
Index

ACCC. *see* **Australian Competition and Consumer Commission**, 86

Access regimes

to essential facilities, 42, 45

Access to justice

in regulating online dispute resolution, 454

Accessions

security interests in, 81-83

Accountability

in Credit Derivatives Determinations, 201-202

Accountants

role in loan agreements, 170-171

Accounts financiers

circular priority problems and, 81-82

Administration of Charitable Trusts

CAMAC report, 260-275

Agency

in intermediated loan agreements, 174-185

intermediaries in competition with suppliers, 50-55

AGL Energy Limited

authorised to carry out merger, 313-316

Anonymity

of whistleblowers, 356-357

Anticompetitive behaviour. *see* **Competition**

Antitrust litigation

ISDA and DCs vulnerable to, 207-213

Arbitration

proposed for credit default swaps, 192

Artificial insemination

litigation relating to, 367-388

Asset lending

unconscionable conduct and, 146-186

Australia

carrying on business in, defined, 102-104

credit default swaps market, 188-189

economic participation by youth in, 229-230

foreign competition occurring in, 100

shale gas reserves, 22

small businesses in, 113

voluntary breeding standards, 378

Australian Competition and Consumer Commission (ACCC)

deceptive conduct responsibilities removed from, 308-309

Flight Centre case, 61

government response to SERC report on, 487-489

litigation brought by, 327

proposals to enhance, 414-435

review of enforcement function, 418-423

role in competition policy, 47-48

- use of infringement notices by, 276-291
- Australian Competition Tribunal**
 - grants authorisation for merger to AGL Energy, 313-316
- Australian Consumer Law**
 - businesses as consumers under, 113-123
 - consumer protection under, 114-115
 - powers of ACCC under, 416
- Australian Law Reform Commission**
 - recommends statutory privacy tort, 403-405
- Australian National Financial Strategy**
 - implementation of, 228
- Australian Productivity Commission**
 - considers reform to CCA Pt 3A, 128-130
- Australian Securities and Investments Commission**
 - alleged lack of aggressiveness, 412
 - future of, 308-312
 - powers sought by, 327
 - seeks larger penalties, 61
 - Senate inquiry into, 258
 - whistleblower disclosures made to, 354-357, 362-363
- Baker, Jonathan**
 - on “maverick” firms, 292-294
- Barwick, Garfield**
 - analysis of anticompetitive legislation, 331
- Baxt Lecture**
 - Fred Hilmer on National Competition Policy, 36-45
- Big Bang CDS Protocol**
 - operation of, 194-196
- Blocking statutes**
 - use against foreign antitrust laws, 91, 97
- Blunt Committee**
 - on anticompetitive practices, 337
- Book reviews**
 - The Construction and Performance of Commercial Contracts*, 406-407
 - The Law of Affidavits*, 407
- Bounty model**
 - for whistleblowing, 359
- Breaches**
 - frustration of contract and, 252
- Business**
 - conducting in Australia, defined, 102-104
 - duplication of regulations relating to, 143
 - small business credit regulation, 113-123
- Canada**
 - circular priority problems, 75-77
 - Personal Property Securities Acts, 65
- Capacity to pay**
 - infringement notices and, 281-282

