

AUSTRALIAN COMPETITION LAW

AND THE OUTLOOK FOR 2019

FEBRUARY 2019

CONTENTS

| | |
|---|----|
| KEY THEMES AND DEVELOPMENTS FROM 2018 | 3 |
| 2019: WHAT TO EXPECT | 4 |
| MAJOR CHANGES TO AUSTRALIA'S COMPETITION LAWS | 6 |
| EXPANDED MISUSE OF MARKET POWER TEST AND NEW CONCERTED PRACTICES PROHIBITION | 7 |
| NEW MERGER AUTHORISATION PROCESS | 8 |
| KEY ENFORCEMENT ACTIVITY AND PENALTIES | 10 |
| COMPETITION LAW PENALTIES: A COST OF DOING BUSINESS? | 12 |
| RECORD COMPETITION LAW PENALTY: YAZAKI | 13 |
| SCRUTINY OF AUSTRALIA'S FINANCIAL SERVICES INDUSTRY | 16 |
| BANKING ROYAL COMMISSION | 16 |
| PRODUCTIVITY COMMISSION INQUIRY | 18 |
| RESIDENTIAL MORTGAGE PRICE INQUIRY | 19 |
| THE DIGITAL ECONOMY | 20 |
| DIGITAL PLATFORMS THE FOCUS OF A "WORLD FIRST" INQUIRY | 21 |
| CONSUMER DATA RIGHT | 26 |
| OPEN BANKING REGIME | 27 |
| THE IMPACT OF COMPETITION POLICY ON DATA ACCESS AND MANAGEMENT | 28 |

KEY THEMES AND DEVELOPMENTS FROM 2018

MARKET STUDIES & INQUIRIES

Market studies and inquiries were a significant focus for the ACCC in 2018. This reflects a growing use of ACCC inquiries and market studies as a way to approach competition policy reform. The ACCC's inquiries into the communications sector, car detailing, insurance products in Northern Australia, digital platforms, residential mortgage products, gas, foreign currency conversion services, the retail electricity market and the dairy industry are examples of competition policy reform being conducted at an industry level.

ENFORCEMENT OF CARTELS AND HIGHER PENALTIES

The last couple of years have seen a focus by the ACCC on prosecuting criminal cartels. In 2017, NYK was fined \$25 million in Australia's first criminal cartel conviction, and criminal cartel proceedings are currently underway against Citigroup, Deutsche Bank, ANZ, CFMEU, the Country Care Group as well as against a number of senior executives from these companies.

We have also seen higher fines for competition law breaches and a willingness by courts to increase fines on appeal. In 2018 the highest penalty ever imposed for a breach of Australia's competition laws (\$46 million) was awarded by the Full Federal Court against Yazaki for cartel conduct. This was a significant increase from the fine of \$9.5 million that had been originally imposed by the Federal Court.

The ACCC has said that it will rethink its approach to penalties for breaches of the competition law following an OECD report which concluded that average Australian penalties are significantly lower than those imposed in comparable jurisdictions.

INCREASED PENALTIES FOR CONSUMER LAW BREACHES

Penalties for breaches of Australia's consumer law were increased in 2018 by legislative changes, which among other things, increased the maximum financial penalties for breaches of the consumer law to align them with the maximum penalty for competition law breaches being the greater of \$10 million, 3 x the benefit received, or, if the benefit cannot be determined, 10% of annual turnover in the preceding 12 months.

SCRUTINY OF AUSTRALIA'S FINANCIAL SERVICES INDUSTRY

Competition in Australia's financial services industry has been in the spotlight with the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**), the Productivity Commission's Inquiry into Competition in the Australian Financial System, The Treasury's Review into Open Banking, the ACCC's Inquiry into Residential Mortgage Products, as well as criminal cartel action against banks and executives from ANZ, Deutsche Bank and Citigroup. Responses to the Banking Royal Commission have affirmed the ACCC's position as a strong regulator, and more concerted efforts are to be expected in criminal and civil enforcement and in advocating for higher penalties.

In its final Inquiry Report into Competition in the Australian Financial System, the Productivity Commission recommended the ACCC take on the role of 'competition champion in the financial system'.

In its Review of the ACCC's 2017 Annual Report, the House of Representatives Standing Committee on Economics stated that it "shares the Productivity Commission's concern that the financial sector has been without a competition champion... and looks forward to the ACCC further developing in the role of competition champion."

(September 2018)



2019: WHAT TO EXPECT

ENFORCEMENT AND PENALTIES

- + Expect the ACCC’s focus on prosecuting criminal cartels to continue, as well as possible changes to the immunity policy to encourage the disclosure of cartels.

“Within the ACCC, we continue to build our capacity to undertake criminal cartel work and there is a team dedicated to investigating serious cartel cases for referral to the Commonwealth Director of Public Prosecutions, or CDPP. There are a number of such matters currently being considered by the CDPP . . .”
Rod Sims, August 2018

- + Rod Sims has said that there need to be higher penalties for breaches of the competition laws, and that the ACCC will be taking a firmer stance on sanctions and penalties. The ACCC will be looking at not only the conduct in question but also the relative size of the company.
- + In the area of consumer law, the ninefold increase in the maximum penalties for breaches of the consumer law will give courts more scope to award higher penalties, which are likely to be vigorously sought by the ACCC.

The ACCC now has a specialised Substantial Lessening of Competition Unit (SLC Unit) to focus on investigations that could give rise to enforcement action arising from the changes to the law from the Harper Review.

“[Y]ou can expect the ACCC to have very different discussions with you and your clients to resolve matters when it comes to agreed penalties.”
Rod Sims, August 2018

MERGERS

For non-contentious mergers, the trend towards confidential pre-assessments is likely to continue

The shift towards the ACCC undertaking more confidential pre-assessments of mergers (instead of public informal reviews) shows no signs of changing.

In financial year 2017-18,



The mergers that go to public review



“While the number of mergers we are assessing each year has tended to be relatively stable, the complexity and contentiousness of the relatively small number of transactions that now go to public review continues to trend upwards.”
Rod Sims, August 2018

More intrusive document and information requests

For mergers being publicly reviewed, parties should expect more intrusive requests from the ACCC (including notices requiring senior managers to appear to be examined) and significant document requests.

The ACCC is increasingly using its information gathering powers under s 155 for information, documents and oral examinations in public reviews. For example, in financial year 2017-18 it more than doubled the number of s 155 notices that it issued compared to the prior year.

Careful analysis by the ACCC of the structure and implementation of merger agreements

Recent “gun-jumping” proceedings brought against Cryosite Limited for alleged cartel conduct, and the ACCC’s proceedings against Pacific National and Aurizon show that the ACCC is also closely looking at the structure and implementation of merger agreements.

Increasing focus on importance of merging parties’ data

For example, the ACCC’s decision not to oppose the consortium acquisition of WestConnex toll road was conditional on the purchaser undertaking to provide access to toll road traffic data to third parties.

THE ACCC AS A “COMPETITION CHAMPION”



- + We expect the increasing profile and responsibilities of the ACCC as a “competition champion” in the economy to continue. With scrutiny on various Australian financial regulators during the course of the Banking Royal Commission, the ACCC received favourable coverage as an effective regulator. The Productivity Commission, for example, has recommended that the ACCC take on a designated role of “competition champion” in the financial system.

“The . . . ACCC is a natural fit for the role [as a competition champion in the financial system] due to its long standing expertise in competition issues and its emerging skill set in the financial system.”

Competition in the Australian Financial System, Productivity Commission Inquiry Report, No. 89, 29 June 2018

- + Reliance on the ACCC to promote competition not just through its enforcement or merger strategy, but also through analysis and recommendations for specific sectors in the economy is likely to continue, as most recently seen in the Productivity Commission's recommendations for the superannuation industry (Jan 2019).

CONSUMER DATA RIGHT AND OPEN BANKING



With the implementation of a new Consumer Data Right (CDR), beginning with the introduction of open banking in February 2020, the ACCC will be taking on a new responsibility as the lead regulator of the CDR, with rule-making and enforcement within its purview.

The ACCC expects that draft rules for the CDR will be published in the first quarter of 2019.

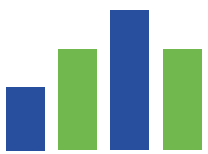
“The environment in which regulators operate has changed on a number of fronts. For example the [Banking Royal Commission] hearings have highlighted the importance of a strong regulatory framework and regulator action to provide confidence to the public and to correct emerging conduct.”

