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EDITORIAL

**Can deliberately misleading and deceptive conduct be "careless and reckless"?** ..... 3

ARTICLES

**In competition with each other? Implications of the apparently divergent outcomes in Flight Centre and ANZ** – *Andrew Christopher* and *Thea Fabricius*

This article discusses the competition law concerns that arise from price arrangements between suppliers and distributors, particularly in the context of agency distribution agreements. The apparently diverging decisions in ACCC v ANZ and ACCC v Flight Centre introduced a level of uncertainty into Australian law as to whether an agent may be "in competition" with its principal. This is significant because, under the cartel provisions in Div 1 of Pt IV of the Competition and Consumer Act 2010 (CCA), price-fixing is subject to a per se prohibition whenever parties are found to be in competition with each other. The article discusses the reasoning in both cases, and potential implications of the Flight Centre decision on agency distribution arrangements if it is held to be correct on appeal. Multi-distribution models containing most favoured nation agreements or "platform parity agreements" are increasingly prevalent in the context of e-commerce and online shopping and highlight the potential for vertical arrangements to have both pro- and anti-competitive effects. The article provides a cross-jurisdictional analysis of the judicial treatment of vertical price arrangements in agency distribution agreements in Australia, the European Union and the United States. Under American and European law, unlike under the CCA, "vertical" price arrangements are explicitly distinguished from "horizontal" arrangements and a "genuine agency" exemption is available for certain distribution arrangements. This defence allows efficient agency distribution agreements to be protected from vertical price-fixing claims. In this context, the possible future direction of Australian law is considered pending the appeal judgments from the ANZ and Flight Centre cases. .... 6

**Vertical merger analysis in the United States, Europe and Australia** – *Paul McLachlan*

Vertical mergers do not involve the combination of two competitors and an increase in market share. Economic theory has long debated whether vertical mergers cause any competition concerns and, if so, why. From the Chicago School positing that vertical mergers are pro-competitive, to post-Chicago theories of foreclosure and raising rivals' costs, regulators and courts have grappled with how to analyse the competitive impact of a vertical merger. This article provides a history of the economic theories of harm for vertical mergers, compares the approach to vertical mergers of courts and regulators in the United States, Europe and Australia, and suggests that the Australian Competition and Consumer Commission's Merger Guidelines should more explicitly treat vertical mergers with a lighter touch. ..... 17

**Consumer guarantees – lessons to be learnt from afar** – *Lynden Griggs*, *Aviva Freilich* and *Nicolas Messel*

The remedies available to the consumer under the consumer guarantees regime of the Australian Consumer Law depend largely on whether the defects of the goods are major or minor. Suppliers and consumers will undoubtedly differ in their views on this. The authors argue that these recent changes, while intended to be beneficial, have possibly reduced consumer protection, or at the very least increased consumer confusion. To overcome this, a simple amendment to the current provisions is suggested, the idea borrowed from the consumer protection laws of Saskatchewan, Canada. This idea is that the legislation include a provision that costs should not be imposed on a consumer who sues to enforce a consumer guarantee, unless the court rules that the litigation was vexatious or frivolous. An alternative to this, or perhaps a complement to it, is to follow the lessons of Europe where it is the consumer who controls the direction remedial relief should take. ..... 36

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