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- Concerted practices: A contravention without a definition  
— *Lindsay Foster and Hanna Kaci* 1

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In late 2017, the Australian Parliament introduced a prohibition on concerted practices into Australian law. This article considers the rationale for the amendment and the likely construction of the prohibition in circumstances where the term ‘concerted practices’ is not defined in the legislation. The authors argue that judicial interpretation will be crucial to the regulatory success of the prohibition and conclude that the prohibition will likely be interpreted to capture exchanges of commercial information, certain instances of parallel conduct and specified vertical conduct. The authors also consider the likely influence of overseas experiences with concerted practices, having regard to key judicial developments in the United States, the European Union and the United Kingdom.

- Unfair contract terms and small business contracts: Insights  
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Part 2–3 of the *Australian Consumer Law* contains a set of provisions specifically regulating unfair contract terms in standard form contracts. The provisions, as originally enacted on 1 January 2011, applied only to consumer contracts but were legislatively amended to apply to small business contracts as of 12 November 2016. This extension was said to account for the comparable vulnerability of small businesses to unfair terms in standard form contracts, and to encourage small businesses to confidently agree to standard form contracts which more efficiently allocate risk. This article examines the first case brought by the Australian Competition and Consumer Commission under the new unfair contract terms small business contract provisions. It explores the Federal Court of Australia’s approach to construing and applying the new provisions to the small business context and uses the case as a backdrop against which to revisit the notion that small businesses are as vulnerable as consumers to unfair terms in standard form contracts.

From 'carries on a business' to 'in trade or commerce':  
Efficiency in government or semantic endeavour?  
— *Deborah Healey and Jack Coles*

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The *Competition and Consumer Act 2010* (Cth) applies to the Crown in right of the Commonwealth, State and Territory governments, and local government, in so far as government 'carries on a business'. The Harper Review recommended amendment to apply the CCA instead to government in so far as it undertakes activity 'in trade or commerce'. This article examines this proposal, setting out the historical context in which the CCA has applied to government, reform processes, and current jurisprudence on the meaning of 'carries on a business'. It examines in detail the High Court's decision in *NT Power Generation Pty Ltd v Power and Water Authority*, and finds that many activities of government, including some procurement, are currently subject to the CCA. The article reviews the interpretation of 'in trade or commerce' in existing provisions of the CCA and concludes that its meaning is unclear and that adoption of it in the context of the Crown may have unintended consequences. It considers *Commerce Act 1986* (NZ) jurisprudence on which the Harper Review's recommendation was based and finds that 'engages in trade' in that context mainly distinguishes between the commercial and regulatory roles of government, has an additional sub-definition which expressly includes procurement, and appears to give NZ competition law a relatively narrow application to government. The article concludes by questioning whether the adoption of 'in trade or commerce' will extend the application of the CCA beyond the range of government conduct already captured, finding that more surgical changes may be appropriate.

Concerted practices and algorithmic coordination:  
Does the new Australian law compute? — *Rob Nicholls and Brent Fisse*

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Algorithm-driven conduct is starting to challenge competition law. Businesses, especially platform operators, acquire data and particularly pricing information from other businesses in real time. Algorithmic processing of that data and information by competitors may result in parallel conduct in the market. The term used here to describe algorithm-driven parallel conduct is 'algorithmic coordination'. The conduct of the competitors may not necessarily involve a contract, arrangement or understanding; for instance, the element of commitment required for an arrangement or understanding may not be present. The adverse welfare effects caused by algorithmic coordination may be as significant as those caused by collusion. There may also be positive welfare effects. This article reviews the extent to which algorithmic coordination is addressed by the prohibition of concerted practices under s 45 of the *Competition and Consumer Act 2010* (Cth). It does so by reference to each of the four types of algorithmic coordination, referred to as scenarios, and described by Ezrachi and Stucke in their illuminating work, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*. The article shows that the concerted practices prohibition may be effective in the Messenger and Hub-and-Spoke scenarios, but that this effectiveness will be severely constrained by the substantial lessening of competition test. The article demonstrates that a fundamental problem with the prohibition is that the concept of concerted practices will not adequately cover Predictable Agents and Digital Eye scenarios.