ACCC and AER Annual Report 2017-18



MAJOR CHANGES TO AUSTRALIA'S COMPETITION LAWS

Significant changes to Australia's competition laws came into effect in late 2017. The effect of these changes on ACCC enforcement efforts is still to be seen, but the ACCC has said it is looking for opportunities to test the new provisions.



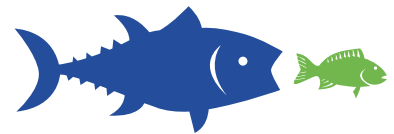
A new, broader effects test for misuse of market power

Previously businesses were prohibited from misusing their market power for the purpose of substantially lessening competition. There is now a broader and more uncertain test which captures conduct (by a corporation with market power) that has the purpose, **effect** or **likely effect** of substantially lessening competition. The "taking advantage of" filter has been removed.



A new concerted practices prohibition

The new prohibition against concerted practices addresses the difficulty that the ACCC had in demonstrating that a "contract, arrangement or understanding" exists. The new prohibition is aimed at businesses that might privately or publicly disclose competitively sensitive information or take other coordinated action that has a purpose or likely effect of substantially lessening competition, but which falls short of the reciprocity required to show a "contract, arrangement or understanding".



Merger process

The formal merger clearance and authorisation processes have been amalgamated into a single formal process administered by the ACCC. The option of applying directly to the Australian Competition Tribunal for merger authorisation at first instance has been abolished.



Resale price maintenance

Resale price maintenance remains prohibited, but businesses can notify the ACCC if they wish to engage in the conduct. After a valid notification, if the ACCC does not issue a draft notice objecting to the notification within 14 days, the resale price maintenance conduct will be protected from legal action.



Third line forcing

Third line forcing is no longer prohibited per se and is instead subject to a substantial lessening of competition test.



Access to infrastructure

There are changes to the National Access Regime to promote investment in new infrastructure, but potentially at the expense of access seekers.

EXPANDED MISUSE OF MARKET POWER TEST AND NEW CONCERTED PRACTICES PROHIBITION

NEW MISUSE OF MARKET POWER TEST

KEY TAKEAWAYS

- + Conduct by a corporation with a substantial degree of power in a market that has the effect or likely effect of substantially lessening competition may breach s 46, even if this was not the purpose of the conduct
- + Corporations with substantial market power should assess the effect/likely effect of their conduct on competition, even when there are legitimate and pro-competitive reasons for doing so. This is particularly so if they price below cost, use bundling or loyalty discounts, buy up potentially scarce inputs, or refuse to supply competitor(s)
- + Having a legitimate business reason for the conduct is not a defence. The ACCC's Misuse of Market Power Guidelines state that while a firm's commercial rationale may help the ACCC to understand the conduct and assess its purpose/effect on competition, it is not a defence
- + Employees and representatives should continue to avoid making communications or statements that could be interpreted as demonstrating an anti-competitive purpose
- + Guidelines should be implemented for when to escalate decisions concerning higher risk conduct (eg guidance about which projects and decisions need input from the legal team or approval by senior management)
- + While authorisation from the ACCC for conduct that may breach s 46 is available, it is unlikely to be used often as proving that the public benefits from the proposed conduct will outweigh the public detriment from a potential misuse of market power is likely to be challenging.

CONCERTED PRACTICES

KEY TAKEAWAYS

- + Businesses should be careful that in their interactions with competitors they do not – even unilaterally – share information that could facilitate conduct by their competitors that may have the effect of substantially lessening competition
- + Businesses should satisfy themselves that any commercially sensitive information that they share with a third party (such as an industry body) is handled confidentially, as indirect information exchanges could potentially form the basis of a concerted practice
- + According to the ACCC, a concerted practice doesn't require reciprocity – even a 'one way' communication with a competitor may be a concerted practice
- + There is no requirement that persons engaging in the concerted practice are competitors or potential competitors. Other parties such as suppliers, distributors, industry associations and consultants could also engage in a concerted practice
- + The ACCC's Concerted Practices Guidelines provide more information on how it plans to interpret and enforce the new prohibition, and identify when a concerted practice has occurred.

NEW MERGER AUTHORISATION PROCESS

Changes to the merger provisions now provide a new route of merger authorisation by the ACCC but have closed the path of obtaining authorisation directly from the Australian Competition Tribunal.

On 24 October 2018, the ACCC released updated Merger Authorisation Guidelines which shed light on how the ACCC proposes to assess applications for merger authorisation under the new test.

The key elements of the changes are

- + The ACCC now has the power under s 90(7) to authorise a proposed merger or acquisition if it is satisfied that it:
 - will not (or is not likely to) substantially lessen competition; or
 - is likely to result in a net public benefit (ie, public benefit outweighs public detriment)
- + The existing informal merger clearance process remains and parties can choose whether to seek authorisation or informal merger clearance
- + There is a 90 day statutory time frame for the ACCC to determine a merger authorisation, which can be extended with agreement from the applicant
- + Merger parties can no longer seek authorisation in the Tribunal in the first instance, but they can apply for a review of the decision by the Tribunal

WHAT THIS MEANS

the ability to present a public benefits case to the ACCC without the need to go through the full Tribunal process can be viewed as a positive

however, the option of going straight to the Tribunal was being increasingly used, as the Tribunal was seen as a viable alternative to the ACCC

In potentially controversial mergers, parties seeking authorisation should consider preparing and presenting information to the ACCC with the potential for a Tribunal review in mind, including the preparation of witness statements, economic reports and the presentation of any data that supports the parties' case. The Tribunal has a strong track record of authorising mergers on public benefits grounds which the ACCC has opposed on competition grounds. Whether the ACCC will be as willing to authorise mergers on public interest remains to be seen.

OPTIONS FOR MERGER CLEARANCE UNDER NEW MERGER AUTHORISATION PROCESS, AT A GLANCE

| Option | Test | Timeframe | Outcome | Appeal |
|------------------------------|--|--|---|---|
| 1. Informal merger clearance | Does the acquisition have the effect of substantially lessening competition in any market? | Pre-assessment: 2-4 weeks (indicative) Phase 1 (if no Statement of Issues): 6-12 weeks (indicative) Phase 2 (if Statement of Issues): further 6-12 weeks (indicative) Allow additional time for s 155 notices and other 'clock stops' for additional information requests or negotiation of undertakings → up to 9 months for complex mergers | Letter of comfort from ACCC saying that it intends to take no action in relation to the proposed merger or acquisition. Residual possibility of actions brought by third parties, but largely theoretical. | No appeal rights. However, could decide to seek ACCC authorisation if informal clearance is unsuccessful or it appears likely to be part way through the process. Would need evidence of strong public benefit to counter the ACCC's views on lessening of competition. |
| 2. Merger authorisation | Does the acquisition have the effect or the likely effect of substantially lessening competition in any market? or Is the acquisition likely to result in a net public benefit (ie that outweighs any lessening of competition)? | 90 days statutory time frame. Parties can agree in writing to extensions of time prior to expiration of 90 days If parties do not agree to an extension of time and the ACCC has not made a decision, it is deemed to have refused the Application. There is the theoretical risk that the ACCC can repeatedly extend its review time and applicants will be left with no choice but to agree to those extensions or else risk a negative decision. However, in other authorisation contexts the ACCC has generally been diligent in complying with statutory time frames. In practice, this means that merger authorisation may give the parties more certainty as to timing and a shorter time frame compared with current average time frames for informal merger clearance. → 90 days subject to extension | Immunity from action by the ACCC and third parties in relation to the merger or acquisition, subject to any conditions. | Limited merits review by the Tribunal: Tribunal can agree to, or request, the admission of additional information that was not available at the time of the ACCC's decision or to address new circumstances. 90 day time limit. Time limit extended to 120 days where new information is admitted. |

KEY ENFORCEMENT ACTIVITY AND PENALTIES

CARTEL CONDUCT – CRIMINAL

NIPPON YUSEN KABUSHIKI KAISHA PTY LTD (NYK)

Nippon Yusen Kabushiki Kaisha Pty Ltd (NYK) was fined \$25 million in August 2017 in relation to alleged cartel conduct in connection with the transportation of vehicles, including cars, trucks, and buses, to Australia over a three year period. This was Australia's first criminal cartel conviction.

COUNTRY CARE GROUP

Criminal charges were laid against Country Care Group, its managing director and a former employee in February 2018 for alleged cartel conduct involving assisted technology products used in rehabilitation and aged care. This is the first criminal prosecution of an Australian company and individual.

