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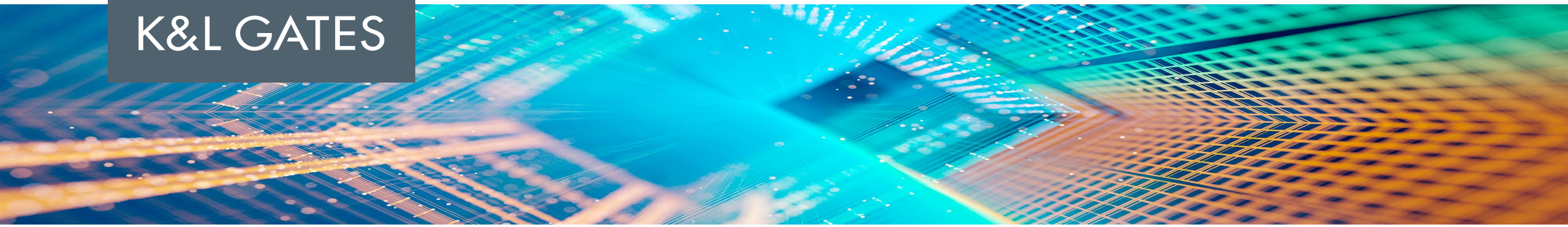

Session 1: Recent Developments in Competition and Consumer Law – and What is Coming

Speakers: Ayman Guirguis, Partner
CPD Category: Substantive Law

9:00 AM – 10:00 AM (AEDT)

Everyone's lines are muted upon entry. We will open the lines up after the session for Q&A.	If you want to ask a question, use the chat icon (along the bottom of your screen) to send a message to the speakers.	This session is being recorded. The recording will be made available via the K&L Gates HUB.

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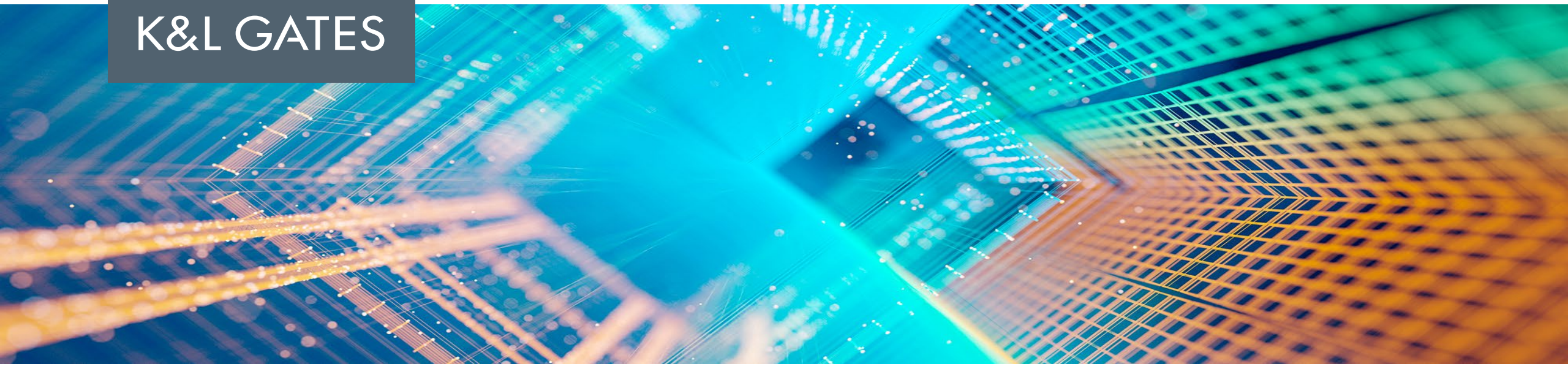

