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Competition and Consumer Update

DEC 2022 ISSUE 2

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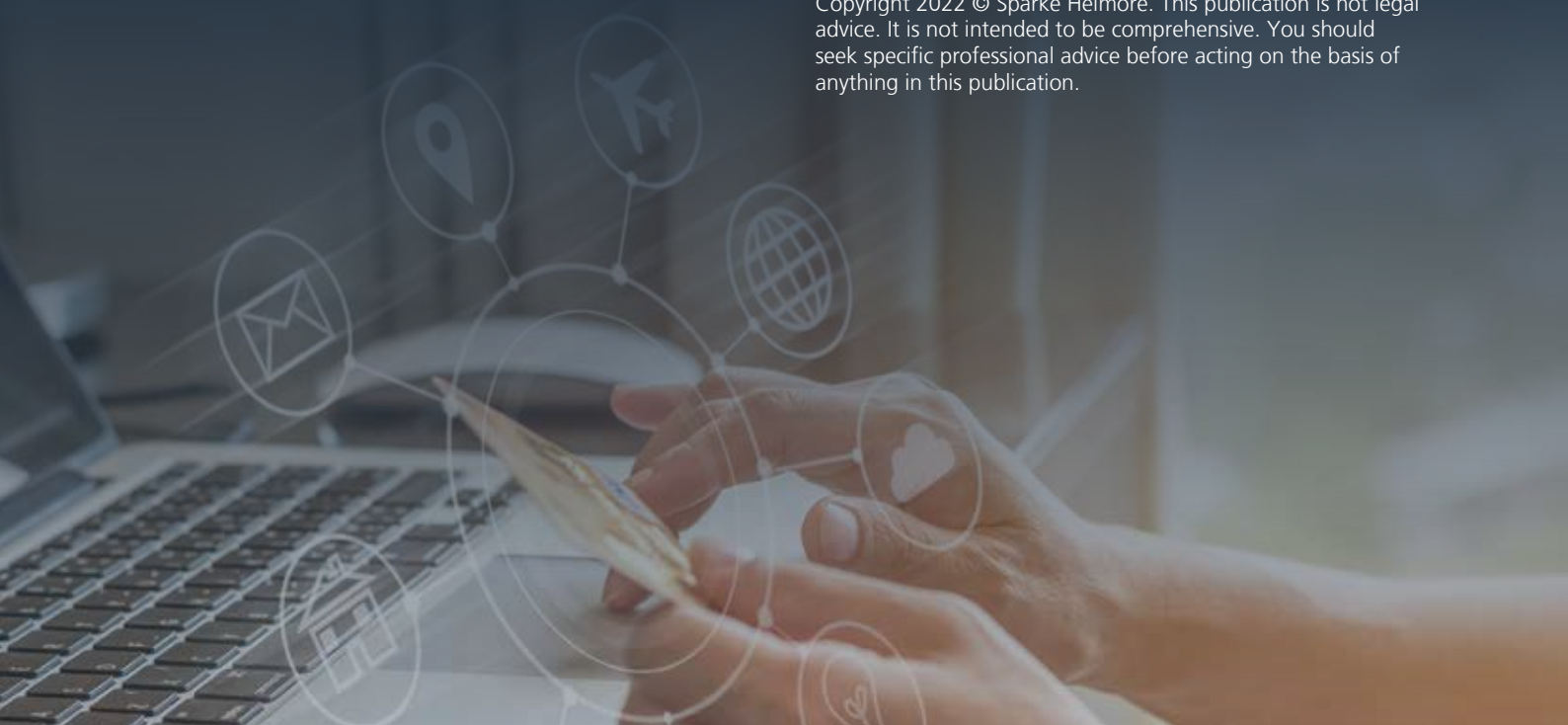


Nick Christiansen

Partner
Sparke Helmore
Commercial Litigation and
Regulatory & Investigations

Welcome to this issue of Competition and Consumer Update, our annual review of key developments and decisions in competition and consumer law. In this issue, we:

- Highlight recent changes to the *Competition and Consumer Act 2010* and the *Australian Consumer Law* that substantially increase maximum penalties for contraventions of the competition and consumer laws and extend the unfair contract terms regime, including the introduction of penalties for using or relying on unfair contract terms.
- Review the focus areas and activities of the Australian Competition and Consumer Commission (**ACCC**) for the year.
- Outline decisions of the courts in 2022 on unfair contract terms, misleading and deceptive conduct, consumer guarantees, "payment without service", cartel conduct, exclusive dealing, bid rigging, and product safety and recalls.

We hope you find this review helpful and entertaining.

If there are competition and consumer law topics you would like Sparke Helmore to cover in the future, or you have any specific queries on competition law and consumer regulatory matters, please contact Nick Christiansen.

Acknowledgment: Thank you to Paralegal Sophie Hussey for her contribution to this publication.

CHANGES TO THE COMPETITION AND CONSUMER LAWS IN 2022

The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth)* (Act) received assent and came into effect (in part) in November 2022, with the balance due to come into effect in November 2023.

The Act made several important changes to the *Competition and Consumer Act 2010* (Cth), including to the *Australian Consumer Law*.

First, the Act has increased the maximum penalties applicable to certain breaches of the competition and consumer law, with the intention of ensuring a sufficient deterrent for misconduct and robust consumer protection.

The new maximum penalty for a breach of a relevant offence or civil penalty provision under the key parts of the *Competition and Consumer Act* and under the *Australian Consumer Law* is, for a body corporate, now the greater of:

- $50 million (up from $10 million)
- three times the value of the benefit obtained from the breach (if determinable), or
- 30% (up from 10%) of the body corporate's adjusted turnover during the breach turnover period (if the benefit obtained is not determinable).

The new term "adjusted turnover" is the sum of the value of all of the supplies of the body corporate (and any related body corporate) made or likely to have been made during the breach turnover period, with that period generally being for the duration of the breach (with a 12 month minimum). Previously this was calculated by reference to the 12 month period prior to the breach.

For an individual, the maximum penalty is now $2.5 million (up from $500,000).

The increases in penalties were considered important to ensure that larger businesses in particular do not regard breaches of the competition and consumer laws, and the associated penalties, as merely a "cost of doing business".

Secondly, the Act has amended the *Competition and Consumer Act*, the *Australian Consumer Law*, and the ***ASIC Act*** to strengthen and clarify the unfair contract terms regime. The most significant changes are the introduction of a civil penalty regime prohibiting the use of and reliance on unfair contract terms in standard form contracts, and the broadening of the classes of contracts covered by the regime.

The key changes include:

- Applying the regime under the Australian Consumer Law to contracts where at least one party employs fewer than 100 people (up from 20; this is calculated on an FTE basis) or has turnover in the last income year of less than $10 million. The same will be the case under the ASIC Act equivalent regime, with the additional qualification that the upfront price payable in the contract does not exceed $5 million.
- The power for the Court to impose a pecuniary penalty if a person proposes, applies, relies, or purports to apply or rely on, an unfair contract term.
- Additional powers for the Court to make orders preventing a term or a substantially similar term, that has been declared unfair from being included in any future standard form small business or consumer contracts.
- A contract may be considered a "standard form contract" even where there has been an opportunity to negotiate or select its terms.

Cases brought under the unfair contract terms regime have become more prevalent in recent years, and the strengthening of the regime is likely to result in an increase in cases over the next year or so, unless businesses using standard form contracts take steps urgently to avoid breaching the new prohibition.

ACCC'S FOCUS AREAS

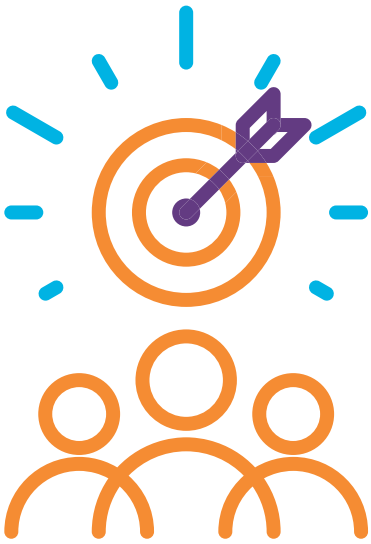
In March 2022, as has become customary, the then-ACCC Chair Rod Sims announced the ACCC's enforcement priorities for the year ahead, many of which displayed a contemporary take on common themes, including:

- Consumer and fair trading issues in relation to environmental and sustainability claims.
- Consumer and fair trading issues relating to manipulative or deceptive advertising and marketing practices in the digital economy.
- Consumer and fair trading issues arising from the COVID-19 pandemic.
- Competition and consumer issues arising from the pricing and selling of essential services, and particularly energy and telecommunications.
- The consumer guarantees, with particular focus on high value goods such as motor vehicles and caravans.
- Competition and consumer issues relating to digital platforms.
- Competition issues in global and domestic supply chains, particularly where disrupted by the COVID-19 pandemic.
- Anti-competitive conduct in the financial services sector, and particularly payment services.
- Exclusive arrangements by firms with market power impacting competition.
- Application of the protections of the competition and consumer laws to small businesses, particularly in agriculture and franchising.
- Compliance with the new button battery safety standards.
- Consumer product safety issues for young children.

The ACCC reiterated its long-standing focus on cartel conduct and other anti-competitive agreements and practices, product safety, protection of vulnerable or disadvantaged consumers, and the impact of breaches of the competition and consumer laws on the welfare of Indigenous Australians.

In September 2022, the new ACCC Chair Gina Cass-Gottlieb announced a further set of priorities, which included:

- Additional measures for pro-active cartel detection, such as cartel screening tools to detect bid rigging, promoting anonymous online reporting, and additional intelligence and analytics capabilities.
- Taking enforcement action against businesses making false or misleading claims about the reason for price changes, which has become particularly relevant in a time of increasing interest rates and the rising cost of living.
- Combating "greenwashing" by requiring businesses making environmental and sustainability claims to substantiate those claims, with a particular focus on the accuracy and verifiability of the claims made.
- Considering the competitive effect of holdings of minority interests in competing companies.
- Pressing for reforms to the merger laws, in the consumer guarantees, and in relation to product safety.



Competition and consumer issues in online retail marketplaces

In April 2022, the ACCC released its report on general competition and consumer issues in online retail marketplaces in Australia as part of its ongoing Digital Platform Services Inquiry. The report concerned general online retail marketplaces such Amazon, eBay, and Kogan, which provide sellers with a low-cost way to enter the market and offer greater choice of products to buyers. These marketplaces are increasingly important in connecting sellers to consumers and, although not constituting as significant a share of retail sales as they do in other jurisdictions, their position in the Australian market was described as "dynamic" with "significant potential for change".

Among the issues identified by the ACCC were the following:

- The effect of user interfaces in directing consumers to make purchasing decisions, including the use of search algorithms that determine the order in which products are displayed. The ACCC specifically identified scenarios where there was no clear reason for particular products being displayed in more prominent positions, and the concern with this practice particularly where marketplaces sell third party products alongside their own. A marketplace giving itself preferential treatment without being transparent is a key concern. The ACCC also has flagged the importance of marketplace display from the seller's perspective, and particularly the need to ensure sellers cannot "game" the algorithms.
- The greater difficulty consumers experience identifying and exercising their consumer rights when a sale is facilitated or intermediated by an online marketplace. The ACCC flagged the need for additional protections for consumers, such as an economy-wide prohibition on unfair trading practices and the introduction of a general safety provision.
- The barrier consumers face in working out who they have purchased a product from, and how to effectively resolve a dispute with the seller, as well as the need for adequate access to redress for sellers when they have a dispute with the marketplace.
- The potential for harm to consumers where they do not have adequate information about and control over the data being collected about them and their transactions, and how that data is used. From the seller's perspective, the ACCC has noted the disparity between the consumer information known to online marketplaces and that available to the sellers, and the effect this has on a seller's ability to tailor their product offering.
- The relative difference in bargaining power in negotiating sellers' fees with online marketplaces, between larger and smaller sellers, as well as the effect of fee and pricing restrictions imposed by the marketplace on a seller's ability to compete effectively.
- The potential for tipping in favour of a single dominant online marketplace, and the risk of a dominant online marketplace engaging in anti-competitive conduct or reducing the benefits that consumers otherwise would gain from competition between online marketplaces.

