Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Australia

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2021 proved to be a significant year for competition and consumer law in Australia. This article outlines a number of the key developments as follows:

- The trend for record penalties continues (as exemplified by the record $153 million penalty ordered against vocational skills training company AIPE).
- The Australian Competition and Consumer Commission (**ACCC**) remains an active regulator of Big Tech platforms, seeking to reinvent and expand its regulatory tools to address the emerging issues raised by these markets.
- The ACCC has proposed drastic merger reforms, although the likelihood of the reforms proceeding is speculative in the absence of significant political traction (together with a query about the incoming Chair's position about the proposed reforms).
- The ACCC is facing significant challenges in prosecuting criminal cartel cases, the cases to date exposed shortcomings in the ACCC's past investigatory processes and immunity deals, providing headaches for prospective immunity criminal cartel applicants and the regulator alike.
- Consumer protection remains firmly on the ACCC's agenda, with:
    - the recent expansion of consumer guarantees to apply to a larger proportion of commercial supplies, the strengthening of remedies for consumers;
    - a similar expansion to the scope of the unfair contract terms regime together with significant penalties for breaches of that regime; and
    - continuing challenges in the application of largely uncontentious unconscionable conduct principles.

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Large penalties increasingly the new norm

2021 saw the largest ever civil penalty awarded for consumer law contraventions, with a $153 million penalty handed down against skills training company AIPE (in liquidation). Volkswagen's appeal against its 2019 consumer law penalty of $125 million was also dismissed by the Court. Until these decisions, the highest penalties had been for cartel conduct, traditionally the most significant focus of Australia's competition and consumer law regulator – but the highest fine in

that space, $46 million imposed on Yazaki for the “auto parts” cartel has been well and truly surpassed.

In 2018, Parliament increased the maximum consumer law penalties by nearly 10-fold, bringing them into line with the competition law penalties. Prior to those changes, the highest consumer law penalty ever awarded was $10 million. Now, only a few years later, Australian Courts have blown through the symbolic $100 million barrier.

The increase reflects more than just the increase in maximum penalties (indeed, AIPE’s conduct occurred prior to the statutory increase). The ACCC has for years argued that higher penalties were needed to ensure contraventions did not become a mere ‘cost of doing business’ in Australia. In particular, the ACCC pointed to notable cases where the penalties awarded were less than the profits made through the contravening conduct.

The importance of general deterrence was also a central theme in both the AIPE and Volkswagen judgments. The Court’s demonstrated willingness to impose far higher penalties, coupled with the increased consumer law penalties, all suggest that increasingly severe penalties are likely to become more common in the coming years.

Crack down on Big Tech Platforms: Overdue or overreach?

Rod Sims, the ACCC’s longest-serving and outgoing chair, has become one of the world’s most powerful advocates calling for a crackdown on Big Tech platforms, a stance that is shared by a plethora of his competition law counterparts, including the US Federal Trade Commission Chair Lina Khan. Whether the longstanding ‘quid pro quo’ of consumers gaining access to free searches and social media services which provides the likes of Google, Facebook and Apple unparalleled access and accumulation of data remains a justifiable endeavour is cast in increasing doubt.

The ‘double edged’ qualities of ‘data’, as being both the gateway to consumer convenience and unrivalled corporate power and its delicate balance is not lost on regulators. Being conscious that an uninformed regulator cannot be an effective enforcer, the ACCC has invested significant resources into gathering information in obtaining an in-depth understanding of how these emerging digital markets operate and thrive. Spurred on by the positive political reception and support of its inaugural Digital Platforms Inquiry in 2019, the ACCC has made significant strides in developing more focused expertise into digital markets, including through its recently completed online advertising market inquiry in 2021 and its ongoing biannual reports in the broader digital platform services inquiry (2020-2025). Leaving aside the thorny question of whether the ACCC is ‘overreaching’ its powers by using competition and consumer laws to regulate concerns that may better fall into the realm of data privacy, the ACCC’s crackdown against Big Tech has so far been an exercise that is as controversial as it has been trail-blazing.

Following the ACCC’s fraught path to implement the news media bargaining code in early 2021, it secured a world-first successful Court win against Google.[1] The case involved the novel application of traditional consumer law principles to address data privacy concerns. In April 2021, the Federal Court found that Google misled consumers about the personal location data that it collected through Android mobile devices over the course of 2017 and 2018. No doubt the ACCC’s success may inspire its further use of consumer law principles to address other data related conduct engaged by the Big Tech platforms (and more generally other businesses that

collect and utilise customer data), and lead to its international counterparts following suit.

