GILBERT +TOBIN

COMPETITION, CONSUMER & REGULATION

REVIEW OF 2020 & THE OUTLOOK FOR 2021

MARCH 2021

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2021 – WHAT TO WATCH FOR

All the world's a stage…. Through 2020 and the start of 2021, the ACCC has certainly taken the world stage of competition law and policy by storm, with its thinking in digital platforms regulation influencing governments and regulators around the world. The ACCC is also taking an increasing role in international mergers that it considers impact Australians, coordinating closely with other regulators but sometimes departing from their views, as the Google/FitBit merger reflected. A cooperation agreement on cross-border investigations signed last year with regulators in several other major jurisdictions will further deepen the ACCC's international coordination. I expect 2021 will bring further international interaction and (sometimes) collaboration on a range of global issues with a potential impact on Australian consumers.

Elizabeth Avery, Partner

I expect that this year we will see considerable debate about the fitness for purpose of Australia's merger laws, particularly in light of the ACCC's track record in contesting the small minority of mergers that it challenges in court. Last year, in both merger cases that it contested, the ACCC failed to establish that the proposed transactions were likely to substantially lessen competition when compared to the counterfactual. This debate is also taking place in the context of global anti-trust agency focus on the sufficiency of merger regulation and notification. Rod Sims has flagged that the ACCC will make proposals for changes to the merger laws early this year, so watch this space.

Gina Cass-Gottlieb, Partner

After the interruptions of last year, we should expect the ACCC to ramp up its enforcement activity in 2021, especially in relation to ACL matters. The trend of regulators globally to tackle traditional competition law issues using consumer protection claims such as unconscionability and unfair contracts terms is likely to continue and it's important that businesses consider their conduct in this broader context.

Charles Coorey, Partner

The outcome of Vodafone v ACCC has not dampened the ACCC's enthusiasm for merger theories of harm revolving around a loss of potential competition. It will be interesting to see how the ACCC's push for merger reform, and its proposal to work with digital platforms on a voluntary merger notification protocol, deals with an assessment of potential future competition in merger review.

Louise Klamka, Partner

I think the sleeper development in 2020 was the emergence of private s 46 litigation under the new s 46 test. The Epic case is the last in a number of private enforcement cases before the Courts over 2019-2020 with injunctions granted and some commercial settlements – so s 46 is alive and kicking, even though the ACCC has so far only brought one case.

Simon Muys, Partner

It's now over 3 years since the Harper amendments to Australia's competition law brought us into a new era with the substantial lessening of competition tests for misuse of market power and concerted practices. Those amendments left much work to be done in clarifying when otherwise routine business conduct may be seen as anti-competitive and the approach that the ACCC would adopt to testing competitive theories of harm in these cases. To date we haven't seen much public activity from the ACCC in either area. I expect they may be feeling some pressure to bring more matters to a conclusion, either through administrative or court enforcement action, so watch this space.

Luke Woodward, Partner

2021 - What to watch for(Cont.)

Concerted practice anyone? Given poor performing markets are often a breeding ground for collusive conduct, I am anticipating a renewed focus on this new prohibition by the ACCC with some concerted practices investigations to follow in the wake of the coronavirus impact on parts of the economy. This provision also continues to remain untested by the Courts, and I imagine the ACCC are keen to get some case law precedent established.

Genevieve Harris, Special Counsel

Brands had an important role in the ACCC's review of two major healthcare mergers last year. Generics and private labels were seen as unlikely to exercise a sufficient constraint in light of factors such as customer loyalty to the brands of the merged entities, arising from trust in products' safety and efficacy, as well as supply on a portfolio basis. Internal documents supporting the strength of a brand can reinforce concerns from the ACCC as to whether that brand may hinder successful new entry. These factors also influenced the ACCC's review of divestiture purchasers with preference given to purchasers with customer relationships and experience supplying branded products in Australia, in addition to an ability to transfer the manufacturing process. This might create challenges in future mergers implicating brands to identify divestiture purchasers with the appropriate mix of experience that do not raise their own concentration issues.

Susan Jones, Special Counsel

In 2021, the ACCC has flagged it will undertake a concerted push to have merger laws reformed in light of its continued lack of success in the small minority of mergers cases that are contested in a court or tribunal. However, it remains to be seen whether the case for reform can be made given that the ACCC continues to be effective at preventing what it sees as anti-competitive transactions or requiring conditions of approval through its informal process – around a dozen transactions were withdrawn in the face of ACCC opposition or subject to conditions in 2020 alone.

Jeremy Jose, Special Counsel

The ACCC has kicked off 2021 with significant activity in digital markets. We can expect this activity to continue throughout 2021, coinciding with similar activity from international regulators and policy-makers. The regulatory issues in digital markets are complex and as the digital policy landscape unfolds in 2021, we will be confronted with questions fundamental to Australian society – democracy, strength of an independent media, preserving dynamic digital competition, and ensuring an equal playing field in digital markets. Watch this space.

Andrew Low, Special Counsel

One area to watch in 2021 will be the policy campaign for a new regulatory framework for monopoly infrastructure – the proposed 'Part IIIB'. The ACCC first raised this proposal in 2019, but it seemed to be overtaken by events in 2020. The campaign may gather momentum in 2021, particularly as more major infrastructure is built and questions are asked around the adequacy of access arrangements.

Geoff Petersen, Special Counsel

2021 will mark a significant milestone in the ACCC's push for serious cartel conduct to be prosecuted criminally with the first ever jury trial scheduled to commence in March against Australian medical equipment company Country Care, following significant delays due to COVID-19. While three criminal cartel matters have been prosecuted in the Federal Court to date, all involved a corporate accused entering an early guilty plea, negating the need for a contested hearing before a jury. As the first case of its kind – including that it represents the first prosecution of an Australian company as well as the first prosecution of individuals - Country Care will consider complex and novel issues including questions about the appropriate directions to be given to the jury and, if any of the individuals are convicted, the sentencing of individuals for criminal cartel conduct for the first time, including whether a custodial sentence should be imposed. It will be a case watched with interest by many – given there are a number of other contested criminal matters not too far behind.

Liana Witt, Special Counsel

INTRODUCING OUR NEW PARTNER AND SPECIAL COUNSEL

LOUISE KLAMKA,
PARTNER

Louise has deep expertise advising clients on contentious mergers and collaborative conduct, including ACCC authorisations. She has extensive experience in ACCC investigations, cartel prosecutions and immunity applications, including in a criminal context. Louise has also advised a broad range of clients in regulated industries. She is the leading lawyer nationally on competition issues associated with airline alliances.

JEREMY JOSE,
SPECIAL COUNSEL

Jeremy has over 14 years' experience in merger review, market regulation and competition law, gained at Gilbert + Tobin and from over 9 years' experience at the ACCC. He has advised clients in relation to a range of high profile and important transactions, ACCC investigations into alleged criminal cartel and anti-competitive bundling conduct and various matters relating to electricity, gas, water and infrastructure access and regulation. He has extensive experience in merger regulation arising from over six years as a senior member of the ACCC's merger review team.

ANDREW LOW,
SPECIAL COUNSEL

Andrew's practice is directed to providing complex advice and advocacy for clients in complex and high profile matters across each core area of the Competition and Consumer Act (including complex merger clearance, enforcement investigations, industry inquiries, and dispute resolution). He has experience in a range of commercial matters, including strategic advice and obtaining regulatory clearance for a number of mergers and acquisitions across a variety of industries (including technology, health, retail, financial, insurance, resources and industrial sectors) both in Australia and internationally; and commercial litigation in the Federal Court of Australia (involving claims of cartel conduct and claims of misleading and deceptive conduct). Andrew has a particular expertise in, and has contributed significant thought leadership to, digital issues for competition policy and regulation. He is also recognised and sought after by clients for his digital economy expertise.

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2020 ACCC COMPLIANCE & ENFORCEMENT PRIORITIES AND ACTIONS

ACCC Chair Rod Sims announced the ACCC's 2020 Compliance and Enforcement Priorities in February 2020, before the COVID-19 pandemic took hold. In March 2020 the ACCC announced that while the 2020 priorities remained in place, its efforts would be refocused on those priorities most relevant to dealing with the impact of the pandemic.

Despite the pandemic, the ACCC still progressed each priority except its proposed priority in the funeral sector. The ACCC has also been very busy enforcing areas of the *Competition and Consumer Act 2010* (CCA) outside of its enforcement priorities, and in line with its enduring priorities (e.g. cartel enforcement).

PRIORITIES, ACCC CONCERNS[1] AND KEY ACCC ACTIVITY IN 2020

PRIORITY

Competition and consumer issues in the funeral services sector.

ACCC CONCERN

'Competition and consumer issues in the funeral services sector have long provoked complaints from the public, governments, and have generated stories in the media. Not least because many consumers engage with the funeral sector at a time when they are grieving, vulnerable and thereby at a disadvantage. This is a concentrated sector with some players having significant market power.'

KEY ACCC ACTIVITY IN 2020

No public action.

PRIORITY

Competition and consumer issues relating to digital platforms.

ACCC CONCERN

'As outlined in the final report of our 2019 Digital Platforms Inquiry, the ACCC has concerns about consumers being misled over the collection and the use of their personal data, as well as a range of important competition issues, some also linked to data. It's vital that we devote considerable resources to these issues given their dominance in all our lives and their effect on economic activity.'

KEY ACCC ACTIVITY IN 2020

Commenced Digital Advertising Services Inquiry and Digital Platform Services Inquiry in February 2020 (see chapter 9 for more detail)

Released draft News Media Bargaining Code, undertook public consultation and made recommendations to Government that fed into the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (see chapter 10 for more detail).

Commenced new, separate, proceedings against Facebook and Google alleging misleading conduct relating to data practices.

Concluded proceedings against HealthEngine through settlement and court-approved agreed penalty of $2.9m.

PRIORITY

Competition and consumer issues arising from the pricing and selling of essential services, with a focus on energy and telecommunications.

ACCC CONCERN

'The misleading and deceptive selling practices of essential services, combined with the lack of transparency in their pricing, can have a detrimental impact on consumers and small businesses...

There are similar concerns regarding misleading and deceptive selling practices of goods and services in the telco sector.'

KEY ACCC ACTIVITY IN 2020

Released draft guidelines on how electricity retailers and generators should comply with new laws that prevent retailers from keeping consumer and small business prices unnecessarily high.

Brought proceedings against Dodo and iPrimus alleging they made false or misleading claims about achievable NBN broadband speeds, and against Sumo Power alleging it made false or misleading claims in relation to pricing of its electricity plans.

Accepted court enforceable undertaking from 1st Energy regarding unsolicited telemarketing calls that likely breached the Australian Consumer Law (ACL), and from NBN Co in relation to its sending of

disconnection communications to consumers containing false or misleading statements.

PRIORITY

Misleading conduct in relation to the sale and promotion of food products, including health and nutritional claims, credence claims and country of origin.

ACCC CONCERN

'We are concerned some business either confuse consumers or deliberately make misleading claims to gain an advantage in the market over suppliers who make honest claims about their products.'

KEY ACCC ACTIVITY IN 2020

Simplot Australia (the owner of Birds Eye) changed its country of origin labelling on 31 frozen fish products to 'Packed in Australia' (previously 'Made in Australia') after the ACCC raised concerns.

Queensland Yoghurt paid $12,600 in penalties after the ACCC issued an infringement notice alleging the company misled consumers by omitting gelatine as an ingredient in some yoghurt products.

PRIORITY

Conduct affecting competition in the commercial construction sector, with a focus on large public and private projects and conduct impacting small business.

ACCC CONCERN

'The construction sector is central to our economy, and it will continue to be a focus.

We have a dedicated Commercial Construction Unit looking at conduct affecting competition and poor trading practices in the commercial construction sector, including conduct impacting small businesses and large public and private projects.

The fear of reprisal and unwillingness of complainants or whistleblowers to come forward is, however, a fundamental problem we must overcome.'

KEY ACCC ACTIVITY IN 2020

Brought proceedings against NGCranes Pty Ltd, an overhead crane company, for alleged market sharing cartel conduct.

Brought proceedings against J Hutchinson Pty Ltd and the CFMMEU regarding alleged boycott conduct at a building site in Brisbane.

UGL will reduce its payment terms back to 30 days after the ACCC raised concerns about its decision to unilaterally extend payment terms to 65 days on new purchase orders.

PRIORITY

Ensuring that small businesses receive the protections of the competition and consumer laws, with a focus on the Franchising Code of Conduct.

ACCC CONCERN

'The ACCC remains concerned that many franchisees cannot freely operate their business because of the prevalence of some questionable industry practices...

We are concerned that some franchise systems do not focus on running a viable system, to the benefit of both franchisees and franchisors.'

KEY ACCC ACTIVITY IN 2020

Brought proceedings against:

Retail Food Group, alleging unconscionable conduct and false or misleading representations when it sold 42 loss-making stores to incoming franchisees.