In a report in November 2022, the ACCC released a further interim report in the Digital Platform Services Inquiry. In this second report, the ACCC:

- Highlighted the need for stronger safeguards for consumers and small businesses to promote trust and confidence in the use of digital platforms and minimise harm.
- Recommended targeted consumer protection measures in relation to scams, harmful apps, and fake reviews on digital platforms.
- Recommended the setting of minimum standards for digital platform dispute resolution processes, with the ability for individuals to escalate complaints to an independent ombudsman.
- Recommended the establishment of legally binding codes of conduct, on a service-by-service basis, to require digital platforms to address competition issues such as anti-competitive self-preferencing, tying, and exclusive pre-installation agreements.

These measures will require new legislation or amendments to the existing competition and consumer laws, as well as the development of new codes.

The Inquiry continues, with its final report expected in March 2025.

ACCC'S REPORTS ON ITS ACTIVITY

In its annual report for the 2021-22 year, published in October 2022, the ACCC report on its performance for the year included the following:[1]

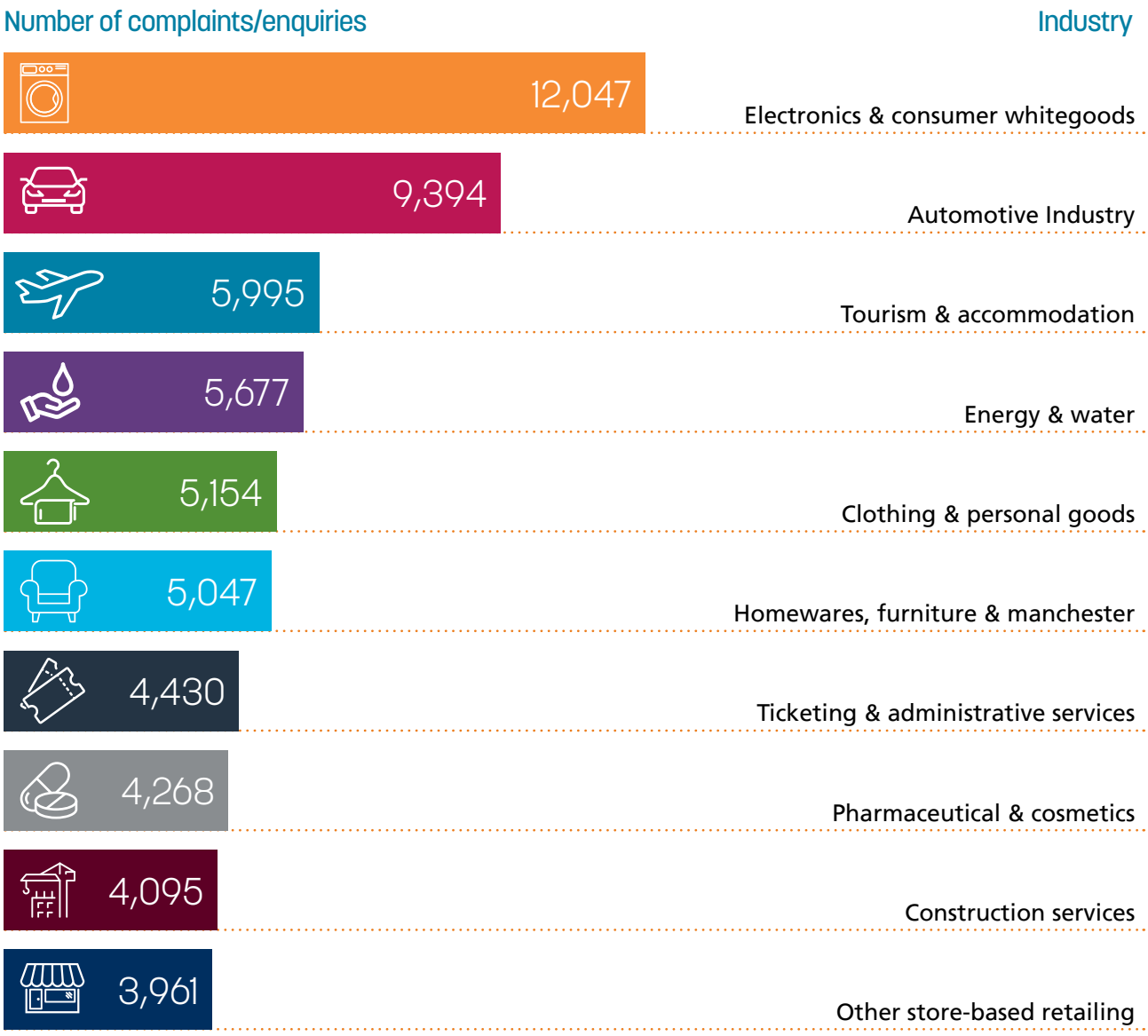
	2020-21	2021-22	
	Result	**Target**	**Result**
Anti-competitive conduct			
Number of in-depth competition investigations completed	18	30	20
Percentage of initial competition investigations completed within 3 months	42%	60%	56%
Percentage of in-depth competition investigations completed within 12 months	44%	70%	45%
Number of competition enforcement interventions (court proceedings commenced, section 87B undertakings accepted, administrative resolutions)	7	6+	5
Prevention of anti-competitive mergers			
Percentage of merger matters considered (under the informal merger review process) that were finalised by pre-assessment	95%	80%	94%
Percentage of merger matters subject to Phase 1 only of public review that were finalised within 12 weeks (excluding time periods where information is outstanding)	67%	80%	84%
Percentage of merger matters subject to Phase 2 of public review that were finalised within 24 weeks (excluding time periods where information is outstanding)	50%	80%	75%
Misleading and deceptive conduct and fair trading			
Number of in-depth ACL and industry codes investigations completed	50	75	56
Percentage of in-depth ACL and industry codes investigations that are in the priority areas outlined in the Compliance and Enforcement Policy	82%	60%	79%
Percentage of initial ACL and industry codes investigations completed within 3 months	57%	80%	70%
Percentage of in-depth ACL and industry codes investigations completed within 12 months	70%	80%	64%
Number of ACL and industry codes enforcement interventions (court proceedings commenced, section 87B undertakings accepted, infringement notices issued, administrative resolutions)	37	40+	40
Percentage of ACL and industry codes compliance and enforcement interventions in the priority areas outlined in the Compliance and Enforcement Policy	84%	60%	70%

Although the number of investigations completed were below the ACCC's ambitious targets for the year, they were on par with the prior year. The ACCC pointed to interruptions to its operations during the COVID-19 pandemic, as well as a shift to more long-term initiatives and less on in-depth investigations, as reasons for not meeting some of the targets.

[1] Australian Competition and Consumer Commission & Australian Energy Regulator, Annual Report 2021-22, October 2022 <https://www.accc.gov.au/system/files/ACCC%20and%20AER%20annual%20report%202021-22.pdf> (Annual Report), pp 43, 58, and 77.

Of note also is the fact that the ACCC's investigations under the *Australian Consumer Law* remain concentrated in the priority areas.

The ACCC also published the following information on the top 10 industries subject to complaints and enquiries made within the 2021-22 year:[2]



Electronics and consumer whitegoods and the automotive industry also topped the list of contacts made to the ACCC relating to misleading and deceptive conduct (11% and 8% respectively) and relating to consumer guarantees and warranties (26% and 23% respectively).

[2] Annual Report, p 97.

UNFAIR CONTRACT TERMS

The courts have determined a number of cases brought under the unfair contract terms regime in 2022.

In ***Commission for Consumer Protection v Starland Management Pty Ltd*** [2022] WASC 96 (Tottle J, 17 March 2022), the Supreme Court of Western Australia dealt with an application by the Commission against an operator of holiday accommodation and its director. The Commissioner alleged, and the Defendants ultimately admitted, that numerous terms in the operator's holiday accommodation letting terms were unfair.

The terms challenged included:

- A term that automatically extended the term of the agreement in four week increments unless the renter gave written notice 21 days before the stated departure date. This term was considered unfair for a number of reasons, including because it contradicted an expressly stated "departure date" in the agreement, because it placed a burden of advance written notice on the consumer that would be unexpected in the context of holiday accommodation, and because it would cause a consumer to be locked into further periods of tenancy even if they were merely late in giving notice.
- A term that authorised the operator to charge the tenant's credit card for "any monies due in excess of the bond" where the bond was inadequate to cover damage or unpaid rent. This term was considered unfair because the agreement already provided for advance rent and a bond, because it was unlimited in amount, because it did not provide for advance notice to be given to the consumer, and because it did not provide consumers with the ability to verify or challenge the charges.
- A term by which the entirety of the bond and rent in advance was forfeited if the tenant allowed other persons to stay at the property, which was unfair because it imposed a penalty disproportionate to the consumer's conduct and any harm or loss it caused.
- A term making deposits, rent, and bonds non-refundable in the event the tenant cancelled the agreement. This was unfair as a disproportionate remedy, because it exceeded a reasonable pre-estimate of the operator's losses or costs on cancellation, because it applied regardless of when the agreement was cancelled, because it made no provision for circumstances in which the tenant could be replaced, and because consumers wold be unlikely to expect that all three amounts would be forfeited in those circumstances.
- A term providing that rent would continue to be charged until the keys had been returned and cleaning completed. This was unfair because of its disproportion to the harm or loss caused, because the potential for the consumer to be substantially penalised for simply losing their keys, because of the potentially indeterminate liability, and because it created a liability to pay rent until cleaning or repairs had been completed that timing of which was in the hands of the operator.

The Defendants consented to the relief granted by the Court, in the form of a declaration that the challenged terms were unfair under s 23 of the *Australian Consumer Law*, orders restraining the Defendants from applying, relying on, or purporting to apply or rely on, the terms or terms to the same effect, and an order directing the Defendant to refund one tenant the amount of forfeited rent and bond monies.

This case is a good example of the unfair contract terms regime in action. It also illustrates the sorts of terms – including in particular in relation to automatic extensions and forfeiture of funds – that are likely to be considered unfair in standard form contracts to which the regime applies.

In ***Australian Competition Commission v Fujifilm Business Innovation Australia Pty Ltd*** [2022] FCA 928 (Stewart J, 12 August 2022), the Federal Court made orders by consent in proceedings brought by the ACCC against Fujifilm relating to various template contracts used by Fujifilm and alleged by the ACCC to contain unfair terms.

Over approximately five years, Fujifilm had used twenty-one standard form contracts for entering into or renewing 34,000 contracts with customers who were (or may have been) businesses employing fewer than 20 people (the relevant threshold at the time, which has recently been raised to 100 people) and involving an upfront price within the thresholds, making them "small business contracts" under the *Australian Consumer Law* and equivalent provisions in the *ASIC Act*.

The terms that the ACCC alleged, and Fujifilm accepted, were unfair included terms:

- allowing Fujifilm to unilaterally vary the price charged or the rights and obligations between the parties
- providing for automatic renewal unless the customer gave advance notice to cancel, where there was no obligation on Fujifilm to notify the customer that the renewal would occur
- incorporating terms from other documents that were not provided or were difficult for the customer to locate or identify, which Fujifilm could unilaterally vary without notifying the customer, and which the customer was required to warrant it had read
- limiting Fujifilm's liability for any delay in supplying or delivering equipment without excusing the customer from charges payable for the period of the delay
- requiring the customer to indemnify Fujifilm for cost and expenses incurred in exercising its rights under the contract without any corresponding right on the part of the customer and without any obligation on Fujifilm to minimise those costs, and also requiring indemnity of Fujifilm for damaged caused by third parties, or accidentally or indirectly by Fujifilm
- significantly capping, reducing, or limiting Fujifilm's total liability to the customer, and excluding consequential loss, by leaving the customer's liability to Fujifilm unlimited
- allowing Fujifilm to suspend services upon the customer's breach of any term, but still requiring the customer to pay for services while suspended
- permitting Fujifilm to terminate the contract immediately on notice if the customer breached the contract, without affording the customer a right to remedy the breach, and without the customer having a corresponding right
- providing for payments from the customer to Fujifilm on termination, including for the remaining term of the contract, and forfeiting prepayments, without the customer receiving anything in return
- requiring the customer, at the end of the minimum contract term, to either retain possession of (but not title to) the equipment and pay to Fujifilm the residual value, or pay to Fujifilm the shortfall between the residual and market values as determined by Fujifilm
- providing that the customer made an irrevocable offer to acquire goods and services upon returning a signed contract to Fujifilm, but Fujifilm was not bound (and the goods or services not supplied) until Fujifilm accepted that offer, which was an indefinite period, and
- allowing Fujifilm to invoice the customer whether or not goods and services had actually been provided.