Online advertising, search engines and app stores dominated the ACCC's interests in digital markets in 2021. Common themes across the ACCC's findings included:

- the high degree of market concentration across all of these markets, with market power of large digital platforms being entrenched and extended through a combination of their targeted acquisition strategies, cross-selling services and unparalleled access to, and insights about, how to commercially optimise the data they collect;
- the lack of transparency across the relevant supply chains in these markets, to the detriment of potential new entrants, consumers and small businesses alike. In particular, the ACCC articulated its concerns around potential 'conflict of interest' positions that Big Tech platforms may find themselves in, and the anti-competitive impacts flowing from such platforms acting on their incentive to self-preference their services and products over its competitors; and
- having regard to the above, the insufficiency of Australia's existing competition and consumer law frameworks to address the multi-faceted issues that are affecting digital markets and the need to expand the ACCC's powers and arsenal of enforcement tools to ensure that it remains an effective regulator for these borderless markets. While the ACCC has signalled that it will consider and consult on the appropriate reforms in 2022, reforms it has flagged to date include the introduction of sector-specific legislation (including merger reforms), the establishment of an external dispute resolution body for digital platforms and requiring Big Tech platforms to share more data with consumers and improve the transparency of the relevant supply chains.

While the ACCC has highlighted its interest to explore general online retail marketplaces in 2022, it is likely to explore algorithms and Big Tech platform's use of pricing algorithms in the near future considering the pivotal role that algorithms play in the operation of virtual markets. 2022 promises to be an illuminating year for legal reforms in digital markets.[2]

'Trial by Fire': Australia's criminal cartel immunity regime

It took almost a decade after the inception of Australia's criminal cartel regime in 2009 for the merits of the regime and the regulator's immunity dealings to be rigorously tested in courtrooms filled with prolific criminal and competition law barristers. While there have been earlier criminal cartel wins by the regulator, these were largely uncontested in Court with guilty pleas. A notable example is the ACCC's success in securing over $80 million in penalties against three global shipping companies who was involved in a notorious and longstanding international cartel for motor vehicle importation into Australia.

But it wasn't until the first contested criminal cartel trial in Australia, with Country Care Pty Ltd and its two employees, including a managing director as prime defendants, that the criminal cartel regime attracted public scrutiny.[3] In a lengthy 12 week jury trial, already once delayed by the COVID-19 pandemic, a short 4 hour deliberation was all it took for the jurors to deliver a unanimous 'not guilty' verdict, clearing the defendants for their role in an alleged cartel in the market for the supply of assistive technology products used in rehabilitation and aged care ('**Country Care cartel**').

While one may argue the Country Care cartel case ultimately failed based on the evidence adduced or the strategic "running" of the case (involving detailed multi-day explanations of complex

competition law theories by the Prosecution and an immunity applicant whose story on the stand was ultimately characterised by the judge as 'unreliable'), the case nevertheless brought into sharp focus a number of emerging issues afflicting Australia's criminal cartel immunity regime, including:

- prosecution witnesses being examined multiple times as the case progressed through various procedural hurdles including a Local Court committal; and
- doubt cast on the processes through which the ACCC and the criminal prosecutor/Commonwealth Director of Public Prosecutions (**CDPP**) accepted immunity deals from witnesses and whether those processes could lead to 'tainting' of the immunised witness' evidence.

These issues remain current and contentious, and where they fall could have profound implications for prospective criminal immunity applicants. They are being explored in depth in the regulator's criminal cartel prosecution involving the financial services industry.

At the heart of that case is an alleged agreement between Deutsche Bank, Citigroup and JP Morgan (the immunity applicant) to limit their trading of ANZ Shares as part of managing a residual shortfall as underwriters of a $2.5 billion capital raising for ANZ, one of Australia's largest banks.

An important interlocutory judgment handed down by Justice White held that JP Morgan has waived its legal professional privilege claims by its conduct of partially disclosing the contents of its lawyer's initial interviews of selected employees with the regulator by way of oral proffers as part of its immunity application.

This decision adds to the numerous difficult balancing decisions for prospective immunity cartel applicants to grapple with, including how to balance their obligation to 'provide full, frank and truthful disclosure' to the regulators while protecting legal professional privilege claims. The disclosure of these 'first accounts' documents is a building block to the defendant's overall strategy to attack the integrity of the regulator's immunity deal making processes across multiple pre-trial forums (at the Local Court committal stage, as well as pre-trial "Basha" hearings in the Federal Court, where both the immunity applicant's employees who are likely to be Crown witnesses and ACCC officers have been examined), in the hopes of 'throwing out' the case entirely before it is scheduled to go on trial in mid-2022.