- Cartel conduct**
 - deterrence of, 106
 - Harper Panel recommendations, 480-481
- Charitable Alliance**
 - input into CAMAC report, 260-261
- Charitable trusts**
 - CAMAC report on, 260-275
- Chattel paper**
 - circular priority problems and, 80-81
- Christchurch Cathedral**
 - insurance issues, 29-35
- Circular priority problems**
 - responses to, 62-89
- Circulating assets**
 - circular priority problems and, 83, 87
- Civil liability legislation**
 - should exclude contractual claims for disappointment and distress, 465-475
- Coal seam gas**
 - in Queensland, 22-23
 - regulatory regime, 27-28
- Comity**
 - US effects doctrine and, 93-96
- Commercial secrecy requirements**
 - whistleblowing and, 364
- Common law**
 - asset lending and, 149
- Companies.** *see* **Corporate law**
- Companies and Markets Advisory Committee**
 - report on charitable trusts, 260-275
- Competition**
 - as object of *CCA*, 439-441
 - competitive vs anticompetitive conduct, 340-341
 - detriment to of merger, 314-315
 - “disruptive” versus “vigorous”, 295-297
 - includes competition from imports, 98
 - “particularly aggressive”, 297-300
 - purpose of anticompetitive practices vs effect, legislation relating to, 335-336, 340-342
 - role of “maverick” firms, 301-305
 - role of voluntary standard-setting in, 367-388
- Competition and Consumer Act 2010***
 - market definition in, 215-216
 - on entry deterrence, 234-244
 - proposed amendments, 60
 - Pt 11C, mandatory access regimes, 128-130
 - Pt IIIA, mandatory access regimes, 128-130
 - Pt IIIA, market definition in, 219-224
 - Pt IV, extraterritorial application of, 90-112
 - Pt IV, market definition in, 216-219

- s 2, on primary objects of, 436-444
- s 5(1), on cartel conduct, 106-109
- s 45(2), on lessening competition, 240-242
- s 46, compulsion under, 124-128
- s 46, fitness for purpose of, 481-483
- s 46, on barriers to entry, 242-243
- Schedule 2. *see* **Australian Consumer Law**
- Competition Policy Review.** *see* **Harper Panel**
- Competition statutes**
 - goals of Australian legislation, 330-350
 - Harper Panel recommendations, 479-486
 - market definition in, 215-216
 - national policy, 36-45
 - need for intergovernment cooperation, 143
 - on voluntary standards, 385-387
 - proposed reforms, 59-60, 144
 - review of, 3, 46-50
- The Construction and Performance of Commercial Contracts***
 - book review, 406-407
- Consumer credit regulation**
 - as applied to businesses, 113-123
- Consumer protection**
 - asset lending arrangements, 148
 - inquiry into micro-economic reform, 399-402
 - under current law, 114
- Contracts.** *see also* **Loan agreements**
 - claims for disappointment and distress, 465-475
 - compensation for failure to perform, 472
 - entered into by local subsidiary or agent of overseas corporation, 104-106
 - frustration of contract, 249-253
 - intentions conflicting with written contract, 136-139
 - practical benefit principle, 389-398
 - regulating insurance contracts, 317-323
- Contraventions**
 - penalty notices for, 278-279
- Contributory negligence**
 - in loan default cases, 171
- Coordinated effects analysis**
 - “maverick” firms and, 292-295
- Corporate law**
 - where corporation “resides”, 104-106
- Corporate whistleblowing.** *see* **Whistleblowing**
- Corporations and Markets Advisory Commission**
 - abolition of, 143-144
 - future of, 488
- Credit default swaps**
 - Protocol for settlement of, 187-213
- Credit Derivatives Determinations Committees**
 - creation of, 188

- operation of, 192-196
- structure and procedures, 196-199
- Credit Ombudsman Service Limited (COSL)**
 - small business access to, 117-119
- Cultural issues**
 - in online dispute resolution, 449-450
- Dawson Committee**
 - on anticompetitive practices, 338-339
- Deductible Gift Recipient tax status**
 - charitable trusts and, 262
- Determination Committees (DCs).** *see* **Credit Derivatives Determinations Committees**
- Disappointment and distress**
 - contractual claims for, 465-475
- Dispute resolution**
 - online, evaluation of, 445-455
- “Disruptive” competition**
 - by “maverick” firms, 295-297
- Divestiture solutions,** 60
- Dixon formula for resolving priority disputes,** 76
- Economic participation**
 - by young Australians, 229-230
- Economic Regulation Authority**
 - inquiry into micro-economic reform, 399-402
- Effects test**
 - in United States, 91, 93-96
- Efficiency defence**
 - for anticompetitive behaviour, 333
- Electronic communications**
 - implications for Notaries Public, 459-460
- Energy Information Administration (US)**
 - estimates of global gas reserves, 20-21
- Enforcement issues**
 - Harper Panel recommendations, 485-486
 - in online dispute resolution, 448-449, 455
 - infringement notices and, 283-284
- Equitable doctrine**
 - unconscionable conduct and, 149-150
- Ergas test**
 - market definition in, 219-220
- Essential facilities**
 - competitive access to, 42, 45
- European law**
 - anticompetitive practices legislation, 340, 343
 - does not recognise small businesses as consumers, 116
- Evans, Gareth**
 - on anticompetitive practices, 337
- Exclusionary provisions**
 - Harper Panel recommendations, 481-483

