Trade Practices Act 1974 (Cth) 309

BOOK REVIEW
Competition Law – Cases & Materials by J Duns, MJ Davison and C Beaton-Wells 314