Wednesday 21 February 2024

Recent Developments in Competition and Consumer Law – and What is Coming

Ayman Guirguis, Partner | Policy and Regulatory

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Contents

Major Takeaway: COMPLIANCE – GET YOUR HOUSE IN ORDER

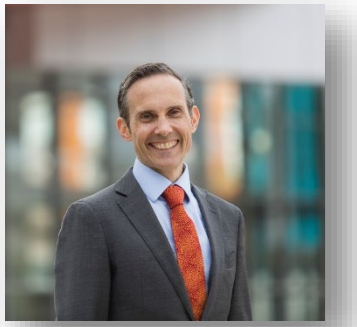
Significant Increases in Penalties

Significant Increases in Penalties

- In November 2022, significant increases for breaches of the *Competition and Consumer Act 2010* (CCA), incl the Australian Consumer Law (ACL) came into effect [penalties for UCT commenced in November 2023]
- The new maximum penalties for each breach are:
  - For corporations, the greater of:
    - **AU$50 million** (up from $10 million); or
    - **Three times** the value of the benefit gained from the breach (this remains unchanged); or
    - If the court cannot determine the value of the benefit obtained, **30% of adjusted Australian turnover during the breach turnover period**, which is to be a minimum of 12 months (up from 10% of annual turnover in the preceding 12 months).
  - For individuals, **AU$2.5 million** (up from AU$500,000). Individuals found guilty of criminal cartel conduct may also face up to 10 years imprisonment (unchanged)
- This reflects a trend of increasing penalties, with the maximum consumer law penalties increased from AU$1.1 million to AU$10 million in 2018

Penalties as a Deterrent to Non-Compliance with the CCA

The Government: Hon Dr Andrew Leigh MP: "*The $10 million penalty has been in place for 30 years, and higher penalties are now needed to ensure competition and better corporate behaviour… This ensures those who perpetrated the wrongdoing, either individually or on behalf of the company, are held accountable.*"



ACCC:

Chair Gina Cass-Gottlieb: "*These increased penalties will serve as a strong deterrent message to companies to comply with their obligations to compete, trade fairly and not mislead or act unconscionably towards consumers.*"

Commissioner Liza Carver: "*It is important that penalties are sufficiently large to deter even large companies and their employees from breaching Australia's competition laws. Cartel conduct is illegal because it cheats Australians by increasing the prices consumers and business customers have to pay, and by restricting healthy economic growth.*"

The Court: Justice O'Bryan: "*…the conduct in the present case warrants a significant penalty to deter repetition by [those] who may otherwise calculate that the rewards from such conduct outweigh the risks of detection.*"

Recent Penalties for Breaches of the CCA

Competition Laws

- **Cartels: *BlueScope***: August 2023, ordered to pay a **AU$57.5 million** for *attempting* to fix prices for flat steel products supplied in Australia - **highest penalty imposed for cartel conduct in Australia** (quantum of penalty on appeal)
  - *Previous highest penalty for attempt to enter into a cartel,* ***Flight Centre $12.5 million*** *and* ***Yazaki AU$46 million*** *for entering into a cartel.*
- **RPM: Techtronic:** December 2023, AU**$15 million** after admitting that it had engaged in RPM Milwaukee branded products, including power tools, hand tools and accessories
  - Previous highest penalty for RPM **Jurlique, AU$3.4 million.**

ACL

- **Phoenix Institute of Australia** and **Community Training Initiatives:** July 2023, ordered to pay record penalties of **AU$438 million**. **ACCC Chair** referred to its conduct as "*cynical and calculated systemic unconscionable conduct towards disadvantaged individuals, on an industrial scale*"
- **FitBit:** December 2023, **AU$11 million** after admitting to making false, misleading representations to 58 consumers about their consumer guarantee rights to a refund or replacement for faulty devices
- **Samsung:** June 2022, **AU$14 million** after admitting to misleading consumers about the water resistance of various Samsung Galaxy phones between (when the maximum penalty was AU$1.1 million)
- **Google:** August 2022, **AU$60 million** for misleading representations to consumers about the collection & use of their personal location data on Android phones. **ACCC Chair** "*This significant penalty imposed by the Court today sends a strong message to digital platforms and other businesses, large and small, that they must not mislead consumers about how their data is being collected and used*."

Review of Australia's Competition Laws

Competition Laws and Policy Review

- On 23 August 2023, Treasury announced a Competition Review, lasting for two years
- The Review will have rolling policy projects and publish rolling reports during this period
- **The Hon Dr Jim Chalmers MP (Treasurer):** "*The review will look at competition laws, policies and institutions to ensure they remain fit for purpose, with a focus on reforms that would increase productivity, reduce the cost of living and boost wages.*"
- Initial issues to be considered by the review will include:
    - Proposals by the ACCC re merger reform, as well as other competition law issues (perhaps exclusivities);
    - Non-compete, non-poach and related clauses that restrict workers from shifting to a better-paying job; and
    - Providing advice on competition issues raised by new technologies, the net zero transformation and growth in the care economy.

