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What's Inside This Issue?

This edition of the K&L Gates Competition & Consumer Law Round-Up provides a summary of recent and significant updates from the Australian Competition and Consumer Commission (ACCC), as well as other noteworthy developments in the competition and consumer law space. If you wish to have more details about the issues outlined in this newsletter or discuss them further, please reach out to any member of the K&L Gates competition and consumer law team (listed in the left column).

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Enforcement

ACCC Commences Action Against Coles' and Woolworths' Illusory Promotions

The ACCC has commenced proceedings against Australia's biggest supermarkets—Woolworths Group Limited (Woolworths) and Coles Supermarkets Australia Pty Ltd (Coles)—for offering consumers illusory discounts.

The ACCC argues that both Woolworths and Coles have systematically engaged in misleading conduct by placing a number of products on “promotion” after they were sold for an artificially inflated price for a short period of up to 45 days. The ACCC alleges that the temporary higher price was set for the products (and subsequently reduced) to engineer illusory “was-now” discounts, and in most cases, the promotion price was higher than the original regular price of the product.

In its claim against Woolworths, the ACCC alleges that at least 266 products were placed on the “Prices Dropped” promotion (many of the products were “discounted” for six months or longer) between September 2021 and May 2023.

In its claim against Coles, the ACCC alleges that at least 245 products were placed on the “Down Down” promotion (many of the products were “discounted” for six months or longer) between February 2022 and May 2023.

“We allege these misleading claims about illusory discounts diminished the ability of consumers to make informed choices about what products to buy, and where” ACCC Chair Gina Cass-Gottlieb said.

The ACCC has alleged that a contravention of the Australian Consumer Law (ACL) occurred on each occasion that a consumer viewed a ticket containing the representations during the above-mentioned periods.

This investigation is separate to the ACCC's supermarket inquiry, which began in February this year and for which an interim report was released in late September.

Read the ACCC's media release [here](#).

Misleading Conduct Results in AU\$100 Million Penalty for Qantas

The Federal Court of Australia has ordered Qantas Airways Limited (Qantas) to pay a penalty of AU\$100 million for breaches of the ACL that affected around 880,000 consumers.

Qantas admitted to having engaged in misleading or deceptive conduct, conduct liable to mislead the public and making false or misleading statements in relation to more than 82,000 scheduled flights.

Qantas sold tickets for 70,543 flights that had already been cancelled, in some instances up to 62 days after the decision was made. 60,297 flights were displayed on the “Manage Booking” page of the Qantas website for as long as 67 days after Qantas had decided to cancel these flights.

The ACCC commenced its proceedings against Qantas for false and misleading representations and misleading and deceptive conduct in August last year.

In May this year, Qantas and the ACCC made joint submissions to the Federal Court of Australia, in which Qantas admitted to having engaged in misleading or deceptive conduct and making false or misleading statements in relation to the advertising and sale of its tickets. In these submissions, Qantas agreed to a penalty of AU\$100 million, as well as an undertaking requiring Qantas to do the following:

- Cease engaging in the misleading conduct.
- Implement a remediation program involving communicating to its customers their options for remediation and providing remediation payments to eligible customers totalling around AU\$20 million.
- Implement and maintain a competition and consumer law compliance program.

“This is a substantial penalty, which sets a strong signal to all businesses, big or small, that they will face serious consequences if they mislead their customers” ACCC Chair Gina Cass-Gottlieb said.

Read the ACCC’s media release [here](#).

Honda Penalised for Breach of Information Sharing Requirements

The ACCC has issued an infringement notice and a penalty of AU\$18,780 against Honda Australia (Honda) following an alleged breach of the Motor Vehicle Service and Repair Information Sharing Scheme (MVIS scheme).

The MVIS scheme is a mandatory scheme under which motor vehicle service and repair information must be made available to all Australian repairers and registered training organisations.

The scheme was brought in to address the anti-competitive arrangements between car manufacturers and their affiliated repairers, which prevented independent repairers from accessing the technical information necessary to service and repair modern cars.

The ACCC alleges that Honda breached the MVIS scheme by offering access to its diagnostic software only on a yearly subscription, with no option to purchase cheaper subscriptions on daily or monthly bases.