KAWASAKI KISEN KAISHA (K-LINE)

In April 2018 Kawasaki Kisen Kaisha (K-Line) pleaded guilty to being involved in alleged cartel conduct in connection with the transportation of vehicles, including cars, trucks and buses. A sentencing hearing was held in November 2018. This case is only the second guilty plea to be entered in relation to criminal cartel conduct. The sentencing decision is currently pending.

CFMMEU AND ACT BRANCH SECRETARY

Criminal charges were laid against the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and its ACT Divisional Branch Secretary in August 2018 for attempting to induce suppliers of steel fixing and scaffolding services to reach a cartel for services provided to builders in the ACT in 2012 to 2013.

RAMSAY HEALTH CARE AUSTRALIA PTY LTD

Proceedings were instituted in May 2017 against Ramsay Health Care Australia Pty Ltd, alleging that it had engaged in anti-competitive conduct involving misuse of market power and exclusive dealing in the Coffs Harbour region of New South Wales. Ramsay operates the only two private day surgery facilities in that region. The hearing is scheduled for February 2019.

CARTEL CONDUCT – CIVIL

ANZ, CITIGROUP & DEUTSCHE BANK

In June 2018 criminal cartel charges were laid against ANZ, Citigroup, Deutsche Bank and ANZ, as well as six current and former senior executives from those companies for alleged cartel conduct in relation to trading in ANZ shares held by Deutsche Bank and Citigroup following an ANZ institutional share placement in August 2015.

“The ACCC is increasing its enforcement activities, and taking a firmer stance on sanctions and penalties with a view to making an even greater impact on compliance.”

Rod Sims, August 2018

MISUSE OF MARKET POWER

FLIGHT CENTRE

In April 2018, travel agent, Flight Centre, was ordered to pay penalties on appeal totalling \$12.5 million for attempting to induce three international airlines to enter into price fixing arrangements between 2005 and 2009. This penalty was a slight increase from the original \$11 million imposed on Flight Centre in March 2014.

YAZAKI CORPORATION

Yazaki Corporation was ordered to pay \$46 million in May 2018 for collusive conduct involving coordinating quotes with a competitor for the supply of wire harnesses used in the manufacture of Toyota Camrys. This is the largest penalty for a breach under the CCA. The original penalty of \$9.5 million was appealed by the ACCC.

AIR NEW ZEALAND

In June 2018 Air New Zealand was ordered to pay \$15 million for its involvement in a global air cargo cartel. Air New Zealand agreed to fix the price of insurance and security charges and the price of fuel and insurance surcharges for freight services with other airlines between 2002 and 2007.

PACIFIC NATIONAL & AURIZON

Proceedings were instituted in July 2018 against Pacific National and Aurizon for allegedly arriving at and giving effect to an anti-competitive agreement with the purpose and/or likely effect of substantially lessening competition in the supply of intermodal and steel rail linehaul services, in the context of M&A negotiations. The hearing commenced in November 2018.

CRYOSITE LIMITED

In July 2018 the ACCC brought proceedings against Cryosite Limited for alleged cartel conduct in relation to the implementation of an asset sale agreement before regulatory approval was obtained and the transaction completed. This represents the first case brought by the ACCC alleging 'gun jumping' in a merger.

MERGER ENFORCEMENT

PFIZER

In May 2018, the Full Federal Court dismissed the ACCC's allegations against Pfizer Australia Pty Ltd that it had misused its substantial market power and engaged in exclusive dealing conduct for an anti-competitive purpose. (The misuse of market power allegations were brought under the previous provision). The court found that Pfizer took advantage of its substantial market power but not for a proscribed anti-competitive purpose (as required by the old test). The ACCC unsuccessfully sought special leave from the High Court to appeal the Full Federal Court's decision. The result of this case may, however, potentially have been different under the new misuse of power provision which considers both purpose and the likely effect of the conduct.

EXCLUSIVE DEALING

PALRAM, AMPELITE & OAKMORE

In August and September 2018 the Federal Court imposed penalties on Palram Australia (\$3.5 million), Ampelite Australia (\$2 million), and Oakmoore, trading as EGR (\$6 million) in relation to exclusive dealing agreements/conduct between the parties to acquire Polycarb (polycarbonate roofing) from EGR on the condition that EGR would not supply Polycarb to retail stores in competition with it.

COMPETITION LAW PENALTIES: A COST OF DOING BUSINESS?

In March 2018, the OECD released its report, *Pecuniary Penalties for Competition Law Infringements in Australia*, which compared maximum and average pecuniary penalties imposed for competition law infringements in Australia with other comparable OECD jurisdictions. The Report concludes that Australian pecuniary penalties are lower than in the comparator jurisdictions it considered, and argues that this potentially limits Australia’s ability to enhance deterrence of anticompetitive conduct.

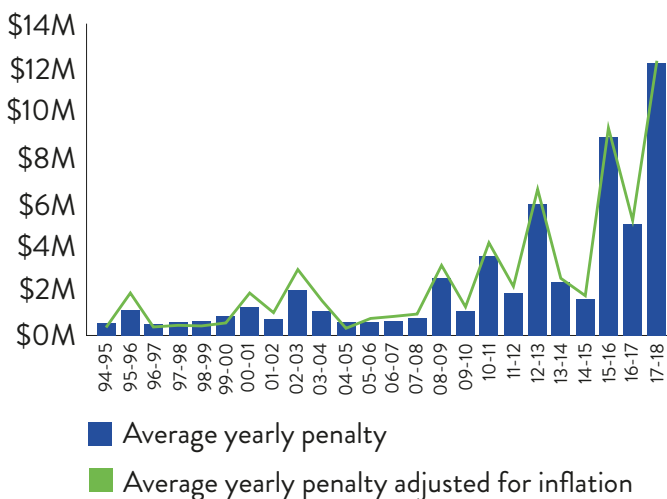
Speaking at the Report’s release, ACCC Chair, Rod Sims, said that this disparity is “*extremely concerning, as it must limit the effective deterrence of sanctions for competition law contraventions in Australia*”. Mr Sims also said that pecuniary penalties should not “*be seen as an acceptable cost of doing business in Australia*”.

Although pecuniary penalties may be comparatively lower than in the OECD’s comparator jurisdictions, Australian pecuniary penalties are on the rise, and have been for some time:

By focusing on the magnitude of corporate pecuniary penalties, the OECD and ACCC are focusing on these as a key measure of how an effective deterrence regime should be assessed. However, assessing the effectiveness of an enforcement regime is more complex. Other ways to evaluate Australia’s ability to deter competition law infringements could include measures of organisational and industry recidivism as indicators of specific and general deterrence, measures of time between reoffending, analyses of the sources of offending conduct, and studies analysing corporate knowledge of and attitudes towards competition laws – as opposed to a concentration on the magnitude of penalties awarded.

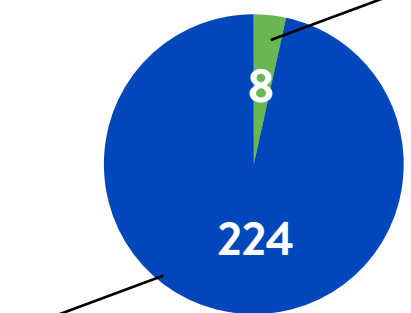
Our analysis of recidivism by companies for competition law breaches indicates there is low recidivism for cartel conduct in Australia, with only 8 out of a total of 232 (3.45%) corporate respondents against whom penalties were awarded between July 1994 and June 2018 being penalised again for anti-competitive conduct:

AVERAGE PENALTIES BY FINANCIAL YEAR



CORPORATE COMPETITION LAW BREACHES

Corporations that were penalised for competition law contraventions more than once (3.45%)



Corporations that were penalised for competition law contraventions once (96.55%)

“We do not want the penalties for breaches of our competition laws to be seen as an acceptable cost of doing business in Australia.”

Rod Sims, March 2018

It is important to remember that penalties and sanctions are only a few of the many ways authorities may seek to achieve compliance and deterrence. A proper debate about deterrence should consider other tools to achieve compliance such as ensuring effective corporate governance and attitudes, education, community attitudes and other means.

RECORD COMPETITION LAW PENALTY

“The ACCC is increasing its enforcement activities, and taking a firmer stance on sanctions and penalties with a view to making an even greater impact on compliance.”