Upcoming Changes to Australia's Merger Laws

*No change suggested to substantive test – acquisitions prohibited if they are likely to result in a substantial lessening of competition (**SLC**) in an Australian market.*

- The Review is examining:
  - Whether Australia's current merger rules and processes are effective, enabling beneficial mergers while addressing those that could be anti-competitive; and
  - Ways in which Australia's merger rules and processes could be improved.
- Nov 2023, the Competition Taskforce published a Merger Reform Consultation Paper, asking whether Australia's merger control processes need changing, setting out three possible options for change:

#1 – Voluntary formal clearance regime where businesses could choose to notify a merger, and the ACCC could grant legal immunity from court action under CCA s 50 if satisfied that the merger would not SLC (closest to current system).

#2 – Mandatory suspensory regime with compulsory notification of mergers above a certain threshold. Transactions suspended for a period while the ACCC conducts a competition assessment. To block a merger, ACCC would need to prove to Federal Court that the acquisition would be likely to SLC.

#3 – Mandatory administrative regime. The option proposed by the ACCC (next slide).

ACCC Proposes a 'Mandatory Administrative Regime'

- *The ACCC's strong view is that the competitiveness of Australian markets is best preserved by moving to a regime where, for the most significant mergers, the merger parties **must** make their case that their proposed transaction should be cleared. They should be required to produce evidence that satisfies the ACCC that there will be no likely substantial lessening of competition."* ***ACCC Chair***
- It proposes a mandatory administrative regime where:
  - Mergers above a certain threshold (**acquirer or target turnover threshold of AU$400 million, or global transaction value of AU$35 million**) **must** be notified to the ACCC, and the ACCC can 'call in' transactions below the threshold where there are competition concerns – in the relevant instances, merger cannot be completed until clearance granted;
  - The ACCC would grant clearance **where it is satisfied that the merger is not likely to SLC**;
  - If a merger was not cleared on competition grounds, a second stage public benefit test could apply;
  - The ACCC's decisions would be reviewable by the Competition Tribunal.
- There would also be a process whereby parties to non-contentious mergers can seek a waiver from the above process
- "*The absence of a mandatory-suspensory notification regime places the ACCC at a significant disadvantage when dealing with merger parties who are willing to push the boundaries of the informal, enforcement-based system.*" (**ACCC submission to Competition Taskforce**)

Law Council Submission on Merger Reforms

- "*Of the options proposed, the Committee's preferred approach is a combination of Options 1 and 2, incorporating a voluntary and suspensory regime in which both the ACCC and the Federal Court apply the existing, evidentiary s 50 standard and merger parties retain a right to seek declaration*."
- The Council's preference is for any changes to the merger regime to be made quickly and without legislative amendment. For example, through changes to ACCC practice or guidance
- The Council is concerned by the ACCC's proposal to amend the substantive test from a conventional evidentiary test, to an administrative discretion in the form of the 'satisfaction' requirement. It said:
    - "*The satisfaction test shifts the focus of any challenge to an ACCC decision from the substance of any competition concerns to the process and reasonableness of the ACCC decision making process, through judicial review… the Committee is concerned that this significantly erodes the quality of oversight and regulatory accountability in merger cases and significantly increases deal uncertainty and risk for Australian transactions."*
- The Council is also concerned about the adverse implications of removing the right of merger parties to seek a declaration from the Federal Court that the merger is lawful
    - "*At most, any right to challenge an ACCC objection to the Federal Court would be limited to judicial review or a limited form of merits review in the Tribunal, applying the 'satisfaction' standard (and not the civil evidentiary standard of the balance of probabilities).*"

