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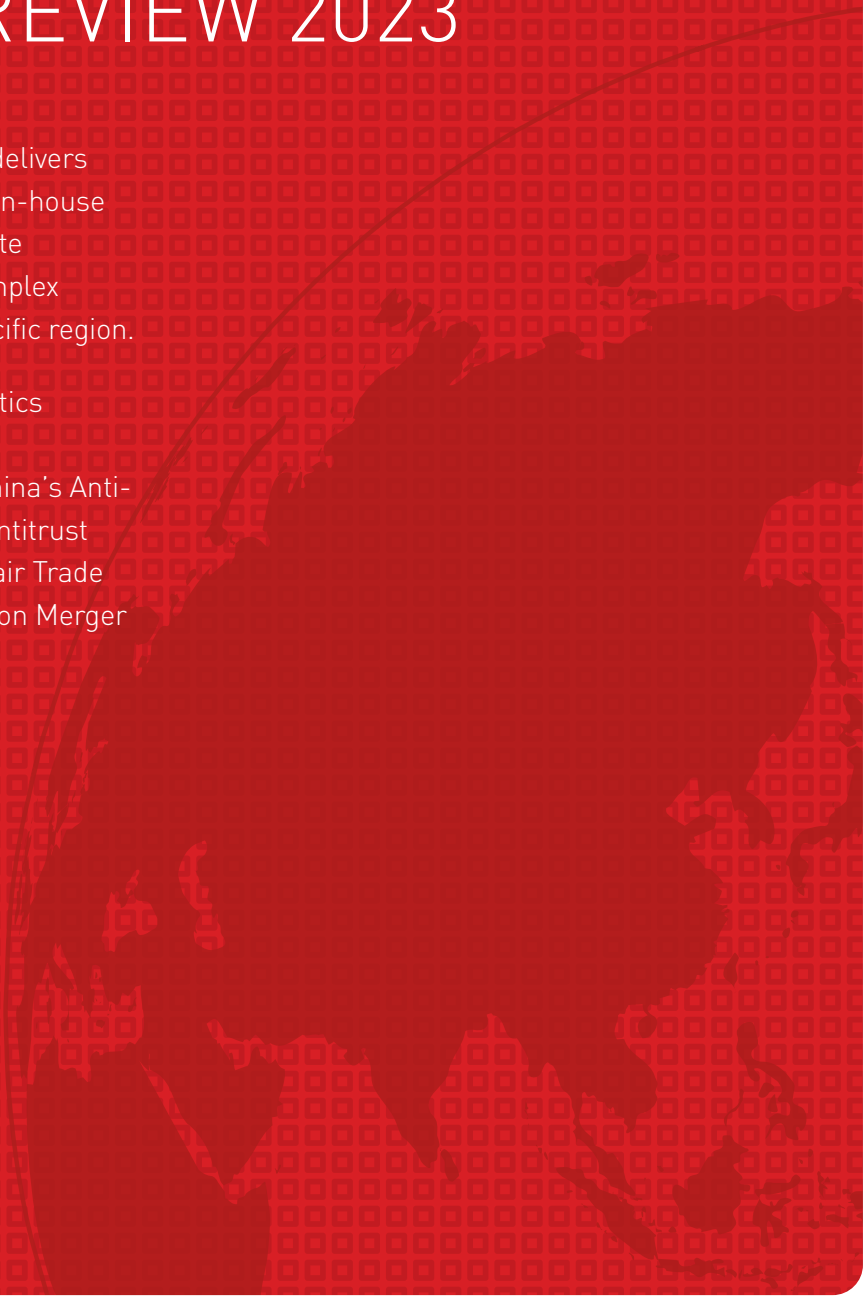

Australia: ACCC sharpens focus on punishing competition contraventions, improving merger control and boosting digital regulation

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In summary

This article provides a summary of recent developments in Australian competition law and Australian Competition and Consumer Commission (ACCC) areas of focus for 2023. It also provides an overview of the key elements of Australian competition law.