The Court accepted the orders for relief proposed by the parties, including declarations that the terms were unfair, restraining Fujifilm from applying or relying on, or purporting to apply or rely on, the terms, requiring Fujifilm to publish a corrective notice on its website and to notify the customer counterparties to the contracts in issue, and requiring Fujifilm to implement a compliance program.

The terms challenged as unfair in this case are good examples of the sorts of terms that (at least prior to the introduction of the unfair contract terms regime) were common in standard-form contracts for the supply of goods and services to consumers and small business customers, and which many suppliers might still regard as legitimate.

However, with the increasing awareness by consumer and small businesses of their ability to avoid such terms under the unfair contract terms regime, and a likely increase in scrutiny from the ACCC with the introduction of penalties for applying or relying on such terms, they ought not appear in standard form contracts going forward.

In ***Carnival plc v Karpik (The Ruby Princess)*** [2022] FCAFC 149 (Allsop CJ, Rares and Derrington JJ, 2 September 2022), the Full Court of the Federal Court allowed an appeal by Carnival in connection with class action proceedings brought against it by passengers and relatives of passengers who were aboard the vessel *Ruby Princess* in March 2020 during the COVID-19 outbreak.

Until recently, Australian courts have had little opportunity to consider the enforceability of class action waiver clauses, which are of limited usage in Australian contracts. However, the Full Court considered whether such a clause precluded certain passengers of the Ruby Princess cruise from entering related class action proceedings. The Court also considered the enforceability of an exclusive jurisdiction clause, which sought to refer parties to Californian courts for determination of disputes.

The *Ruby Princess* class action proceedings commenced in 2020, with the applicants asserting that the cruise ship line had contravened the *Australian Consumer Law* (**ACL**) and acted negligently during the initial outbreak of COVID-19.

During these proceedings, an issue arose in respect of Mr Ho, a representative for US sub-group members of the class action, who was a party to a contract incorporating the clauses through US Terms & Conditions. The cruise line argued that proceedings should be stayed for US sub-group members on the grounds that these clauses prohibited them from participating in the Australian proceedings, asserting that the waiver barred them from participating in class actions and the jurisdiction clause referred all litigation to California.

The primary judge refused the stay application, holding that the US Terms and Conditions were not part of Mr Ho's contract with the cruise line. His Honour also held that the exclusive jurisdiction clause could not be relied upon and the class action waiver clause was unfair, rendering it void and unenforceable under s 23 of the ACL.

The Respondent appealed this decision, seeking further clarification from the Full Court of the Federal Court in relation to the enforceability of the class action waiver and exclusive jurisdiction clauses. It is worth noting that the Court also considered the peripheral issue of the extraterritorial application of the unfair contract term provisions.

Under the ACL, consumers and small businesses are afforded protection against unfair contract terms, provided the contract is for the supply of goods or services, or the sale or grant of an interest in land, and a contracting party is an individual whose acquisition is predominantly for personal, domestic or household use or consumption. Unfair contract term provisions also apply to standard form contracts, which are pre-prepared contracts that have not been negotiated by parties. Once a court has decided a contract term is 'unfair', the term will not be enforceable against the disadvantaged party. However, the remaining contract may still be enforceable.

Contract terms are deemed 'unfair' in circumstances where they cause detriment to a particular party, create significant imbalance in parties' rights and obligations, and are not reasonably necessary to protect the legitimate interests of the party benefiting from the term.

Chief Justice Allsop held that the class action waiver clause did not amount to an unfair contract term under the ACL, agreeing with the reasons provided by Justice Derrington. His Honour also observed that it was difficult to see how it was unfair for Mr Ho to be excluded from the Australian proceedings when class action waivers were enforceable in US courts, which were an appropriate avenue for any claim he may have, given he was a North American resident and US maritime law was the proper law of the contract. His Honour also considered the issue of enforceability in relation to Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) (**FCA**), which governs class actions in the Federal Court. His Honour found that the legislature's intentions were not undermined by enforcing class action waivers, provided these contract terms had been freely and fairly bargained for. His Honour gave the further example of the rights of class action group members to opt out of proceedings under s 33J of the FCA.

In determining the issue of the exclusive jurisdiction clause, his Honour took into account the primary judge's observation that "*factual issues rather than the legal issues [would be] the principal debate*" in proceedings. His Honour found that the exercise of the Court's discretion to refrain from enforcing the clause was not justified given the lack of public policy benefits associated with hearing the matter in Australia. For these reasons his Honour found that the clause was enforceable.

Justice Derrington arrived at the same conclusion as the Chief Justice, finding that the class action waiver was not an unfair contract term under the ACL. His Honour found that no "significant imbalance" existed between the parties, having regard to the fact that proceedings could still be brought in the US. His Honour rejected submissions that Mr Ho would be denied access to justice if he was excluded from class action proceedings. His Honour also found that the clause was reasonably necessary to protect the legitimate interests of the cruise line, given the practical benefits of confining all legal proceedings to the jurisdiction that the company operated out of and the risks associated with class actions. His Honour concluded that Mr Ho had not suffered detriment as a consequence of the cruise line's reliance on the class action waiver, acknowledging that while Mr Ho would be denied the benefits of a class action, no evidence had been tendered to demonstrate financial detriment. His Honour made the further finding that the cruise line had flagged the importance of carefully considering the waiver clause in its contracts with consumers, meaning it had been 'transparent' for the purposes of s 24(2) of the ACL.

His Honour also made a finding in respect of the Court's discretion to refrain from enforcing exclusive jurisdiction clauses, rejecting submissions that enforcing the clause would result in a fracturing of proceedings, noting that if this approach was taken, class actions would always be defeated by exclusive jurisdiction clauses. His Honour concluded that any policy concerns associated with referring the dispute to another jurisdiction were insufficient to prevent enforcement of the clause.

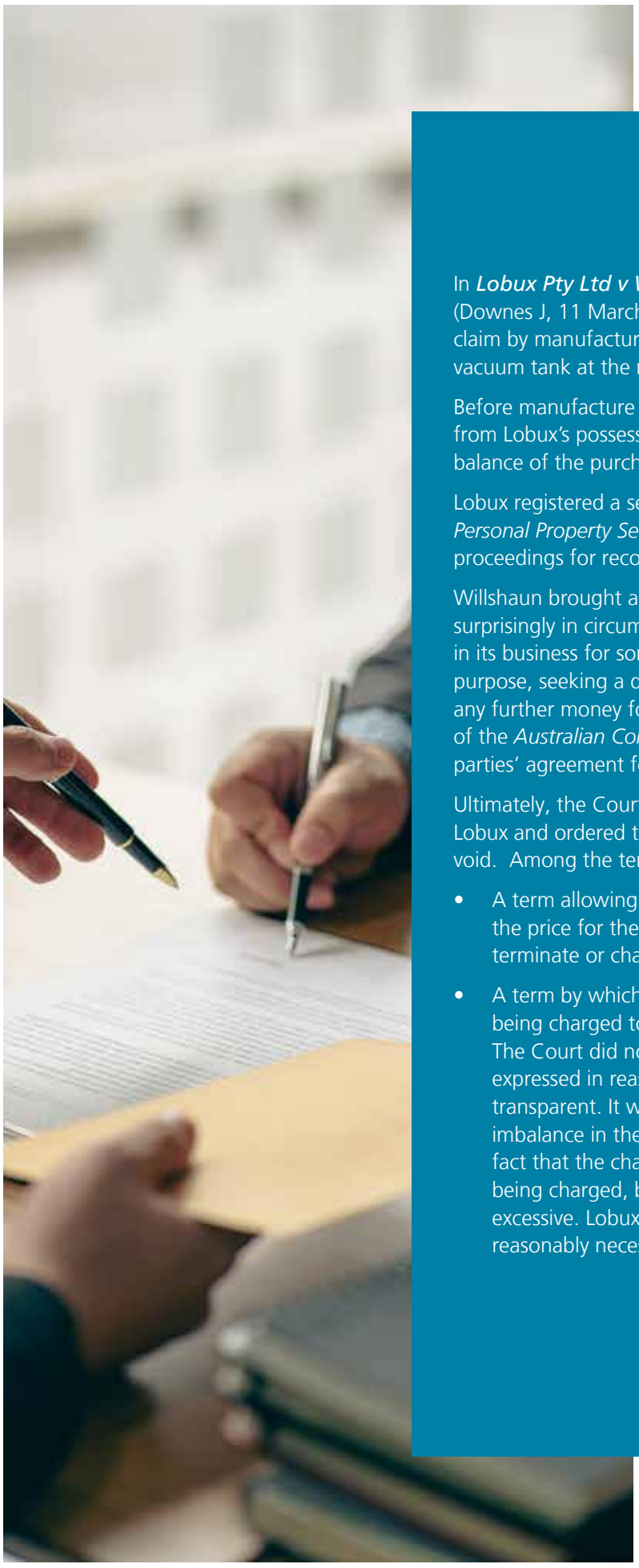
Justice Rares came to a vastly different conclusion to Allsop CJ and Derrington J, concluding that parties were unable to "contract out of" the class action regime under Part IVA of the FCA. His Honour acknowledged the statutory right to opt out of representative proceedings under s 33J but noted that group members cannot opt out without first receiving an opt out notice, which must be approved by a Court pursuant to ss 33X and 33Y of the FCA. His Honour explained that these provisions were introduced to provide prospective group members with the opportunity to make informed decisions before relinquishing their rights to participate in proceedings. In finding the class action waiver was unenforceable, his Honour also considered the Court's powers and concluded that the Court lacked the power to compel class action group members to opt out.

When considering the exclusive jurisdiction issue, his Honour referred to public policy considerations, agreeing with the primary judge that it was desirable to avoid fracturing legal proceedings, wasting resources and risking conflicting outcomes, which were potential consequences of enforcing the clause. His Honour also recognised that enforcing the exclusive jurisdiction clause would be contrary to policy objectives underpinning the FCA.

For these reasons, Justice Rares considered it unnecessary to consider whether the exclusive jurisdiction and class action waiver clauses were unfair contract terms.

The Court's majority held that the class action waiver clause was enforceable and did not amount to an unfair contract term. The Court also held that the exclusive jurisdiction clause was enforceable, despite the Courts' discretion to prevent its enforcement.

Given the infrequent use of class action waivers in Australia and the unique facts of this decision, the circumstances in which these clauses will be enforceable remains unclear for now. While the Court's decision provides tentative approval of their enforceability, the attitude of Australian courts will not be fully revealed until these clauses have been considered in a broader range of circumstances.



In ***Lobux Pty Ltd v Willshaun Pty Ltd*** [2022] FCA 204 (Downes J, 11 March 2022), the Federal Court considered a claim by manufacturer Lobux concerning the manufacture of a vacuum tank at the request of Willshaun.

Before manufacture was completed, Willshaun removed it from Lobux's possession, did not return it, and failed to pay the balance of the purchase price.

Lobux registered a security interest over the tank under the *Personal Property Securities Act 2009* (Cth) and brought the proceedings for recovery of the tank.

Willshaun brought a cross-claim alleging – somewhat surprisingly in circumstances where it had been using the tank in its business for some years – that the tank was not fit for purpose, seeking a declaration that it was not required to pay any further money for the tank, and a declaration under s 250 of the *Australian Consumer Law* that a range of terms of the parties' agreement for supply of the tank were void as unfair.

