



Australian Competition & Consumer Law Update

Message from the Editors

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The Australian competition law environment has undergone some important changes of late. In this *Update*, we discuss the Australian Competition and Consumer Commission's ("ACCC") increasing focus on the unfair contracts regime. We also discuss the changes to the Competition and Consumer Act and the implementation of recommendations from the Harper Review. There have been two interesting appeals that we discuss—one in relation to representation in *ACCC v Medibank* and the other in relation to an output restrictive cartel in *ACCC v Australian Egg Corporative*.

Highlighting Changes of Interest in Competition and Consumer Law

The Unfair Contract Terms Regime to Small Businesses in the Federal Court and the Approach of the ACCC

Summary

ACCC brings the first two cases under the unfair contracts provisions. The provisions affect contracts with consumers and small businesses (with 20 employees or less). The cases will provide much needed guidance as to the application of these laws.

In November 2016, the unfair contracts regime was extended to contracts with small businesses. Significant areas of potential exposure arise in relation to clauses seeking to limit liability, unilaterally vary prices or provide indemnity clauses. Guidance as to the Australian Competition and Consumer Commission's ("ACCC") approach is gained from proceedings commenced in the Federal Court of Australia for alleged contravention of this regime under the Australian Consumer Law ("ACL") as well as a handful of examples where businesses have amended their approach following the introduction of the new law. These proceedings are important for all businesses as they are the first time that the ACCC has taken action to enforce the regime in relation to small business contracts.

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Australia's Competitive Laws are Changing

Summary

After two years of discussion and consultation, the Australian Government has enacted its legislative response to key recommendations in the Competition Policy Review (the Harper Review).

Background—The Harper Review

In late 2013, the Prime Minister and the Minister for Small Business ("Minister") announced a review of Australia's competition policy and laws. In March 2014, the Minister tasked a panel, led by Professor Ian Harper ("Review Panel"), to conduct a 'root and branch' assessment of Australia's competition laws and policies, with the key area of focus being to identify impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest. The Review Panel

released an issues paper, draft report and final report within 12 months.

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Hot Off the Bench—Discussion and Interest from the Australian Courts

ACCC Claims Against Medibank for Misleading or Deceptive Conduct and Unconscionable Conduct

Summary

On 20 September 2017 the Australian Competition and Consumer Commission (ACCC) appealed a Federal Court judgment that considered the lawfulness of a change to Medibank Private Limited's ("Medibank") insurance coverage of inpatient diagnostic treatment. The ACCC has appealed the first instance decision rejecting the ACCC's claims that Medibank had engaged in misleading or deceptive conduct and unconscionable conduct.

Background Facts

Australia's national health scheme, Medicare, provides subsidised access to prescribed medical services. The Medicare Benefits Schedule ("MBS") lists the medical services to which the scheme applies, and the prescribed fees payable on those medical services (known as schedule fees).

Patients with private health insurance that receive inpatient diagnostic treatment are entitled to have 75 percent of the schedule fee paid by Medicare, and 25 percent of the schedule fee paid by their private insurer. Because medical service providers are permitted to charge 'gap fees' above the value of the schedule fee, private health insurers can distinguish their policies by offering to reimburse insured patients for any gap fees they incur.

Prior to September 2014, Medibank reimbursed insured patients for gap fees incurred with specified diagnostic service providers. From 1 September 2014, Medibank's policy was amended so that Medibank only reimbursed insured patients for gap fees incurred with two diagnostic service providers.

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The Full Federal Court Fries and Scrambles the ACCC's Case

Summary

On 25 September 2017, the Full Federal Court dismissed the ACCC's appeal of the primary judge's decision [dismissing](#) the ACCC's case against AECL and other participants in the egg industry (*Australian Competition and Consumer Commission v Australian Egg Corporation Limited [2017] FCAFC 152*). This case explores the role played by industry bodies and their conduct with their members and thresholds of what constitutes an attempt under Australia's cartel laws.

Facts

The Australian Egg Corporation Limited ("AECL") is an industry body that monitors egg production and the demand for eggs in Australia. In 2011, the board of AECL became aware that there was an oversupply of eggs. On 19 January 2012, the AECL recorded and approved, in its board minutes, that there would be a meeting of the top 25 egg producers to encourage destocking and egg disposal. On 25 January 2012 in its fortnightly publication Eggcorp EggsPress, the AECL requested a meeting of the top 25 egg producers to meet and seek a "path forward ... in a coordinated and consolidated fashion". On 8 February 2012 at a summit with 22 people from 19 egg producers in attendance, discussions and presentations were made regarding egg oversupply.

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