Non-Compete Clauses / No-Poach Agreements

- The background is an Australian Government's 2023 Employment White Paper, which identified non-compete and related clauses as potentially hampering job mobility, innovation, and wage growth in industries where they are prevalent. The focus will be on whether they:
  - Hinder competitors' ability to attract talent and therefore limit their ability to compete in terms of service offering;
  - Hinder innovation, by preventing the formation of new businesses or bringing innovative ideas to new employers; and
  - They may already contravene the CCA or whether amendments to the CCA may be required.
- In the US:
  - In 2023, the United States' Federal Trade Commission proposed that non-competes should be banned in the US, on the basis that they were an unfair method of competition; and
  - There was previously a Silicon Valley class action – **Apple, Google, Adobe** and **Intel** settled for US$415 million in 2015.
- Are non-competes/restraints / no-poach clauses anti-competitive?
  - Restraints/non-competes may presently be subject to an exception from the competition laws; and
  - Non-poach clauses between businesses outside of mergers and acquisitions could constitute cartel conduct (they may amount to an agreement between competitors that they will not acquire labour services from particular classes of persons.

Digital Platform / Marketplace Reforms Forthcoming

- The ACCC is in the midst of its five-year (2020-25) Digital Platform Services Inquiry
- ACCC Chair has strongly advocated for regulation of digital platform / marketplaces on the basis of the following:
    - Digital platforms' massive aggregation of data provide a considerable competitive advantage to established firms through network effects and economies of scale;
    - Large digital platforms with significant market power can entrench that market power and extend it into other services – e.g. through self-preferencing conduct, bundling and tying, exclusivity agreements and denying interoperability;
    - Consumers and businesses face less choice, diminishing innovation and quality, and higher prices; and
    - Prevalence of scams, lack of effective dispute resolution mechanisms, and inability to make informed choices online.
- The ACCC has advocated for new regulatory tools, including mandatory codes of conduct for designated digital platforms, as well as economy-wide consumer law reforms, including unfair contract introducing an unfair trading practices prohibition – more on these later

Recent Actions Against Digital Platforms

- **Google** – As previously stated, was ordered to pay AU$60 million for misleading consumers about the collection and use of their location data
- **HealthEngine** – Ordered by the Federal Court (by consent) in 2020 to pay AU$2.9 million in penalties for engaging in misleading and deceptive conduct relating to the sharing of patient personal information to private health insurance brokers, and publishing misleading patient reviews and ratings
- **Meta (formerly Facebook):**
  - In July 2023, Facebook Israel and Onavo Protect (both Meta subsidiaries) were ordered to pay AU$20 million in penalties for misrepresenting the manner in which customer's data would be used after they downloaded the Onavo Protect VPN app. Customers were not informed that their data collected by the Onavo Protect app would be shared with parent company Meta for its commercial benefit.
  - In March 2022, the ACCC commenced action against Meta, alleging that it engaged in misleading and deceptive conduct by publishing advertisements for crypto schemes containing fake endorsements.

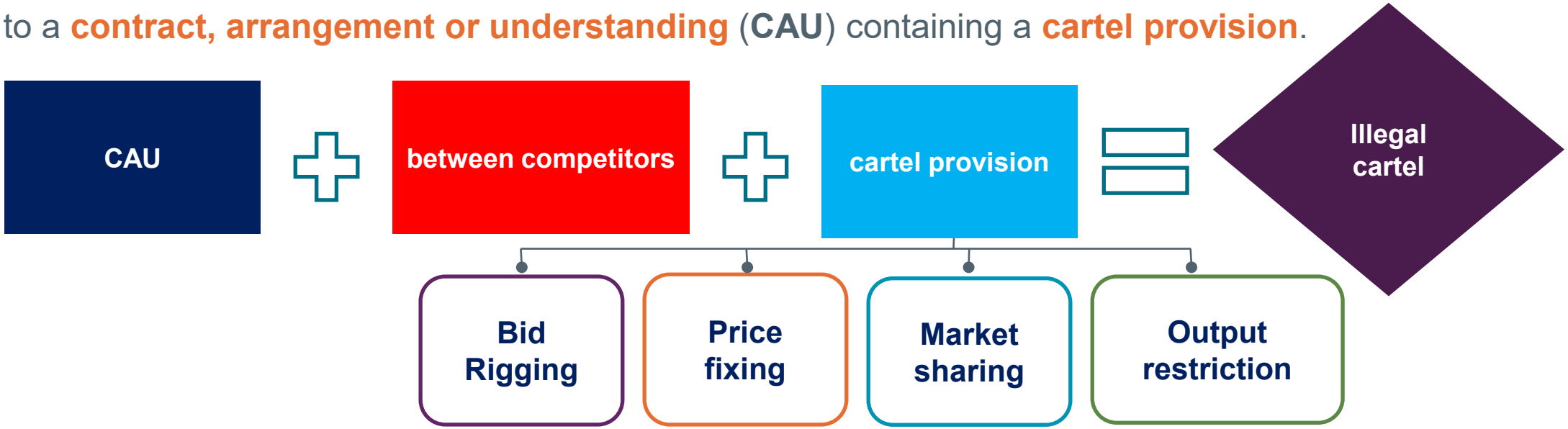
Updates on Criminal and Other Penalties for Cartels – and Attempting to Enter Cartels