Rod Sims, August 2018

The ACCC commenced proceedings against Yazaki in December 2012 alleging a cartel concerning the supply of wire harnesses for motor vehicles between two Japanese Corporations (Yazaki Corporation and Sumitomo Electric Industries Ltd) and their wholly owned Australian subsidiaries.

Wire harnesses are electrical systems that facilitate the distribution of power and send electrical signals to various components of a motor vehicle. Yazaki and Sumitomo are two of the five main manufacturers of wire harnesses globally.

Sumitomo and its subsidiary cooperated with the ACCC’s investigation.

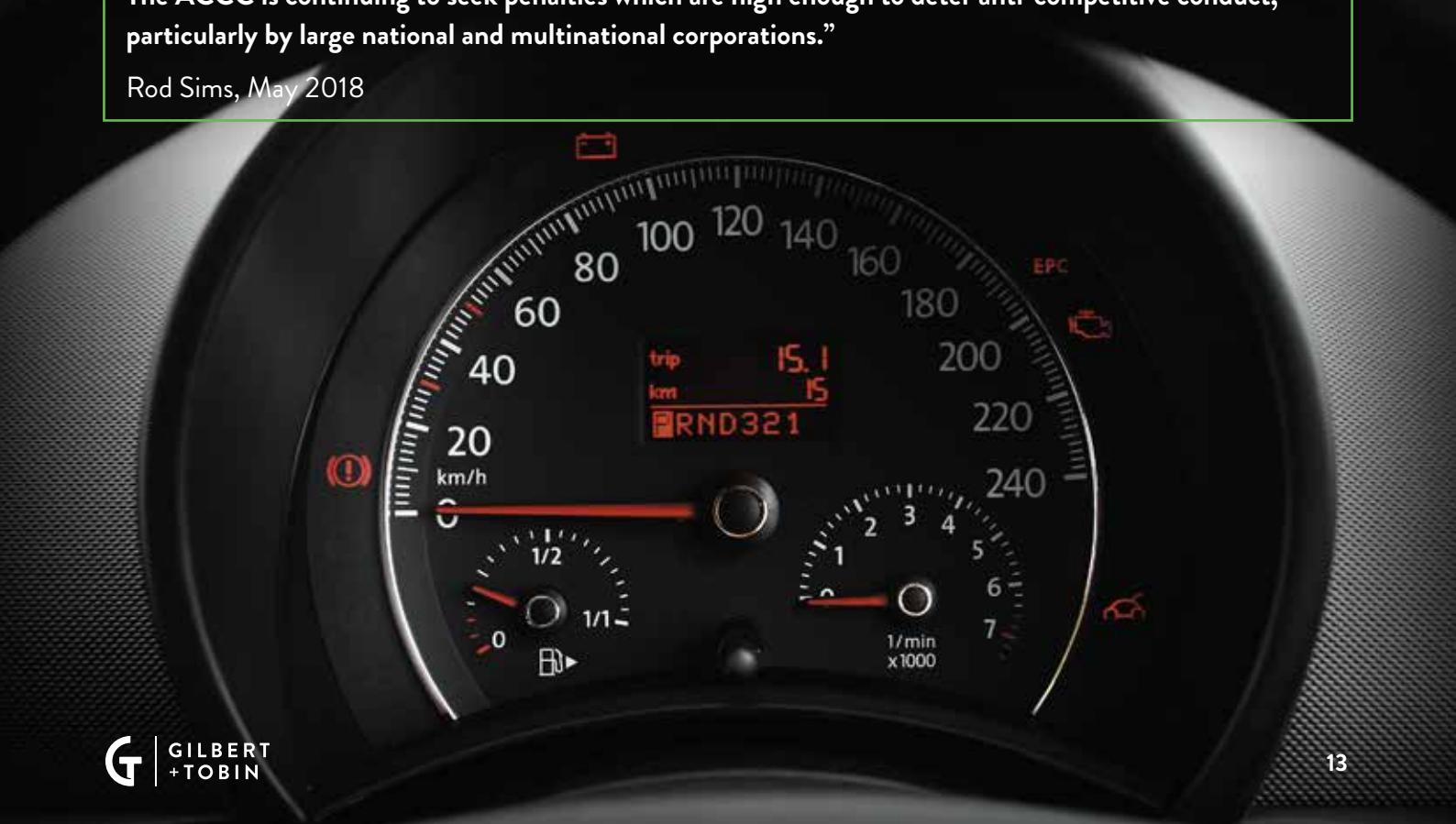
The trial judge found that Yazaki engaged in cartel conduct between 2003 and 2008 by making and giving effect to arrangements with a competitor, including the coordination of quotes to Toyota for the supply of wire harnesses used in the manufacture of the Toyota Camry.

The trial judge ordered Yazaki pay penalties totalling \$9.5 million. The ACCC appealed this amount arguing it was insufficient to adequately deter Yazaki given the serious nature of its actions and the size of their global operations.

The Full Court increased Yazaki’s penalty to \$46 million. This is the highest penalty awarded under Australia’s competition laws, and is \$10 million higher than the next highest penalty imposed.

“... it is of considerable importance that penalties imposed by the Courts are large enough to act as a sufficient deterrent to prevent companies and their employees contravening Australia’s competition laws. The ACCC is continuing to seek penalties which are high enough to deter anti-competitive conduct, particularly by large national and multinational corporations.”

Rod Sims, May 2018



FIRST AUSTRALIAN M&A GUN-JUMPING CASE

ACCC v Cryosite Limited

KEY TAKEAWAYS

In July 2018, the ACCC instituted proceedings in the Federal Court against Cryosite Limited for alleged cartel conduct in relation to its entry into an asset sale agreement with Cell Care Australia Pty Ltd (Cell Care).

The ACCC claims that Cryosite and Cell Care were, until August 2017, the only two private suppliers in Australia for services involving the collecting, processing, storing and releasing of CBT, which is sourced from a newborn child's umbilical cord. CBT is rich in stem cells and may be used for later treatment.

While commonly prosecuted in other jurisdictions around the world, this is the first time the ACCC has brought cartel proceedings for “gun-jumping”, that is, for coordination of business activities, including by restricting competitive conduct and illegitimate information exchanges, between a buyer and a target prior to regulatory approval and completion of a merger, while they are still independent competitors.

While parties to a proposed merger will often need to plan for the integration of their businesses ahead of completion and prior to obtaining clearance from the ACCC (particularly in relation to back office and IT functions), and the buyer will want to ensure that the value of the target's business is preserved until after completion, the ACCC's civil prosecution of Cryosite Limited (Cryosite) and Cell Care Australia Pty Ltd (Cell Care) illustrate the care that must be taken to ensure that doing so does not give rise to “gun jumping” concerns under the *Competition and Consumer Act 2010* (Cth) (CCA).

THE ACCC'S ALLEGATIONS

Between January and June 2017, Cryosite and Cell Care allegedly negotiated the sale of certain assets used in Cryosite's cord blood and tissue (CBT) banking services and, during this time, Cryosite did not make any public announcements about the future of its CBT banking services. It is claimed the parties were aware that the ACCC might scrutinise their proposed transaction.

The parties entered into an asset sale agreement (ASA) on 23 June 2017, however it is alleged that earlier that month the parties discussed Cryosite announcing that it had decided to close part of its CBT banking business before entry into the ASA occurred. The ACCC claims this extended to Cell Care proposing Cryosite amend its announcement of entry into the ASA to state it had entered into the ASA “consequently” to a decision to cease marketing, selling, collecting and processing CBT.

The ACCC also claims the parties agreed Cryosite's announcement would state that this “transaction delivers attractive financial returns to Cryosite shareholders for exiting the challenging aspects of the Cord Blood and Tissue business”. The ACCC claims this announcement is the first time that Cryosite publicly announced that it would cease marketing, selling, collecting and processing CBT banking services.

Following the announcement of the entry into the ASA, the ACCC commenced a review of the proposed asset sale under the ASA. The ACCC began conducting a public merger review of the proposed sale under the ASA in October 2017 before discontinuing its review in December 2017.

In the course of its public merger review, the ACCC raised concerns that cartel conduct may have been engaged in by the parties. As a result, in September 2017, the parties executed a deed of variation deleting certain clauses, including clause 5.1 of the ASA.

When it discontinued its public merger review, the ACCC noted that it was both concerned that the parties to an acquisition in a highly concentrated market did not contact the ACCC and that it was continuing its investigation into the ASA. In January 2018, Cryosite announced the proposed acquisition would not be completed.

