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AUSTRALIAN COMPETITION LAW 2018

THE START OF A NEW ERA

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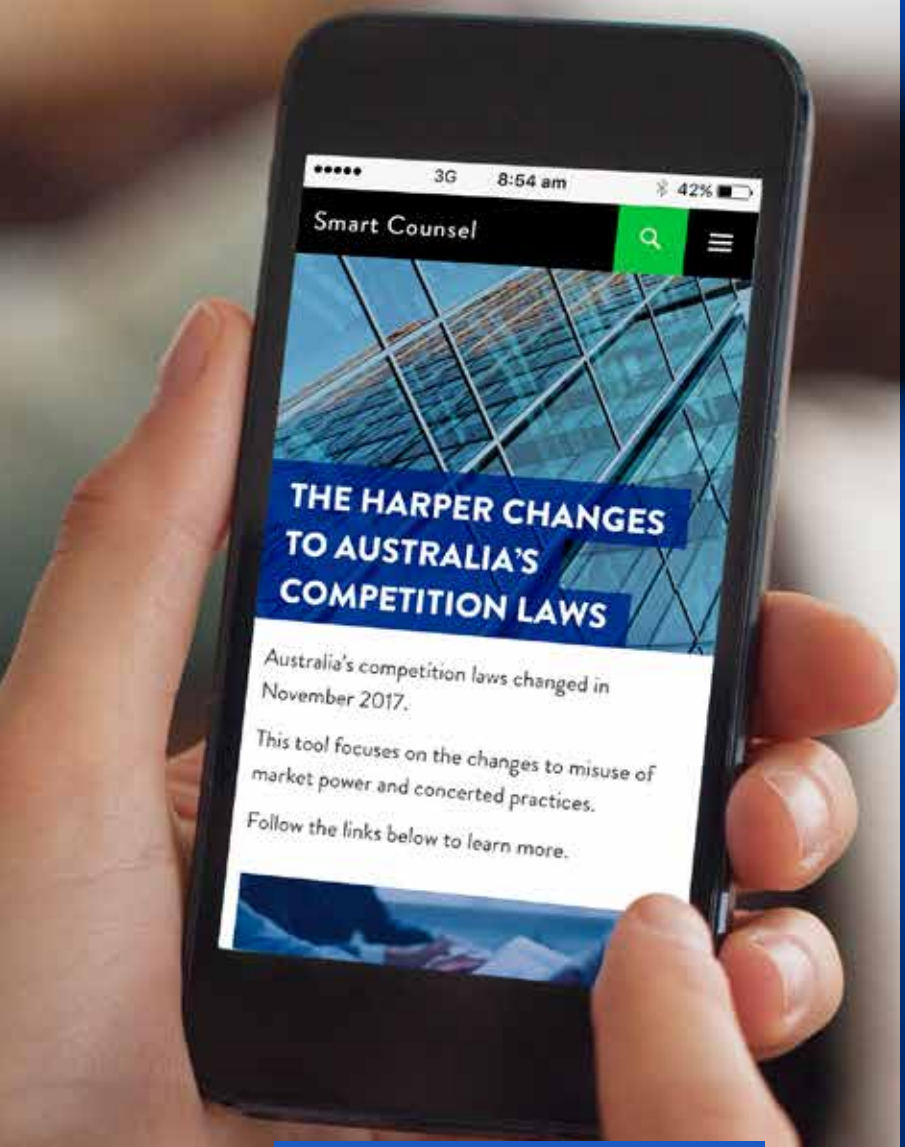

Get HarperReady

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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KEY COMPETITION LAW DEVELOPMENTS – A new era ahead