The ACCC has proposed sweeping merger reforms

Coming off the back of two high profile court losses in merger cases, the ACCC has proposed sweeping changes to Australia's merger control regime.

Under the current system, while the ACCC can pursue anticompetitive mergers before the courts, it has no suspensory powers, and there is no requirement for parties to notify the ACCC of a planned merger. Rather, the ACCC oversees, for the most part, a voluntary, informal merger review process for perspective merger parties.

The informal review process is an efficient and timely process for the vast majority of applicants. In 2021, of the 424 prospective mergers considered by the ACCC, 95% of those were cleared under 'pre-assessment' a fast track review process which usually takes less than four weeks. Only

22 applications (~5%) required a public merger review.

Nonetheless, in an August 2021 address, the (now outgoing) ACCC chair proposed wide ranging reforms, including:

- A formalised, mandatory, suspensory merger control regime, with limited merits review before the Australian Competition Tribunal, rather than the Federal Court.
- A burden on applicants to satisfy the ACCC that the proposed acquisition would have, at most, a remote possibility of resulting in a substantial lessening of competition.
- Acquisitions by firms that already possess substantial market power would be deemed anticompetitive if they would be likely to enhance or entrench that market power.
- Acquisitions by large digital platforms or technology companies would face particular scrutiny, possibly including a more lenient legal test to establish anticompetitive conduct.

The ACCC argues that the current merger control regime, without any suspensory powers, has made it increasingly difficult for the ACCC to properly review and consider potential mergers and is no longer "fit for purpose". The ACCC has described some parties as being "contemptuous" of the current, voluntary system, and pushed for a formalised system with suspensory effect.

The ACCC also argues that court decisions have placed increasingly more difficult for the ACCC to prove a case in court, resulting in mergers proceeding despite – in the ACCC's view – the transactions having significant potential to cause long term competitive harm.

While these proposals have not been the subject of a formal view/response by the Government, informal public comments by the Government have been 'lukewarm'. Time will tell how the incoming ACCC chair will wish to pursue these changes and how the debate will proceed in 2022.

Consumer guarantee laws expanded

2021 also saw significant changes made to, and proposed for, consumer guarantees.

In December 2020, changes came into effect providing that more than one minor failure (i.e. minor failings, errors, or imperfections in the good/service) can be considered cumulatively to determine whether they amount to a major failure. The distinction between a 'major' and 'minor' failure is important, as it determines who (the supplier or the consumer) has the power to elect the remedies that the Australian Consumer Law makes available for non-compliance with consumer guarantees in the supply of goods and services to consumers (including businesses that purchase as end users). For instance, in the case of a minor failure, the supplier may elect to repair a good, whereas in the case of major failures the consumer has the right to elect the remedies, including a full refund. By allowing minor failures to be considered cumulatively, the changes provided greater rights and remedies to consumers under the consumer guarantees.

Prior to July 2021, consumer guarantees applied to supplies of goods or services to a value of up to $40,000 (an amount unchanged since 1986 – subject to some exceptions which can increase that monetary amount), regardless of whether the purchaser is an individual or corporation, small or large, sophisticated or unsophisticated. Since July 2021, that amount increased to $100,000, a more than 100% increase. The effect is that consumer guarantees now apply to a much wider cohort of supplies of goods or services, in particular capturing a greater level of B2B agreements.

Further changes to consumer guarantees have also be mooted. In particular, reforms have been suggested to impose penalties for breaches of consumer guarantees. Currently, consumer guarantees only provide private rights to individual consumers who have suffered a minor/major failure (unless the conduct also amounted to misleading or deceptive conduct). If acted upon, the current proposal would see regulatory penalties applied for the first time, allowing the ACCC to take action directly for a breach of a consumer guarantee.

Unconscionable Conduct: Significant Penalties and Challenging Applications

2021 also proved to be the year where the Court clarified this normative area of the law, although as a practical matter the consistent application of the law continues to be challenging.

In March 2021, a Full Federal Court ruling in an ACCC appeal against Quantum Housing Group Pty Ltd (**Quantum Housing**) provided vital clarification on the law for statutory unconscionable conduct. The Court affirmed that it is unnecessary to establish that the business engaging in the conduct exploited some disadvantage or vulnerability on consumers or small business counterparties for statutory unconscionable conduct to be established (even though this may often be the case).

