
Index

Australian Competition and Consumer Commission

- appointments, 145
 - chair, re-appointed chair, 145
 - commissioners, 146
 - deputies, 145-146
- statutory demands for information, increasing use of, 146-147
- Completion Policy, and
 - town planning, 147
 - ACCC recommendations on, 147
 - COAG decision to examine, 147-148
 - suggested Australian position, 148
- failing firm counterfactual, acceptance of
 - Primo acquisition of Hans, 151-152
- s 45 TPA claims, pleading
 - problems with, 152-153
- s 155 notices, information gathering under
 - burden and relevance, 223
 - oppressive burden and bad faith, whether, 223-224
 - power to issue, 221
 - Emirates v ACCC 2009, 221-224
 - validity of, 222

Authorised acquisitions

- ACCC process, 288-289
- Air New Zealand and Air Canada agreement
 - authorisation denied, ACCC, 261
 - counterfactual, assessment of, 262
 - public benefits, 262-263
 - public detriment, 263-264
 - viability of direct services, primary risk to, 263
 - recent developments, 264-265
- provisions, authorisation, 287
- damages for victims, anti-competitive conduct, 289-290
 - ACCC impact, 291-293
 - better approach, 290-291
 - amendments, suggested, 293
- CEMEX authorisation
 - ACCC assessment, 38
 - anti-competitive effects, 38
 - public benefits, 38-39
 - background, 36-37
 - EOT system in Western Australia, 37

equal opportunity versus equal earnings arrangements, 39

Cartels

Australian class action regime, 174-175

cartel class action, challenges pleading, 182-183

“passing on defence”, and, 183-184

quantifying loss, complex task of, 184

statutory limitation period under TPA, 184-185

litigation funder, complexities of, 175

cartel provisions under TPA, and, 169

ACCC, criminal prosecutions by, 248-250, 268-270

investigations, conduct of, 250, 268,

ACCC and DPP, respective roles of, 171-172, 267-268

ACCC v Pratt, avoiding unintentional admissions, 283-285

admissibility, clarification of law, 285-286

Commonwealth Director of Public Prosecutions, 270-271

cartel conduct, meaning of, 169, 245

contract, arrangement or understanding, entry into, 245-246

civil contravention, 169, 266-267

consequences of, 267

exceptions to cartel regime, 247-248

immunity policy, incentivised, 172-173, 250-251

communications privileged, whether, 182

investigative powers, 247

criminal and civil conduct, distinction, 170-171

liability, determination of, 246-247

penalties, and, 169

protected cartel information, 247

criminalisation of conduct, and 123-124, 143-144, 168, 244-245

Dawson Review 2003, endorsement by, 167-168

penalties, imposition of, 123-124

international air freight price-fixing, 272

s 5 of TPA, issue of, 273-274

penalty, 274-275

market failure, serious form of, 123

efficiency, threats to, 123

overview, 167-168

private and public enforcement actions, interplay of, 173-174, 176

prior public enforcement, perceived benefit of, 176-177

use of findings of fact in private enforcement, 177

obtaining ACCC evidence, difficulties, 178

public interest immunity, 180-182

restrictive trade practices, and, 168

Trade Practices Amendment (Credit Conduct and Other Measures) Bill 2008, 126, 245

- criminal fine, low deterrent value of, 126
- flaws in key areas, 123, 128-129
- proposed new joint venture defence to broad, 126-128
- recommendations
- s 44ZZRD, convoluted drafting of, 124
- serious and objectionable conduct, failure to distinguish 124-125
 - alternative approach, 125-126
- simplify legislative provisions, 128
 - class compensation orders, 128
- unfair burden, 123
- s 155 notices under TPA, and
 - amendments to, 143
 - Korean Airlines Co Ltd v ACCC, 140, 181
 - improper purpose, 140-141
 - service of notice, timing of, 141-143
 - significance and developments, 143-144

Competition Policy

- Australian Competition and Consumer Commission, and
 - suggested Australian position, 148
 - town planning, ACCC recommendations on, 147
 - COAG to examine, 147-148
- businesses, perspective of, 57
 - competition laws, interest in, 58
 - regulatory reform of TPA, propose further, 57-58
- competitive conduct, meaning of, 58-59
- costs of regulatory error, 60
- council, and
 - certification matters, 227
 - National gas law, work under, 228-230
 - Pt IIA, declaration of services, 225-227
- economic context of, 59-60
- market failure, and, 72
- National, administration of, 205
 - Pt IV of TPA, exemptions to
 - Australian Business Investment Partnership Bill, 207-208
 - impact studies, need for, 206-207
 - scrutiny, need for ongoing, 207, 209-210
- public benefit, 72
- recent reforms, s 46 predatory pricing, 60-61
 - see also* **Predatory pricing**
 - proposed further amendments, 61-62

