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COMPETITION + CONSUMER LAW INSIGHTS:

2023-24 REVIEW AND OUTLOOK

2024

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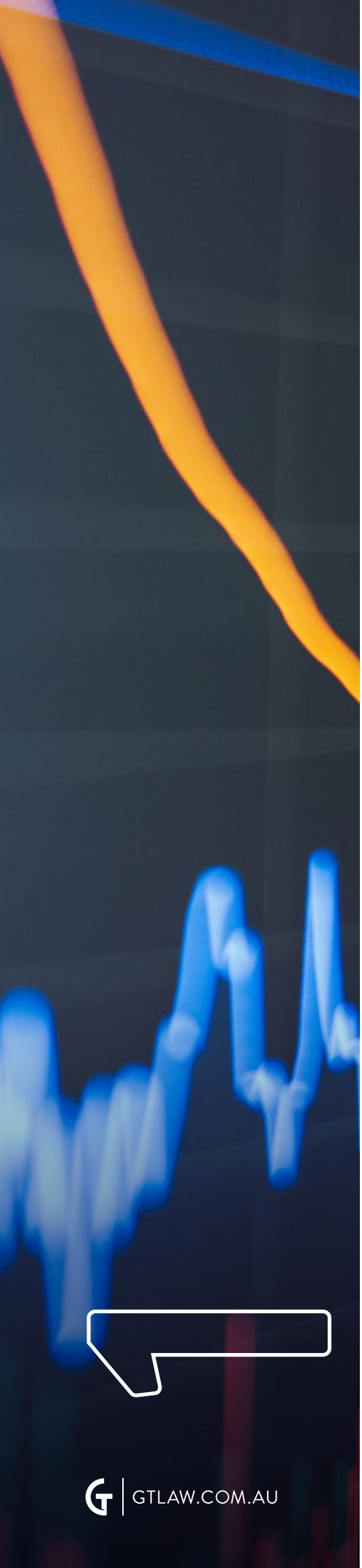
FOREWORD: 2023-24 REVIEW AND OUTLOOK



INTRODUCTION

As 2023 marked Gina Cass-Gottlieb's first full calendar year as Chair of the ACCC, we reflect on ways the Chair and Commissioners have implemented and emphasised some of the ACCC's 2023-24 compliance and enforcement priorities of 2023–24 and comment on shifts in the ACCC's tactical approach to enforcing the *Competition and Consumer Act 2010* (Cth) (**CCA**).

As we foreshadowed in last year's Competition and Consumer Insights publication, the ACCC has continued to emphasise the need to protect consumers from exploitation in the context of cost of living pressures, to ensure that environmental claims are accurate, and has continued to engage with financial services and payments, and the digital services that have become even more important in our lives.

The legal backgrounds of Chair Gina Cass-Gottlieb and Commissioners Liza Carver and Stephen Ridgeway may be discerned in a renewed emphasis on the significance of facts over theories, and the analysis of factual and economic evidence, which has resulted in a more interventionist but also more pragmatic approach in merger reviews, and a more targeted approach in other areas.

At the same time, the ACCC continues to argue for legislative change where it feels that existing laws and procedures are not resulting in the enforcement outcomes it is seeking. The Chair and Commissioners with a particular background in legal private practice have been especially active in arguing the case for change to lawmakers and legal practitioners, resulting in an energetic debate which is certain to continue through 2024.

NEW LEGAL AND PRACTICAL FOCUS

In her early days as Chair Cass-Gottlieb referred to the ACCC's role as to "maintain effective competition", which might have suggested a less interventionist approach to markets. But in 2023 she affirmed the ACCC's position of "making markets work" and an intention to "foster and support competition", noting that the statutory purpose of the CCA refers to the promotion – and not just the maintenance – of competition in order to enhance the welfare of all Australians.

The first full year of Chair Cass-Gottlieb's leadership of the ACCC has seen a refinement in emphasis on legal issues and renewed focus on competition and consumer issues that have previously been explored by the ACCC, including in relation to supermarkets, partly due to the directions of the Australian Government but largely aligning with the ACCC Chair and Commissioners' existing priorities and enforcement posture.

In mergers, the ACCC has expressed concerns over concentration levels with perceived links to competition and productivity levels. While the ACCC opposed a significant number of mergers outright in 2023 (the highest number of oppositions in the past decade), the ACCC also appears to be more willing to engage with business to restructure rather than reject acquisitions outright, at least in appropriate circumstances. At the same time, Chair Cass-Gottlieb's recent experience of the merger approval process from the ACCC's perspective appears to have convinced her that procedural and even substantive changes to that framework are necessary.

ENFORCEMENT APPROACH AND OUTCOMES

The ACCC commenced proceedings, accepted court-enforceable undertakings and obtained penalties in a significant number of high-profile consumer protection matters in 2023. We expect the ACCC's focus on consumer protection to continue in 2024, amid growing financial pressures and a persistent 'cost of living' crisis.

The ACCC also signalled concerns around misleading or deceptive environmental claims or 'greenwashing', though so far its only public enforcement action in this area has been in accepting a court-enforceable undertaking in relation to '100% ocean plastic' representations from yoghurt manufacturer MOO Premium Foods Pty Ltd.

In contrast, 2023 was a quiet year for new competition law proceedings, with no public enforcement action commenced by the ACCC in that area since the cartel case against Swift Networks alleging bid-rigging and price-fixing in the supply of services and equipment to mining sites in the Pilbara. That case was brought in February 2023 – more than a year ago.

The ACCC did not take any public enforcement action or commence proceedings in relation to alleged anti-competitive agreements or concerted practices, misuse of market power or exclusive dealing under sections 45, 46 and 47 of the CCA. Of the four Federal Court decisions handed down in 2023 competition proceedings commenced by the ACCC, three were cartel cases (Delta Building Automation, BlueScope and Swift Networks) and one was in relation to resale price maintenance (Techtronic).

It was largely left to private litigants to continue to test the misuse of market power provision under section 46 in 2023, noting there is only one ACCC case on foot (which was commenced against Mastercard in May 2022) while there are five private section 46 cases currently before the Courts (*Epic Games v Apple, Epic Games v Google, Dialogue Consulting v Instagram, Engage Marine v Tasmanian Ports Corporation* and *Stillwater Pastoral Co v Stanwell Co*.)

These results may be attributable to the ACCC taking more time and undertaking closer legal analysis under Chair Cass-Gottlieb's stewardship, suggesting a more forensic approach to gathering evidence and testing the likelihood of certain conduct to substantially lessen competition more rigorously before commencing proceedings in relation to Part IV breaches.

In recent years, the ACCC has also trended towards alleging "attempts" or "attempts to induce" cartel conduct, including the ongoing case of Qteq and the successful outcomes in ARM Architecture and Delta Building Automation. This new focus on attempts to induce has occurred in the context of the first instance decision in BlueScope where the Federal Court held BlueScope had attempted to induce cartel conduct in the form of fixing or controlling prices for flat steel products. The case is currently on appeal.

MERGER REVIEWS, AUTHORISATIONS AND REFORMS

Chair Cass-Gottlieb and the newly constituted ACCC appear to have made a significant impact on Australian merger control in 2023. Aside from proposing material reforms to Australia's merger laws, the ACCC opposed four public informal merger applications and one merger authorisation in the 2023 calendar year, with mixed results from the Australian Competition Tribunal which will inform the debate over changes to the merger regime. The ACCC's use of undertakings was down somewhat after a record 2022 but still remains a very significant tool in granting both informal merger clearance and formal merger authorisation.

More informal merger clearances have been opposed

In relation to informal merger clearance:

+ Australian Clinical Labs/Healius was opposed after the ACCC raised concerns about the markets for community and public pathology services, and rejected an enforceable undertaking, the takeover offer was then withdrawn;
+ Transurban/Horizon Roads was opposed after the ACCC raised concerns about competition for future toll road concessions, though it had cleared previous toll road acquisitions on the basis of undertakings to share traffic data;
+ Woolworths' acquisition of the Supa IGA in Karabar was opposed after the ACCC raised concerns about retail grocery competition in the local area, having opposed Woolworths' acquisition of the same site in 2008; and
+ Qantas's acquisition of the remaining shares in Alliance Airlines was opposed after the ACCC raised concerns about competition in corporate rural and regional air transport services in Queensland and/or the Western Australia and general services on one particular route – having previously investigated but taken no action in relation to the completed acquisition by Qantas of the initial 19.9% of shares.

This represents a significant increase from zero oppositions in 2022 and only one in 2021.

In 2023, the ACCC decided to not oppose nine informal public merger applications, including two proposed mergers in which it accepted court-enforceable undertakings to address its competition concerns:

+ Viva Energy/OTR Group following an undertaking to divest 25 retail fuel and convenience stores in South Australia; and
+ Sika AG/MBCC Group following an undertaking to divest part of MBCC's business in overseas jurisdictions and all of its business in Australia and New Zealand.

There appears to have been a reduction from calendar year 2022, when six informal clearances were granted on the basis of undertakings. In context, the proportion of public merger reviews in which the ACCC decided to not oppose a merger after accepting a court-enforceable undertaking from the merger parties increased from 8% in financial year 2021/22 under the former Chair to 29% in 2022/23 under the current Chair. This is the highest proportion of public merger reviews which were not opposed subject to accepting court-enforceable undertakings in over 10 years.

In its most recent annual report, the ACCC signalled that it will increasingly use its compulsory information gathering powers in merger investigations where concerns warrant increased evidence gathering. This is borne out by the fact that the ACCC used its compulsory information gathering powers in 52% of public merger reviews in 2022/23, up from 50% in 2021/22 and 32% in 2020/21 and is the highest in the past 10 years.

Merger authorisations give a glimpse of a possible future

Only one new application for formal merger authorisation was lodged in 2023. In June 2023 Brookfield and MidOcean applied to the ACCC for authorisation of their joint acquisition of Origin Energy, and the ACCC granted that authorisation, subject to undertakings, after finding that the public benefits in accelerating the energy transition outweighed the public detriments.

Although that acquisition has not gone ahead, the authorisation was a landmark in the ACCC's treatment of mergers – and potentially other authorisations – with environmental benefits.

The year also saw a number of previously lodged applications determined by the ACCC or on review by the Australian Competition Tribunal:

+ in June 2023 the Tribunal upheld the ACCC's decision in December 2022 not to authorise the spectrum-sharing agreement between Telstra and TPG Telecom;
+ also in June 2023 the ACCC granted authorisation to the merger of Linfox Armaguard and Prosegur Australia, subject to undertakings as to price and non-price behaviour; and
+ in August 2023 the ACCC decided not to authorise ANZ's proposed acquisition of Suncorp's banking business, though on review the Australian Competition Tribunal decided to authorise the acquisition in February 2024.

Before the Armaguard/Prosegur and Brookfield/Origin applications, under the current framework the ACCC had never granted merger authorisation on the basis of net public benefits after finding that a transaction was likely to result in a substantial lessening of competition; it had only granted authorisations after finding there was no lessening of competition and so no need to consider public benefits.

Similarly, before those two applications the ACCC had only once granted merger authorisation subject to accepting court-enforceable undertakings from the merger parties.

Both of those authorisations involved questions of the quantification and verification of public benefits claimed by the merger parties, with detailed testing and consideration of parties' claimed benefits.

The Tribunal's hearing in the Telstra/TPG matter was the first merits review of an ACCC merger authorisation decision under the current framework. It gave important insights into the scope of such a review that will inform the merger reform debate, where the ACCC also proposes that its merger decisions should be subject to limited merits review by the Tribunal.

Merger reforms

Changes to the process by which the ACCC reviews and intervenes in mergers and acquisitions have been a key focus since former Chair Rod Sims set out the ACCC's concerns with the existing system in August 2021. On her appointment as Chair of the ACCC in 2022, Gina Cass-Gottlieb said that she welcomed the debate on merger reform; she has since affirmed the ACCC's view that the current process is not fit for purpose and needs to be substantially overhauled.

In 2023–24 the ACCC laid out further details of its proposed changes in submissions to Treasury and addresses to the public. Essentially, the ACCC proposes that the current voluntary informal clearance and formal authorisation processes should be replaced by a new formal process under which:

+ all mergers above certain value or turnover thresholds would need to be notified to the ACCC, though the ACCC could also "call in" mergers that fell below those thresholds for assessment;
+ mergers to be assessed by the ACCC would not be allowed to complete until the ACCC had granted formal clearance or issued a "notification waiver" for non-contentious transactions;
+ the ACCC would grant clearance where it was satisfied that the merger would not be likely to substantially lessen competition or, as a subsequent inquiry, the merger would result in public benefits that outweighed the substantial lessening of competition;
+ if the ACCC did not grant clearance, the parties would need to seek limited merits review from the Australian Competition Tribunal or judicial review from the Federal Court if they wished to proceed with the transaction.

The ACCC also suggests additional legislative guidance in the interpretation of the "substantial lessening of competition" test but is no longer asking for substantive changes to that test or to the definition of "likely". These questions would be largely avoided by adopting a "satisfaction" standard instead of the current judicial burden of proof approach.

Treasury opened a consultation on options for merger reform in late 2023, issuing a consultation paper that set out the ACCC's model and a range of possible variations. The ACCC has described its proposal as a complete package that may not be effective unless it is adopted as a whole. However, the ACCC has identified two kinds of concern that may call for different – and arguably separable – kinds of response:

+ concerns about the ACCC's visibility of acquisitions and the timing of applications for clearance, which the ACCC says should be addressed by a mandatory notification scheme; and
+ concerns about the ACCC's ability to prevent acquisitions that they have determined to be anti-competitive from completing, which the ACCC says should be addressed by shifting from the judicial enforcement model to an administrative decision model.

Although from the ACCC's point of view a process that covered both categories of concern might be most effective, many jurisdictions around the world operate under different frameworks. For example, the United Kingdom has an administrative decision framework but does not have mandatory notification; while the United States has mandatory notification but a judicial enforcement framework.

The ACCC has raised the merger reform debate in the context of particular merger reviews, court decisions or other developments. For example, the ACCC's discovery that PETstock had acquired a number of its competitors without notifying the ACCC has been presented in support of the need for a mandatory notification framework; while the Tribunal's decision to authorise the ANZ/Suncorp merger "demonstrates the checks and balances of an administrative merger review process".

These references reinforce the importance that the ACCC ascribes to merger reform in the current climate, and echo the concerns of government about concentration and its relationship with productivity and the cost of living. We expect the debate to continue through the year.

COST OF LIVING PRESSURES

The ACCC's priorities have in different ways anticipated and responded to the Government's concerns, particularly in the case of the Government's efforts to address the 'cost of living' crisis. This alignment includes formal government directions such as the childcare inquiry – which the ACCC reported on in December 2023 – and now the supermarket inquiry discussed below; but it also reflects the longstanding concern of the ACCC and its Commissioners with the welfare of consumers, particularly those that may be vulnerable.

While inflation has eased somewhat since its peak in December 2022, concerns around the cost of living remain, and they will continue to guide regulatory settings and priorities across the economy in 2024 and beyond.

In December 2023 the Senate established a Select Committee on Supermarket Prices, which is due to present its final report by 7 May 2024. The Committee's Terms of Reference suggest a strong emphasis on the price of groceries to consumers, while acknowledging frameworks to protect suppliers interacting with supermarkets. Submissions to the Committee are concerned in roughly equal measure with reducing prices for consumers and increasing prices for suppliers, reflecting a tension that will continue to play out.

In January 2024 Chair Cass-Gottlieb said that, while the ACCC does not have a general power over potentially excessive pricing, it would respond to misleading or deceptive conduct such as "was/now" pricing that exaggerated discounts.

In February 2024 the Government directed the ACCC to conduct a price inquiry into the markets for the supply of groceries under Part VIIA of the CCA. The inquiry will examine the value chain at the supplier, wholesaler and producer levels, including competition at each level and the relationships between the levels. It will focus on small and independent retailers, particularly in regional and remote areas; as well as the impact of online shopping and other technological changes, the way prices are set at each stage, the price and availability of inputs across the supply chain, and non-price aspects such as loyalty programs and discounts on future purchases.

In 2008 the ACCC was directed to conduct an inquiry with similar terms of reference. The ACCC under Chair Graeme Samuel then found that grocery retailing in Australia was "workably competitive" and that any possible weakening in retail competition was unlikely to have contributed substantially to food price inflation; it did not identify any fundamental concerns with the grocery supply chain and did not find evidence that retail prices had risen while farm-gate prices had stagnated or declined.

Market conditions at the time of the 2008 inquiry were in some ways similar to those that we face today, with concerns about higher interest rates, sustained inflation and cost pressures. But considering the ACCC's particular focus on the cost of living and its increasing concern over concentration, it would be surprising if the next report were quite as sanguine as the last one.

The ACCC is required to give an interim report to the Treasurer by 31 August 2024 with a final report due by 28 February 2025. Given the ACCC's demonstrated concerns over the cost of living and its particular impact on disadvantaged consumers, we can expect a thorough and considered report.

The ACCC's inquiry does not include an examination of the Food and Grocery Code of Conduct, which is separately being reviewed by former Minister for Competition and Consumer Affairs Dr Craig Emerson. That review will focus on the effectiveness of the Code in improving commercial relations between grocery retailers, wholesalers and suppliers, and its final report is due by 30 June 2024.

Outside the Government, in August 2023 the Australian Council of Trade Unions launched an inquiry into unfair prices and trading practices, chaired by former ACCC Chair Professor Allan Fels. In February 2024 the inquiry reported a number of practices of concern, including the "was/now" pricing identified by the ACCC and the "rockets and feathers" effect where retail prices could quickly increase in response to rising costs but took much longer to fall when costs began to ease.

GREEN GOALS

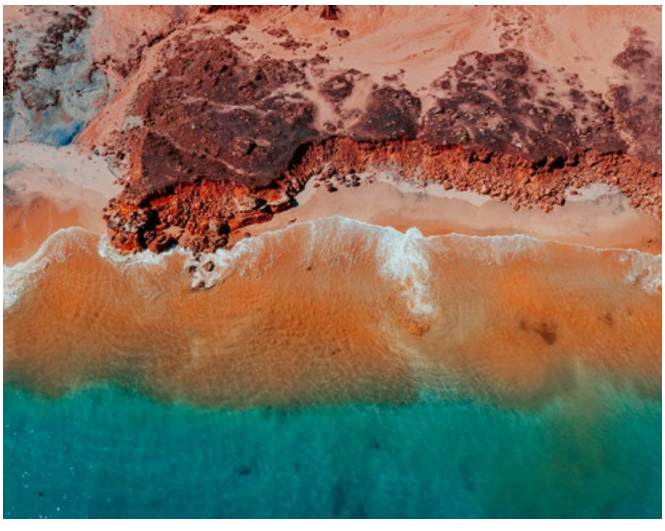
As discussed above, the ACCC continues to be closely involved on environmental issues in both competition law and consumer protection. This is another area where the ACCC's priorities intersect with the Government's commitment to achieve environmental outcomes through market mechanisms.