Megasave Couriers, alleging misleading or deceptive conduct regarding guaranteed minimum weekly payments and annual income for prospective franchisees.

Back in Motion Physiotherapy will remove potential unfair contract terms from standard form franchise agreements.

Bob Jane undertook to comply with its Code obligations in relation to the renewal and extension of franchising agreements.

Holden committed to negotiate with its dealers in good faith (as required under the Code) regarding compensation for Holden's withdrawal from Australia following pressure from the ACCC.

PRIORITY

Ensuring compliance with the Dairy Code of Conduct.

ACCC CONCERN

'The Dairy Industry Code of Conduct came into effect on 1 January 2020. The ACCC will be working closely with the affected dairy farmers and processors to ensure a smooth implementation, and to educate them about their rights and obligations under the Code. The ACCC will also enforce the Code where significant non-compliance issues arise. A review of the Code's role, impact and operation will take place after 12 months.'

KEY ACCC ACTIVITY IN 2020

Won a competition advocacy award from the International Competition Network and World Bank Group for dairy industry work.

Closely monitoring compliance with the new mandatory Code.

Wrote to dairy processors in May to remind them of their obligations under the Code, particularly the requirement to publish standard forms of milk supply agreements by 2pm on 1 June 2020.

Investigated Saputo Dairy for publishing its MSAs at around 3pm on 1 June 2020 and issued a warning after finding that the delay was caused by a technical failure.

Issued infringement notice against Riddoch Trading (trading as The Union Dairy Company) for alleged breaches of Code publishing requirements.

Published 'Dairy Code: Initial observations on compliance' in December, which focused on compliance with publish-ing, single document, termination and supply period requirements.

PRIORITY

Empowering consumers and improving industry compliance with consumer guarantees, with a focus on high value goods such as motor vehicles and electrical and whitegoods.

ACCC CONCERN

'[C]onsumer guarantees remain the number one issue that the ACCC and the Australian Consumer Law regulators have to deal with. Over the last year, we've received 25 000 reports from consumers who want help trying to resolve a dispute involving a motor vehicle or white goods; these two are the most complained about sectors to the ACCC.'

KEY ACCC ACTIVITY IN 2020

Created COVID-19 taskforce which educated consumers and small businesses about application of consumer guarantees to cancellations due to pandemic (among other things).

Accepted a court-enforceable undertakings from Toyota Australia to review and improve consumer guarantee compliance processes.

Brought proceedings against AA Machinery (Agrison) alleging false or misleading representations about warranties and after-sales services in connection with tractor sales.

Freedom Furniture paid $25,200 in penalties for two infringement notices alleging false or misleading representation to customers regarding consumer guarantee rights.

PRIORITY

Pursuing regulatory options to prevent injuries and deaths to children caused by button batteries.

ACCC CONCERN

'They can cause significant injuries if swallowed by children, and have already caused two deaths in Australia in the past six years. At least 64 children have died globally, and hundreds of children suspected of swallowing button batteries have ended up in hospital emergency rooms.'

KEY ACCC ACTIVITY IN 2020

Undertook consultation to develop new mandatory safety and information standards. The new standards, announced by Assistant Treasurer in December, will commence after an 18-month transition period.

Launched 'Tiny batteries, Big danger' safety campaign aimed at parents and carers.

PRIORITY

Finalising the compulsory recall of vehicles with Takata airbags.

ACCC CONCERN

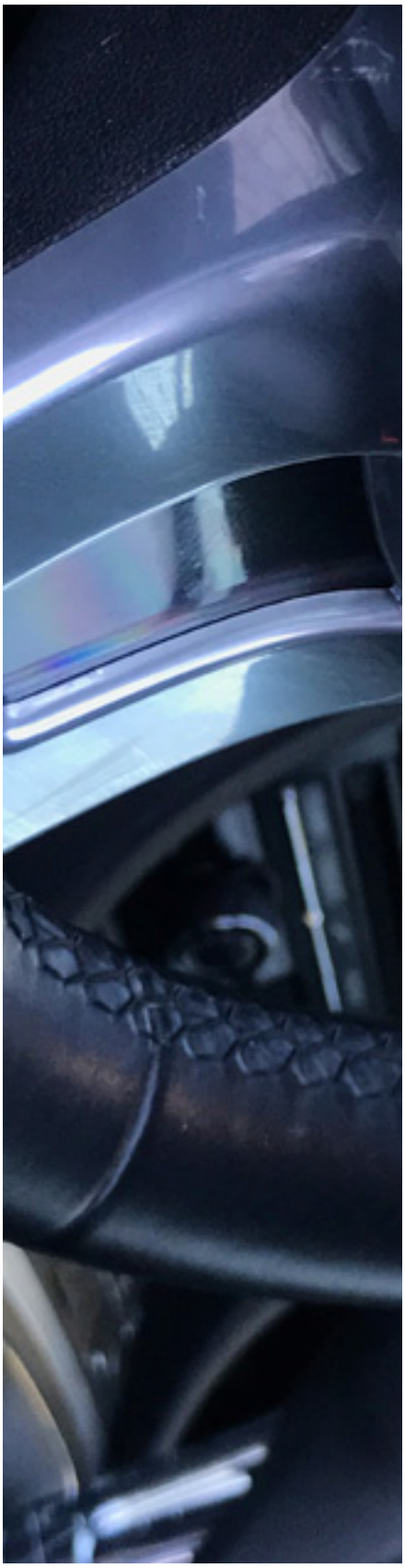
'The Takata airbag recall is one of the most important, and by far the largest product safety project the ACCC has undertaken. While we have made good progress with the largest-ever recall in Australia, with 2.6 million of the 3 million affected vehicles now repaired, our work is not yet complete.'

KEY ACCC ACTIVITY IN 2020

As at 12 February 2021, 99.9% of the recall has been completed.

Three companies paid a total of $63,000 in penalties after the ACCC issued infringement notices for allegedly selling or advertising vehicles under active recall.

Mercedes-Benz gave a court-enforceable undertaking after ACCC raised concerns about its implementation of the recall.



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ACCC 2021 COMPLIANCE AND ENFORCEMENT PRIORITIES

On 23 February Rod Sims, Chair of the Australian Competition and Consumer Commission (**ACCC**) announced its 2021 compliance and enforcement priorities in his address to the Committee for Economic Development Australia (**CEDA**) in Sydney.

Many of the priorities build on those identified in 2020, but the continuing impact of COVID-19 is apparent in the prioritisation of competition in the domestic air travel market and consumer rights relating to the promotion and sale of products such as travel and event cancellations. Promoting competition and investigating allegations of anti-competitive conduct in the financial services sector is also a new priority for 2021.

Key priorities and activities for the ACCC for 2021 include:

+ monitoring compliance with the new 'big stick' energy legislation, with the ACCC actively monitoring electricity costs and whether reductions in costs are passed on to consumers;
+ continuing to investigate the practices of the digital platforms, flagging that there are more cases to follow in this space;
+ progressing the ACCC's inquiry into digital advertising services, calling out adtech and apps as key areas of focus;
+ commencing proceedings in two or three new cartel cases this year, which may be civil or criminal prosecutions; and
+ setting up a regulatory framework for the multi-technology nbn network that allows the most efficient utilisation of the public investment in the nbn.

AN ADJUSTED ENFORCEMENT AND COMPLIANCE APPROACH IN 2020

Mr Sims reflected on the effectiveness of the ACCC's response to COVID-19. He commended the ACCC staff teams for their ability to consider and grant a large number of authorisations in very short timeframes to allow businesses to cooperate in ways that they would not have been allowed to absent the pandemic. The ACCC's COVID-19 Taskforce has responded to complaints relating to COVID-19 restrictions, in particular complaints and reports about the travel sector which rose by 500% in 2020. Mr Sims said that over the past year, the ACCC became more proactive in responding to complaints and working with business to resolve issues proactively, rather than taking an investigatory approach. He suggested that, given that much of the public sees the ACCC as a 'complaints handling body', and the success of this strategy, this may be a practice that is continued in 2021.

Enduring priorities – essential services, the funeral services sector, commercial construction, protecting small businesses and compliance with industry codes

The ACCC has affirmed that many of its 2021 compliance and enforceable priorities are a continuation of its 2020 priorities, including:

+ competition and consumer issues relating to digital platforms;
+ competition and consumer issues relating to the funeral services sector;
+ the pricing and selling of essential services, especially energy and telecommunications;
+ competition issues in the commercial construction sector;
+ protecting small business under the competition and fair-trading laws, including franchising; and
+ ensuring compliance with mandatory industry codes of conduct in the agricultural sector, specifically the Dairy Code of Conduct and the Horticulture Code of Conduct.

In relation to the pricing and selling of essential services, Mr Sims emphasised that the 'big stick' energy legislation requires electricity retailers to adjust their prices to reflect sustained reductions in wholesale electricity costs. He said that the ACCC is actively monitoring electricity retailers' pricing responses and asking for justification of certain

prices. The ACCC has signalled it expects to see significant price reductions:

'Consumers saw their electricity prices rise enormously over many years; now they need to see them fall considerably. This is only fair.'

The ACCC also remains concerned with issues in the funeral services sector, especially given their significant market power to bundle services and block new entrants.

The impact of COVID-19 on travel and the aviation industry

A new focus for the ACCC is on issues arising from the impact of COVID-19 on travel. Mr Sims said they would be:

+ looking at the sales practices of travel businesses when promoting forward-booking of services and products;
+ continuing to monitor the Australian domestic aviation sector through its Airline Taskforce, which was established at the Treasurer's direction in 2020; and
+ closely considering competition in the domestic aviation industry, in particular ensuring access to slots at Sydney Airport for new entrants in the light of Rex's plans to enter major domestic routes.

Digital platforms – further cases and 'adtech' and 'apps' inquiries

Mr Sims noted that the ACCC will be bringing 'more cases' from its investigations into the practices of digital platforms, in addition to the current consumer law proceedings underway against Facebook and Google.

Meanwhile, the ACCC is also progressing its inquiry into digital advertising services looking at adtech and apps.

Developing an nbn regulatory framework for the multi-technology network

With the current commercial framework in place until December 2022, Mr Sims stated that a key priority of the ACCC's will be to establish a regulatory framework for the multi-technology nbn network that allows for the very significant public investment in the nbn to be most efficiently utilised. He noted that industry and stakeholders will be given ample opportunity to express their views on this framework.

Advocacy for merger reform

Mr Sims flagged that the ACCC's approach to merger control needs to be 'rebalanced' and that the ACCC will be exploring merger law reform options in 2021. Mr Sims expressed concerns that under the current merger regime, the uncertainty inherent in the forward-looking merger test which focuses on the counterfactual of what will happen in the future both with and without the acquisition 'in many cases risks overlooking the likely anticompetitive effects of the merger itself'.

He also noted that the regime is 'skewed towards clearance', presenting challenges for the ACCC to prevent anti-competitive mergers:

'It appears that insufficient weight is placed on the risks to competition, such as potential competition being lost, barriers to entry being raised or competitors being foreclosed.'

Other reforms that the ACCC will continue to advocate for in 2021 include:

+ reforms to address deficiencies in the consumer guarantees regime, especially in light of the outcome of its case against Jayco Caravans;
+ the introduction of an unfair trading practice prohibition, which the ACCC recommended following its Digital Platforms and Perishable Goods inquiries; and
+ a national safety provision as part of Australia's consumer product safety framework.

4

ENFORCEMENT INSIGHTS

Here we take a deeper dive into enforcement trends in 2020.

3.1 RESPONSE TO COVID-19

The COVID-19 pandemic caused significant disruption to Australian businesses and consumers, but in the end no changes needed to be made to competition law in order to facilitate the ACCC's response.

The ACCC formed a COVID-19 taskforce early on in the pandemic which focused on helping small businesses and consumers understand and exercise their consumer rights. On 8 April 2020, ACCC Chair Rod Sims stated: "*Our aim is to address immediate problems being faced by consumers in relation to cancellation of services and failure to obtain refunds and remedies, and working with expert teams across the agency to ensure we can quickly get to the heart of the issues being raised with the ACCC and work to fix them.*"

Much of the taskforce's public activity concerned refunds and other remedies for consumers who had travel plans cancelled due to COVID-19 restrictions. Whether consumers were entitled to such remedies generally depended on the terms and conditions of the relevant provider, but the ACCC was active in engaging with businesses, such as Qantas, Etihad and Flight Centre, to ensure that customers were treated fairly. The ACCC also carried out confidential work engaging with other industries in relation to excessive price increases, issues with subscription services and private health insurance.

