K&L GATES

COMPETITION & CONSUMER LAW ROUND-UP

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What's Inside This Issue?

This edition of the K&L Gates Competition & Consumer Law Round-Up provides a summary of recent and significant updates from the Australian Competition and Consumer Commission (ACCC), as well as other noteworthy developments in the competition and consumer law space. If you would like any further detail about the issues outlined in this newsletter or discuss them further, please reach out to any member of the K&L Gates Competition and Consumer Law team (listed in the left column).

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Enforcement

Australian Government Grants an Additional AU$67.7 Million to the ACCC Over a Four-Year Period to Strengthen Competition and Consumer Law Enforcement Capabilities

The Australian Government has allocated an additional AU$67.7 million over a four-year period to "further strengthen the ACCC's competition and consumer law enforcement capabilities."

The extra funding will help the ACCC stay abreast of fast-moving technological changes, allowing it to better detect, examine, and respond to unlawful activities that negatively impact consumers.

Part of the 2026–27 federal budget released on 12 May 2026 included funding in relation to:

- Production of guidance materials and education campaigns ahead of upcoming amendments to the Australian Consumer Law (ACL) (e.g. a general prohibition on unfair trading practices and penalties for noncompliance with consumer guarantees);
- Development of national safety standards for all e-micromobility devices (including e-scooters) and implementation of surveillance or compliance enforcement measures;
- Continuation of the National Anti-Scam Centre's activities for 12 months;
- Continuing as the Digital ID Regulator for a further four years; and
- Continuing the ACCC's Consumer Data Right functions for two more years.

According to ACCC Chair Gina Cass-Gottlieb, the additional funding highlights that, over and above its role as an independent law enforcement agency, the ACCC has "many additional regulatory responsibilities to safeguard consumers, promote competition, and bring transparency to complex markets".

Read the ACCC's media release here.

Key takeaways: With the boost in funding under the 2026–27 federal budget, the ACCC is likely to be more proactive and vigorous with its enforcement action. In light of the upcoming changes to the ACL, particularly with the introduction of the unfair trading practices prohibitions, businesses should endeavour to promptly "get their house" in order to avoid falling afoul of the law.

Coles Found by the Federal Court to Have Misled Consumers in its "Down Down" Promotions

On 14 May 2026, the Federal Court of Australia (Federal Court or Court) found that Coles Supermarkets Pty Ltd (Coles) had engaged in misleading conduct and made misleading representations regarding the price of products in trade or commerce between February 2022 and May 2023. The proceedings centred on Coles' long-running "Down Down" promotional campaign, which advertised lower prices on frequently purchased grocery items.

Coles was alleged to have briefly raised prices on 245 products before placing them on "Down Down" promotions, with pricing tickets displaying a temporarily inflated price as the pre-promotional "was" price. As a result, the promoted price (despite being lower than the "was" price), remained higher than the product's original regular price.

The decisive issue on whether Coles had offered consumers a genuine discount was the duration for which the "was" price was on offer. The Court concluded that 13 of the 14 "Down Down" pricing tickets for a sample set of

products were misleading, as these sample products had not been sold at the "was" price for a reasonable period prior to the promotion.

For a discount to be genuine, the pre-promotional price must be commercially justifiable, the product must have been sold in commercial volumes at that price, and the price must have been offered for a reasonable period.

Penalties for Coles have not yet been determined, although the ACCC has indicated that it will seek a substantial penalty.

For more details, please see the Insight article that we prepared about this matter here and the ACCC's media release here.

Key takeaways: This decision has significant implications for businesses using "was/is" pricing strategies, and businesses are encouraged to review their promotional strategies and materials. The "was/is" pricing strategies may implicitly convey representations about a product's pricing history to consumers, and businesses should "take stock" of these representations to ensure that they do not mislead consumers.

AU$15 Million Penalty Ordered Against Emma Sleep for Misleading Statements About Sale Prices

In proceedings brought by the ACCC, the Federal Court has ordered Emma Sleep Pty Ltd and Emma Sleep Southeast Asia (collectively, Emma Sleep) to pay a AU$15 million pecuniary penalty for making false or misleading statements about the sale price of mattresses, bed frames, pillows and accessories.

The ACCC commenced proceedings against Emma Sleep in December 2023. The ACCC alleged (and Emma Sleep admitted) that the bedroom furniture supplier made false or misleading representations in contravention of the ACL by advertising its 74 products online showing a purchase price alongside a higher price with a strikethrough or specified saving amounts (for example, "Save as much as $3,531").

In reality, 58 of the products had never been offered at the higher price or without the discount, while the remaining 16 had almost never been for sale at the higher price or without the discount. Emma Sleep also admitted to making misleading representations that its discount prices were available for a limited time. This included the use of countdown timers and statements such as "Ending Soon", despite the products continuing to be offered at the same or similar discount.