- A new era has begun in Australian competition law. The most significant changes to Australia's competition laws in over 40 years came into effect in November 2017
- Market studies and reviews are increasingly being undertaken as a way to approach competition policy reform. The ACCC's inquiries into residential mortgage products, digital platforms, and electricity supply and prices are examples of competition policy reform being conducted at an industry level
- In 2017 there was a strong focus by the ACCC on cartels – including with Australia's first criminal cartel conviction (NYK fined $25 million) – and this is set to continue, and likely to increase in intensity
- Competition in Australia's financial services system is again subject to review and inquiry with the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Productivity Commission's Inquiry into competition in the Australian Financial System, the Review into Open Banking, and the ACCC's Inquiry into residential mortgage products
- ACCC is expecting a busy 2018 on the mergers front. While more mergers are being pre-assessed by the ACCC, it is taking longer for the ACCC to do so. It has indicated that merger parties should expect more intrusive document and information requests, and longer timeframes for contentious mergers

The ACCC is

highly active in issuing notices

requiring companies to compulsorily produce information, documents and/or attend an ACCC examination –

178 section 155 notices

were issued between January and September 2017

In the 2016/17 financial year, of the

288 mergers

which were assessed by the ACCC,

88% were pre-assessed

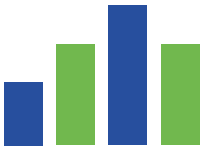
(the risk of them substantially lessening competition was low).

72% of merger reviews

were completed within 15 business days, and 33 were subject to a public review

MAJOR CHANGES TO AUSTRALIA'S COMPETITION LAWS

In November 2017, significant changes to Australia's competition laws came into effect.

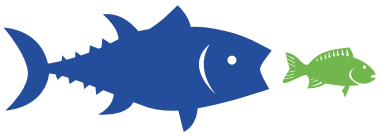


A new effects test for misuse of market power

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.

A new concerted practices prohibition

The new prohibition against concerted practices addresses the difficulty that the ACCC has under the cartel laws in demonstrating that a "contract, arrangement or understanding" exists. The new prohibition is aimed at businesses that might privately or publicly disclose competitively significant information or take other coordinated action that is intended or likely to substantially lessen competition.



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 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 28 days (this will reduce to 14 days after 6 November 2018), 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.

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 shares should assess the effect/likely effect of their conduct on competition. 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)
+ 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

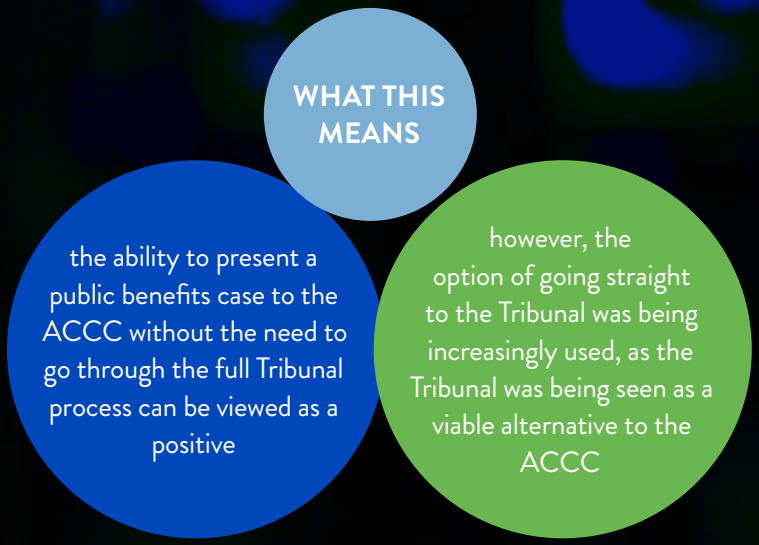
+ Businesses should be careful that in their interactions with competitors they do not – even unilaterally – share information that could facilitate conduct by their competitors that may have the effect of substantially lessening competition
+ Businesses should satisfy themselves that any commercially 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

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

The key elements of the changes are

+ The ACCC now has the power 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 benefits that outweigh any lessening of competition)
+ 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 if they are unhappy with the ACCC's authorisation decision they can apply for a review of the decision by the Tribunal



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 Phase 1 (if no Statement of Issues): 6-12 weeks Phase 2 (if Statement of Issues): further 6-12 weeks 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.

