

December 2024 – January 2025**Key Contacts****Ayman Guirguis**

Partner

+61 2 9513 2308

ayman.guirguis@klgates.com**James Gray**

Lawyer

+61 2 9513 2428

james.gray@klgates.com**Tess Kane**

Lawyer

+61 2 9513 2390

tess.kane@klgates.com**Jenna Yim**

Lawyer

+61 2 9513 2384

jenna.yim@klgates.com**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 any more detail 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).

Enforcement

- [NDIS Providers Warned Against Misleading Advertising](#)
- [Misleading Pricing Alleged Against Woolworths NZ](#)

Mergers and Acquisitions

- [Divestiture Required for Blackstone's Acquisition of Irom](#)

Consultations

- [Treasury Consults on ACL Reform for AI-Enabled Goods and Services](#)
- [Treasury Further Consults on ACL Prohibitions Against Unfair Trading Practices](#)

Noteworthy Developments

- [Mandatory Merger Clearance Regime to Commence on 1 January 2026](#)
- [ACCC Releases Sustainability Collaborations Guidelines for Businesses](#)
- [ASIC's Enforcement Priorities Focus on Cost-of-Living Pressures](#)

NDIS Providers Warned Against Misleading Advertising

The ACCC is addressing concerns about misleading advertising targeting National Disability Insurance Scheme (NDIS) participants. In a recent media release, the ACCC put businesses “on notice” that it intends to take action against such false and misleading representations, stating that “the ACCC is actively investigating multiple NDIS providers for contraventions of the Australian Consumer Law and anticipates taking public enforcement action in the near future.”

The ACCC has flagged the following statements in NDIS advertisements as potentially false or misleading:

- Using the words “NDIS approved”, noting that the NDIS does not “approve” particular goods and services and the funding of goods and services depends on the NDIS participant’s plan;
- Suggesting that a business is affiliated with the NDIS; for instance, wording such as “NDIS therapies”; and
- Suggesting that NDIS funds can be used for costs that are not covered by the NDIS, including holidays, meals and meal-delivery services, and recreational services.

ACCC Deputy Chair Catriona Lowe warned that “NDIS providers should be aware that we are closely monitoring and responding to how they advertise their products and services to consumers, and that we will not hesitate to take appropriate enforcement action if we consider advertising is false or misleading”.

In addition to the ACCC’s ongoing investigations of NDIS providers, the Australian Government has also introduced the following measures:

- The establishment of the NDIS (Fair Price and Australian Consumer Law) Taskforce at the end of 2023, which is comprised of the ACCC, the NDIS Quality and Safeguards Commission and the National Disability Insurance Agency; and
- Changes to the NDIS in October 2024 which clarify the items on which participants may spend their NDIS funding.

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

Key takeaway: This aligns with the ACCC’s Compliance and Enforcement Priorities for 2024-25, which includes improving consumer law compliance by NDIS providers, as well as with the ACCC’s enduring priorities, which include tackling conduct that impacts vulnerable and disadvantaged consumers.

Misleading Pricing Alleged Against Woolworths NZ

New Zealand’s consumer regulator (NZCC) has filed criminal charges against Woolworths NZ alleging inaccurate pricing and misleading specials in breach of New Zealand’s Fair Trading Act.

NZCC’s deputy chair, Anne Callinan, stated that “supermarkets have long been on notice about the importance of accurate and clear pricing and specials, and we’re not satisfied with the continuing issues we’re seeing across the industry... The major supermarkets are large, well-resourced businesses that should invest the time and effort to get pricing and promotions right.”

K&L GATES

Woolworths NZ is cooperating with the NZCC in its investigation and, in a separate statement, acknowledged the importance of consumer law compliance, pointing to the company's "long-standing and market-leading refund policy" and the importance of pricing accuracy.

Separate charges have also been filed against Pak'nSave Silverdale and Pak'nSave Mill Street. Pak'nSave, owned by Foodstuffs, is the largest competitor of Woolworths NZ in New Zealand's supermarket industry.

Supermarket operators are currently facing scrutiny by regulators across Australia and New Zealand. In Australia, the ACCC is investigating:

- Supermarkets' pricing practices as part of its extensive Supermarkets Inquiry, with a final report expected in February this year;
- Coles' discount pricing claims under its "Down Down" promotion; and similarly,
- Woolworths' discount pricing claims under its "Prices Dropped" promotion, with proceedings filed against the supermarket giants in the Federal Court in September last year for alleged misleading conduct.

In New Zealand, the NZCC also has ongoing investigations into supermarket operators, with the 2024 Annual Grocery Report released in September to benchmark the state of competition in major supermarkets.

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

Mergers and Acquisitions

Divestiture Required for Blackstone's Acquisition of I'rom

The ACCC has decided it will not oppose Blackstone Group (HK) Limited's (Blackstone's) proposed acquisition of I'rom Group Co Limited (I'rom).

Blackstone indirectly owns Nucleus Network Pty Ltd (Nucleus), a supplier of Phase 1 clinical trial services to biotechnology and pharmaceutical companies in Australia and overseas, including operating clinical units in Queensland and Victoria.

