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A new frontier: Going where the ACCC has not gone before—an overview of recent developments in Australian competition and consumer law

In December 2016, Australian courts handed down four significant decisions that provide insights into the way in which Australian courts and the Australian Competition and Consumer Commission (**ACCC**) are likely to approach the application of Australia's competition and consumer laws in 2017.

In particular, these decisions are a culmination of the ACCC's 2015/2016 enforcement priorities and stated willingness to both bring cases that will challenge existing competition law norms and also to pursue larger penalties for contraventions of Australian competition and consumer law.

Key issues

- The High Court majority's decision in *ACCC v Flight Centre* takes a new approach to agency arrangements and possibly also MFN-type arrangements, which could force businesses to reassess restrictions in agency relationships to ensure compliance with Australia's cartel laws. The decision also highlights the ACCC's willingness to extend the boundaries and develop competition law principles in the e-commerce sector.
- The decisions of the Federal Court and Full Federal Court in *ACCC v ANZ* and *ACCC v Reckitt Benckiser*, respectively, provide insight into the ACCC's campaign over the last few years to seek (and the willingness of Australian courts to impose) significantly larger penalties for contraventions of both the competition provisions of the CCA and the ACL.
- However, the Federal Court's decision in *ACCC v Woolworths* is a reminder of the necessity of the ACCC to be able to prove their cases based on the particular facts of the matter and clarifies the standard against which conduct is to be assessed in order to successfully establish unconscionable conduct. The decision also provides some guidance as to the role and relevance of commercial norms in the context of establishing the requirement of a 'moral obloquy' or 'commercial norms' in assessing the impugned conduct against the context of the particular industry.

Overview of why these cases are important

The end of 2016 culminated in court decisions that have the potential to significantly affect the landscape of competition and consumer law jurisprudence in Australia in respect of conduct captured by Australia's cartel and unconscionable conduct laws as well as the nature and size of penalties imposed for contraventions of the *Competition and Consumer Act 2010* (Cth) (**CCA**)**.**

The first of the decisions to be handed down by the Federal Court was in *ACCC v Woolworths* [2016] FCA 1472 (**Woolworths Case**), whereby the Court dismissed proceedings instituted by the ACCC alleging that the design and implementation of Woolworths' 'Mind the Gap' scheme constituted unconscionable conduct in contravention of the Australian Consumer Law (**ACL**), which is a schedule to the CCA. Interestingly, the way in which the ACCC ran this case, in terms of the facts and evidence presented, appears to have been a significant factor in the Court's decision, allowing Woolworths to present a strong 'business as usual' defence.

Notably, the long-running *ACCC v Flight Centre*[1] proceedings (**Flight Centre Case**), resulted in a majority judgment from the High Court that found Flight Centre to be in competition with its airline suppliers and that its status as an 'agent' was not sufficient to remove it from the operation of the cartel provisions in Division 1 of Part IV of the CCA. A more detailed analysis of the implications of this decision and the possible impact of a less black letter law approach to agency principles is available in our recent Client Briefing.

On the same day the Federal Court delivered a judgement with agreed penalties negotiated between the ACCC and each of ANZ and Macquarie Bank (*ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516) (**ANZ Case**) for cartel conduct engaged in by traders in Singapore that attempted to manipulate and indirectly fix the price of the Malaysian ringgit benchmark rate. Although the penalties of A$9 million and A$6 million imposed on ANZ and Macquarie Bank were ultimately considered to be within the appropriate range of permissible penalties for such conduct, an important insight comes from Wigney J's clearly articulated views that, were it not for the fact that the parties had agreed penalty figures with the ACCC to avoid litigation, the Court would have imposed significantly higher penalties because of the nature of the conduct and the parties involved.