Discussion points

- Significant increases to maximum penalties for competition and consumer law contraventions
- Continued advocacy in support of proposed reforms to the merger provisions and review process
- Continued competition law enforcement proceedings (ie, criminal proceedings in cartel matters and active enforcement of anticompetitive vertical arrangements)
- Ongoing focus on digital markets
- Specific ACCC-enforced legislation on gas pricing

Referenced in this article

- ACCC
- Competition and Consumer Act 2010 (Cth)
- Federal Court of Australia
- Australian Competition Tribunal
- Commonwealth Director of Public Prosecutions
- Australian Federal Police

Recent developments

Areas of focus in 2023

The most recent enforcement priorities of the Australian Competition and Consumer Commission (ACCC) were published on 3 March 2022. Although those enforcement priorities were said to be applicable to both 2022 and 2023, the length of time that has lapsed since publication and subsequent ACCC activity may suggest some change in focus. For example, covid-19 disruptions are likely to be less of a focus going forward.

It is apparent that, in 2023, the ACCC will continue to focus on enforcement, especially in pursuing criminal charges in cooperation with the Commonwealth Director of Public Prosecutions (CDPP) for cartel conduct. The ACCC's enforcement efforts may be augmented by significant increases to the maximum penalties for contraventions, which came into effect in November 2022.

Consistent with recent enforcement proceedings, it is also likely that the ACCC will continue to closely examine vertical arrangements.

The ACCC will continue to have an important role in considering the competition and consumer issues arising from the pricing and selling of essential services, with a focus on energy and telecommunications. The introduction of a gas market energy price order and the ACCC's enforcement powers in respect of this order are noteworthy.

The ACCC will continue to focus on digital platforms in 2023. In its fifth interim report on the Digital Platform Services Inquiry 2020–2025, the ACCC recommended the introduction of compulsory codes of conduct to regulate designated digital platforms. The ACCC also published an issues paper on social media services, which it will consider in detail in a March 2023 report.

The ACCC is also expected to continue to monitor and take enforcement action in respect of consumer and fair trading issues, such as misleading environmental and sustainability claims, manipulative or deceptive advertising and marketing practices in the digital economy, and non-compliance by businesses with consumer guarantees. In November 2023, unfair contract terms will be subject to pecuniary penalties, which may increase ACCC enforcement activity in this area.

Amendments to the Competition and Consumer Act 2010 (Cth)

In October 2022, the Competition and Consumer Act 2010 (Cth) (CCA) was amended to substantially increase the maximum penalties for contraventions of Australian competition and consumer laws. Increased penalties have been in effect since 10 November 2022.

Under the prior regime, maximum penalties per contravention of the CCA by body corporates were the greater of:

- A$10 million;
- where the benefit obtained can be calculated, three times the value of the benefit; or
- where the benefit obtained cannot be calculated, 10 per cent of the annual turnover of the body corporate in the preceding 12 months.

For individuals, the maximum penalty was A$500,000 for each contravention.

Under the new regime, the maximum penalty is now the greater of:

- A$50 million;
- where the benefit obtained can be calculated, three times the value of the benefit; or
- where the benefit obtained cannot be calculated, 30 per cent of the adjusted turnover of the body corporate during the breach turnover period.

Maximum penalties for individuals have increased to A$2.5 million.

The CCA was also amended to apply the CCA's pecuniary penalty regime to unfair contract terms in consumer law contracts. This followed significant advocacy by the ACCC in support of these amendments. Prior to these amendments, the court could declare unfair contract terms to be unenforceable, but could not impose a penalty. The penalty regime will apply to unfair contract terms on 10 November 2023.

Digital markets

The ACCC continued to consider the need for broader regulatory changes relating to digital platforms markets as part of the ongoing Digital Platform Services Inquiry 2020–2025. Pursuant to this inquiry, the ACCC is publishing biannual interim reports, with a final report to be delivered in March 2025. Topics covered in interim reports to date include:

- private messaging services (September 2020);
- competition and consumer issues associated with the distribution of mobile applications to smartphone users (March 2021);
- the provision of web browsers and general search services to Australian consumers, including the effectiveness of choice screens in facilitating competition and improving consumer choice (September 2021);
- potential competition and consumer issues in the provision of general online retail marketplaces to consumers in Australia (March 2022); and
- potential measures to address harms from digital platforms to Australian consumers, small businesses and competition (September 2022).

