



MINTERELLISON

Up to 20* competition and consumer law lessons for 2020

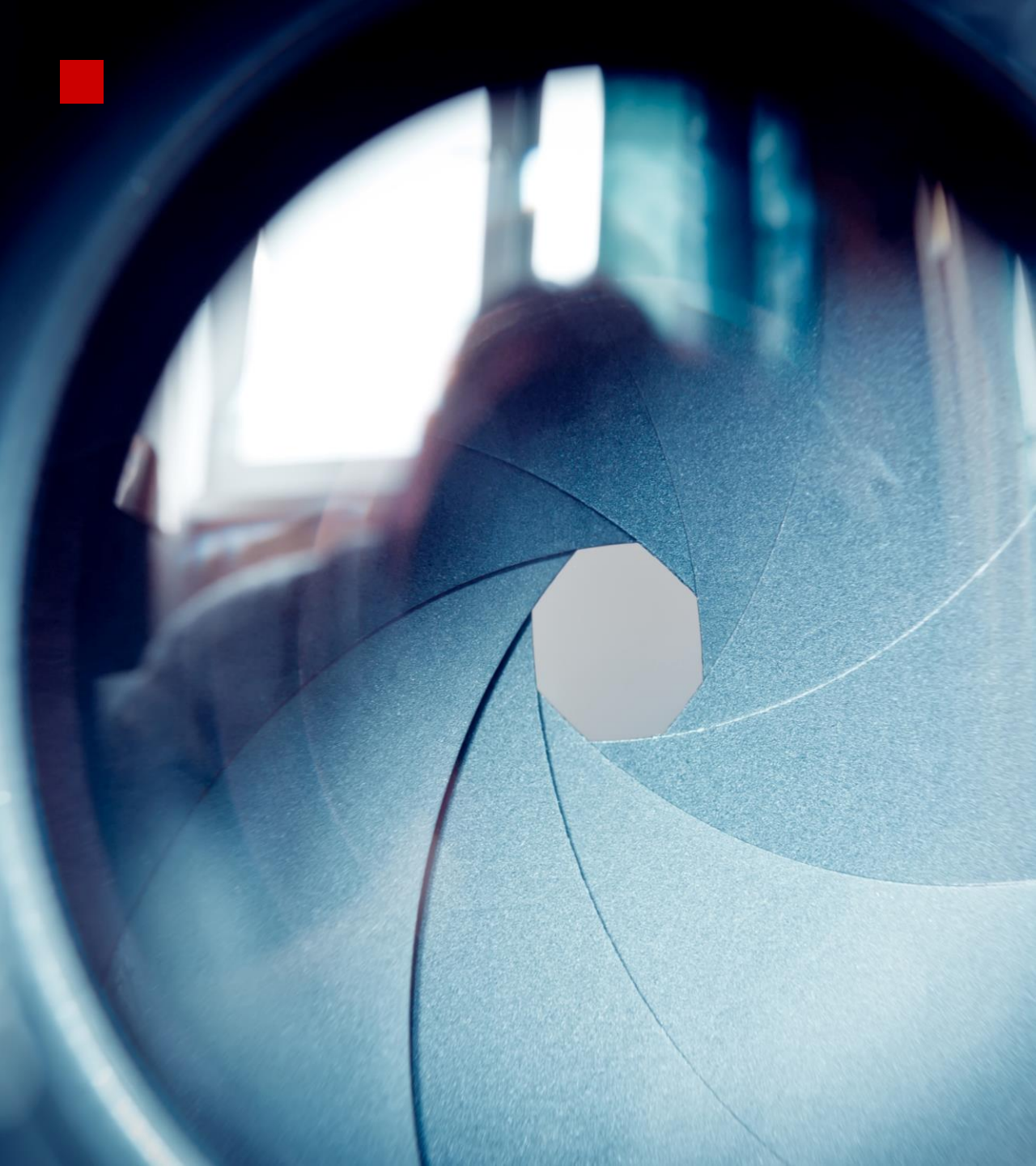
March 2020

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Our Agenda

1. **Cartel conduct** – an enduring focus through an increasingly criminal lens
2. **Data** – an increasing competition and consumer law focus area
3. **2020 trends** – current targets and advocacy looking to the future
4. **Recurring issues** – getting the basics right





