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(articles and book review included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

This article examines how the principles of statutory interpretation will apply to the 'concerted practice' prohibition in s 45(1)(c) of the Competition and Consumer Act 2010 (Cth). The principles require a focus on the ordinary and grammatical meaning of the 'text' having regard to its 'context' and 'purpose'. 'Purpose' refers to both the object of the provision and the CCA as a whole. 'Context' includes the jurisprudence on 'contracts, arrangements and understandings' as well as the extrinsic materials purporting to provide a definition of the term. There is a high risk that courts may also have regard to the interpretation of the concept under European Union law. This article argues that such an approach is inappropriate, and that courts should instead resolve the tension between the amendment's clear purpose of not requiring a 'commitment' with the inability of Australian courts to ignore the accepted precedent on CAU.

This article compares two areas of legal regulation with a view to determining the strengths and weaknesses of each as a means of protecting children from misleading advertising. Media regulation, including self-regulatory advertising industry codes, has rules designed to address children's special vulnerability to advertising, but its application is limited by narrow definitions and concepts that are open to subjective interpretation. Therefore, it places few restrictions, in practice, on the kinds of advertising to which children are exposed. Section 18 of the Australian Consumer Law, by contrast, is broad and comprehensive in its coverage, but does not contain any special provision for children. The article examines the case law on s 18 and determines that there is scope, should an appropriate case arise, for the courts to adopt a test that takes into account children's cognitive development when determining what is misleading to a young audience. Therefore, consumer law has the potential to serve as a more effective protection for children's rights and interests as media consumers.

A trio of Court of Appeal decisions under s 47 of the Commerce Act 1986 (NZ), if read consistently, support the presence of a structural presumption in horizontal merger regulation in New Zealand. Because the burden of persuasion in merger clearance proceedings lies with the applicant, the Commission could therefore rely on a significant increase in concentration in an already concentrated market as prime facie evidence of a substantial lessening of competition. A merger may be likely to substantially lessen competition even where the probability of that occurring is less than an even chance. To be consistent, the applicant should be required to produce strong evidence to show that entry or expansion is highly likely to occur, to exclude a real chance that it would not occur, in order for the merger to be cleared. The outcome is consistent with a large body of economic research showing that horizontal mergers in concentrated markets are highly likely to lessen competition.

This article explores the history of the counterfactual test in Australia and New Zealand and its origins in the wording of s 7 of the Clayton Act 1914 (US). In Australia and New Zealand, an explicit counterfactual test (also known as the 'with and without test') is a core aspect of the evaluation of mergers and business acquisitions. In the United States, the counterfactual test takes a more implicit form only explicitly being considered in relation to an obscure and uncertain doctrine in relation to vertical and conglomerate mergers. This article argues that the difference in approach is a result of each jurisdiction's response to a common problem, namely, the uncertainty involved in determining the likely future scenarios with and without the merger.

Book Review