Shortly after, the Federal Court handed down the third largest ever penalty for a corporation's breach of the Australian Consumer Law, fining telecommunications giant, Telstra, $50 million in penalties for its unconscionable conduct in the supply of mobile contracts to over 100 Indigenous customers. While the Court acknowledged Telstra's cooperation with the ACCC and display of contrition, it nevertheless considered the conduct to be very serious, and directed towards vulnerable Indigenous customers who signed mobile contracts which they didn't understand and couldn't afford. This case provides an apt warning for businesses to not be complacent even if they have competition and consumer law compliance programs in place (just as Telstra did). Continual reviews of such compliance processes are necessary to ensure misconduct is captured in a timely and effective manner.

While the principles of unconscionable conduct are largely uncontroversial, its application continues to prove to be challenging. While misleading or deceptive conduct and unconscionable conduct were interconnected allegations that were made out in the above two cases, the courts have been quick to indicate that that is not always the case. For instance, in two separate cases the ACCC succeeded in its misleading or deceptive claims against both Employsure and Mazda, respectively, for their conduct towards consumers. In the case of Employsure, for misrepresenting Employsure was a Government affiliated agency, while in the case of Mazda, for misrepresenting consumer guarantee rights in the context of repeated car failures. However, in both the Mazda and Employsure cases, the ACCC failed to establish unconscionable conduct claims (the ACCC is currently appealing the quantum of the penalty handed down in the Employsure decision).

While the unconscionable conduct case against Employsure arguably failed on evidentiary weaknesses, the Mazda case suggests that the normative nature of the application of unconscionable conduct remains a difficult exercise. In particular, although the Court found Mazda engaged in 'appalling customer service' and gave customers the 'run-around', as well as violated its own internal complaints handling policies, it was insufficient to meet the standard required to establish unconscionable conduct. Hopefully 2022 will provide further clarifications to facilitate a

more consistent approach to the application of unconscionable conduct, for the benefit of regulators and businesses alike.

Proposed unfair contract term reforms would see laws significantly strengthened

In August 2021, the Australian Government Treasury released Exposure Draft legislation and Explanatory Materials setting out a wide range of proposed reforms to the unfair contract terms (**UCT**) laws found in the Australian Consumer Law (**ACL**) and *Australian Securities and Investments Commission Act 2001* (**ASIC Act**).

Five key changes were proposed:

- Financial penalties for contraventions. The proposed penalties would be the same as those applying to other competition or consumer contraventions, being the greater of: $10,000,000; x3 the benefit obtained; or if the benefit cannot be identified, up to 10% of turnover for the preceding 12 months. UCT provisions have not, to date, been subject to any penalties. Supporters of the proposal argue that greater deterrence is needed. However, UCT analysis often has an inherent degree of ambiguity, and there are concerns that imposing penalties could create a chilling effect as risk averse firms seek to avoid potential exposure.
- Significantly expanding the number of business-to-business contracts subject to UCT laws. The proposals, if adopted, would apply UCT laws to all consumer or small business standard form contracts in which one party has an annual turnover of less than $10 million and fewer than 100 employees. In effect, the UCT laws would be expanded to cover a very significant proportion of contractual activity.
- Introduction of a rebuttable presumption that certain terms which are "the same or substantially similar in effect" to unfair contract terms will also be unfair. If implemented, this could require firms to monitor UCT cases in their industries and potentially alter their contracts proactively in response to breaches found against other parties.
- More flexible remedies. The proposals allow courts to impose, and parties to seek, a wider range of remedies. The new remedies include injunctions preventing parties from using certain clauses in any current *or future*
- Clarity on the definition of a "standard form contract". UCT provisions only apply to 'standard form contracts', a term that has historically generated much uncertainty. The reforms seek to provide greater clarity by specifying further factors that courts should or should not consider, such as whether there was an effective opportunity to negative.

No date for implementation has been set, but further developments are likely throughout 2022.

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[1] For a deeper dissection into the News Media Bargaining Code, please read our 2020 review of noteworthy competition and consumer law issues here: http://competitionlawblog.kluwercompetitionlaw.com/2020/11/18/anti-trust-in-a-time-of-global-crisis-an-australia-perspective/.

[2] For completeness, the ACCC has cleared Meta (formerly Facebook)'s acquisition of Kustomer,

but has continued to investigate Google's completed acquisition of Fitbit and Meta's completed acquisition of Giphy as enforcement actions.

[3] K&L Gates represented an interested party in *CDPP v Country Care Group & Ors*, and is currently representing a number of derivative immunity applicants in the ongoing *CDPP v Citigroup Global Markets & Ors* trial.

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