The alleged cartel conduct

According to the ACCC, there were two clauses in the ASA that contained cartel provisions:

- + **clause 5.1:** During the period between execution of the ASA on 23 June 2017, and the date of completion, Cryosite agreed to refer all sales inquiries in relation to its CBT banking business to Cell Care (**Customer Referral Requirement**); and
- + **clause 18:** Cell Care undertook not to seek or accept an approach from any Cryosite customers who had CBT stored with Cryosite in the five years preceding completion of the ASA. This restraint applied for a period commencing five years from the date of execution of the ASA and ending 6, 12 or 18 months later. It applied at its narrowest in relation to conduct in New South Wales and, at its broadest, in relation to conduct in Australia (**Non-Compete Clause**).

The ACCC alleges that Cryosite gave effect to the Customer Referral Requirement in essentially three ways:

- + first, by establishing a process where Cryosite staff would refer customer inquiries, and customers who made contact with Cryosite, to Cell Care;
- + second, by Cryosite reporting to Cell Care on the customers which were referred to Cell Care; and
- + third, by Cryosite ceasing to provide CBT banking services to new customers.

The ACCC alleges that Cryosite and Cell Care also reached an understanding or arrangement in June 2017 for Cell Care not to market to Cryosite's existing customers. The ACCC alleges this understanding or arrangement was given effect to by Cryosite requesting that Cell Care amend information on its website which related to an offer for Cryosite customers to obtain a particular genetic test.

The ACCC claims that the purpose of the Customer Referral Requirement, the Non-Compete Clause and the alleged understanding or arrangement reached in June 2017 was to directly or indirectly restrict or limit the supply or likely supply of CBT banking services, or, to allocate potential customers between Cryosite and Cell Care.

Finally, the ACCC claims that Cryosite has not since re-entered the market and has retained \$500,000 it received from Cell Care upon signing the ASA.

“Merger parties should be aware that we do not just take a narrow merger assessment during our reviews and will consider any other related agreements to determine whether they would, combined with the acquisition, be likely to SLC or whether separately they potentially breach other provisions in the CCA. The recent Cryosite case is an example of the latter...”

Rod Sims, August 2018



SCRUTINY OF AUSTRALIA’S FINANCIAL SERVICES INDUSTRY

Competition in Australia’s financial services industry was subject to significant review and inquiry in 2018, and this is likely to continue in 2019 with likely increased regulation and enforcement.

THE BANKING ROYAL COMMISSION

The Royal Commission into Misconduct in the Banking, Superannuation and the Financial Services Industry (**Banking Royal Commission**) was established on 14 December 2017 and was conducted by former High Court judge, the Honourable Kenneth Hayne AC QC. The Commission's work spanned more than 12 months.

A final report was publicly released on 1 February 2019.

THE TERMS OF REFERENCE

The Terms of Reference included:

- + the conduct of financial services entities (including their directors, officers, employees and anyone acting on behalf of the entities), and whether it might have fallen below community expectations and standards and/or amounted to misconduct
- + the use of superannuation members’ retirement savings by financial services entities
- + the effectiveness of mechanisms of redress for consumers of financial services who suffer detriment as a result of misconduct by financial services entities
- + the adequacy of:
 - existing laws and policies relating to banking, superannuation and financial services
 - internal systems of financial services entities
 - forms of industry self-regulation, including industry codes of conduct
- + the ability and effectiveness of regulators to identify and address misconduct by financial services entities
- + whether changes to the laws, the financial regulators and the practices within financial services entities are necessary to minimise the likelihood of misconduct by financial services entities in the future

AT A GLANCE

The Commissioner made 76 recommendations

| Category | Number of Recommendations |
|--------------------------------------|---------------------------|
| Regulators | 14 |
| Remuneration, culture and governance | 7 |
| Consumer lending | 8 |
| Small business lending | 8 |
| Financial advice | 14 |
| Superannuation | 9 |
| Insurance | 15 |
| Other | 5 |

Key Themes

- Simplification of laws
- Regulators’ enforcement culture
- Role of remuneration in culture and governance
- Managing conflicts of interest and non-financial risks
- Leadership and responsibility
- Power

“Misconduct will be deterred only if entities believe that misconduct will be detected, denounced and justly punished.”

Banking Royal Commission
Final Report

ROYAL COMMISSION FINAL REPORT

The Report (which is over 1000 pages long) will no doubt lead to significant debate and important change among lawmakers, industry, regulators and the community. In the Commissioner's view, much of the potential misconduct identified by the Commission was already contrary to the law. Consistent with that, many of the recommendations focus on enforcing, and complying with, existing laws, including by:

- + focusing on culture, governance and non-financial risks within financial services entities, including by reviewing remuneration and incentive structures (which the Commissioner concludes were key factors in much of the misconduct identified);
- + changing the enforcement culture among regulators – promoting litigation as the default enforcement outcome (rather than negotiated outcomes, infringement notices and enforceable undertakings);
- + reducing the power imbalance between financial services entities and consumers; and
- + simplifying (rather than adding to) the matrix of financial services laws.

By contrast, structural changes recommended by the Report are more limited. For example, having examined these matters in length during the hearings and through submissions, the Report does not recommend:

- + mandated changes to remuneration structures (beyond existing recommendations put forward by the Sedgwick review);
- + restructuring or reallocating ASIC's regulatory remit;
- + changes to the use of benchmarks or other significant changes to responsible lending laws and processes;
- + applying the consumer lending 'responsible lending' obligations to small business lending; or
- + structural changes which would prohibit vertical integration in financial advice and superannuation businesses, or prohibit for-profit superannuation funds.

That said, the Report makes a number of recommendations which would have significant and immediate effects to financial services entities and the industry if implemented.

Key recommendations include:

- + changes to the mortgage broking model, including payment of broker fees by borrowers rather than lenders, and the imposition of financial advice-style obligations on brokers. The Government has indicated, though, that it will not adopt this recommendation in light of the anticipated effects on competition;
- + removal of the point of sale exemption for retail car dealers, which would require car dealers to adhere to responsible lending obligations if facilitating auto loans (and, if applied more broadly, this reform could extend the same obligations to anyone offering credit at the point of sale, such as department stores and other retail vendors);
- + reforms to ongoing financial advice fees, including requiring an annual 'opt-in' by the client (the Commission having examined 'fee for no service' issues in detail and being highly critical of a number of organisations in the Report);
- + prohibiting 'dual regulated entity' structures (for example, where one entity is both a superannuation trustee and responsible entity of a managed investment scheme); and
- + removing exceptions to prohibitions on conflicted remuneration. The Government has already announced that it intends to remove grandfathered exceptions by 2021.



THE PRODUCTIVITY COMMISSION INQUIRY INTO COMPETITION IN THE AUSTRALIAN FINANCIAL SYSTEM

On 3 August 2018, the Productivity Commission released the Final Report of its inquiry into ‘Competition in the Australian Financial System’, with a view to improving consumer outcomes, the productivity and international competitiveness of the financial system and economy more broadly, and supporting ongoing financial system innovation, while balancing financial stability objectives.

“**The Australian Competition and Consumer Commission (ACCC) is a natural fit for the role [of competition champion in the financial system] due to its long standing expertise in competition issues and its emerging skill set in the financial system. It has enthusiasm for the role and that will be important to sustaining it in the face of a regulatory culture of indifference or hostility to competition**”

Key recommendations include

- + **Market Studies:** The ACCC should undertake 5-yearly market studies on the effect of vertical and horizontal integration on competition in the financial system
- + **Open Banking:** The Open Banking system proposed for Australia should be implemented in a manner that enables the full suite of rights for consumers to access and use digital data
- + **Commission clawbacks:** The Government should extend the ban on early exit fees to explicitly prohibit commission clawbacks being passed on to borrowers
- + **Best interest obligations:** The Government should amend the National Consumer Credit Protection Act to impose best interest obligations on licensees that provide credit or credit services in relation to home loans
- + **Principal Integrity Office:** The Government should mandate the appointment of a Principal Integrity Office in parent financial entities
- + **Additional disclosure methods:** The ACCC, in consultation with ASIC, should investigate what additional disclosure methods could be used to improve consumer understanding and comparison of fees for foreign transactions levied by ADIs and other payment providers
- + **ePayments Code:** ASIC should be given the power to make the ePayments Code mandatory for any organisation that sends or receives electronic payments
- + **ACCC as a competition champion:** The ACCC should be given a mandate by the Australian Government to champion competition in the financial system. The role should be implemented through the Council of Financial Regulators by making the ACCC a permanent member

Notably, according to the Productivity Commission, there is no entity in Australia’s regulatory system with clear ability to do more than react to abuses of dominant firm behaviour. The Commission proposed that the answer to this regulatory shortcoming is a new role for the ACCC in the financial system: a ‘competition champion’.