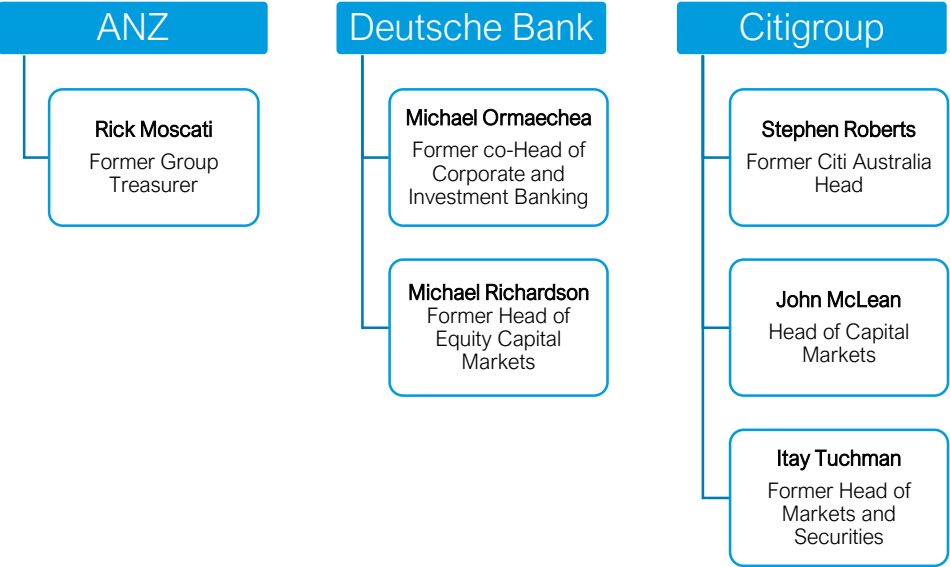
Cartel Conduct

... an enduring focus through an
increasingly criminal lens

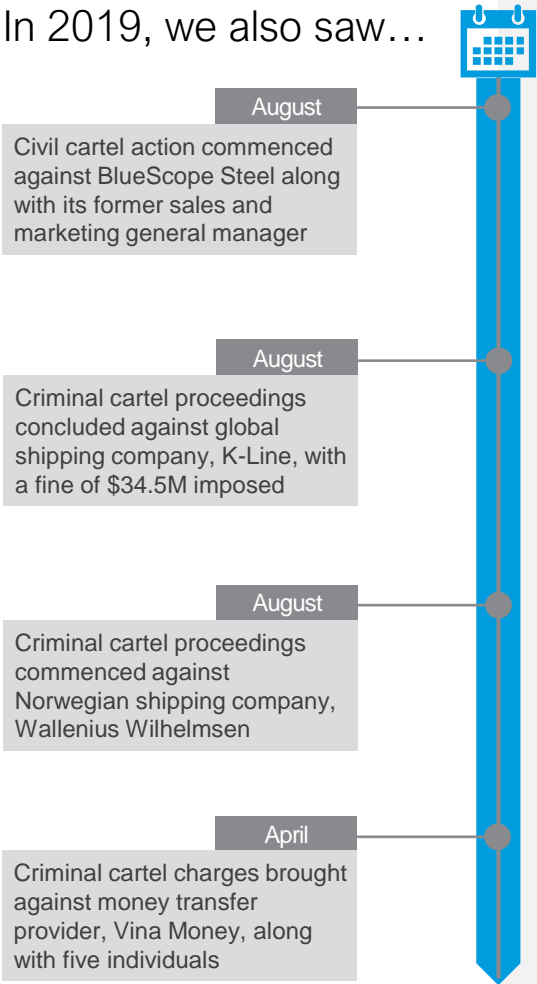
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Criminal cartels: Continued ACCC scrutiny

- Criminal proceedings against ANZ, Deutsche Bank and Citigroup continue to draw headlines
- This high profile prosecution is currently at the 'committal' stage in the NSW Local Court, with extensive cross-examination of investigators and the witnesses with 'immunity' (JP Morgan)



In 2019, we also saw...



A reminder that cartels can be large or small, and facilitated by formal agreement or Facebook post



Updated ACCC cartel immunity and cooperation policy

2019 also saw significant changes made to the ACCC's Immunity and Cooperation Policy, which is a key plank to the ACCC discovering cartels:

- Offers civil and/or criminal immunity to the first party to report cartel conduct, subject to stringent requirements being met by the applicant
- Updates came into effect on 1 October 2019
- The ACCC also launched an anonymous whistleblower hotline, which allows the regulator to communicate confidentiality with whistleblowers

Key policy updates

- Clarifies that immunity not available for concerted practices
- Applicants will now be asked to enter into a cooperation agreement early in the immunity process. Further clarity is also provided about:
 - Eligibility for immunity
 - The level of cooperation required
 - How information is used
 - Confidentiality

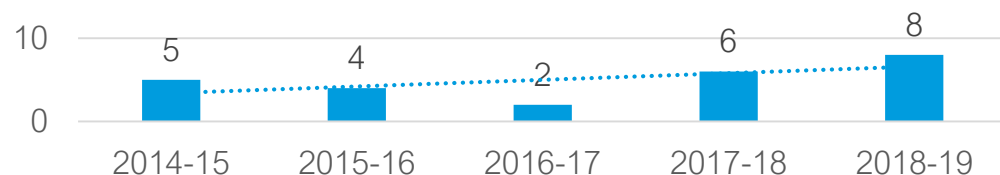


We are seeing a slight uptick in the use of dawn raids...

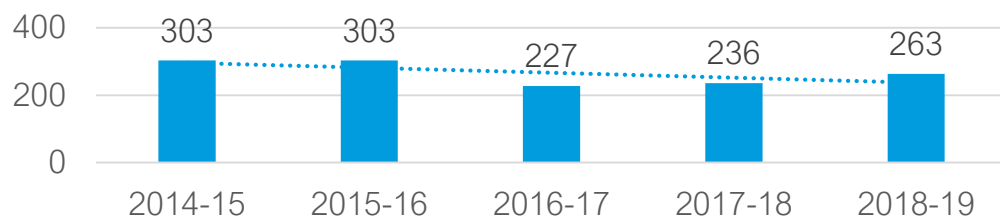
Search warrants and ancillary risks are areas to watch

- Traditionally, search warrants have been used where there is a concern that evidence may be tampered with or destroyed. We are, however, seeing a slight uptick in the use of warrants
- Considerable care must be taken in an around investigations. Recent criminal action against a former BlueScope manager for obstructing a Commonwealth official illustrates the risks