SCRUTINY OF COMPETITION IN AUSTRALIA'S FINANCIAL SYSTEM

Competition in Australia's financial system is again subject to review and inquiry

Open Banking Regime

On 9 February 2018, the Treasury released the Review into Open Banking

Key recommendations include

- **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 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 Royal Commission into Misconduct in the Banking, Superannuation and the Financial Services Industry

The Royal Commission into Misconduct in the Banking, Superannuation and the Financial Services Industry was established on 14 December 2017. The inquiry is being run by the Honourable Kenneth Hayne AC QC. An interim report is due by 30 September 2018 and a final report by 1 February 2019.

The Terms of Reference include

- 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
- the ability 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

It's time for a "competition champion" in the financial system: Productivity Commission draft report

On 7 February 2018 the Productivity Commission released the draft report of its inquiry into 'Competition in the Australian Financial System'.

According to the Productivity Commission;

> **"it's time that our financial system had a competition champion to put the case for competition inside what are otherwise closed shop discussions".**

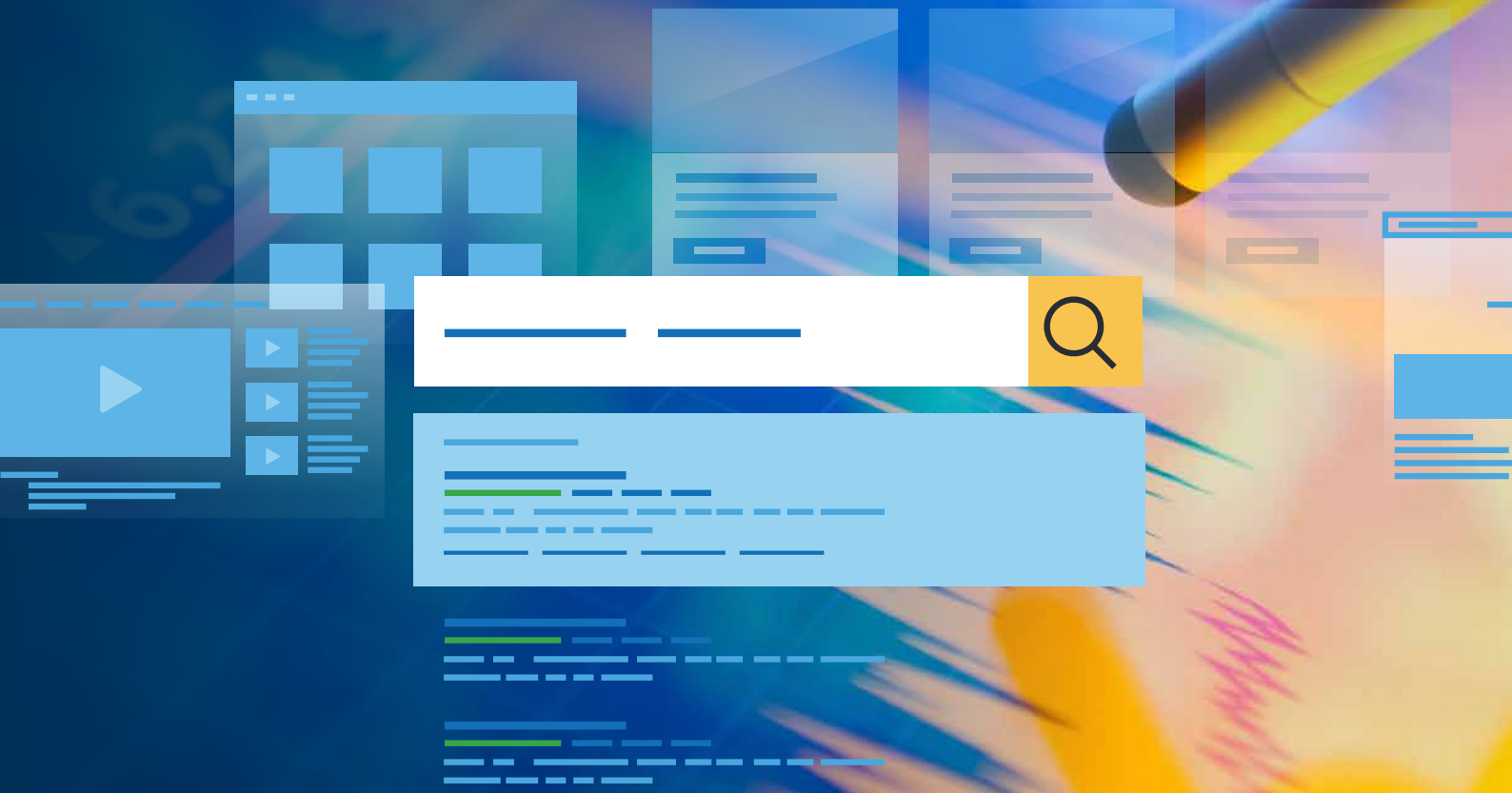
Key recommendations include

+ **New competition functions for a regulator** An existing regulator must be given a mandate to take the lead on matters related to competition in the financial system
+ **Reforms should be implemented in 2018**
+ **Mergers or acquisitions within the financial system** — including banks, insurers and other financial services firms should be notified to the ACCC and ASIC
+ **ASIC should impose a clear legal duty** on mortgage aggregators owned by lenders to act in the consumers best interests, even if these aggregators operate as independent subsidiaries of their parent lender institution, and this should also apply to the mortgage brokers operating under them
+ **Mortgage broker disclosure requirements** ASIC should require mortgage brokers to provide plain-English documents to consumers, and discuss those documents, before recommending loans to consumers
+ **Ban on card interchange fees** The Payments System Board should introduce a ban on card payment interchange fees by mid-2019. Any remaining fees should be directly related to the costs of operating the system and should be transparent and published