External dispute resolution schemes

- online dispute resolution, 445-455
- regulation of small businesses via, 119-122
- required for Australian Credit Licence, 117
- small businesses in, 113

Extraterritorial application

- Competition and Consumer Act 2010*, 90-112

Fairness

- fees for trust management, 270-273
- in regulating online dispute resolution, 454

Federal Government

- red tape regulation days, 412
- response to SERC report, 487-489

Federal regulation

- infringement notices in, 276-291

Finance brokers

- as loan intermediaries, 176-183

Financial literacy

- of school students, 228-233

Financial Ombudsman Service (FOS)

- small business access to, 117-119

Financial Services Council

- input into CAMAC report, 260-261

Financial Services Inquiry

- findings of, 258
- reviews submissions, 327

FOFA reforms. *see* Future of Financial Advice (FOFA) reforms

Foreign law

- is advice on privileged?, 5-15

Franchising

- review of Federal Franchising Code, 60

Freedoms Inquiry

- terms of reference, 144

Frustration of contract

- NZ litigation, 249-253

Functional dimension

- in defining markets, 214-227

Future of Financial Advice (FOFA) reforms

- progress of, 59

***The Future of Franchising*, 60**

Gender differences

- online dispute resolution and, 448

Global markets

- Australian markets included in, 100-101

Harper Panel

- Draft Report by, 327, 349-350
- Federal Government response to, 411, 444-445
- findings of, 257-258
- Issues Paper by, 417-418

- objectives identified by, 443-444
- on misuse of market power, 329
- recommendations on competition law, 479-486
- results of for primary objects clause in *CCA*, 436-444
- terms of reference, 442-443
- High Court**
 - on patentability of human DNA, 476
 - on “reasonable endeavours”, 245-248
- Human DNA**
 - patentability of, 476-478
- Independence**
 - in regulating online dispute resolution, 454
- Industry Codes of Practice**
 - small business credit protected by, 116-117
- Infringement notices**
 - effects of withdrawal of, 288-289
 - in federal regulation, 276-291
- Injury and death**
 - negligently caused, liability for, 467-468
- Innovation**
 - “disruptive”, 300
- Insolvency issues**
 - external dispute resolution schemes, 121
- Insurance issues**
 - Christchurch Cathedral cases, 31-32
 - Christchurch Cathedral damage and repair, 29-35
 - liability for negligently caused injury and death, 467-468
 - qualities shared with credit default swaps, 191
 - regulating insurance contracts, 317-323
- Intellectual property law**
 - Harper Panel recommendations, 485
 - on human DNA, 476-478
- Intermediaries.** *see also* **Agency**
 - acting in competition with suppliers, 50-55
 - in asset lending, 146-186
- International Energy Agency**
 - on shale gas industry, 21
- International Swaps and Derivatives Association**
 - credit default swaps protocol, 187-213
 - litigation brought against, 207-213
- Intimidation**
 - reduced by online dispute resolution, 446
- Ipp Report**
 - on contractual claims for compensation, 473-474
- Joint venture proceedings**
 - intentions conflicting with written contract, 137-138
- Judiciary**
 - regulation of online dispute resolution, 452-453