Number of search warrants issued



Number of section 155 notices issued



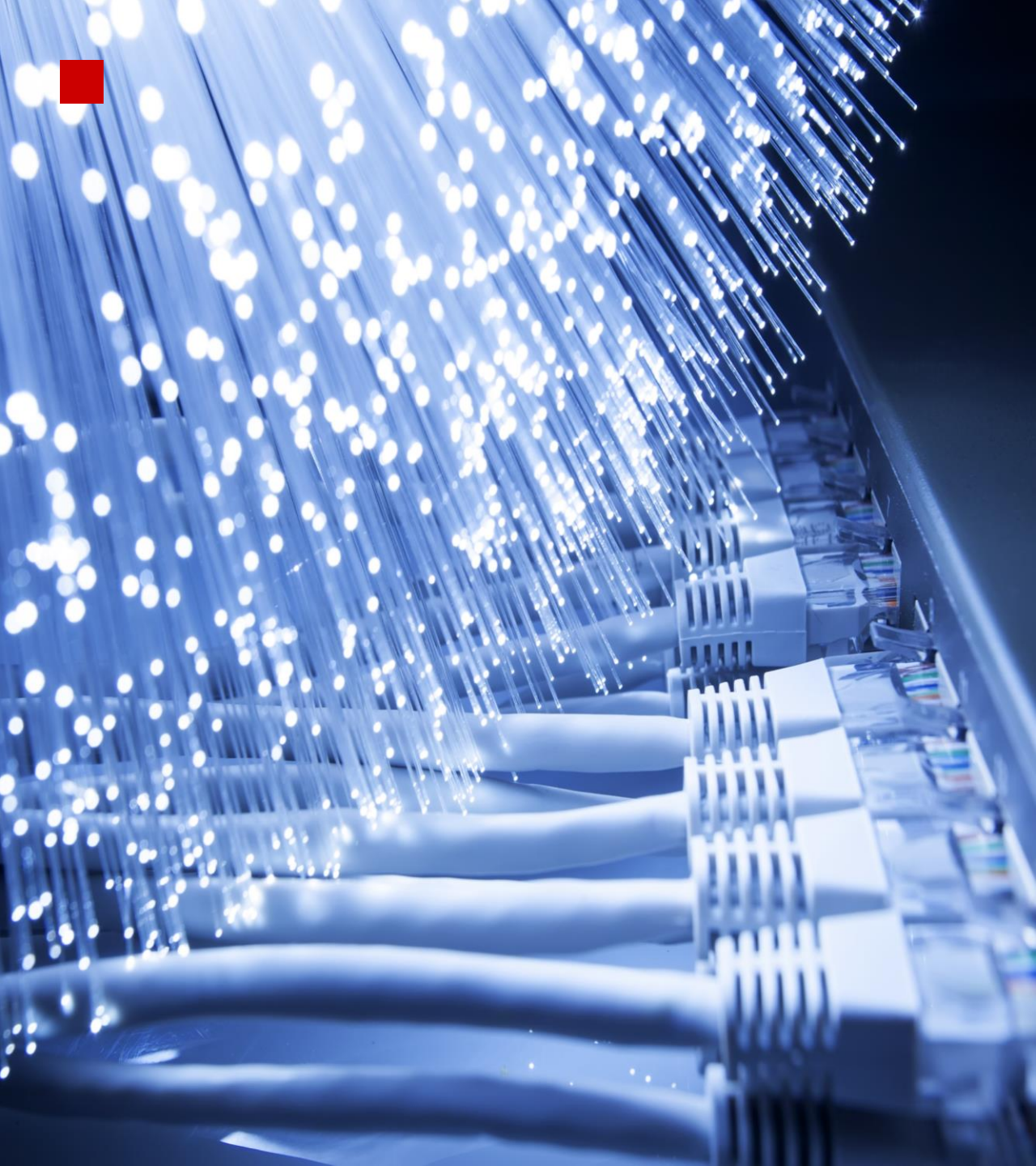
In a dawn raid scenario, DO...

- Seek legal advice immediately
- Carefully review the search warrant to ensure the search is authorised
- Ask to make a copy of the warrant and ID cards. Accompany officers and take notes of their activities
- Ask for copies of any documents taken and a receipt for item seized
- For documents that may be legally privileged, tell officers that documents may be privileged and you do not waive privilege

DO NOT

- Obstruct the officers from carrying out their duties (or suggest that anyone in the office should tamper with any documents)
- Hinder the ACCC from:
 - entering and searching the premises
 - taking photographs or videos
 - seizing or making copies of material





Data
...an increasing competition and
consumer law focus area

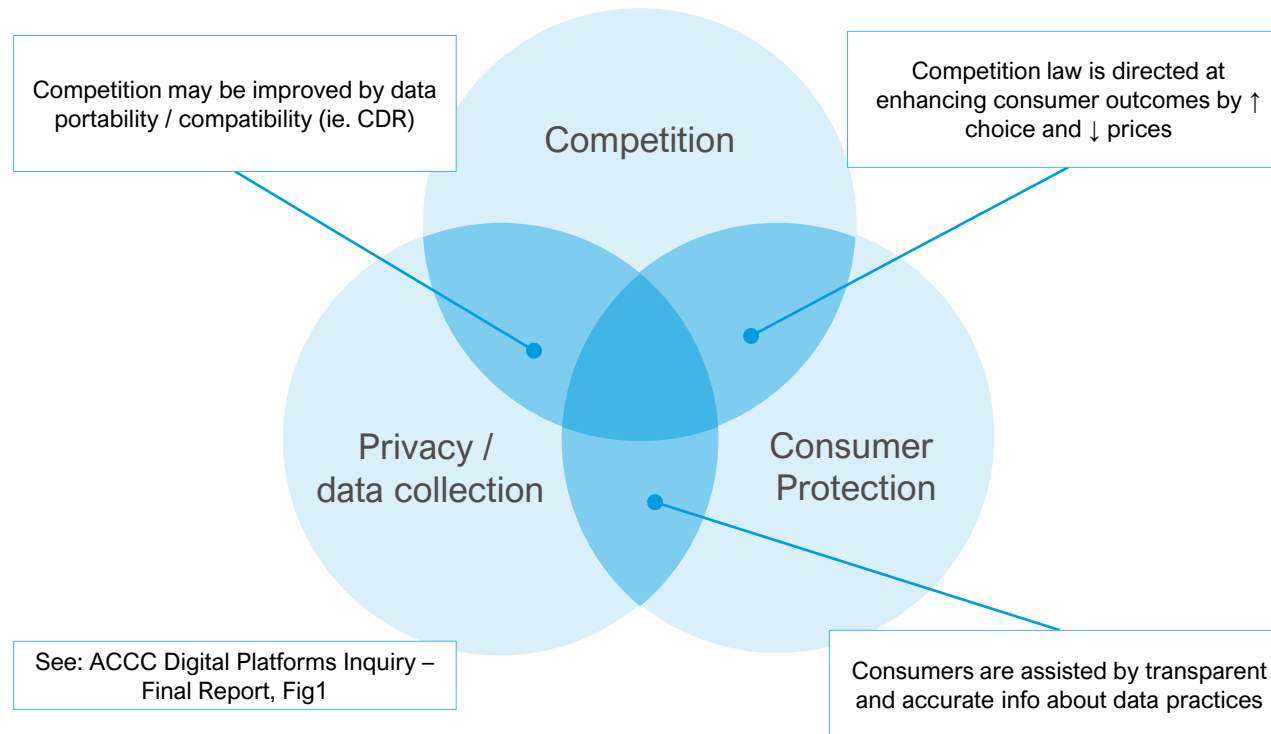
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Data & algorithms – an increasing focus for regulators