THE ACCC'S RESIDENTIAL MORTGAGE PRICE INQUIRY

On 9 May 2017, the Treasurer directed the ACCC to conduct an inquiry into the prices charged or proposed to be charged by five major banks affected by the Major Bank Levy – ANZ, CBA, Macquarie Bank, NAB and Westpac – in relation to the provision of residential mortgage products in the banking industry between 9 May 2017 and 30 June 2018.

Combined, these five banks held over \$1.3 trillion in outstanding residential mortgages as at July 2018.

On 19 November 2018, the ACCC provided the Final Report of its Residential Mortgage Price Inquiry to the Treasurer. The ACCC's main findings were that:

- + Discretionary discounting of residential mortgage pricing increases the difficulty, time and cost for borrowers to shop around, leading to inefficiency and stifling competition;

“Pricing for mortgages is opaque and the big four banks have a lot of discretion. The banks profit from this and it is against their interests to make pricing transparent.”

Rod Sims, December 2018

- + New borrowers pay lower interest rates than existing borrowers on average;

“I encourage more people to ask their lender whether they are getting the lowest possible interest rates for their residential mortgage and, as they do so, be ready to threaten to switch to another lender.”

Rod Sims, December 2018

- + There was no evidence that the five inquiry banks changed prices specifically to recover the costs of the Major Bank Levy, whether in part or in full, during the price monitoring period;
- + APRA's requirements announced in March 2017 that the banks cap new interest only lending, resulted in all banks increasing interest only mortgage rates;

“We were not surprised banks seized the opportunity to increase prices for interest-only loans. These price rises were enabled by the oligopoly market structure in which the big four banks collectively have a market share of about 80 per cent.”

Rod Sims, December 2018

- + There was greater diversity amongst non-Inquiry banks in their pricing strategies compared to the big four banks; and
- + The ACCC also noted that the new Consumer Data Right (CDR) will make it much easier for consumers to compare available interest rates.

SPOTLIGHT

THE DIGITAL ECONOMY

DIGITAL PLATFORMS THE FOCUS OF A “WORLD FIRST” INQUIRY

“The ACCC is playing an increasing role in regulation in relation to the digital economy, with it leading the consumer data right implementation, and the digital platforms inquiry (DPI).”

Rod Sims, August 2018

On 4 December 2017 the Treasurer issued Terms of Reference (**ToR**) to the ACCC, directing it to conduct an 18 month long public inquiry into the impact of digital platform services on the state of competition in media and advertising services markets, pursuant to s 95H(1) of the Competition and Consumer Act (**CCA**).

In 2017, ACCC Chair Rod Sims called this a “world first” inquiry of its kind into digital platforms that goes to “the heart of their business models”.

“Our work here [in the digital platforms inquiry] will focus on improving transparency, assessing potential breaches of the CCA and, crucially, making recommendations to government.”

Rod Sims, August 2018

TERMS OF REFERENCE

The ToR direct the ACCC to look at the impact of digital search engines, social media platforms and other digital content aggregation platforms (**PSPs**) on media and advertising, particularly in relation to the supply of news and journalistic content, and implications of this for media content creators, advertisers and consumers.

The ToR include, but are not limited to:

1. The extent to which PSPs are exercising market power in commercial dealings with the creators of journalistic content and advertisers
2. The impact of PSPs on the level of choice and quality of news and journalistic content to consumers
3. The impact of PSPs on media and advertising markets
4. The impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets
5. The impact of information asymmetry between PSPs, advertisers and consumers and the effect on competition in media and advertising markets

ISSUES PAPER

The issues paper sought public feedback on issues such as:

- 1 whether digital platforms have market power in their dealings with media content creators and advertisers and the implications of this for competition
- 2 to what extent consumers understand what data is being collected about them by digital platforms, and how this information is used
- 3 whether the digital platforms have an unfair competitive advantage as a result of unequal treatment of regulation
- 4 how technological change and digital platforms have changed the media and advertising services markets, including the ability to produce quality news and journalistic content for Australians
- 5 how the use of algorithms affects the curation of news for digital platform users

On 3 May 2018, the ACCC published 75 submissions to the inquiry received from advertisers, consumers, digital platforms, journalists and media organisations.

The ACCC also held stakeholder forums for consumers, corporate stakeholders, journalists and advertisers, commissioned consumer research and used its broad investigation powers under s 95ZK of the CCA to gather information from digital platforms, media publishers and advertisers.

FINDINGS AND PRELIMINARY RECOMMENDATIONS

The ACCC's preliminary report and findings was publically released on 10 December 2018. The final report is due by 3 June 2019.

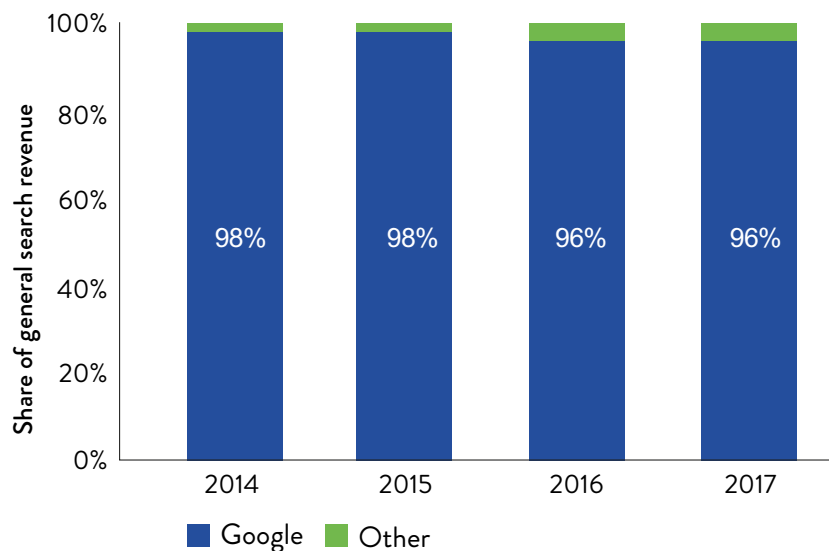
FINDINGS

Google and Facebook have market power

The ACCC's key finding is that Google and Facebook have substantial market power in Australia. It is therefore proposing far-reaching and unprecedented reforms to the way digital platforms are regulated under Australia's competition and consumer laws. This stark conclusion rests on the following primary factual findings:

- + Google has a dominant share of search services and search advertising in Australia (ACCC Figure 2.7); and

FIGURE 2.7 SHARE OF GENERAL SEARCH ADVERTISING REVENUE IN AUSTRALIA



“The ACCC considers that the strong market position of digital platforms like Google and Facebook justifies a greater level of regulatory oversight.”

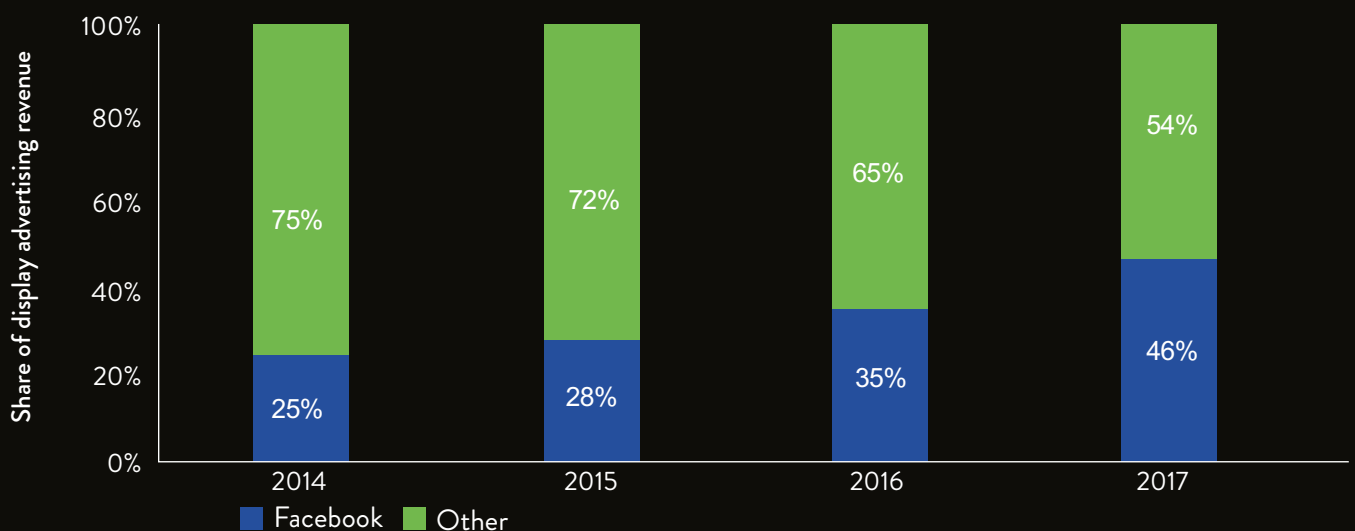
Rod Sims, December 2018

“Australian law does not prohibit a business from possessing significant market power or using its efficiencies or skills to ‘out compete’ its rivals. But when their dominant position is at risk of creating competitive or consumer harm, governments should stay ahead of the game and act to protect consumers and businesses through regulation.”

