

# Competition & Consumer Law Journal (CCLJ)

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

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#### Articles

##### Competing explanations for parallel conduct: Lessons from the Australian detergent case (*ACCC v Colgate-Palmolive*)

— *George A Hay and E Jane Murdoch*

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Parallel conduct by competing firms can be the result of completely independent and uncontroversial behaviour, such as when all suppliers are affected by and respond unilaterally to the same increase in costs. At the other extreme, parallel conduct can be the result of interdependent and deliberately coordinated behaviour, such as when all suppliers meet in the proverbial smoke-filled room and agree to fix prices. But as economists have been telling us for decades, there is a vast middle ground, where the parallel conduct stems from some degree of interdependence and some behaviour short of the hard-core cartel described above. Understanding the reasons for the parallel behaviour and deciding what to do about it is a central element of modern antitrust law and policy. Our goal in this paper is to make some incremental progress by exploring, in the Australian context, how a firm can escape the allegation that it has been a party to a contract, arrangement or understanding even when its conduct in the marketplace appears to be roughly parallel to that of its competitors. Our vehicle for this approach is the decision of the trial judge in the laundry detergent case (*ACCC v Colgate-Palmolive*), upheld by the Full Court of the Federal Court of Australia, to dismiss the case brought by the Australian Competition and Consumer Commission against Cussons, the one producer of detergent that actually went to trial, determining that the ACCC had not succeeded in proving that Cussons was a party to any collusive arrangement or understanding with its competitors (Colgate and Unilever) or with one of its major customers (Woolworths). It is our hope that an analysis of the evidence in the case and the claims that were made (and either accepted or rejected) based on that evidence will assist in framing the ongoing debate about where the boundary between lawful and unlawful conduct lies (or should lie) and will highlight the kinds of economic evidence that advance the debate.

##### The future of public benefit test under the *Commerce Act*: Part 2

— *Chris Noonan*

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The Part 2 of this article examines the normative foundations of the revised public benefit test under the Commerce Act 1986 (NZ). Building on the analysis of the New Zealand Court of Appeal's decision *NZME Ltd v Commerce Commission* in Part 1, it identifies the manner in which the public benefit test departs from both the total and consumer surplus standards and the value judgments implicit in those standards. More comprehensive economic frameworks which might better account for the range of considerations that the application of the public benefit test throws up exist and their use could bring greater consistency to government policy. The decision of the Court of Appeal may be best seen as initiating an exploratory and inductive process of rethinking, guided by a few principles.

## Secondary boycotts and the implied freedom of political communication

— *Shirley Quo*

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Secondary boycotts are prohibited under pt IV of the Competition and Consumer Act 2010 (Cth). However there is an exemption under s 45DD(3) which permits boycotts where the dominant purpose of the conduct relates to environmental or consumer protection. The Australian Government is reportedly considering removing the exemption under s 45DD(3). It has been argued by environmental and consumer protection groups that a repeal of the exemption potentially infringes on the implied freedom of political communication under the Constitution. The High Court has reaffirmed that the implied freedom is a limitation upon the power of government to regulate communication relating to matters of government and politics. Assuming that secondary boycotts by environmental and consumer protection groups are communications and activities about governmental and political matters, there is an unresolved issue as to whether removing the exemption under s 45DD(3) impermissibly burdens the freedom of political communication.

## Online cross-border target marketing: Consumer protection through the lens of the Australian doctrine of unconscionability

— *Mary Ip*

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This article reviews the efficiency of Australian unconscionability laws in protecting consumers from online cross-border target marketing. The rationale for this focus is the rapid expansion of electronic retailing and the increased use of virtual shopping. Although digital marketing has provided many benefits to consumers, it also presents challenges for the conventional legal system. Virtual marketers can reach consumers worldwide, but a national law has limited reach to virtual marketers. Therefore, it is important to increase consumers' awareness of, and draw legislators' attention to, the limitations of domestic law in safeguarding consumers' rights in the cyber marketplace. This article also draws on insights from legislative developments in China and offers suggestions to benefit consumers seeking cross-border remedies.