As can be seen in the following timeline, in the first six months of 2020 there was a lull in the ACCC bringing new enforcement actions, which then ramped up again in the latter half of the year. This was acknowledged by Mr Sims in a Lawyerly report in May 2020: "*I think you'll find cases coming up in current months. That will be a fair number of cases. And in some ways, we'll probably catch up.*"

Many of these new enforcement matters were business-as-usual consumer law matters, but they also included new cartel and other competition law matters, including proceedings against Lorna Jane for representing that its 'Anti-virus Activewear' could prevent the spread of and protect against viruses and pathogens including COVID-19. In relation to this new case ACCC Commissioner Sarah Court said that

"This year, the ACCC prioritised consumer and competition issues arising from the COVID-19 pandemic and we will continue to look closely at allegations relating to companies seeking to take advantage of the crisis by engaging in illegal conduct to enhance their commercial position or harm consumers".

IN 2020, THE ACCC COMMENCED PROCEEDINGS AGAINST:

JAN FEB MAR APR MAY JUN

22 June: Dodo and iPrimus, alleging misleading broadband speed claims.

JUL

6 July: Megasave Couriers and Gary Bourne for allegedly misleading franchisees

23 July: Decathlon for allegedly selling sporting goods that did not comply with safety standards.

27 July: Google for allegedly misleading consumers to obtain consent to expand scope of personally identifiable information Google could collect and combine about consumers' internet activity, for uses including targeted advertising.

AUG

5 August: Sumo Power for allegedly misleading Victorian consumers in relation to pricing of its electricity plans.

SEP

14 October: B&K Holdings (trading as FE Sports) alleging it engaged in resale price maintenance in relation to the recommended retail price contained in dealer agreements for the wholesale supply of cycling and sporting products.

19 October: Civil cartel proceedings against NQCranes, alleging market sharing cartel conduct in the overhead crane market.

22 October: Fuji Xerox Australia, alleging 173 unfair contract terms in 9 types of Fuji standard form small business contracts.

27 October: AA Machinery (trading as Agrison) alleging false or misleading representations about warranties and after-sales services available to its customers regarding tractor sales.

OCT

NOV

20 November: Australasian Food Group (trading as Peters Ice Cream) for exclusive dealing conduct that hindered or prevented competition for the supply of single-wrapped ice-creams to convenience and petrol retailers.

26 November: Telstra for admitted unconscionable conduct regarding sales staff who signed up 108 Indigenous consumers to multiple post-paid mobile products.

1 December: Criminal cartel proceedings against Alkaloids of Australia and its former export manager alleging price fixing, supply restrictions, customer and/or geographic market sharing and/or bid rigging in the supply of scopolamine N-butylbromide, the active ingredient in certain antispasmodic bowel medications.

4 December: J Hutchinson and the CFMMEU for alleged boycott conduct at a Brisbane building site.

DEC

15 December: Retail Food Group, alleging unconscionable conduct and false or misleading representations when it sold 42 loss-making stores to incoming franchisees.

16 December: Facebook, alleging that it misled consumers in the promotion of the Onavo Protect virtual private network mobile app.

21 December: Lorna Jane, alleging false or misleading claims about 'Anti-virus Activewear', which it claimed was sprayed with 'LJ Shield' which protected against viruses including COVID-19.

3.2 CARTELS

2020 was a significant year for cartel enforcement.

Existing criminal matters worked their way through the court systems:

Banking cartel:

In December, ANZ, Citigroup, Deutsche Bank and six senior executives were committed to stand trial in the Federal Court for cartel conduct concerning an institutional share placement for ANZ in 2015. This was after lengthy and complex initial proceedings in the Local Court in Sydney, during which senior ACCC case staff were cross-examined on the ACCC's investigative process.

Country Care:

Pre-trial hearings in the Federal Court continued in the ACCC's first criminal cartel case against an Australian company, and its first against individuals. A jury trial is due to begin in March 2021.

Two new matters, one criminal and one civil, were commenced toward the end of 2020:

Alkaloids Australia:

In December 2020 charges were laid against Alkaloids of Australia and a former export manager in relation to alleged cartel conduct in the supply of scopolamine N-butylbromide, the active pharmaceutical ingredient in certain antispasmodic medications. The ACCC is alleging price fixing, output restriction, market allocation and / or bid rigging conduct in the supply of SNBB to generic manufacturers overseas, over a ten year period.

NQ Cranes:

In these civil proceedings the ACCC alleges that NQCranes, an overhead crane company based in Mackay but which operates in Queensland and parts of NSW, signed a distributorship agreement that included a provision under which the parties would not target each other's customers for parts and servicing in relevant geographic areas. The ACCC alleges that this provision is a market sharing cartel provision.

Two other matters were concluded:

Shipping cartels:

The Norwegian shipping company Wallenius Wilhelmsen Oceas AS pleaded guilty to criminal cartel conduct in June 2020. In February 2021 it was ordered to pay a $24 million fine. The conduct concerned the transportation of vehicles to Australia between June 2011 and July 2012, and involved several international shipping companies. Other participants have already been convicted and fined in relation to this cartel: Nippon Yusen Kabushiki Kaisha was fined $25 million in 2017, and K-Line was fined $34.5 million in 2019.

Obstruction case:

In September a former general manager of sales and marketing at BlueScope Steel pleaded guilty to inciting the obstruction of an ACCC investigation into alleged price fixing cartel conduct by inciting two employees to give false information and evidence to the ACCC. This is the first instance of a prosecution of obstruction of an ACCC investigation. In December the former employee was sentenced to 8 months in prison but was released without entering custody on condition of good behaviour for two years, and was ordered to pay a $10,000 fine.

3.3 PRIVATE ENFORCEMENT: EPIC V APPLE

Since the provision was reformed in November 2017, the ACCC has only brought one misuse of market power case (against TasPorts). However, private litigants have been making use of the provision.

In November 2020, Epic Games, Inc, the creator of the popular videogame Fortnite, commenced proceedings against Apple in the Federal Court of Australia. Epic alleges that Apple has a substantial degree of power in the "iOS App Distribution Market" and the "iOS In-App Payment Processing Market", and that it has misused that power by, among other things:

+ preventing the distribution of iOS Apps to iOS users by any means other than the App Store;
+ restraining app developers from using any in-app payment processing system other than Apple's system to distribute in-app content;
+ charging a 30% commission for in-app content; and
+ removing Fortnite and other Epic apps from the App Store in response to Epic allowing Fortnite players to use a direct payment system created by Epic that bypassed Apple's payment system.

Epic is seeking the immediate reinstatement of Epic's apps and an injunction restraining Apple from engaging in the alleged anti-competitive conduct for five years.

Epic has brought similar cases in the US and the UK. We can expect this case to generate debate and media interest throughout 2021. The Epic case follows a number of other s46 private enforcement cases over 2019-2020. These have led to some interim remedies (injunctions) as well as commercial settlements.

3.4 NEW EXCLUSIVE DEALING CASE: PETERS ICE CREAM

In November 2020, the ACCC commenced proceedings against Australasian Food Group, trading as Peters Ice Cream, alleging that it engaged in exclusive dealing conduct in breach of s 47.

It alleges that at the relevant time Peters was one of two major suppliers of single serve ice cream products distributed to petrol and convenience store retailers, and that it supplied those products to its distributor PFD Food Services on the condition that PFD would not distribute competing ice cream products in various geographic areas. The ACCC also alleges that hindering potential competitors from using PFD to distribute their products had the effect of substantially lessening competition, as PFD was the only commercially viable option for new entrants, and that a substantial purpose behind Peters' conduct was to protect its market share.

5

CONSUMER LAW TRENDS

The ACCC expended significant resources in helping consumers and small businesses understand and exercise their rights in response to the COVID-19 pandemic, and it has been actioning most of its consumer law priorities for 2020.

Other themes coming through in 2020 were the ACCC's focus on unfairness and fair trading, and its desire to protect consumers from misleading data claims on the part of the digital platforms.

Consumer guarantee financial threshold set to increase to $100,000

Regulations made in July of 2020 mean that from 1 July 2021, more consumers will be able to rely on the consumer guarantee protections in the ACL when buying goods and services. The definition of "consumer" in section 3 of the ACL will be expanded when the monetary threshold increases from $40,000 to $100,000 on 1 July 2021.

Businesses have been given 12 months to update their compliance programs and ensure their staff understand that a wider range of goods and services will be captured by the consumer guarantees regime come 1 July 2021. Given the long lead time before the reform takes effect, businesses should expect the ACCC to take a more aggressive approach to enforcement of any non-compliance. For this reason, it is important that, if they have not been doing so already, businesses start considering what changes to their operations may need to be made.

For more information on this topic see our coverage: **Consumer guarantees to apply to more "consumers"**

Consumer law penalties in 2020

In 2020, the ACCC successfully obtained significant penalties in a number of matters, most notably:

1. **24 January:**
   $4.2m penalties against Geowash for breaches of the ACL and the Franchising Code of Conduct.
2. **24 April:**
   $14m penalties against STA Travel for misleading advertisements about its MultiFLEX Pass product.
3. **12 May:**
   $6m penalties against Bupa Aged Care for misleading representations and wrongly accepting payments for extra services not provided or only part provided to residents of 20 aged care homes.
4. **28 May:**
   $4.5m penalties against GSK and Novartis for misleading representations in the marketing of Voltaren Osteo Gel and Voltaren Emulgel pain relief products.
5. **5 June:**
   $3.5m penalties against Sony Europe for false or misleading representations about consumers' ACL rights in relation to purchases of PlayStation games.
6. **16 July:**
   $5m penalties against Medibank (trading as ahm Health Insurance) for making false representations to members about benefits under ahm health insurance policies.
7. **20 August:**
   $2.9m penalties against HealthEngine for publishing misleading patient reviews and ratings and engaging in misleading conduct regarding the sharing of consumers' personal information.
8. **18 September:**
   $3.5m penalties against Oscar Wylee for misleading or deceptive conduct and false or misleading representations regarding 'buy a pair, give a pair' charitable donation claims.
9. **2 October:**
   $7m penalties against Viagogo for false or misleading representations regarding the reselling of tickets for live music and sports events.
10. **8 October:**
    $8.5m penalties against iSelect for false or misleading representations regarding its energy plan comparison service, which did not actually compare all plans offered by its partner retailers.

However, the ACCC also suffered some losses last year, most notably two appeals to the Full Federal Court with regard to:

+ Flushable wipes: Kimberly-Clark's claims that Kleenex Cottonelle toilet wipes were 'flushable' were not misleading. The ACCC's appeal was dismissed in June.
+ Biodegradable picnic products: Woolworths' claims about 'biodegradable and compostable' W Select eco picnic products were not misleading. The ACCC's appeal was dismissed in September.

4.1 FOCUS ON UNFAIRNESS AND FAIR TRADING

In October 2020, ACCC Chair Rod Sims stated that the ACL should be renamed the "Australian Consumer and Fair Trading Law", "*to emphasise that it doesn't just protect consumers*". Mr Sims also identified certain types of behaviour that would be unlikely to reach the threshold of prohibited unconscionable conduct, but that "is unfair and should be prohibited" by a new prohibition on "unfair practices":

+ "A digital platform not removing a known scam that is causing individuals to lose large sums, and, in some cases, seeing prominent individuals' reputations damaged.
+ Companies using data about individuals to target them with sales approaches when they are at their most vulnerable.
+ Small businesses getting threatened by larger businesses with commercial consequences unless they agree to change contract terms or otherwise accept considerably less than they are entitled to.
+ Larger businesses demanding their small business suppliers provide them with their cost of and sources of key inputs, and then establishing a competing, near identical, 'home' brand."

We can expect further debate and information about what such a provision should look like in 2021.

Similarly, in November 2020 the Government announced that it plans to make unfair contract terms illegal and punishable by civil penalties, a change for which the ACCC has been advocating for some time. The unfair contract term regime protects consumers and small businesses that are party to 'standard form' contracts.

CURRENT LAW	KEY PLANNED CHANGES
Unfair contract terms are void	Unfair contract terms are unlawful
Term is void if declared by a Court to be unfair	Courts have flexibility to determine an appropriate remedy
No civil penalties	Civil penalties apply
'Small business' threshold is: + fewer than 20 employees; AND + either: – upfront price payable under the contract is less than $300,000; OR – $1 million if the contract is for longer than 12 months.	'Small business' threshold is: + fewer than 100 employees OR + annual turnover of less than $10 million No upfront price requirement.

For more information on this topic, see our coverage: **Unfair Contract Terms: Government planning to introduce penalties**

In October 2020, the ACCC also brought new enforcement proceedings alleging 173 unfair contract terms in certain standard form small business contracts used by Fuji Xerox Australia. Those terms include unilateral price increases, automatic renewals and excessive exit fees. This new case is in addition to a number of court-enforceable undertakings the ACCC obtained from various companies in 2020 to remove terms from their standard form contracts that the ACCC was concerned were unfair.

4.2 CONCERNS ABOUT MISLEADING CONDUCT IN THE DIGITAL SPHERE

In 2020 the ACCC brought two cases against digital platforms alleging that consumers were misled about the extent to which their data would be used for a platform's commercial benefit.