+ **Access regime for the new payments platform** The New Payments Platform (NPP) should be subject to an access regime imposed by the Payments System Board
+ **Data access to enable switching** The proposed Open Banking system should be implemented to enable the full suite of rights for consumers to access and use digital data (as set out in the Productivity Commission's inquiry report, 'Data Availability and Use')
+ **Transparency of regulatory decision making** The Council of Financial Regulators (CFR) should implement a process of review before its members put in place regulatory interventions that may have a material impact on competition in a product market

DIGITAL PLATFORMS THE FOCUS OF A "WORLD FIRST" INQUIRY

On 4 December 2017 the Treasurer, the Hon Scott Morrison MP, 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**) (**Inquiry**). ACCC Chair Rod Sims has called this a "world first" inquiry of its kind into digital platforms that goes to "the heart of their business models".

The Government agreed to undertake the Inquiry as a condition of Senator Xenophon's support for significant legislative changes to media control and ownership laws under the *Broadcasting and Services Act 1992*. It also comes in the wake of growing international interest from competition regulators in digital platforms and their conduct in the use of data and advertising practices. The ACCC has complemented the changes to media control and ownership laws with its Media Merger Guidelines 2017. The Guidelines acknowledge how media is delivered and consumed differently, with increasing convergence between old and new media.



The 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

An **issues paper** with a call for public submissions is anticipated to be released in the first quarter of 2018. A **preliminary report** is to be submitted by 4 December 2018, and a **final report** is due by 4 June 2019. The ACCC will be able to use a range of information gathering powers, pursuant to Part VIIA of the CCA. Those powers, and the breadth of the ToR, are what make it a first of its kind.

Implications of the Inquiry

Mr Sims recognises both the "enormous benefits and opportunities from data-driven innovation", as well as the timeliness of such an inquiry amidst a key period of transformation in the media sector.

The Issues Paper is anticipated to be released by the ACCC in the first quarter of 2018, which will provide more detailed guidance on the key issues the ACCC will be exploring in the Inquiry.