Cartels

- Cartel = competitors colluding.
- It is prohibited for **competitors** to:
  - **Attempt**
  - **Enter (into),** or
  - **Give effect**

to a **contract, arrangement or understanding** (**CAU**) containing a **cartel provision**.

- Separate **criminal** and **civil** contraventions
- **Accessorial liability** for corporations and individuals
- **Prohibition on indemnification by company for charged 'officers'**



Criminal Prosecution of Cartels

- To date, the ACCC / CDPP have only succeeded in criminal cartel prosecutions where the accused has pleaded guilty. Regardless, cartel investigations entail a **massive** cost to businesses and individuals – in terms of money, time and emotional stress
- The ACCC has not been deterred by its mixed success – cartels continue to be an enduring priority
- Seeking immunity results in ‘certainty’ that you will not be subject to criminal or civil prosecution – but it comes with the high cost of time and effort of full and frank disclosure, and ongoing assistance to the ACCC
- Despite the ongoing ‘costs’, given the significant business and personal costs involved, participants in potential cartel conduct should **seek immunity as soon as possible – there is only one ‘marker’ available!** Note that immunity applicants must provide full, frank and truthful disclosure – and may need to waive privilege over certain documents
- If immunity is not possible, depending on the circumstances, consider whether in the circumstances you should cooperate with the ACCC and enter guilty pleas early – Courts are more likely to be lenient!
- Courts intentionally hand down very heavy penalties in order to deter businesses from merely weighing the risk of engaging in cartel conduct and accepting any penalties as a mere ‘cost of doing business’

Vina Money Transfer Cartel

Facts:

- Vina Money, Hong Vina and Hai Ha: Australian money remittance businesses that service money transfers from Australia to Vietnam. The businesses accounted for ~ **two-thirds** of money remittance transactions between Australian and Vietnam (**AU$2.5 billion**)
- They all had relationships with Sacombank (a large commercial bank in Vietnam who set the wholesale rate for exchange of AUD to VND)
- Sacombank approached them in March 2011 to encourage them to agree on one exchange rate, this failed. Sacombank did so again in December 2011 to encourage them to agree on one exchange rate. This approach was successful
- Between 2011 and 2016, the businesses entered into a CAU relating to:
  - Charging customers a common AUD/VND exchange rate; and
  - The ceasing or application of fee discounts on money remittances to Vietnam.
- **The Federal Police & Crime Commission referred the matter to the ACCC for investigation after they intercepted material relating to a different investigation**

Outcomes:

- Vina Money pleaded guilty to giving effect of a CAU that contained a cartel provision – fined **AU$1 million**
- Four individuals pleaded guilty to being knowingly concerned in the contravention of a cartel offence provision – **they received prison sentences between nine months to 2.5 years, but were immediately released on good behavior bonds**, meaning no time actually served
- One individual pleaded not guilty – charges were withdrawn against this individual

Bingo Industries and *Aussie Skips Cartel*

Facts:

- Following an ACCC investigation in August 2022, the CDPP charged Bingo Industries and its former CEO, Daniel Tartak, with various criminal cartel offences:
  - In December 2022, the CDPP charged Aussie Skips and its former chief executive, Emmanuel Roussakis, with criminal cartel offences in relation to the same conduct.
- It was alleged that in mid-2019, Aussie Skips and Bingo agreed to increase and fix prices for the supply of skip bins and processing services for building and demolition waste in Sydney

Outcomes:

- Bingo and Mr Tartak pleaded guilty to their charges on 16 August 2022 and 20 October 2022, respectively
- Aussie Skips and Mr Roussakis pleaded guilty in February 2023
- Sentences are yet to be handed down

BINGO INDUSTRIES

AUSSIE SKIPS

First NZ Criminal Cartel Prosecution

Facts:

- On 12 December 2023, the NZ Commerce Commission announced it had filed criminal charges against two construction companies and two directors for the alleged bid rigging of publicly funded construction contracts
- If convicted, the companies could face the following maximum penalties – the greater of:
  - AU$10 million;
  - Three x the value of any commercial gain resulting from the conduct; or
  - 10% of turnover for each accounting period in which the conduct occurred.
- The directors could each face a maximum fine of AU$500,000 and up to seven years imprisonment

"Bid rigging of publicly funded construction contracts loads extra costs onto taxpayers and the New Zealand economy as conduct of this type undermines fair competition.

The Commission will not hesitate to bring criminal proceedings in appropriate cases to ensure kiwis are getting the benefit of fair prices, quality services and more choice."

***- Commerce Commission Chair,* John Small**

COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

Unfair Contract Terms (UCT)

What is a UCT?

The contract is a **"standard form contract"**

The contract is a **"consumer contract"** or **"small business contract"**

The term is **"unfair"**

The term is **not excluded** under the legislation

Meaning of ‘Unfair’ Terms

Unfair terms defined in both the ACL and ASIC Act as those that:

- Would cause a significant imbalance in the parties’ rights and obligations
- Are not reasonably necessary to protect the legitimate interests of the party advantaged by the term
- Would cause detriment (financial or otherwise) if relied upon
  at the time that the contract was entered into and when the term was relied upon

As from 9 November 2023, UCT contravene the ACL and are susceptible to the very high penalties set out earlier (and the order that the terms are void/can’t be enforced and damages)

Recent Developments in UCTs – *Karpik v Carnival (High Court)*

Dec 2023: High Court handed down judgment in *Karpik v Carnival plc* relating to the Ruby Princess cruise which was linked to several COVID-19 deaths and hundreds of positive cases. Key takeaways from the High Court's decision were:

- That the Australian Consumer Law (including the UCT regime) has **extraterritorial application**, and can apply even where the law of the contract is not Australia
- That Carnival's **class action waiver clause was an UCT:** it had the effect of requiring customers to bring proceedings on an individual (rather than collective) basis, thereby restricting the likelihood that customers will take court action/deny access to justice, having regard to the likely quantum of claim for a holiday cruise – thereby
- That there were **strong reasons not to enforce the exclusive jurisdiction clause** in the contract, including that it may deny passengers access to justice (given that the class action waiver clause may be enforceable in the US), and would fracture litigation if the passengers were forced to commence claims in the US

Recent Developments in UCTs – ASIC Actions in 2023

- ASIC has been very active in enforcing UCT laws. It has also been quite 'specific' in the terms that it has been targeting – often just one clause from a broader contract
- **PayPal** – User Agreement contained a clause requiring business account holders to notify PayPal of any errors/discrepancies in fees charged by PayPal within 60 days, or else accept those fees as accurate
    - ***ASIC Deputy Chair, Sarah Court***: "*….it allows PayPal to escape the consequences of its own errors in overcharging small businesses, and places additional burdens on small business to detect and correct charging errors.*"
- **HCF Life Insurance Company** – ASIC commenced proceedings alleging that the 'pre-existing condition' term in three types of insurance policy were UCTs, in that the terms purport to deny customers coverage for pre-existing conditions, even where no diagnosis had been made and the customer was not aware of that condition
- **Auto & General Insurance Company –** ASIC commenced proceedings, alleging that a term requiring customers to notify Auto & General "*if anything changes about your home or contents*" was UCT because it:
    - Imposes an obligation on customers which they practically cannot meet (i.e. **anything** about their home/contents);
    - Is not clear as to the parameters of the customer's obligation; and
    - Could mislead or confuse the customer as to their true rights and obligations under the contract.