The ACCC is targeting data related issues

The ACCC's recent work in the context of the Digital Platforms Inquiry has demonstrated that issues regarding data and algorithms can trigger a range of intersecting questions across competition, consumer and privacy laws

For our purposes, it is enough to note that the ACCC will test conduct involving algorithms and data from antitrust *and* consumer angles (ie. data use may not be properly disclosed and may be leveraged to harm competition)

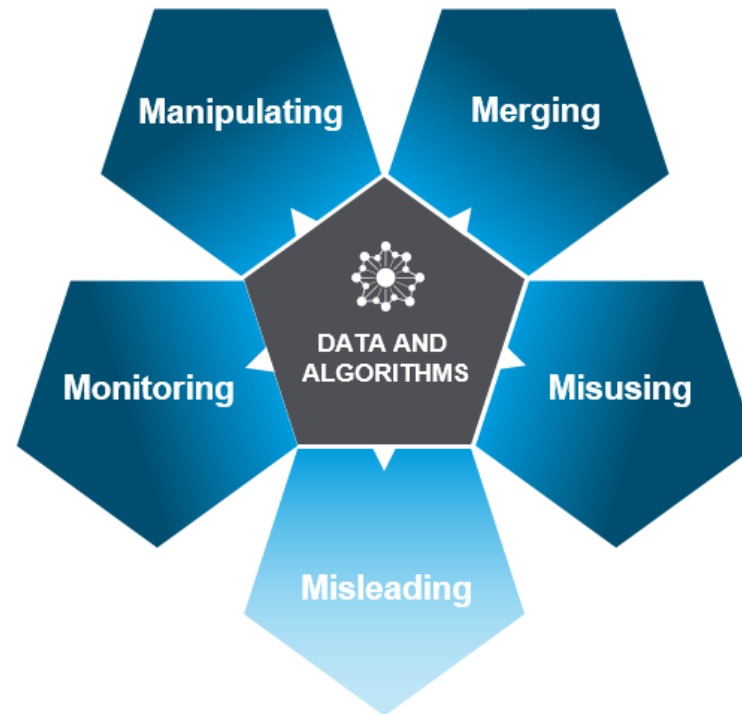


Data – Digital competition and antitrust focus

Data and antitrust – a 'hot' topic



- Competition regulators are increasingly looking at data as a critical factor in assessing antitrust issues (including mergers) and conduct risks
- There is an evolving discussion about whether data (especially platforms) can be considered and addressed under existing competition laws, or if tailored regulatory responses are needed
- It is important to understand:
 - How regulators are approaching data-related issues, including current consumer actions
 - The 'theories of harm' that could potentially trigger an investigation by the ACCC
 - Regulatory developments and current enforcement actions that suggest likely directions / areas of focus for the ACCC



The competition / antitrust approach to data is still evolving

United States

US antitrust is grappling with how to respond to data and 'big tech'. Prevailing view is existing laws can deal with big data changes.

Europe

In Europe, regulators have shifted – see something 'different' about data. These 'differences' may demand tailored responses and regulation.



Australia

Enforcement 'attitude' in Australia usually fall between the US and the EU (but generally closer to the EU). Signs indicate this is also the case for data. ACCC signals suggest it may be regarded as an evolving market feature which may need a regulatory response.

Data – A new consumer law focus area



The ACCC is not viewing data as only a competition law risk, it is also a focus area under **consumer law**

While the focus of the DPI was on platforms, the recommendations made by the ACCC are likely to have broader consequences far beyond platforms
In terms of risks, the ACCC was focussed on consumer harm from:

- Information asymmetry

- Bargaining power imbalance

- Consumer inability to assess the current / future cost of providing data

These features – a lack of transparency (the supplier) and lack of control / understanding (the customer) – are not issues unique to digital platforms

Key recommendations made by the ACCC included:

Transparency and consumer control: Transparency over collection and use of data is critical. The ACCC found that platforms had vague and complex privacy policies (particular criticism of click-wrap agreements with bundled consents). In response, the ACCC made broad recommendations including to enhance notification and to strengthen consent requirements

Privacy reforms: This includes updating aspects of the regime (ie. 'personal information' includes technical data such as IP address and location data)

Data – An emerging enforcement focus

Loyalty Programs



In December 2019, the ACCC released its final report into loyalty schemes. The Report echoes many issues in the DPI:

- Examined schemes for interrelated competition, consumer & data issues
- Recommendations re approach to communicating with customers and the way data practices are described

The Report puts the industry 'on notice'.