Rod Sims, December 2018

+ Facebook has a unique audience more than three times that of Snapchat, which the ACCC describes as its ‘closest competitor’, and a 46% share of digital display advertising with no other provider having more than 5%.

FIGURE 2.9 SHARES OF DIGITAL DISPLAY ADVERTISING REVENUE IN AUSTRALIA



Source: ACCC analysis based on data provided to the ACCC.

Australian law does not prohibit a firm from having market power. However, in this instance the ACCC has formed the view that the market power of Google and Facebook needs to be managed, which is the basis for the ACCC’s key recommendations in the report.

PRIVACY CONCERNS

In addition to its findings on market power, the ACCC recognises that in today’s digital economy, where ‘data is king’, increasing consumer privacy concerns about how personal information and other forms of data are being collected and used by digital platforms are related to issues of a lack of informed and genuine consumer choice. The ACCC considers that complex and opaque online terms and privacy policies have contributed to the amassing of valuable data by digital platforms and, in turn, the growth in their market power. To this end, the ACCC has made preliminary recommendations specifically dealing with the *Privacy Act 1988* (Cth) (**Privacy Act**), powers of the Office of the Australian Information Commissioner (**OAIC**) and privacy rights.



PRELIMINARY RECOMMENDATIONS

The report contains 11 preliminary recommendations:

- + 3 measures to directly address Google and Facebook’s market power:
 - a reform to the merger law, which would apply to all mergers assessed by the ACCC, more explicitly allowing the ACCC to consider the likelihood that a transaction could remove a potential competitor and the amount and nature of data that may be acquired in a transaction;
 - measures aimed at giving the ACCC early scrutiny of acquisitions undertaken by large digital platforms; and
 - restrictions on the default settings for installation of internet browsers and search engines on computers, mobiles and tablet devices.
- + 2 measures to give an unnamed “regulatory authority” increased power to scrutinise the digital platforms’ activities and their impact on news media organisations and advertisers. These measures would empower the regulatory authority to investigate complaints, initiate investigations and make referrals to other government agencies.
- + A separate, independent and wholesale government review to design a new, platform-neutral regulatory framework for news media organisations and content classification.
- + A mandatory standard regarding digital platforms’ take-down procedures for copyright infringing content.
- + 4 measures to better inform consumers and improve their bargaining powers when dealing with digital platforms, although the proposed changes to the Privacy Act and Australian Consumer Law (ACL) would apply to all businesses. These measures include:
 - that the OAIC develop an enforceable code of practice under Part III B of the Privacy Act which would apply specifically to digital platforms;
 - amendments to the Privacy Act aimed at enabling consumers to make more informed choices and exerting greater control over the distribution of their data. They include strengthening the notification and consent requirements under the Privacy Act, providing for an ‘erasure right’ where information is no longer needed, increasing the penalties for Privacy Act breaches to the same level as those related to breaches of the ACL and introducing a direct right of action for individuals whose privacy has been breached under the Privacy Act;
 - support for the Australian Law Reform Commission’s call for the introduction of a statutory cause of action for serious invasions of privacy; and
 - amendments to the ACL to render unfair contract terms illegal and subject to pecuniary penalty proceedings.

In addition to these preliminary recommendations, the ACCC has proposed eight areas for further analysis (including labelling regimes to increase transparency in news reporting and options to fund journalism in an era of declining advertising revenue) in the next phase of the inquiry.

The ACCC has also flagged that it is actively investigating five allegations that digital platforms have breached the Act, including four instances where actions relating to privacy policies may have breached the ACL.

“The inquiry has also uncovered some concerns that certain digital platforms have breached competition or consumer laws, and the ACCC is currently investigating five such allegations to determine if enforcement action is warranted.”
Rod Sims, December 2018

WHAT NEXT?

While some recommendations are targeted specifically at digital platforms, the ACCC's proposed legislative and regulatory reforms would be far-reaching and directly impact a wide range of Australian businesses particularly in relation to mergers and acquisitions, privacy and consumer protection. That said, it is not clear whether the ACCC will choose a more targeted list of recommendations for the final report, considering that some of the recommendations in the preliminary report would require changes to the law that would be very difficult to implement in the short term.

The extent of the reforms proposed in relation to privacy are surprising but the approach taken by the ACCC is understandable. Many will see the proposed amendments to the Privacy Act as long overdue and the other proposed reforms as providing some much needed teeth to the OAIC's enforcement mechanisms in this age of big data. It will be interesting to see how the renewed call for more direct rights for consumers to protect their privacy, including through a statutory cause of action for serious invasions of privacy, will play out in the final report and if this attempt will be successful – it is perhaps the strongest one yet.

The report also demonstrates the ACCC's willingness to push for new and expansive regulation to curb the

activities of companies that it considers have market power. The ACCC, as has been its approach in past inquiries, has assumed that it has the policy mandate to recommend far-reaching new regulatory functions. The ACCC does not engage with the question of whether Australia's existing 'backstop' regulatory access regime is an appropriate tool, or whether the digital platforms would meet the important threshold requirements for that regime to apply.

The ACCC Chair, Rod Sims, recently disavowed the broader goals of competition law espoused by the "Hipster Antitrust" movement, affirming that the primary purpose of competition law in Australia will continue to be the promotion of consumer welfare, in accordance with the consumer welfare standard. However, the preliminary report shows the ACCC's willingness to engage with broad public interest considerations (including privacy and the role of news and journalism in democracy) in addition to its core role of competition law enforcement and regulation.

The ACCC also notes its intention to engage with international bodies (such as the OECD, the ICN and ICPEN) and other competition regulators globally to discuss and share findings and recommendations. We should expect further cross-fertilisation of ideas on digital platform regulation.

CONSUMER DATA RIGHT

The ACCC has a new role in delivering the implementation of the consumer data right (CDR).

“The introduction of a consumer data right in Australia is a fundamental competition and consumer reform. The ACCC is delighted to lead the data right and to work in the best interest of consumers.”

Rod Sims, May 2018

In November 2017, the Government announced the introduction of the CDR to give Australians greater control over their data. The right is a partial response to the Productivity Commission’s Inquiry into Data Availability and Use.

The CDR will allow customers to choose to share their data with trusted recipients for purposes for which they have been authorised. The CDR will improve consumers’ ability to compare and switch between products and services and encourage competition between service providers, leading to better prices and more innovative products and services.

The Federal Government has allocated \$20 million over the next four years to oversee its implementation.

The CDR will first apply to the banking sector, under a framework known as Open Banking. Under Open Banking, consumers will be able to access and safely transfer their banking data to trusted parties. The energy and telecommunications sectors will follow.

The ACCC has a number of new roles including determining the rules that will govern the CDR regime, accrediting third party data receivers, consumer education, as well as enforcing the right.

In September 2018, it released the Consumer Data Right Rules Framework (**Rules Framework**) for consultation with the public. Submissions on the Rules Framework were due by 12 October 2018. The Rules Framework outlines the approach and substantive position the ACCC proposes to take when making rules to implement the CDR. Though the proposals have been designed to apply generally, the ACCC notes that the Rules Framework has a banking focus due to the impending implementation of the Open Banking regime. Through outlining its approach and position, the ACCC aims to provide transparency prior to the release of draft rules.

Under the Rules Framework, a data holder will be required to share CDR data with the consumer themselves or accredited data recipients (**ADR**).

On 21 December 2018, the ACCC released the Consumer Data Right Rules Outline (**Rules Outline**) setting out what it proposes to include in the draft rules. The draft rules are expected to be published in the first quarter of 2019 for public consultation.