Finally, in *ACCC v Reckitt Benckiser* [2016] FCAFC 181 (**Nurofen Case**), the Full Federal Court upheld an appeal by the ACCC on the size of the penalty imposed at first instance for misleading and deceptive conduct in relation to representations made on Nurofen packaging and websites. The Full Federal Court tripled the initial A$1.7 million penalty to A$6 million, citing the need for penalties to act as a deterrent and not be merely regarded as the 'acceptable cost of doing business'. The Nurofen Case together with the ANZ Case highlights that the ACCC has succeeded in changing the mindset of the judiciary as to the size of penalties and the importance of competition and consumer law compliance in terms of doing business in Australia.

We now outline some of the key implications arising from each of these cases in more detail below.

An analysis of the relevant cases and their importance

The Woolworths Case and the meaning of unconscionability

The ACCC failed to plug the gap in its evidence

Under its 'Mind the Gap' scheme (**Scheme**), Woolworths sought payments from certain suppliers in order to reduce a significant half-year gross profit shortfall. The ACCC alleged that the design and implementation of the Scheme contravened section 21(1) of the ACL. The key allegations of the ACCC's case focused on Woolworths:

- Not having a contractual or legal right or legitimate basis to ask for the payments;
- Intentionally applying pressure on suppliers to make payments with the threat of commercial consequences for non-compliance;
- Taking advantage of its stronger bargaining position and exerting undue pressure, with the design of the Scheme targeted at vulnerable suppliers; and
- Engaging in conduct that could not be properly considered to be 'business as usual' and that was inconsistent with prevailing norms of the supermarket industry.

Interestingly, the ACCC ran its case on the basis of documentary evidence and did not call any suppliers affected by the Scheme. Ultimately, Yates J noted that correspondence tendered by the ACCC was an incomplete record of the communications

between Woolworths and its suppliers and did not allow the Court to determine why a supplier was prepared to make a payment, noting that the 'why' of the alleged conduct was of critical importance as section 21(1) of the ACL requires the Court to have regard to 'all the circumstances' in determining whether the Scheme was unconscionable.

In dismissing the ACCC's allegations, Yates J found that:

- The absence of a contractual or legal right for Woolworths to the payments did not make the scheme unconscionable. The absence of a legitimate basis upon which to ask for such payments cannot alone constitute unconscionable conduct, particularly in light of the fact that Woolworths and its suppliers are in commercial relationships where the aim of each party is to maximise its profits.

- Requests made by Woolworths were part of the ordinary course of business in the supermarket industry and in dealings between supermarkets and suppliers. Consequently, the scheme was found not to go against the norms that exist between supermarkets and their suppliers. Further, notwithstanding the underlying motivation for implementing the scheme, the lack of payments being linked to proposals to improve future performance and the short timeframes in which suppliers had to agree to the request, and the manner in which Woolworths engaged in commercial negotiations with its suppliers was not found to depart from the notion of 'business as usual' and did not depart from acceptable standards of conduct within the supermarket industry.

- Size disparity in and of itself does not necessarily equate to inequality of bargaining power. Although the ACCC provided evidence of Woolworths' large share of the grocery market, the ACCC failed to relate this to the sales of products supplied by the suppliers. Yates J noted that a particular supplier, even a small one, may be as significant to Woolworths as Woolworths is to that supplier.

Differences to the ACCC's success against Coles

Yates J noted the broad parallels between Woolworths' conduct and the facts that gave rise to the two sets of proceedings brought by the ACCC against Coles for attempts to extract rebate payments from suppliers and seeking payments to cover profit gaps.

However, the ACCC's allegations were said to be materially different in the Woolworths Case, which ultimately led to a different outcome. In the Woolworths Case the ACCC alleged that the design and implementation of the scheme by Woolworths as a whole constituted unconscionable conduct. This differs from *ACCC v Coles* [2014] FCA 1405, where the ACCC focused on Coles' particular dealings with particular suppliers, and it was those facts and circumstances that led to a determination of unconscionable conduct.

