

AUSTRALIAN JOURNAL OF COMPETITION AND CONSUMER LAW

Volume 25, Number 1

2017

EDITORIAL

A Silver Anniversary! 3

ARTICLES

Triple A Rated? Regulating Online Information Disclosures – *Robert Walker and Rosannah Healy*

Efficient markets require consumers to be able to compare offers and make informed choices. Empowered consumers force firms to compete on price, service delivery and innovation. The “digital revolution” has played an important role in reducing transaction costs and correcting information asymmetries between firms and consumers. The internet provides consumers with access to more information than ever before, presenting new issues and challenges for regulators and policy-makers. Competition and consumer laws play a key role in ensuring that consumers reap the full benefits of the shift online. This article uses the “Access, Assess, Act” behavioural economics framework developed by the UK’s Office of Fair Trading (now the Competition and Markets Authority) to analyse current and future trends in the regulation of online disclosures of information under competition and consumer laws both in Australia and overseas. 4

Is There a Gap in the Unfair Contract Term Provisions Between a “Consumer Contract” and a “Small Business Contract”? – *Peter Sise*

Since 12 November 2016, the unfair contract term provisions in Pt 2-3 of the *Australian Consumer Law* have applied to “small business contracts”. Previously, they only applied to “consumer contracts”. It is possible that a contract entered into by a vulnerable individual may qualify as neither a “consumer contract” nor a “small business contract”, in which case the individual will fall into a gap in the protection provided by the unfair contract term provisions. Such a gap does not exist for other provisions in the *Australian Consumer Law* which are intended to protect the vulnerable, such as the prohibition on unconscionable conduct. This article considers whether such a gap exists and if it does, whether this represents a policy failure. 14

The Cartelist’s Dilemma: Leniency Policies and Game Theory – *Nick Kotzman*

Leniency policies have become a staple of the cartel enforcer’s toolkit. Policies differ from jurisdiction to jurisdiction, but generally involve granting the first eligible cartel participant full exemption from civil and criminal proceedings for cartel conduct. This article examines the theoretical underpinnings of leniency policies by applying the Prisoner’s Dilemma to cartelists. Over three iterations, the article develops a model called the “Cartelist’s Dilemma” to analyse the reactions of cartelists to the offer of leniency. With each iteration, another layer of complexity is added so that the final iteration reflects the Immunity Policy administered by the Australian Competition and Consumer

| | |
|--|----|
| Commission (ACCC). Using this model, four reforms are proposed to improve the effectiveness of the ACCC’s Immunity Policy: removing the coercer exception; codifying “partial leniency”; limiting private actions with “bar orders”; and increasing penalties for cartel conduct. | 22 |
| AUTHORISATIONS AND NOTIFICATIONS | |
| Collective Bargaining: When Will the ACCC Approve? – <i>Lovelle D’Souza</i> | 40 |
| CONSUMER PROTECTION | |
| Banking Fees: Self-Preservation or Punishment? The Rule Against Penalties in Paciocco and its Significance for Consumer Protection – <i>Stephanie Hayes</i> | 46 |
| ENFORCEMENT AND REMEDIES | |
| Criminal Cartel Conduct: A Brief Survey of Domestic and International Criminal Cartel Enforcement Activity – <i>Scott Meacock</i> and <i>Tenille Kearney</i> | 53 |
| TELECOMMUNICATIONS | |
| ACMA Varies Compliance and Monitoring Arrangements for the Telecommunications Consumer Protections Code – <i>Karen Lee</i> | 62 |
| CASE NOTES | |
| Establishing a Quantifiable Benefit or Detriment When Setting Pecuniary Penalties: ACCC v Cement Australia Pty Ltd – <i>Rebecca McEwen</i> | 65 |
| Deterrence is a Primary Objective in Setting Penalties: ACCC v Hillside (Australia New Media) Pty Ltd t/as Bet365 (No 2) – <i>Tom Bridges</i> and <i>Patrick Barkachi</i> | 71 |
| ENERGY ETCHINGS | |
| The Australian Energy Regulator: A Year in Review – <i>Paula Conboy</i> | 79 |
| SNAPSHOTS | |
| Agreed Facts and Penalties: The More Things Changed, the More They Stayed the Same – <i>Douglas Shirrefs</i> | 82 |
| You Get What You Pay For: Accepting Risk, Reliance, and the Scope to Contract Out of Representations – <i>Douglas Shirrefs</i> | 82 |
| Penalties for Underquoting: Federal Court Restates the Applicability of the “Instinctive Synthesis” Process in Imposing Civil Pecuniary Penalties – <i>Douglas Shirrefs</i> | 84 |
| REPORT FROM AFRICA | |
| Competition Law Developments Across Africa: Enhanced Focus on Areas Other Than Mergers – <i>Lesley Morphet</i> | 87 |