In March 2023 the ACCC reported the results of an internet sweep to identify "greenwashing" claims, finding that 57% of the 247 businesses reviewed had "made concerning claims about their environmental credentials", particularly in the cosmetic, clothing and footwear, and food and drink industries. In December it published its final guidance on environmental and sustainability claims, setting out eight principles for trustworthy claims along with the relevant legal framework and its approach to enforcement.

As noted above, in 2023 the ACCC achieved an enforcement outcome against MOO Premium Foods in relation to "100% ocean plastic" representations. It has not made any of its other greenwashing investigations public; but it has said that it has several active investigations underway. We expect more of these to take shape in 2024, whether they lead to court action, substantiation or infringement notices or corrective undertakings.

Product safety is also a key part of the ACCC's environmental focus, for example in administering the recall of LG lithium-ion batteries installed in solar energy systems.

Environmental goals are often raised in applications for merger and non-merger authorisation, where the ACCC may have to weigh the public benefits of cooperation or consolidation for environmental purposes against the need to preserve competition in emerging markets – such as the markets for electric vehicles and charging infrastructure. As noted above, the ACCC recognised the environmental benefits in the Brookfield/Origin authorisation. It has reported that a quarter of authorisation applications received between 2016 and 2021 included claims of environmental public benefits.



In 2023 it granted authorisation for:

+ groups of local councils to collectively tender and negotiate for the collection and processing of kerbside recycling;
+ business buying groups to jointly procure renewable energy; and
+ supermarkets to coordinate in the recycling of soft plastics following the collapse of the REDcycle program.

Notably, in November 2023 the ACCC granted authorisation to the Australian Energy Market Operator and electricity industry participants to coordinate the scheduling of repairs, maintenance and new connections – but only after a draft determination proposing to refuse authorisation, and further information from AEMO to substantiate its public benefit claims. Although the ACCC did not deny any authorisations for environmental purposes in 2013, the scrutiny it applied to the AEMO authorisation suggests that it will continue to test environmental claims like any other public benefits. Significantly, in Brookfield/Origin, the ACCC also granted its first merger authorisation on the basis of public benefits derived from enabling the merged entity to reach net-zero faster.

The ACCC is currently considering applications to authorise a scheme to increase the recycling of end-of-life tyres, and additional groups of local councils and renewables buying groups, so we expect more of these decisions through 2024.

INTERNATIONAL ZEITGEIST

The ACCC is increasingly engaged in the global competition law community. In 2023 it entered into cooperation agreements with its counterparts in Italy and Thailand, and in 2024 it added the Philippines to the list, adding to its already extensive network. The ACCC has surveyed overseas models to support its arguments for law reform, including in mergers and in the proposed introduction of a prohibition against unfair trading practices, and previously in relation to misuse of market power and increased penalties.

Conversely, the ACCC has led the world in its analysis of digital platforms and its News Media Bargaining Code; though its proposals for *ex ante* regulation are still with Treasury after consultation ended in February 2023, while the European Union is pressing ahead with the Digital Markets Act and the *Digital Services Act* and a range of enforcement actions.

The ACCC's recent focus on pricing and supermarkets echoes the United Kingdom and New Zealand, which have both completed market studies into that sector in recent years – though that aspect of the global zeitgeist has also aligned with domestic Government priorities.

Theories of harm developed by regulators overseas have also been adapted to Australian conditions. For example, the ACCC is increasingly focused on non-price competition and the loss of differentiated product offerings – a key aspect of its decision to oppose the Woolworths acquisition of the Supa IGA in Karabar, and its ongoing consideration of Endeavour's proposed acquisition of various pubs around the country. These theories of harm can be at odds with low price competition – an especially difficult tightrope to walk in the context of cost of living pressures. We expect that the ACCC will continue to exchange ideas and information with the rest of the world into 2024.

MAJOR REFORMS ON THE AGENDA

MERGER REFORMS

Treasury Competition Taskforce review: How did we get here?

Like much of the ACCC's advocacy for law reform over the years, the merger reform debate followed two high-profile losses in merger litigation before the courts, in Aurizon / PN (2019) and TPG / Vodafone (2020).

These losses led to a speech by ACCC Chair Rod Sims in August 2021, which questioned the appropriateness of the Australian merger reform process and set out his ideas for reform – explicitly acknowledging that he wanted to start a debate about reform. The package proposed by Mr Sims involved the following elements:

+ A remodelling of the requirement that the ACCC prove that a merger would be "likely" to substantially lessen competition. This "likely" standard, in the context of a forward-looking counterfactual, had proven challenging and had been the reason the ACCC lost in both the *Aurizon / PN* and *TPG / Vodafone cases* (as well as earlier decisions before both the Australian Competition Tribunal and the Federal Court);
+ The ACCC wanted an assumption introduced into section 50 that any transaction where the acquirer held market power was anticompetitive, which would need to be disproved by the merger parties to achieve clearance;
+ Introducing greater focus on structural assumptions within the section 50 process. This would be done through changes to the "merger factors" defined in subsection 50(3) in order to focus the attention of the Court on any change in the structure of markets, including where they entrenched or extended market power;
+ A mandatory and suspensory framework for mergers – which forces merger parties to notify the ACCC of deals that meet stated thresholds and ensures that completion cannot occur until they are cleared;
+ A single formal regime where the test the ACCC would apply would be framed to require it to be satisfied that the proposed acquisition is not likely to have the effect of substantially lessening competition.

The Coalition Government was not receptive. Shortly after Mr Sim's speech, Josh Frydenberg, the then Federal Treasurer responded, "While we must always ask if our regulatory framework is efficient and fit for purpose I do not want to put more regulatory barriers in front of business".

[1] ACCC v Pacific National [2019] FCA 699 (trial); [2020] FCAFC 77 (appeal).

[2] Vodafone v ACCC [2020] FCA 117.

The 2022 Federal Election changed the atmospherics around merger reform. The Hon Andrew Leigh MP was appointed as the Assistant Minister for Competition, Charities and Treasury. Minister Leigh had strong and longstanding concerns with competition and merger policy and made several early public comments about the need for competition reform in Australia. In April 2023, the ACCC accepted the invitation, as Chair Cass-Gottlieb in a speech to the National Press Club argued that Australia's merger control regime was no longer fit for purpose. Shortly after the address, in March 2023, the ACCC provided a submission to the Treasury outlining a more detailed set of proposals for merger reform.

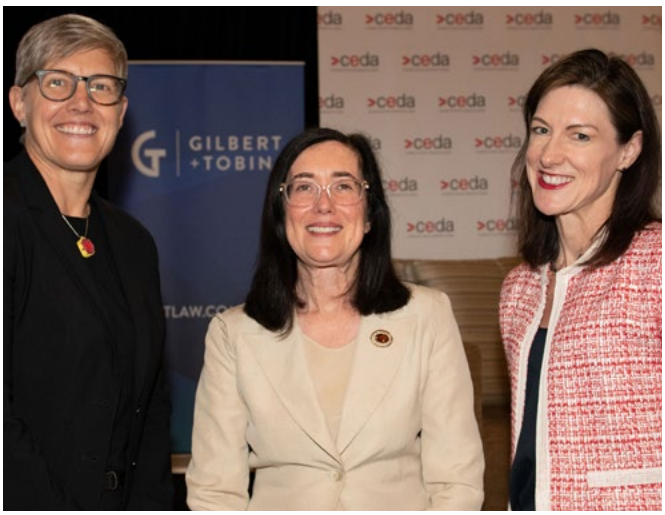
What are the differences between the current ACCC proposals under Chair Cass-Gottlieb and the original ones proposed by former Chair Sims?

The ACCC's updated proposal showed continuity with the concerns raised by Sims, as well as refinement in approach.[3]

1. The ACCC continued to press for a mandatory and suspensory framework. In doing so, it flagged suggested monetary thresholds that would capture almost all transactions by large Australian companies.

2. Importantly, the ACCC dropped its request for any change to the "likely" test. However, the ACCC continued its support for, and elaborated, on Mr Sims' request for a formal administrative system under which merger clearance decisions would face a different legal standard entirely. Instead of an evidentiary standard which must be proved before a Court, to the balance of probabilities, the ACCC instead called for the decision to be a purely administrative one that placed the onus on merger parties to establish their deals were not anti-competitive: i.e. whether the ACCC was "satisfied" that an acquisition was not likely to substantially lessen competition.

3. There would no longer be any right to seek to challenge the merits of an ACCC decision before the Federal Court (by seeking declaration or requiring the ACCC to take steps to block a deal). Instead, merger parties would be restricted to the limited merits review process that applied to merger authorisation decisions. This was a form of review introduced in 2017 following the Harper Review.



An overview of the differences is set out in Table 1 on page 13.

The ACCC approach had been shaped by experience with the limited merits review process which had been tested for the first time in early 2023 in Telstra / TPG. In an important decision by the Tribunal in January 2023[4], it held that the form of review was narrow and limited almost entirely to the material which the ACCC obtained during its review (including submissions, any evidence submitted by stakeholders as well as any material obtained by the ACCC through the use of compulsory powers).

Among other things:

+ The Tribunal's role was not to test the reliability or credibility of evidence tendered during the ACCC process. Merger parties have no ability to lead fresh evidence (including expert material), cross examine witnesses or otherwise challenge the cogency of evidence that was before the ACCC – including in circumstances where the merger parties did not have an opportunity to see or respond to that material during the ACCC review.
+ The Tribunal was unlikely to have the power to issue summons to compel witnesses to appear.
+ There were very limited, if any, rights of discovery or production. Indeed, the Tribunal was only free to allow new material that was brought into existence after the ACCC determination. It was not enough that parties had not previously seen material and wished to respond to it or had identified "gaps" in the record that required further investigation or testing.

Tribunal processes under the new regime were, in essence, a process of parties making oral submissions based on the documents and materials that were before the ACCC – and very little more.

[3] ACCC, "Treasury – Competition Taskforce: Merger Reform – Consultation Paper, ACCC Submission", January 2024.

[4] *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2) [2023] ACompT 2.*

The Competition Taskforce

In August 2023, almost precisely two years after Rod Sims made his initial pitch for major merger reform, the Treasurer announced the establishment of a 2-year Competition Review to be undertaken by a Competition Taskforce (**Taskforce**). The Taskforce was populated by a cross-disciplinary team of experienced Treasury, ACCC and Productivity Commission staff

The first reform agenda item? Merger reform.

The Taskforce sought views on:

- **A mandatory and suspensory notification process:** Should merger notification remain voluntary (like in the United Kingdom and New Zealand) or become mandatory (like in the United States or European Union)? If notification is to become mandatory, how should notification thresholds be designed (eg size of transaction and parties in the US, or based on turnover like in the EU and UK) and should there be an ability to review non-notifiable mergers (i.e. a call-in power like in the UK)?
- **Upfront information requirements:** If the regime will stipulate upfront information requirements, who should be setting these requirements (e.g., regulation or ACCC guidance)? What checks and balances could be incorporated to ensure they're not overly onerous and what should be the consequences for providing inaccurate information? Notably in the mandatory US enforcement model, the upfront information requirements in phase 1 review are relatively less onerous, with more information required if the matter proceeds to a phase 2 review. Compare this with the mandatory EU's administrative model, which has onerous information and document requirements upfront.
- **Is the decision maker a Court or is it an administrative decision ("likely" or "satisfaction")?** Who should the relevant decision-maker should be? The current merger process (referred to as an 'enforcement model' by the Tribunal) the ultimate arbiter of the lawfulness of a merger is the Federal Court, based on a evidentiary standard (i.e. the balance of probabilities) and requires the ACCC to establish that a merger it wants to block would be likely to substantially lessen competition (SLC). Under an administrative model, the ACCC would become the decision-maker and a merger would only be lawful if the ACCC was "satisfied" that the merger was not likely to SLC.
- **Review of administrative decisions:** In the absence of the Federal Court, who will the ACCC be accountable to, and in what type of review? Where the ACCC makes an administrative decision, what review rights (specifically merits review rights) should be afforded to merger parties? Is the limited merits review process, as experienced in Telstra / TPG, the appropriate review mechanism?
- **Procedural fairness: I**f there is to be an administrative decision-making function in the re-designed merger control regime, what are the appropriate procedural fairness mechanisms? Considerations include whether notifications should be made public, what opportunities parties should have to respond to any ACCC concerns, whether merger parties (and potential third parties) would have the right to access the information the ACCC relied on to make its decisions (e.g., third party submissions, economic reports), whether the ACCC is required to publish reasons, the applicable timeframes for review and what confidentiality protections should be available.
- **Entrench, materially increase or materially extend a position of substantial market power:** The Taskforce is seeking views on the ACCC's proposal that the "substantially lessen competition" component of the merger test be amended or expanded to include mergers that "entrench, materially increase or materially extend a position of substantial market power". Issues for consideration include whether the current merger test actually impedes the ACCC from challenging certain anti-competitive mergers or whether the proposal might discourage innovation or have some other unintended consequence.
- **Expanding the 'merger factors':** the ACCC proposed to expand the list of factors currently set out in section 50(3) of the CCA, including explicit reference to changes in market structure (i.e., the height of barriers to entry and any increase in such heights as a result of the merger), whether the acquisition is part of a series of acquisitions (addressing the "creeping acquisition" concern detailed above), the nature and significance of assets to be acquired (e.g., data and technology assets), and the likelihood the acquisition would remove a potential competitor.
- **Public benefits:** whether merger authorisation should be retained or abolished, and if abolished, whether a public benefit test should be retained (and at what stage can it be considered).
- **Other issues** such as:
  - Should **related or ancillary agreements** should be considered when assessing the effects of a merger on competition under section 50 of the CCA?
  - Can there be any improvements or streaming to the processes for and interactions between **FIRB and ACCC merger filings?** Any changes to the current merger regime would need to be able to work effectively with the foreign investment framework.
  - Should **common ownership of minority interests** in competing firms and i**nterlocking directorates** be included as another factor when assessing mergers?
  - Should there be a **significance threshold** for joint ventures and minority acquisitions in section 50?

In drawing these various options and issues together, the Taskforce offered three options for reform of Australia's merger control regime, including the ACCC's proposal as "Option 3":

Table 1 - The Taskforce's options for merger reform

	Current regime	Voluntary formal clearance regime (Option 1)	Mandatory suspensory regime (Option 2)	Administrative model (Option 3)
Notification	Voluntary	Voluntary	Mandatory	Mandatory
Suspensory?	No	Yes, for notified transactions	Yes	Yes
Test applied	Is the merger likely to SLC? If seeking merger authorisation: Must be satisfied the merger is not likely to SLC or net public benefit	Is the merger likely to SLC? For notified transactions: Must be satisfied the merger is not likely to SLC or net public benefit	Is the merger likely to SLC? Note: Taskforce seeking views on whether merger authorisation process should still apply	Must be satisfied the merger is not likely to SLC or net public benefit
Primary decision-maker	Federal Court (ACCC prosecutes case if concerned merger likely to SLC and parties decide to proceed) If seeking merger authorisation: ACCC subject to Tribunal review	ACCC (for notified transactions) subject to review by the Tribunal) Federal Court (ACCC prosecutes case if concerned merger likely to SLC and parties decide to proceed)	Federal Court (ACCC prosecutes case if concerned merger likely to SLC and parties decide to proceed)	ACCC (subject to merits review by the Tribunal or judicial review by the Federal Court)

The debate and where to from here?

At the time of writing, the Taskforce recommendations are due to be provided to the Treasurer and any Government response has still to be released.

It is too early to predict the outcome, however several key issues in the debate have been clarified:

+ **The ACCC's proposed changes are fundamental – but are they supported by evidence?**

  Moving from a conventional, evidence-based approach for merger control to an administrative model is a fundamental realignment in favour of the ACCC's power to block deals. Is this appropriate? What is the evidence that the ACCC has not been able to block transactions that are anti-competitive?

  On this point, there is active debate between the ACCC and the industry. The ACCC argue that they see less than a third of all mergers that occur and that the evidentiary standard has led to the ACCC clearing deals it would otherwise be uncomfortable with.[5]

  Industry, in response, argues that the ACCC is likely to see more mergers than its fellow regulators (as a proportion of the total number of deals). Moreover, while it has lost a handful of high-profile merger cases in the Federal Court and Competition Tribunal, the ACCC has been successful in blocking or reshaping almost all of the transactions where it identifies concerns because most merger parties do not challenge an ACCC decision to oppose a transaction – or they withdraw from, or reshape, a transaction after any litigation commences.[6]

+ **If an administrative process is adopted, is limited merits review appropriate?**

  Both the Telstra / TPG and ANZ / Suncorp review processes have highlighted the remarkable limitations which now exist under the limited merits review process, including the acceptance by the Tribunal that its role is neither to test the evidence before the ACCC nor to afford merger parties procedural fairness. While this process may be appropriate in a voluntary authorisation process, where parties accept such limitations as the 'price' of seeking to a discretionary, administrative authorisation, there is a question whether parties that are subject to a formal and mandatory process should be limited in the same way.

+ **If a mandatory notification process is adopted, how can we avoid this becoming an inefficient and costly burden on the economy?**

  Any mandatory notification process must be structured in a way that avoids imposing inefficient and unnecessary costs and burden on Australian deals. This includes ensuring thresholds are appropriate and that a "fast track" exemption process is in place and workable.

[5] ACCC, "*Treasury – Competition Taskforce: Merger Reform – Consultation Paper, ACCC Submission*", January 2024.

[6] Law Council of Australia, "Competition Review: Response to further ACCC submission", 8 February 2024.

HISTORY REPEATING ITSELF: SECTION 50 OVER THE YEARS

The current debate surrounding Australia's merger control regime is not new. Prior to now, there have been eight reports which have explored proposals to change Australia's merger control regime since 1974 when section 50 was introduced.[1] However, only a small number of reforms resulted from these reviews.

Interestingly, some of the key changes which are currently being debated have been explored by previous competition policy inquiries:

+ **Mandatory notification of transactions:** the requirement that the regulator be notified of transactions meeting a prescribed thresholds was first recommended by the Attorney General's Department in a 1984 Green Paper on the Trade Practices Act 1974. Mandatory notification was again considered in 1989 in the Griffiths Report (which recommended against its introduction), in 1991 in the Cooney Report (which supported mandatory notification), and in 1994 by the Treasury in a discussion paper (which supported mandatory notification). Despite these recommendations, successive governments have opted to retain the informal process because of its flexibility and efficiency.
+ **Changes to the SLC test**: the SLC test was present when section 50 was enacted. However in 1997 it was replaced with a less restrictive test, being 'market dominance' test, meaning that transactions were only prohibited where they resulted in, or substantially strengthened, a 'position to control or dominate a market'. The rationale for this amendment was that Australian firms should be allowed to achieve economies of scale to improve international competitiveness. In 1991 the Cooney Report recommended that the 'dominance test' set the threshold too high and recommended a return to the SLC test. Following this, in 1992, the SLC test was adopted once again in section 50 and has remained since.