Raising the bar—key takeaways

The decision focuses heavily on the facts as is usually the case in unconscionable conduct cases. However, although the decision does not expressly change the law in respect of unconscionable conduct under the ACL, Yates J's reasoning did in some respects clarify previous precedent and judicial consideration. Most notably:

- In assessing Woolworths' conduct, Yates J narrowed the standard against which the impugned conduct was assessed. Rather than adopting the norms of the wider community as the lens through which to assess the conduct (as has previously been the case and which the ACCC argued), the Court adopted norms as they exist between supermarkets and suppliers. The Court concluded that the conduct in question was widespread in the supermarket industry, and in the Court's view, was therefore less likely to be viewed as aggressive or oppressive in the context in which it occurred.

- Although the decision acknowledged the continuing necessity to demonstrate a high level of moral obloquy to successfully establish unconscionable conduct, Yates J emphasised that conduct must go beyond being merely unfair or unjust and appeared to be comfortable lifting the standard in respect of satisfying moral obloquy.

The decision also raises practical questions as to the operation of section 21(4)(b) of the ACL, which is aimed at capturing a 'system of conduct', and what evidence is required to establish such behaviour.

Ultimately, the case was decided on its facts and is indicative of a willingness by the courts to adopt a more commercial and tangible set of norms against which conduct is assessed. The decision may suggest that conduct by a large market participant that is commercially robust does not in and of itself constitute

unconscionable conduct. Rather, courts will undertake a wide-ranging factual inquiry and will look to the rationale of conduct to determine whether the conduct contravenes the ACL.

The Flight Centre decision – the end of MFNs?

The long-running Flight Centre Case culminated with the High Court's decision that Flight Centre was in competition with its airline suppliers (notwithstanding that the parties were also in an agency relationship), and therefore constituted price-fixing conduct that was caught by the cartel provisions of the then *Trade Practices Act 1974* (Cth).

This decision has the potential to cause a fundamental shift in the way in which vertical relationships in a variety of sectors are likely to be assessed under Australia's competition laws going forward. The decision is likely to significantly broaden the scope of Australia's per se cartel provisions to capture conduct that may also generate customer benefits and efficiencies without having due regard to the purpose, effect and/or benefits of such conduct. More specifically, it also raises questions as to the legality of most favoured nation (price parity) clauses (**MFNs**) between suppliers and distributors that would have previously been found unlikely to have had the purpose or effect of substantially lessening competition (unless parties first obtain authorisation prior to implementing arrangements that contain such clauses).

There is some uncertainty as to what the decision means practically for the way in which the ACCC will approach MFNs in light of proposed carve outs for certain vertical arrangements in the Harper recommendations that look to be implemented some time in 2017-18. However, the ACCC Chairman has indicated publicly that the decision will have 'profound implications' for business across the e-commerce sector. It is not entirely clear whether such statements mean that the ACCC will be focusing its enforcement activities on dual distribution models between suppliers and distributors who sell the supplier's product through any alternative channels that have restriction(s) as to price or whether such concerns could manifest themselves in a broader e-commerce sector inquiry.

Deterrence matters – signalling a more aggressive approach to penalties

The ANZ Case: The Court's hesitation and perceptions as to 'low' agreed penalties for cartel conduct

The conduct in question occurred offshore by entities incorporated or carrying on business in Australia

The facts of the ANZ Case before the Federal Court involved traders employed by ANZ and Macquarie banks in Singapore engaging in discussions on ten and eight occasions, respectively, during 2011 with traders employed by other banks about submissions that would be made concerning the Malaysian ringgit benchmark rate. The traders employed by ANZ and Macquarie were said to have attempted to get the traders employed by other submitting banks to make either high submissions, or low submissions, thereby impacting the setting of the Malaysian ringgit benchmark rate.

These discussions were found to constitute an attempt to make arrangements which indirectly provided for the fixing of the price for Malaysian ringgit forward contracts, as prices for such contracts are essentially determined by reference to benchmark rates. ANZ, Macquarie and the banks whose traders participated in those discussions were in competition with each other for Malaysian ringgit forward contracts. As such, the Court found that the arrangements that ANZ and Macquarie traders attempted to make with the traders from other banks contained cartel provisions.