ACCC v Google:

The ACCC's case concerns Google's 2016 decision to start combining (in an identifiable way) consumers' personal information in their Google accounts with information collected about those consumers' activities on other websites that use Google's display ad technology (e.g. DoubleClick). The ACCC alleges that Google did not obtain the necessary consent from consumers, and that an "I agree" pop-up notification that account holders were prompted to click was misleading because it did not properly explain the changes. The notification included:

> *Some new features for your Google Account*
>
> *We've introduced some optional features for your account, giving you more control over the data Google collects and how it's used, while allowing Google to show you more relevant ads.*

ACCC v Facebook:

The ACCC alleges that Facebook misled consumers that its Onavo Protect virtual private network (VPN) app would keep users' personal activity data "private, protected and secret, and that such data would not be used for any purpose other than to provide the Onavo Protect services" when a key purpose of the app was alleged by the ACCC to be for Facebook to collect personal activity data to inform market analytics and identify potential future acquisitions of other app businesses.

For more information on digital regulation in 2020, see our Spotlight section in chapter 8 of this publication.

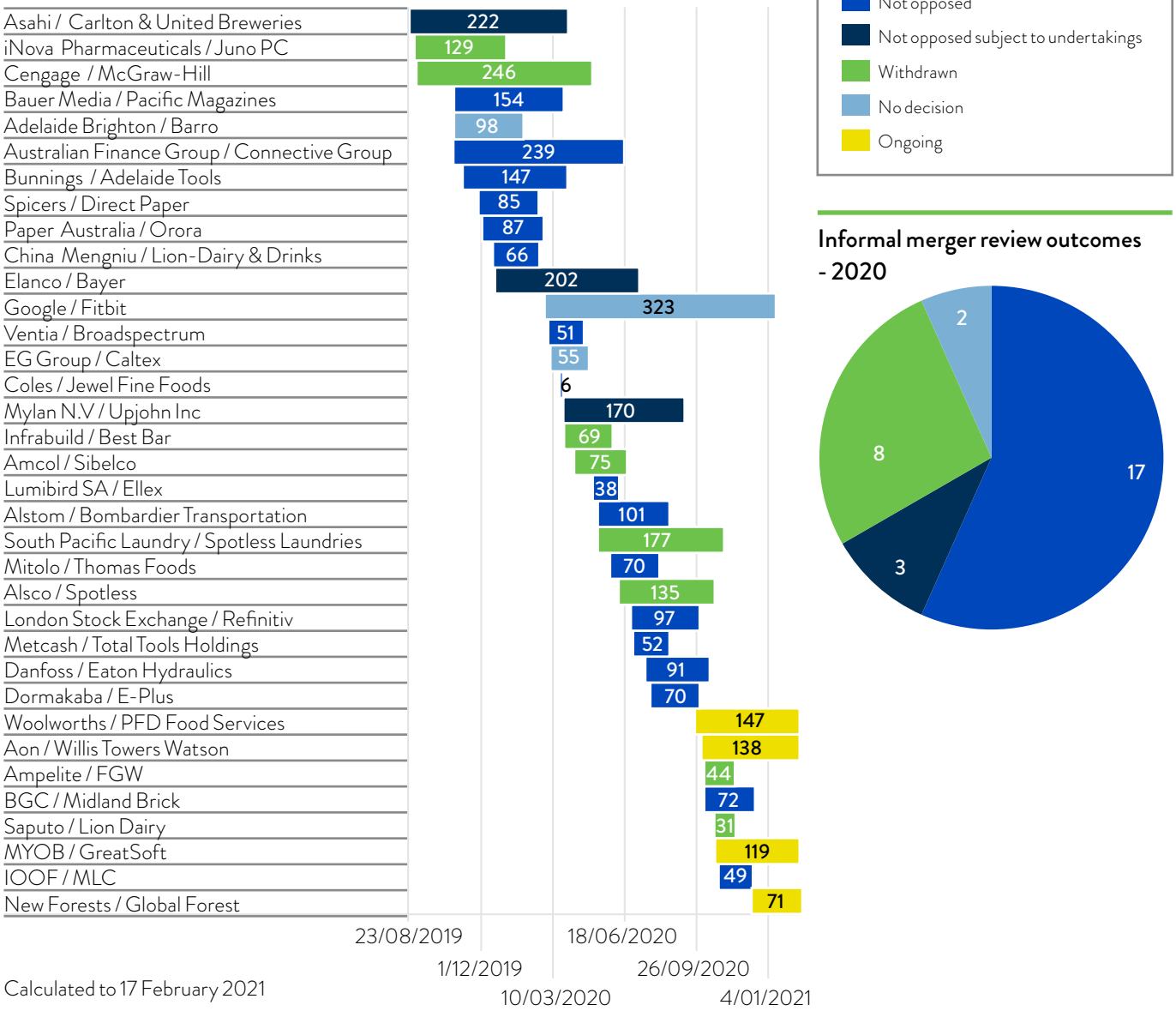
MERGERS

ACCC Chair Rod Sims was clear from the beginning of the COVID-19 pandemic: "*Do not expect a different, or lenient approach to merger assessments during this crisis. Our objective will be to protect the competitive structure of the economy, and not to see anti-competitive increases in market power, or the rise of so-called 'national champions'*".[4]

Mr Sims was true to his word. In our experience, apart from an initial transition to working remotely, there was no substantive change in the ACCC's approach to merger assessments in 2020. This has also been reflected in timing data for public merger assessments which did not change substantially from previous years.

Below is a timeline of the informal mergers reviews the ACCC assessed publicly in 2020.

Overview of public merger reviews conducted in 2020



Calculated to 17 February 2021

Informal merger review outcomes - 2020

[4] Rod Sims address to Australian Financial Review Banking & Wealth Summit Crisis Briefing, 30 March 2020, *Will competition survive the current crises?*

Courtroom losses

2020 also saw some major developments in high-profile mergers:

Pacific National / Aurizon

Following trial in theFederal Court, an appeal to the Full Court and an application for special leave to appeal to the High Court, this case finally concluded in December 2020.

After refusing to grant informal clearance for the transaction, the ACCC instituted proceedings against Pacific National and Aurizon in July 2018, alleging (among other things) that Pacific National's acquisition of Aurizon's Acacia Ridge Terminal in Queensland would have the likely effect of substantially lessening competition. It was concerned that the acquisition would deter new entry in interstate rail linehaul services in competition with Pacific National.

The trial judge held in the merger parties' favour, but also found that in the absence of an access undertaking that Pacific National offered the Court the transaction would have been likely to substantially lessen competition in breach of s 50 of the Competition and Consumer Act (Cth) 2010.

The ACCC argued on appeal that the trial judge had erred in accepting the undertaking from Pacific National. The Full Court, however, dismissed the appeal and released Pacific National from the undertaking, as it found that the transaction was not likely to substantially lessen competition as the prospect of new entry within the relevant timeframe was merely speculative.

The High Court dismissed the ACCC's special leave application in January and the transaction is expected to close in March 2021.

TPG / Vodafone

TPG had announced in 2017 that it would build Australia's fourth mobile network, but it abandoned those plans after the Federal Government prohibited the use of Huawei's equipment in 5G networks.

The ACCC opposed TPG's acquisition of Vodafone in May 2019, as it was concerned that, without the proposed merger, there was still a real chance that TPG would become a competitive fourth mobile network operator even without Huawei's equipment. Vodafone then applied to the Federal Court for a declaration that the transaction was not likely to substantially lessen competition, arguing that TPG no longer had the ability or intention to roll out its own mobile network but the merged entity could offer consumers a better mobile service.

In February 2020 the Federal Court found in Vodafone's favour, acknowledging that 'there is no commercially relevant or meaningful real chance that TPG will roll-out a retail mobile network or become an effective competitive fourth [mobile network operator]. The rational and business-like solution is for Vodafone and TPG to merge, with the result that both companies will be enhanced and will be a stronger competitive force against Telstra and Optus.' The ACCC later announced that it would not appeal the Court's decision.

ACCC response

Following these losses the ACCC questions whether Australia's merger law are fit for purpose, with Mr Sims commenting::

"The ACCC faces challenges in contested merger cases where a forward looking merger test is applied. The nature of the test, and the inherent uncertainties in predicting the future, make it difficult to prove that a change in the market structure after the merger will substantially lessen competition in the future."

"This task is further complicated by the need to prove that competition is likely to be substantially lessened compared to a hypothetical future in which the acquisition did not occur."

"These challenges raise important issues for the consideration of whether Australia's current merger laws are fit for purpose."

In November 2020 at a Gilbert + Tobin seminar, Mr Sims noted that the COVID-19 pandemic had interrupted the ACCC's internal work in pursuing potential reforms to the merger law, but that we can expect proposals this year. See the interview here: **In conversation with Rod Sims: COVID-19 and the fitness and flexibility of Australia's merger law**

Other key developments

Google / Fitbit

2020 kicked off with the ACCC commencing an informal merger review into Google's acquisition of Fitbit. This was the first significant global digital merger review following the ACCC's release of its Digital Platforms Inquiry Final Report in July 2019. The merger was reviewed by a number of competition regulators including the European Commission, US Department of Justice, Canadian Competition Bureau, Japan Fair Trade Commission, and South Africa Competition Commission. The transaction was announced in November 2019 – and completed in January 2021 after over 14 months, during which competition regulators scrutinised the transaction. The issues were novel – there was no competitive overlap between Google and Fitbit. The ACCC's concerns focused on the issues associated with the aggregation of data and potential foreclosure – and whether this would lead to a loss of potential competition, or potential competition in nascent health markets.

The review of this transaction reflects the inherent challenges confronting regulators with respect to merger analysis of digital markets. Regulators were split globally on a merger where the parties' businesses were largely identical worldwide – the EC cleared the transaction with commitments, CCB concluded its review and took no action, the JFTC took no action having regard to the EC commitment, the DOJ allowed the deal to close without objection, while the ACCC did not complete its informal merger review. The ACCC moved the review post completion into an enforcement review. During the review, the ACCC rejected the commitment that was accepted by the EC, citing issues with monitoring and enforcement in Australia. This shows that reasonable minds can differ significantly on these issues.

Of note is that the extensive period of time allowed for review (over a year) without a resulting informal merger clearance decision is a first in Australia. In Australia, merger parties can avail themselves of the informal merger review process as set out by the ACCC in its Informal Merger Guidelines to obtain an opinion. Fundamental to the informal merger clearance process is the ability to obtain a view within a reasonable period of time – such timeframes set out in the ACCC's guidelines (6-12 weeks for a public review and a further 6-12 weeks for a post-SOI review). It remains to be seen whether the highly unusual approach of the ACCC in Google/Fitbit in extending its review out past the scheduled deal closure (having spent over one year on the review) without expressing a final view is simply a one off, or reflects a change in approach which merger parties will need to factor in.

Merger investigations

Midway through 2020 the ACCC advised that it would no longer place its investigations of completed acquisitions on the public merger register, to reinforce that such investigations are enforcement matters and are not subject to the timing and other requirements the ACCC normally adheres to in a public merger review.

Gumtree (eBay) authorisation of acquisition of Carsguide and Autotrader

Since the process was reformed in 2017, the ACCC has received only two applications for formal merger authorisation, one of which was in 2020.

Both Gumtree (a wholly-owned subsidiary of eBay) and CarsGuide and Autotrader (owned by Cox Automotive) supplied online automotive classified advertising to private and commercial advertisers in Australia, and space on their websites and mobile applications to display advertising. In light of Carsales' dominance in the market, and the increasing constraint of Facebook Marketplace, the ACCC found that the acquisition would not cause a substantial lessening of competition in any market and granted authorisation under the first limb of the test, without the need to assess public benefits. Gumtree lodged its application on 14 January 2020, and authorisation was granted on 30 April 2020, being 107 calendar days.

No COVID failing firm defences raised

The ACCC has not (at least so far) been inundated with public submissions claiming that a merger between two competitors is necessary because one or both parties would otherwise exit the market due to COVID-related pressures.

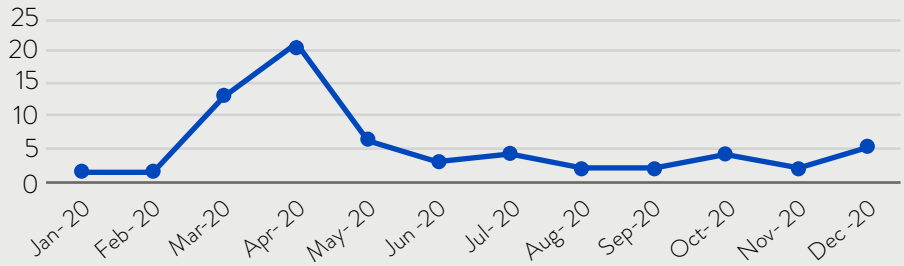
However, in a seminar[6] with Gilbert + Tobin partners Gina Cass-Gottlieb and Elizabeth Avery, ACCC Chair Rod Sims advised businesses that the ACCC would scrutinise any failing firm arguments very rigorously: "*If your firm is in trouble and you want to merge with somebody, don't merge with your biggest competitor... So a company gets into trouble, it goes to the dominant firm in the industry, it says 'would you buy me out' because they know they'll pay the most because they've got most to gain through the reduction of competition and they don't even offer the business to anybody else. Well, that's not going to work, sorry. That's not going to work. No matter how urgent you say it is, that's not going to work.*"

For more on this topic see the interview here: **In conversation with Rod Sims: COVID-19 and the fitness and flexibility of Australia's merger law**. See also our recent in-depth coverage of mergers in 2020: **Sailing steady in rough seas: Mergers in 2020**

NON-MERGER AUTHORISATIONS

One of the major developments for the ACCC in 2020 was the sheer number of non-merger authorisation applications it received – a total of 64, compared to 28 in 2019. This increase was concentrated around the beginning of the COVID-19 pandemic, with many applications seeking authorisation for conduct designed to enable industry responses to the crisis.