The fact that Australia's merger control regime has remained virtually unchanged since 1992 despite frequent reviews, has prompted some commentators, including Justice Michael O'Bryan, to conclude that it is difficult to conclude that the system requires significant reform.

[1] Swanston Report (1976), Attorney General's Department Green Paper (1984), Griffiths Report (1989), Cooney Report (1991), Hilmer Report (1993), Treasury Discussion Paper (1994), Dawson Report (2003), Harper Report (2015).

The following table outlines the various changes to the ACCC's proposed merger reforms under the previous Chair, Rod Sims, and the current Chair, Gina Cass-Gottlieb. As highlighted in the table below, the ACCC no longer calls for amendments to the merger factors (including for digital platforms) or definition of 'likely' in section 50, or for the ACCC's prior recommendations to add deeming provisions or provisions allowing agreements to be taken into account. The ACCC largely retains its calls for a mandatory notification regime, call-in powers and limited merits review, but with a renewed focus on amending the SLC test in section 50 to expressly state that an SLC "includes entrenching, materially increasing or materially extending a position of substantial market power".

Table 2 - Table outlining how the ACCC's proposed merger reforms have evolved over time

	Speech by previous Chair Sims, 27 August 2021[7]	ACCC proposals to the Government, March 2023[8] and December 2023 *(First proposals under Chair Cass-Gottlieb)*	ACCC response to the Competition Taskforce Consultation Paper, January 2024[9] *(Third proposal under Chair Cass-Gottlieb)*
Proposed amendments to the process			
Mandatory notification	Yes: Proposed a single new formal merger regime, whereby all acquisitions above specified thresholds would be subject to mandatory notification to the ACCC before proceeding. No specific thresholds were proposed.	Yes: Proposed the introduction of mandatory notification if the merger meets "specified thresholds", being a turnover threshold of $400 million or a global transaction value threshold of $35 million.	Yes: Same as previous with the addition of: + A formal clearance model where merger parties must convince the ACCC the proposed transaction will not SLC. This will align with many OECD countries; + A fast-track regime where parties must not complete the transaction without ACCC or Tribunal approval, or unless the ACCC grants a 'fast-track waiver' from the full notification and approval requirements.
Call-in powers	Yes: The ACCC should have a 'call in' power for proposed acquisitions that are below the thresholds but where the ACCC considers there are potential competition issues which require a public review.	Yes: Under the ACCC's preferred option, the call-in power would only be relevant for a subset of transactions that fall below the notification requirements, but under the first option proposed by Treasury, the call-in power would be a central linchpin of the regime for all transactions because notification is voluntary.	Yes: Under the ACCC's preferred option, the call-in power would only be relevant for a subset of transactions that fall below the notification requirements, but under the first option proposed by Treasury, the call-in power would be a central linchpin of the regime for all transactions because notification is voluntary.
Burden of proof	The ACCC must be satisfied that the proposed acquisition is not likely to have the effect of substantially lessening of competition.	Proposed reversing the burden so that it would lie with the parties to demonstrate to the ACCC's positive satisfaction that their transaction is not likely to SLC.	Proposed an approval test where the ACCC (and Tribunal on review) must grant approval if "satisfied there is no likely SLC".
Limited merits review	Yes: Proposed limited merits review by the Australian Competition Tribunal (the Tribunal) rather than the Federal Court.		

[7] ACCC, Speech by Rod Sims titled 'Protecting and promoting competition in Australia keynote speech' delivered to the Competition and Consumer Workshop 2021 – Law Council of Australia on 27 August 2021: https://www.accc.gov.au/about-us/media/speeches/protecting-and-promoting-competition-in-australia-keynote-speech.

[8] ACCC, Submission to Treasury on merger reform, 9 March 2023: https://www.accc.gov.au/system/files/submission-to-treasury-regarding-merger-reform.pdf; ACCC, Submission to Treasury on ACCC preliminary views on options for merger control process, 20 December 2023: https://www.accc.gov.au/system/files/accc-submission-on-preliminary-views-on-options-for-merger-control-process.pdf.

[9] ACCC, Second submission to Treasury on urgent need for merger law reform, 31 January 2024: https://www.accc.gov.au/system/files/merger-reform-submission.pdf.

	Speech by previous Chair Sims, 27 August 2021	ACCC proposals to the Government, March 2023 and December 2023 *(First proposals under Chair Cass-Gottlieb)*	ACCC response to the Competition Taskforce Consultation Paper, January 2024 *(Third proposal under Chair Cass-Gottlieb)*
Proposed amendments to the legal test			
Merger factors	Yes: The merger factors should be revised to focus on the structural conditions for competition that are changed by the acquisition to the detriment of competition.	No: This was not addressed under the new Chair.	
Definition of 'likely' in section 50	Yes: Proposed defining 'likely' in the legislation for the purpose of merger review to include 'a possibility that is not remote'.	No: The current precedent interpreting 'likely' as a 'real chance' or 'real commercial likelihood' is appropriate.	
Deemed provisions	Yes: Proposed including a deeming provision for acquisitions that entrench, materially increase or materially extend positions of substantial market power.	No: This was not addressed under the new Chair.	
Provision allowing agreements to be taken into account	Yes: Proposed adding a provision to allow agreements between the merger parties to be taken into account in the merger assessment of the likely effect on competition.	No: This was not addressed under the new Chair.	
Substantial market power	Proposed a deeming provision for firms with substantial market power.	Proposed amendments to the SLC test in section 50 to expressly state that an SLC "includes entrenching, materially increasing or materially extending a position of substantial market power".	
Upfront information requirements	Merger parties would need to provide their best information up-front to support their notification. There would be clarity around timeframes for the ACCC's review. The ACCC's investigation of proposed acquisitions in the formal system would commence as a Phase 1 review, with those unable to be cleared at the end of Phase 1 moving to Phase 2.	Introduction of requirement for parties to provide the ACCC information (yet to be specified).	
Public benefits	Not considered	Proposed introduction of the option for merger parties to subsequently apply for clearance on public benefits grounds if the transaction is not cleared on competition grounds.	Proposed a separate process to have a merger considered on net public benefits.
Digital platforms	Yes: Proposed adding new merger factors specific to digital platforms to address whether the acquisition may result in the loss of potential competitive rivalry and/or increase access to or control of data, technology or other significant assets.	No: The ACCC now considers the economy wide reforms it has put forward provides the tools necessary for assessing such acquisitions.	

UNFAIR TRADING PRACTICES – A NEW ECONOMY WIDE PROHIBITION?

In light of Treasury's consultation on proposed reforms to regulate unfair trading practices in Australia during the second half of 2023, we can expect to see developments towards implementing a new unfair trading practices prohibition in Australia in 2024. While the outcome of the consultation is yet to be published, both Treasury and the ACCC indicated their preference for the highest level of protection in the proposed reforms, implementing both general and specific prohibitions.

The idea of a prohibition on unfair conduct in Australia is far from new. It was first recommended in 1997 by the Reid Committee, and the ACCC has been advocating for a ban on unfair trading practices in recent years, since the Digital Platforms Inquiry Report in 2019.[10]

'Unfair trading practices' are proposed to cover types of commercial conduct that are not prohibited by existing provisions of the Australian Consumer Law (**ACL**) but which can nevertheless distort competition and result in significant harm to consumers and small businesses. Whilst certain types of conduct are prohibited under the ACL, such as misleading or deceptive conduct, unconscionable conduct and bait advertising, Treasury's proposed reforms indicate we may see this wider-reaching, general prohibition introduced in 2024.

Treasury consulted on four distinct policy options to address unfair trading practices in Australia:

1. **Status quo (no change):** no reform to the current legislative framework.
2. **Amend statutory unconscionable conduct:** insert the concept of unfairness into the unconscionable conduct provisions in the ACL or expand the prohibition to mandate consideration of unfair conduct by the courts when determining whether conduct is unconscionable.
3. **General prohibition:** a general prohibition on unfair trading practices would be applied across all business sectors, separate from the current prohibitions under the ACL.
4. **A combination of general and specific prohibitions:** further specific unfair practices would be inserted into the ACL, as well as a general prohibition on unfair practices, similar to unfair trading approaches in the EU, UK and Singapore.

Whilst Treasury confirms that these practices are driven in part by the growing importance of digital platform services for small business and consumers, and the ACCC has previously recommended amending the ACL to include an unfair trading practices prohibition in the Digital Platforms Inquiry, Digital Platform Services Inquiry and Digital Advertising Services Inquiry, the ACCC has made it clear they are seeking the prohibition to be economy-wide, applying to all businesses regardless of industry.

> *"The government is proceeding through a consultation process, which will conclude in November of this year, and we hope this will result in the introduction of an unfair trading practices prohibition across the economy."*
>
> *- ACCC Chair Gina Cass-Gottlieb, 14 February 2024, Economics Legislation Committee estimates hearing*

We recommend businesses keep a close eye on developments on this proposed reform. What constitutes an 'unfair' trading practice is currently unclear, and ACCC Chair Cass-Gottlieb recognised the inherent difficulty in what exactly constitutes 'unfairness' in a panel hosted at G+T last year. Chair Cass-Gottlieb:[11]

- argued that a legislative change will have the purpose of "*direct[ing] judges to think in a different fashion*" about what constitutes anticompetitive conduct; and
- recognised the active role that the ACCC would have to play in shaping the understanding and interpretation of 'unfairness' in both the community and the judiciary. Chair Cass-Gottlieb confirmed that as the legal standard of unfairness is identified and clarified, the ACCC would take a proportionate approach to investigation and enforcement appropriate to the nature of the conduct and the consumer harm it may cause, and issue guidance around the specific practices which it considered likely to contravene a fairness standard.

The development of an unfair trade practices prohibition may well be 2024's biggest achievement for the ACCC in the consumer protection space and we will be carefully watching for any guidance provided in the coming months.

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[10] See our earlier client update at Gilbert + Tobin, "Digital reform unfolds – ACCC releases Final Report on Digital Platforms Inquiry", 26 July 2019. Available at: https://www.gtlaw.com.au/insights/digital-reform-unfolds-accc-releases-final-report-digital-platforms-inquiry.

[11] Gilbert + Tobin, "Unfair Trading Practices: ACCC Chair Gina Cass-Gottlieb at G+T", 21 February 2023 (available at: https://www.gtlaw.com.au/knowledge/unfair-trading-practices-accc-chair-gina-cass-gottlieb-gt).

Examples of conduct identified by The Treasury as potentially amounting to unfair trading practices not covered by the ACL include:

Inducing consumer consent or agreement to data collection through concealed data practices.

Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice.

Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered.

Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy.

Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise).

Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights.

Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into).

All or nothing 'clickwrap' consents that result in harmful and excessive tracking, collection and use of data, and don't provide consumers with meaningful control of the collection and use of their data.

Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.

NEW 'DESIGNATED COMPLAINTS' FUNCTION

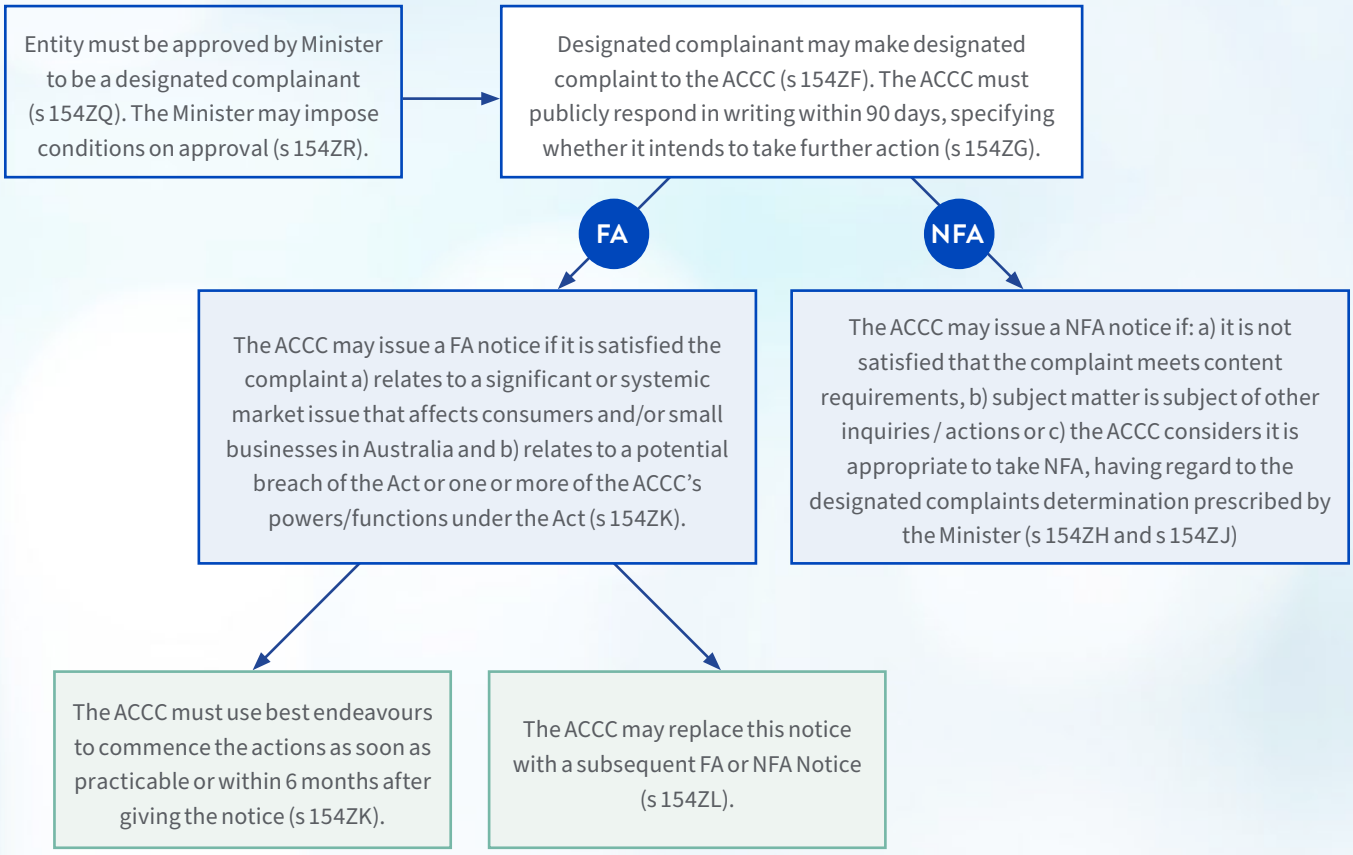
Just last month, on 15 February 2024, the Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (**Bill**) was introduced into Parliament, enabling designated consumer and small business groups to make complaints to the ACCC about significant or systemic market issues that affect consumers or small businesses in Australia. The designated complaints process will apply pressure and public scrutiny on the ACCC to be seen as actively considering complaints about issues affecting Australian consumers.

While anyone can submit a complaint to the ACCC, the ACCC has no obligation to action complaints. Under the designated complaints system, the ACCC must assess the complaint and publish information on its website where a complaint has been made by a designated complainant. Entities that represent the interests of consumers or small businesses in Australia can become designated complainants with approval of the Minister.

We expect the new designated complaints system may expedite the time the ACCC takes to consider and pursue matters of high political interest, as the ACCC will be required to specify within 90 days of receiving a designated complaint whether it intends to take further action (**FA**). If the ACCC issues a FA notice, it will be required to use "best endeavours" to commence those actions as soon as practicable and within 6 months after giving the notice. This process is set out below.

If the Bill is passed, the ACCC will be required for the first time to explain publicly why it considers it appropriate to take no further action (**NFA**) in response to certain complaints. Under the current regime, if the ACCC chooses to take NFA in response to a complaint, it may do so silently, or confidentially by writing a letter to the complaint (and parties involved), or publicly in a speech or media release (noting it has only done this on rare occasions).

Operation of the designated complaints system



We consider the public nature of this complaints process might also spark ACCC pursuit of enforcement outcomes in relation to consumer issues as they are raised in the public domain, and potentially private claims.

The Bill is expected to commence the later of 1 May 2024 or the day following Royal Assent.

AUSTRALIA'S DIGITAL REFORM AGENDA

In late 2023, the Federal Government voiced support for the ACCC's proposed regulatory reforms targeting digital platforms. As a reminder, the ACCC proposed a new forward-looking (or 'ex ante') regulatory regime for digital platforms in its September 2022 Interim Report, marking the mid-way point for its **Digital Platform Services Inquiry 2020-2025**. In its official response, the Federal Government announced in-principle support for the following proposals:

+ **Mandatory codes of conducts for designated digital platforms:** Treasury will develop a possible legislative framework enabling the creation of digital service-specific codes of conduct to address anti-competitive behaviour by designated digital platforms. The ACCC had recommended developing mandatory codes tailored to specific services such as search engines, app stores, advertising technology and mobile operating systems. Only those digital platforms considered to be 'gatekeepers' or essential trading partners would be subject to the codes which would promote competition by addressing tying and bundling, exclusive arrangements, impediments to switching and interoperability, data-related barriers, and transparency. We expect this to be dealt with as part of the Competition Taskforce and understand that codes for app stores and search services will be given priority.
+ **Economy-wide ban on 'unfair trading practices':** Treasury has released a Regulation Impact Statement for consultation on options to address certain 'unfair trading practices' identified by the ACCC. These reforms are intended to target a range of commercial conduct including conduct specific to digital platforms such as harmful and excessive data tracking, collection and use; all-or-nothing clickwrap consents; and 'dark patterns' which are deliberate user interface design strategies that impede choice and harm consumers). As noted in the "Major Reforms – Unfair trading practices" section on page 17, Treasury consulted on these proposed reforms during the second half of 2023. While the consultation process is closed and the outcome of the consultation is yet to be published, both Treasury and the ACCC have indicated their preference for the highest level of protection in the proposed reforms, implementing both general and specific prohibitions.
+ **Internal dispute resolution standards for digital platforms:** The Government called on industry to develop voluntary internal dispute resolution standards by July 2024 to address the ACCC's concerns around consumers' access to appropriate dispute resolution processes when dealing with online services (including in relation to scams, harmful apps and fake reviews). There have been no further developments since then.

The ACCC welcomed the Federal Government's response to its proposed regulatory reforms and cited the need for Australia to keep pace with other countries in its media release:

"The United Kingdom, Germany, Japan and the European Union have already announced or implemented significant new competition and consumer regulations for digital platforms… It is our experience that platforms rarely extend changes made in one jurisdiction to others, so it is critical that the Australian Government works quickly to implement these reforms so that consumers and small businesses aren't left behind."