The September 2022 interim report recommended the introduction of separate codes to apply to different types of digital platform services.[1] The ACCC recommends that three principles will be applied to the codes. First, the codes will seek to prohibit anticompetitive conduct that hinders the ability of rival firms to compete, including that third-party services are treated at least as favourably as similar first-party services. Second, consumers should be able to switch between alternative digital platforms with improved transparency over prices and quality. Finally, the codes should seek to address unfair and unreasonable terms faced by business users in their dealings with digital platforms. The proposed codes of conduct would include targeted obligations to prevent anticompetitive self-preferencing, tying and exclusive pre-installation arrangements; to address data advantage; and to improve transparency. To minimise the risk of regulatory overreach by capturing smaller market participants and new entrants, it is proposed that the codes will only apply to designated digital platforms.

The ACCC also published an issues paper in August 2022 seeking views on the operation of social media services in Australia, which will be the focus of the sixth interim report due in March 2023.

Vertical arrangements

There has been a renewed enforcement emphasis on competition issues relating to vertical arrangements, with the ACCC commencing various retail price maintenance (RPM) and exclusive dealing proceedings or investigations across various sectors. This trend highlights the ACCC's increased focus on ensuring efficiency and competition throughout the supply chain. Restrictions within a vertical supply chain can lead to higher prices to the detriment of consumers.

Relevant ACCC proceedings include the following.

In October 2020, the ACCC brought proceedings against FE Sports, alleging that it had engaged in RPM by prohibiting dealers from advertising or promoting certain brands or products online for less than the recommended retail price between February 2017 and June 2019. In March 2021, FE Sports was ordered to pay a A$350,000 penalty for this misconduct.

In November 2020, the ACCC commenced proceedings against Australasian Food Group Pty Ltd, trading as Peter Ice Cream (Peters), alleging that it engaged in exclusive dealing by way of conduct that hindered or prevented competition for the supply of single-wrapped ice creams to petrol and convenience retailers. Peters admitted that it had engaged in anticompetitive conduct and, on 25 March 2022, it was ordered to pay A$12 million for anticompetitive exclusive dealing.

1 The interim report is accessible via the ACCC's official website.

In September 2021, Nero Bathrooms International Pty Ltd admitted to withholding supply of its products from a retailer when the retailer failed to raise its advertised prices – conduct likely to constitute RPM. The ACCC accepted a court-enforceable undertaking from Nero in which it committed to advising all Nero retailers that they are free to set their own prices and to ensure that staff receive compliance training on their CCA obligations.

In November 2021, Federal Court proceedings were brought against Techtronic Industries Australia Pty Limited for RPM in relation to the wholesale supply of Milwaukee brand power tools, hand tools and accessories, whereby agreements with dealers restricted the sale of the products below a specified minimum price. These proceedings are ongoing.

In May 2022, the ACCC commenced proceedings against Mastercard alleging both misuse of market power and anticompetitive exclusive dealing in respect of pricing with various retail businesses. The ACCC alleges that Mastercard provided discounted rates for Mastercard credit card transactions provided that the retailers committed to routing relevant debit card transactions through Mastercard rather than the alternative electronic funds transfer at point of sale (also referred to as EFTPOS) network. These proceedings are ongoing.

Merger reform

There is no compulsory merger regime in Australia.

In 2021, under the leadership of former chair Rod Sims, the ACCC proposed material changes to Australia's merger control regime. Current chair Gina Cass-Gottlieb has indicated her support for substantive reform. The key aspects of the proposed reforms included the following.

Introduction of a mandatory and suspensory merger review process

The ACCC has proposed the introduction of a formal mandatory and suspensory merger control regime that would replace all existing clearance processes, involving:

- mandatory notification to the ACCC of any merger above certain thresholds (currently unspecified) – mergers above such thresholds will be prohibited unless clearance has been granted;
- a reversal of the onus of proof in the test for clearance, which currently requires the ACCC to find that the transaction would have, or is likely to have, an anticompetitive effect; and

- opportunity for only limited merits review of ACCC decisions by the Australian Competition Tribunal, effectively removing the option for parties to approach the Federal Court for a declaration that a transaction will not contravene the CCA.

The informal clearance 'pre-assessment' process would continue for mergers below the mandatory notification thresholds. However, the ACCC will have the power to call in transactions that are below the notification thresholds.