Data Collection and Use



Commenced action against Google in relation to its collection and use of data.

The ACCC alleges Google engaged in misleading conduct by:

- Failing to disclose that several settings needed to be disabled in order for location data to not be kept
- Suggesting to consumers that the only way to stop Google retaining location data was to cease using the service (which was not the case)
- Not fully disclosing to consumers how location data would be used

Insufficient Disclosure



Action against health booking platform, HealthEngine, for conduct including:

- That it provided information of 135k patients to health insurance brokers for a fee, without properly disclosing to platform users that it would do so
- That HealthEngine altered customer reviews and failed to publish around 17k negative consumer reviews

Note for both HealthEngine and Google the failure to disclose (ie. silence) is key

Misleading Representations



Federal Court found Trivago made misleading representations about hotel rates. In particular, Trivago:

- Falsely represented that its website would quickly and easily help users find the cheapest price for a given hotel room
- Misled consumers to believe it gave an impartial, objective and transparent price comparison

Misrepresentations were facilitated by an algorithm that favoured sites which paid Trivago the highest booking fees



2020 trends

Industries in focus and
the reform agenda

Unfair contract terms laws to be extended to insurance

Quick overview

From 5 April 2021, the **Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures)) Bill 2019**, will ban unfair contract terms in standard form insurance contracts

Insurance Contracts Act 1984 (Cth) to be amended to allow application of the UCT regime under the *ASIC Act 2001* (Cth) in line with Royal Commission Recommendation 4.7.

Proposed timing

From 5 April 2021:

- Insurance contracts **created** after this date
- Contracts which are **renewed** or **varied** after this date

Three Part Test

1. Is the term contained in a **consumer** or **small business** contract?
2. Is that contract a **standard form** contract?
3. Is the term **unfair**?

→ Term is void.

What is an 'unfair' term?

Terms that, when looking at the **contract as a whole**:

- would cause **significant imbalance** in parties' rights and obligations;
- are not reasonably necessary to protect the **legitimate business interests** of the advantaged party;
- would cause **detriment** (financial or otherwise) if applied or relied on.

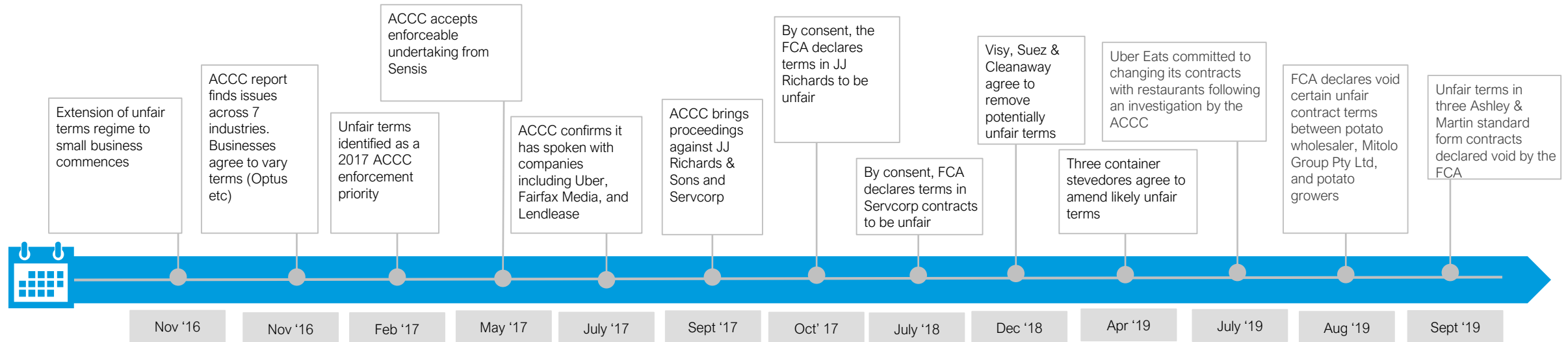
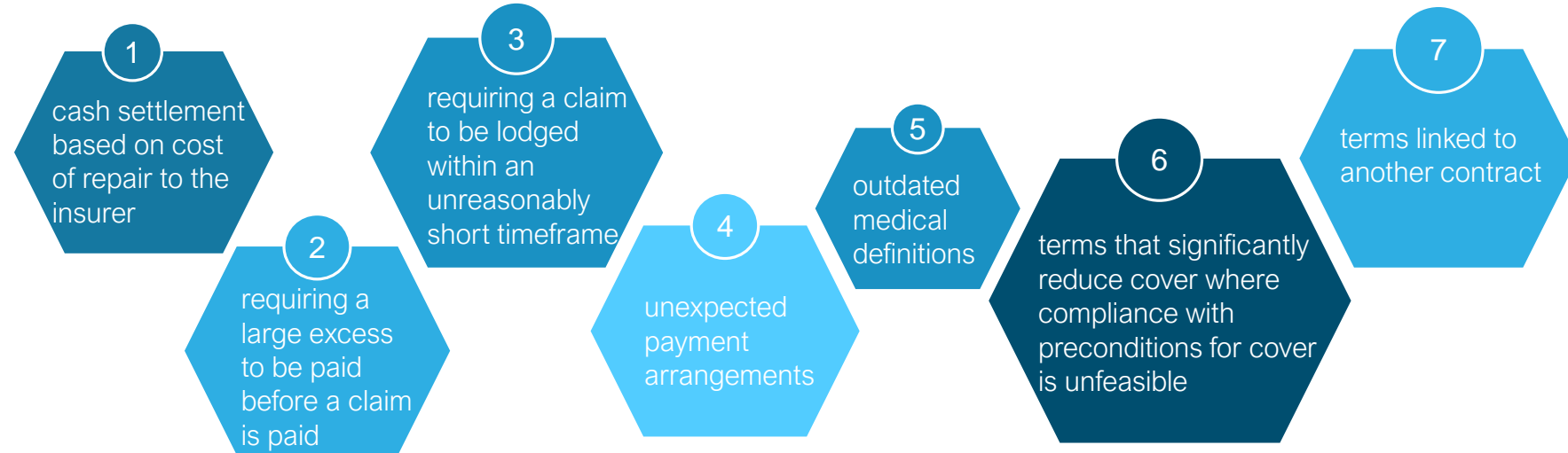
Exempt terms