MERGERS – 2023 IN REVIEW

2023 SHOWS THE ACCC IS TOUGH AND GETTING TOUGHER FOR DEAL MAKERS

In addition to the ACCC's advocacy for significant reforms to Australia's merger laws (discussed above in section 2.1 "Merger Reforms"), from December 2022 to December 2023, the ACCC **opposed (or refused to authorise)** six of the 24 transactions that were subject to informal clearance or merger authorisation during this period.

This was the highest number of blocked transactions in a single year since 2006, when the ACCC also blocked six.

The deals blocked last year were the following:

+ Qantas/Alliance Airlines was opposed after the ACCC expressed concerns that combining two of the largest charter service providers in Western Australia and Queensland would significantly lessen competition for regional services, and especially "fly in, fly out" services into resource areas.
+ Woolworths/SUPA IGA (Karabar) was opposed after the ACCC expressed concerns that the transaction would remove an important independent supermarket in the Queanbeyan and Jerrabomberra area which competed with larger chains through a differentiated shopping experience.
+ Transurban/Horizon Roads was opposed after the ACCC raised concerns that the transaction would enhance incumbency advantages held by Transurban including access to skilled traffic modellers and data, reducing scope for entry by a competitive alternative private toll road operator in future bidding processes.
+ Australian Clinical Labs/Healius was opposed after concerns that it would combine two of the three largest providers of pathology services in Australia.
+ Telstra/TPG, in which the ACCC rejected an application for authorisation of a network sharing arrangement in regional areas. The ACCC expressed concern that, by enhancing the market position of TPG, the deal would weaken the competitive position of Optus to a degree that it would reduce future investment in its own competitive regional network. This decision was upheld in mid-2023 on review by the Australian Competition Tribunal, although for different reasons.
+ ANZ/Suncorp was opposed after the ACCC's concerns that it would further entrench a highly concentrated market structure, and facilitate coordination, while also limiting the options for second-tier banks to combine and strengthen in a way that would create a greater competitive threat to the major banks. However, on 20 February 2024, the ACCC's decision was overturned by the Australian Competition Tribunal, which was satisfied that the transaction would not likely substantially lessen competition in any market.

Of the 11 transactions (both authorisations and informal reviews) that were not opposed in the 2023 calendar year, two informal reviews and two authorisations involved court-enforceable undertakings:

In Sika AG/MBCC Group the parties undertook to divest MBCC Group's entire business in Australia and New Zealand.

In Viva Energy/OTR Group the ACCC accepted an undertaking from Viva Energy to divest 25 Coles Express sites in South Australia.

Armaguard/Prosegur was approved on subject to a remedy involving price and service level commitments, on the basis that, without the proposed transaction, it was highly probable either Armaguard or Prosegur would withdraw from the declining cash-in-transit market, and this would cause significant disruption to the public. Accordingly, taking into account the remedy, avoiding this disruption was likely to result in a public benefit that would outweigh the likely public detriment.

Brookfield/Origin was approved, subject to remedies, on the basis that the likely gains for Australia's renewable energy transition amount to a public benefit sufficient to outweigh the likely public detriments.

Significantly, both of the Armaguard/Prosegur and Brookfield/Origin authorisations involved the parties offering – and the ACCC accepting – different forms of behavioural undertakings, demonstrating the ACCC's capacity for creative solutions to address concerns in particular cases.

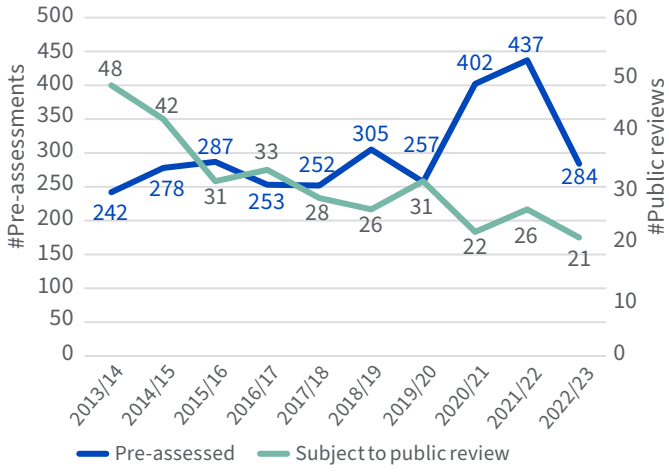
LESS TRANSACTIONS GO PUBLIC, BUT THOSE THAT DO ARE SCRUTINISED MORE CLOSELY

One interesting emerging trend is that the ACCC is escalating less matters to public review. However, those deals that are escalated to public review are being scrutinised more closely.

In FY22/23, the ACCC conducted a public review of 21 transactions, which is the lowest number of public reviews conducted since the ACCC commenced reporting on the number of mergers confidentially reviewed compared to those publicly reviewed in 2005/06. The total number of mergers reviewed by the ACCC decreased by 25% due to a slower M&A market.

Figure 1 below illustrates this is part of a broader trend that, in the past decade, the ACCC has conducted fewer public reviews, instead opting to pre-assess more transactions. However, despite subjecting fewer transactions to public review, two key data points suggest that the ACCC is scrutinising the transactions that are escalated more closely.

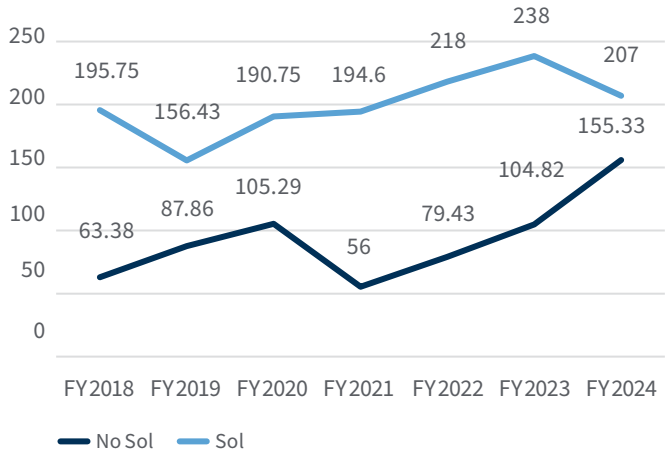
Figure 1 - Number of transactions pre-assessed vs subject to public review (by financial year)*



*Source: ACCC Annual Reports, excludes merger authorisations

First, as illustrated in **Figure 2**, the *duration* of public reviews is trending upwards, in both complex matters where a Statement of Issues (**SoI**) is published, and those where an SoI is not issued.

Figure 2 - Duration of public reviews in calendar days (by financial years)*

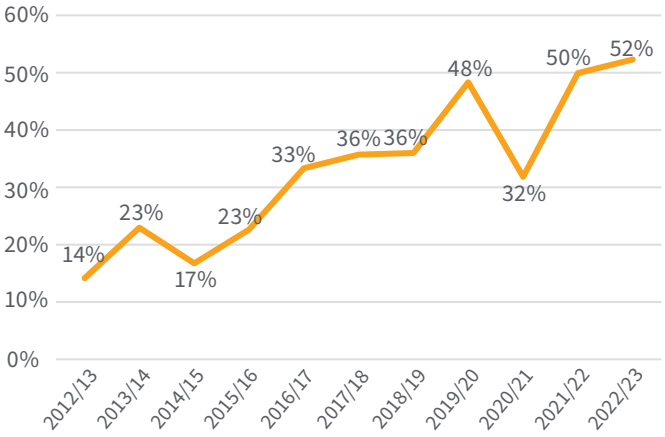


*Source: ACCC's informal merger review public register, excludes merger authorisations

Second, the ACCC is utilising its compulsory information gathering powers (i.e. issuing section 155 notices) more often.

In its most recent annual report, the ACCC has signalled that it will increasingly use its compulsory information gathering powers in merger investigations, where concerns warrant increased evidence gathering. In the past decade, the number of matters in which s 155 notices were issued has remained stable at an average of around 11 per year. This is despite the number of public review of mergers decreasing. As illustrated by the Figure 3 below, this suggests the proportion of public merger reviews where s 155 notices were issued is increasing.

Figure 3 – Proportion of public merger reviews where compulsory information gathering powers were issued (by financial year)*



*Source: ACCC Annual Reports, excludes merger authorisations

ACCC ENFORCEMENT ACTIVITY– OBSERVATIONS AND TRENDS

TRENDS IN THE ACCC'S APPROACH TO ENFORCEMENT OF THE CCA - 2023 -2024 SO FAR

It has now been almost two years since Chair Cass-Gottlieb assumed leadership of the ACCC. During this time, there has been a noticeable shift in ACCC enforcement actions and outcomes. In particular, over the previous 12 months, we have observed:

+ a reduction in the number of enforcement actions commenced by the ACCC for alleged contraventions of the competition law provisions of the CCA;
+ of the competition cases that have been commenced by the ACCC (especially in the last 12 months but also over the previous 24 months), there has been a focus on cartel conduct and, in particular, cartel cases that allege "attempts" or "attempts to induce" cartel conduct as opposed to allegations that parties having engaged in actual cartel conduct; and
+ there is an observable trend towards increased penalties in line with findings in *Australian Building and Construction Commission v Pattinson* (**Pattinson**),[12] as well as an expectation of further increases to penalty outcomes in the future as a result of increases to the maximum penalties imposed for contraventions of Australia's competition laws.

REDUCED ACCC ENFORCEMENT OF COMPETITION CASES

Calendar year 2023 saw the ACCC commence only one competition enforcement proceeding, which was against Swift Networks, alleging cartel conduct. This follows what appears to be a tendency by the ACCC over the last five years (and, in particular, in the last 12 months) towards prioritising the enforcement of consumer law cases under the Australian Consumer Law over competition law cases arising under Part IV of the CCA.

When asked recently by the Senate Committee about the ACCC's slowdown in taking competition law cases, Chair Cass-Gottlieb said

> *"We are as committed as we have ever been to taking these cases and investigating them. They have a significant degree of complexity because of each of the elements that are required… In certain respects, while we have a very strong pipeline of consumer matters, undoubtedly, it has always been the pattern that there have been more of those because of the complexity of the competition cases. But we think that each has big bang for buck in a deterrent sense. We do have a series of significant ones that we are working forward to be able to commence."*

[12] *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 – plurality held that a civil penalty must be no more than what might be reasonably necessary to deter further contraventions but need not be proportionate to the seriousness of the conduct, and that the maximum penalty does not need to be reserved for the most serious conduct.

The following table summarises the number of enforcement cases commenced by the ACCC:

Year proceeding commenced	Consumer enforcement cases	Competition enforcement cases	Other enforcement cases[13]	Proportion of competition enforcement cases
2023	7	1[14]	0	13%
2022	10	5[15]	0	33%
2021	6	3[16]	1[17]	30%
2020	11	5[18]	0	31%
2019	0	4[19]	0	100%

In parallel with Court outcomes, we have observed a significant increase in the ACCC's reliance on infringement notices as a mechanism of enforcement, predominantly focussed on contraventions of the ACL, as discussed further below in Part 5 "Consumer protection – observations and trends". For example, there were 39 infringement notices issued by the ACCC in 2023, compared with 8 infringement notices issued in 2022. Infringement notices represent a low-cost and timely enforcement mechanism for alleged minor breaches of Australia's competition and consumer law, which require the ACCC to have reasonable grounds for believing that a contravention has occurred. It is therefore unsurprising that there has been a significant recent uptick in the reliance on infringement notices in light of the ACCC's consumer-law focus, as comparatively to litigation, there are a readily available enforcement lever to pull.

In contrast, the ACCC has attributed the reduction in competition cases to them being much more uncertain and complex. Chair Cass-Gottlieb has recently recognised as such, stating to the Senate's Economics Legislation Committee in February 2024 that the lack of competition enforcement is attributable to "*the significant degree of complexity because of each of the elements that are required.*"[20] Chair Cass Gottlieb also stated that even though a focus on consumer cases had "*always been the pattern*" of the ACCC, "*we are as committed as we have ever been to taking [competition law] cases and investigating them" and there were "a series of significant [cases] that [the ACCC is] working forward to being able to commence*".[21]

Despite Chair Cass-Gottlieb's statements to the Senate Committee, it is unclear whether reference to a series of future cases means that the ACCC is exploring actions outside of the cartel prohibitions - e.g., for contraventions of sections 45, 46 or 47 of the CCA which require establishing that the conduct in question has the purpose, effect or likely effect of substantially lessening competition. Of the competition cases that the ACCC has brought in the previous 24 months, all but one have alleged a contravention of the cartel prohibitions. The only other competition case brought by the ACCC in the previous 2 years has been the *ACCC v Mastercard* case, where the ACCC has alleged a misuse of market power as well as anticompetitive exclusive dealing (or in the alternative, anticompetitive agreements).

What we are observing is with the reduction of ACCC actions under sections 45, 46 and 47 of the CCA, there has been an increase in private actions. Indeed, two key Australian competition cases on foot at the moment are private actions brought by Epic Games against both Apple and Google in respect of their alleged monopolistic control over app distribution platforms (i.e. the Google Play Store and Apple App Store). In addition to these two cases, there are currently a further three private actions alleging contraventions of section 46, the misuse of market power prohibition: *Dialogue Consulting v Instagram, Engage Marine v Tasmanian Ports Corporation* and *Stillwater Pastoral Co v Stanwell Co.*

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13 This category includes enforcement cases initiated by the ACCC under the *Competition and Consumer Act 2010* (Cth) (**CCA**) other than under the *Australian Consumer Law* and Part IV.

14 Swift Networks (cartel conduct).

15 Aussie Skips Recycling (cartel conduct), Qteq (cartel conduct), ARM Architecture (cartel conduct), Bingo Industries (cartel conduct), Mastercard (misuse of market power).

16 Techtronic (resale price maintenance), First Class Slate Roofing (cartel conduct), Delta Building Automation (cartel conduct)

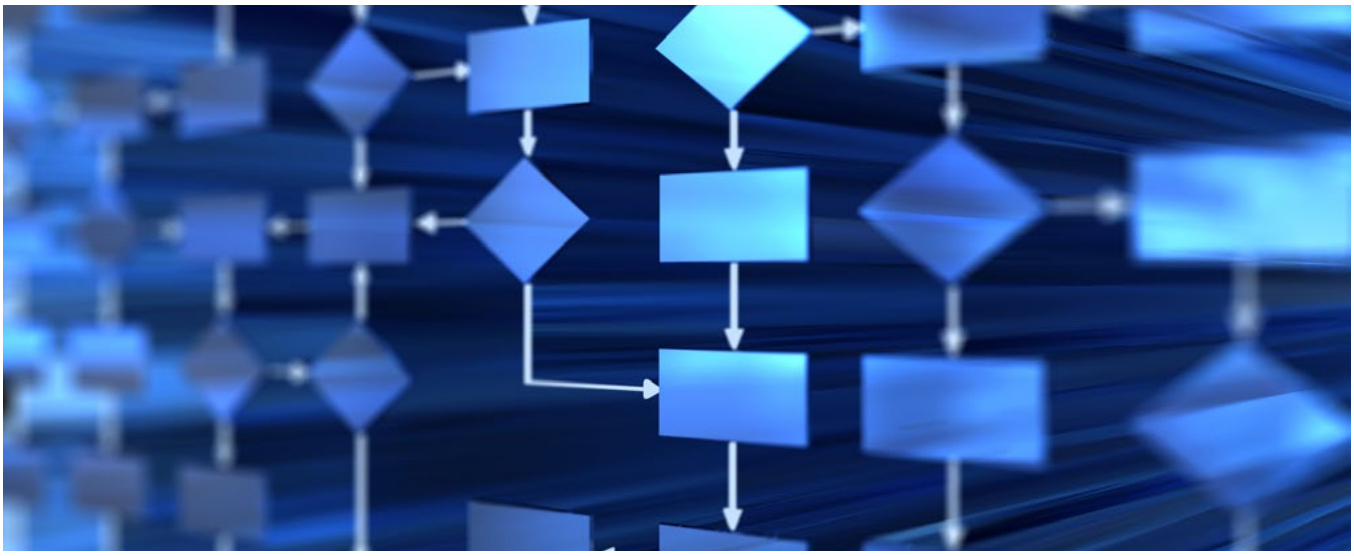
17 Lactalis Australia (industry codes).

18 J Hutchison / CFMMEU (Part IV – boycott provisions), Alkaloids of Australia (cartel conduct), Australasian Food Group (exclusive dealing), NQ Cranes (cartel conduct), B&K Holdings (resale price maintenance).

19 TasPorts (misuse of market power), BlueScope Steel (cartel conduct), Wallenius Wilhelmsen (cartel conduct), Vina Money Transfer (cartel conduct).

20 Senate Economics Legislation Committee, Proof Committee Hansard (14 February 2024) p. 136.

21 Senate Economics Legislation Committee, Proof Committee Hansard (14 February 2024) p. 136.



A SHIFT IN THE ACCC'S STRATEGY FOR COMMENCING CARTEL ENFORCEMENT PROCEEDINGS

As shown above, the ACCC has commenced only nine competition law proceedings in the last three years, seven of which have alleged contraventions of the cartel prohibitions.

From the cartel cases that have been commenced by the ACCC, we have observed an increase in the number of cases that allege "*attempts*" or "*attempts to induce*" cartel conduct as opposed to allegations that the parties having engaged in actual cartel conduct. For example:

+ in 2022, the ACCC brought proceedings against Qteq Pty Ltd, a mining equipment and technology services company, alleging that Qteq attempted to enter, or attempted to induce four other suppliers to enter into, contracts, arrangements or understandings which contained cartel provisions, including provisions to not supply particular services to large oil and gas companies, to share markets and to rig a tender; [22]
+ in 2022, the ACCC brought proceedings against ARM Architecture and its former managing director Anthony John Allen, alleging it had attempted to engage in cartel conduct when Mr Allen sent emails to eight other architecture firms in September 2020 asking the firms not to bid for the second phase of the university project;[23] and
+ in 2021, the ACCC brought proceedings against Delta Building Automation Pty Ltd alleging that it had attempted to make, or attempted to induce the making of, an arrangement or understanding with a competitor to engage in bid rigging.[24]

The increased reliance on "attempts" or "attempts to induce" cartel conduct may continue as an enforcement trend, following O'Bryan J's decision in *BlueScope*, where his honour found that "*an attempt to induce a price fixing understanding does not require…a commitment from distributors…[but] requires a step towards the inducement of the price fixing understanding which is more than merely preparatory of the inducement*".[25]

The ACCC appears to favour "attempt to induce" cases because it can target early, unilateral conduct which would only require evidence that one party took some initial steps to persuade another to reach some kind of non-committal, but common, understanding.

The ACCC's apparent enforcement strategy following the decision in *BlueScope* throws into question the utility and relevance of the separate concerted practices prohibition which was introduced into the CCA in 2017. The introduction of the concerted practices provisions followed calls by the ACCC in the 2010s for a looser basis for liability due to what was perceived to be inherent challenges with establishing a sufficient level of commitment for there to be an understanding in cartel conduct cases.

