



Quay Regulatory Update for September 2023

A round up of key Australian regulatory actions during September 2023

September 2023 was a busy month in the areas of competition, consumer protection, media, digital platforms and privacy. This Quay Regulatory Update looks at key actions in these areas.

Competition Law

- **Swift Networks to pay \$1.2 million for engaging in cartel conduct by rigging bids:** The Federal Court ordered Swift Networks to pay \$1.2 million for rigging bids when tendering to supply technology infrastructure and services to three WA mining village projects. As noted by the Australian Competition and Consumer Commission (ACCC), bid rigging is a serious breach of Australia's competition law, potentially leading to higher prices for businesses and ultimately consumers. It is hoped Swift's fine acts as a deterrent to other would-be cartelists. The ACCC's media release is [here](#).
- **New legislation to improve competition in securities trading:** The Treasury Laws Amendment (2023 Measures No 3) Act 2023 (Cth) was assented to on 20 September. The legislation aims to improve safeguards in Australian financial markets, including by creating a framework for fair, transparent and non-discriminatory access to market infrastructure for emerging competitors, allowing them to offer their own clearing and settlement services. The ACCC has also been given powers to conduct binding arbitrations to resolve disputes regarding the price and access to clearing and settlement services. For further information see the Treasurer's media release [here](#).
- **ACCC opposes Transurban:** The ACCC concluded that the proposed acquisition by Transurban of a majority interest in Horizon Roads would be likely to substantially lessen competition for future toll road concessions in Victoria, noting that those two companies are the only private toll operators in Australia. Stakeholders, including the Victorian Government, expressed strong concerns to the ACCC, which determined that, if the acquisition went ahead, Transurban would operate every private sector controlled toll road in Australia. Under the counterfactual, the ACCC concluded that Horizon Roads would likely be acquired by a potential long-term rival, developing stronger competition in the toll road concession sector. The ACCC's public informal merger review documentation is available [here](#).
- **ACCC penalties guidelines:** These guidelines, which were released without fanfare, are the first detailed guidance the ACCC has publicly released regarding its approach to penalties. The ACCC has often expressed concern that the Federal Court does not impose sufficiently large penalties. The guidelines reflect this view, confirming that the primary reference point for the ACCC when

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considering its penalty recommendations to the Court is the maximum penalty available to be imposed under the Competition and Consumer Act 2010 (Cth). While the guidelines offer an insight to the thinking of the ACCC, they are not binding on the Court and, ultimately, it is the Court that will decide the appropriate penalties where breaches of the Australia's competition and consumer protection law occur. The guidelines are [here](#).

- **Ongoing focus on Qantas:** Qantas' regulatory woes continue. On 15 September the ACCC issued a draft determination denying continued coordination between Qantas and China Eastern Airlines. The airlines had sought authorisation to continue to coordinate passenger and cargo transport operations between Australia and China until the end of March 2024. The ACCC was concerned that the authorisation could lead to both the opportunity and incentive to increase prices, without resulting in additional services being provided for the benefit of consumers. The draft determination was issued less than a month after the ACCC initiated action in the Federal Court against Qantas for allegedly engaging in deceptive conduct by advertising flights for sale which it had already cancelled. Qantas has also come under the scrutiny of a recently formed Senate Select Committee on Commonwealth Bilateral Air Service Agreements, which is largely looking at the question of why the Australian Government denied access to Qatar Airways for further flights to Australia and whether this was influenced by Qantas. During a 27 September Committee meeting, there was considerable discussion of Qantas' purported dominance of Australian skies, and whether Qantas is potentially abusing its market power. The ACCC's media release on the Qantas/China Eastern coordination is [here](#), the ACCC's media release in relation to Qantas' alleged "fares for no flights" is [here](#) and the Committee media releases are [here](#).

Consumer Protection

- **Online love might not be free, but it should be protected:** The ACCC and eHarmony's relationship is on shaky ground, as the regulator is pursuing the dating website through the Federal Court alleging it made misleading representations to consumers about the pricing, renewal and duration of its memberships. The ACCC claims that eHarmony represented to consumers that they could engage in two way-communication with potential suitors for free, when they in fact had to upgrade to a paid "premium" membership to do so. The ACCC also alleges that eHarmony suggested subscriptions were for fixed periods, when in fact subscriptions automatically renewed. The ACCC's media release is [here](#).

The Government has also requested that the online dating industry develop a new voluntary code of practice to better protect Australians using their services. If the sector does not do so by mid-2024, regulation is likely. The Minister for Communications discussed this in her media release available [here](#).

- **ASIC sues PayPal Australia for unfair contract terms:** PayPal's User Agreement gives PayPal business account holders 60 days to notify PayPal of any errors or discrepancies in fees that PayPal has charged or otherwise the fees are deemed to be accurate. The ASIC has taken action on the basis that this clause allows PayPal to benefit from its own errors, places additional burdens on small businesses to detect PayPal's mistakes (which PayPal itself should do) and is not reciprocal – that is, the small business customers are not relieved of liability if PayPal delays in charging a fee. The ASIC is seeking declarations that the term is void, in addition to injunctions and corrective orders. For additional information see the ASIC media release [here](#). This is another reminder for businesses to check standard contracts for unfair contract terms, particularly in light of the penalty increases that will take effect in November 2023.