Recent Developments in UCTs – ACCC Warns Franchisors

- In December 2023, the ACCC published a report following a review of franchising contracts, warning franchisors to urgently review and amend their standard form agreements or be prepared for potential enforcement action
- ***ACCC Deputy Chair, Mick Keogh:*** "*We are concerned that franchisors are failing to grasp the importance of complying with the unfair contract terms provisions of the ACL.* ***Every franchising agreement we reviewed contained potentially unfair contract terms****."*
    - The ACCC's review considered franchising agreements across a range of industries, including repair and maintenance, education and training, arts and recreation, wholesaling, personal services, and food retailing.
- The report expressed concerns about the power imbalance between franchisors and franchisees. It stated that **many contract terms were likely broader than reasonably necessary** to protect the franchisor's legitimate business interests:
    - High-risk clauses identified in the report include unilateral variation clauses, withholding and set-off payment clauses, audit power clauses, restraint of trade clauses, and termination clauses.
- The ACCC has advised franchisors to avoid unduly broad terms:
    - Consider both points of view and Include counter-balancing terms;
    - Meet their ACL obligations;
    - Be clear; and
    - Be transpare.nt

Proposals for an Unfair Trading Practices Prohibition

Unfair Trading Practices

What are unfair trading practices?

"*Unfair trading practices… are particular types of commercial conduct which are not covered by existing provisions of Australia's consumer laws (such as misleading or deceptive conduct or unconscionable conduct), but nevertheless can result in significant consumer and small business harm.*"

Consultation Regulation Impact Statement

"*The ACCC has been advocating for some time for an unfair trading practices prohibition to be introduced into the [ACL] to better protect consumers and small businesses. We have previously identified numerous examples of concerning business conduct, which is unlikely to breach [the ACL] but causes real harm to consumers.*"

ACCC Deputy Chair, Catriona Lowe

In August 2023, Treasury opened a consultation seeking the views of stakeholders as to the potential introduction of an unfair trading practices prohibition. Examples of potentially unfair trading practices:

- Adopting business practices or designing a product / service in a way that dissuades a customer from exercising their contractual or other legal rights, such as making it difficult to cancel a subscription, change privacy settings etc.
- Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered
- Using dark patterns or other interface design strategies that impede choice/confuse or exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' or products or services (digital or otherwise) – e.g. pre-ticked 'I agree' buttons, illogical colours for click options, false scarcity reminders etc
- All or nothing 'clickwrap' consents that result in harmful and excessive tracking, collection and use of data, and which don't provide consumers with meaningful control of the collection and use of their data

Possible Options for Reform

Option One – Status quo (no change)

- Regulators seeking to enforce the existing ACL framework and pursuing unconscionable conduct cases so the law gradually develops - but regulators would be limited in their ability to respond to unfair trading practices (which do not meet the threshold of unconscionable conduct)

Option Two – Amend statutory unconscionable conduct

- Extend the phrase unconscionable conduct prohibition to capture unfair conduct as an element that **must** be assessed in determining whether conduct is unconscionable (currently, these factors are an optional consideration)
- Alternatively, add the concept of unfairness to the unconscionable conduct provision itself

Option Three – Introduce general prohibition on unfair trading practices

- Add a prohibition in the ACL (as already exists in the US, UK, EU and Singapore) with the specific definition to be decided through policy development process

Option Four – Introduce a combination of general and specific prohibitions on unfair trading practices

- Most comprehensive and targeted policy approach. Provisions would complement existing ACL protections such as misleading or deceptive conduct and unconscionable conduct
- Specific prohibition could include a list of specific instances of prohibited conduct that commonly result in consumer / small business harm, which could be gradually updated over time

Possible Strengthening of the Consumer Guarantees Provisions

Consultation Process on the Effectiveness of Consumer Guarantees

- In late 2021/early 2022, the Treasury sought stakeholder feedback on options aimed at improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the ACL
- The first main problem identified was that **consumers are not always given the remedies that they are entitled to**:
  - Treasury noted that there is currently no penalty for suppliers who refuse to provide a penalty. This can result in consumers experiencing both a level of inconvenience, as well as suffering loss as a direct result of the failure to comply with the consumer guarantees. This may lead to less confidence when purchasing goods / services.
- A potential reform option that was being considered (as an alternative to the status quo and education & guidance) was the introduction of a **prohibition against not providing a remedy for consumer guarantee failures, supported by penalties and other enforcement mechanisms:**
  - This would allow courts to impose civil pecuniary penalties, or injunctions requiring businesses to act, or refrain from acting, in a certain way. It will also allow the ACCC to issue civil penalty notices. This option was only proposed in respect of remedies not provided for major failures.
- In January 2024, the ACCC urged Australians to take advantage of their consumer guarantee rights under the ACL when dealing with businesses over defective products or poorly performed services

Consultation Process on the Effectiveness of Consumer Guarantees Cont.