The ACCC's main concern with the proposed transaction was Blackstone's acquisition of CMAX Clinical Research Pty Ltd (CMAX). I'rom-owned CMAX is, like Nucleus, a supplier of Phase 1 clinical trial services to biotechnology and pharmaceutical companies in Australia and overseas and operates a clinical unit in South Australia.

Nucleus and CMAX are the two largest suppliers of Phase 1 clinical trial services in Australia, together constituting around 60% of the market share in Australia. The ACCC was concerned that the merged entity would hold excessive market power, with high barriers to entry and the limited capacity of its existing competitors furthering the entity's stronghold on the market.

Blackstone's undertaking to divest its interests in CMAX has alleviated the ACCC's preliminary concerns that the acquisition would have the purpose or effect of substantially lessening competition in the market.

On the agreed divestiture, ACCC Commissioner Dr Philip Williams noted, “the divestiture addresses the competition issues as it will require the sale of the entire CMAX business to an ACCC-approved purchaser.”

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

Consultations

Treasury Consults on ACL Reform for AI-Enabled Goods and Services

The Department of the Treasury (Treasury) has released a discussion paper as part of its broader review into how the Australian Consumer Law (ACL) applies to artificial intelligence (AI)-enabled goods and services (the Discussion Paper). This consultation builds on earlier efforts to address emerging risks associated with AI technologies, including the Department of Industry, Science and Resources’ “Safe and responsible AI in Australia” discussion paper in June 2023 and subsequent proposals for introducing mandatory guardrails for AI in high-risk settings in September 2024.

AI-enabled goods and services are those that involve consumers directly interacting with an integrated AI system. These include common, everyday goods and services such as smart phones and streaming services.

The Discussion Paper seeks input on four main areas:

- The adaptability of the ACL to mitigate consumer law risks associated with AI-enabled goods and services;
- The application of existing ACL principles, such as consumer guarantees, to these technologies;
- The allocation of liability among manufacturers and suppliers of AI-enabled goods and services; and
- The adequacy of existing remedies for addressing consumer harm from AI products, particularly those with autonomous or continuously learning capabilities.

Stakeholders have flagged key challenges, including:

- **Definitional uncertainty:** For instance, ambiguity in whether “software”, traditionally a good, qualifies as a good or service under the ACL where it is supplied incidentally to AI-enabled services;
- **Application of the consumer guarantees regime:** Difficulty applying standards like “fitness for purpose” and “acceptable quality” to AI models that evolve post-sale; and
- **Access to remedies:** Barriers to proving failures in AI systems due to their “black box” complexity.

While the ACL remains a principles-based, technology-neutral framework, some stakeholders argue targeted reforms are needed to address gaps, such as cybersecurity obligations or mandatory safety standards for AI products. Others suggest greater regulatory guidance is needed to provide clarity about legislative changes.

Read the Discussion Paper [here](#).

Treasury Further Consults on ACL Prohibitions Against Unfair Trading Practices

Treasury has announced that it is further consulting on options to address unfair trading practices. The Australian Government released a consultation paper (Consultation Paper) seeking feedback on the elements and operation of general and specific prohibitions on unfair trading practices; the likely consequences of such prohibitions – for instance, the benefit to consumers and the compliance costs for businesses; and an appropriate penalty regime.

The Consultation Paper seeks further feedback on the introduction of general and specific prohibitions on unfair trading practices, which was the most supported option for policy reform coming out of an initial consultation in late 2023.

The Consultation Paper found that there are a number of unfair trading practices that may cause consumer harm. While the ACL already provides for a number of protections against unfair practices, the Australian Government has received feedback that some of these protections may be inadequate in the face of complex and emerging risks, especially given the increasing sophistication of online marketplaces and technologies. For example, drip pricing has been flagged as potentially problematic, in which extra fees are added onto the advertised purchase price, particularly when consumers are purchasing event tickets or booking accommodation and flights. Such conduct, especially when the seller creates a sense of urgency in the purchasing process, may be considered an unfair trading practice. These new and complex risks may leave consumers vulnerable and without recourse under the ACL.

A general prohibition on unfair trading practices is proposed, which seeks to capture a business's conduct where it:

- Unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviours of a consumer; and
- Causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.

It further proposes that the ACL specify a nonexhaustive list of examples of unfair trading practices, similar to the examples of unfair contract terms currently provided for in the ACL. The following have been suggested:

- The omission of material information;
- The provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer;
- Impeding the ability of a consumer to exercise their contractual or other legal rights; or
- Use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.

Read the Consultation Paper [here](#).

Noteworthy Developments

Mandatory Merger Clearance Regime to Commence on 1 January 2026

At the end of November 2024, the Australian Government passed the Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024 which introduces a mandatory and suspensory pre-merger clearance regime.

This is anticipated to have far-reaching and significant impacts on the merger landscape in Australia, with more mergers and acquisitions requiring notification and regulatory approval.