Interestingly, the conduct in question occurred almost entirely outside of Australia by entities incorporated or carrying on business within Australia. Although not examined in any detail, the decision affirmed that the conduct of traders employed by ANZ and Macquarie in Singapore (both of which carry on business in Australia), was sufficient to attract the operation of Australia's cartel laws.

As is quite common in respect of competition litigation in Australia, the parties settled the proceedings with the ACCC on the basis that ANZ and Macquarie would admit to the contraventions and that the matter would proceed on the basis of agreed facts. It is important to note that these admitted contraventions are quite often effectively commercial compromises to litigation as between the ACCC and commercial parties in circumstances where the law is unclear, but a commercial resolution to proceedings is considered to be desirable by the ACCC and commercial parties in the particular circumstances of the matter.

The Court's view as to the adequacy of the agreed penalties

The parties submitted to the Court that they had agreed on penalties of A$900,000 for each of ANZ's contraventions (totalling A$9 million) and A$750,000 for each of Macquarie's contraventions (totalling A$6 million). The role of the Court was to order ANZ and Macquarie to pay such penalties as it considers appropriate in the circumstances of the particular matter. The appropriateness of a penalty will often be determined on the basis as to whether it falls within a permissible range, particularly in circumstances where a particular figure cannot be said to be more appropriate than another.

In its CFMEU decision[2], the High Court reaffirmed that the role of courts regarding agreed civil penalties between a respondent and a regulator is to ensure the appropriateness of the penalty having regard to all relevant matters.

Wigney J characterised the contraventions by ANZ and Macquarie as very serious, and had the capacity to significantly undermine the integrity and efficacy of the market in Malaysian ringgit forward contracts. Notably, the Court gave weight to the fact that the conduct of the traders was systematic, covert and deliberate. The significant and serious corporate failings of ANZ and Macquarie to establish satisfactory training, compliance and surveillance systems in their Singapore offices were also said to be grounds upon which to attribute liability for the conduct of the traders.

Although both ANZ and Macquarie did not contest the proceedings, demonstrated contrition, had not previously been found to contravene the CCA, and had since improved their compliance and surveillance systems, the Court emphasised that penalties for such conduct need to be sufficiently large to deter large financial institutions from engaging in similar conduct in the future and that penalties must go beyond the mere cost of doing business.

In these circumstances, Wigney J indicated that the penalties were towards the very lower end of the permissible range and that he would have been inclined to impose significantly higher penalties had the parties not agreed to settle the proceedings. However, the Court ultimately accepted that the penalties were within the permissible range (albeit towards the lower end), and were consistent with established and authoritative principle and practice.

Key takeaways—courts will more actively examine the appropriateness of agreed penalties

The decision reinforces that courts will not rubber stamp agreed penalties put forward by respondents and the ACCC in civil penalty proceedings. The decision also reaffirms the broad jurisdictional reach and operation of Australia's cartel laws.

Notwithstanding the public interest benefits associated with settling proceedings and avoiding trial, the decision indicates that courts will (and should) actively assess statements of agreed facts and whether an agreed penalty is indeed appropriate in the circumstances. Respondents should ensure that statements of agreed facts clearly justify the agreed penalty.

It would seem that courts may become less willing to accept agreed penalties moving forward unless the quantum goes beyond the mere cost of doing business, even if respondents have relatively clean competition compliance records. If nothing else, the decision has emboldened the ACCC to pursue larger penalties, particularly in respect of the more serious competition provisions of the CCA.

Whether this will encourage respondents to proceed to trial to contest liability more fiercely will remain to be seen. However, the decision is likely to make settlement negotiations more interesting and robust moving forward as respondents assess the benefits of admitting liability without putting the ACCC to proof.

The Nurofen Case: no relief in sight for ACL penalties

A world of pain for claims of targeted relief

In May 2016 the Federal Court found that Reckitt Benckiser (**RB**) had engaged in misleading or deceptive conduct in relation to representations made on Nurofen packaging and websites.