Ultimately, the Court ordered Willshaun to deliver the tank to Lobux and ordered that a number of terms were unfair, and so void. Among the terms declared unfair were the following:

- A term allowing Lobux, at its sole discretion, to determine the price for the supply, without any right to Willshaun to terminate or challenge the determination.
- A term by which Willshaun charged its assets capable of being charged to secure performance by its obligations. The Court did not consider the term to have been expressed in reasonably clear language, and so it was not transparent. It was also regarded as creating a significant imbalance in the parties' rights and obligations. The fact that the charge extended to all assets capable of being charged, both present and future, was considered excessive. Lobux had not shown the clause to be reasonably necessary to protect its legitimate interests.

MISLEADING AND DECEPTIVE CONDUCT

Reflecting its position as one of the broadest and most frequently deployed provisions of the *Australian Consumer Law*, there have been a large number of cases alleging misleading and deceptive conduct in 2022, brought both by the regulators and in private proceedings.

In ***Commissioner for Consumer Affairs v Goros*** [2022] SASC 107 (Kourakis CJ, 22 September 2022), the Supreme Court of South Australia considered a claim by the Commissioner alleging misleading and deceptive conduct by a demolition contractor, waste transporter, and asbestos remover.

Broadly, the Respondents were alleged to have engaged in a scheme to coerce consumers into paying additional fees for removal and disposal of asbestos contaminated material where such material was not present or was present in a lesser volume than represented.

The scheme involved the Respondents issuing a quote for demolition works that specified that it included asbestos removal "except for asbestos that is not visibly seen at the time of inspection and/or attached to concrete or friable asbestos", and that all asbestos would be removed in accordance with applicable guidelines.

Once accepted, the Respondents would contact the customer to advise that asbestos had been discovered mixed with other demolition rubble, which would need to disposed or in a specialised way, and that the specialised services and disposal of the contaminated material would be at an extra cost to the customer.

In one case, a customer had requested evidence of the extra charges for disposing of the contaminated waste, and the Respondents provided a receipt issued in the name of an entity related to the Respondents that was not licenced to receive asbestos waste.

On the evidence of eight customers, the Commissioner alleged that in each case there either was no asbestos on the site or else the Respondents had overstated the extent of the asbestos contamination, and then failed to lawfully remove, transport, and dispose of the asbestos within the requirements of the regulations.

The Respondents did not actively defend the proceedings.

The Court found that:

- the Respondents had made the representations alleged
- the Respondents had dumped waste from the demolitions exclusively at facilities that were not licensed to receive asbestos waste, suggesting that the waste did not in fact contain asbestos
- there was no large volume of asbestos dumped at any facility licensed to receive asbestos waste
- in at least some of the cases, therefore, there was no (or no additional) asbestos discovered on site in the course of the demolition, making the representations false
- there was "*a clear and striking similarity in the pattern of conduct*" that was "*more consistent with a fraudulent scheme than the discovery of asbestos contamination*"
- when considered cumulatively, the circumstances and extent of the supposed contamination were improbable, making the falsity of the representations probable
- in the absence of evidence from the Respondents, the Court was prepared to draw the inference adverse to the Respondents based on similar fact reasoning, to find that in each case there was no asbestos present or any asbestos present was not of a quantity or mixed to such an extent that it required the removal of truckloads of contaminated waste as represented, and
- as a result, there was no need for removal, transportation, or disposal of contaminated waste in the way represented, and no reasonable basis for the representations that those services were required or would need to be paid for on top of the quoted demolition cost.

The Court found that, in contravention of the *Australian Consumer Law*, the Respondents had engaged in misleading and deceptive conduct and had made false or misleading representations about services, that the Respondents had wrongly accepted payment, and that, given the degree to which the Respondents' conduct departed from the standards expected by society, the conduct also was unconscionable.

The Court made declarations to that effect, and penalties against the respondent are due to be determined at a later date.

In ***Australian Competition and Consumer Commission v Google LLC (No 4)*** [2022] FCA 942 (Thawley J, 12 August 2022) the Federal Court found that Google had engaged in misleading or deceptive conduct in respect of users of Android OS mobile devices on which Google Mobile Services was installed.

Between 1 January 2017 and 19 December 2018, Google made a series of representations to Android OS owners using Google Mobile Services in respect of the use of their user location data, with users being led to believe that adjusting the 'Location History' setting would prevent Google from collecting this data. Users were also led to believe their data would not be retained or used by Google if they consented to 'one-off' collection. Instead, user location data continued to be collected, despite 'Location History' being turned off, and Google retained data obtained on a 'one-off' basis.

The ACCC commenced proceedings in the Federal Court on the grounds that this conduct amounted to misleading and deceptive conduct under s 18 of the *Australian Consumer Law* (**ACL**), false and misleading representations as to performance characteristics, uses or benefits that they did not have pursuant to s 29(1)(g), and conduct liable to mislead the public in respect of the nature and suitability for purpose of Google Services, under s 34 of the Act.

The Federal Court found that these representations amounted to breaches of ss 18, 29(1)(g) and 34 of the ACL.

The Court heard submissions from Google LLC and the ACCC to the effect that both parties accepted that a large financial penalty was appropriate to deter conduct "of a like kind".

Although some of the impugned representations were made prior to amendments to civil penalty proceedings, which significantly increased available penalties, Google LLC did not seek lesser penalties for earlier contraventions. Accordingly, the penalty was determined with reference to s 224(3) of the *Competition and Consumer Law 2010* (Cth). Under this provision, the maximum penalty for a contravention of this Act was at that time the greatest of either $10 million; three times the value of any benefit obtained, which is reasonably attributable to breach; or, if this cannot be quantified, 10% of the annual turnover of the body corporate during the 12-month period in which the breach occurred.

Although the Court recognised that Google LLC benefited from retaining the data - which could be used for the purposes of targeted advertising - it was accepted that the value of the benefit could not be quantified. Accordingly, the civil penalty was determined with reference to Google LLC's annual turnover, with the Court taking into account the $2.1-$3 billion (USD) revenue Google LLC had accumulated through its Australian operations during the relevant period.

While courts ordinarily isolate conduct and apply penalties in respect of individual incidents, this was not the approach taken in these proceedings. The data required to pinpoint individual contraventions was not available and both parties agreed that this approach would result in excessive penalisation. The Court accepted these submissions and adopted the 'course of conduct' principle, treating multiple contraventions as a single course of conduct when determining an appropriate penalty.

The Court determined that it was not necessary to penalise Google Australia Pty Ltd, finding it sufficient to confine the financial penalty to its parent company, Google LLC.

The Court ultimately imposed a $60 million penalty, which the parties agreed would "*strike the right balance between deterrence and oppressive severity.*"

The $60 million penalty imposed by the Court demonstrates the gravity of breaches of competition and consumer law and the significant civil penalties available following legislative amendments. The size of this penalty and the relevant increases in maximum penalties should remind businesses that civil penalties may be calculated with reference to annual turnover, with regulators and courts seeking to deter large corporations from treating these penalties as merely costs incurred while doing business.

In ***Viagogo AG v Australian Competition and Consumer Commission*** [2022] FCAFC 87 (Yates, Abraham, and Cheesman JJ, 18 May 2022) the Full Court of the Federal Court rejected the appeal of ticket reselling platform, viagogo, following the imposition of a $7 million civil penalty for its contraventions of consumer law.

In 2019, the Federal Court held that viagogo had breached the *Australian Consumer Law* (**ACL**), by making a series of representations to the effect that:

- viagogo was an official ticket vendor rather than a ticket reseller – misleading consumers by using the phrase "Buy Now, viagogo Official Site" in an advertisement, which had the effect of representing approval or affiliation with official organisers of events and creating the impression that original tickets could be purchased through the website (the '**Official Site Representation**')
- consumers could purchase tickets to particular events for specific amounts advertised on its website (the '**Total Price Representation**')
- ticket prices listed on its delivery webpage were total prices – omitting the sizeable service fee it charged until purchasers had entered their credit card details and reached a review page (the '**Part Price Representation**'), and
- limited quantities of tickets were available – failing to clarify that references to quantity referred to tickets being resold via the viagogo website, rather than tickets available for the events, generally (the '**Quantity Representations**').

At first instance, the Federal Court found that these representations amounted to misleading and deceptive conduct, false or misleading representations about goods and services, and a failure to specify single prices. The Court imposed a penalty of $2.5 million in respect of the Official Site Representation, $1.5 million in respect of the Total Price Representation, $500,000 in respect of the Part Price Representation, and $2.5 million in respect of the Quantity Representations.

In May this year, viagogo challenged these findings in an appeal before the Full Court of the Federal Court.

During the appeal, viagogo argued that the primary judge had been wrong to find that the Official Site Representation amounted to misleading and deceptive conduct. viagogo argued that the other Google search results and its linked website provided consumers with the necessary context to realise they were a ticket reselling platform. The Court rejected these arguments and upheld the primary judge's findings,

viagogo also challenged the finding made in respect of the Total Price Representation, arguing that this was inconsistent with the primary judge's acceptance of the proposition that consumers expected to incur a small handling fee. On appeal, the Court rejected this, finding that the primary judge had been correct to delineate between a small handling fee and the steep 28% service fee customers of viagogo incurred while using the platform.

A further appeal ground raised by viagogo challenged the primary judge's findings in relation to the Partial Price Representation, which was held to contravene s 48 of the ACL. Under this provision, persons supplying goods or services have an obligation to provide consumers with a single price for each transaction. viagogo argued that the price on its delivery page was only reflective of the price set by the relevant third-party vendor using its platform and was reflective of a separate price for the supply of the ticket. viagogo asserted that its 28% fee was a separate fee incurred for its services as a ticket reselling platform. The Court rejected this argument, finding that the ticket supply was ultimately a single transaction, meaning the obligation to provide a single price still remained.

viagogo's final appeal ground concerned the $7 million penalty, which it argued was manifestly excessive. This was ground was unsuccessful and the Court upheld the original penalty.

The Court's rejection of viagogo's appeal should encourage businesses to consider consumer experiences when designing their websites and internet advertisements. This decision makes it clear that information must be presented in manner that makes it readily apparent and accessible to consumers – burying information in further webpages will not suffice. The onus is on businesses to resolve ambiguity in their internet advertisements in order to minimise the risk of misleading consumers.

In ***Zong v Wang*** [2022] NSWCA 80 (Leeming, White and Brereton JJA, 1 June 2022) the NSW Court of Appeal upheld a finding of misleading and deceptive conduct in *Zong v Wang* [2022] NSWCA 80. In doing so, the Court has reinforced that business discussions may amount to representations made in 'trade or commerce' despite occurring in a social context.

During a series of social occasions, the Respondent, Mr Wang, and the First Appellant, Mr Zong, discussed a joint business venture involving a yacht hire business – Australian Yacht Club Pty Limited (**AYC**). During these discussions, Mr Zong made a series of representations about the business, including, that it would be easy to rent yachts to Chinese tourists, that Mr Zong would promote the business, that Mr Zong would ensure the business was compliant with laws and regulations, and the business would be a 'good' business.

Following these discussions, Mr Wang contributed $315,000 towards the business venture, acquiring a 35% shareholding in the business. However, the venture ultimately was unsuccessful.

Mr Wang commenced proceedings in the District Court of NSW, arguing that the representations Mr Zong had made during their discussions amounted to misleading and deceptive conduct under s 18 of the *Australian Consumer Law* (**ACL**), entitling him to damages.

The trial judge made a finding in Mr Wang's favour, holding that these four representations amounted to misleading and deceptive conduct, awarding him a total judgment sum of $233,185.27, plus costs.

Mr Zong challenged these findings in the NSW Court of Appeal.

Mr Zong asserted that the trial judge incorrectly found that the relevant representations were made in the context of 'trade or commerce'. Instead, Mr Zong argued his representations were anterior to trade or commerce, given no business activity was occurring when the representations were made. The Court of Appeal rejected this argument, clarifying that the relevant consideration was whether the representations were of a commercial nature, rather than whether a commercial operation was occurring when the representations were made. Accordingly, the Court upheld the trial judge's findings, holding that these representations had occurred 'in trade or commerce'.

Mr Zong advanced further appeal grounds, asserting that Mr Wang had not suffered loss as a consequence of the relevant representations, and that the trial judge incorrectly had regard to unpleaded conduct and other unestablished representations when determining this question.