Justification defence

for anticompetitive behaviour, 333

The Law of Affidavits

book review, 407

Lawyers

advice on foreign law given by, 5-15

duties as Notaries Public, 456-464

involved in loan agreements, 170

Legal professional privilege

status of in-house counsel and, 5-15

Liability

for negligently caused injury and death, 467-468

Litigation funding, contingent

in United Kingdom, 131-135

Loan agreements

intentions conflicting with written contract, 137-138

misrepresentation in, 156-169

Local subsidiaries or agents

legal status of under *CCA* Pt 4, 104-106

Macquarie Generation

merger with authorised, 313-316

Market power provision

misuse of, 329-350

Markets. *see also* Competition

ACCC effectiveness enhanced by studying, 423-434

conduct occurring in or affecting, 98-100

functional dimension of defining, 214-227

strategic entry deterrence, 234-244

“Maverick” firms

identifying, 292-307

Media

whistleblowers’ approach to, 355-356

Mergers

Harper Panel recommendations, 484-485

identifying “maverick” firms in, 292-307

Merits review

proposed for infringement notices, 287-288

Micro-economic reform inquiry

for Western Australia, 399-402

Ministerial consent

for proceedings under *CCA* Pt 4, 101

Ministerial responsibility

for competition policy, 37-38

Misrepresentation

in loan agreements, 156-169

Misuse of market power provision

under *CCA* s 46(1), 329-350

Monopolisation

in Australian legislation, 330-332

- Mortgage originators**
 - as loan intermediaries, 176-183
 - role in loan agreements, 173
- Multifactorial analysis**
 - of contract tests, 252-253
- Multiple infringement notices**
 - cumulative effect of, 280-281
- Murphy, Lionel**
 - analysis of anticompetitive legislation, 334-336
- Murray Inquiry.** *see* **Financial Services Inquiry**
- National Commission of Audit report**
 - on commercial law regulation, 143
- National Competition Council**
 - on use of standards, 379-381
- National Competition Policy**
 - achievements of, 36-45
- Negligence**
 - claims for injury and death caused by, 467-468
- Negotiable documents of title**
 - circular priority problems and, 80-81
- Negotiable instruments**
 - circular priority problems and, 80-81
- Negotiation.** *see* **Dispute resolution**
- New Zealand**
 - challenges facing notaries in, 456-464
 - Christchurch Cathedral insurance issues, 29-35
 - frustration of contract in, 249-253
 - Personal Property Securities Act 1999*, 65
 - voluntary breeding standards, 378
- Non-payment**
 - of infringement notices, 289-290
- Notaries Public**
 - new challenges facing, 456-464
- Notice**
 - priority claims turning on, 81
- Office of Market Intelligence**
 - proposed, to facilitate whistleblowing, 363-364
- Online dispute resolution**
 - evaluation of, 445-455
- Partial performance of contract**
 - frustration and, 250-252
- “Particularly aggressive” competition**
 - by “maverick” firms, 297-300
- Patent claims**
 - regarding human DNA, 476-478
- Payment**
 - in response to infringement notices, 282-287

Penalties

sizes of, for infringements, 279-280

Penalty notices. *see* **Infringement notices**

Performance-based standards

competition law and, 381

Personal Property Securities Act 2009 (PPSA)