Applications for non-merger authorisation lodged with the ACCC in 2020



6.1 COVID-RELATED INTERIM AUTHORISATIONS

Faced with an enormous increase in its authorisation workload in March and April of 2020, the ACCC moved quickly to reallocate resources internally and expedite assessment of applications connected to the COVID-19 pandemic. It recognised that interim authorisation was necessary in "a number of sectors to ensure the economy is able to function and provide essential goods, services, medicines and medical equipment, and hardship relief during the COVID-19 pandemic."

The results were impressive. In the space of three weeks the ACCC granted 14 separate interim authorisations across a number of critical industries, often with a turnaround of fewer than 3 days – and in some instances, on the same day. Some examples are listed below:

Banking

The Australian Banking Association was granted interim authorisation for itself and its members to implement COVID-19 financial relief programs on 30 March, the same day the application was lodged

Supermarkets

Coles Group (on behalf of itself and participating supermarkets including Woolworths, ALDI and Metcash) was granted interim authorisation to cooperate to ensure the supply and fair and equitable distribution of fresh food, groceries, household products and liquor on 23 March 2020, after the application was lodged on 20 March. On 26 March, this was replaced with a conditional interim authorisation.

Airlines

Regional Express was granted interim authorisation to coordinate flight schedules with QantasLink and Virgin Australia to reduce capacity on ten regional routes and enter into agreements to share revenue on 26 March 2020, after the application was lodged on 23 March (subject to an agreement not to raise prices).

Medical Technology

Medical Technology Association of Australia (on behalf of itself, members and relevant non-member businesses) was granted interim authorisation to coordinate the supply of medical equipment and related supplies on 25 March, the day after the application was lodged.

Pharmaceutical

The National Pharmaceutical Services Association (on behalf of itself, its members and certain distributors) was granted interim authorisation to coordinate the distribution of medicines and pharmacy products on 31 March 2020, after the application was lodged on 27 March.

Private Hospitals

A number of private hospital systems were granted urgent interim authorisation that enabled coordination between each other and public health facilities to maximise capacity.

Other interim authorisations were quickly granted to shopping centre owners, NBN Co and telcos, oil companies, energy companies and insurers.

8

SPOTLIGHT: 2020 REVIEW – DIGITAL REGULATION AND ENFORCEMENT IN AUSTRALIA

7.1 BACKGROUND

Digital and data services and the opportunities and challenges they present have become an increasing focus of government inquiry and academic study around the world. A number of key reviews and investigations in these areas have recently been completed, and more are underway, in an extensive evaluation of the ways in which digital and data services might be regulated in the future.

In the United States, the Stigler Committee on Digital Platforms recommended the establishment of a new Digital Authority to oversee all aspects of digital platforms; the House Judiciary Committee called for major changes to antitrust and merger review laws and processes, and Senator Amy Klobuchar introduced a bill that would implement many of those recommendations, while the Department of Justice and the Federal Trade Commission brought major antitrust proceedings against Google and Facebook.

In the United Kingdom, the House of Lords Select Committee recommended a Digital Authority that would direct and mediate between existing regulators; the Competition and Markets Authority (**CMA**) completed its Online Platforms and Digital Advertising Market Study, and the Government announced a new Digital Markets Unit within the CMA to enforce a statutory code of conduct for significant digital platforms and undertake key market interventions, following the recommendation of the Digital Competition Expert Panel chaired by Jason Furman.

In Europe, the European Commission Special Advisers' Report on Competition Policy for the Digital Era led by Jacques Crémer considered that traditional European competition law should be complemented by specific ex ante regulation,; Germany's "Competition 4.0" Commission recommended a new Digital Markets Board to facilitate information exchange, coordination and coherent policy across the various Directorates General, and the European Commission and national agencies have pursued perhaps the most extensive program of investigations and proceedings, often based on novel theories of harm, against digital platforms in the world.

In Australia, the ACCC's Digital Platforms Inquiry and the Government's support of most of its recommendations have resulted in additional inquiries and measures including the Digital Platform Services Inquiry 2020–2025, the Digital Advertising Services Inquiry, the News Media Bargaining Code, the Review of the Privacy Act 1988, and a range of enforcement investigations and actions, particularly under the Australian Consumer Law. Existing projects such as the Consumer Data Right are also continuing to evolve.

The COVID-19 pandemic has accelerated existing trends towards digitalisation. Many Australians have been working and studying from home; many businesses have increased their online presence or moved entirely online. More business is being conducted electronically, including interactions with regulators. Electronic and particularly contactless payments are increasing and cash declining. And the transition to digital health has been rapidly compressed – described as "a 10-year shift done in 10 days".

Many providers of digital and data services – and providers of associated hardware products – have seen increased revenues and share prices during the pandemic. Their growth and our increased reliance on digital and data services has only intensified international focus on regulation and enforcement in these areas. The Head of the Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development noted in December 2020 that:

> *With the COVID-19 pandemic continuing to push economic activities online, governments around the world are increasingly concerned about competition and consumer protection in the digital economy.*

We expect that governments and regulators will continue to sharpen their focus on digital and data services in 2021 and beyond.

7.2 AUSTRALIAN RESPONSE

The ACCC's Digital Platforms Inquiry continues to substantially shape Australia's approach to regulating digital and data services and providers.

It has already led to legal proceedings under the Australian Consumer Law against Google for representations to users about the collection and use of location data and the combination of user data with other data sets; and against Facebook for representations about the data accessed by its Onavo Protect virtual private network app. Other investigations raised in the Digital Platforms Inquiry, such as Google's removal of the Unlockd app from the Play Store and whether Facebook's terms and policies contain unfair contract terms, may still be ongoing.

The ACCC is also now assessing Google's recently completed acquisition of Fitbit as an enforcement investigation. It had previously raised potential concerns with Google's access to Fitbit's consumer data and its ability to foreclose competing suppliers of wearables, and had rejected a proposed undertaking from Google to address those concerns even though the European Commission had cleared the merger following similar commitments. If the ACCC determines that the merger is likely to substantially lessen competition with an effect on Australian consumers it may bring legal action in Australia.

The ACCC has also said that it is closely following investigations and enforcement proceedings overseas, along with relevant private litigation, including:

+ the US Department of Justice's action in October 2020 alleging that Google had maintained a monopoly position in general search and search advertising through agreements with distributors that denied its competitors access to the scale they needed to compete effectively – echoing the proceedings by the European Commission in 2015 which resulted in a €4.34 billion fine and a commitment by Google to introduce browser and search engine ballots that prompt users to make an explicit choice between Google and a selection of alternative options;
+ the US Federal Trade Commission's action in December 2020 alleging that Facebook had engaged in anticompetitive conduct and unfair competition by acquiring companies that presented competitive threats – in particular Instagram and WhatsApp – and imposing restrictive policies that hindered other rivals;
+ the European Commission's investigations commencing June 2020 into Apple's rules in relation to the App Store, including the mandatory use of its proprietary in-app purchase system and restrictions on developers informing users of alternative purchasing possibilities outside of apps; and
+ the private actions brought by Fortnite developer Epic Games against Apple and Google in multiple jurisdictions (including also in Australia) for removing its app from their app stores after it introduced its own direct payment system, bypassing Apple and Google's own in-app purchase systems and the commissions they attract

As the Google/Fitbit merger illustrates, the ACCC will make its own decision in relation to these matters based on Australian law and circumstances. It may have options that are not available to individual enforcement agencies overseas, including a choice of competition and consumer law remedies and the possibility of direct regulation.

For example, in the Digital Platforms Inquiry the ACCC recommended that Google implement in Australia the commitments it had given to the European Commission to offer users a choice of default browser and search engine. If Google provides those options in Australia, the ACCC may decide that litigation is not necessary.

ACCC Chair Rod Sims has acknowledged that all of these options are available in relation to the Epic Games proceedings, as reported by the SMH:

"[Rod] Sims said the ACCC had an open mind as to whether any potential issues could be dealt with using competition law, consumer law or the imposition of regulations."

The further reviews and inquiries that are currently underway, including those flowing from the Digital Platforms Inquiry, will provide opportunities for the ACCC to recommend new or amended regulations where it considers that will be the most effective course:

- The ACCC's Digital Platform Services Inquiry 2020–2025 will examine competition and market power in digital markets as well as privacy, data and other practices that may result in consumer harm. It will publish an interim report every six months: the September 2020 interim report focused on online private messaging services such as Facebook's WhatsApp and Messenger and Apple's iMessage and FaceTime, while the March 2021 interim report will deal with online app marketplaces such as Apple's App Store and Google's Play Store and is likely to address the issues raised in the European Commission's investigations and the Epic Games litigation. The final report is due in March 2025.
- The ACCC's Digital Advertising Services Inquiry is examining markets for the supply of digital advertising technology services and digital advertising agency services. The ACCC published its Interim Report in January 2021 and a Final Report is due in August 2021. See our detailed analysis of the Interim Report in chapter 9 of this publication.
- The News Media Bargaining Code has been developed by the ACCC to address potential imbalances in bargaining power between news media businesses and digital platforms by providing for collective negotiations and final-offer arbitration on fees to be paid by digital platforms for linking to news content. Legislation implementing the Code was introduced to Parliament in December 2020 and passed in February 2021 after a number of amendments and a great deal of drama. See our detailed analysis of the News Media Bargaining Code in chapter 10 of this publication.
- The Government is undertaking a broad Review of the Privacy Act 1988 following the recommendations of the Digital Platforms Inquiry. In October 2020 it published an Issues Paper seeking views on the scope and application of the Privacy Act; whether it effectively protects personal information and provides a practical and proportionate framework for promoting good privacy practices; whether individuals should have direct rights of action to enforce privacy obligations and whether there should be a statutory tort for serious invasions of privacy. It will publish a Discussion Paper for further comment later in 2021.
- In December 2020 the Government released the Final Report of the Inquiry into Future Directions for the Consumer Data Right which recommended a significant expansion to more directly facilitate customer switching and delegating actions across the economy. The Interim Report of the Senate Select Committee on Financial Technology and Regulatory Technology has also recommended changes to the administration of the Consumer Data Right with a view to creating a new national body responsible for digital issues, as discussed below. See our detailed analysis of the Consumer Data Right.

The ACCC is far from the only regulator grappling with digital and data issues that are intensifying through the COVID-19 pandemic. The Australian Communications and Marketing Authority, the Office of the Australian Information Commissioner and the Office of the eSafety Commissioner all have roles in regulating online activity. The Reserve Bank of Australia is monitoring payment systems and the move to an increasingly cashless society. The Department of Health and the Therapeutic Goods Administration are navigating telehealth and medical artificial intelligence applications. The Commonwealth Deregulation Taskforce, State and Territory governments and regulators such as the Australian Securities and the Investments Commission and Australian Prudential Regulatory Authority are working to modernise business communications.

At the same time, as the Productivity Commission recently recognised, there are opportunities for to improve regulatory outcomes and decrease costs through regulatory technology – provided that regulations are necessary and well-designed.

7.3 A REGULATORY FRAMEWORK FOR DIGITAL AND DATA SERVICES

The Government's direction to the ACCC to conduct the Digital Platforms Inquiry has led to an extensive program of reviews and reforms that will continue through 2025 and beyond. The ACCC has quickly established knowledge and expertise in complex and rapidly-evolving digital sectors and continues to contribute to public understanding and discourse on these issues from a competition and consumer-focused perspective.

However, the ACCC is proceeding from an established culture of enforcement, and its approach is not the only one that can contribute to the development of innovative digital and data products and services that benefit consumers and the public.

Reviews in other jurisdictions have recommended regulatory frameworks for digital and data services that are not driven primarily by an enforcement agency but engage the full range of regulators, industry and experts to ensure that regulation is coordinated, consistent and comprehensive. They have established new bodies to advise on complex digital issues, such as the Centre for Data Ethics and Innovation in the United Kingdom, and some have recommended that overarching responsibility for digital regulation should rest with a single body such as the Digital Authority suggested by the House of Lords Select Committee:

What is needed is not just more regulation but a new approach to regulation. More than a dozen UK regulators have a remit covering the digital world, but no single body has complete oversight. Regulation of the digital environment is fragmented, with gaps and overlaps. Problems are neglected until they become emergencies ...