In delivering its judgment, the Court found that "the evidence establish[ed] at the very least that Emma Sleep "turned a blind eye" to whether its conduct was contrary to the ACL" and that the contravening conduct "was not inadvertent or caused by a system error."

ACCC Commissioner Luke Woodward stated that the ACCC was particularly concerned that using a countdown timer and making false claims suggesting that the sale was ending soon created a false sense of urgency, thereby potentially pressuring consumers into making rushed purchase decisions.

Read the full judgment here and the ACCC's media release here.

Key takeaways: The "was/now" pricing, percentage-off claims, savings figures, and countdown timers are not inherently unlawful, but the underlying message must accurately reflect reality. In particular, higher reference prices must be the genuine price at which goods were actually offered, and a message indicating the end of a sale cannot "mask" a perpetually rolling promotion. The case also demonstrates that senior management "turning a blind eye" and awareness of potential unlawfulness makes the contravention more serious. Businesses should therefore ensure regular internal auditing of marketing strategies and online advertising practices.

Mergers and Acquisitions

ACCC Requires Two More Merger Notifications to Proceed to Phase 2 Review (MicroStar – Konvoy and Insurance Australia Group – RAC Insurance)

The ACCC has determined that two more merger notifications should proceed to Phase 2 review, bringing the total number of Phase 2 merger notifications to four.

MicroStar Logistics LLC (MicroStar) – Konvoy Holdings Pty Ltd (Konvoy)

MicroStar proposed to acquire Konvoy's assets, which include kegs, keg tracking technology (hardware and software), select employees and a keg repair and maintenance facility.

The ACCC considered that MicroStar and Konvoy have competitive overlaps in the supply of keg pooling services in Australia. Keg pooling is a service where empty kegs are delivered to brewers, who clean, fill, and distribute them to licensed venues. The provider then collects the empty kegs from venues and returns them to the brewer using either its own or third-party logistics. Brewers are charged based on the number of kegs refilled.

MicroStar and Konvoy were each other's closest competitor, as they are the only two suppliers of keg pooling services in Australia. The ACCC was satisfied that the proposed acquisition could have the effect, or likely effect, of substantially lessening competition in the supply of keg pooling services in Australia should Konvoy be removed as an effective competitor to MicroStar. More specifically, MicroStar would no longer face significant competitive constraint should its closest rival be removed. Customer countervailing power would not be likely to sufficiently constrain MicroStar, and there is a low likelihood of timely new entry or expansion at sufficient scale. Post-acquisition, MicroStar could therefore increase prices above a competitive level and reduce service quality.

Insurance Australia Group Limited (IAG) – RAC Insurance Pty Limited (RACI)

IAG proposed to acquire 100% of the issued share capital in RACI. IAG is an ASX-listed general insurance company operating in Australia and New Zealand. It provides a range of personal and commercial insurance products. RACI is a Western Australia-based member-owned organisation that provides roadside products, general insurance products, and other ancillary services to its members.

The ACCC identified three areas of competitive overlap: in the supply of motor vehicle insurance in Western Australia (WA), the supply of home and contents insurance in WA, and the acquisition of smash repair services in WA. The ACCC was satisfied that the proposed acquisition could have the effect of substantially lessening competition in the supply of home and contents insurance in WA and the supply of motor vehicle insurance in WA.

More specifically, the proposed acquisition would combine the leading supplier, RACI, with its largest competitor and materially increase concentration in the market for home and contents insurance. In relation to the market for motor vehicle insurance, the ACCC identified impediments to effective competition by alternative insurers post-acquisition. The proposed acquisition could also have vertical effects by enabling IAG to require partial or full exclusivity from smash repairers, which would restrict rivals' access to repairers and raise their costs. As such, the proposed acquisition could substantially lessen competition.

Read the ACCC's media releases here (IAG – RAG) and here (MicroStar – Konvoy).

Key takeaways: The ACCC is continuing to closely assess the competitive effects of notified acquisitions. As of the date of this insight, there are four Phase 2 notifications currently under assessment by the ACCC. Factors assessed by the ACCC in assessing whether a notification warrants further consideration include the degree of competition

between the parties to the proposed acquisition, the competitive landscape of the relevant market pre- and post-acquisition, customer countervailing power and any vertical effects arising from the proposed acquisition.

Notifications and Authorisations

ACCC Proposes *Not* to Authorise Screen Producers Australia to Negotiate with Broadcasters and Streaming Platforms

The ACCC issued a draft determination proposing *not* to grant authorisation to Screen Producers Australia (SPA) and its producer members to collectively negotiate with television broadcasters and major streaming platforms to develop model terms of trade (the Proposed Conduct).

