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Articles

[The future of merger law in Australia](#)

— *Annalisa Heger and Prof Allan Fels AO*

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This article discusses the recent Australian Competition and Consumer Commission ('ACCC') proposals to reform the merger provisions of the Competition and Consumer Act. It contends that there is a strong case for Australia to follow the competition policy of nearly all OECD countries and large non-OECD countries in requiring compulsory, pre-merger notification of larger mergers. A mandatory and suspensory regime would enable the ACCC to be appropriately informed in a timely manner about and review all significant mergers, including international mergers. It would also reduce reliance on burdensome and less effective ex post enforcement of post-merger anticompetitive behaviour. An additional advantage is that the new merger regime would require the advance notification of all relevant information needed for ACCC decisions. A challenge with the present merger regime is that merger parties determine whether and when a merger is notified to the ACCC and what information is provided. This presents the opportunity for merger parties to engage in tactical or strategic behaviour, much of which threatens good ACCC decision making and is costly to the public purse. The costs of reform of the merger regime are not likely to be high, as many merger parties already pre-notify. Moreover, the authors contend that the public benefits in creating an efficient and effective merger control regime are likely to outweigh the costs of reform. This article also discusses recent ACCC proposals to alter the statutory criteria by which mergers are judged. The authors contend that the adoption in 1992 of a substantial lessening of competition test was correct in principle. However, in practice, the test has been interpreted to emphasise the behavioural or conduct outcomes in the future which necessitates a degree of prediction or forecast, rather than more immediate, tangible, structural changes as a result of the merger. This has made the ACCC's task in proving the likely harm to competition more difficult.

[Unfair terms and legitimate business interests in standard form small business contracts](#)

— *Jeannie Marie Paterson and Hal Bolitho*

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The extension of the unfair contract terms regime in the Australian Consumer Law to small businesses has been robustly enforced by the ACCC and ASIC. The terms targeted by the regulators mirror those that have been found to be unfair in standard form contracts with consumers, including unfettered unilateral variation clauses, rigid renewal clauses and overly broad termination for default clauses. However, the justifications for these terms in business transactions may differ from consumer contracts, possibly making some such terms 'reasonably necessary to protect the legitimate interests' of the party relying on it. Nonetheless, most judgments on the regime involve declarations by agreement between the parties, meaning there is little judicial consideration of these possible nuances. The recent introduction of civil penalties for unfair contract terms makes addressing these issues of interpretation and application of the unfair contract terms regime to business-to-business standard form contracts critically important.

Pay for delay 2.0: Anticompetitive early generic entry agreements in the Australian pharmaceutical sector

— *Dr Sven Gallasch*

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Competition is vital for the pharmaceutical sector. It saves Australian consumers millions of dollars. A global competition concern is the so-called ‘pay-for-delay settlements’. In essence, pharmaceutical brand companies in the US and EU aim to delay generic competitors by paying them off. Australia seemed immune to this trend — until now. For the first time, the Australian Competition and Consumer Commission had to consider a new variant of such settlements in 2022. The parties claim that allowing generic competitors to enter early instead of delaying them is purely beneficial to consumers. This article disagrees with this claim. Advocating for increased vigilance, it argues that such settlements can significantly distort the competitive market in the long run at the expense of the public.

Consumer data right, insurance contracts and how much choice there really is

— *Zofia Bednarz, Kimberlee Weatherall and Chris Dolman*

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The Consumer Data Right (‘CDR’), introduced in 2019 into the Competition and Consumer Act 2010 (Cth), promised increased competition, innovation and consumer benefit from greater access to data and increased ease of data sharing. So far, the CDR has been rolled out to the banking and energy sectors with non-bank lending to follow, the vision being for the CDR to apply in the future across the entire economy, including to the insurance sector. This article analyses whether insurance underwriting, currently undertaken through a series of webform questions, can be replaced by CDR data requests. We suggest that it can, in addition to the CDR potentially enabling novel underwriting questions to be asked of prospective insureds. The last part of our article demonstrates through a stylised market example that adoption of the CDR in general insurance may not only lead to an effective obligation to share data — contrary to the regime’s opt-in nature — but also unfair pricing for some consumers. These latter real-world effects have so far been insufficiently addressed by policymakers.

Smart contracts and consumer protection in Australia

— *Son Tan Nguyen*

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Smart contracts are coded computer programs that automatically monitor, execute, and ensure compliance with agreed-upon terms. Operating on a distributed and decentralised blockchain network, smart contract code governs contract execution, providing traceability and irreversibility to transactions. This article evaluates the extent to which the Australian Consumer Law can effectively address the use of smart contracts. To lay down the foundation for the inquiry, the article first provides a background of smart contracts by discussing their key features. It then assesses whether the key provisions of the Australian Consumer Law, particularly the provisions on misleading and deceptive conduct, unconscionable conduct, unfair contract terms, and consumer guarantees can adequately protect smart contract consumers. This article finds that while the Australian Consumer Law is basically effective, the use of smart contracts does give rise to difficult issues which require proper consideration to ensure adequate protection for smart contract consumers.

Book Review

Current Issues in Competition Law, Michael Gvozdenovic and
Stephen Puttick (eds)

— *Barbora Jedlickova*

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