[A digital] authority would militate against the conflicts between several government departments, which, in speaking variously and vigorously on digital matters across security, education, health and business, are ultimately divided in their purpose.

They have also emphasised the importance of collaborative ex ante regulatory tools as a complement to ex post enforcement. For example, the Furman Report noted that:

> *Whatever the institutional format, co-operation and consultation with business and other stakeholders will be essential. The unit will be most effective if its functions are designed and delivered through participation, balancing the interests of major platforms and newer and smaller tech companies to ultimately benefit the consumer, and translating this into codes and standards that can be understood and used.*

In September 2020 the Senate Select Committee on Financial Technology and Regulatory Technology noted concerns about the way that digital and data regulation had evolved in Australia and recommended a new national body that would initially take over regulatory and operational responsibility for the Consumer Data Right with a broader role in the future:

> *The committee agrees that it is time for a clear, effective and accountable regulatory structure for all aspects of data management and privacy in the digital economy.*
>
> *As this broad goal may take some time to achieve, as a starting point the committee is recommending that a new national body be established to take on regulatory and operational responsibility for the Consumer Data Right. Over time, other functions relating to data policy could also be consolidated under this new body.*

The past year has seen unprecedented activity in digital regulation and enforcement in Australia and overseas. The coming year may see steps to unify these efforts into a cohesive and comprehensive framework for the technologies that have become so important to our lives.

9

DIGITAL INQUIRIES IN 2020

Throughout 2020 the ACCC continued its work inquiring into the state of competition in various digital markets, following on from the Digital Platforms Inquiry which concluded in July 2019.

There are currently two ongoing digital inquiries, both of which commenced in February 2020:

Digital Platform Services Inquiry

The ACCC is inquiring into markets for the supply of digital platform services, including internet search engines, social media, online private messaging, digital content aggregation platforms, media referrals and electronic marketplaces.

The ACCC must release an interim report every six months until the inquiry concludes in 2025. The ACCC released the first Interim Report in October. This report focused primarily on online private messaging and, among other things, found that Facebook is leading in online private messaging services. While Facebook and Apple are both large suppliers, the size of Facebook's user base (via Messenger and WhatsApp) and the fact that Apple's *i*Message and FaceTime are limited to Apple devices result in Facebook having the largest share of online private messaging services.

ACCC Chair Rod Sims also noted that

"Consumers commonly choose to use the biggest providers in part because their friends, family, colleagues and acquaintances are also more likely to use them, and because most online messaging services don't allow consumers to send or receive messages to users of different services." "This means the big players have a significant competitive advantage over small entrants."

The ACCC's other concerns included consumer privacy (with many users concerned about their data being shared with third parties and their online activities being tracked) and small businesses being disadvantaged by digital platforms' terms and conditions.

See our in-depth coverage of this report: **ACCC releases Digital Platforms Services Inquiry Interim Report on Online Private Messaging**

Digital Advertising Services Inquiry (also known as the 'Ad Tech Inquiry')

The ACCC is inquiring into digital advertising technology services and digital advertising agency services, in particular the intensity of competition in and efficiency of the markets for these services, relationships between suppliers and customers, and whether market participants are satisfied with services being provided in these markets.

The ACCC released its Interim Report in January 2021. The Final Report is due on 31 August 2021.

The Interim Report, and this alert, primarily consider competition in the supply of digital advertising technology services (ad tech) (i.e. services that provide for or assist with the automated buying, selling and delivery of digital display advertising), in particular:

+ advertiser ad servers;
+ demand-side platforms (DSPs);
+ supply-side platforms (SSPs); and
+ publisher ad servers.

The Interim Report did not make any draft recommendations, but it did make clear that he ACCC is concerned about Google's high market shares in each of the four markets analysed across the advertising technology services supply chain, and seeks feedback on a number of proposals aimed at addressing concerns about:

+ low levels of competition in the supply of ad tech services;
+ conflicts of interest and self-preferencing; and
+ opacity in the supply chain.

The table below summarises the ACCC's concerns and the proposals the ACCC is seeking submissions on:

Potential Concern	Data-related barriers to entry	Conflicts of interest and self-preferencing	Opacity in the supply chain
Theory of Harm	Lower levels of competition Leads to poorer outcomes for users (i.e. advertisers and publishers)	+ Customers' needs not prioritised + Misuse of market power (self-preferencing)	Users are prevented from making informed decisions about Google's services, and/or comparing Google services to other providers' Leads to weak competition
Proposals	Reduce data-related barriers to entry, by: 1. Increasing data portability (i.e. data mobility at consumer's or advertiser's request) and data interoperability (i.e. without a consumer's request), e.g. by requiring Google to offer access for rival firms to specified types of data 2. Require data gathered in the context of supplying one ad tech service to be ringfenced i.e. prevented from being used in the supply of another ad tech service	Introduce rules to manage conflicts of interest and self-preferencing, e.g. + prevent information sharing between ad tech services (i.e. ringfencing); + obligation to act in customer's best interests; + provide equal access to rival ad tech services; + increase transparency. The ACCC notes that the Competition and Markets Authority (UK) and the European Commission have each recently proposed similar obligations for key digital platforms.	1. Implement a voluntary industry standard to enable full, independent verification of DSP services (initially developed by industry). 2. Implement a common transaction ID system that would allow a single transaction to be traced through the entire supply chain. 3. Implement a common user ID system that would allow tracking of individual users (subject to privacy protection). This would enable third-party attribution providers to provide independent attribution assessment as they would be able to track all ads seen by a user regardless of DSP servicing the ad.

See our more in-depth coverage of this report: **The ACCC's Ad Tech Inquiry Interim Report: What you need to know**

TENSIONS BETWEEN CONSUMER PRIVACY AND DATA-BASED COMPETITION

While reading about the ACCC's potential concerns and solutions you may have been thinking, but what about consumer privacy? Do we really want Google to be sharing more data with third parties?

On the one hand, the ACCC is suggesting there needs to be consumer data portability and interoperability to "level the playing field" for all industry participants. On the other hand, a proposal to increase access to consumer data is at odds with the ACCC's concerns about consumer privacy protections.

The ACCC acknowledges that Google has claimed that privacy concerns (privacy legislation or consumer expectations) prevent it from releasing raw data about how ad tech services operate that would enable publishers and/or advertisers to evaluate Google's performance in more detail, but appears sceptical that Google's reluctance to share is motivated by these concerns.

The balancing of competing privacy and data portability and interoperability goals will continue to be a key question for regulators of digital markets. Widespread consumer data portability has the potential to transform our economy, making it much easier for consumers to understand, compare and switch services. The rollout of the CDR will hopefully be an example of consumer data portability succeeding in the banking, energy and telecommunications sectors. However, it is clear that any form of data sharing will need to take place within privacy frameworks that meet community expectations of trust and transparency.

See also our more in-depth consideration of this topic: **Mi data su data: do we want mandated data sharing?** and: **Regulatory landscape disruption needed to drive innovation in new data technologies**

10

THE NEWS MEDIA BARGAINING CODE

Possibly the biggest story of 2020 in the digital sphere has been the ACCC's development of a mandatory News Media Bargaining Code, which is intended to address perceived bargaining power imbalances between digital platforms and Australian news media businesses.

The Bill establishing the Code has now passed both Houses of Parliament. Here is a recap of how the News Media Bargaining Code has been developed.

1. In July 2019, the ACCC released the Digital Platforms Inquiry Final Report. Recommendation 7 was that designated digital platforms should provide codes of conduct governing relationships between digital platforms and media businesses to the Australian Communications and Media Authority.
2. In December 2019 the Government directed the ACCC to work with news and digital platform businesses to develop a voluntary code.
3. The Government requested a progress update from the ACCC. The ACCC advised that "progress on a voluntary code had been limited" and that the ACCC "considered it unlikely that any voluntary agreement would be reached with respect to the key issue of remuneration for content".[1]
4. In April 2020 the Government directed the ACCC to draft a mandatory code, acknowledging that the pressure on the media sector was being exacerbated by a decline in advertising revenue connected to the COVID-19 pandemic, and that it was unlikely that agreement would be reached on revenue-sharing.
5. In July 2020, the ACCC released a draft code for public feedback. Many companies and individuals made submissions on the draft code.

WHAT'S IN THE CODE?

The final Code comprises the following main elements:

+ a mechanism to allow registered news business corporations to indicate an intention to bargain with a responsible digital platform corporation in relation to a designated digital platform service. After indicating such an intention, the parties must bargain in good faith. In December 2020 the Government announced that the Code would initially apply to Facebook NewsFeed and Google Search. Further factors have now been added for the Minister to consider before designating a platform under the Code. Notably, Treasurer Josh Frydenberg recently told the ABC that if commercial deals (such as those Facebook and Google have recently reached) are in place, that "changes the equation" since his earlier December announcement with respect to designation of platforms.
+ general requirements, including that responsible digital platform corporations provide registered news business corporations with 14 days' notification of planned changes to an algorithm that will have a significant effect on referral traffic to that corporation's news content;
+ the Code also recognises that parties may reach a commercial agreement outside the Code – where the ACCC is notified of such an agreement the parties would not need to go through the Code bargaining and arbitration processes, and the algorithm notification provisions would not apply (depending on the terms of the commercial agreement);
+ compulsory final offer arbitration where the parties cannot agree on remuneration after 3 months of good faith bargaining and a mediation process;
+ provisions preventing responsible digital platform corporations from differentiating between news businesses participating in the Code and between participants and non-participants in relation to crawling, indexing, distributing or making available news businesses' covered news content merely because of their participation or non-participation; and
+ allowance for standard offers from digital platform corporations to news businesses, which should reduce the time and cost of negotiations.

[1] Explanatory Memorandum to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 para 1.2 – 1.7.

6. In December 2020 the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (the Bill) was introduced to Parliament and referred to a Senate inquiry for further scrutiny.

KEY INITIAL REVISIONS OF THE DRAFT CODE

Google and Facebook had articulated strong opposition to certain aspects of the ACCC's draft code and the Government made some key changes to the draft code in light of their views:

+ **Arbitrators to consider both sides:** If a platform responsible for a designated digital platform service and a registered news business cannot successfully negotiate between themselves on how much the platform should pay the news business to distribute their news content, the Code sets up a mechanism for the dispute to be referred to an arbitrator. In the Bill introduced to Parliament, the arbitrator is now required to consider the benefit to the news business of that platform making available its news content, as well as the benefit of the news businesses' content to the platform.

  Google had argued in response to the ACCC's draft version that the Code needed to "take account of the value both sides bring to the table". Requiring the arbitrator to consider the value the platform brings shifts the entire arbitration framework from being solely focused on one party to having to consider both sides.

+ **Notification of algorithm changes:** The Bill limits the type of changes about which the platforms responsible for the designated digital platform services must notify registered news businesses.

  The platforms will only need to notify news businesses of changes about content distribution that are likely to significantly affect either referral traffic to news businesses' news content (whether free or paywalled), or advertising distribution directly associated with registered news business' news content. The notification requirement will now only be triggered if the platform has had a "dominant purpose…to bring about an identified alteration" with that change. The platforms also only need to give 14 days' notice, rather than 28 days.

+ **Data sharing clarification:** Google publicly argued that under the ACCC's draft version there was a risk that digital platforms would have to give potentially personalised data to news businesses about how consumers use Google's services. The Bill clarifies that the requirement that responsible digital platforms are not required to give the actual data to registered news businesses on user interactions with news content. Instead the platforms will only need to give lists and explanations of the type of data.

For more on this topic see our in-depth coverage **here**: *It's Here! News Media & Digital Platforms Mandatory Bargaining Code*

7. In January and February of 2021, the Senate Economics Legislation Committee held public hearings. Representatives from the ACCC, Treasury, Google and Facebook attended, among others.

GOOGLE AND FACEBOOK'S CONTINUED OPPOSITION

Throughout this period both Google and Facebook continued in their opposition to the Bill.

Google's main issues were:

1. That the concept of requiring Google to pay for links to news would 'fundamentally break how search engines work'.
2. The 14 day algorithm notification would delay important updates and give news publishers special treatment.
3. The arbitration process only considers publishers' costs, not Google's, and "*incentivises publishers to make enormous and unreasonable demands*".

8. On 12 February 2021, the Senate Economics Legislation Committee released its report, which concluded:

   Despite the concerns raised by various submitters and witnesses, the committee is confident that the bill will deliver on its intended outcomes. Its provisions will provide the basis for a more equitable relationship between the media and Google/Facebook and, through this, help safeguard public interest journalism in Australia. Accordingly, the committee recommends that the bill be passed.

9. Following further opposition from the digital platforms, on 17 February the Bill passed the House of Representatives with 19 government amendments, including limiting the advance notification requirements for digital platforms to circumstances where changes to an algorithm are likely to have a significant effect on referral traffic for covered news content, and providing that arbitrators must consider the reasonable costs of both parties.