However, the Court found that the trial judge was entitled to consider unpleaded 'background' statements as it provided context to Mr Wang's willingness to trust Mr Zong and rely upon the four misleading and deceptive representations.

The Court reiterated that the pleaded conduct need not be the sole cause of loss. Instead, it was sufficient that it had influenced his decision in a material or non-trivial way.

The Court found that although Mr Wang had taken into account other unestablished representations, he had also relied upon the four misleading and deceptive representations, and his consideration of unestablished representations did not lessen the influence of the misleading and deceptive conduct. Accordingly, this appeal ground failed.

Mr Zong also challenged the trial judge's assessment of damages, arguing that this should have been calculated with reference to the date of the transaction rather than the date of the hearing. The Court rejected this argument and held that it was appropriate to quantify the loss as the difference between the price paid and the value of the shareholding on the date of the hearing. While this was a departure from the usual approach, this provided the fairest compensation for Mr Wang, as AYC's main asset had depreciated significantly and Mr Wang's shares in the company could not be easily transferred to others.

The Court ultimately rejected all of Mr Zong's appeal grounds, upholding the decision of the trial judge.

This decision is a reminder that representations of a commercial nature may amount to misleading and deceptive conduct despite being made in a social context. It would be prudent to be cautious when engaging with prospective investors, business partners or clients about commercial matters in social settings, as the setting of these discussions will not be a defence if a misleading and deceptive conduct claim arises.

In ***SPEL Environmental Pty Ltd v IES Stormwater Pty Ltd*** [2022] FCA 891 (Downes J, 1 August 2022), the Federal Court determined a claim brought by SPEL, a supplier of products and services used in stormwater and pollution management, against its competitor IES, a company in the business of selling and maintaining stormwater quality improvement devices.

In 2019, IES' staff had attended a site at Heathwood in Queensland to prepare a quote for maintenance of stormwater filtration systems installed at the site, which had been installed by SPEL. While there, they observed that the filters appeared different to the SPEL filter they were familiar with. They were a different filter that was not approved by the Brisbane City Council for installation at the site.

IES carried out investigations into the physical characteristics of the filters discovered, testing and comparing the two types of filters. They prepared a report of their findings, which included their concerns that:

- Based on their research and investigations, the filters were made with different components and functioned in a different manner, meaning that, in their opinion, it was almost impossible for the two filters to have the same treatment performance, such that they were not interchangeable and should not be marketed, sold, or installed interchangeably.
- It would not be appropriate to assume or consider the new filter to be an accepted or approved solution under the Council's register, and it should instead be viewed as unapproved and unsuitable for inclusion in development approvals.
- The new filters may be being marketed, sold, or installed as substitutes for the older version, misleading and deceiving customers.

The report was sent to seven participants in the stormwater industry, including the engineer that had certified the site, the Brisbane City Council, and the property manager that had requested the quote.

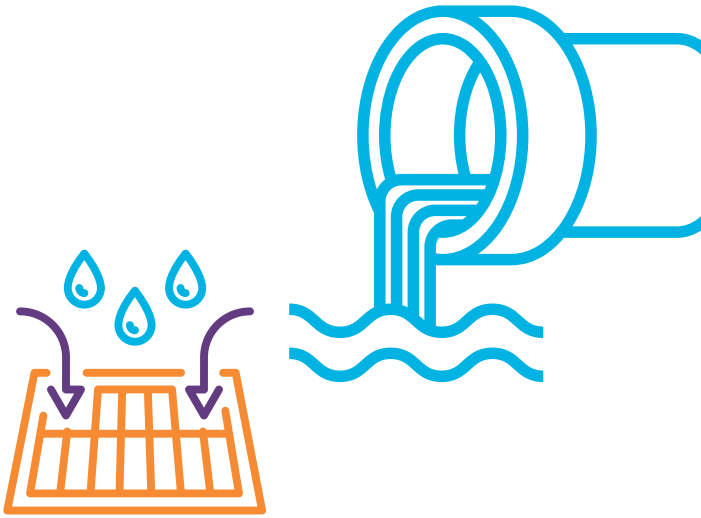
SPEL brought proceedings against IES alleging that the representations in the report were misleading or deceptive, or likely to mislead or deceive, in contravention of the *Australian Consumer Law*.

The Court adopted the standard two-stage analysis of the alleged representations asking first whether the representations were conveyed in the particular circumstances of the case, and secondly whether they were false, misleading or deceptive, or likely to mislead or deceive.

The first stage involved an assessment of whether the representations in issue were statements of opinion or of fact when considered from the perspective of an ordinary reasonable person reading the statement. A statement of opinion will not be misleading or deceptive, even if it is factually incorrect, if it has a proper foundation and is validly held.

In refusing the claim, the Court determined that:

- the representations alleged by SPEL relied on a selective reading of particular words or sentences in the report that, even if misleading in isolation, were not misleading when viewed in context
- the report as a whole was properly characterised as a representation by IES of its state of mind or its opinion, for which there was a basis, and so the alleged representations of fact would not have been conveyed to an objective reader
- SPEL had not established that IES did not hold (and did not honestly hold) the concerns expressed in the report, or did not have a basis for them
- the report would be interpreted by an objective reader as no more than a preliminary expert report, due to the limited investigations referred to in the report during a short period of time, which would be understood as not being an adequate and appropriate investigation of the comparability of the filters, and
- SPEL had not established that, as at the date of publication of the report, the new filter's performance and ability was not inferior, that it was and is interchangeable with the old filter, that it was properly tested and had proven performance to make it suitable and acceptable for use in development applications, and that it was not attempting to mislead or deceive customers by selling or installing the new filter as a substitute for the old one.



In ***Lanhai Pty Ltd v 7-Eleven Stores Pty Ltd*** [2022] VSC 132 (Riordan J, 22 March 2022), the Supreme Court of Victoria considered a claim by franchisee Lanhai that it had been induced to enter into a franchise agreement with 7-Eleven by 7-Eleven's misleading and deceptive conduct.

Lanhai's director made inquiries with 7-Eleven in 2014 about franchise opportunities. 7-Eleven's representative responded providing an information brochure including, under the heading Store Agreement, the statement:

> The typical term of the 7-Eleven Store Agreement is 10 years, unless limited by an earlier expiry of the property lease. All rights and obligations of 7-Eleven and the franchisee are set out in the Store Agreement.

Lanhai's directors subsequently attended a meeting with 7-Eleven to discuss a potential franchise. During that meeting, 7-Eleven gave an explanation of how a lease of a franchise store might work, showing a primary term of six years, two three year options, and three subsequent five year terms. The example given showed a primary term with options of 12 years, and a franchise agreement term of 10 years, such that the lease was sufficient to cover the term of the franchise agreement.

There was a dispute between the parties about whether 7-Eleven had explained to Lanhai's directors that the 10 year term of the franchise agreement in the example was subject to 7-Eleven exercising the options under the lease after the primary term expired, and that 7-Eleven was under no obligation to do so.

7-Eleven gave Lanhai's directors a document showing, in relation to a store that they were interested in, particulars to the effect that the franchise agreement term would be "as per Lease" and the lease term was "16/2/17 + 1x5 Yr Opt". Against the lease term was an asterisk, referring to an explanatory note. That note stated that options were not guaranteed and lease extensions would be decided on a case by case basis at 7-Eleven's discretion.

Lanhai's directors ultimately were not approved to purchase the first store and were provided with a further "franchise opportunities" document referring to a store at Heathmont showing a lease term of "4/7/21 + 1x5 Yr Opt" and including the same asterisk and explanatory note. It also (incorrectly) stated that the term of the franchise agreement in relation to that store would be 10 years.

Lanhai's directors expressed an interest in purchasing the Heathmont franchise and, as part of the 7-Eleven approvals process confirmed to 7-Eleven that one of the factors influencing their decision was that the store had a long term lease.

Lanhai entered into a franchise agreement with 7-Eleven for the store in June 2015. It relevantly included terms acknowledging that 7-Eleven had no obligation to renew or extend any option to extend the lease and tying expiration of the agreement to expiration of the primary term or extended term of the lease, if an option had been exercised.

In 2021, 7-Eleven determined that the store was loss making and should be divested and began a process towards terminating the franchise agreement.

Lanhai subsequently commenced proceedings, claiming in part that 7-Eleven had engaged in misleading and deceptive conduct, including in making statements to Lanhai's directors that the standard franchise term was 10 years, that the total primary and option terms in the hypothetical example was 12 years being sufficient to cover the 10 year franchise agreement, and that 7-Eleven would exercise the option to extend the lease.

The Court found that the Defendant's conduct was misleading in that is had a sufficient tendency to lead a person into error. The erroneous assumption formed by Lanhai's directors in this case was that the contractual entitlement under the franchise agreement they were to enter into was a term of 10 years, rather than the earlier of approximately six years (being the primary term of the lease) or 10 years (if 7-Eleven chose to exercise an option).

Influencing the Court's determination were the incorrect statement that the franchise agreement term would be 10 years, which conflicted with the term in the franchise agreement itself, which was expired at the end of the lease term subject to 7-Eleven exercising an option.

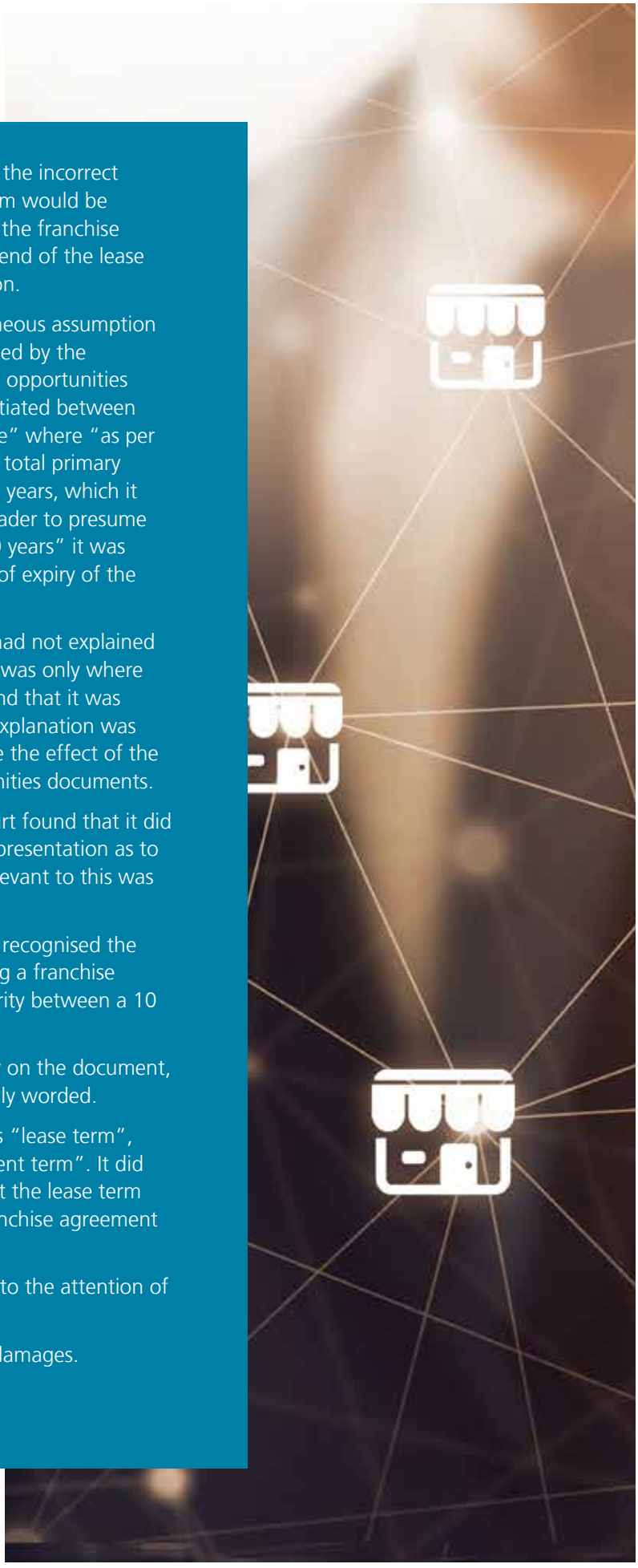
Also relevant was the finding that the erroneous assumption that the franchise term would not be affected by the lease was reinforced by the fact that, in the opportunities documents provided, 7-Eleven had differentiated between terms of "10 years" and terms "as per lease" where "as per lease" was used for those stores where the total primary term and all option period was less than 10 years, which it was considered would lead a reasonable reader to presume that where a term was expressed to be "10 years" it was no subject to earlier termination by reason of expiry of the primary term.