Key elements of the new regime include:

- **Mandatory turnover-based notification thresholds** which also have regard to the cumulative effect of acquisitions in the three years prior to the notification date of the acquisition (to account for **serial / creeping acquisitions**);
- The **minister's power to designate classes of acquisitions as requiring notification** (even when they fall below the mandatory thresholds);
- The **minister's power to designate classes of acquisitions as exempted from notification requirements** (even when they meet the mandatory thresholds);
- A **substantial lessening of competition test**, which may include an assessment of whether the proposed transaction is "creating, strengthening or extending substantial market power"; and
- Most notified acquisitions will be published (essentially immediately) on the ACCC's merger register for **transparency**.

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

Read our insights on the new regime [here](#) and [here](#).

ACCC Releases Sustainability Collaborations Guidelines for Businesses

In December 2024, the ACCC published its final guide on Sustainability Collaborations and Australian Competition Law, which provides much-needed clarity on how businesses can collaborate to achieve sustainability outcomes without breaching competition law. The guide builds on a draft release in July 2024, incorporating feedback from over 35 submissions.

Key takeaways from the guide:

- **Sustainability collaborations have varying degrees of risk:** The ACCC emphasises that many sustainability arrangements, such as joint research and development or supply chain traceability, are generally low risk. For higher-risk arrangements, such as those that may otherwise constitute price-setting or market allocation, businesses can seek legal protection through authorisation.

K&L GATES

In an assessment of risk, businesses must consider whether the collaboration is likely to substantially lessen competition; for instance, by setting up barriers for other businesses to enter or expand in the market, or by sharing commercially sensitive information that means competitors are no longer making independent decisions.

Examples of low-risk collaborations may include jointly funded research into sustainable practices, voluntary emissions reduction pledges and shared supply chain sustainability mapping, provided commercially sensitive information is not exchanged.

- **Exemptions and authorisation processes:** The guide outlines available exemptions for businesses, including class exemptions, notifications and authorisation applications. The ACCC highlights that authorisation may be granted if the public benefits of a collaboration outweigh public detriments, with sustainability benefits often seen as holding significant public value.
- **Practical tools for businesses:** The guide is accompanied by a five-step checklist, helping businesses self-assess the risks of collaboration. This includes identifying when legal advice or ACCC engagement may be needed.

In short, the checklist sets out the following steps for businesses:

- a) Understand the ACCC's guide and Australian competition laws;
 - b) Consider the objectives of the collaboration and why the collaboration is necessary to meet the objectives;
 - c) Consider whether the collaboration will impact competition and how;
 - d) If there is, or there may be, an anticompetitive impact, consider seeking legal advice; and
 - e) If there are anticompetitive impacts, consider the public benefit of the collaboration and the availability of ACCC exemption.
- **Evolving focus on environmental and social benefits:** While primarily focused on environmental sustainability, the ACCC will also look to broader social benefits, including social initiatives like antislavery collaborations and governance reforms.

The ACCC's guidance provides reassurance for businesses seeking to align with Australia's transition to a sustainable economy while complying with competition law. It also underscores regulators' 2024/25 enforcement priorities, which include environmental claims and sustainability-related issues.

The ACCC encourages early engagement for those seeking authorisation or exemptions. The final guide highlights the importance of balancing collaboration with compliance to unlock sustainability benefits for industries and the broader community.

Read the guide [here](#).

ASIC's Enforcement Priorities Focus on Cost-of-Living Pressures

The Australian Securities and Investments Commission's (ASIC) announcement of its revised enforcement priorities for 2025 (2025 Priorities) comes at a time where the rise of cost-of-living pressures has increased the risk of financial exploitation, especially amongst vulnerable Australians.

Within the context of the cost-of-living crisis, the 2025 Priorities introduce:

K&L GATES

- Unscrupulous property investment schemes;
- Strengthening investigation and prosecution of insider trading;
- Business models designed to avoid consumer credit protections;
- Debt management and collection misconduct;
- Auditor misconduct;
- Licensee failures to have adequate cyber-security protections; and
- Misconduct impacting small businesses and their creditors.

In addition, the 2025 Priorities have restated ASIC's focus on:

- Greenwashing and misleading conduct involving environmental, social and governance claims; and
- Used car finance sold to vulnerable consumers by finance providers.

Reflecting on 2024, ASIC Deputy Chair Sarah Court said that ASIC increased its new investigations by 25% and increased its civil proceedings by 23%. This has significant enforcement outcomes across areas such as greenwashing, crypto, high-cost credit, insider trading and predatory lending. These enforcement outcomes include record civil penalties claimed against superannuation funds including Mercer Superannuation and Vanguard Investments for misleading environmental claims.

ASIC's continued prioritisation of and enforcement against greenwashing run parallel to the ACCC's ongoing focus on environmental claims and sustainability. These principles ensure that clear, accurate and specific claims are made with substantiating evidence.

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

K&L GATES

K&L Gates is a fully integrated global law firm with lawyers located across five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit klgates.com.

K&L Gates complies with the Australian Spam and Privacy Acts. If your contact details are incorrect, or if you do not wish to receive any electronic or other communications from K&L Gates, please contact our Database Administrator by email at jenny.jenkins@klgates.com. Details of our privacy policy can be found on our website: klgates.com.

This email was sent by: K&L Gates, Level 31, 1 O'Connell Street, Sydney NSW 2000.