

# AUSTRALIAN JOURNAL OF COMPETITION AND CONSUMER LAW

Volume 33, Number 1

2025

## EDITORIAL

**Obstetricians Help Deliver a Legal Precedent** ..... 3

## ARTICLES

**Competition and Consumer Issues from Artificial Intelligence Foundation Models** – *Katharine Kemp*

Artificial intelligence foundation models (FMs) present a new frontier for competition and consumer protection regulation. This is a topic which has received minimal consideration in Australian legal commentary to date, despite its fast-growing importance. FMs are, and will likely increasingly become, the bedrock of many applications and services across the economy. This article explains the meaning and wider significance of FMs, and key inputs in the supply chain for FMs, as background to understanding concentration concerns in relevant markets. The present trajectory of FM development and deployment has given rise to concerns about potential monopolisation at various levels of the FM supply chain, and systemic risks arising from concentrations of power, unlawful or unethical processes and insufficient protections in respect of flawed outputs. This article analyses competition, consumer and privacy concerns arising from the development of FMs, as well as broader risks and opportunities, and makes some modest regulatory proposals. .... 5

**The Evidence Base for Tightening Australia’s Merger Laws** – *Chris Whelan*

This article examines the evidence base used to claim too many mergers have been allowed through in Australia, leading to higher prices for consumers, which, in turn, has been used to support calls for stronger Australian merger law. The evidence base includes growing profit margins earned by Australian firms, increasing concentration of a few firms within industries, incumbents being displaced less frequently and merger retrospective analysis showing price increases following mergers. This article argues that the evidence base is not as strong as claimed and does not indicate overly permissive merger control. In particular, the margin analysis suffers from serious reliability issues. The claimed concentration and incumbency increases are small. International merger retrospective evidence finds evidence of price increases, but tends to focus on specific industries (where data is available), on short-run price effects (and so could miss longer term quality improvements) and may not even apply to Australia, while very few Australia-specific merger retrospective analyses have been conducted. .... 22

ADMINISTRATIVE AND COMPETITION POLICY – *Editor: Dr Luke Wainscoat*

**AI-Powered Pricing Algorithms: Be Alert, Not Alarmed** – *Dr Luke Wainscoat* ..... 34

CONSUMER PROTECTION – <i>Editor: Bernard McCabe</i>	
<b>Beware the User Manual: Ventilator Shortages during COVID</b> – <i>Patrick Quirk</i> .....	41
TELECOMMUNICATIONS – <i>Editor: Professor Niloufer Selvadurai</i>	
<b>Google and the Vexed Nexus between Competition Law and Privacy Law</b> – <i>Holly Raiche</i> .....	44
COMMENTS FROM COMMERCE	
<b>Is the Small Business Sector Disappearing?</b> – <i>Elizabeth [Liz] Greenwood</i> .....	49
CONSUMER CONCERNS	
<b>Intelligent Design: The Need for Fit-for-Purpose Laws to Regulate AI</b> – <i>Dr Rafi Alam</i> .....	51
REPORT FROM ASIA – <i>Editor: Andrew Christopher</i>	
<b>Review of Japan’s Ex-Ante Smartphone Software Legislation</b> – <i>Joe Scarcella and Henry Lynch</i> .....	56
REPORT FROM EUROPE – <i>Editor: Tom Pick</i>	
<b>The European Commission’s Draft Guidelines on the Application of Art 102 of the TFEU to Abusive Exclusionary Conduct By Dominant Companies – Overview</b> – <i>Tom S Pick and Britt Gerritsen</i> .....	63