In the interim, Mr Sims made some noteworthy public comments about the ACCC approaching the Inquiry through two lenses:

- **Potential use or misuse of any market power:** looking at any asserted market power of PSPs and their potential effect on advertising and media markets; and
- **Transparency:** looking at the extent to which people may be misled. In Mr Sims' words, "If you're an advertiser, how much do you know about whether your advertising is getting to consumers, if you're a content provider, how much is getting through and if you're a consumer how does your news get to you"

As part of the Inquiry, the ACCC has indicated that it will be keen to hear from content creators, mainstream media, smaller media operators, PSPs, advertisers, journalists, consumers and small business interest groups.

In a recent podcast, Mr Sims has said that the ACCC's focus of the Inquiry is about giving advice on policy (as distinct from enforcement of the CCA), although an enforcement action could follow if it were to identify any concerning conduct it were identified. To the extent the ACCC is to pursue contraventions of the CCA, Mr Sims has noted in a recent speech that it will particularly be able to do so as a result of the Harper Reforms.

KEY ENFORCEMENT ACTIVITY AND PENALTIES

NIPPON YUSEN KABUSHIKI KAISHA PTY LTD (NYK)

Nippon Yusen Kabushiki Kaisha Pty Ltd (NYK) fined $25 million in August 2017 in Australia's first criminal cartel conviction 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.

YAZAKI CORPORATION

Yazaki Corporation fined $9.5 million in May 2017 for collusive conduct involving coordinating quotes with a competitor for the supply of wire harnesses used in the manufacture of the Toyota Camry. The ACCC has appealed the penalty, and is seeking a penalty of $42-55 million.

PRYSMIAN CAVI E SISTEMI S.R.L

Italian company, Prysmian Cavi E Sistemi S.R.L., ordered to pay $3.5 million in July 2017 for cartel conduct in relation to the supply of high voltage land cables in Australia.

KAWASAKI KISEN KAISHA (K-LINE)

Criminal cartel charges laid against Kawasaki Kisen Kaisha (K-Line), also in relation to alleged cartel conduct in connection with the transportation of vehicles, including cars, trucks and buses, to Australia between July 2009 and September 2012. The trial is scheduled begin in late July 2018 for 16 weeks.

RAMSAY HEALTH CARE AUSTRALIA PTY LTD

Proceedings instituted in May 2017 against Ramsay Health Care Australia Pty Ltd in the Federal Court of Australia, 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.

2018: WHAT'S AHEAD

Cartels and Anticompetitive Conduct

> **"2018 will be a very big turning point for cartel enforcement and cartel deterrence"**
>
> ACCC Chairman, Rod Sims, January 2018

> **"[O]ur criminal cartel machine is now built, and running at its appropriate capacity. You will now see its continuing output."**
>
> Rod Sims, August 2017

- The ACCC is preparing guidelines on the new concerted practices prohibition
- The majority of the ACCC's cartel investigations involve an immunity applicant
- There is a focus on new technologies and the use of artificial intelligence. The ACCC is building expertise to analyse algorithms via its Data Analytics Unit

What to Expect in Cartels and Anticompetitive Conduct

- More cartel cases – and more often - including against individuals. Rod Sims has said that the ACCC is likely to have three or four domestic-based criminal cartel actions in 2018
- ACCC's continued use of its dedicated team to uncover cartels
- An ACCC strategy to encourage more corporate whistle-blowers to proactively identify their involvement in cartel conduct and cooperate with the ACCC
- ACCC focus on enforcement against large companies – the deterrence effect
- Higher penalties against larger companies
- Fewer negotiated settlements

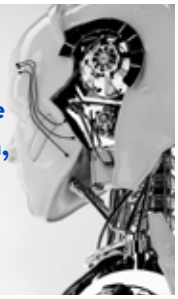
ACCC Enforcement Priorities for 2018

The ACCC released its 2018 Compliance and Enforcement Priorities in February 2018.