OPEN BANKING REGIME

The Open Banking regime is one part of the development of a national Consumer Data Right. On 9 February 2018, the Treasury released the Final Report to the Review into Open Banking in Australia, and on 9 May 2018, the Government committed to implement a consumer data right in line with the Review’s recommendations.

Key recommendations included:

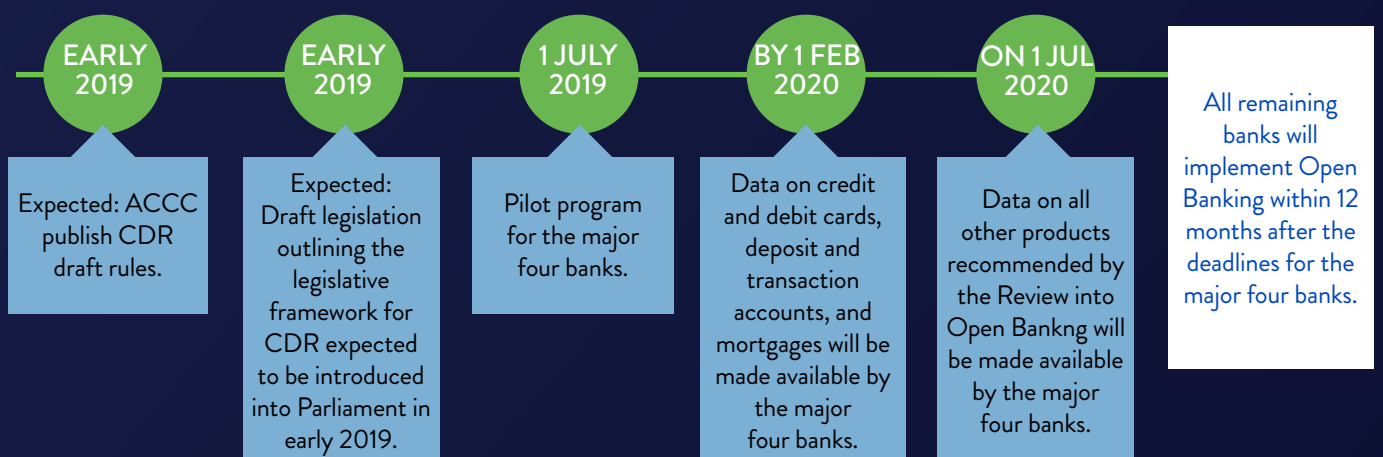
- + The ACCC should be the key regulatory body, supported by the Office of the Australian Information Commissioner
- + Technical Standards should be determined by a new “Data Standards Body” (in conjunction with regulators)
- + Participants (ie data holders and data recipients) should be accredited – with the ACCC setting the accreditation criteria, which may be graduated based on the type of data they receive and hold
- + Data recipients should be subject to the Privacy Act. This has implications for offshore based organisations
- + All ADIs (but not branches of foreign banks) should be subject to the regime, which includes a breach reporting regime
- + Reciprocity: Non-ADI participants (eg recipients of data) should also comply with respect to data they receive through the regime and also data which is transaction data or its equivalent (eg data relating to payment of monies which they are facilitating)
- + Informed, explicit consent should be required from the customer for data shares and the ability to revoke access should be easy
- + A principles-based liability framework should be established, which would allocate liability to the wrong-doer, not other participants in any data share. Importantly, the example principles should be consistent with the position that a bank sharing data to a data recipient is not liable to the data recipient for inaccuracies in that data (but should be responsible to the customer for correction of records)
- + For the 4 major banks, a 12 month implementation period is proposed from final government decision to operation of the regime. For the remaining ADIs, a further 12 month period is initially proposed

The Australian Government has agreed to the recommendations of the Review into Open Banking.

On 21 December 2018, the ACCC announced that the launch of the CDR would be delayed by seven months from 1 July 2019 to 1 February 2020. Instead, the ACCC and the Data Standards Body will now launch a “pilot program” on 1 July 2019 with the major four banks to test the performance, reliability and security of the Open Banking system.

The revised implementation timeline for Open Banking is set out below.

REVISED OPEN BANKING IMPLEMENTATION TIMELINE



THE IMPACT OF COMPETITION POLICY ON DATA ACCESS AND MANAGEMENT

It has now become commonplace to acknowledge that data is an increasingly valuable asset for businesses. The capture and commercialisation of large data sets (or 'Big Data') is creating new business opportunities, services, and ways of generating growth.

'Big data' is not only changing the ways in which businesses interact with consumers, but is also changing the way in which businesses compete with one another, prompting many to ask the question: can the use of 'Big Data' be anticompetitive?

The answer is a long way from being settled, but governments and regulators around the world, including in Australia, are grappling with these questions with an increasing sense of urgency.

BIG DATA: WHY DO COMPETITION AUTHORITIES CARE?

The net economy has seen the proliferation of businesses that manage and control vast amounts of data (particularly, personal data). While embraced by consumers, the sheer size and importance of these businesses have led many to raise concerns as to the long term impact that these businesses might have on the economy and society at large. For example, in some of the submissions to the ACCC's ongoing Digital Platforms Inquiry, social network sites such as Facebook have been variously criticised for a number of social issues, ranging from the decline of traditional forms of media (eg, newspapers), to, more broadly, the undermining of democratic processes at large.

Some of these concerns directly relate to the impact that these businesses may have on competition. As a result, competition authorities around the world have started to increasingly pay attention, investigate and, in some cases, intervene and penalise behaviour that may be considered a threat to competition.

The responses to these problems are still evolving and there is some debate as to whether these businesses should be left alone (to avoid stifling innovation and competition) or should be regulated. While the debate continues, it seems to be clear that the trend is likely to be towards more intervention rather than less.

WHAT IS THE ACCC DOING?

- + New regulation:
 - In November 2017, the Government announced the introduction of the consumer data right (**CDR**) beginning with the banking industry. The CDR can be thought of as a data portability right granted to customers, who will be able to direct holders of their data to share that information with a nominated third party.
- + Independent inquiries and commissions:
 - The Digital Platforms Inquiry (DPI) is focussing on the impact of digital platforms on choice and quality of news; the extent to which digital platforms are exercising market power against media content creators and advertisers; the extent that digital platforms benefit from unfair competitive advantages (due to unequal treatment of regulation); and finally whether consumers are adequately informed about how personal data is collected.
 - The CDR is also the culmination of a number of Government reviews and inquiries which recommended expanding consumers’ access to data.
- + Merger review:
 - The ACCC has announced that it will “*expand its work on data, algorithms and digital platforms, and increase the use of its powers to gather evidence in complex merger investigations*”.
 - For example, on 30 August 2018, the ACCC announced that it would not oppose the consortium acquisition of WestConnex (a toll road) on condition that the purchaser would undertake to provide third party access to toll road traffic data (thus creating a data sharing regime to mitigate what the ACCC otherwise identified as a potential competition issue).
- + Enforcement action:
 - The ACCC has also announced that it will expand its work on data and has made a start at looking at the impact of algorithms on the consumer experience.



HOW COULD THIS AFFECT BUSINESSES IN AUSTRALIA?

Businesses are already relatively familiar with the privacy impacts of Big Data. While privacy issues are here to stay, the discussion above shows that competition laws have the potential to add an additional layer of regulatory oversight, one which will represent opportunities for some and new regulatory controls for others.

The full extent and impact of these new regulatory approaches is still in development. Some potential impacts to start considering:

- + If business is subject to criticism because of its data capabilities (or practices around data management), these concerns may be expressed as competition issues (and directed to the ACCC)
 - ACCC may want to know more (focusing on either particular industries or individual businesses) (eg, DPI)
- + In some cases, sharing of data may be mandated (eg, CDR)
 - In any event, data is likely to be significant factor in all interactions with the ACCC (eg, how data is collected and commercialised, how data impacts interactions with competitors, how data would impact any acquisitions or large transactions)
- + If there are plans to commercialise data in the future, it is worth considering:
 - if any competition law issues may apply; and
 - if there may be third parties likely to be interested in access to data held by the business.
- + Can data be accessed through mandated arrangements?
- + Could lack of access to data potentially give rise to a competition issue?
- + Can the sharing of data be encouraged by other informal means?



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SmartCounsel's **HarperReady** tool helps businesses understand the impact of the Harper changes to the misuse of market power provisions and the new concerted practices law.

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