

## Recent trends in Australian competition law

There have been significant developments in Australian competition law over the last 12 months, both from a merger review and enforcement perspective. Onerous merger reviews and criminal cartel prosecutions are indicative of a more acute antitrust landscape for those doing business in Australia. The ACCC has cemented itself as a leading voice in Australia's regulatory ecosystem and competition policy is shaping the future of Australia's key industries from financial services to energy.



## IN-DEPTH MERGER REVIEWS



### Overview:

- In August 2017, ACCC Chairman Rod Sims announced that 'for that small number of contentious mergers,... we are gathering substantially more evidence'.
- Since that statement, the ACCC is increasingly using its statutory information gathering powers including obtaining evidence under oath.
- This approach is informed by the ACCC's past experience in litigated merger cases.

### Takeaways:

Parties to contentious mergers should expect more onerous and frequent compulsory notices for production of documents, requests for market data and for business representatives to give evidence under oath.

## GUN JUMPING



### Overview:

- It is not mandatory to seek merger clearance from the ACCC. Nevertheless, where a merger raises competition issues, parties commonly notify the ACCC.
- While, generally speaking, the Australian merger review regime is 'non-suspensory', the normal competition law rules apply to the merger parties prior to completion.
- The ACCC has recently instituted Australia's first 'gun-jumping' proceedings, reiterating the need to have careful regard to the rules relating to cartel conduct and anticompetitive arrangements during a transaction.
- The ACCC has instituted proceedings against:
  - Cryosite in relation to its proposed sale to Cell Care, alleging that the asset-sale agreement, which required Cryosite to refer all customer enquiries to Cell Care after the agreement was signed but before the acquisition was completed, amounted to cartel conduct.
  - Pacific National and Aurizon, alleging that the parties reached an understanding during merger negotiations that would have led to Aurizon exiting the market.

### Takeaways:

Merger parties should be conscious of their obligation to continue to act as arm's length competitors pending the ACCC's merger review and completion. The ACCC is prepared to launch antitrust prosecutions off the back of merger reviews.

## CRIMINAL CARTELS



### Overview:

- The ACCC has brought a series of criminal cartel prosecutions, particularly against individuals.
- Recent cases include:
  - NYK pled guilty and was fined \$A25 million for its involvement in a shipping cartel;
  - Kawasaki Kisen Kaisha has also pled guilty for its involvement in the same shipping cartel;
  - The County Care Group, its director and a former employee have been charged in relation to alleged price-fixing regarding assistive technology products;
  - Construction, Forestry, Maritime, Mining and Energy Union and its ACT Branch secretary for allegedly attempting to induce union members to enter cartel agreements;
  - A number of banks and six executives relating to their involvement in a \$A2.5 billion jointly underwritten capital raising.

### Takeaways:

By international standards, penalties for antitrust breaches are low. The highest penalty imposed to date is \$A46 million. While the ACCC is pushing to increase fines for antitrust breaches, the ACCC sees criminal prosecutions (particularly against individuals) as key to deterring anticompetitive behaviour.

## MARKET STUDIES & INQUIRIES



### Overview:

- Market studies and inquiries are being increasingly used by the ACCC both to conduct deep dives into the state of competition in particular sectors as well as to respond to government requests to consider broader social issues such as energy affordability and the role of digital platforms in media and advertising services.
- The ACCC has recently completed or is currently undertaking market studies and inquiries in the following sectors:
  - Digital platforms;
  - Electricity supply and prices;
  - Electricity market monitoring;
  - Residential mortgage products;
  - Foreign currency conversion services;
  - Gas;
  - Communications;
  - New car retailing;
  - Cattle & beef;
  - Dairy;
  - Wine grapes; and
  - Insurance in Northern Australia.

### Takeaways:

Market studies are increasingly being used as a tool to look closely into competition issues. The ACCC's dual role as competition and consumer protection regulator means it is well placed to consider structural as well as behavioural issues in markets. While the ACCC's powers are limited to making recommendations for regulatory reform, the ACCC enjoys a respected position among Australia's politicians and its recommendations are given significant weight. The ACCC also can commence enforcement actions following a market study/inquiry.

## CONSUMER DATA RIGHT



### Overview:

- On 15 August 2018, the Federal Government released draft legislation that, if passed, will amend Australia's competition laws to establish an economy wide consumer directed data transfer system, known as the CDR. Following the end of the second stage consultation phase, the Treasurer has announced the intention to introduce the bill into parliament, and the Senate has referred it to the Economics Legislation Committee, with a decision due 18 March 2019. The draft legislation will allow consumers to access information held about them by designated organisation, and direct that information to be transferred to third parties.
- The ACCC will be the lead regulator charged with developing and enforcing the regulatory framework which will support the CDR.
- The CDR as part of the broader Open Banking initiative will apply to Australia's banking sector first, starting 1 July 2019, after which point it will be rolled out to the energy and telecommunications sectors.

### Takeaways:

In Australia, competition policy rather than privacy concerns is the driving force behind the new framework for the CDR. The nomination of the ACCC as the lead regulator in charge of the CDR is reflective of this pivot.

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