Regime does not apply to terms that:

1. define the **main subject matter** of the contract;
2. set the **upfront price payable**; or
3. are expressly permitted / required **by law**

Unfair terms will remain an ACCC focus

- The ACCC has focused on enforcement of unfair terms, particularly following the extension to small business contracts
- It is likely that there will be focus on the insurance sector, as well as continued advocacy to apply penalties to the unfair terms regime





Focus on agriculture and food products

Quick overview

Agriculture sector to be an area of focus for the ACCC in light of significant changes in agricultural commodity markets associated with higher value and premium markets.

ACCC response to focus on:

1. Development of more closely integrated supply chains linking farmers and processors.

1. Addressing unequal bargaining power in supply chains (ie. dairy; wine grapes)

2. Consumer willingness to pay premium prices for specific food characteristics.

2. Maintaining consumer trust in product claims

Regulator response

Numerous market studies / inquiries conducted:

- Cattle and beef market study (2016-2017)
- Wine grapes market study (2018-2019)
- Dairy Inquiry (2018)
- Agricultural machinery markets (2020)

More regulatory scrutiny on the horizon:

- mandatory codes aimed at encouraging product / pricing consistency and transparency
- increased enforcement against unfair contract terms + misleading advertising

Agriculture and food products – ACCC focus areas



1

Price Opaqueness

- Opaque and complex pricing systems particularly in the **dairy** industry
- Prevents farmers comparing offers from different processors. This can make production and planning decisions difficult and more risky
- Exposes farmers to commercially damaging practices – **Murray Goulburn** executive fined \$200,000 in 2016



2

Unfair Contract Terms

- Unfair supply contracts found to be prevalent in the **wine industry**
- **Standard form contracts** are common
- Use of clauses that are disadvantageous to growers (certain first **right of refusal** clauses, broad **unilateral termination** and **rejection rights**, **lengthy payment periods**)

3

Misleading Product Claims

- Action in relation to misleading product claims will continue to be a 2020 focus area for the ACCC – this includes a particular focus on health claims
- Recent examples have included:
 - **Heinz** penalized \$2.25M for advertising certain toddler snacks
 - **Snowdale** fined \$750,000 in 2017 for falsely advertising their eggs as being 'free-range'
- Organic status, farm management systems, or origin claims will continue to be complex issues
- Consideration of minimum industry-agreed product and labelling standards across domestic market to ensure consistency and avoid consumer confusion.



Advocacy – An ‘unfair trading practices’ prohibition

Quick overview

ACCC increasingly concerned that existing statutory unconscionability laws under s 21 of the ACL do not adequately capture a range of concerning conduct:

Questionable data practices

- › data breaches
- › use/disclosure of personal information by companies without consent
- › changing policy terms without reasonable notice
- › including provisions for consumer consent in long and detailed contracts
- › preventing consumers accessing legal rights until they acquire additional information

Targeting of vulnerable consumers – for example

Medibank (2018)

- › Medibank limited in-hospital services / benefits without informing customers
- › Vulnerable customers consequently impacted by unforeseen out-of-pocket expenses
- › ACCC unsuccessful at first instance, but the matter is currently on appeal
- › The Court determined that while the conduct was harsh and unfair, it was not unconscionable

Kobelt (2019)

- › Kobelt provided a system of informal credit to the Anangu people in the remote north of South Australia
- › Kobelt held customers' debit card and PIN information, withdrawing money owed as it was paid in from wages and Centrelink
- › A divided High Court found the conduct in the circumstances was not 'unconscionable'