10. On 23 February, the Government announced further amendments, including to the process to designate a digital platform service under the Code – the Minister must give 30 days' notice, and must consider whether the digital platform has made a significant contribution to the sustainability of the Australian news industry through agreements for news content, including through remuneration, before making the designation. The amendments also clarified that the fact that commercial agreements result in different remuneration amounts or commercial outcomes will not breach the non-differentiation provisions, and stipulate that parties must enter into a new mediation process before going to arbitration, emphasising that arbitration is a last resort.

WHAT NEXT?

Both Facebook and Google have been entering into commercial deals outside the Code. As we noted above, Treasurer Josh Frydenberg has stated that this "changes the equation" when it comes to designating digital platform services, as the Government's first objective is to have commercial deals in place:

> *The first thing to say is, when we've talked about designation, we have talked about Google and Facebook. I don't want to pre-empt any decisions that I may or may not take as the Treasurer to designate a particular digital platform under this code. But what I have said is if commercial deals are in place, then it changes the equation. Because we have always sought a number of objectives here. Firstly, to get commercial agreements to be struck between the parties. That is work that is currently underway and is looking very promising indeed. The second objective has been to legislate the code...*[2]

The last set of amendments also requires the Minister to consider whether a digital platform has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content) before designating a digital platform as subject to the Code.

If enough commercial deals are reached, it is possible that the Government could consider it has achieved its objective of addressing a power imbalance between the digital platforms and news media organisations without actually needing to designate Facebook NewsFeed or Google Search under the Code. This could mean that controversial aspects of the Code such as the compulsory final offer arbitration mechanism and the algorithm notification requirements are never put to use.

[2] Doorstop interview with The Hon Josh Frydenberg MP at Parliament House, Canberra, 17 February 2021.

11

THE CDR GOES LIVE

REMINDER – WHAT IS THE CDR?

The purpose of the CDR is to create more choice and competition, and otherwise promote the public interest, by empowering consumers in designated sectors of the economy to safely, efficiently and conveniently access certain data about them held by businesses.

The CDR was established by the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) (**CDR Act**) which inserted Part IVD – *Consumer Data Right into the Competition and Consumer Act 2010* (Cth) (**CCA**). The regime framework also comprises CDR Rules made under the legislation, Consumer Data Standards made under the Rules, and the Privacy Safeguards contained in Part IVD.

Consumers can require the data to be disclosed, in a CDR-compliant format, to themselves or to accredited third parties for use subject to privacy safeguards (accredited data recipients). For instance, consumers may find it difficult to comprehend raw CDR data themselves, and so may choose to direct a data holder to disclose their data to an accredited third-party comparison service which can help the consumer make informed choices about the services that would work best for them.

The CDR regime also requires certain businesses to provide public access to non-personal information about certain goods or services in designated sectors.

2020 was a big year for the Consumer Data Right (CDR). These developments include:

Open Banking:

The CDR regime started to be rolled out in the banking sector. This is taking place in phases – the first phase commenced on 1 July 2020 with the "big 4" banks being required to provide certain types of data for certain product categories, and more banks will be required to share more types of data about more categories of product over the course of the rollout. See also our comprehensive coverage of this topic: **Open Banking turns the lights on**

Energy:

The Government officially designated energy as the next sector to be subject to the CDR, via the Consumer Data Right (Energy Sector) Designation 2020 made on 26 June 2020. The next sector we should expect a designation for is telecommunications: At the time the CDR Act was introduced, the Government was committed to applying the CDR 'to the banking, energy and telecommunications sectors, and eventually across the economy'.

CDR Rules:

- **February:** The ACCC made the initial Competition and Consumer (Consumer Data Right) Rules 2020. The Rules set out the primary mechanism by which consumers can request and data holders must disclose CDR data.
- **October:** These amendments expanded the Rules relating to CDR outsourcing arrangements (where a principal consumer-facing accredited data recipient engages another party (intermediary) to assist the delivery of a good or service to a CDR consumer) to permit the use of accredited intermediaries to collect, use and disclose CDR data on the principal's behalf.
- **December:** These amendments expanded the functionality of the CDR regime in banking, including by broadening the scope of consumers who may share CDR data to include non-individuals (in the context of business partnerships) and secondary users, introducing additional functionality and flexibility to the rules relating to consumer consent, authorising transfers of CDR data between accredited persons with consumer consent, authorizing the de-identification of CDR data to be used for general research purposes with consumer consent, and expanding obligations for data holders in relation to joint accounts.

Compliance and enforcement:

In May the ACCC and the Office of the Australian Information Commissioner published their joint CDR Compliance and Enforcement policy. The policy acknowledges that the ACCC and OAIC cannot pursue every matter that comes to their attention, and that they will prioritise conduct involving data holder refusal, misleading or deceptive conduct, invalid consent, misuse or improper disclosure of CDR consumer data and insufficient security controls.

Responsibilities:

In December the Treasury Laws Amendment (2020 Measures No. 6) Act 2020 was passed. Amendments to Part IVD include reallocating the ACCC's responsibility for making the CDR rules and conducting sectoral assessments (prior to a designation of a sector as subject to the CDR) to the Minister and the Secretary of the Department. This will take effect on 28 February 2021.

SPOTLIGHT: FRANCHISING

Changes to franchising regulation and continuing scrutiny from the ACCC

"The ACCC remains concerned that many franchisees cannot freely operate their business because of the prevalence of some questionable industry practices. We have a number of important cases we want to bring before the courts which we think will highlight some of the significant problems in the sector."

Rod Sims, ACCC 2020 Compliance and Enforcement Priorities, 25 February 2020

Protecting small business by ensuring compliance with the mandatory Franchising Code of Conduct (Franchising Code) has been one of the ACCC's compliance and enforcement priorities for over 5 years now. Recent ACCC enforcement action, anticipated reforms to the Franchising Code, a collective bargaining exemption for small businesses and reforms last year to the regulation of franchise arrangements in the car dealership sector indicate that this will remain an area of priority for the ACCC.

INCREASED OBLIGATIONS ON FRANCHISORS: CHANGES TO THE FRANCHISING CODE OF CONDUCT

In March 2019, the Parliamentary Joint Committee on Corporations and Financial Services released the Fairness in Franchising report (Report) from its inquiry into the operation and effectiveness of the Franchising Code (see our publication: **Cracking the Franchising Code – proposed reforms from the Senate Inquiry and their consequences for business**).

The Report found systemic problems in franchising arrangements, including exploitation in certain franchise systems, and, as a result, made a raft of recommendations that would involve significant changes to the Franchising Code and the power and responsibilities of the ACCC. These recommendations aimed to mitigate the worst impacts of the power imbalance between franchisors and franchisees.

In response to the Report, the Government will be introducing changes to the Franchising Code to protect franchisees, improve the information available to franchisees and improve franchisor standards of conduct. The Exposure Draft of the changes was released by the Department of Industry, Science, Energy and Resources in November 2020. It is proposed that these changes will take effect from 1 July 2021.

If enacted, the changes will have significant practical impacts on the way franchisors engage with franchisees.

Capital expenditure

Franchisors will be prohibited from requiring a franchisee to undertake significant capital expenditure during the term of the franchise agreement unless, for example, disclosure requirements are complied with prior to entering into or renewing the agreement, or with the franchisee's agreement. These prohibitions were introduced to New Vehicle Dealership agreements in June 2020, and are proposed to be expanded to cover all franchising agreements.

Legal costs

The proposed changes prohibit broad obligations being imposed on the franchisee in relation to it being responsible for the franchisor's legal costs. Instead, if legal costs will be contributed to by the franchisee, more specificity must be included in the franchise agreement.

Restraints of trade

The amendments sets out circumstances in which a restraint of trade clause in a franchisee agreement will have no effect. They also clarify that a restraint of trade will not apply unless a franchisee has committed a 'serious' breach of the agreement.

Expanded disclosure requirements

The proposed changes expand the obligations on franchisors to provide disclosure to potential franchisees before entering into an agreement.

The changes would require that at least 14 days prior to entering into a franchise agreement the franchisor provides the franchisee with a copy of:

+ the franchise agreement;
+ the disclosure document;
+ A more fulsome "Key Facts Sheet" (which will be finalised subject to consultation on the Exposure Draft of the changes);
+ the Franchising Code; and
+ the lease of the premises and additional information about the lease, if applicable.

Penalties

For breaches of the Franchising Code that attract a civil penalty, these are proposed to be doubled (from 300 penalty units to 600 penalty units – which currently is $133,200).

Retrospective variation of franchise agreements

Franchisors will be prohibited from retrospectively varying a franchise agreement without the franchisee's consent.

Termination of franchise agreements

The cooling off period for a franchisee entering into a franchise agreement will be extended from 7 to 14 days.

Franchisees will be able to propose to terminate the franchise agreement at any time, and the franchisor must provide a written response with any reasons for refusal within 28 days.

Franchisors are able to terminate the franchise agreement with 7 days notice in certain circumstances (eg bankruptcy of franchisee, endangerment of public health or safety)

Dispute resolution

The proposals include a comprehensive handling procedure for disputes between franchisees and franchisors, including an optional arbitration procedure.

NEW VEHICLE DEALERSHIP AGREEMENTS

New provisions (Parts 5 and 6) were added to the Franchising Code of Conduct on 1 June 2020 which apply to dealership agreements that involve predominantly new passenger or light goods vehicles. The changes apply to new, renewed and extended agreements entered into on or after 1 June 2020. Agreements that were in place prior to this date continue to be regulated by the previous iteration of the Code. Unless where otherwise stated, the remainder of the Code continues to apply to new car dealership agreements.

According to the Explanatory Statement, the amendments were introduced to "address the effects on commercial arrangements arising from the power imbalance between car manufacturers as franchisors and new car dealers as franchisees", and they incorporate various recommendations from the ACCC's 2017 New Car Retailing Industry market study.

Key changes to the Code involve:

End of term obligations:
Extending the notice period for non-renewal of dealer agreements to 12 months when the agreement is 12 months or longer, requiring increased communication and a written plan between dealers and manufacturers for end of term arrangements, as well as reasons to be given by the other party as to why an agreement is not being renewed.

Capital expenditure requirements:
Introducing requirements governing the circumstances when franchisors can require franchisees to undertake significant capital expenditure, and disclosure requirements concerning that

Dispute resolution:
The Code now expressly entitles franchisees to deal with a franchisor collectively if two or more franchisees have a dispute of the same nature with the franchisor.

FRANCHISEES CAN SOON ENGAGE IN COLLECTIVE BARGAINING

In October 2020, the ACCC announced a collective bargaining class exemption (see our publication **ACCC: Class exemption will enable small businesses to collectively bargain**) for all franchisees and fuel retailers to allow them to collectively negotiate with their franchisor or fuel wholesaler without first having to obtain ACCC approval. The exemption will also apply to small businesses more generally with an aggregated turnover of less than $10 million to collectively negotiate with suppliers or customers. The ACCC has said that this will commence in early 2021 on a date yet to be announced.

Under the current framework for collective bargaining exemptions, bargaining groups can secure a collective bargaining exemption by filing an authorisation application or lodging a notification with the ACCC. The legal protection enjoyed by businesses under the current framework is only limited to a specified period of time; once the exemption expires, the group will have to launch a new application.

When the collective bargaining class exemption commences, bargaining groups will not need to apply for authorisation or file a notification, they will simply be required to complete a one-page form when a bargaining group is formed. The form will need to be submitted to the ACCC and to each target group that the bargaining group intends to collectively bargain with.

The class exemption will not force any business to join a collective bargaining group, nor will it force a target business to deal with the group. The target business will be free to negotiate with members of the bargaining group individually if it prefers.

The ACCC is developing guidelines to aid the application of the class exemption, as well as the one-page notice form that will need to be completed when forming a bargaining group.

ACCC ENFORCEMENT

In line with its Compliance and Enforcement Priorities, the ACCC has been active in pursuing alleged breaches of the Franchising Code and other prohibited conduct towards franchisees.

In December 2020, the ACCC commenced proceedings in the Federal Court against Retail Food Group Limited and five of its related entities alleging that the food and beverage franchise company (with brands such as Michel's Patisserie, Brumby's Bakery, Donut King and Gloria Jean's Coffee) engaged in unconscionable conduct and made false or misleading representations in its dealings with franchisees, in breach of the Australian Consumer Law.

Allegations include that Retail Food Group withheld important financial information from new franchisees who were purchasing or licensing loss-making corporate stores and made false or misleading representations to them about the viability or profitability of the stores.

Earlier in 2020, the ACCC was successful in securing $4.2 million in penalties against former carwash and detailing franchisor Geowash Pty Ltd and its director and manager for false or misleading representations and contraventions of the Franchising Code. The Court found that Geowash acted unconscionably towards franchisees through its charging practices for the establishment and fit-out of Geowash franchise sites.