What to expect:

- Ongoing roll out of criminal cartel cases – with 5 matters on referral to the CDPP and an expected mix of cases over the next few years to promote behavioural change
- More market studies – being used as an important tool to identify competitive market reforms and areas for enforcement action. Market studies already underway in banking, digital platforms, gas and electricity.
- Enforcement of the amended misuse of market power prohibition and the new concerted practices prohibition in cases of clear consumer harm
- Larger penalties for big business in both competition and consumer protection

> **"The ACCC is considering cases where algorithms are deployed as a tool to facilitate conduct which may contravene Australian competition law. In Australia, we take the view that you cannot avoid liability by saying 'My robot did it'."**
>
> Rod Sims, November 2017



> **"We may have been too cautious [on penalties] in the past. Certainly in future we won't settle unless the penalties are in accord with what we think they should be."**
>
> Rod Sims

Mergers – A busy year

"I think it will be quite a busy year on the mergers front, you have got the new media laws coming in, we do expect quite a lot of mergers to be happening, we had quite a lot in 2017 and we try to pre-assess 90 per cent of the mergers and focus our resources on the ones that cause the largest competition concerns."

ACCC Chairman, Rod Sims, January 2018

+ The ACCC has not been successful in opposing a litigated merger for more than 20 years - it is trying to address this with input and advice from other competition agencies (eg the US Department of Justice and the Canadian Competition Bureau)

"I think you will now see some lengthening of our timelines on contentious mergers."

Rod Sims, August 2017

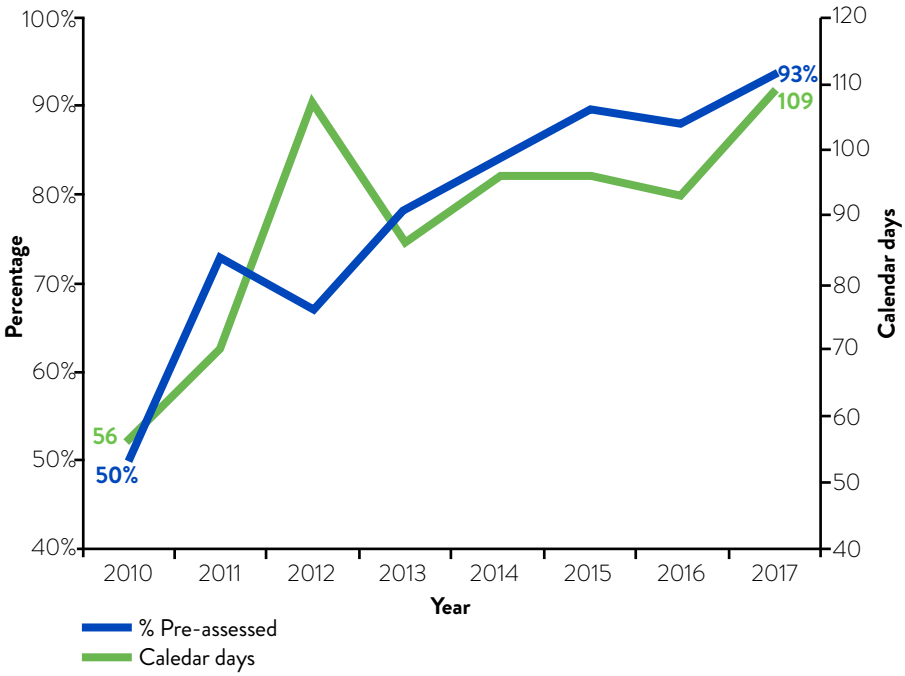
The ACCC will "carefully consider acquisitions where both parties are involved in collecting and selling big data, or they are vertically linked in the big data supply chain"

Rod Sims, November 2017

What to Expect in Mergers

- More intrusive requests from the ACCC (including notices requiring senior managers to appear to be examined) and significant document requests for contentious mergers
- Lengthening of the ACCC's timelines for contentious mergers
- Increased pressure to offer remedies, and to do so earlier in the process
- The trend towards longer pre-assessment time frames is likely to accelerate

MERGER REVIEW TRENDS 2010 – 2017*



*Statistics based on date merger assessments commenced, some mergers commenced in 2017 are incomplete at date of calculation (August 2017)

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ACCC v Australian Egg Corporation

Competition compliance risk for industry bodies

In September 2017, the Full Federal Court dismissed the ACCC's appeal from the Federal Court, finding that the Australian Egg Corporation did not engage in cartel conduct. The Full Federal Court found that a "call to action" from an industry body that encouraged members to make production decisions based on overall industry profitability, was not a breach of the CCA. The circumstances in this case fell short of creating reciprocal obligations between the parties to act in a certain way, and therefore did not constitute a "contract, arrangement or understanding".