The Court was also satisfied that 7-Eleven had not explained that the 10 year term in the example given was only where 7-Eleven had exercised the lease options, and that it was under no obligation to do that. Whatever explanation was given was not considered sufficient to erase the effect of the subsequent representations in the opportunities documents.

In relation to the explanatory note, the Court found that it did not "erase the effect" of the misleading representation as to the term of the franchising agreement. Relevant to this was that:

- The opportunities documents provided recognised the very substantial investments in acquiring a franchise business, and the very significant disparity between a 10 year term and a lesser term.
- The note was not featured prominently on the document, being in small print, and was confusingly worded.
- The asterisk was placed after the words "lease term", not after the words "franchise agreement term". It did nothing to communicate the effect that the lease term and options might have had on the franchise agreement term.
- The explanatory note was not brought to the attention of Lanhai's directors.

The Court ordered 7-Eleven to pay Lanhai damages.



In ***Ripani v Century Legend Pty Ltd*** [2022] FCA 242 (Anastassiou J, 18 March 2022), the Federal Court considered a claim by the Ripanis against developer Century Legend concerning an "off-the-plan" purchase of an apartment at Queens Road, Melbourne.

The Ripanis agreed to purchase one of the premium apartments on the 14th floor of the development, paying $9.58 million, subject to a floor plan satisfactory to them being agreed.

Amongst the marketing materials produced by Century Legend to assist in marketing the development for sale was a hard-bound brochure containing various "renders" of what the development would look like once constructed.

The Ripanis saw a copy of the brochure. One of the images was of the apartment they would go on to purchase. It showed a large free span opening between the inside of the living areas and the outside terrace, with a consistent floor level between them. The same image was used in large form on the wall of the display suite for the development.

The Court accepted that the opening between living and outdoor areas was a significant attraction to the Ripanis, and something that they were specifically looking for in the purchase of an apartment.

The Ripanis alleged that the representations conveyed by the image were misleading or deceptive contrary to the *Australian Consumer Law*, being that there would be a free span opening and seamless transition between internal living areas and the terrace.

Century Legend asserted that the image did not convey any meaningful representation. The Court rejected that contention, finding that the image conveyed in substance the alleged representations.

The Court further found that there was no reasonable basis for making the representations, because Century Legend knew prior to using the image that it was impossible to construct the apartment in a way that would reasonably resemble the image.

There being no reasonable grounds, the representations were found to be misleading and deceptive.

The Court further found that the image was not only misleading, but deliberately misleading, because Century Legend knew that the free span opening depicted could not be constructed for design and engineering reasons but, continued to use the image. They did this despite the architect describing the image to Century Legend as "misleading".

The Court considered the image of the use on the image of the words "artist's impression" and a disclaimer printed in the brochure that included words to the effect that illustrations did not necessarily "*depict the finished state of the property*" and were "*for presentation purposes and are to be regarded as indicative only*".

As to the words "artist's impression", the Court considered that it did not detract from the materiality of the image and the representations it conveyed due to the "off-the-plan sale" context, which makes such images a proxy for a physical inspection.

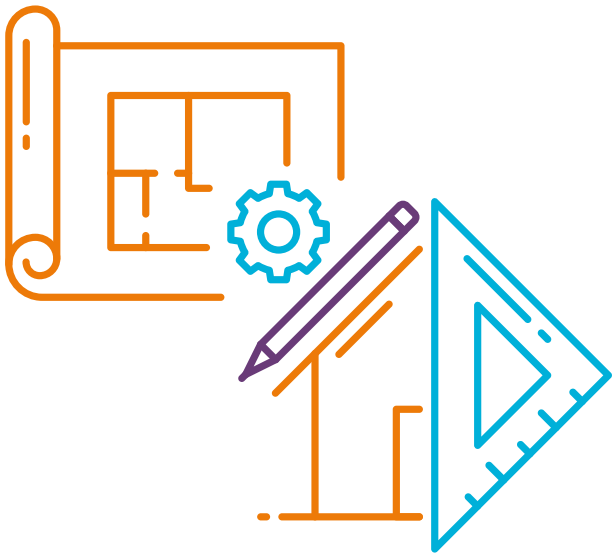
The Court also dismissed the effect of the disclaimer, finding that it was given no prominence at all in the marketing materials, being "hidden" at the back of the brochure. The Court also considered it to communicate only equivocal and misleading propositions. In the Court's view, the images had no work to do – other than to mislead – if they were not indicative of the intended construction of the apartment shown.

The Court granted orders rescinding the sale contract and ordered Century Legend to pay damages.

The Court's decision was challenged before Full Court, which on 30 November 2022 granted the developer's appeal, setting aside the lower Court's judgment (***Century Legend Pty Ltd v Ripani*** [2022] FCAFC 191, Markovic, McElwaine and McEvoy JJ).

Century Legend appealed on the grounds that the primary judge had erred:

- in rejecting evidence that the Ripanis had been informed, prior to entering into the contract, that the opening in the apartment could not be constructed in accordance with the depiction in the marketing image. The primary judge had not found the witness giving this evidence to be dishonest, but did find it vague, evasive, and uncertain, concluding that the evidence was reconstructed and unreliable. The rejection of this evidence was central to the Court finding Century Legend liable. The Full Court found that the judge erred in his reasoning, having proceeded on the basis of several factual errors. As a result, the Full Court determined that a new trial should be ordered, limited to the question of whether the Ripanis continued to rely on the misleading conduct of Century Legend between 7 April 2017 (when the Ripanis had been presented with a floor plan inconsistent with the marketing image) and the date the contract became conditional on 29 August 2017
- in finding that the disclaimer/exclusion clauses in the contract were ineffective to negate any misleading or deceptive conduct on the basis that they were not sufficiently specific or explicit in relation to the image. The Full Court found no error in the primary judge's reasoning, agreeing that, contrary to the clauses in the contract, the Ripanis as a matter of fact had relied on the marketing image and were induced to enter into the contract on that basis. They also had not read the relevant clauses when they signed the contract. The result was that the disclaimer clauses did not erase the earlier misleading conduct, and
- in concluding that the Ripanis were entitled to statutory rescission under the *Australian Consumer Law*, in light of various matters, including that the Court could not have been satisfied that they had suffered economic or other loss, and the expert valuation evidence had not been critically evaluated. The Full Court accepted that the Ripanis had not adduced evidence of the difference in value (if any) between the contract price for the apartment and its true value on completion, with and without the opening in the façade depicted in the marketing image, which evidence was necessary to determine if they had suffered economic loss by reason of Century Legend's misleading conduct. The primary judge had been content that, on the evidence of a diminution in value, and because Century Legend had not adduced any contrary valuation evidence, he was entitled to infer that the value of the apartment was less than the contract price, which satisfied the pre-requisites for the grant of an order for rescission of the contract. The Full Court considered this reasoning to be erroneous, in that the absence of evidence from the developer did not entitle the judge to make the inference that the Ripanis had suffered economic loss. However, it also considered that the primary judge had not founded the exercise of the discretion to grant relief upon his conclusion about economic loss, which instead was primarily based on the detriment suffered by the Ripanis in incurring a contractual obligation that they would not have incurred but for the misleading conduct. The primary judge was entitled to find on the evidence that the Ripanis had suffered substantial prejudice and disadvantage in being held to the purchase of the apartment without the primary feature that was most important to them in making their decision to purchase.



We look forward to updating you on the outcome of the new trial in our next issue.

CONSUMER GUARANTEES

In *Williams v Toyota Motors Corporation Australia Limited (Initial Trial)* [2022] FCA 344 (Lee J, 7 April 2022), the Federal Court for the first time awarded aggregate damages to funded class action claimants.

Between 2015 and 2020, Toyota sold vehicles in its Prado, Fortuner, and HiLux ranges fitted with certain diesel combustion engines and a diesel exhaust after-treatment system that was defective because it was not designed to function effectively during all reasonably expected conditions of use. Even when driven normally, the exhaust would emit excessive white smoke and malodour, the fuel efficiency was reduced, and there would be an excessively frequent notifications prompting service or repair of the vehicle.

The class action proceedings were brought by Williams and his business as Representative Applicants on behalf of a group of consumers that had acquired one of the affected vehicles during the relevant period. They claimed that the vehicles were not of acceptable quality, and so failed to comply with the statutory guarantee in s 54 of the *Australian Consumer Law*, and that Toyota had made misleading representations and omissions about the vehicles.

Considering the case about acceptable quality, the Court confirmed that to meet the standard expected by the statutory guarantee, goods must possess all of the qualities listed – that is: fitness for all purposes for which goods of the kind are commonly supplied, acceptable appearance and finish, freedom from defects, safety, and durability – and that failure to possess any one of those qualities would mean failure to comply with the guarantee.

It was necessary to consider whether a reasonable consumer, fully acquainted with the nature of the defect the vehicles suffered from and its consequences and symptoms, would have regarded the vehicles as being of acceptable quality at the time of supply.

The Court considered that the fact that the products were not of acceptable quality was "glaringly obvious" in this case, despite Toyota having contested that in "reams of submissions".

The Court:

- Rejected a submission to the effect that the symptoms of the defect in issue were to a certain extent "normal", were the result of compliance with emissions rules, and that the vehicles remained operational in any driving environment even with the defect, and so the effect of the defect on fitness for purpose was not as severe as in other cases.
- Rejected the contention that, provided the vehicles could still transport a driver from "A to B" they were fit for all purposes for which vehicles are commonly supplied.
- Found that no reasonable consumer would regard as acceptable the fact that the vehicle could not be exposed to a mode of operation and use that is considered normal in the Australian market without malfunctioning.
- Rejected a submission that the emission of excessive and foul-smelling white smoke was not something that a reasonable consumer would regard as unacceptable, because it does not impact on the safety of the vehicle, and otherwise mattered very little to the way in which they valued the vehicle. The Court considered it obvious that the reasonable consumer would not have viewed the vehicles as free from defects.

- Rejected a submission that, although the diesel exhaust system itself was not as durable as a reasonable consumer would expect, the vehicle as a whole was durable. The Court considered that the requirement for frequent unscheduled repair or replacement of a component part would not be regarded as acceptably durable by a reasonable consumer, where the failure of the component requires that the whole of the product be delivered up for servicing and repair.

The Applicants also asserted that Toyota had made a number of representations to consumers about the vehicles, which were misleading in contravention of the *Australian Consumer Law*. To a large extent those mirrored the acceptable quality case, including representations that (in effect):

- the vehicles themselves were, in design and manufacturing, not defective, of good quality, and durable, and provided a comfortable driving experience, and
- the diesel exhaust system was, in its design and manufacturing, not defective, of good quality, and durable.

Toyota admitted making the representations, and accepted that the representations about the diesel exhaust system breached the statutory norms in the relevant sections of the *Australian Consumer Law*, but disputed that the representations about the vehicles were misleading or deceptive due to the distinction that Toyota said must be drawn between defective goods on the one hand and goods that contain a defective component on the other. Specifically, Toyota asserted that the failings of the diesel exhaust system did not make representations about the vehicle as a whole misleading.

The Court rejected that contention, finding that the attempt to divorce issues with a vital component of the vehicles from the vehicles themselves was entirely superficial. The Court also considered that an ordinary reasonable consumer would have understood the representations made about the vehicles to include the components of the vehicles.

The Court also dealt with contentions by Toyota that the Court could not determine the acceptable quality and misleading and deceptive conduct cases on a common basis (that is, on behalf of all group members of the class action).