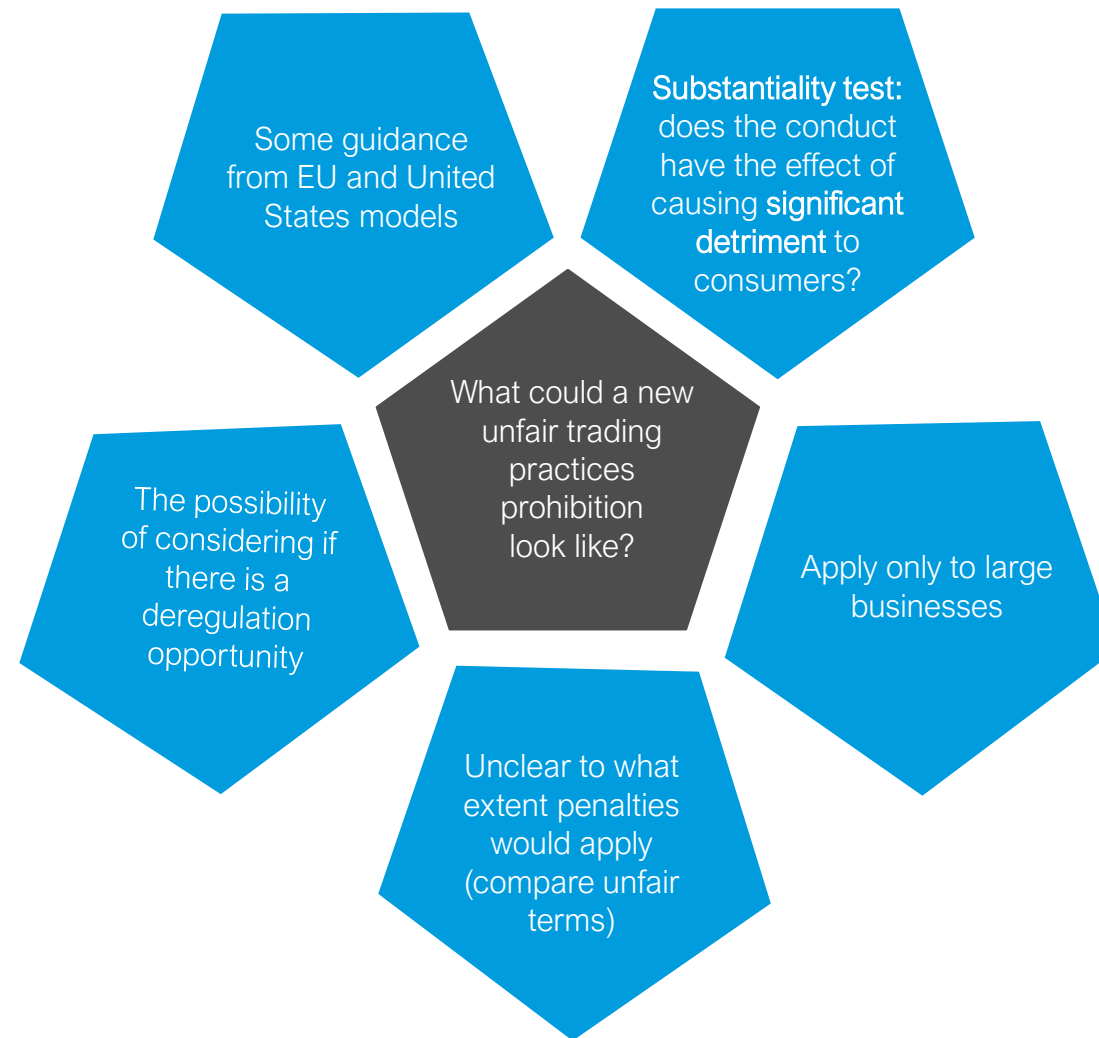
Advocacy – An ‘unfair trading practices’ prohibition

“And the debate has just started on having Australia follow the US, the UK, Europe and others, and introduce a law against unfair practices by large businesses against consumers and small businesses, where significant detriment is involved.”

Rod Sims | February 2020

“introduction of a new standard of fairness would require companies to think deeply about the nature of their relationship with their customers and how they are contracting with them,”

Telstra CEO | February 2020



Advocacy – The ACCC revisiting the merger test (and its record)

ACCC has lost seven contested merger cases in a row

Seeking reforms that might lower the bar in blocking mergers.

Increased use of s 155 notices in merger context

1

Going after Big Tech - a 'potential competitor' test



2

Rebuttable structural presumptions



3

Post-clearance reviews – merger retrospectives

- › Seeking changes to the merger test aimed particularly at tech giants from “cannibalising” smaller start-ups
- › Changes to the test so that when assessing a merger, regard had to:
 - › Removal of a potential competitor
 - › Nature of assets being acquired, including data and technology

- › There has, however, been discussion of broader changes to the merger test
- › A flagged option is where a threshold of concentration is triggered, the evidentiary burden shifts to the merging entities to demonstrate the merger will not substantially lessen competition

- › Also proposing reviews twice in the decade following the merger
- › Seeking to test the claims that were made at the time of approval
- › Considering the impact of mergers on economic outcomes (productivity, prices, employment and wages)



Recurring issues

Getting the basics right

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Consumer guarantees – A constant ACCC focus

Quick overview

The consumer guarantees are **legal rights** that the ACL gives to consumers. Subject to limited exceptions, the consumer guarantees can't be waived, restricted, limited or modified

The **ACL** prescribes the remedies that must be offered to consumers for failure to comply

Consumers can **claim against the supplier / retailer**, or against the **manufacturer** (there are different rights and remedies for claims against a supplier compared to a manufacturer)

Pecuniary penalties under the **ACL** apply to misrepresentations relating to guarantees or remedies under guarantees



Consumer guarantees – 2019 case examples

No refunds



Zenimax + Sony



- ZeniMax and Sony respectively told consumers they were not entitled to a refund for their games
- Sony also said they could provide refunds using virtual PlayStation currency

Jetstar



- \$1.95 million penalty imposed for making false representations on website about rights and remedies
- Website represented that some fares were not refundable (or that it was only refundable if a consumer had bought a more expensive fare)

Shifting the responsibility to the manufacturers



Big W + Target



- BigW and Target told consumers who complained about faulty products that they had to contact the manufacturer directly and were not entitled to any remedy from them because the fault occurred after a certain number of days
- The ACCC will continue to target conduct where operators make misleading representations about rights that are available under the consumer guarantees regime

Getting the basics right – continuing to focus on pricing-related claims

Overview

ACCC is continuing to focus on **pricing-related issues**:

- Misleading and false claims
- Lack of pricing transparency
 - “Was/now pricing”

Standard **pecuniary penalties** per contravention under the **ACL** apply (noting that they increased in 2018)

Was/now pricing can be viewed as a form of misleading or deceptive conduct when used in a way that misrepresents the savings that are actually available to consumers

ACCC looks at whether the 'was' price was available to consumers for a **reasonable period** before the sale to substantiate the claimed saving