O'Bryan J's decision in *BlueScope* is currently the subject of appeal. Should the appeal be allowed, this may well revive the utility of the concerted practices provisions and it would be unsurprising to see a shift by the ACCC towards relying on them in future enforcement cases.

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[22] ACCC, "Oil and gas services company Qteq in court for alleged cartel conduct", 8 December 2022 (available at: https://www.accc.gov.au/media-release/oil-and-gas-services-company-qteq-in-court-for-alleged-cartel-conduct).

[23] ACCC, "ARM Architecture in court over alleged cartel conduct for university project", 30 September 2022 (available at: https://www.accc.gov.au/media-release/arm-architecture-in-court-over-alleged-cartel-conduct-for-university-project).

[24] ACCC, "ACCC takes action over alleged attempted cartel for National Gallery of Australia tender", 13 May 2021 (available at: https://www.accc.gov.au/media-release/accc-takes-action-over-alleged-attempted-cartel-for-national-gallery-of-australia-tender).

[25] *BlueScope Steel Limited* (No. 5) [2022] FCA 1475, at [657].

ALL ROADS LEAD TO HIGHER PENALTIES

Within the developing enforcement landscape, there is a clear trajectory towards higher penalties being sought by the ACCC and an increasing appetite of the Courts to impose such penalties for contravening conduct. There have been two key developments that will continue to drive this trend:

+ first, in 2022 the Commonwealth government significantly increased the maximum penalties for contraventions of key competition and consumer protection (as well as privacy) provisions in Australian law; and
+ second, the High Court case of *Pattinson* re-affirmed that the primary, if not sole, purpose of civil penalties is deterrence and in doing so, overturned an earlier decision of the Full Federal Court that used the concept of proportionality from criminal law to find that the maximum civil penalties are reserved for the worst category of cases. Rather, a majority of the High Court held that the relevance of the concept of proportionality to determining the appropriate penalty was reduced to ensuring that a balance was struck between the need for deterrence while ensuring a penalty was not oppressive.

While the new maximum penalties only apply to conduct engaged in on or after 10 November 2022, we have already observed record penalties for contraventions of consumer law under the previous penalty provisions – for example, $428 million penalty imposed against Phoenix Institute in July 2023 for unconscionable conduct and misleading representations,[26] and $57.5 million penalty imposed on BlueScope for attempts to induce price fixing, which is the subject of appeal.[27]

Of the eight enforcement proceedings initiated by the ACCC in 2023, only three of them relate to conduct engaged in after 10 November 2022 (against Emma Sleep, eHarmony and Express Online Training). These cases are still ongoing – however the new maximums coupled with the impact of the decision in Pattinson may well have significant implications for the level of penalties that may be imposed if the ACCC is successful.

[26] ACCC, "Record penalties of $438m ordered against Phoenix Institute and CTI for acting unconscionable and misleading students", 28 July 2023 (available at: https://www.accc.gov.au/media-release/record-penalties-of-438m-ordered-against-phoenix-institute-and-cti-for-acting-unconscionably-and-misleading-students).

[27] ACCC, "Record $57.5 million penalty for BlueScope's attempted price fixing", 29 August 2023 (available at: https://www.accc.gov.au/media-release/record-575-million-penalty-for-bluescope%E2%80%99s-attempted-price-fixing).

PROCEEDINGS COMMENCED IN CALENDAR YEAR 2023

KEY
COMPETITION
CONSUMER

17 FEBRUARY 2023

Swift Networks Pty Ltd
For bid rigging and price fixing when tendering to supply equipment and services to five Pilbara mining village sites. Swift Networks admitted it had engaged in cartel conduct and was penalised $1.2 million in September 2023

FEB

MAY

29 MAY 2023

Meg's Flowers
For engaging in alleged misleading conduct relating to representations that it was a local florist when it is in fact a national online business.

JUL

5 JULY 2023

Secure Parking
Alleged misleading conduct relating to its 'Secure-a-Spot' service, which represented to customers that a booking made using the service would reserve a parking space.

AUG

31 AUGUST 2023

Qantas Airways
For alleged false or misleading conduct relating to the sale of more than 8,000 flights after they had already been cancelled.

SEP

7 SEPTEMBER 2023

eHarmony
Alleged misleading representations relating to statements made about the pricing, renewal and duration of its memberships.

NOV

24 NOVEMBER 2023

RSA Express (trading as Express Online Training)
Alleged misleading conduct relating to the payment and time for completion of its online training courses offered to students for the responsible service of alcohol and construction induction training. It is alleged that Express Online Training falsely represented that participants would only pay after they passed, and the courses could be completed in one day.

SEP

22 SEPTEMBER 2023

EnergyAustralia
Alleged breaches of the Electricity Retail Code and Australian Consumer Law due to the way in which it notified customers of impending price changes.

DEC

14 DECEMBER 2023

Emma Sleep
Alleged misleading conduct in the advertising of its products, in that Emma Sleep falsely misrepresented that sales campaigns were limited in time and falsely showed higher prices with a strikethrough when the products have almost never been sold at the higher price.

CONSUMER LAW PENALTIES IN 2023 AND 2024 SO FAR

8 FEBRUARY 2023

$3 million penalty imposed against Employsure for making false and misleading representations in its online ads that it was, or was affiliated with, a government agency.

10 MARCH 2023

$6 million penalty imposed against Booktopia Pty Ltd for making false or misleading representations on its website, and in dealings with consumers, about consumer guarantee rights. Booktopia admitted it made misleading statements in its online Terms of Business that consumers were only entitled to a refund, repair or replacement if they notified Booktopia within 2 business days of receiving a product that was faulty or not what they ordered.

25 JULY 2023

$950,000 penalty imposed on Lactalis for entering into agreements allowing them to unilaterally terminate agreements in breach of the Dairy Code of Conduct. It also failed to publish their milk supply agreements on their website in breach of the Code.

26 JULY 2023

$20 million penalty imposed on Meta for making false and misleading representations relating to the use of Onavo Protect app user data. They collected data from users which was used for commercial benefit.

28 JULY 2023

$438 million in total penalties imposed on Phoenix Institute and CTI for engaging in unconscionable conduct and making misleading representations to vulnerable students who were enrolled in their vocational courses. Phoenix Institute was ordered to pay $400 million, and CTI was ordered to pay $38 million.

14 AUGUST 2023

$10 million penalty imposed on Dell for making false and misleading representations relating to the discount available to customers who purchased add-on computer monitors. Dell admitted to overstating the discount on its website.

12 DECEMBER 2023

$11 million penalty imposed against Fitbit for making false and misleading representations about the consumer guarantee rights available to 58 consumers who had claimed their devices to be faulty. It misrepresented to consumers their ability to obtain a refund or replacement.

15 DECEMBER 2023

$6 million penalty imposed against Honda for making misleading representations to the customers of former Honda dealerships. Honda represented that the dealerships had either closed or would no longer service Honda vehicles, when in fact they were still operational and servicing Hondas.

20 DECEMBER 2023

$33,000 penalty imposed against Crusader Caravans for making misleading representations about the waterproofing tests it conducted on caravans it manufactured. Tests that Crusader Caravans conducted checked for low standards of water resistance but did not check for waterproofing.

20 DECEMBER 2023

$15 million penalty imposed against Airbnb for making false or misleading representations that prices were displayed in Australian dollars, when in fact the prices were in US dollars.

14 FEBRUARY 2024

$11.5 million penalty imposed against Mazda Australia for making 49 separate false or misleading representations to nine customers about their rights under consumer guarantees.

COMPETITION LAW PENALTIES IN 2023 AND 2024 SO FAR

13 APRIL 2023

$900,000 penalty imposed on ARM Architecture for engaging in cartel conduct by attempting to rig bids relating to a $250 million building project. They had contacted 8 other architecture firms requesting they do not bid for the second phase of the project.

29 AUGUST 2023

$57.5 million penalty imposed on BlueScope for attempts to induce participants in the steel industry to reach an understanding to fix prices for steel products (case on appeal).

7 SEPTEMBER 2023

$1.2 million penalty imposed on Swift Networks for engaging in cartel conduct in relation to tendering tosupply its service to mining village projects. It admitted to bid-rigging by agreeing on the price they would submit for bids with a competitor.

1 DECEMBER 2023

$15 million penalty imposed on Techtronic following admissions it engaged in resale price maintenance in relation to Milwaukee power tool products. Techtronic admitted it entered into 97 agreements restricting the sale of the products below a set price.

INFRINGEMENT NOTICES IN 2023 AND 2024 SO FAR

24 APRIL 2023

$240,000 penalty paid by The Reject Shop and Dusk for allegedly supplying Halloween novelty products containing button batteries, without complying with mandatory product safety and information standards.

14 JUNE 2023

CovaU Pty Ltd and ReAmped Energy Pty Ltd each paid $33,300 in penalties for alleged contraventions of the Electricity Retail Code. The ACCC alleged that both retailers failed to include all required information when notifying customers about price changes.

23 JUNE 2023

$13,750 penalty paid by Green Endeavour Pty Ltd for an alleged breach of the Horticulture Code. Green Endeavour, trading under Fresh and Fruitlink, allegedly failed to prepare, publish and make publicly available the terms of trade on which it was prepared to trade with growers.

10 JULY 2023

$33,000 penalty paid by Costco Wholesale Australia for allegedly engaging in false or misleading labelling of the country and place of origin on lobster products. The conduct was also alleged to be in breach the Country of Origin Food Labelling Information Standard.

14 JULY 2023

$13,750 penalty paid by Bache Bros for an alleged contravention of the Horticulture Code of Conduct. The ACCC alleged Bache Bros failed to make its terms of trade publicly available.

10 OCTOBER 2023

$155,460 penalty paid by Tesla Motors Australia after the ACCC issued it with ten infringement notices for allegedly failing to comply with mandatory safety standards for products powered by button batteries.

GTLAW.COM.AU

INFRINGEMENT NOTICES IN 2023 AND 2024 SO FAR (CONTINUED)

25 AUGUST 2023

$26,640 penalty paid by Millell Pty Ltd (trading as Pet Circle) for allegedly making false or misleading representations on its website to two customers about the price of goods at 'checkout'. The customers had discount codes or vouchers which were applied; however the ACCC alleged the customers were later charged an additional amount equal to the discount amount.

13 OCTOBER 2023

$24,850 penalty paid by Seven Fields Operations Pty Ltd (trading as Nutrano) for alleged contraventions of the Horticulture Code. The ACCC alleged Nutrano failed to specify the price it received for produce in grower statements.

14 NOVEMBER 2023

$132,000 penalty paid by Riff Raff Baby Pty Ltd after the ACCC issued it with eight infringement notices for allegedly making false or misleading statements about its comforter toys being safe for sleep from birth.

28 NOVEMBER 2023

$43,150 penalty paid by GetFresh Merchants Pty Ltd after the ACCC issued it with three infringement notices for alleged contraventions of the Horticulture Code of Conduct. The ACCC alleged that GetFresh failed to have horticulture produce agreements in place while trading with growers and failed to publish its terms of trade.

8 DECEMBER 2023

$11,100 penalty paid by Delicia Franchising for allegedly failing to provide franchisees with a copy of its annual marketing fund financial statement.

5 DECEMBER 2023

Repco, Supercheap Auto and Innovative Mechatronics Group each paid penalties for supplying aftermarket car key remotes that allegedly breached warning requirements for products powered by button batteries. IMG paid $59,640 in penalties for four infringement notices, and Repco and Supercheap Auto paid $33,000 and $26,640, respectively, in penalties for two infringement notices each.

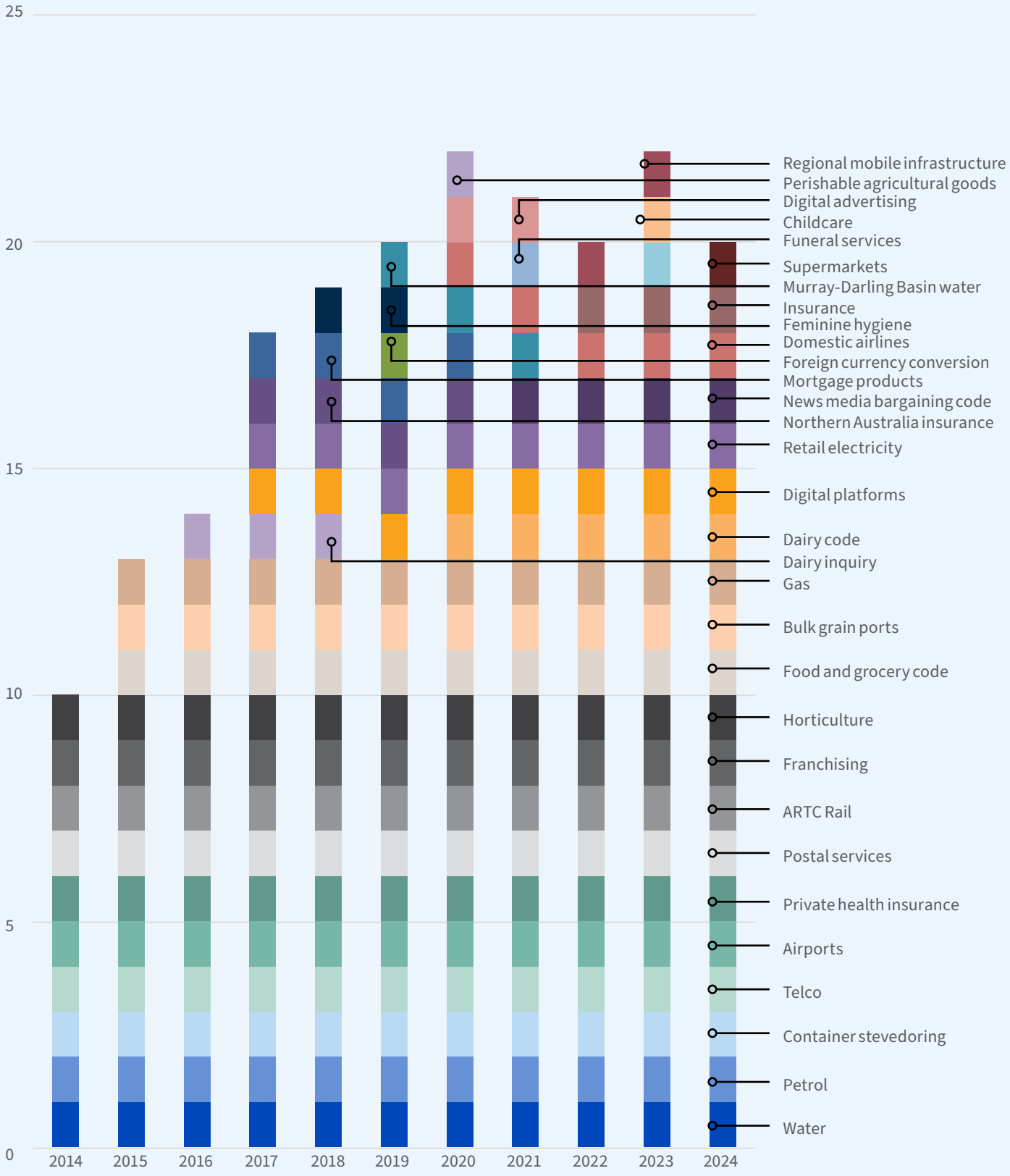
8 JANUARY 2024

$56,340 penalty paid by Dreamscape Networks International Pte Ltd for allegedly making false or misleading representations about two 'free' products automatically added at checkout. The ACCC alleged the products had an 'auto-renewal' feature that meant customers would be charged after the free period elapsed. Dreamscape also was alleged to have misrepresented the benefits of its Domain Privacy product.

MARKET INQUIRIES

In addition to the ACCC's enforcement and merger review functions, the following graph shows the increase in market regulatory functions of the ACCC over the last decade by sector.

Inquiries undertaken by ACCC



CONSUMER PROTECTION – OBSERVATIONS AND TRENDS

WHERE WILL THE ACCC'S FOCUS LIE IN 2024? COST OF LIVING PRESSURES TO GUIDE ACCC (AGAIN)

In 2023 we saw the ACCC really target consumer protection and we expect this focus to continue in 2024, particularly as consumers continue to face growing financial pressures and a 'cost of living crisis'.

Consumer issues dominated ACCC enforcement in 2023. Seven of the ACCC's eight court cases commenced in the calendar year were for alleged contraventions of the ACL. As highlighted above in Part 4 "ACCC enforcement activity – observations and trends", the ACCC also showed an increased reliance on infringement notices and court-enforceable undertakings as an administrative enforcement mechanism, including in relation to environmental claims, high value consumer goods, essential services, the digital economy and consumer product safety issues for young children.

Similarly, 2024 is shaping up to be another big year of consumer protection enforcement action. We expect the ACCC to take action in relation to the matters that were the subject of various reforms that have come into effect and guidance that has been published in the past 12 months. For example, the ACCC's final greenwashing guidance was published in December 2023, and the ACCC's Deputy Chair Catriona Lowe confirmed there are several active investigations underway in relation to environmental claims. The ACCC is also conducting an inquiry into pricing and competition in Australia's supermarket sector and is reportedly carefully considering commencing ACL proceedings against an industry player this year.

We are closely watching developments of a new unfair trading practices prohibition in Australia in 2024, following Treasury's consultation on proposed reforms in the second half of 2023. While the outcome of the consultation is yet to be published, both Treasury and the ACCC indicated their preference for the highest level of protection in the proposed reforms, implementing both general and specific prohibitions.

The introduction of the Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 just last month on 15 February is also firmly on the agenda. Due to come into force later this year, the Bill if passed will require the ACCC for the first time to publicly explain why it considers it appropriate to take no further action in response to complaints from designated complainants.

GROCERY INQUIRIES

On 25 January 2024, the Australian Government announced it would direct the ACCC to conduct an inquiry into pricing and competition in Australia's supermarket sector. While this is the ACCC's first supermarket inquiry since 2008,[28] it is just one of eight current inquiries across Australia into the supermarket sector.[29] In welcoming the direction, ACCC Chair Cass-Gottlieb acknowledged cost of living pressures Australian consumers are facing: "*We know grocery prices have become a major concern for the millions of Australians experiencing cost of living pressures*".

PRICING PRACTICES – WAS/NOW PRICING BACK IN FOCUS

Businesses should also heed the ACCC's warning on advertising practices and take note of the ACCC's proceedings commenced against Emma Sleep on 14 December 2023. The ACCC alleges that Emma Sleep misrepresented savings to consumers by advertising products with 'strikethrough' prices via savings and percentage discounts, despite these products rarely (or never) being offered at the higher price. The ACCC also alleges that Emma Sleep represented particular sales campaigns were limited in time, when actually the campaign would continue, or a similar campaign would continue, after the period ended. In effect, this created an 'artificial sense of urgency' regarding the availability of the discounted prices for consumers, misrepresented the extent to which consumers could save, and infringed consumer choice as they could not informedly compare competitor products.

