Supplier terms and pricing issues under Australian competition law

Introduction

Under Australian law, the provision of rebates can raise competition concerns particularly where the supplier has substantial market power. There has been relatively limited case law addressing this issue and the approach that the ACCC is likely to take is not as clear as the approach taken in the EU. Recent EU decisions including the *Intel* case are likely to influence the approach taken in Australia. There have also been recent amendments to the Australian law dealing with misuse of market power, which may influence the approach taken by the Australian regulator.

While the ACCC is keen to promote the benefits of online retailing, subject to the ongoing *per se* restrictions on resale price maintenance (RPM), suppliers have more flexibility in adopting platform restrictions or dual pricing regimes than may be the case in other jurisdictions, in particular, the EU. Where such restrictions/regimes do not constitute RPM, they will only contravene the law in Australia where they have the purpose, effect or likely effect of substantially lessening competition.

What is the basic position under Australian competition law regarding resale price maintenance (RPM)?

The Australian *Competition and Consumer Act* (CCA) strictly prohibits suppliers of goods or services from specifying a minimum price below which a reseller must not on-sell, or advertise for sale, those goods or services. Recommended retail prices and maximum resale prices are permitted.

RPM includes circumstances where a supplier withholds supplies to a reseller where the reseller has sold or is likely to sell goods at a price lower than a specified price. Withholding supplies is deemed to include circumstances where goods are supplied on disadvantageous terms.

While *per se* illegal, the CCA contains processes which can provide legal immunity. Prior to recent amendments to the CCA, parties could only seek authorisation for RPM conduct on public benefit grounds. Recent amendments to the CCA allow parties to also seek RPM immunity through a notification process, which is a significantly simpler process than the authorisation process. For both authorisation and notification processes, the ACCC will consider whether the public benefits of the RPM conduct outweigh any public detriments. For notification, immunity commences after a short waiting period unless the ACCC takes steps to challenge the notification.

What do recent cases and investigations tell us about the ACCC's position on RPM?

Unless notification or authorisation is sought and obtained, the ACCC takes a strict approach to RPM enforcement. The ACCC has successfully initiated proceedings for RPM conduct numerous times, and significant penalties have been imposed. For example in 2007, the Court ordered Jurlique, a manufacturer of high quality skincare and cosmetic products, to pay a penalty of $3.4 million for RPM conduct.

In the context of an authorisation or a notification, the ACCC recognises that RPM can result in public (i.e. pro-competitive) benefits, including by creating incentives for a reseller to invest in pre-sales services.

There has only been one authorisation from the ACCC allowing RPM. In 2014, the ACCC authorised the RPM conduct by Tooltechnic, recognising that without RPM there was the ability for some retailers to 'free-ride' by failing to provide pre- and post-sale services. This decision was based on the factual circumstances, where the products provided by Tooltechnic required significant pre- and post-sale services. The ACCC also noted that the risk of harm from RPM conduct would be minimised as the product was subject to strong competition from other goods.

How are online sales restrictions treated?

Are Platform restrictions permitted?

Generally speaking, the law in Australia allows for suppliers to include a range of restrictions on the distribution of products, including in respect of online distribution. Such restrictions will only contravene the CCA where they have the purpose, effect or likely effect of substantially lessening competition.

As is the case with RPM conduct, restrictions on distributors/resellers which might otherwise contravene the CCA can be subject to authorisation and/or notification to obtain legal immunity.

In 2014, Games Workshop notified the ACCC that it was proposing to require independent retailers to have at least one offline outlet, and to not supply their products to persons who would sell the products through online platforms such as eBay. The ACCC determined that Games Workshop's products required pre- and post-sales services, and that without these platform restrictions there is a high risk of free-riding, and that ultimately the conduct did not have the purpose, effect or likely effect of substantially lessening competition. It is noted however, that there was no obligation on Games Workshop to notify the ACCC regarding this conduct as it is not *per se* illegal. In addition, it is not apparent that the conduct would have resulted in any substantial lessening of competition even if there was limited risk of free riding.

