

Competition & Consumer Law Journal (CCLJ)

Volume 26 Part 2

(speech and articles included in this part are linked to the two LexisNexis platforms)

CONTENTS

Speech

Presentation on 'What will the Australian Competition Tribunal Do Now without Limited Merits Review?' — *John E Middleton*

103

[LexisNexis AU](#) | [Lexis Advance](#)

Articles

Mavericks in merger regulation: Approaches and problems
— *Lynsey Edgar*

116

[LexisNexis AU](#) | [Lexis Advance](#)

The maverick in merger regulation is the firm that is a 'vigorous and effective competitor', even if it has a small market share. The maverick is thought to have a significant impact on competition — they might be price-cutters, innovative, or disruptive — so the possibility of removing a maverick through a merger is a significant concern for competition regulators. This article considers the role of the maverick in Australian merger regulation, with reference to the experience and approaches in the United States.

In particular, the article examines the problems with maverick firms: How can they be identified? Would their acquisition have any meaningful impact on competition? Should the idea that a merger might create a maverick be discounted entirely? What is the impact if a regulator wrongly identifies a firm as a maverick? The article concludes with the view that a regulator opposing a merger because the target is a maverick must be certain that its maverick classification is correct, and that the loss of that firm will have a real impact on competition. Putting aside the fact that it is unfair from the perspective of the individual firm not to be able to merge — wrongly characterising firms as mavericks has the potential to discourage price-cutting, stifle innovation, and delay other firms from entering the market — all of which is bad for consumers.

Will emerging information technologies outpace consumer protection law? — The case of digital consumer manipulation
— *Kayleen Manwaring*

141

[LexisNexis AU](#) | [Lexis Advance](#)

A 'third wave' of computing is emerging, based on the widespread embedding of processors with data handling and communications capabilities into everyday objects and environments, such as fridges, cars, fitness trackers and hairbrushes. This sociotechnical change brings with it the possibility of a disconnection between current consumer protection law and new marketing activities. The widespread digitisation of commerce has given firms an enhanced ability, not only to compile detailed customer profiles, but also to exploit consumers' cognitive biases and individual vulnerabilities: a form of 'digital consumer manipulation'. Opportunities for digital consumer manipulation will be increased by the widespread use of third wave technologies, enabling the availability of a greater amount of intimate and personalised data and creating additional personalised targeting opportunities. Why does this matter? Digital consumer manipulation can erode consumer autonomy, limit choice and competition, violate privacy, compromise personal dignity and subvert reasonable decision-making by consumers. This article examines the key provisions of the Australian Consumer Law to establish its likely effectiveness in the face of digital consumer manipulation facilitated by the third wave.

Consumer protection, modern regulation, paternalism and the nanny state: Understanding the legitimacy challenge
— *Eric L Windholz*

182

[LexisNexis AU](#) | [Lexis Advance](#)

Regulation to protect consumers from making choices that may be harmful to themselves is commonplace in Australia. Yet commentary on such regulation can be both polarised and bipolar. At one extreme are libertarian groups and business for whom much regulation is a reflection of government overreach and interference. 'Nanny state' is the label they oft attach to it, and to the experts that advocate it. Those experts, on the other hand, describe such regulation as the epitome of the modern regulatory state — one that seeks to proactively shape a world in which people live healthy, wealthy and happy lives. And in the middle are people for whom discussion of consumer protection regulation produces contradictory impulses. Such extreme and variable views represent a challenge to the legitimacy of consumer protection regulation. This article examines developments specific to the consumer protection regulatory landscape to understand the underlying causes of this legitimacy challenge. It is only by understanding those causes that governments can hope to navigate a path to better legitimacy.