'Was/now' pricing, or 'strikethrough' pricing, may be misleading or deceptive if the good or service was not offered for sale at the 'was' price for a reasonable period before the sale commenced, or at all, or if the good was rarely or never sold at the 'was' price before the sale commenced.

The concept of 'reasonable' is nuanced and will turn on the type of product and market involved. As such, businesses should take care when engaging in sale pricing practices, and seek legal advice if they are unsure.

We anticipate that was/now pricing and sales practices will also be a subject of the grocery inquiry currently being undertaken by the ACCC, and the ACCC is reportedly considering legal action in the supermarket sector in the next 12 months.

SCAMS: ACCC FOCUS ON PREVENTATIVE FRAMEWORKS RATHER THAN ENFORCEMENT

The ACCC was active in setting up the National Anti-Scams Centre and alerting consumers and businesses to the prevalence of scams in 2023, but did not commence proceedings or take any public enforcement action.

Treasury's recent consultation on a proposed Scams Code Framework to deliver the Government's commitment to introducing new mandatory industry codes suggests that the ACCC may continue down this path in 2024, focussing on establishing an effective framework to prevent scams rather than taking enforcement action.

The proposed codes framework is expected to outline the responsibilities of the private sector in relation to scam activity, with a focus on banks, telecommunications providers and digital platforms.[30] The proposal includes an overarching framework under the CCA setting mandatory obligations for businesses and regulated by the ACCC, as well as sector-specific codes and standards.[31]

Treasury is yet to publish submissions, which were due 29 January 2024. Businesses should be aware of any reforms arising from the proposed framework, as the introduction of mandatory scams codes risks placing increased regulatory scrutiny on businesses.

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[28] In 2008, the ACCC undertook a Grocery Inquiry into the price of groceries. Note that the ACCC undertook a Feminine Hygiene Products Price Monitoring Inquiry in 2018-19, focussed on prices, costs and profits relating to the supply of menstrual products in the feminine hygiene products industry in Australia.

[29] Australian Senate Select Committee on Super Market Prices; Australian Senate Select Committee on Cost of Living; ACCC Supermarkets Inquiry 2024-25; Independent Review of the Food and Grocery Code of Conduct 2023-24; Queensland Parliamentary Inquiry; Victorian Parliamentary Inquiry; South Australian Parliamentary Inquiry; and ACTU Inquiry.

[30] Telecommunications providers are currently the only sector specifically regulated in relation to scams.

[31] Treasury, S*cams – Mandatory Industry Codes: Consultation paper,* November 2023 (available at: https://treasury.gov.au/sites/default/files/2023-11/c2023-464732-cp.pdf).

GREENWASHING: CAN YOU SUBSTANTIATE YOUR CLAIM?

Despite publishing guidance throughout the year and completing an internet sweep in March 2023, the ACCC is yet to commence proceedings in relation to 'greenwashing'. However, we expect this to change in 2024, with the ACCC prioritising enforcement now that its final guidance for businesses making environmental claims was published in December 2023.

The ACCC has confirmed that it has several active investigations in this space, and in November 2023 accepted a court-enforceable undertaking from yoghurt manufacturer MOO in respect of claims that its product packaging was made from "100% ocean plastic". The ACCC was concerned that these claims gave the misleading impression that the product packaging was made from plastic waste collected directly from the ocean, but it was actually collected onshore from coastal areas with inexistent or inefficient waste management (being ocean bound plastic). Businesses should ensure that all environmental claims abide by the ACCC's guidance and be prepared to substantiate all claims at ACCC request.

ACCC's eight principles for trustworthy environmental claims:

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 environmental sustainability transition

"Misleading environmental and sustainability claims continue to be an enforcement and compliance priority for the ACCC, and we have several active investigations underway"

- ACCC Deputy Chair Catriona Lowe, December 2023

UNFAIR CONTRACT TERMS: IS YOUR HOUSE IN ORDER? FRANCHISOR'S CAUSE FOR CONCERN

We flagged last year that one of the more significant legislative changes was the expansion of the unfair contract terms (**UCT**) regime under the ACL. The changes came into effect on 9 November 2023, broadening the definition of a 'small business contract' and making UCTs illegal – with penalties now applying – for businesses and individuals who include UCTs in their standard form contracts with consumers and small businesses.

REMINDER

Amendments expanding the UCT regime came into force on 9 November 2023. UCTs are now illegal and substantial penalties now apply for terms in standard form contracts with consumers or small businesses that:

- cause a significant imbalance in the rights and obligations of the parties;
- are not reasonably necessary to protect the legitimate interests of the party benefiting from the term; and
- would cause detriment to a party if relied on.

Previously, a Court could only declare such terms to be unfair and therefore void. Now, if the terms fall within the scope of the regime,[32] they are illegal, and the maximum penalty per contravention for corporations is the greater of $50 million, 3 times the value of the benefit that is "reasonably attributable" to the conduct or, if that cannot be determined by the Court, 30% of the corporation's adjusted turnover during the breach turnover period.

Whilst we are yet to see any enforcement under the expanded regime, the ACCC explicitly warned franchisors "*to urgently review and amend their standard form franchise agreements or be prepared for potential enforcement action*".[33] In December, the ACCC reported that franchising compliance checks uncovered "*wide-ranging*" concerns, and that the ACCC is monitoring the use of UCTs in franchise agreements. We recommend businesses take urgent action to review their standard form contracts if they have not already done so and we expect to see the first enforcement measures taken under this expanded regime in 2024.

"Franchisors are on notice that we will be watching, and those who fail to address the wide-ranging concerns we outline in our report are at risk of legal action by the ACCC and franchisees."

- ACCC Deputy Chair Mick Keough, December 2023

[32] The updated UCT regime applies to standard form contracts made or renewed on or after 9 November 2023, and terms of standard form contracts varied or added on or after 9 November 2023. We note that where a term of a contract is varied or added on or after 9 November 2023, the whole contract will need to be considered in deciding whether it is a standard form contract".

[33] ACCC, "Franchisors warned to remove unfair contract terms or risk legal action", 15 December 2023 (available at: https://www.accc.gov.au/media-release/franchisors-warned-to-remove-unfair-contract-terms-or-risk-legal-action).

ACCC V QANTAS

Arguably the highest profile case commenced by the ACCC in 2023 was its proceedings launched against Qantas on 31 August 2023. The ACCC alleges that Qantas engaged in false, misleading or deceptive conduct, by advertising tickets for more than 8,000 flights that it had already cancelled. The ACCC also alleges that, for more than 10,000 flights, Qantas did not notify existing ticketholders that their flights had been cancelled for an average of about 18 days, and in some cases for up to 48 days.

We expect the ACCC to continue to closely scrutinise Qantas' pricing behaviour. When asked at an additional Economics Senate Estimates hearing on 14 February 2024 about what levers the ACCC has to crack down on the aviation sector, Chair Cass-Gottlieb said "*The most important presence and power that we exercise is monitoring and transparency… The additional lever we have is action for misleading and deceptive conduct, including drip pricing.*"

In relation to Qantas, Chair Cass Gottlieb noted the ACCC has taken "*very significant action against Qantas. We continue to receive very high levels of complaints against the Qantas Group, and we look at it all very carefully. We not only have meaningful Australian Consumer Law powers, but we are very vigilant in relation to them. But we cannot intervene to set price.*"

PRODUCT SAFETY RECALLS AND ISSUES

The ACCC published a significant number of consumer product safety warnings after it announced on 15 June 2023 that consumer products affecting young children's safety and infant sleep products are among the ACCC's product safety priorities during 2023-24.[34] Consistent with this focus, the ACCC achieved a range of administrative and public outcomes in 2023, including recalls, infringement notices and court-enforceable undertakings.

In 2023, each of the Reject Shop, Dusk, Riff Raff Baby, Repco, Supercheap Auto and Innovative Mechatronics Group were issued with and paid infringement notices. Dusk and Riff Raff additionally gave court-enforceable undertakings, relating to the supply of products that allegedly breached product safety and information standards and/or alleged false or misleading statements about the safety of the products.

In terms of product safety recalls, the ACCC appeared particularly focused on unsafe batteries in 2023. On 20 November 2023, following recommendations by the ACCC, the Assistant Treasurer, the Hon. Stephen Jones, issued a national safety warning notice to warn consumers of fire risks associated with recalled LG solar lithium-ion batteries which are installed in solar energy systems across the country.[35] Additionally, three entities (Repco, Supercheap Auto and Innovative Mechanic Group) paid infringement notices totalling almost $120,000 for supplying aftermarket car key remotes that allegedly breached warning requirements for products powered by button batteries.

We expect the ACCC to continue focusing on the supply of unsafe products online, noting that in February 2023 it announced that signatories to the Product Safety Pledge had removed thousands of dangerous items from online marketplaces. We anticipate further follow up enforcement action in respect of any residential dangerous items from online marketplaces, particularly if they pose a risk to young children (in line with the ACCC's 2023-24 enforcement priorities).

We expect the ACCC's focus on consumer protection to continue in 2024, with the ACCC bringing consumer law cases and being guided by the Government in its focus on the vulnerability of consumers amidst growing financial pressures and a 'cost of living crisis'. The 2023 enforcement priorities were almost identical to those of 2022, but consumer protection is always a focus of the ACCC. Indeed, as Chair Cass Gottlieb confirmed at a recent Additional Economic Senate Estimates Meeting that "*while we have a very strong pipeline of consumer matters, undoubtedly, it has always been the pattern*".

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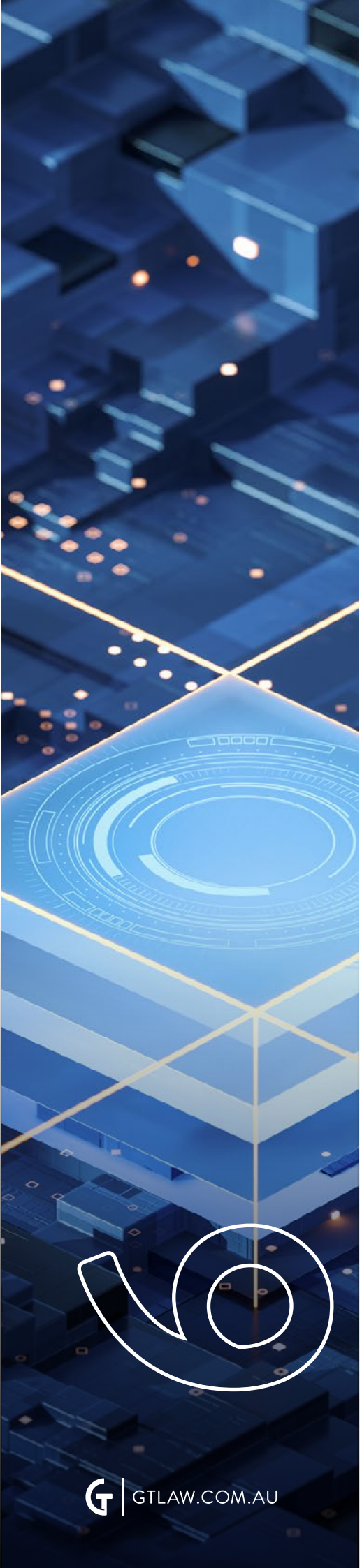
[34] ACCC, "Product safety priorities 2023-24", 15 June 2023 (available at: https://www.accc.gov.au/about-us/publications/product-safety-priorities-2023-24).

[35] ACCC, "Safety warning notice – LG home energy storage system batteries", 20 November 2023 (available at: https://www.productsafety.gov.au/about-us/publications/safety-warning-notice-lg-home-energy-storage-system-batteries).



SECTOR FOCUS: DIGITAL PLATFORMS

Digital platforms continue to be a hot topic for regulators and law makers in Australia and around the world. In the coming year we will see the next stage of implementation of the ACCC's recommendations for digital platform specific regulation, following Government "in-principle" support, with further consultation on these reforms on the horizon (as discussed above in the "Major Reforms – Australia's digital reform agenda" section on 20). The outcome of private litigation in Australia and the potential for regulatory action as the Digital Markets Act (**DMA**) is now in force in Europe, will no doubt factor into how this all plays out.

DIGITAL PLATFORMS SERVICES INQUIRY

The ACCC continues to release periodic Interim Reports focusing on different digital services and issues as part of its five-year **Digital Platform Services Inquiry** which is building to its Final Report next year in March 2025. The ACCC's latest Interim Reports include:

+ The March 2023 Interim Report focused on **social media services** (Facebook, Instagram, TikTok, Twitter, Snapchat, YouTube, LinkedIn, Pinterest, Reddit and BeReal).
+ The September 2023 Interim Report focused on the **expanding ecosystems of digital platform service providers** in Australia (Alphabet, Amazon, Apple, Meta and Microsoft).
+ The March 2024 Interim Report will focus on **data products and services supplied by third-party data brokers**. The ACCC released an issues paper for public consultation and is set to submit its Interim Report to Treasury by 31 March 2024.

The ACCC has not made any further reform proposals in its more recent Interim Reports and considers many of the harms they've identified can be addressed by the ex-ante regulations proposed in the September 2022 Interim Report.

PRIVATE ENFORCEMENT UPDATE

Of the five current private section 46 cases before the Courts, two have been commenced by Epic Games. Epic commenced proceedings against Apple and Google in 2020 and 2021 respectively for allegedly engaging in anti-competitive behaviour by misusing their market power and imposing restrictions on app developers to use only Apple's and Google's respective app stores and in-app payment systems. Following Apple's unsuccessful appeal to stay the proceedings in 2021, the Federal Court has ordered both cases and two related class action proceedings to be heard together for a joint trial on liability commencing on 18 March 2024. The Epic proceedings are part of global litigation between the parties regarding Apple and Google's app stores and in-app payment systems. It'll be interesting to see the extent to which these matters will be impacted by the US cases noting:

+ Epic lost all but one of its antitrust claims against Apple in the US in relation to Apple's anti-steering rules for in-app payments. As a result, Apple now allows links to third-party payment systems in the US and imposed a 27% commission fee on developers for all payments made via third-party platforms. Apple's appeal of the decision in the US was denied by the Supreme Court in January 2024.
+ The jury trial decision in the US in December 2023 which found that Google maintains a monopoly in the market for distribution of programs and payments on its Android software through its mobile app store. Google has filed a motion for re-trial and intends to appeal the decision.

INTERNATIONAL DEVELOPMENTS IN FOCUS

Digital Markets Act (EU): Apple's challenge to compliance in Europe

What is the Digital Markets Act (DMA)?

The DMA is the EU's answer to regulating digital platforms. It is designed to promote better competition in the EU's digital markets and has even inspired some of the ACCC's proposed reforms. The DMA establishes a range of obligations for designated 'gatekeepers' who meet certain criteria around turnover, user numbers and the durability of their market position. So far, six digital platforms have been designated as 'gatekeepers', these companies have until 6 March 2024 to demonstrate their 'core platform services' are compliant with the DMA.

Apple workarounds could threaten the efficacy of the DMA's obligations

Under the DMA, Apple will be required to allow app developers to host their own third-party app stores and collect payments for in-app purchases using their own payments systems. Until now, Apple has required users to use ethe Apple App Store and Apple Pay payments system, where it charges developers a 30% commission fee on every purchase.

Apple recently announced its intention to comply with the DMA's obligations (in Europe only) to allow third party apps stores on its mobile phones, but also released details of its new fee structure, which includes a new 'Core Technology Fee' for developers intending to use third-party app store or payment systems. In effect, after an app has been installed one million times in 12 months, Apple will charge developers using a third-party app store or payment system €0.50 for each additional app install. Critics argue this new fee structure is designed to deliberately circumvent the DMA and will make it prohibitively expensive for any large digital platforms to use third-party app stores or payment systems. A European Commission official has already flagged that they are seeing evidence of non-compliant DMA solutions commenting, "*The DMA is about effective compliance, not about compliance on paper*".

Time will tell whether the EU can effectively prevent digital platforms from bending the DMA's rules or if the DMA is destined to be superseded one iOS update at a time.

SECTOR FOCUS: FINANCIAL SERVICES

OVERVIEW

Competition in the financial service sector continued to be an ACCC enforcement priority into 2023. Continuing the trend from the previous year, the ACCC indicated it would place particular emphasis on the role of payment services in the sector. This has manifested in continued enforcement enforcement action, detailed review of merger and non-merger authorisations, and the ACCC's inquiry into retail deposits.

Most significant was the ACCC's difference in approach to two merger authorisations: granting authorisation to Linfox Armaguard / Prosegur in a 2 to 1 merger in the declining cash-in-transit market on public benefit grounds following a comprehensive forensic assessment; and refusing authorisation in ANZ's proposed acquisition of Suncorp Bank on the basis that it would lead to coordinated effects in the banking industry and substantially lessen competition for home loans, small and medium enterprise banking services in Queensland and agribusiness banking products in Queensland. The ACCC's decision was overturned by the Australian Competition Tribunal in February 2024. We expect that the Tribunal's decision may embolden banks and dealmakers considering transaction involving mid-tier and smaller banks as banks continue to face increasing economic headwind and regulatory requirements.

2023 also saw the introduction of two significant areas of legislative reforms in financial services. In addition to establishing the National Anti-Scams Centre, Treasury is currently consulting on a proposed Scams Code Framework to address the increasing threat of scams to Australian consumers, and remove risks of siloed, irregular approaches to address the threat posed by scammers. Banking is an initial sector of focus. Following the announcement of the Government's Strategic Plan for Australia's Payment System on 7 June 2023, Treasury consulted on proposed reforms to the Payment Systems (Regulation) Act 1988 (PSRA) with an exposure draft released in October.

[37] Chair Cass-Gottlieb, Speech: Opportunities and challenges in the digital revolution, 17 March 2023.

RETAIL DEPOSIT PRODUCTS INQUIRY

The ACCC continues to have an important role in regulating competition and consumer issues in the financial services sector. The Government's increasing reliance on the ACCC's inquiry and monitoring powers in key sectors of the economy including banking and insurance was evident in the past 12 months.

In February 2023, as part of a response to the 'cost of living crisis', and rapidly rising Reserve Bank of Australia (**RBA**) rates,[38] the Treasury directed the ACCC to conduct an inquiry into the market for the supply of retail deposit products. The Inquiry examined how banks make interest rate decisions in the context of their funding requirements and changes in the cash rate target set by the RBA. In its final report in December 2023, the ACCC notes that banks rely on retail deposits for close to 30% of their funding needs on average and interest paid to customers on their deposits is therefore a significant cost which banks try to minimise. The final report also states that, although the ACCC observed instances of price competition from smaller competitors seeking to grow their market share,[39] there is little evidence of aggressive broad-scale price competition and that banks instead pursue strategic pricing practices at an individual product or customer level.[40]

The ACCC made seven recommendations in response to the Inquiry findings, including recommendations to increase transparency for decision-making, support effective consumer engagement and reduce barriers to consumer switching.[41] The recommendations included further consideration of bank account and bank data portability,[42] supporting more effective consumer engagement and increasing transparency.[43] The ACCC also suggested building on proposed CDR reforms, and aligning Australia with other OECD nations like the Netherlands and Sweden.[44]

While this inquiry marks the end of the ACCC's financial services competition program which was announced in the 2017-18 Budget, the ACCC stated it would continue to investigate allegations of anti-competitive conduct in the financial services sector.