This decision underscores the difficulty of meeting the high standard of proving the existence of a contract, arrangement or understanding when prosecuting cartel conduct. Recent amendments to the CCA introducing prohibitions on concerted practices are a direct response to such difficulties. The new provisions prohibit a concerted practice with the purpose, effect, or likely effect, of substantially lessening competition, without requiring a contract, arrangement or understanding. It is a possibility that had this case been prosecuted under the new concerted practices prohibition that an alternate outcome would have been reached.

KEY TAKEAWAYS

Avoid sharing commercially sensitive information. Care should be taken at industry meetings to avoid commercially sensitive information being exchanged between competitors. Sharing such information is always high risk, and members should take care to avoid such disclosures.

Focus on legitimate business interests. All topics of discussion at an industry meeting should be based on the legitimate business interests of the industry. When information is being shared between competitors, the ACCC will carefully consider why that information was exchanged.

Meetings should be properly structured. When industry meetings follow a set agenda and are properly managed (ie, there is a responsible chair, minutes are taken) it is easier to manage concerted practices risk. Following an agenda can prevent legitimate discussions from escalating to high risk topics such as pricing, customers and upcoming tenders.

Air Cargo cartel

Air New Zealand and PT Garuda lose appeals to High Court

The ACCC brought proceedings against Air New Zealand and PT Garuda under section 45 of the then *Trade Practices Act 1974* (TPA) alleging that they colluded with other airlines on charges for aviation fuel, security, insurance surcharges, and a customs fee, for the carriage of air freight from origin ports in Hong Kong (both Air New Zealand and Garuda), Singapore (Air New Zealand) and Indonesia (Garuda) to destination ports in Australia.

In June 2017, the High Court dismissed Air New Zealand and PT Garuda's appeals against a lower court decision that they had engaged in price fixing in a "market in Australia", and held they were therefore in contravention of the TPA (now *Competition and Consumer Act 2010*).

The High Court took an expansive view of the boundaries of the Australian market. Rather than focusing on a traditional approach to geographic market definition – where the act of substitution between competing services took place (ie, the location where the customer contracts were signed) – the High Court focused on the geographical area in which the airlines competed. The High Court found that, in this case, it included Australia because it was a significant source of demand for air cargo services, and the airlines "tussled" with each other to meet that demand, including by marketing their services directly to Australian customers (even though the contracts were actually signed overseas).

KEY TAKEAWAYS

Clarifies and potentially expands circumstances in which conduct that takes place Australia may be caught by Australia's competition laws. Whether a market is "in Australia" will be examined by taking into account all aspects of the market. Where the suppliers are physically located and where substitution takes place will not be the determining factor in all cases. Focus will be placed on where the competition for customers takes place.

The concept of a market "in Australia" is a key factor in other provisions of the Act (eg with respect to exclusionary conduct and general anticompetitive activity, as well as mergers). In mergers, this may inform and potentially expand the scope of ACCC merger reviews in relation to acquisitions involving trans-national supply or acquisition of goods or services.

However, the decision has limited application to the cartel provisions of the CCA. Further recent changes to the CCA have futher limited the application of the cartel provisions with respect to cartels outside Australia.

Tabcorp / Tatts merger authorised by Australian Competition Tribunal

In June 2017, the Australian Competition Tribunal initially authorised Tabcorp Holdings Limited's proposal to acquire Tatts Group Limited. The transaction proposed to combine the two wagering companies, creating a diversified gambling entertainment group with operations in betting/ wagering, racing media, lotteries and Keno.