Nurofen released a line of 'targeted pain' products designed to treat migraines, back pain, neck pain or period pain. The packaging and websites were found to be misleading as to the nature and characteristics of the product. More specifically, the packaging represented to consumers that each product had a targeted use and was suitable only for certain types of pain, such as back pain, period pain or migraines. The Nurofen website was found to reinforce the misleading representations by providing comparisons of each product to assist consumers to select the correct type of Nurofen to treat their pain.

The Federal Court initially imposed a pecuniary penalty of A$1.7 million on RB. The ACCC then appealed the sufficiency of the penalty to the Full Federal Court.

Sufficiency of the initial penalty questioned leading to a substantial increase on appeal

On appeal, the Full Federal Court more than tripled the initial penalty imposed to A$6 million. In its decision, the Full Federal Court emphasised that penalties must go beyond the mere cost of doing business. The Court noted that RB was aware that the representations were misleading and "court [ed] the risk"[2], as the misleading representations were found to have caused consumers to suffer loss and the Court took the view that the penalty should reflect the loss suffered.

Notably, the reasoning of the Full Federal Court indicates the seriousness with which contraventions of the ACL are now viewed. The Full Court indicated there are a number of key considerations that are relevant for the purposes of calculating an appropriate penalty:

- The penalty must act as a deterrent and needs to go beyond the mere cost of doing business to protect the public interest in not having the conduct repeated. This is particularly the case in respect of products and services relating to health.
- The loss suffered by consumers should be quantified and used as a factor to determine the penalty. In this respect, the Court noted that consumers paid more than twice the price of regular Nurofen on the premise that the 'targeted relief' range would be more effective at treating their symptoms.
- Determining the maximum penalty is a multi-factorial inquiry that should be considered having regard to the scope and number of misrepresentations made and the profit attributable to such conduct. In this respect, there were over 5.9 million packets of the Nurofen targeted pain relief sold, which resulted in a A$45 million profit for RB.
- The timing and nature of any admissions are likely to affect the weight of any discount to the penalty. In this respect, the Full Federal Court downplayed the admissions of RB deflecting from the decision at first instance. The Full Court noted that they occurred after the first full day of trial and did not save the court a large amount of time.

Appellate courts have indicated a willingness to increase the size of ACL penalties

The decision highlights that the ACCC has been successful in convincing courts to increase the severity of penalties imposed for contraventions of the ACL, particularly in respect of conduct engaged in by large corporations.

Although penalties for breaches of the ACL are currently limited to A$1.1 million per contravention (unlike the competition provisions of the CCA), the decision indicates a willingness by courts to impose penalties that are 'fit for purpose' in deterring conduct to which actual and potential significant harm to consumers can be attributed.

As such, businesses should not underestimate the importance of compliance with the provisions of the ACL. The Nurofen decision may clear the way for the ACCC to pursue much higher penalties for material contraventions of the ACL to bring them in line with competition penalties for more serious conduct engaged in by large companies.

Conclusion

These decisions indicate a changing landscape for competition and consumer law jurisprudence in Australia that businesses need to be mindful of to ensure effective compliance with the CCA and ACL particularly as courts increase penalties for breach of the ACL.

Businesses in agency relationships and operating dual distribution models also must assess the implications of the Flight Centre Case carefully in order to mitigate what could potentially be significant civil (and criminal) compliance risk under Australia's current cartel laws.

Businesses should also take care to ensure that they conduct themselves in a manner consistent with the prevailing commercial norms of the sector in which they operate and ensure that corporate conduct is not construed as making threats or engaging in unfair tactics so as to seek to address the increasing risk of allegations of unconscionable conduct by the ACCC in how businesses deal with smaller businesses, as well as with consumers.

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[1] *ACCC v Flight Centre Travel Group Limited [2016] HCA 49.*

[2] *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; CFMEU v Director, Fair Work Building Industry Inspectorate [2015] HCA 46.*

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