[38] Gina Cass-Gottlieb, Keynote address at AFR Banking Summit 2023, 28 March 2023.

[39] ACCC, Retail Deposits Inquiry: Final Report, December 2023, p 1.

[40] ACCC, Retail Deposits Inquiry: Final Report, December 2023, p 12.

[41] ACCC, Retail Deposits Inquiry: Final Report, December 2023, p 13.

[42] ACCC, Retail Deposits Inquiry: Final Report, December 2023, pp 4 and 141.

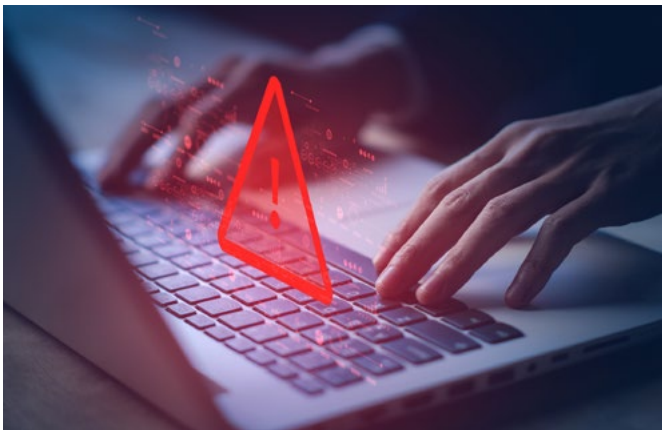
[43] ACCC, Retail Deposits Inquiry: Final Report, December 2023, p 9.

[44] ACCC, Retail Deposits Inquiry: Final Report, December 2023, p 140.

ENFORCEMENT AND MERGER AND NON-MERGER AUTHORISATION REVIEWS IN THE FINANCIAL SERVICES SECTOR

The ACCC has undertaken / continued a number of significant competition matters in in the financial services sector.:

- **ACCC v Mastercard:** the ACCC commended proceedings against MasterCard Asia/Pacific Pte Ltd and Mastercard Asia/Pacific (Australia) Pty Ltd in May 2022. The ACCC alleged that the parties engaged in conduct with the purpose of substantially lessening competition in the supply of debit card acceptance services. The ACCC also alleged that Mastercard offered discounts on credit card transaction fees to retailers who agreed to use Mastercard for their debit card transactions, instead of the Eftpos network, which was often the lowest cost provider. The parties continue their discovery period through 2024. The matter is set down for hearing in the Federal Court beginning on 24 March 2025.
- **Linfox Armaguard / Prosegur:** On 13 June 2023, the ACCC granted authorisation subject to accepting court-enforceable undertakings for the proposed merger of Linfox Armaguard and Prosegur Australia Holdings. The ACCC recognised that, despite the ongoing decline in usage, for some parts of the economy, cash remains crucial. Without the merger, either company could withdraw from the market, which would have a detrimental and disruptive effect on the access to and availability of cash. The undertaking provided a significant public benefit by enabling the merger to take place and avoid the consequences of a disorderly exit if one of Armaguard or Prosegur were to leave.
- **ANZ / Suncorp Bank:** On 4 August 2023, the ACCC announced it would not grant authorisation to ANZ in relation to its proposed acquisition of SBGH Limited, the parent company of Suncorp Bank. The ACCC raised concerns that the proposed acquisition would further embed the dominance of the four major banks in an oligopoly market structure and that the transaction would give rise to coordinated effects in the banking sector.[45] The ACCC was also of the view that the acquisition would substantially lessen competition in the supply of home loans, small to medium enterprise banking in Queensland and agribusiness banking in Queensland.[46] ANZ appealed the ACCC's decision and on 20 February 2024, the Australian Competition Tribunal granted in ANZ's favour to permit the acquisition. The Tribunal cited that detriments raised were uncertain and unlikely to outweigh benefits of integration.



The ACCC has also considered a range of applications for non-merger authorisation regarding conduct in the financial services sector. For example:

- **Australian Banking Association scams authorisation:** On 3 August 2023, the ACCC granted conditional interim authorisation to the Australian Banking Association (**ABA**) to enable it and its member banks to develop potential industry initiatives to prevent, detect, disrupt and respond to scams affecting individual and small business customers. The application was subject to reporting and legal representative attendance conditions. The application was ultimately withdrawn by the ABA prior to a final determination following the announcement by the ABA and the Government of the Scams Accord reflecting initiates by ABA member banks to combat scams.
- **ABA cash-in-transit initiatives:** On 6 December 2023, the ACCC granted conditional interim authorisation to the ABA, ABA member banks and other relevant industry participants (including Australian Post, cash-in-transit service providers and retailers) to discuss and develop arrangements to maintain the physical distribution of cash in the Australian economy and ensure the ongoing sustainability of the wholesale cash distribution network and access to retail cash services in Australia. A final determination is pending.[47]
- **Aggregator assurance program:** On 17 April 2023, the Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group Limited, National Australia Bank Limited and Macquarie Bank Limited applied for authorisation to establish a voluntary industry-wide program for participating mortgage lenders to jointly procure assurance reviews of the compliance systems and standards of participating mortgage aggregators. The ACCC's draft determination proposed to deny authorisation. A final determination is expected by April 2024.

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45 ACCC, Australian Competition Tribunal authorises ANZ's proposed acquisition of Suncorp Bank, (Media Release), 20 February 2024.

46 ACCC, Australian Competition Tribunal authorises ANZ's proposed acquisition of Suncorp Bank, (Media Release), 20 February 2024.

47 ABA, Report for period 6 December 2023 to 15 January 2024.

PAYMENT PLATFORMS SYSTEM

Treasury is currently undertaking payment systems reforms following the announcement of the Government's Strategic Plan for Australia's Payment System on 7 June 2023.

As part of the reforms, Treasury consulted on proposed reforms to the Payment Systems (Regulation) Act 1988 (PSRA) in June 2023. The exposure draft was released on 4 October 2023. Amendments to the PSRA have been considered by the Senate Standing Committee for the Scrutiny of Bills.[48]

There were two key changes proposed as part of the PSRA reforms. The first was an extension of powers for the RBA to designate for regulation of new and emerging payment systems in the 'public interest' (such as cryptocurrency service providers, 'Buy Now, Pay Later' providers and digital wallet providers). This would, for example, enable the RBA to impose and access regime or standards on a designated payment system under the PSRA.[49] These reforms would have efficacy impacts on competition by streamlining regulatory processes in the market for payment services.[50]

The second key reform was the introduction of a new ministerial designation power to allow certain payment services or platforms in the 'national interest' alongside the RBA's designation power.[51] This designation power ensures that the Government can respond to payment issues with regard to factors outside the remit of the RBA. These factors include cybersecurity, consumer protection, anti-money laundering, counter-terrorism financing, national security, and innovation.[52]

In addition to this, the Treasury identified a need for a new nationwide payments licensing framework.[53] The Government intends to introduce legislation for the new payments licensing regime in 2024.[54] The objectives of the suggested framework include improving regulatory certainty, supporting a more level playing field for payment service providers and better targeting of regulation against existing risks.

These reforms, while payment specific, could be used to address the broader competition concerns raised by the ACCC concerning conduct in digital payments:

+ In commentary at the Law Council of Australia, the Chair Cass-Gottlieb indicated that payments remain a key area of focus for the ACCC in digital markets, pointing to recent proceedings against Mastercard.[55]
+ The Chair has emphasised the ACCC's concerns with multiple parties taking a percentage of digital economy payments that over time impose a high-cost burden on the economy.
+ The ACCC has previously indicated it was also investigating Apple's practice of restricting access to the near-field communication (**NFC**) functionality of its devices, limiting the extent to which competitors can offer alternatives to Apple Pay. As at the date of writing, the ACCC has not announced the progress or outcome of this investigation.

Internationally, on 9 January 2024, Apple offered voluntary commitments to the European Union to grant third-party access to the near-field communication technology on Apple iPhones. The commitment requires Apple to make APIs available to third party developers that allow alternative and direct access to the NFC to perform in-store payments using the iPhone without being routed through Apple Pay. Apple has volunteered the commitment on the condition that the EC would conclude its ongoing investigation into Apple Pay on a no admissions basis. To be eligible, developers must be established in the European Economic Area (**EEA**) and must be developing an application for supply in the EEA only. While the Commitment does not have broader global application, they are directed to addressing similar issues raised by the ACCC in Australia. It will be interesting to see what, if any, follow on effect his might have in Australia.

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48 Parliament of Australia, "Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 (available at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar7133%20Recstruct%3Abillhome).

49 Treasury, Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendments of the Payment Systems (Regulation) Act 1998 - Exposure Draft Explanatory Materials, p 22.

50 Treasury, Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendments of the Payment Systems (Regulation) Act 1998 - Exposure Draft Explanatory Materials, p 24.

51 Treasury, "Reforms to the Payment Systems (Regulation) Act 1998 – Exposure draft legislation" (available at: https://treasury.gov.au/consultations/c2023-452114).

52 Treasury, Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Amendments of the Payment Systems (Regulation) Act 1998 - Exposure Draft Explanatory Materials, p 13.

53 Australian Government, A Strategic Plan for Australia's Payments System, June 2023, p 2.

54 Australian Government, A Strategic Plan for Australia's Payments System, June 2023, p 15.

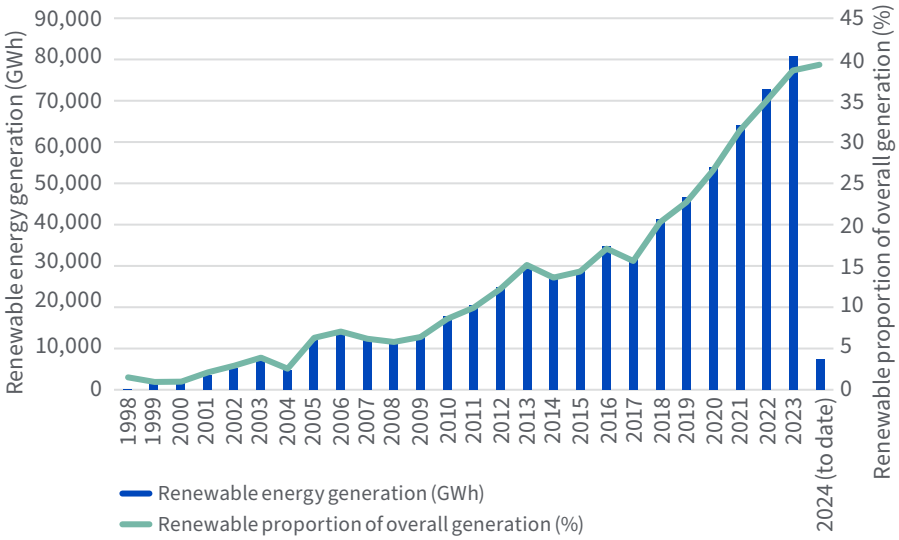
55 ChairCass Gottlieb, "Speech: Law Council Annual Competition and Consumer Law Workshop", 1 September 2023.

SECTOR FOCUS: ENERGY

Energy regulation has continued to evolve as it seeks to accommodate the competing demands of the market transition. The price of energy continues to be a major focus for regulators and policy-makers. However the traditional focus of regulation on cost efficiency and the protection of competition is increasingly being weighed against other objectives in the development of policy and decision-making. In particular, we are seeing a growing recognition by regulators of the increasingly urgent need for investment to support the transition to net zero.

The Australian energy market has moved towards renewables and decarbonisation at an accelerated pace over the past year. Consistent with the steady rise over the past decade in renewable energy generation, renewables delivered 80,877 GWh (38.6%) of energy in 2023 – the highest ever recorded both in absolute terms and as a proportion of overall energy generation.

Renewables mix in NEM energy generation



Source: OpenNEM, Energy | NEM, accessed 23 February 2024, [56] alongside internal calculations.

[56] OpenNEM, Energy | NEM (available at: https://opennem.org.au/energy/nem/?range=all&interval=1y&view=discrete-time).

This uptake in green alternatives contributed to lower electricity prices in 2023.[57] After average annual wholesale electricity prices across the NEM reached record highs in 2022 (culminating in the AEMO's temporary suspension of the electricity spot market),[58] prices decreased by 48% in 2023.[59] Factors contributing to this more moderated pricing in 2023 included milder weather conditions, lower fuel costs, fewer coal supply issues and, crucially, record generation output from low marginal-cost grid-scale renewables (such as wind and solar).[60] That said, despite this price decrease, average electricity prices in most NEM regions have remained high when compared to historical levels.[61]

Energy regulatory processes are moving in line with these broader market trends. Emblematic of this trend, Australia's Energy Ministers agreed in May 2023 to amend the national energy laws to incorporate an emissions reduction objective into the National Energy Objectives. Regulators, including the AER and AEMC, are now required for the first time to consider jurisdictional targets for reducing greenhouse gas emissions when making decisions about system planning, investment and operation of energy infrastructure. The second reading speech for the amending Bill noted the critical role that these changes play in embedding emissions reduction policies into the national energy laws:

> *"[T]his will send a clear signal to wider industry, market participants, investors and the public of all Australian governments' commitments to achieve a decarbonised, modern and reliable energy system that contributes to the achievement of Australia's emissions targets. These reforms are long overdue. … Further reducing the emissions footprint of Australia's electricity and gas networks can play a substantial role in achieving net zero and interim emissions reduction targets by promoting a higher share of low or no emissions renewables and storage."*[62]

[57] AEMO, Draft 2024 Integrated System Plan, 17 January 2024, p 7 (available at https://aemo.com.au/-/media/files/stakeholder_consultation/consultations/nem-consultations/2023/draft-2024-isp-consultation/draft-2024-isp.pdf?la=en&hash=17DED079F7A2066D2872D36B76012749

[58] See AEMO, Market Suspension FAQs: June 2022, last updated 27 June 2022 (available at https://aemo.com.au/-/media/files/electricity/nem/data/mms/2022/market-suspension-faqs-june-2022.pdf?la=en).

[59] AEMO, Quarterly Energy Dynamics Q4 2023, 25 January 2024, pp 3, 11 (available at https://aemo.com.au/-/media/files/major-publications/qed/2023/quarterly-energy-dynamics-q4-2023.pdf); AER, Wholesale markets quarterly Q4 2023, January 2024, p 4 (available at https://www.aer.gov.au/system/files/2024-01/Q4%202023%20Wholesale%20markets%20quarterly%20report.pdf); AER, State of the energy market 2023, October 2023, p 36 (available at https://www.aer.gov.au/system/files/2023-10/State%20of%20the%20energy%20market%202023%20-%20Full%20report_1.pdf).

[60] AEMO, "East coast wholesale electricity prices fall, while peak demand record set in WA", 25 January 2024 (available at https://aemo.com.au/newsroom/media-release/east-coast-wholesale-electricity-prices-fall); AER, "Average wholesale energy prices drop in 2023", 31 January 2024 (available at https://www.aer.gov.au/news/articles/news-releases/average-wholesale-energy-prices-drop-2023). See also AER, Wholesale markets quarterly Q4 2023, January 2024, p 4 (available at https://www.aer.gov.au/system/files/2024-01/Q4%202023%20Wholesale%20markets%20quarterly%20report.pdf).

[61] AER, State of the energy market 2023, October 2023, p 38 (available at https://www.aer.gov.au/system/files/2023-10/State%20of%20the%20energy%20market%202023%20-%20Full%20report_1.pdf).

[62] Hon. A. Koutsantonis, Second Reading speech, House of Assembly (14 June 2023), 4378 (available at https://www.aer.gov.au/system/files/2023-10/State%20of%20the%20energy%20market%202023%20-%20Full%20report_1.pdf).

The AEMC has taken further steps to implement these changes, formally incorporating emissions reduction considerations into the National Energy Rules and allowing networks and gas pipeline operators to propose expenditure contributing to achieving emissions reduction targets. The AEMC and AER have also released guidance on how they will incorporate the amended National Energy Objectives into their decision-making process. The AER observes that it will need to balance the emissions reduction objective alongside the other existing objectives, including price, reliability and security of supply.

The ACCC has also demonstrated a willingness to recognise the importance of the energy transition in its assessment of proposed transactions that may otherwise raise competition issues. Despite not being satisfied that Brookfield and MidOcean's proposed acquisition of Origin Energy would not substantially lessen competition,[63] the ACCC authorised the merger (with conditions) on the basis that the likely public benefits to Australia's renewable energy transition would outweigh the likely anti-competitive public detriments resulting from vertical integration.[64]

In reaching this decision, ACCC Chair Cass-Gottlieb highlighted the material public benefit that can result from transactions which facilitate emission reduction:

> *"The ACCC considers that the acquisition will likely result in an accelerated roll-out of renewable energy generation, leading to a more rapid reduction in Australia's greenhouse gas emissions … The Brookfield Global Transition Fund has been specifically established to focus on the transition to renewable energy. Its decision to buy Origin, Australia's fourth largest emitter of greenhouse gases, is driven by a strong imperative and commercial incentive to lower emissions quickly … In this case, we determined that the likely gains for Australia's renewable energy transition amount to a public benefit sufficient to outweigh the likely public detriments."*[65]

State and territory governments in the National Energy Market (NEM) are also taking further steps to accelerate the renewable energy transition through continued development of renewable energy zones (REZs) that take advantage of high-quality wind and solar areas around Australia.[66] These REZs are designed to improve grid reliability and security while reducing transmission, connection and operation costs for individual assets through economies of scale.[67] To support the accelerated development of REZ infrastructure, state governments have in some cases needed to develop bespoke regulatory arrangements.

We expect that in 2024, regulators and market bodies will face an increasingly difficult task in seeking to balance reliability, affordability, sustainability and security of supply considerations. This will occur in an environment of intense political scrutiny, heated policy debate and growing community anxiety around the pace of the transition to net zero and its impact on local communities. As always, the energy sector will be one to watch for high regulatory drama.

63 ACCC, "ACCC authorises Brookfield and MidOcean's acquisition of Origin", 10 October 2023 (available at https://www.accc.gov.au/media-release/accc-authorises-brookfield-and-midocean%E2%80%99s-acquisition-of-origin).

64 Ibid.

65 Ibid.

66 AEMO, *Draft 2024 Integrated System Plan*, 17 January 2024, p 24 (available at https://aemo.com.au/-/media/files/stakeholder_consultation/consultations/nem-consultations/2023/draft-2024-isp-consultation/draft-2024-isp.pdf?la=en&hash=17DED079F7A2066D2872D36B76012749).