- Treasury also noted that stakeholders have advised that **manufacturers often fail to reimburse suppliers for the costs incurred in providing a remedy to a consumer** for a manufacturer fault, or otherwise make it difficult for suppliers to obtain indemnification (even though there is a statutory obligation to indemnify)
- These difficulties have been attributed to the following factors:
    - A lack of incentives for manufacturers to provide indemnification (given the current lack of civil pecuniary penalties applicable to non-compliance);
    - Possible power imbalances between manufacturers and suppliers; and
    - Disagreement on the existence and responsibility for the failure.
- Treasury considered (as an alternative to the status quo and education & guidance), **the introduction of a prohibition against not indemnifying suppliers**, supported by penalties and other enforcement mechanisms, and / or a prohibition against manufacturers retaliating against suppliers who request indemnification

Greenwashing

What is Greenwashing?

- ‘Greenwashing’ is a term used to describe false or misleading environmental claims. These claims may be used by businesses to appear more environmentally beneficial / sustainable than they really are:
  - For example, “Carbon Neutral”, “Better for the environment”, “Made from recycled materials”, when that is not the case.
- Greenwashing has been a compliance and enforcement priority for the ACCC and ASIC in the last two years, as the increasing awareness among consumers of the environmental impact of their purchasing decisions has seen ‘green claims’ become a powerful marketing tool:
  - Companies use green claims to differentiate their brands and products from their competitors and for general market positioning; and
  - Consumers are often willing to pay a premium for ‘environmentally friendly’ products.
- The prioritisation of enforcement of greenwashing by the ACCC (and ASIC) means that the potential of prosecution and significant penalties is very high

ACCC's Eight Principles for Trustworthy Environmental Claims

In December 2023, the ACCC published guidance for businesses, setting out 8 principles for making trustworthy environmental claims. These are:

1. **Make accurate and truthful claims**
2. **Have evidence to back up your claims**
3. **Do not hide or omit important information**
4. **Explain any conditions or qualifications on your claims**
5. **Avoid broad and unqualified claims**
6. **Use clear and easy-to-understand language**
7. **Visual elements should not give the wrong impression**
8. **Be direct and open about your sustainability transition**

Recent Regulatory Greenwashing Actions

Recent regulatory actions have included:

- **ASIC: Mercer Super:** (December 2023), agreed to pay an AU$11.3 million penalty in settlement of the first greenwashing proceedings brought by ASIC. The penalty is subject to Federal Court approval. ASIC had alleged that:
  - Merger represented that its 'Sustainable Plus' investment options excluded investments in companies involved in carbon intensive fossil fuels, alcohol production and gambling; and
  - In fact, the Sustainable Plus options had investments in 15 companies involved in the extraction/sale of carbon intensive fossil fuels, 15 companies involved in alcohol production, and 19 companies involved in gambling.
- **ASIC: Active Super:** (August 2023), ASIC commenced proceedings alleging that Active Super had represented on their website that they eliminated investments that posed a threat to the environment and the community, including tobacco manufacturing, oil tar sands and gambling (as well as excluding Russian investments following the invasion of Ukraine):
  - ASIC alleges that Active Super's holdings in fact included a range of gambling, tobacco, Russian and coal mining investments.
- **ASIC: Vanguard Investments**: (July 2023), ASIC commenced civil proceedings against Vanguard Investments for alleged false and misleading statements that all securities in the Vanguard Ethically Conscious Global Aggregate Bond Index Fund were screened against certain ESG criteria
- **ACCC: Undertaking by Moo Premium Foods:** (November 2023), that its plastic packaging were made "from 100% ocean plastic", when it was collected from coastal areas in Malaysia and not directly from the ocean

Contact

Ayman Guirguis

Partner
+61 2 9513 2308
Ayman.Guirguis@klgates.com

K&L GATES