Defective goods

- Dennis v Hagemeyer Brands Australia Pty Ltd
 - fire, Smeg dishwasher alleged cause of, 131
 - interlocutory application for better particulars, 131
 - ss 74B and 74D of TPA, amenability of, 131
 - supervening event, onus on supplier to prove, 131-132
- Drew v Makita (Australia) Pty Ltd
 - general damages, assessment of, 131
 - moveable chainsaw blade guard defective, whether, 130-131
 - opened deliberately or inadvertently, alternatively, 130-131
 - product safety recall notices, Makita issuance of, 131
 - ruling on liability, inadequate reasons on, 131

Franchising

- agreements, certainty of
 - disclosure documents and prospective franchisees, 53
- franchisors
 - franchisees, discriminatory conduct between, 149
- Master Education Services v Ketchell, 53
 - s 51AD TPA, role in proceedings of, 53
 - prohibited from expanding s 51AD, franchising code, 54-55
 - significance of decision, 55-56
- statutory framework, 53

Horticulture code of conduct

- ACCC v Gorge and Edgar Pty Ltd, 150

Information providers defence

- accessorial liability, and 194-195
- conduit defence, and s 52 TPA, 196-197
 - s 65A defence, reconciling with, 198
- exclusion, 189
 - goods, services and land, publications in respect of, 190-191
- overview, 187-188
 - rationale, 188
- practical scope, 195
- prescribed
 - information providers, 188
 - publication, 189
 - publishers exemptions, 40
- s 65A TPA, under, 40
 - emails attract operation of provision, whether, 43
 - Bond v Barry, 43-44
 - exceptions to exemptions, and, 41
 - ACCC v Channel Seven, 41-43
 - limits to exemption, 44

conduct occurring in trade and commerce, 45-46

TCN Channel Nine v Ilvari, 44-45

pre-publication statements protected, whether, 192-193

Legal professional privilege

affidavit protected when intended to be served, whether, 211

Cadbury Schweppes v Amcor, 216

cartel investigations, legislative intervention, 219

privilege waived by filing and service, whether

proofs of evidence privileged, whether, 216

judicial consideration, 212-213

divergent authority, 214

lessons and implications, 219-220

support for maintenance of privilege, 215

Litigation

costs, lowering of, 67

Bell Atlantic Corp v Twombly, 67

indirect proof of conspiracy, 68-69

courts, role and power, 18-24

length, complexity and cost, 9-13

overview, 7-9

TPA, under

economics and law, 13-14

evidence, managing admission and flow of, 14-18

expert, 14

unsuccessful litigants, costs and, 73

Merger

failing firm defence, cases and, 252

Australian position on acquisitions, 253-254

ACCC guidance, 254

bank acquisitions, application in recent, 257-8

origins, United States, 253

merger guidelines, 253

overview, 252

recent decisions, 255-256

requirements, ACCC, 256-257

United Kingdom and United States compared, 258-259

Australia is different, whether, 259-260

retail banking markets, authorised in, 231

collapsed competition, 231

review process, reforming

engagement, 233

stability and competition, 232

- restoring competitive, 234
- transparency, 233

Misrepresentation

- s 51A TPA, future matters
 - accessorial liability, 32-34
 - deeming provision, forestalling, 26-27
 - Fair Trading Acts, and, 34-35
 - interpretation, problems of, 25-26
 - McGrath decision, evidential onus, 27-29
 - discharge of, 29-30
 - substantial defence, whether, 30-32

New Zealand

- exports to China, 157
 - free trade agreement, 157-158
- Fair Trading Amendment Act 2008, 158-159
- Natural monopolies
 - regulation of, 154-155
 - old and new regime, 154-155