Acting ACCC Chair Catriona Lowe stated that *“providing repairers with flexibility and choice in how they access information under the MVIS scheme is fundamental to increasing competition and consumer choice. Making the information available on a daily, monthly and annual basis allows independent repairers to select the access period that is most appropriate for them. This in turn enables them to be in a position to offer more competitive prices to consumers.”*

The infringement notice is the first enforcement action taken by the ACCC in relation to the MVIS scheme. The ACCC has indicated the MVIS scheme shall be a continued area of enforcement, with breaches resulting in penalties of up to AU\$10 million. The ACCC also plans to release an MVIS scheme industry guide in the coming months.

Read the ACCC’s media release [here](#). More information regarding the MVIS scheme is available [here](#).

Mergers and Acquisitions

ACCC Raises Preliminary Concerns in Relation to Qube's Proposed Acquisition of MIRRAT

The ACCC has raised preliminary competition concerns in relation to the proposed acquisition of Melbourne International RoRo & Auto Terminal Pty Ltd (MIRRAT) by Qube Holdings Limited (Qube).

Qube is Australia's largest provider of import and export logistics services and provides an extensive range of services across import-export supply chains (including automotive stevedoring and pre-delivery inspection services). It proposes to acquire MIRRAT through its wholly owned subsidiary, Australian Amalgamated Terminals Pty Ltd, which operates automotive terminals in Queensland (at Port Brisbane) and New South Wales (at Port Kembla).

MIRRAT is the current operator of the automotive terminal at the Webb Dock West facility in the Port of Melbourne, which, according to information received by the ACCC, is the "key facility for the processing of automotive and roll on-roll off cargo through the Port of Melbourne."

The ACCC's key concerns include that the proposed acquisition may substantially lessen competition in the markets for the provision of automotive stevedoring and pre-delivery inspection services at the following locations:

- *Webb Dock West*—where Qube may be given the ability/incentive to:
 - Foreclose its downstream competitors who need to access the terminal or use Qube's services as the terminal operator.
 - Access and use its downstream competitors' commercially sensitive information.
 - Preferentially tie or bundle terminal services to its downstream services.
- *Port Kembla and Port Brisbane*—where Qube may be given the ability to engage in concurrent foreclosure conduct.

"The proposed acquisition would result in Qube, which is one of Australia's largest integrated terminal and freight logistics providers, owning a further interest in a critical component of the automotive delivery supply chain at the Port of Melbourne" ACCC Commissioner Dr. Philip Williams said.

To address potential competition issues, Qube has offered a court-enforceable undertaking to the ACCC, on which the ACCC is in the process of seeking and considering views.

Read the ACCC's statement of issues [here](#) and the media release [here](#).

Bill to Enact Mandatory and Suspensory Merger Clearance Regime Introduced

On 10 October 2024, the Australian Government introduced a bill into the Parliament of Australia for Australia to enact a mandatory and suspensory competition merger clearance regime.

The thresholds for mandatory merger clearance are more straightforward than previously envisaged. The government has included a number of monetary thresholds in the bill, but it has not proceeded with market share

thresholds. We have published an alert on the bill which provides further detail on these thresholds and other features of the bill—it can be read [here](#).

ACCC chair Gina Cass-Gottlieb stated that *“the ACCC is committed to the successful implementation of these reforms, if passed by parliament, to ensure that transactions that may adversely affect competition are subject to adequate scrutiny based on the risks raised, and to provide a more efficient and transparent process for businesses and for the wider community.”*

The ACCC also published a “Statement of Goals for Merger Reform Implementation” at the same time as the introduction of the bill, which provides its initial high-level approach in delivering the government’s merger reforms.

The new regime will commence on 1 January 2026, and parties can voluntarily seek clearance under the new regime from 1 July 2025.

Read the ACCC’s statement of goals [here](#) and its media release in relation to the bill [here](#).

Notifications and Authorisations

ACCC Does Not Object to Airservices Australia’s Proposal to Increase Prices

The ACCC has announced that it will not object to Airservices Australia’s (Airservices) proposed increase in the prices of a number of services that it provides to airlines.