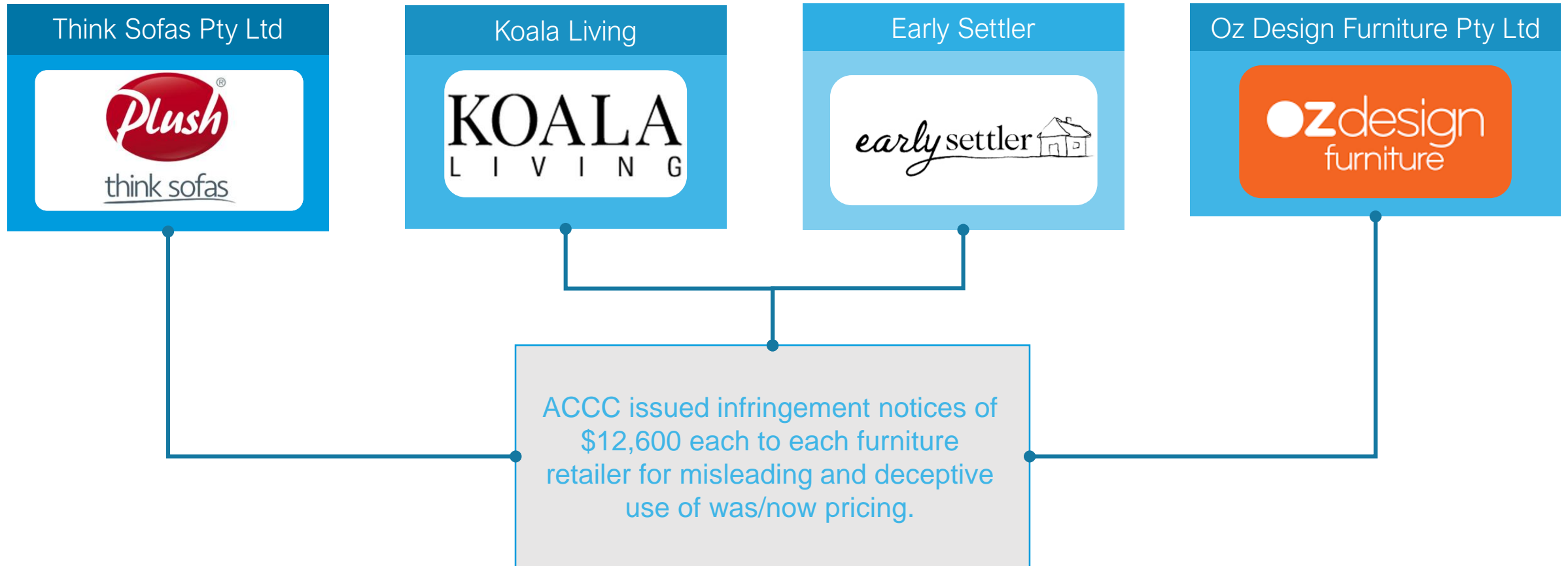
Kogan



- Recent proceedings against Kogan bring together data and pricing issues
- Kogan is alleged to have offered a 10% saving for its 2018 EOFY sale. However, the ACCC alleges that immediately prior to the sale, prices were inflating on more than 600 products (some by more than 10%)



Was / now pricing – 2019 case examples



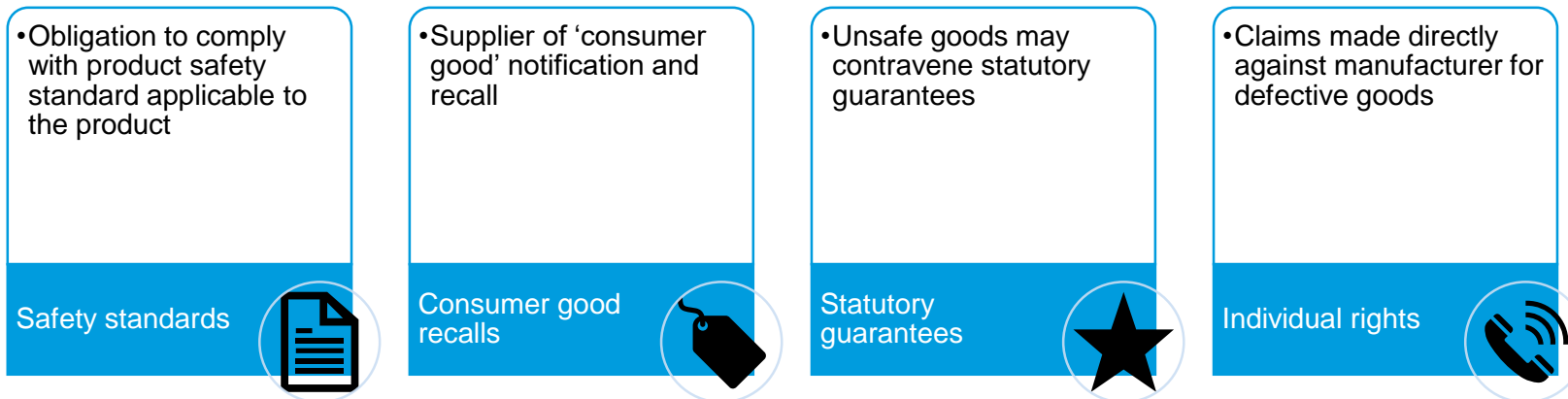
A new 'general safety provision' on the horizon?

ACCC wants there to be a general prohibition on the sale of unsafe goods in Australia

This will oblige companies to take reasonable steps to avoid supplying unsafe goods

Such provisions already exists in overseas jurisdictions (e.g UK example)

Current product safety provisions in Australia 'reactive' in nature:



"For consumers, a General Safety Provision will give greater confidence that the goods they buy are safe. And for business, it will create a level playing field so that those firms who deliberately supply cheap but unsafe products do not derive a financial benefit" - Rod Sims

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