- **Allegations of misleading electricity price information:** The Electricity Retail Code requires electricity retailers to communicate price information in a simple and standardised way, for ease of comparing like-for-like prices between different suppliers. The ACCC claims that EnergyAustralia was in violation of the Code between June and September 2022, by failing to state the “lowest possible price” when sending price change notices to customers. It is also claimed that EnergyAustralia made false or misleading representations in the estimates of annual costs that it provided to customers in price change notices. The ACCC is seeking penalties and declarations, costs, and other orders, as noted in its media release available [here](#).
- **Unfair trading practices:** The ACCC has been arguing for the introduction of an unfair trading practices law since at least 2019 so it is unsurprising that it has welcomed the Government’s consultation to introduce that regime in the Australian Consumer Law. The ACCC believes the new law is needed to address concerning business conduct which could harm consumers but might not breach the existing Australian Consumer Law, such as conduct which is not misleading or deceptive but which nonetheless distorts consumer behaviour through confusion. The consultation will remain open until 29 November 2023. See the ACCC’s media release [here](#).
- **No online gambling on credit:** The Government has introduced new legislation to protect against online gambling harms, the Interactive Gambling Amendment (Credit and Other Measures) Bill 2023. The Bill, if it becomes law, will ban the use of credit cards and digital currencies used for online gambling. The Minister for Communications may also prohibit the use of additional credit-related products for gambling as these emerge in the future. The media release from the Minister for Communications discussing the Bill is [here](#).
- **Banks fees are bad:** ANZ has been penalised \$15 million by the Federal Court for misleading consumers about available funds while reaping the reward of associated fees and interest. The Federal Court found that ANZ displayed incorrect “Available Funds” amounts, leading to some customers being hit with fees and interest for withdrawing more than was actually available. The Court held that ANZ did not act efficiently, honestly or fairly by failing to take timely action to fix the issue. See [Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited \[2023\] FCA 1150](#). In a separate case, NAB was ordered to pay \$2.1 million by the Federal Court for fee related unconscionable conduct. The Court found NAB continued to charge periodic payment fees even though it knew it was not entitled to do so. See [Australian Securities and Investments Commission v National Australia Bank Limited \(No 2\) \[2023\] FCA 1118](#).

Media

- **Australia’s Classification Scheme:** The Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification and Other Measures) Act 2023 (Cth) received assent on 14 September 2023. The Act, which will take effect in early 2024, among other matters, expands options for self-classification of content and broadens the Classification Board’s powers to quality assure self-classification decisions. The changes are aimed primarily at promoting industry compliance and reducing classification timelines and costs. The Act is available [here](#).

Digital platforms

- **New industry code registered for search engines:** The eSafety Commissioner registered a new industry code of practice under the Online Safety Act 2021 (Cth), the Search Code, which covers internet search engines and seriously harmful online content. This follows on from the eSafety

Commissioner’s registration of industry codes for social media services; internet carriage services; app distribution services; hosting services; and equipment. An industry code was not resolved to the eSafety Commissioner’s satisfaction for “designated internet services”, that is, file storage services such as iCloud, and “relevant electronic services”, which includes private messaging services. The eSafety Commissioner will implement standards for those online service categories. For additional information see the media release from the eSafety Commissioner [here](#).

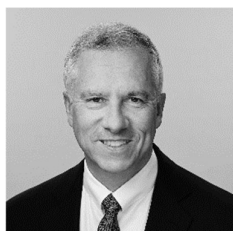
- **Regulators align on generative AI:** On 11 September 2023, the Digital Platform Regulators forum (DP-REG), comprising the ACCC, the ACMA, the Office of the Australian Information Commissioner and the eSafety Commissioner, released their joint submission to the Department of Industry, Science and Resources’ consultation on “Safe and responsible AI in Australia”. The submission outlined how DP-REG is working to understand the potential issues posed by AI in Australia and consider how current regulatory frameworks may apply to AI and address the challenges it raises. The submission noted the inherent risks of AI in the context of competition, consumer protection, media and the information environment, privacy and online safety and also actions being taken by members to address AI risks. The DP-REG’s joint submission is available [here](#).

Privacy

- **More consultation on Privacy Act reforms:** The Attorney-General released the Government’s response to his Department’s Privacy Act Review Report on 28 September 2023. The Government has largely agreed or “agreed in-principle” to the proposals for reforms put forward in the Report. The only areas from the Report which will not be progressed relate to the imposition of obligations to protect de-identified information, the extension of the Privacy Act 1988 (Cth) to actions of political parties and a proposal that targeted advertising is prohibited without consent, though some version of that targeted advertising proposal may ultimately be adopted in a revised form.

Pending further consultation, legislation may be introduced in 2024 and the Government has acknowledged that transitional periods will need to be implemented to ensure the private, public and not-for-profit sectors have time to make the necessary changes to comply with the reformed regime. The Government’s response is [here](#).

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