In relation to the acceptable quality case, the Court determined that:

- There are cases where the Court may determine liability for breach of the consumer guarantee on a common basis, and others where it cannot. It depends on the facts and how the parties conduct their positions.
- The Applicants' case was that the vehicles were not of acceptable quality because, at the time they were supplied, they were defective because of a common flaw in the design of the diesel exhaust system and carried an inherent propensity to manifest the adverse symptoms of that defect. It did not matter whether or not a particular vehicle actually developed those symptoms.
- Although, in determining acceptable quality, the *Australian Consumer Law* requires an enquiry into individual circumstances of each instance of a supply, the enquiry is objective, and the assessment done by reference to the ordinary reasonable consumer. What a particular individual consumer knew or subjectively believed about the goods does not form part of the test. Additionally, the allegation that the vehicles were not of acceptable quality arose from a common characteristic of the vehicles, and there was no evidence of any material difference between relevant characteristics of the goods relevant to the question of whether a reasonable consumer would have regarded the vehicles as being of acceptable quality .

In relation to the misleading and deceptive conduct case, the Court considered that it was possible to characterise Toyota's conduct as misleading without reference to individual circumstances because the pleaded conduct was directed at a class of persons, rather than to any identified individual. The representations had been made in Toyota's marketing of the vehicles, not in dealings with individuals.

Additionally, whether the representations were misleading was, at least in this case, to be assessed by reference to its effect on a hypothetical ordinary reasonable member of the class of persons to whom it was made, and so it was not necessary to consider whether an individual group member is in fact misled.

In respect of both cases, therefore, the Court considered there was no impediment to determining liability on a common basis.

The applicants sought relief on behalf of group members in the form of an award of aggregate damages for any reduction in value of the vehicles resulting from the failure to comply with the guarantee of acceptable quality, and an award of damages for the excess GST that the group members paid in acquiring the vehicles.

About relief, the Court said the following:

- In considering what was meant by "reduction in value", the Court noted Toyota's contention that it could only be understood through market data, whereas the Applicants contended that the reduction could be quantified by means of repair cost and change in consumers' willingness to pay. The Court consider that, in some cases, the concept of reduction in value may best be viewed as a question of market value. However, in this case, where there were issues ascertaining market value, there is nothing in the legislation excluding the use of estimates or proxies.
- The calculation of the Applicants' expert of the reduced willingness to pay for the marginal consumer, which approximated the price decrease that would have been required for Toyota to sell the same number of vehicles with the defect disclosed, was found to represent the true value, because it was the price that would need to have prevailed in the marketplace in that scenario.

As to quantification, the Applicants contended that the real value of the defective vehicles was 75 per cent of the average retail price for the relevant model at time of purchase. Having considered the expert evidence, the Court considered this figure too high, but settled on a reduction in value of 17.5 per cent, being midway within the range o 15 to 20 per cent that the Court considered appropriate.

The Court has the power, under s 33Z of the *Federal Court of Australia Act 1976* (Cth), to award damages on an aggregate basis – that is, to make an award of damages without specifying the amounts awarded in respect of individual group members.

In relation to aggregate damages, the Court noted that:

- For an order under s 33Z(1)(e), the Court needed only to be satisfied that the proposed methodology would sufficiently approximate the reduction in value of the vehicles resulting from the defect as at the date of purchase.
- The Applicants' methodology was accepted, that is: a reduction in value of 17.5 per cent, such that the vehicles true value was 82.5 per cent of the average retail price at the time, and determination whether the price in fact paid for each vehicle was lower than the average retail price at the time, and adopting the lower value; then comparing the difference between the true value of the defective vehicle and the comparator value in each particular case, giving the amount recoverable in respect of the vehicle.

In May 2022, clothing retailer **A&C Labels Pty Ltd**, trading as Tiger Mist, paid penalties of $26,640 on receipt of two infringement notices issued by the ACCC for allegedly misleading consumers about their right to return faulty items.

On its website, Tiger Mist stated that customers could return faulty items only by contacting Tiger Mist within 30 days of receiving their order and required that the return be made in the original packaging.

The ACCC asserted that these statement may have misled consumers into believing they were not entitled to return a faulty product. In fact, a consumer's a right to return a faulty product under the *Australian Consumer Law* has no time limitation, nor is there any obligation to return a product in original packaging.

PAYMENT WITHOUT SERVICE

In *Australian Securities and Investments Commission v Aware Financial Services Australia Ltd* [2022] FCA 146 (Moshinsky J, 17 February 2022), the Federal Court made orders imposing a pecuniary penalty of $20 million on Aware for contravening s 12DI(3)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth).

Between 2014 and 2018, Aware provided financial advice services, under an Australian Financial Services Licence, accepting payment from clients for annual review services.

The Court found that there were reasonable grounds for believing that it would not be able to provide the services to all of the clients within an annual period, and in many cases the promised review services were not performed.

Approximately 25,300 clients in the relevant period were charged for services they did not receive.

In imposing the pecuniary penalty, the Court considered that a substantial penalty reflected the seriousness of the contraventions and would act as a deterrent to other financial services providers.

COMPETITION

In ***Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd*** [2022] FCA 665 (Abraham J, 9 June 2022), the Federal Court has, for the first time since criminal penalties for cartel conduct were introduced in 2009, sentenced four individuals who engaged in price fixing, and imposed a large civil penalty on Vina Money Transfer, a money remittance business involved in the contravention. The sentencing of these individuals is significant given criminal penalties have previously only been imposed upon corporations.

The four Defendants – Mr Van Ngoc Le, Mr Tony Le, Mr Khai Van Tran and Ms Thi Huong Nguyen were directors, secretaries, and/or employees of three rival money remittance businesses (Vina Money, Hong Vina and Hai Ha), which transferred money from Australia to Vietnam. The Defendants entered into discussions about their exchange rates and pricing in late 2011, conspiring to set common exchange rates, service fees, and fee discounts. This collusion enabled the Defendants to maintain their market share, with the three businesses collectively occupying approximately two-thirds of the private money remittance market. The Court estimated that the value of the businesses' transactions during the period of contravention amounted to $2.5 billion.

The arrangement between the Defendants continued undetected for five years until the Australian Criminal Intelligence Commission intercepted telecommunications between Mr Nguyen and Mr Tran during an unrelated investigation. The matter was referred to the AFP and ACCC for investigation and charges were eventually laid by the CDPP. The four Defendants sentenced by the Federal Court all pleaded guilty. However, a fifth Defendant proceeded to a defended hearing before the charges against him were eventually withdrawn.

Given the fact that no individuals had been sentenced under these provisions, the Court had no comparable cases to turn to when determining appropriate sentences for the Defendants. Instead, Justice Abraham considered criminal cartel conduct prosecutions involving corporations, and other matters involving white-collar offending. Her Honour noted the difficulties associated with detecting, investigating and prosecuting these types of offences and the tendency of offenders to weigh up the financial benefits of these crimes and conclude that potential profits justified the risk of prosecution. Her Honour observed that this created a need for harsher penalisation in order to deter potential offenders. Her Honour emphasised that the primary sentencing consideration was general deterrence, to send the message that the Court emphatically condemns this type of offending.

In assessing the objective seriousness of the offending, Justice Abraham had regard to the lengthy period over which the offending had occurred, with the Defendants' arrangement continuing for close to five years. Her Honour accepted the submissions of the CDPP and defendants, concluding that the objective seriousness of the offending could be categorised as being of mid to low-level seriousness, but reiterated that the offences were serious.

Her Honour accepted that there was some level of sophistication, planning and cooperation involved in the offending, and that the Defendants' collusion was deliberate and involved repeated conduct. While her Honour was careful to draw a distinction between the large corporations referred to in case law and the money remittance businesses, which were operating on a far smaller scale, her Honour concluded that the same evil underpinned the offending and customers were still affected by the anti-competitive conduct.

The Court imposed the following penalties:

- Vina Money Transfer Pty Ltd was fined $1 million.
- Mr Van Ngoc Le was sentenced to imprisonment

for a total period of two years and six months but, was released on a recognisance release order to be of good behaviour of three years in the amount of $1,000.

- Mr Tony Le was sentenced to imprisonment for a total period of nine months but, was released on a recognisance release order to be of good behaviour for a period of one year and six months in the amount of $500.
- Mr Khai Van Tran was sentenced to imprisonment for a total period of one year and seven months but, was released on a recognisance release order to be of good behaviour for a period of three years in the amount of $1,000.
- Ms Thi Huong Nguyen was sentenced to imprisonment for a total period of two years and four months but, was released on a recognisance release order to be of good behaviour for a period of three years in the amount of $1,000.

Despite finding that the objective seriousness of the Defendants' offending fell within the category of mid to low-level offending, her Honour sentenced the Defendants to periods of imprisonment, highlighting the harsh consequences of this type of offending.

Businesses and their directors and employees should heed the warning of this decision and be cautious of engaging in behaviour that may fall within the scope of criminal cartel conduct, as ignorance of anti-trust and competition law will be no defence.

It is worth noting that, as noted above, recent legislative amendments have increased the maximum civil penalties available.

In ***Australian Competition and Consumer Commission v Australasian Food Group Pty Ltd*** [2022] FCA 308 (Moshinsky J, 25 March 2022), the Federal Court found that Australian Food Group Pty Ltd trading as Peters Ice Cream, had contravened competition law when it by engaging in exclusive dealing involving a major distributor – PFD Food Services Pty Ltd (**PFD**).

Peters entered into an agreement with PFD between November 2014 and December 2019 for the national distribution of Peters' products. The agreement included an exclusivity clause stipulating that PFD could not, without the prior written consent of Peters, sell or distribute Peters' competitors' single service ice cream products (**SSICPs**). On multiple occasions, PFD approached Peters to query whether it could distribute a competitor's product and was either ignored or told it was prohibited from doing so under the agreement.

The distribution agreement caused significant detriment to Peters' competitors as PFD was one of the few distributors capable of distributing products nationally, meaning its customers did not incur additional administrative and financial costs associated with relying upon multiple distributors. Moshinsky J acknowledged that this was likely to have had the effect of increasing existing barriers to entry into the market, decreasing Peters' competition.

While the ice cream brand benefited from the contravention, both parties submitted that it had not intended to contravene competition laws. Moshinsky J accepted that Peters had originally included the exclusivity clause in the distribution agreement to protect the confidentiality of its commercially sensitive information and industry 'know-how', which it shared with PFD to facilitate the effective distribution of its products. His Honour recognised that Peters had taken steps to remedy the contravention before proceedings commenced, entering into a new agreement with PFD, which replaced the exclusivity clause with additional confidentiality clauses.

While evaluating the seriousness of the contravention and determining an appropriate penalty, Moshinsky J acknowledged Peters had no previous involvement in corporate misconduct and otherwise fostered a culture of compliance with competition law. His Honour also had regard to the contrition Peters had demonstrated by admitting it had contravened the CCA and agreeing to a statement of facts.

Despite the distribution agreement being in place for five years, both parties submitted that Peters' conduct amounted to a single contravention, or alternatively, a single course of conduct, meaning it attracted a single penalty. Moshinsky J accepted that the maximum penalty available to the Court was $33,750,000, having regard to the company's revenue during the period of the contravention. However, both parties submitted that $12 million was the most appropriate penalty to impose.

Moshinsky J accepted this and ordered Peters to pay a $12 million pecuniary penalty to the Commonwealth of Australia and $250,000 in costs to the ACCC.

Peters was also ordered to establish and maintain a competition law compliance program for at least three years, in accordance with an agreement both parties had come to. Under this order, Peters is required to appoint a Compliance Officer and Compliance Advisor, who are responsible for implementing and maintaining its program and undertaking risk assessments and reporting, which is presented to its Board. The company has an additional obligation to ensure that all employees and contractors whose duties may affect the company's compliance with the CCA, receive training about compliance with competition law at least once per year.

In *Australian Competition and Consumer Commission v First Class Slate Roofing Pty Limited* [2022] FCA 1093 (Yates J, 14 September 2022), the Federal Court penalised two roofing companies and their directors for their engagement in bid-rigging during two tender processes, contrary to the cartel conduct provisions in the *Competition and Consumer Act 2010* (Cth) (**CCA**).

