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(articles and book review included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[The future of public benefit test under the *Commerce Act*: Part 1](#)

— *Chris Noonan*

167

Over much of the past 2 decades, the public benefit test in New Zealand was viewed as essentially an efficiency defence. In *NZME Ltd v Commerce Commission*, the Court of Appeal, upholding the Commerce Commission's decision to decline authorisation for the merger of New Zealand's two largest media organisations, refocused the Act on the long-term benefit of consumers and rejected the total surplus standard as the touchstone for the public benefit test. In doing so, the Court empowered the Commission to consider all types of benefits and detriments, whether or not quantifiable, including out of market detriments such as media plurality, and rejected the notion that the Act was blind to distributional consequences. The decision should initiate a re-thinking of the conceptual basis of the public benefit test. The Commission's 2019 draft Authorisation Guidelines, however, reveal a reluctance to depart from existing practice. The first part of this article reviews the way in which the Court of Appeal has reshaped the public benefit test including broadening of the benefits and detriments that should be considered, permitting consideration of the impact of distributional considerations, liberalising the manner in which the relevant factors should be weighed, reducing reliance on quantification of benefits and detriments, and, against the general flow, limiting which uncertain benefits and detriments can be considered. The second part (appearing in the next issue of this journal) examines the normative foundations of the revised public benefit test, identifying the manner in which it departs from both the total or consumer surplus standards and the value judgments implicit in those standards. More comprehensive economic frameworks which might better account for the range of considerations that the application of the public benefit test throws up exist and their use could bring greater consistency to government policy. The decision of the Court of Appeal may be best seen as initiating an exploratory and inductive process of rethinking, guided by a few principles.

[When the carrot resembles a stick: The exclusion of concerted practices from the ACCC's revised immunity policy](#)

— *Deniz Kayis and Rob Nicholls*

187

The Australian Competition and Consumer Commission has successfully litigated number of major cartel cases connected to a party's defection or cooperation. In October 2019, the Australian Competition and Consumer Commission revised its cartel immunity policy and, among other things, excluded immunity for contraventions of the concerted practices provision. This article examines the purpose of immunity policies and their use in Australia. It analyses the merits and drawbacks of excluding concerted practices from immunity. It proposes an alternative approach using an appropriated 'descending discount'. The proposal addresses both the Commission's desire to not allow overly easy access to full immunity and the need to provide incentives for cartel members to defect.

The role of big data in influencing market power: An investigation into the impact of strategic mergers and acquisitions in digital markets

— *Jia-Lee Lim*

211

Recent mergers such as Google–DoubleClick and Facebook–WhatsApp have given rise to discussion about the role data plays in influencing market power. While some commentators raise concerns about the implications of Big Data on competition in digital markets, others attach little importance to the possession and control of Big Data in assessing market power. This article supports the former camp of commentators, arguing that Big Data is one of the most important 21st century commodities and thus, through strategic mergers and acquisitions, companies are able to gain control over Big Data, enabling them to entrench their position in the market. This article hopes to answer questions about why access to Big Data is an important indicator of market power, and how its possession and control are capable of substantially lessening competition.

New Zealand’s unfair contract terms law fails to incentivise businesses to remove potentially unfair terms from standard form contracts

— *Victoria Stace, Emily Chan and Alexandra Sims*

235

This article presents the results of a study undertaken by Victoria University of Wellington in association with the Ministry of Business, Innovation and Employment (NZ) over the period December 2018 to August 2019, to assess whether businesses that are offering goods or services to consumers in New Zealand on standard form terms are including potentially unfair contract terms in those contracts. The study compared the 2015 and 2018 versions of the same standard form contracts in relation to 119 businesses to assess if those businesses had reduced the number and nature of potentially unfair terms appearing in their contracts since 2015. The study also considered the number and nature of potentially unfair terms appearing in contracts of a total of 134 businesses offering goods and services in 2018. The study found that all the contracts examined in 2018 contained potentially unfair terms and that the number of potentially unfair contract terms in standard form contracts had increased between 2015 and 2018.

A ‘damaging loophole’ ‘long overdue’ for closing: Extending consumer protections against unfair contract terms to insurance

— *Evgenia Bourovalan Ramsay and Paul Ali*

264

As part of the Australian Consumer Law reforms of 2010, unfair contract terms protections were implemented nationwide across most sectors that use standard form contracts in their dealings with consumers, including financial services. However, until recently, these protections did not apply to general insurance contracts covered by the Insurance Contracts Act 1984 (Cth). Consumer groups, as well as a series of government and independent inquiries and reviews, have long called for reforms to bring insurance within the ambit of the unfair contract terms protections contained in the Australian Securities and Investments Commission Act 2001 (Cth). In February 2020, legislation was passed to remedy the situation. In this article, we examine the history that paved the way to these reforms, and evaluate their impacts for consumers and insurers. We argue that this legislation indicates a move away from the view of insurance contracts as having a ‘unique character’ that renders them ‘unsuited’ to the consumer protections that apply to other financial products and services. We suggest that the

application of unfair contract terms protections to insurance contracts has potential to address consumer harm without resulting in prohibitive costs for the insurance industry.

Book Review

The Normative Foundations of European Competition Law:
Assessing the Goals of Antitrust through the Lens of Legal
Philosophy by Oles Andriychuk

295

— *Ray Steinwall*