However, after this initial authorisation by the Tribunal, Crownbet and the ACCC lodged appeals in the Federal Court of Australia, seeking judicial review in an attempt to stop the merger. As a result, the Federal Court quashed the Tribunal's initial approval and referred the case back to the Australian Competition Tribunal for re-determination. Ultimately however, the Tribunal allowed the $11 billion merger between Tabcorp and Tatts Group to proceed – subject to one condition being that Tabcorp was required to dispose of its Odyssey Gaming Business in Queensland.

Gilbert + Tobin, as co-competition advisors with Herbert Smith Freehills, advised Tabcorp on the competition clearance,Tribunal process and merger strategy.

The proceeding was the largest merger clearance authorisation in recent times.

Following the implementation of the Harper changes on 6 November 2017, merger authorisation applications to the Tribunal at first instance are no longer available. However, the ACCC may now authorise mergers by applying the same public benefit assessment as the Tribunal.

TABCORP COMPANY WITNESSES	5 (+4 REPLY STATEMENTS) 9 STATEMENTS IN TOTAL	TATTS COMPANY WITNESSES	5 (+3 REPLY STATEMENTS) 8 STATEMENTS IN TOTAL
INDUSTRY STAKEHOLDER WITNESSES	32 WITNESSES (23 RACING + 9 OTHER) 40 (23 STATEMENTS WITH APPLICATION + 17 REPLY)		
EXPERTS (FOR TABCORP /TATTS)	4 (+4 REPLY REPORTS) 8 IN TOTAL	INTERESTED THIRD PARTY SUBMISSIONS	5 OPPOSING 10 SUPPORTIVE 15 IN TOTAL
NUMBER OF INTERVENERS (VRI, RACING.COM)	1 SUPPORTIVE (TATTS) 3 OPPOSING (CROWNBET	RACING.COM	2 LAY WITNESSES
CROWNBET	4 LAY WITNESSES 1 EXPERT WITNESS	ACCC	8 LAY WITNESSES 2 EXPERT WITNESSES 1 REPORT
VICTORIAN RACING INTERVENERS	5 LAY WITNESSES 1 EXPERT WITNESS		
IN COURT BOOK	OVER 1,900 DOCUMENTS OVER 44,000 PAGES		
TOTAL	82 STATEMENTS FROM 69 LAY WITNESSES, 15 THIRD PARTY SUBMISSIONS AND 12 STATEMENTS FROM 7 DIFFERENT ECONOMISTS		

ACCC v Flight Centre

Competition compliance risk for dual distribution models

In December 2016, the High Court of Australia (Australia's highest court) found that Flight Centre, one of Australia's largest travel agents, was in competition with certain airlines in the market for international airline tickets. It was therefore found to have breached the *Competition and Consumer Act 2010* by attempting to engage in price fixing with those airlines. Flight Centre allegedly attempted to induce airlines to agree that the airlines would not sell tickets through their own channels at prices below those that Flight Centre could offer its customers.

The High Court found that where an agent (ie., Flight Centre) exercises its own discretion in the pricing of the principal's (ie., the airlines') goods or services, and where the agent is not obliged to act in the interests of the principal, this may mean that the principal and agent are in competition with each other.

KEY TAKEAWAYS

Careful management of dual distribution models is required. Care needs to be taken to ensure that arrangements with distributors do not constitute cartel offences, or attempts to commit cartel offences. In particular, commissions, pricing, supply terms and customer allocations should be examined to ensure such arrangements do not constitute price fixing.

Supplier and distributor communications should relate to the terms of supply. The parties should act in their respective capacities of "supplier" and "distributor" rather than in their capacity as suppliers of goods and services to customers, because in this capacity they may be considered competitors.

Principals and agents may be competitors, depending on the degree of discretion of the agent. Where the agent has a significant amount of discretion over the terms of sale of the principal's goods and services it may be considered to be in competition with the principal, and therefore prohibited from entering certain arrangements with each other, including in relation to price, capacity, customer and territorial allocations.

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