Airservices, a government-owned business, is the monopoly provider of Australian air traffic control services, including terminal navigation and enroute navigation, as well as aviation rescue and firefighting. On 1 October 2024, Airservices provided a formal price notification to the ACCC, which proposed that Airservices would increase its prices for these services by approximately 6%.

Following consideration of relevant statutory criteria and stakeholder feedback, the ACCC has decided not to object to the proposed price increase. The ACCC indicates that this decision was based on its finding that the increase was not likely to lead to Airservices over-recovering its costs.

However, the ACCC has noted that it identified a number of areas for improvement in Airservices’ price notification processes, including more robust stakeholder management and more robust and transparent key performance indicators. The ACCC notes that its suggested changes in these processes will provide stakeholders with greater transparency about Airservices’ pricing, project timing/delivery, and cost breakdowns.

Airservices is a “declared person” under the Competition and Consumer (Airservices Australia Prices Surveillance) Declaration 2018 of the *Competition and Consumer Act 2010*, meaning that it cannot increase the price of certain services without first notifying the ACCC.

Read the ACCC’s media release [here](#).

Noteworthy Developments

ACCC Releases Interim Report for Ongoing Supermarkets Inquiry

Now at the halfway mark of the supermarkets inquiry, the ACCC has released its interim report, which sets out numerous concerns caused by the oligopolistic and concentrated market landscape.

The ACCC expressed concern about the market power of Woolworths and Coles, noting that they represent 67% of supermarket sales in Australia.

“Oligopolistic market structures can limit incentives to compete vigorously on price. We see Woolworths and Coles providing a broadly similar experience to customers through largely undifferentiated product ranges, pricing at similar levels and similar non-price offerings including loyalty programs” said ACCC Deputy Chair Mick Keogh.

This market structure creates significant imbalances in Woolworths’ and Coles’ interactions with both suppliers and customers.

In its roundtable discussions with suppliers, the ACCC heard various concerns about the buyer power of supermarkets across various supplier sectors. The bargaining power held by supermarkets creates disadvantages for suppliers, including being required to do the following:

- Sell its goods to supermarkets at below-efficient levels, sometimes below the cost of production.
- Fund promotions that they would otherwise not fund.
- Use advertising and transport services specified by the supermarkets.
- Comply with onerous accreditation/packaging requirements.

On the consumer side, groceries have been identified as a contributing factor to the rising cost-of-living crisis, with prices rising 20% within the last five years. Almost half of the participants in a consumer survey disclosed they “always” or “most times” make a comparison between different stores’ prices. The majority of low-income households that took part in the consumer survey indicated that 20% of their household net income is spent on groceries. A growth in member-only pricing has also created concerns around loyalty programs imposing penalties on nonparticipating consumers.

The ACCC is expected to release its final report in February 2025. In this final report, the ACCC will focus its analysis on 14 products, including staple groceries such as meats and fresh produce.

Read the interim report [here](#) and the ACCC’s media release [here](#).

ACCC Releases Infringement Notices Guidelines for Telecommunications Companies

Recently published guidelines outline the ACCC’s approach to the exercise of its new infringement notice powers against network operators and intermediaries in breach of carrier separation rules.

Carrier separation rules under the *Telecommunications Act 1997* (the Act) require operators of high-speed broadband networks to supply only on a wholesale basis (rather than operating as a retailer over the network

infrastructure), unless an exemption applies, for instance, if the operator has less than 12,000 residential customers under the 2020 class exemption designed to assist smaller networks.

The ACCC's infringement notice powers purport to enable the regulator to respond quickly to noncompliance, for instance, where a network operator is alleged to be favouring its own retail services over others. The guidelines require that infringement notices are issued only where they are prepared to proceed to court as an alternative (where the recipient of the notice should choose not to pay).

The guidelines also set out the following factors that may be considered in the issuance of an infringement notice:

- The objects of the Act.
- The nature, circumstances and seriousness of the conduct.
- The duration of the conduct and whether it is ongoing.
- The impact of the conduct and whether it has caused significant harm or detriment.
- The corporate culture of compliance of the person.
- The need for specific and general education or deterrence.