The ACCC recognises that the Proposed Conduct would likely benefit some of SPA's producer members. However, it considered that the Proposed Conduct could impact contracting in the wider screen production sector and limit some producers, broadcasters, or major streaming platforms from coming to an agreement on particular contracts. Therefore, the ACCC was not satisfied that the likely public benefit arising from the Proposed Conduct would outweigh the likely public detriment.

The ACCC's primary reason for refusal was the risk that establishing model contract terms would, in practice, constrain commercial flexibility across the industry. While model terms can serve as a starting point for negotiations, treating them as the default may prolong or even prevent negotiations for projects that need customised terms, such as those with unique financing structures or specific risk profiles, if the contract departs from standard model terms.

Read the ACCC's media release here, and the ACCC's draft determination here.

Key takeaways: Although collective bargaining allows businesses to negotiate on more even footing in the face of information asymmetries and limited resources, businesses should be aware that the structure of a collective bargaining arrangement does matter. If businesses wish to include the development of model terms in their collective bargaining arrangements, they should gather robust evidence to demonstrate that those terms still allow for flexibility in negotiation and will not inadvertently have a chilling effect on more bespoke agreements.

ACCC Proposes to Grant Authorisation for Australian Hotels Association Members to Engage in Collective Bargaining

The ACCC issued a draft determination proposing to grant authorisation for a 10-year period to the Australian Hotels Association National Office (AHA) regarding its application for authorisation to:

- Collectively bargain with a range of hospitality suppliers and enter into and give effect to contracts, arrangements or understandings arising out of this conduct; and
- Continue to give effect to contracts, arrangements or understandings with hospitality suppliers arising out of its previous collective bargaining authorisation that was granted in 2016.

(together, the Proposed Conduct).

The ACCC has also granted interim authorisation such that the Proposed Conduct can start while the ACCC continues to assess the application.

The ACCC's evaluation determined that the Proposed Conduct would likely yield public benefits by enabling AHA members, who are generally small businesses, to negotiate with suppliers more efficiently.

Submissions in response to the ACCC's draft determination were due by 27 May 2026.

Read the ACCC's media release here, and the ACCC's draft determination here.

Key takeaways: The ACCC's draft determination acknowledges that small businesses frequently face challenges related to limited resources and experience when negotiating with large suppliers in complex commercial settings. Collective bargaining may facilitate more effective negotiations, enabling small businesses to gain greater insight into market conditions and negotiate on more even footing.

Noteworthy Developments

Heightened ACCC Attention on Compliance with Consumer Guarantee Rights in the Electronics and Whitegoods Sector

The ACCC has reported a significant increase in reports about consumer guarantees in 2025. Approximately 70% of reports to the ACCC in 2025 about an electronic product or whitegood raised issues relating to consumer guarantees, and the electronics and whitegoods sector was the sector for which the ACCC received the most reports.

The ACL provides consumers with automatic basic rights called consumer guarantees when they purchase a product or service, and these include that products must be of acceptable quality, match any description provided, and be fit for a particular purpose. Where a supplier fails to comply with a consumer guarantee, the consumer is entitled to a remedy, such as repair, replacement or refund. Critically, these guarantees apply separately from any warranty provided by the supplier or manufacturer and cannot be excluded or restricted in any way.

In 2025, the ACCC received over 3,000 reports of businesses directing consumers to the manufacturer or informing consumers that they were not entitled to a remedy when products potentially failed to comply with consumer guarantees. The following are examples of reports:

- A consumer was asked to pay for the repair of a high-end fridge because a component failed after the two-year warranty period.
- A consumer could not get a replacement TV after discovering a new TV screen was broken upon delivery.
- A consumer was charged for repairs to a three-month old smartphone that randomly restarted during normal use and had issues with the camera.

ACCC Deputy Chair Catriona Lowe stated that businesses cannot rely on store policies or terms and conditions to deny consumer guarantees and "policies that say 'no refunds' or 'no refunds or exchanges on sale items' are likely to be misleading as consumer guarantee rights continue to apply in relation to major and minor faults."

Improving industry compliance with consumer guarantees, with a focus on consumer electronics, is an ACCC 2025–26 Compliance and Enforcement Priority, and compliance with consumer guarantees will continue to be a priority for 2026–27. Proposed reforms to the consumer guarantee provisions of the ACL, which are supported by the ACCC, will introduce penalties for businesses that fail to provide remedies for consumer guarantee failures as well as for manufacturers that fail to reimburse suppliers for remedies they provide to consumers (where the manufacturer is responsible for the consumer guarantee issue).

Read the ACCC's media release here.

