



HERBERT
SMITH
FREEHILLS

DOING BUSINESS IN AUSTRALIA

COMPETITION PRINCIPLES



Chapter 12

Competition Principles

The *Competition and Consumer Act 2010* (Cth) (**CCA**) regulates competition in Australia. It prohibits a range of anti-competitive behaviour, governs merger activity and regulates companies' dealings with customers under the Australian Consumer Law.

The CCA provides for authorisation and notification processes to permit behaviour otherwise prohibited by the legislation, such as mergers, resale price maintenance, misuse of market power, cartel conduct and exclusive dealing. Significant reforms to the Australian competition recently came into effect. The new laws include the introduction of a prohibition on concerted practices and a lessening of competition test for the prohibition on misuse of market power.

Contravention of the CCA carries significant penalties, with the Australian Competition and Consumer Commission (**ACCC**), the body responsible for enforcing the CCA, increasingly pursuing criminal prosecution of companies and individuals for cartel conduct. In May 2018, the ACCC successfully brought proceedings before the Full Federal Court against Yazaki Corporation which was ordered to pay a penalty of \$46 million for cartel conduct, the highest penalty ever handed down under the CCA. Furthermore, in 2018 the ACCC brought two criminal cartel proceedings which included individuals as co-defendants, the first time this has occurred in Australia. The ACCC's enforcement priorities for 2018 included misleading and deceptive practices (particularly in relation to the misrepresentation of consumer guarantees), anti-competitive conduct, product safety, and unfair contract terms affecting small business and franchisee businesses, with a particular emphasis upon contravening behaviour in the financial services and energy sectors and in the online marketplace. The ACCC is also pushing for higher penalties to be awarded in relation to breaches of the CCA and is actively looking to increase criminal prosecution of cartel conduct. As of February 2019, there are three criminal cartel cases before the court.

Conduct prohibited under the CCA

Under Part IV of the CCA, certain conduct is prohibited outright (that is, irrespective of the effect on competition), while other conduct is prohibited only where it has the purpose, effect or likely effect of substantially lessening competition (**SLC**) in any market or it involves the misuse of

substantial market power.

Outright prohibitions	Conduct prohibited where it has the purpose, effect or likely effect of SLC
<p>Cartel conduct - any contract, arrangement or understanding between competitors (or potential competitors) which has:</p> <ul style="list-style-type: none"> • the purpose or effect of fixing or influencing prices; or • the purpose of restricting production, capacity, or supply to customers; sharing or dividing up markets by allocating customers, suppliers or territories; or bid rigging. 	<p>Misuse of market power - where a company has substantial market power, engaging in conduct that has the purpose, or has or is likely to have the effect of substantially lessening competition in:</p> <ul style="list-style-type: none"> • that market; • any other market in which that company supplies goods or services; or • any other market in which that company acquires goods or services.
<p>Resale price maintenance - specifying a minimum price below which customers are not to resupply or advertise goods or services for resupply.</p>	<p>Concerted practices - the co-operation between two or more person which reduces the uncertainty of competition.</p>
	<p>Exclusive dealing - imposing restrictions on a customer's or supplier's freedom to choose with whom, where or on what terms it may conduct business.</p>
	<p>Mergers and acquisitions - the acquisition of shares or assets.</p>

Authorised conduct and merger clearances

The CCA permits conduct that may otherwise contravene the CCA to be exempted by the ACCC. A company may apply to the ACCC for authorisation of anti-competitive conduct (including cartel conduct and misuse of market power) on public benefit grounds; or it may lodge a notification with the ACCC for exclusive dealing, resale price maintenance or collective bargaining arrangements.

In respect of a merger or acquisition which raises competition law issues, companies may also seek to have the merger cleared or authorised by the ACCC. Clearance will require the parties to persuade the ACCC that the proposed merger or acquisition is not likely to substantially lessen competition. Authorisation can be granted where the merger or acquisition will result in public benefits which outweigh any detriments (including competitive harm). There is no mandatory requirement to notify the ACCC prior to completing a transaction; however, the

ACCC Merger Guidelines encourage the parties to notify the ACCC where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

Penalties

Pecuniary penalties apply to contraventions of all Part IV provisions. The maximum penalty per contravention is displayed below:

	Companies	Individuals
Civil Penalties	The greatest of: <ul style="list-style-type: none"> • A\$10 million; • three times the value of the benefit obtained that is reasonably attributable to the act or omission; or • if the court cannot determine the value of the benefit, 10% of the annual turnover of the corporate group in Australia in the preceding 12 months. 	A\$500,000
Criminal penalties (for cartel conduct)	Equivalent to civil penalties	Up to 10 years imprisonment and/or fines of up to \$A420,000

A company must not indemnify its officers against a liability to pay a pecuniary penalty or for the legal costs of defending proceedings in which the officer is found to have such a liability.

In addition, on the application of the ACCC (or in respect of criminal cartels, the Commonwealth Director of Public Prosecution), a court may disqualify a person who has been found to have engaged in anti-competitive conduct from managing companies for a period the court considers appropriate. Other non-pecuniary penalties include community services orders and adverse publicity orders.

Other provisions of the CCA

The CCA also has specific parts dealing with:

- access to telecommunications services (access to telecommunications facilities is dealt with in Schedule 1 of the *Telecommunications Act 1997* (Cth));

- access to essential infrastructure services which cannot be economically reproduced by a third party – for example, gas and electricity transmission and distribution services, railway lines, airports, ports and other services with natural monopoly characteristics;
- anti-competitive conduct in telecommunications markets;
- the regulation of international liner cargo shipping;
- prices surveillance; and
- unfair dealings in business, consumer protection and product safety (now contained in the Australian Consumer Law, in Schedule 2 of the CCA). For more information on the Australian Consumer Law see Chapter 15 of this publication, 'Consumer protection and product liability'.

Australian Competition and Consumer Commission

The ACCC is the body charged with administering the CCA. It also has a number of other competition-related functions under a wide range of other industry legislation. The ACCC is a powerful regulator, with broad discretions and a high profile.

Broadly, the ACCC's role includes:

- the enforcement of the anti-competitive conduct, consumer protection and unfair dealing provisions of the CCA. The ACCC has extensive investigation powers, including powers to compel companies to provide information and documents and to examine individuals under oath. However, the ACCC cannot make findings of illegality and impose penalties for a breach of the CCA itself – it must apply to the Australian Federal Court. The exception to this is in relation to certain consumer protection provisions where the ACCC has the power to issue infringement and substantiation notices, banning orders and public warnings. The ACCC's role in enforcement of the CCA is supplemented by the ability of private parties to take private actions under the CCA (other than seeking an injunction in relation to an anti-competitive merger);
- the assessment of mergers and acquisitions which might have the likely effect of substantially lessening competition. Although there is no compulsory pre-merger notification requirement, the ACCC will often investigate mergers and acquisitions that come to its attention, even where the merger parties may not have sought ACCC clearance. Parties can apply for the ACCC to assess mergers and acquisitions through its informal clearance process or the formal process which includes the option of seeking authorisation

on public benefit grounds and which can be appealed to the Tribunal;

- a range of regulatory functions under the general and telecommunications-specific access regimes, which relate to the terms and conditions upon which businesses competing in upstream and downstream markets will be granted access to services provided by essential infrastructure facilities (for example, telecommunications, electricity and gas transmission and distribution services, and railway lines); and
- prices surveillance including price notification, price monitoring and pricing inquiries.

A range of state regulatory bodies are responsible for administering state-based access regimes, and other industry-specific regulation.

Last updated: 01/03/2019

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