The recent amendments to the Act also increased the maximum penalty per contravention to AU\$10 million if the ACCC pursues legal action in the Federal Court of Australia. Where there is evidence of contravening conduct, the ACCC has made it clear that there will be no hesitation in seeking the appropriate penalties in the Federal Court of Australia.

The guidelines and amended enforcement powers are in accordance with the ACCC's enforcement and compliance priority for 2024–2025 regarding the promotion of competition in essential services, such as telecommunications.

Find more information about the guidelines [here](#), and read the ACCC's media release [here](#).

Treasury Releases Consultation Paper on Consumer Guarantees and Supplier Indemnification Provisions Under the ACL

The federal government has announced that it is consulting on new prohibitions and penalties for breaches of the consumer guarantees and supplier indemnification (CGSI) provisions of the ACL. The government released a consultation paper (Consultation Paper) along with the announcement, which seeks feedback on the design of these prohibitions and penalties.

The current consultation process will build on the work undertaken in a consultation in 2021, which sought feedback on potential options to strengthen the CGSI provisions.

The Consultation Paper notes that there are a number of issues associated with the current CGSI provisions of the ACL, including the following:

- The 2023 Australian Consumer Survey found that it was difficult for consumers to obtain remedies from suppliers and manufacturers for consumer guarantee failures. More specifically, 31% of the consumers surveyed had not had their problem resolved, and one-third of consumers who had received a resolution were not satisfied with it.
- Similarly, in response to the 2021 consultation, a survey conducted by CHOICE found that approximately 20% of respondents had encountered difficulties with obtaining a remedy under the consumer guarantees for a major

fault, and that 99.6% of respondents believed that businesses should be penalised for failing to provide a remedy as required under the ACL.

- For low-cost goods, consumers are unlikely to enforce their rights under the ACL, as it tends to be cheaper and more efficient to buy a replacement or pay to have a good fixed than to enforce their rights (e.g., via a court or tribunal). For higher-value goods, such as motor vehicles, consumers who experience faults often find it difficult to obtain a remedy, due to a lack of understanding in relation to the complaint process, as well as the costs and time associated with pursuing a complaint in a court or tribunal and gathering evidence for this process.

The Government has noted that the above difficulties can lead to poorer outcomes for consumers and the economy as a whole. The reforms that the Government seeks to introduce would aim to do the following:

- Prohibit suppliers from refusing to provide a remedy where required under the ACL's consumer guarantee regime.
- Prohibit manufacturers for refusing or failing to indemnify suppliers.
- Prohibit manufacturers from retaliating against suppliers who request indemnification under the ACL.

To incentivise suppliers' and manufacturers' compliance with the CGSI provisions, the reforms would also introduce civil penalties for breaches.

Read the Consultation Paper [here](#).

Albanese Government to Ban Unfair Trading Practices

The Labor Government has announced its proposal to prohibit unfair trading practices under the ACL.

The proposed reforms, which the Government has stated are intended to ban practices which distort consumers' purchasing decisions or result in increased costs, have long been advocated for by the ACCC. Practices that the proposed legislation is likely to prohibit include the following:

- "Subscription traps," which use complex and confusing steps to increase the difficulty of cancelling a subscription.
- "Drip pricing" practices, which involve hidden or added fees throughout the purchasing process.
- Deceptive and manipulative online practices, which aim to confuse or overwhelm consumers, omit or hide material information, or create a misleading sense of urgency/scarcity.
- Dynamic pricing, where the price of a product fluctuates throughout the purchasing process.
- Requiring consumers to provide unnecessary information and create an account to make a purchase online.
- Where businesses make it difficult for a consumer to contact them in circumstances where the consumer has an issue with its product/service.

Treasurer Jim Chalmers stated that *"whether it's traps that make it difficult or confusing to cancel a subscription, hidden fees and charges at different stages of a purchase, deceptive or manipulative practices online or making it difficult for people to report problems with their products or services, we're going to change the rules."*

The Department of the Treasury will shortly consult on the proposed reforms, and the government intends to work with states and territories to finalise a reform proposal in the first six months of 2025.

Read the prime minister's media release [here](#).

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