Predatory pricing

- Birdsville Amendment to TPA, under, 83
 - effectiveness of 92-93
 - elements of breach, 93
 - relevant cost, 93-94
 - substantial market share and substantial market power, determination of, 95
 - terms, lack of definition of, 83, 99-100
- Boral, and
 - High Court's approach, 91-92
 - Birdsville Amendment, whether different outcome under, 97
 - proscribed purpose, 96
 - sustained period, 96
- competitive pricing, and
 - difficulties distinguishing, 82
- consideration of recoupment, whether necessary, 101
- effects test, argument for, 101-103
 - market power, Rural Press and, 90-91
 - Melway and "take advantage element", 89-90
 - misuse of market power provision, criticism of
 - difficult to prove, 98
 - effectiveness, 89
 - expense and complexity, 98
 - judicial treatment of, 84-85
 - objectives of, 84
- overseas jurisdiction, comparative provisions, 85

-
- Art 3 Antimonopoly Act, Japan, 88
 - European Economic Community, 86-87
 - Art 82 European Community competition law, 86
 - France, 87
 - recent reforms, 60-61
 - proposed further amendments, 61-62
 - regulation
 - regulatory approach, criticisms of 83
 - broad objectives of TPA unmet, whether, 84
 - dangers of, 82
 - anti-competitive effects, 82
 - Misuse of market power provisions, under, 82
 - Report on Predatory Pricing, International Competition Network, 85
 - s 2 Sherman Act 1890, United States, 85
 - s 50(1)(c) Competition Act 1985, Canada, 87
 - s 60 Competition Act 1998, United Kingdom, 87
 - regulatory reform, recommendations for, 103-105
 - s 46 of Trade Practices Act
 - capture of legitimate competitive pricing conduct, criticism, 83
 - central provisions, 83
 - “take advantage element”, argument for removal of, 100
 - “business rationale defence”, and, 100-101
 - Public monopolies**
 - telecommunications infrastructure Australia, 48
 - Services**
 - state access regime, water infrastructure
 - access decisions, accountability for, 202-203
 - certification, 199
 - effectiveness, 200
 - National Competition Council, criticism, 199
 - pt IIIA of TPA, versus, 199-200
 - immunity from, 203
 - similarity, 200-201
 - state flexibility, retaining, 202
 - Slotting**
 - case against, 64-65
 - exclusionary theories, and 63-64
 - inadequacy of empirical data, 64
 - Indian position, 65-66
 - meaning of, 63
 - pro-competitive case for, 64
 - proving slotting, challenge of, 66

value of product variety, and 65

Telecommunications

Application by Chime Communications Pty Ltd, 133

access to Telstra's ULLS declared service, 134

construction of s 152AT(4) of TPA, outline of, 134

Pt XIC of TPA, whether constitutionally valid, 47

declaration of ULLS an "acquisition of property", whether, 50-51

regulation continued to distort market, whether, 134-135

result of decision, 51-52

Telstra, exemptions sought by, 134

Telstra Corp v Commonwealth, proceedings in, 49-50

litigation costs, and lowering of, 67

Bell Atlantic Corp v Twombly, antitrust case of, 67

follow the money, 70

indirect proof of conspiracy, 68-70

stealth declaration and motion to dismiss, 70-71

regulation in Australia

public switched telephone network (PSTN), history of, 47-48

infrastructure, 48-49

United States Federal Communications Commission (FCC)

achieving network neutrality, 135

background, 136

Comcast, complaints against, 135-136

legal and evidential basis of FCC decision, 136-138

wider policy issues, 138-139

Trade practices compliance

ACCC, influence of, 111

role of, 106-107

business experience, quantitative survey of, 107-108

business' lawyers, influence of, 109, 116

compliance professionals, influence of, 110-11

consumer groups, 110

industry association, influence of, 109-10

media stories, influence of, 109, 116

Trade Practices Act awareness of, 108-109

businesses, 112-113

calculative motivations, 113

reinforcement of, 116-117

controlling factors, 114

normative motives, 113-114

statistical tests, 118-122

Unconscionable conduct

unfair contract terms framework, case for enhancing, 276

- detriment and transparency, undue emphasis on, 278-279
- Minter Emerson's reversal, 276
- overview of issues, 276-278
- safe harbours, failure to provide, 279-281
 - advantages of, 281-282

Unilateral conduct

- Department of Justice (DOJ), ruling, 295-297
 - Federal Trade Commission, reaction of, 297-298
 - withdrawal of report, DOJ, 298
- United States
 - antitrust policy, shift in, 294
 - s 2 of the Sherman Act, 294