

# **Competition & Consumer Law Journal (CCLJ)**

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*(articles and book review included in this part are linked to the LexisNexis platform)*

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### **Articles**

#### **The rise of Uber and Airbnb: The future of consumer protection and the sharing economy**

— *Rangika Palliyaarachchi and Kanchana Kariyawasam*

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The sharing economy has been heralded for disrupting traditional business models by reducing the barriers of entry. It has also been lauded for the ease and simplicity of doing business while opening new opportunities for consumers. The dark side to this, however, is that it has also created legal and regulatory uncertainties for consumers and stakeholders alike given that technological advances have been known to outpace legal development. While some of these uncertainties are easily foreseen, a good number will remain unknown until they occur. This article explores the application of the Australian Consumer Law to sharing economy business models, particularly those of Uber and Airbnb that have been taken as the prototype for subsequent ventures.

#### **Art fraud and market failure in the art market: A need for multiple approaches**

— *May Fong Cheong*

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The ‘financialisation’ of art has transformed art from an object of aesthetic expression to an instrument of increasing wealth, in turn increasing the likelihood of forgery. Art fraud harms artists, purchasers, museums, and society at large. Ultimately, the integrity of the art industry is at stake. The culture of secrecy and questionable auction practices widen the information asymmetry contributing to market failure in the art market. Multiple approaches are needed to address these challenges. The criminalisation of art fraud faces evidential difficulties of proof beyond reasonable doubt. The more accessible threshold of proving misleading conduct under s 18 of the Australian Consumer Law has been successfully invoked by artists against the forger, a purchaser against an auction house, and the Australian Competition and Consumer Commission obtaining pecuniary penalties and restraint orders against art offenders. Besides imposing presumptive liability on auction houses, authentication boards and a Code of Conduct for Art Merchants will promote transparency in the art market.

#### **Proving an unconscionable system of conduct or pattern of behaviour in the VET FEE-HELP decisions: Lessons learned from the regulator’s unique approach in *Unique***

— *Rosaline Tan*

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A system case requires a ‘radically different approach to evidence and case theory from that traditionally adopted for claims of individual unconscionable conduct’. Of all the resolved proceedings brought in relation to the now defunct Vocational Education and Training Fee Higher Education Loan Program, the Full Court of the Federal Court of Australia’s decision in *Unique International College*

*Pty Ltd v Australian Competition and Consumer Commission* represents the sole loss for the regulator. This article contrasts the regulator's evidentiary approach in *Unique International College Pty Ltd v Australian Competition and Consumer Commission* with the other Vocational Education and Training Fee Higher Education Loan Program decisions and thus seeks to identify some 'lessons learned' in bringing a system case both in this context and, perhaps, more broadly. Specifically, it suggests that the regulator in Unique: (i) should have filed a concise statement rather than statement of claim; (ii) erroneously relied on the evidence of individual consumers; (iii) failed to adduce evidence of the Provider's business processes through other means; and (iv) adopted a flawed approach to its use of expert evidence.

### Identifying unconscionable conduct post-Kobelt: Is good faith the key to interpreting the statutory unconscionability provisions in Australian law?

— Ruth Kooy

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In the wake of the High Court decision in *Australian Securities and Investments Commission v Kobelt*, the 'statutory unconscionability' provisions under s 21 of the Competition and Consumer Act 2010 (Cth) sch 2 (Australian Consumer Law) and s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) remain a source of consternation for courts, regulators, businesses and consumers. This article explores a potential approach to determining unconscionability under the provisions post-Kobelt. In particular, it examines the meaning and potential application of one consideration the legislation makes relevant to the determination of unconscionability: the good faith of the parties. It is proposed that the notion of good faith may be viewed as an underlying, interpretative principle with respect to the provisions, which both infuses notions of good faith and brings coherency to the application of statutory unconscionability.

### Unfair contract terms law: A 'white knight' or 'fly in the ointment'? The ACCC's spotlight on the commercial construction sector and its impact on small business standard form construction contracts

— Krystian Kmita

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The Australian Competition and Consumer Commission has prioritised unfair conduct in the commercial construction sector in recent years. This spotlight has come after the commencement of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth) in 2016. The Act, in effect, extends the Unfair Contract Terms Law provisions in the Australian Consumer Law to small construction businesses that enter standard form construction contracts. This article considers the efficacy of the extension and whether larger contract-issuing construction firms in the commercial construction sector continue to inequitably allocate risk to small construction businesses through the imposition of unfair terms in standard form construction contracts. It argues that whilst uncertainty and inadequate enforceability measures remain limitations of the Unfair Contract Terms Law regime, larger construction firms will continue to impose unfair terms in standard form construction contracts to the risk of vulnerable small construction businesses, with little incentive to change their behaviour.

## **Book Review**

Pablo Figueroa and Alejandro Guerrero (eds), EU Law of Competition and Trade in the Pharmaceutical Sector

— *Ray Steinwall*

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