First Class Slate Roofing (**FCSR**) came to an agreement with two of its competitors, MLR Slate Roofing and Rad Roofing Specialists (trading as '**Mr Shingles**'), during a tender process for a $1 million re-roofing project at Wesley College. The parties agreed that they would each submit a tender bid, with MLR and Mr Shingles submitting bids with higher prices, allowing FCSR to be more successful in the tender process. To facilitate this, FCSR distributed a tender price breakdown between the parties and arranged to make a payment of $10,000 to each of the other parties.

FCSR and Mr Shingles agreed to take similar action in relation to a tender process for a roofing project at a residential property in Bellevue Hill. Mr Shingles provided FCSR with a tender price breakdown and FCSR intentionally submitted a tender bid with a higher price, increasing the likelihood that Mr Shingles would be successful. In exchange for this, Mr Shingles agreed to subtract $2,000 from the $10,000 sum owed by FCSR in respect of the Wesley College project.

The ACCC became aware of these agreements and commenced civil proceedings in the Federal Court on the basis that FCSR and Mr Shingles had contravened ss 45AK and 45AJ of the CCA, by giving effect to and entering into agreements containing a cartel provision. The directors of each company, Scott Barton and Damian Hand, were both alleged to have been directly knowingly concerned in, or a party to, these contraventions.

The companies and their directors were cooperative during the investigation and subsequent proceedings, admitting to the contraventions at the earliest possible opportunity and adopting agreed statements of facts. The Respondents accepted that they would need to pay pecuniary penalties.

When considering the seriousness of the contraventions, Yates J took the Respondents' cooperation into account and also recognised the 'modest' benefits the Respondents received. His Honour noted that none of the parties had previously been involved in contraventions of competition law nor any other corporate misconduct.

Despite acknowledging the small scale of the contravention, his Honour still found it necessary to impose financial penalties upon each of the parties, taking into account the unique financial circumstances of each respondent. FCSR was ordered to pay $280,000, with its director being ordered to pay an additional $60,000 for the contravention. Mr Shingles was ordered to pay $65,000 for the contravention, with its director being ordered to pay a further $15,000. Given the size of the businesses and the penalties, Yates J made an allowance for payment to be made through a series of instalments, with payments owed by FCSR and its director being due bi-annually for the next six years.

In addition to imposing financial penalties upon each Respondent, Yates J made a further order requiring Mr Barton and Mr Hand publish an educational piece about their contraventions, which was to be distributed amongst members of the Roofing Industry Association of NSW Incorporated, to dissuade other members of their industry from engaging in similar conduct.

In ***Australian Competition and Consumer Commission v NQCranes Pty Ltd*** [2022] FCA 1383 (Abraham J, 23 November 2022), the Federal Court found that NQCranes had contravened the *Competition and Consumer Act 2010* (Cth) (**CCA**) by entering into a contract containing a cartel provision, imposing a $1 million penalty on the family-run business.

NQCranes is a Queensland based company that designs, manufactures and supplies overhead cranes and their spare parts and provides servicing of overhead cranes. In August 2016, the company entered into an agreement with a competitor, MHE-Demag Australia Pty Limited (**Demag**) that contained a 'Co-Ordinated Approach Provision', which came into effect in a particular region, being Newcastle in NSW and south of Gladstone in Queensland. Under this provision, the companies agreed to engage in a co-ordinated approach to avoid targeting each other's customers. This provision had the effect of assigning clients in this particular region, in circumstances where the two businesses would otherwise have been in competition with one another.

Pursuant to the parties' joint submissions and statement of agreed facts, Abrahams J found that NQCranes had entered into a contract containing a cartel provision in contravention of the CCA. However, her Honour was careful to note that NQCranes had not given effect to this provision.

Abrahams J acknowledged the proactive approach of NQCranes during proceedings, with the company participating in a mediation where an agreement was reached between the parties, avoiding the burden of a contested hearing.

In determining whether the parties' proposed penalty was appropriate, her Honour took into account the fact that the conduct was a single contravention occurring over a short period of time and the company had not engaged in anti-competitive conduct previously. Her Honour accepted that NQCranes and its senior managers were not knowledgeable about competition law and had not known that they were entering into a contract with a cartel provision. However, it was accepted that the senior managers still appreciated its effect.

Abrahams J reiterated that the primary purpose of pecuniary penalties was deterrence. Her Honour took into account the small size of the business—— which had fluctuating profits—and found that the parties' proposed penalty of $1 million would provide 'sufficient sting' without being excessive. Her Honour also ordered the company to make a contribution of $50,000 towards the ACCC's costs incurred in connection with the proceedings. NQCranes requested that this penalty be paid in a series of instalments in order to allow it to meet its other financial obligations as they fall due. Her Honour accepted this and ordered NQCranes to pay the fine over a period of 12 months.

Abrahams J acknowledged the 'clear nexus' between NQCrane's ignorance of competition law and the contraventions, and made orders requiring the company to implement a competition law compliance program. Under this program, the company has an obligation to appoint a Compliance Officer, who must receive training about restrictive trade practices and oversee the program. As part of the program, NQCranes must introduce compliance reporting and a complaints handling system for competition law complaints, along with annual compliance reviews, which will be carried out by an external independent reviewer. The Court made a further order requiring NQCranes to maintain all records relating to its compliance program for five years. During this period, the ACCC will be entitled to request copies of these documents, allowing the regulator to oversee the company's compliance with the Court's orders.

This decision serves as a reminder that ignorance will be no defence when businesses enter into contracts involving cartel provisions.

In May 2022, the ACCC commenced proceedings in the Federal Court against **Mastercard Asia/Pacific Pte Ltd and Mastercard Asia/Pacific (Australia) Pty Ltd** alleging that they engaged in conduct with the purpose of substantially lessening competition in the supply of debit card acceptance services.

The conduct is alleged to have occurred in the context of the Reserve Bank of Australia's "least cost routing initiative", which is intended to increase competition in the supply of debit card acceptance services and reduce costs for businesses by allowing them to choose the lowest cost network (for example, Visa, Mastercard, or eftpos) for transaction processing.

The ACCC alleges that, in response to the initiative, Mastercard entered into agreements with numerous major retailers giving discounted rates for transactions on the Mastercard network if the retailer agreed to process all or most of their Mastercard-eftpos debit card transactions through Mastercard rather than the often-cheaper eftpos network. The purpose, the ACCC alleges, was to hinder competition by deterring retailers from using eftpos to process debit card transactions.

The ACCC has applied for declarations, penalties, and other orders.

The proceedings are in the early stages.

PRODUCT SAFETY AND RECALL

In June, the ACCC announced its product safety priorities for the year ahead. They include:

- identifying safety issues and hazard prevention strategies in relation to lithium-ion batteries, and compliance with the new button battery safety standards
- addressing product safety issues for young children
- improving the mandatory standards regulatory framework
- preventing injuries and deaths in infants caused by inclined products that can be used for sleep
- strengthening product safety online, and
- preventing injuries and deaths caused by toppling furniture.

In ***Australian Competition and Consumer Commission v Mercedes-Benz Australia/Pacific Pty Ltd*** [2022] FCA 1059 (Middleton J, 2 September 2022) the Federal Court dealt with proposed declarations and penalties in connection with Mercedes Benz's failure to use attention-capturing high-impact language in communications to consumers affected by the compulsory Takata airbag recall.

In 2018, the ACCC issued a Recall Notice in respect of Takata airbags, with the manufacturer's Alpha and Beta airbag inflators found to pose risks of serious injury or death. Under the Recall Notice, all suppliers of affected vehicles incurred an obligation to develop and implement a Communication and Engagement Plan to encourage owners of affected vehicles to replace their inflators.

Mercedes Benz was among a number of suppliers affected by the Takata recall, with the Beta inflators being installed in a number of its vehicles. In accordance with the ACCC's Recall Notice, Mercedes Benz and Mercedes Benz Vans Australia Pacific Pty Ltd developed Communication and Engagement Plans, which were approved by the regulator. In these Plans, Mercedes Benz acknowledged the gravity of the situation, making a commitment to use 'attention-capturing, high-impact language' in its communications with consumers to ensure high recall completion rates.

However, when contacted by consumers, Mercedes Benz call centre staff members told consumers that the recall was being undertaken as a precaution and that the Beta inflator had not caused any injuries or deaths. The ACCC subsequently commenced proceedings in the Federal Court, alleging these statements had contravened s 127(1) of the *Australian Consumer Law* (**ACL**), which stipulates that pecuniary penalties may be imposed if recall notices are not complied with.

The Federal Court held that these statements failed to meet the standard of 'attention-capturing, high-impact language' Mercedes Benz had committed to under its approved Plan and the Recall Notice, meaning the corporation had contravened s 127(1). The Court also found that Mercedes Benz did not have appropriate monitoring and quality assurance processes in place within its call centre.

When determining an appropriate penalty for the contravention of s 127(1), the Court emphasised the need for general deterrence; taking into account the importance of maintaining consumer confidence in the recall process, reminding businesses of the need for robust internal compliance programs, and deterring corporations from dismissing civil penalties as a cost of doing business. Although all affected vehicles were recalled before the relevant deadline, meaning no loss or harm was incurred, the Court acknowledged the significant risks associated with delays in completing the recall, and took into consideration the importance of deterrence where a contravention poses risks to public safety.

When quantifying the civil penalty, the Court considered the size and financial position of Mercedes Benz, as well as recent legislative amendments, which resulted in later contraventions attracting higher penalties. The Court ultimately imposed a penalty of $12.5 million for the corporation's contraventions of s 127(1) of the ACL and ordered payment of $100,000 towards the ACCC's legal costs.

In addition to receiving a large financial penalty, Mercedes Benz also entered into a court-enforceable undertaking under s 87B of the *Competition and Consumer Act 2010* (Cth), which targeted its internal compliance processes. In doing so, Mercedes Benz incurred an obligation to inform all staff of the outcome of the Federal Court proceedings, reinforcing the importance of compliance with its product safety obligations, and an obligation to communicate with its staff about compliance with product safety and recall processes every 12 months. In circumstances where a Mercedes Benz product is the subject of a recall, the corporation has a further obligation to ensure all staff are aware of the requirements of recall notices, ensure all call centre materials, transcripts and communications are reviewed by senior corporate counsel, and that senior staff and corporate counsel are kept informed of all updates during these processes.

The penalties imposed by the Federal Court in these proceedings should prompt supplier businesses to review their internal compliance processes, ensuring that all staff are aware of the importance of compliance with product safety obligations.

Matters where decisions are pending

The ACCC has commenced proceedings in a number of matters in 2022 that are still before the Courts or on which we are awaiting outcomes. Many see the ACCC taking on big-name brands. They include:

- Federal Court proceedings against Facebook owner **Meta Platforms** for alleged false, misleading, or deceptive conduct in publishing scam advertisements featuring prominent Australian public figures.
- Federal Court proceedings against **Honda Australia** for alleged false or misleading representations to consumers that two dealerships would close or had closed and would no longer service Honda vehicles.
- Federal Court proceedings against **Uber** seeking penalties for false or misleading representations about fare estimates, likely to be at least $26 million.
- Federal Court proceedings against **Mastercard** for allegedly engaging in conduct with the purpose of substantially lessening competition in the supply of debit card acceptance services (outlined on page 31).
- Federal Court proceedings against **Airbnb** for allegedly misleading consumers into believing that prices for accommodation in Australia were displayed in Australian dollars, when in many cases the prices were in United States dollars.
- Federal Court contempt proceedings against **Ultra Tune Australia** arising from its alleged breach of court orders restraining contraventions of the Franchising Code.
- Federal Court proceedings against architecture practice **Ashton Raggatt McDougall** and its former managing director for alleged cartel conduct in attempting to rig bids for a building project at Charles Darwin University.
- Federal Court proceedings against **Fitbit** for alleged false or misleading representations about consumer guarantee rights in relation to malfunctioning Fitbit wearable devices.
- Federal Court proceedings against **Dell Australia** for alleged false and misleading representations about the price of computer monitors as add-ons to purchases of Dell computers.

We will look forward to updating you on these matters in 2023.

Contact details

To find out about the ways that we can help you, please contact a member of our team:

Nick Christiansen
Partner
t: +61 2 9260 2443
e: Nick.Christiansen@sparke.com.au

sparke HELMORE LAWYERS

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