What about online pricing restrictions?

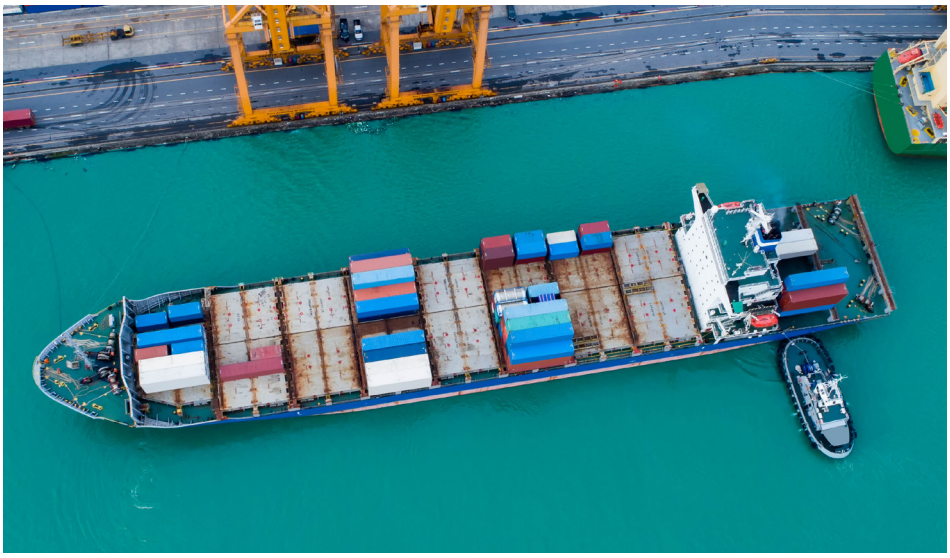
Online pricing restrictions are not specifically prohibited in Australia, and there have been no cases considering this issue. In considering any dual pricing policy, the issue is whether or not the pricing policy would have the purpose, effect or likely effect of substantially lessening competition.

However, in considering any dual pricing policy, a manufacturer or supplier would need to consider the broad definition of RPM and in particular, whether different terms constitute a withholding of supply for the reason that an online discounter has sold or is likely to sell goods at a price less than a specified price.

What is the approach to discounts and rebates under Australian competition law?

The use of discounts and rebates can, in some circumstances, constitute a misuse of market power. The ACCC refers to this issue in its Guidelines on Misuse of Market Power' of August 2018 (Guidelines).

The starting point under the Guidelines is that businesses are generally free to set their own sales promotions, including rebates, and that rebates usually do not harm competition. In many cases rebates are an example of the benefits of the competitive process, incentivising retailers to promote the supplier's products and reducing the overall price.



The Guidelines take the position that rebates are most likely to constitute a misuse of market power if the rebate is conditional on a distributor meeting certain sales targets. In comparison, unconditional rebates are said to only raise concerns if the reduced price amounts to predatory pricing. The Guidelines include a loyalty rebates example where a firm with a significant market share applies a 10% rebate to customers if they purchase at least 15% more product than they did the previous year. Provided this target is met, a rebate is received on all purchases. The ACCC takes the view that this conduct would likely constitute a misuse of market power as it provides a very strong incentive for customers to increase their purchases from the supplier as a rebate will then apply to every product sold (i.e. not simply on the incremental sales).

Have there been any recent developments in this area of competition law?

As noted above, the introduction of a notification regime in respect of RPM conduct may result in more suppliers seeking legal immunity in regards to RPM conduct. In addition, the change to the misuse of market power provisions which, arguably, align the Australian position more closely to that in overseas jurisdictions, may have some impact on the ACCC's approach. Under the previous misuse of market power provisions, the ACCC was required to show a 'use of market power' for a proscribed anticompetitive purpose. Under the amended provisions, "a corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition".

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