67 AEMO, *Draft 2024 Integrated System Plan,* 17 January 2024, pp 10, 24 (available at https://aemo.com.au/-/media/files/stakeholder_consultation/consultations/nem-consultations/2023/draft-2024-isp-consultation/draft-2024-isp.pdf?la=en&hash=17DED079F7A2066D2872D36B76012749).

SECTOR FOCUS: AVIATION

Airline competition continues to be a key focus for the ACCC and the Government. Aviation is reportedly high on the Competition Taskforce's priority list, and with the Aviation White Paper, slot reform, and the return of the ACCC's airline monitoring mandate, the sector should strap themselves in for what could be a long and bumpy ride. It's better news for travellers as travel markets begin to normalise, with more international flights, capacity expansion under bilateral agreements, and lower prices in the domestic market.

ACCC BACK IN THE CONTROL TOWER

On 13 February 2024, the ACCC published its first quarterly report on the domestic airline industry since the Treasurer's direction that the ACCC resume its domestic airline monitoring in November 2023. The ACCC found that domestic airfares "generally fell" in 2023 due to factors including cheaper jet fuel, an easing of pent-up demand following the Covid-19 pandemic and additional seat capacity, with combined domestic seat capacity in December 2023 reaching approximately 95% of December 2019 levels.

However, the ACCC noted that reliability remains "poor", with cancellations and delays higher than long term averages, acknowledging that pilot shortages and air traffic controller workforce shortages have contributed to these issues.

In December 2023, the Qantas Group (Qantas and Jetstar) increased its share of domestic passengers to 61.8%, while Virgin Australia and Rex's shares remained relatively stable at 31.2% and 5.3% respectively and Bonza flew 1.7% of domestic passengers.

The ACCC's report also provided an update on its consideration of Airservices' price increase proposals which would collectively increase its weighted average prices by 19% in nominal terms by January 2026. Airservices is Australia's only declared provider of air traffic control and aviation rescue and fire-fighting services.

The ACCC considered that the trends observed over 2023 "appear to be structural and unlikely to change in the short term". Look out for the ACCC's next quarterly reports in May and August to see how this lands.

THE INTERNATIONAL AIRLINES ARE BACK

Latest statistics

Although international aviation has taken longer than domestic to recover following the Covid-19 pandemic, there has been sig nificant progress more recently. As at November 2023, the number of international airlines operating scheduled services to/from Australia had almost returned to pre-pandemic levels, while the number of seats available on international flights to/from Australia reached 92% of November 2019 levels. The Qantas Group has seen its share of international passengers carried ascend to 27.9% in November 2023 compared to 26.5% in November 2019, with Singapore Airlines also growing its share from 8.5% to 9.4% and Air New Zealand growing its share from 7.2% to 7.7%.

A number of international airlines more than doubled seat capacity to/from Australia in the year to November 2023, including AirAsia X, ANA, Batik Air Indonesia, Cathay Pacific Airways, China Airlines, China Eastern Airlines, China Southern Airlines, Garuda Indonesia, Korean Air and Xiamen Airlines.

Impact of bilateral capacity on competition – Bali Bonanza

Australian and foreign carriers can only operate international air passenger services to/from Australia in accordance with diplomatically negotiated bilateral capacity limits. Following the Australian Government's controversial decision to decline Qatar's request for additional bilateral capacity in mid-2023, there has been increased attention on how bilateral capacity rights are agreed. But competition is equally affected by the allocation of capacity under these bilateral agreements.

More Australians were recorded returning from Indonesia in December 2023 than in December 2019. Australia's airlines expect a continued upward trajectory, but Australian carriers currently have the right to operate only 25,000 seats per week in each direction between Indonesia and the following points in Australia: Brisbane, Melbourne (including Avalon), Perth and Sydney. This capacity is fully allocated with Virgin Australia having 4,924 seats per week and the Qantas Group having the remainder.

2,500 seats per week are also available in each direction to Brisbane, Melbourne, Perth and Sydney, provided such services operate via or beyond to a point in Australia other than Brisbane, Melbourne, Perth and Sydney.

Both Virgin Australia and the Qantas Group have made competing applications for this capacity, with:

+ Qantas proposing to operate services on its Jetstar brand between Adelaide-Perth-Denpasar (Bali) and Cairns-Melbourne-Denpasar; and
+ Virgin Australia proposing to operate services connecting Adelaide-Perth-Denpasar and Gold Coast-Perth-Denpasar.

The International Air Services Commission (**IASC**) is currently considering these competing applications. Where there are competing claims for capacity, the IASC must make the allocation that would be of the greatest benefit to the public, considering each applicant's reasonable capability to utilise the capacity, as well as additional criteria, including competition.

The ACCC has submitted that the "proposal from Virgin Australia would appear to be more conducive to fostering a competitive environment, and a broader distribution of capacity, than the proposal from Qantas" with Virgin's proposal introducing "*Australian competition between Perth and Denpasar", as well as reducing "Jetstar's dominance on services between Adelaide and Denpasar.*"

Separately, in respect of Indonesia capacity that Qantas has already been allocated, Qantas has applied to the IASC for variations to allow Garuda Indonesia and Qantas to market each other's flights between Australia and Indonesia under a codeshare agreement. The ACCC has expressed concerns that "*Qantas and Garuda are each other's closest competitor in the Australia – Indonesia air passenger services market and the proposed codeshare arrangement may soften competition between them…This could result in higher fares and reduced competitive pressure to improve service levels, compared to the future without the codeshare".*

The IASC has not yet publicly indicated when it intends to make its final decision on these applications.

WHITE PAPER PROCESS AT CRUISING ALTITUDE

The sector is also attracting attention as part of the Government's in-depth White Paper process. In September 2023, the Government released its Green Paper, inviting stakeholders to comment on a range of issues including competition, consumer protections, airport regulation, slot management at Sydney Airport and reducing carbon emissions. In response, the Government received over 2,000 submissions. The Government is also seeking input from Treasury's Competition Taskforce. This will all inform the development of the Aviation White Paper, expected to be released in the first half of 2024, which will set the Government's policy direction for the sector out to 2050.

Key points raised by stakeholders include:

+ scepticism from airlines and airports that proposals for aviation-specific consumer protections will actually address issues which are largely caused by the operational difficulties inherent in flying;
+ a need to reform the current light-handed approach to regulating airports, which as the ACCC and airlines pointed to in their submissions, leaves airlines with no effective dispute resolution process and may allow airports to exercise market power; and
+ a push from some airlines and airports for Government decisions about bilateral capacity to be more transparent and involve consultation with the sector.

This is a potentially significant pivot point for right policy settings in the Australian aviation sector. Previous policies going as far back as the 1940s, including the two airlines policy, continue to be felt in today's market structure and so any policy changes may similarly have long term impacts. As the experience from the Covid-19 pandemic has showed, the aviation industry needs to be agile and policies should allow for this flexibility and promote competition, while parts of the sector that are not subject to competition may be more appropriately regulated.

REFORMS TO SYDNEY AIRPORT SLOTS

In February 2024 the Government announced its proposed reforms to the demand management scheme at Sydney Airport, which has been under consideration since 2021 when former Productivity Commission Chair Peter Harris delivered an independent review.

The proposed reforms include:

+ requiring airlines to provide regular information about how they use slots, including reasons for cancellations and major delays, which will be made public;
+ independent audits of slot usage, with the first due in 2024;
+ a new 'compliance regime' which will include penalties for anti-competitive behaviours, strengthened enforcement tools to monitor airlines and the ability to take legal action where necessary;
+ changes to the slot allocation process which will benefit new entrants and regional NSW services; and

+ a competitive process for selecting the airport's Slot Manager with improved governance arrangements around potential conflicts.

The reforms follow concerns from smaller carriers that other airlines may be 'hoarding' slots. The major airlines strongly deny this, pointing to the current 'use it or lose it' system (which is not planned to be changed) and the fact that operational complexities and Sydney Airport's movement restrictions, not slot allocations, contribute to cancellations.

The Government will also introduce a 'recovery period' to allow increased movements for two hours following disruptions such as extreme weather events, but has ruled out any broader changes to Sydney Airport's curfew or hourly movement cap.

Expect the reforms to lead to some greater flexibility in the allocation of slots and resilience in the operation of flights, with more public information facilitating even greater scrutiny of airlines.

The Government will consult on the reforms before introducing legislation to Parliament.

INQUIRY INTO PRICE GOUGING AND UNFAIR PRICING PRACTICES

In February 2024, the Inquiry into Price Gouging and Unfair Pricing Practices, commissioned by the Australian Council of Trade Unions and chaired by Allan Fels (former ACCC Chair), published its report (**Fels Report**).

The report included a case study on aviation, which was particularly scathing of Qantas, emphasising that the industry is "*dominated by Qantas and there is price gouging by Qantas*", pointing to the blocking of Qatar capacity expansion without "*reasonable justification*" as an example of the Australian Government "*acting in the interests of Qantas*". The Fels Report also raised concerns that Qantas' ability to reduce supply while increasing prices may have affected CPI in December 2022, contributing to rate increases by the Reserve Bank.

The report specifically criticised:

+ "*restrictive slot allocation practices*" which make it difficult for "*substantial entry by a third player*";
+ capacity limits under international bilateral air services agreements; and
+ airports' "very high degree of monopoly", calling for price regulation in relation to airports.

The ACCC Chair Cass-Gottlieb was questioned about some of the points raised in the Fels Report at a senate estimates hearing on 14 February 2024. When asked about whether drip pricing, algorithmic pricing and asymmetric pricing (as noted in the Fels Report) had an impact on the aviation market, Chair Cass-Gottlieb said the ACCC has recently seen some real competition, noting "*particularly at the time of peak travel for holidays, we were seeing some real competition, including even best-discount competition. That was in December 2023 and January 2024. Before that time, we were concerned about that level but we did see, even on best-discount pricing—as compared to 2023 and as compared to 2022—a 40 per cent decrease on that average price.*"

COMPENSATION FOR FLIGHT DELAYS AND CANCELLATIONS

Opposition senators Bridget McKenzie and Dean Smith have used the Fels Report to call for significant reforms to airline passenger protections. Details of their *Pay on Delay Bill*, which the senators propose to introduce to Parliament in late February, are not yet known but the senators have stated that it will:

+ clarify that a passenger's ticket relates to a particular flight, destination and time (hinting to the ACCC's litigation against Qantas and Qantas' unusual defence centred around the sale of "a bundle of rights");
+ establish minimum standards of service; and
+ ensure "concrete protections" in the event of "flight delays, cancellations or denials of boarding".

Heartbreaking stories of Taylor Swift fans having their flights impacted have continued to put the issue in focus, even with the obvious link between disruptions and recent storms. With a potential compensation scheme also being reviewed as part of the Aviation White Paper, the opposition senators are likely to lack Government support at this time. Airlines and airports have questioned the utility of any compensation scheme, emphasising that:

+ aviation-specific protections overseas have increased airfares but done little to address delays, which are mostly caused by operational issues; and
+ the Australian Consumer Law already provides broad protections to all consumers which are designed to address the loss suffered by customers, rather than being fixed schemes.

WHAT TO EXPECT ON THE HORIZON

Increases in capacity and a normalisation in demand should provide support for stable or lower airfares in 2024.

However, it's not just the flight radar that will be monitoring airlines' movements, with a continued focus by the Australian Government around service quality, including operational performance, likely.

The White Paper will be key in providing a clearer indication on potential legislative changes that could impact the aviation industry. The Government will also consult with stakeholders on how to implement proposed reforms to Sydney Airport's demand management scheme, before introducing legislation to Parliament.

Airlines can expect continued scrutiny from the ACCC on pricing behaviour and green claims. This is consistent with the commencement of proceedings against Qantas for allegedly engaging in false, misleading or deceptive conduct, by advertising tickets for that it had already cancelled but not removed from sale, as discussed in Part 5 "Consumer protection – observations and trends".

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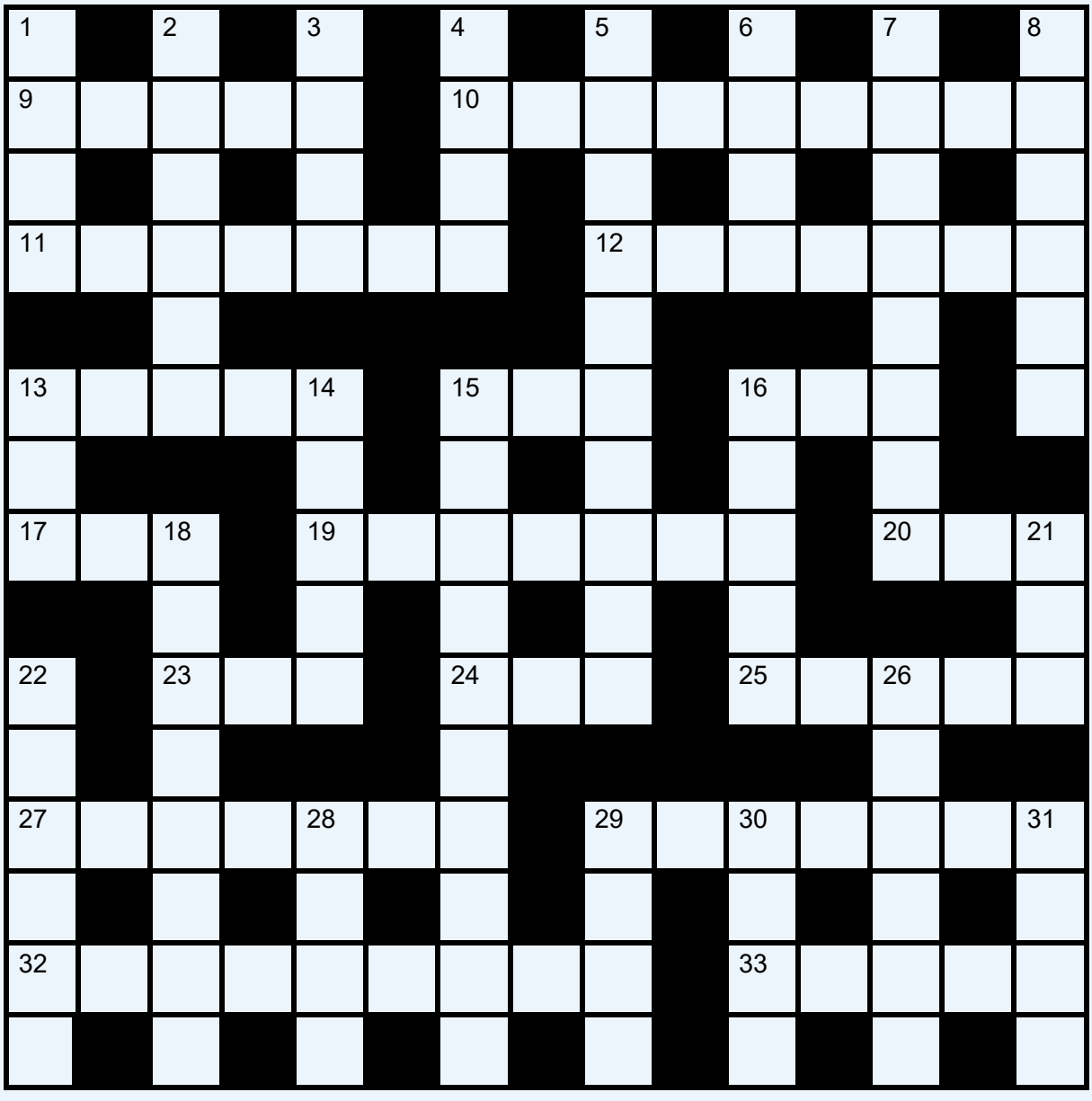
THE COMPETITIVE EDGE CRYPTIC CROSSWORD #4

A HIGHLY PRESCRIPTIVE LABYRINTH

Justice Wigney, the patron saint of competition-themed cryptic crosswords, recently described the criminal cartel prohibitions in the *Competition and Consumer Act 2010* as "a highly prescriptive labyrinth". While this description might also apply to a simple maze puzzle, we at *The Competitive Edge with Gilbert + Tobin* podcast choose to interpret it as a call for another cryptic crossword. Hints may be obtained by listening to the entire podcast archive.

Please feel free to fill in this printed version and e-mail a scan to edge@gtlaw.com.au; the first person to submit a correctly solved crossword will be an answer in the next one. You can also download or complete all the crosswords online at crossword.info/edge.



Across

9 See 8-down

10 What's happening, hep one-man combo? (9)

11 Crooked teeth, or legally to that place? (7)

12 Recycling mixed law? Never give up five! (7)

13 See 28-down

15 Encourage board cleared of attempt to induce (3)

16 Cursory without your powerful sugar company (3)

17 Backwards-flying fox authorised tote (3)

19 Somewhat more electricity central to Nixon's CRP (7)

20 Hairy brother lost his head over broadband promise (3)

23 Midnight fossil fuel (3)

24 X reverted 1-down gross (3)

25 Airline building automation (5)

27 Once again report on damages, for example (7)

29 Film horse in domestic gas security mechanism (7)

32 12-bar maybe manage steelmaker (9)

33 Panama Fiat parts trade practices, perhaps (5)

Down

1 It's not "ain't" (4)

2 Relinquish a takedown on opposite day (4,2)

3 Pigpen finishes life with hordeolum (4)

4 Oversharing service stations mixed up cabana or mundial (4)

5 Deft German breaks down what mergers might do to markets (10)

6 Hard currency maybe a bit of a coincidence (4)

7 24-across does the trick after 9-across mining camp attempter (8)

8, 9-across At worst I fly erratically as fearless singer (6,5)

13 Polyethylene terephthalate acquiring and acquired kind of stock (3)

14 30 rock juror or powerful press? (5)

15 First emerita list or trick antitrust emerita? (7,3)

16 101st trendy talk talked about (5)

18 Reserve putter for fans of the wealth of nations and the antitrust paradox (4,4)

21 20-across last shall be first in FTC jurisdiction (3)

22 Maybe rehearsal reversal partly as a result of this, legally? (6)

26 Very loud symbol anticipates what we all need to do (3,3)

28, 13-across Coiled vipers pay in market-sharing case (4,5)

29 Ancient feud around continental pact (4)

30 Agree, arrange, abet or collude in metrical foot? (4)

31 Confused king a likely kind of chance (4)

COMPETITION, CONSUMER + MARKET REGULATION

With a team of more than 50 lawyers, including 10 partners and 5 special counsel, Gilbert + Tobin's market-leading competition practice is one of the largest in Australia, top-ranked across all legal directories. The team is widely recognised as the leading competition and regulatory practice in Australia, with unparalleled depth and breadth, advising on many of the most complex competition law cases in Australia and globally.

Marking 30 years as Australia's go-to competition and regulation practice, we have recently renewed our practice group name to 'Competition, Consumer + Market Regulation' to better display the breadth of our team's expertise.

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