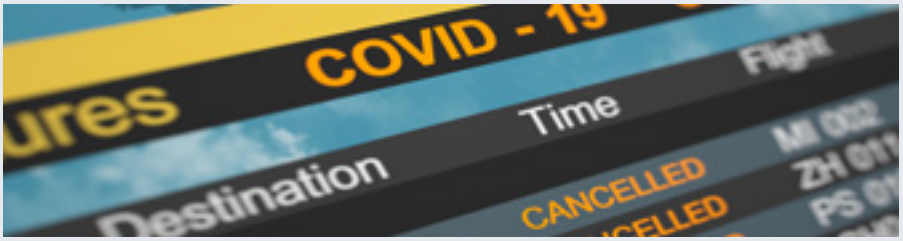
In April 2020, Bob Jane provided a court-enforceable undertaking to the ACCC to comply with its obligations under the Franchising Code in relation to its renewal and extension of franchising agreements. The ACCC was concerned that Bob Jane failed to comply with its obligations under the Franchising Code relating to end of term and renewal of agreements.

In July 2020, the ACCC instituted proceedings against franchisor Megasave Couriers Australia Pty Ltd (Megasave) in the Federal Court, alleging that it misled prospective franchisees with false or misleading promises of guaranteed minimum weekly payments and annual income if they purchased a Megasave courier franchise. It is also alleged that Megasave's director was knowingly involved in the conduct.

SPOTLIGHT: AIRLINES

The COVID-19 pandemic and resulting collapse in demand for passenger air services has had a profound impact on airline markets in Australia and globally. As the pandemic continues, border control continues to be a key health management tool and recovery of demand for air travel is further delayed. Will this result in fundamental changes in the structure of airline markets? Will this prompt regulatory change and in what form? How will competition regulators respond as competitors look to cooperate or consolidate? Will it be possible to maintain pre-COVID-19 levels of competition and have airline markets recover?

12.1 KEY DEVELOPMENTS IN 2020



Impact of the COVID-19 pandemic

Government imposed travel bans in response to the COVID-19 pandemic saw air passenger volumes collapse from March 2020 in Australia and globally. According to BITRE, passengers carried on Australian domestic commercial flights (including charter operations) in April 2020 were down 93.6 per cent compared to April 2019. By November 2020, domestic passenger volumes were still down 74.6 per cent compared to November 2019.

International volumes have been almost completely wiped out, with Australian citizens and permanent residents only able to leave the country with an exemption, while strict caps on the number of arrivals are in place. By November 2020, international scheduled passenger traffic to/from Australia was still down 98% compared to November 2019.

While Australia has managed to keep its case load low relative to other countries, state border closures in response to outbreaks have limited the extent of the recovery for the aviation industry.

Virgin Australia Voluntary Administration and expansion of REX

The sudden loss of volumes led Virgin Australia to enter into voluntary administration in April 2020. In November 2020, Bain Capital became the owner of the airline and new CEO Jayne Hrdlicka has indicated plans to position Virgin Australia as a mid-market carrier that will serve 'all segments of the market'. The extent of Virgin Australia's future offering and ability to rebuild its network will have significant implications for competition in the domestic airline industry.

Meanwhile, after receiving a large injection of funds from the Federal Government under three support packages - more cash than was granted to Qantas and Virgin Australia combined - regional airline REX has purchased ex-Virgin Australia fleet and commenced services in competition with Qantas and Virgin Australia on "the triangle" between Melbourne, Brisbane and Sydney. The history of three-way competition in Australian domestic airline markets suggests we should watch this space.

Australian regulatory responses

At the onset of the pandemic, the ACCC considered several urgent authorisation applications in record timeframes. Since then, the ACCC has continued to address matters pragmatically, in recognition of the continued impact of the pandemic on the industry.

On 19 June 2020, the Treasurer issued a direction to the ACCC to monitor prices, costs and profits relating to the supply of domestic air passenger transport services for a period of 3 years. The direction requires the ACCC to give the Treasurer a report on the monitoring at least once every quarter. The ACCC noted in its latest quarterly report that in carrying out its functions, it may be that the ACCC identifies that the level of competition within the industry is diminishing and/or identifies anti-competitive behaviour, but short of thresholds for enforcement action. The ACCC intends to recommend potential policy options to government should there be signs that competition is not effective. The monitoring direction provides the ACCC with the ability to compel information from relevant companies within the industry. As part of its monitoring this year, the ACCC can be expected to closely consider the impact of Rex's entry on flights between Sydney, Melbourne and Brisbane.

12.2 WHAT TO EXPECT IN 2021

Continued uncertainty

Most industry analysts are forecasting a very gradual and non-linear recovery over a protracted period, and IATA is forecasting that it will be 2024 at the earliest before international passenger demand returns to pre-pandemic levels. Health Department boss Brendan Murphy and Chief Medical Officer Paul Kelly have signalled that international travel is unlikely to resume for Australians before 2022. Even with a vaccine rollout, it is not yet clear whether those who are vaccinated may still infect those who are not. In addition, it appears that some vaccines are not as effective against new strains of the virus. These factors may impact the industry's recovery.

There are also serious doubts that business travel will return to pre-pandemic levels any time soon, with the effectiveness of technology in facilitating meetings now more proven. As for leisure travellers, there were signs of pent-up demand towards the end of 2020. However, with snap state border closures being imposed in recent months following outbreaks, it is also possible that many leisure travellers may not have the confidence to make interstate travel plans in the short-term.

Possible consolidation

With the challenging operating environment likely to continue for some time, several airlines are forecast to exit the industry globally. The industry has seen the collapse and/or consolidation of airlines when there have been shocks in the past (e.g. following September 11). Airlines with a network focused on international flights or with fleets of larger aircraft are likely to be more challenged as demand for international and long-haul flights continues to be more affected. For example, LATAM, which was the largest airline in Latin America prior to the pandemic, filed for US bankruptcy protection in 2020, while Korean Air has recently announced its proposed acquisition of Asiana Airlines.

With many airline markets largely dormant for a year or so, it is unclear how mergers and acquisitions will be analysed by competition regulators. For example, will recent market shares be of use when volumes are negligible? Can historic market shares indicate what market shares may be expected in the future when so much is unknown? What counterfactual will regulators use to assess transactions when the counterfactual may be unknown or speculative given the uncertainties about future reopening and demand?

Greater co-ordination

With uncertainty comes risk and airlines are likely to seek to share this risk by making authorisation applications for joint conduct. Qantas has recently made applications to renew authorisations for coordination with China Eastern Airlines and American Airlines. Qantas also recently sought authorisation and urgent interim authorisation for joint conduct with Japan Airlines. If Virgin Australia were to return to international flying, it is likely that it would seek to do so jointly with other airlines, particularly on longer routes.

Continued focus on slot allocation

2021 is likely to see the ACCC continue to call for slot allocation reform. In recent submissions to senate and Australian Government inquiries examining the future of Australia's aviation sector and Sydney Airport Demand Management, the ACCC argued that access to slots at Sydney Airport is a "key barrier to entry and expansion" in Australian air passenger service markets. 2020 saw the waiver of requirements that airlines operate a certain number of flights to keep slots allocated to them. The issue can be expected to remain in focus this year as the inquiries continue.

SPOTLIGHT: ENERGY

2020 was another big year for energy regulation in Australia. As with every other sector, COVID-19 made its mark. However, the bigger stories confirmed a continuation of the key long-term trends impacting the domestic energy sector – a lack of holistic policy vision, resulting in continued stopgap solutions to the challenges posed by climate change and the rise of distributed energy generation, coupled with increasingly heavy-handed government regulation in response to consumer concerns about energy prices. These are not new trends so, for all its novelty, 2020 was very much business as (un)usual in the energy sector.

COVID-19 PRICE FALLS AND COOPERATION

The disruption to supply chains and demand caused by COVID-19 had an immediate and sustained impact on key energy commodity prices. These price falls had an impact on Australian domestic energy markets, with lower gas prices contributing to reductions in electricity spot market prices in the first half of the year and the ACCC reporting that large domestic users had experienced reductions in prices for contracted gas supply. Gas prices rebounded somewhat in the middle of the year but overall the heat very much came off domestic electricity and gas prices, at least in part due to COVID-19.

As the disruption posed by COVID-19 became apparent, the ACCC rapidly granted interim authorisation to oil companies and the energy sector more broadly to co-operate in relation to fuel and energy supply security during the pandemic. Both of these matters were granted interim authorisation in April 2020, but the parties to the authorisations continued to work with the ACCC over the course of the year in relation to specific aspects of the authorised conduct and associated condition before final authorisation in each was granted in September.

ACCC HANDED A BIG STICK

In 2018, the government proposed draconian "big stick" legislation as part of its response to the ACCC's 2018 report into retail electricity prices. The headline grabbing feature of the proposed laws at the time was the draconian divestiture powers that were originally proposed to be granted directly to the minister. As the law was developed by Treasury and moved through parliament, the punitive nature of the legislation was gradually watered back – in particular, the divestiture powers are subject to court oversight.

The the final version of the bill was passed as the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019* (**PEMM Act**) in late 2019. This law, which commenced in mid-2020 and amends the *Competition and Consumer Act 2010*, has three key prohibitions relating to:

Retail pricing, requiring retailers to make reasonable adjustments to prices in response to significant and sustained changes in their underlying costs of procuring electricity;

Financial market liquidity, prohibiting parties from refusing to supply electricity financial contracts for the purpose of substantially lessening competition in any electricity market; and

Spot market conduct, prohibiting fraudulent, dishonest and bad faith bidding and / or bidding for the purpose of distorting or manipulating electricity spot market prices.

The ACCC is actively enforcing these laws, announcing in January 2020 that it was investigating two retailers over retail pricing conduct and we can expect further action in relation to these laws over the course of 2021.

FROM COGATI TO REZ

The biggest long-term trends impacting facing electricity markets are the twin challenges posed by climate and rapid technology change, which has resulted in fundamental changes to the physical nature of generation, transmission and distribution. Participants across the energy sector have long realised that these changes are not well supported by current market and regulatory designs which are fundamentally premised on a legacy model of generation location and technologies.

While there is agreement that the status quo is not tenable, there is no agreement as to how to move forward. In 2016, the AEMC, under the direction of the COAG Energy Council, commenced its "Coordination of generation and transmission investment" (**COGATI**) review. The first report in that review, which included comprehensive proposals designed to coordinate renewable generation and network transmission investment over the long term, was published in 2018. In proposing such fundamental changes to the status quo, this report was controversial.

The AEMC commenced a second round of COGATI in 2019. The AEMC published 11 papers over the course of 2019 and 2020, culminating in a set of reports in September 2020 that were intended to lead to a final report in December 2020. Key aspects of the AEMC's proposal in these reports were sufficiently controversial that it ultimately abandoned its final report, instead progressing work on renewable energy zones (*REZs*) as an "*interim step, that will build towards the long-term solution*". Whether that long-term solution is any closer in 2020 than it was in 2016 is not yet clear.

The Energy Security Board kicked off 2021 with a Directions Paper setting out the key areas of reform it intends to pursue as part of the Post-2025 market design project. Consistent with the feedback received by the AEMC in its COGATI review, changes to transmission access frameworks (including locational marginal pricing and financial transmission rights) will be seen by the ESB as longer-term objectives rather than immediate priorities for reform. The ESB will instead focus its attention on resource adequacy mechanisms, ensuring availability of essential system services such as frequency control and inertia, fostering demand-side participation and early implementation of renewable energy zones.

CONTACT

ELIZABETH AVERY
Partner
T + 61 2 9263 4362
E eavery@gtlaw.com.au

GINA CASS-GOTTLIEB
Partner
T + 61 2 9263 4006
E gcass-gottlieb@gtlaw.com.au

CHARLES COOREY
Partner
T + 61 2 9263 4019
E ccoorey@gtlaw.com.au

MOYA DODD
Partner
T + 61 2 9263 4432
E mdodd@gtlaw.com.au

LOUISE KLAMKA
Partner
T + 61 2 9263 4371
E lklamka@gtlaw.com.au

SIMON MUYS
Partner
T + 61 3 8656 3312
E smuys@gtlaw.com.au

LUKE WOODWARD
Partner
T + 61 2 9263 4014
E lwoodward@gtlaw.com.au

GENEVIEVE HARRIS
Special Counsel
T + 61 2 9263 4194
E gharris@gtlaw.com.au

SUSAN JONES
Special Counsel
T +61 3 8656 3451
E sejones@gtlaw.com.au

JEREMY JOSE
Special Counsel
T + 61 3 8656 3366
E jjose@gtlaw.com.au

ANDREW LOW
Special Counsel
T + 61 2 9263 4793
E alow@gtlaw.com.au

GEOFF PETERSEN
Special Counsel
T + 61 2 9263 4388
E gpetersen@gtlaw.com.au

LIANA WITT
Special Counsel
T +61 2 9263 4472
E lwitt@gtlaw.com.au

GILBERT +TOBIN

GTLAW.COM.AU