Key takeaways: Consumer guarantee rights cannot be excluded, restricted or modified, and apply separately from any warranty provided by a supplier or manufacturer. Businesses risk breaching the ACL if their store policies or terms and conditions mislead consumers about their consumer guarantee rights, for example, by stating that there are no refunds or exchanges on sale items.

ACCC Granted Leave by the Federal Court to Intervene in the Epic Games, Inc v Apple Inc Proceedings

The ACCC has been granted leave to intervene in the Epic Games, Inc v Apple Inc proceedings, in relation to the relief to be ordered by the Court. The regulator's involvement is limited to making written submissions regarding specific relief issues of public interest.

In August 2020, Apple and Google removed Fortnite, a popular video game developed by Epic Games (Epic), from their respective app stores following Epic's decision to introduce its own payment processing system within the game, thereby bypassing Apple and Google's 30% commission fees on in-app purchases. Epic subsequently commenced proceedings.

In August 2025, the Court found that Apple and Google had misused their market power. In relation to Apple, the Court held that Apple had substantial market power in both the iOS app distribution market and the iOS in-app payment solutions market, and had contravened Australia's competition laws by requiring the use of its own in-app payment solution for digital in-app purchases and preventing the use of alternative app distribution methods and in-app payment methods.

The ACCC typically seeks leave to intervene in private proceedings in certain limited circumstances, such as in cases involving significant public interest issues, and where it can offer the Court a broader perspective than that of the private parties to the proceedings.

ACCC Commissioner Luke Woodward commented that the "ACCC hopes to assist the Court by putting submissions that recognise the public interest in the promotion of competitive digital services markets and the broad public interest nature of the remedial orders that the Court may make."

Epic's proceeding against Google was dismissed in March 2026 as the parties have entered into a settlement agreement which applies globally, including in Australia.

Read the ACCC's media release here.

Key takeaways: The ACCC's interest in these proceedings since commencement in November 2020 is consistent with its monitoring of digital platform-related competition and consumer harms. This was highlighted by its Digital Platform Services Inquiry which ran from 2020 to 2025 and identified a range of concerning practices by dominant digital platforms, including self-preferencing, exclusivity arrangements, and the withholding of access to key technical inputs.

Streamlined Competition Exemption Powers for Emergencies and Exceptional Circumstances, Alongside Increased Penalties in the Petroleum Marketing Industry

On 27 May 2026, the *Competition and Consumer Amendment (Responding to Exceptional Circumstances) Bill* (the Bill) came into effect. This Bill recognises the challenges that businesses face in responding to exceptional circumstances, including those circumstances that fall short of being considered a national emergency. A recent example of this is the currently ongoing conflict in the Middle East that has impacted supply chains for critical goods

such as petroleum. The Bill introduces amendments to both the *Competition and Consumer Act 2010* (Cth) (CCA) and the *National Emergency Declaration Act 2020* (Cth).

In exceptional circumstances, businesses may need to coordinate or engage in conduct that risks breaching the CCA, even where public benefits substantially outweigh competition risks. Existing authorisation processes can be too slow to enable a rapid response, and the ability to respond quickly may prevent or substantially mitigate significant harm to the economy.

To address this, the Bill establishes a new ministerial power to declare exceptional circumstances and provides the ACCC with powers to grant individual authorisations and streamlined class exemptions. As a result, certain competition law provisions (Division 1 or 2 of Part IV of the CCA) do not apply where the conduct would assist, or would be likely to assist, in the response to or recovery from the declared exceptional circumstances or emergency. The duration of each declaration is capped at six months, but the minister may extend this (subject to any disallowance, sunsetting and periodic review). There is no limit on the number of times the duration may be extended, but each extension is limited to three months at a time.

Schedule 2 of the Bill also increases the penalty to be specified in an infringement notice for contraventions of industry codes that relate to the petroleum marketing industry. Prior to the Bill, the Oil Code of Conduct did not have any civil penalty provisions for noncompliance and therefore no infringement notices could be issued nor civil penalties applied. The Bill now introduces a new infringement notice penalty of 600 penalty units for a body corporate. These amendments align the Oil Code of Conduct with the penalty regime already applicable to franchising and food and groceries codes.

Key Takeaways: In exceptional circumstances, businesses may (subject to an authorisation or class exemption) be able to engage in conduct that would usually risk breaching the provisions of the CCA. The Bill creates a formal, lawful pathway to do this under exceptional circumstances or emergency declarations. Businesses should ensure that they seek an authorisation or conduct due diligence to check if a class exemption applies.

Petroleum industry businesses in particular now face significantly greater exposure, and the penalty specified in an infringement notice (issued in relation to an alleged contravention of a civil penalty provision of an industry code that relates to the suppliers, distributors and retailers in the petroleum marketing industry) is now 600 penalty units for a body corporate.