on circular priority problems, 62-63, 77-89

s 55, priority rules in, 86-88

s 59, priority rules in, 85-86

s 73, resolving circular priority disputes with, 88

Practical benefit principle

in contract formation, 389-398

Preferred creditor cases

circular priority problems arising from, 71-75, 83-84, 87

Priority agreements

circular problems arising from, 64-71

Privacy issues

statutory privacy tort recommended, 403-405

Private Ancillary Funds

defined, 262

Processes, serving. *see* **Serving processes**

Professional privilege. *see* **Legal professional privilege**

Property rights

public interest opposed to, 124-130

Protected disclosures

by whistleblowers, 354-358

Public Ancillary Funds

defined, 262

Public benefits test

merger authorisation, 313

Public interest

property rights opposed to, 124-130

Public sector

protection for whistleblowers in, 352-354, 364-365

Publicity

infringement notices and, 284-285

Purchase money security interests

circular priority problems and, 77-78, 81-82

Queensland

shale gas industry regulation, 16-28

Reasonableness

fees for trust management, 270-273

High Court on “reasonable endeavours”, 245-248

Red tape regulation days

success of, 412

Regulatory administrative efficiency

whistleblowing and, 362-364

Renegotiation of contracts

practical benefit principle in, 394

- Resale price maintenance**
 - Harper Panel recommendations, 484
- Rule-of-reason analysis**
 - for voluntary standards, 367-388
- School students**
 - financial literacy of, 228-233
- Security issues**
 - in online dispute resolution, 450-452
- Senate Economic References Committee**
 - government response to report of, 487-489
 - on anticompetitive practices, 345
 - on whistleblowing, 363-364
 - report on ASIC, 308-312, 328
- Serviceability of loans**
 - as factor in judgment, 169
- Serving processes**
 - outside Australia, 111-112
- Shale gas industry regulation**
 - in Queensland, 16-28
- Small Bang CDS Protocol**
 - operation of, 194-196
- Small businesses**
 - under consumer protection law, 113-123
- Special disadvantage**
 - in loan default cases, 168
- Sports bodies**
 - voluntary standards set by, 367-388
- Standards Australia**
 - competition law and, 379-380
- “Step-aside” priority agreements**
 - in litigation, 66-67
- Stewardship audits**
 - for trust management, 273-275
- Strategic entry deterrence**
 - does it constitute misuse of market power?, 234-244
- Sub-agents**
 - in loan agreements, liability for acts of, 183-185
- Subordination**
 - priority compared to, 64-65
- Subrogation approach**
 - to priority disputes, 70-71, 85-87
- Subsidiary companies**
 - contracts entered into by, 104-106
- Suppliers**
 - intermediaries acting in competition with, 50-55
- Swanson Committee**
 - on anticompetitive practices, 336, 342

- “Taking advantage” element**
 - CCA* s 46, 238-239
 - in anticompetitive practice legislation, 342-344
- Taking free rules**
 - operation of, 84-85
- Thoroughbred horse racing**
 - breeding standards upheld by litigation, 367-388
- Trade Practices Commission**
 - authorisations for anticompetitive conduct, 331, 333
- Transferred collateral**
 - circular priority problems and, 79-80
- Transitional security interests**
 - circular priority problems and, 83
- Transparency**
 - in Credit Derivatives Determinations, 201-202
 - in regulating online dispute resolution, 453-454
- Treasury Working Party**
 - findings of, 257-258
- Treaty of Rome**
 - anticompetitive practices under, 334-335
- Trustee companies**
 - CAMAC report on, 260-275
- Trustmarks**
 - in online dispute resolution, 452
- Trusts**
 - Christchurch Cathedral, 29-35
- “Turnover” priority agreements**
 - in litigation, 67
- Unconscionable conduct**
 - attribution of, 174
 - in asset lending, 146-186
- Uniform Evidence Act**
 - effect on legal professional privilege, 13-14
- Unilateral conduct legislation**
 - in Australia, 330-332
- United Kingdom**
 - litigation funding in, 131-135
 - voluntary breeding standards, 378-379
- United States**
 - anticompetitive practices legislation, 340, 343, 367-369
 - circular priority problems, 75-77
 - “consumer” defined as “natural person” in, 116
 - effects test and comity in, 91, 93-96
 - human DNA patentability in, 476-478
 - identifying “maverick” firms in, 292-307
 - litigation on voluntary standards, 382-385
 - Office of Market Intelligence, 363-364
 - shale gas industry regulation, 18-20
 - voluntary breeding standards, 379

Vertical restrictions

Harper Panel recommendations, 483-484

Video conferencing

in online dispute resolution, 447-448

Waivers of liability for negligence

Big Bang and Small Bang CDS protocols, 198-199

Welfare

as object of *CCA*, 439-440

Western Australia

litigation regarding *Civil Liability Act*, 474-475

micro-economic reform inquiry, 399-402

Whistleblowing

dealing with, 328, 351-366

Young people

financial literacy of, 228-233