Substantive changes to the merger 'test'

The CCA prohibits mergers and acquisitions that have the effect or likely effect of substantially lessening competition in any market in Australia. The ACCC is proposing three key changes to the existing test:

- Update the merger factors in section 50(3) of the CCA, including to add factors to address whether the acquisition may result in the loss of potential competitive rivalry or increase access to or control of data, technology or other significant assets.
- Change the definition of 'likely'. The current test requires that the transaction is 'likely' to substantially lessen competition in the sense of a 'real commercial likelihood'. The ACCC proposes changing 'likely' to mean 'a possibility that is not remote', being a substantially lower standard. The onus of proof would be reversed, meaning that the applicant is required to prove that a transaction is not likely to substantially lessen competition.
- Include a deeming provision prohibiting firms that possess substantial market power from engaging in mergers or acquisitions that entrench, materially increase or materially extend positions of substantial market power.

Acquisitions by large digital platforms

The ACCC has proposed additional sector-specific changes relating to digital platforms.

Under these reforms, a different test would apply to acquisitions by certain digital platforms. Affected digital platforms would be specified in advance by the ACCC based on certain factors including the size and scope of services of the digital platform in question. The ACCC has not yet identified what this merger test should be or whether the ACCC's determination should be reviewable. However, it has stated that the probability of competitive harm that needs to be established should be lower than that which applies for acquisitions in the economy more broadly.

While advocated for by the ACCC, any changes would need to be adopted by government and introduced via legislation. Cass-Gottlieb has noted her support for reform (in circumstances where initial advocacy for reform was championed by her predecessor), stating that the current merger regime is not fit for purpose.

Criminal cartel enforcement

Cartel conduct can be pursued in Australia as either a civil or a criminal matter.

The trend of increased use of criminal proceedings is evident and is likely to continue in 2023, despite ACCC setbacks in particular matters.

Successful prosecution of criminal cartel matters in 2022 included the following:

- In June 2022, the Federal Court sentenced four individuals for criminal cartel offences. The matter, which focused on the activity of the money remittance business Vina Money, involved admissions and resulted in custodial sentences being imposed on individuals in Australia for cartel conduct for the first time. The prison terms were suspended. In addition to the individuals, Vina Money was fined A$1 million in relation to price fixing of the Australian dollar/Vietnamese dong exchange rate and the transaction fees charged to consumers who were sending money from Australia to Vietnam.
- In August 2022, waste company Bingo Industries pleaded guilty to criminal cartel offences relating to price fixing for demolition waste services in Sydney. In December 2022, Aussie Skips Recycling and Aussie Skips Bin Services were also charged with criminal cartel offences relating to their involvement in the relevant cartel arrangement.
- In November 2022, the Federal Court sentenced pharmaceutical company Alkaloids of Australia Pty Ltd and its former export manager for engaging in criminal cartel conduct in relation to alleged arrangements to fix prices, restrict supply, allocate customers or geographical markets, or rig bids for the supply of the active pharmaceutical ingredient scopolamine N-butylbromide to international manufacturers of certain medications. Again, a custodial sentence was imposed on the former export manager (although, through the use of an intensive corrections order, the manager will not be required to serve a prison term provided that the requirements of the order are satisfied).

While there has been a number of successes for the ACCC and CDPP in 2022 in criminal cartel matters, there have been some notable setbacks from the perspective of the ACCC:

- In June 2021, a Federal Court jury acquitted Country Care and relevant individuals of eight criminal cartel offences relating to an alleged attempted price fixing and bid rigging. This was the first contested criminal cartel prosecution and the first to proceed to trial by jury.

- In February 2022, the CDPP withdrew charges against Citigroup, Deutsche Bank and four senior banking executives in relation to criminal cartel allegations arising from an ANZ institutional share placement. The pretrial withdrawal of charges came almost five years after the CDPP first decided to bring criminal cartel charges.

Although much of the focus has been on criminal prosecutions, the ACCC has not abandoned civil proceedings in respect of cartel matters. In 2022, it was successful in the following proceedings:

- In November 2022, overhead crane company NQ Cranes Pty Ltd was ordered to pay a A$1 million penalty after admitting that it had entered into an anticompetitive cartel agreement with a competitor, whereby the competitors agreed to cooperate in the market for servicing overhead cranes by not targeting each other's current customers in Newcastle and parts of Queensland. The agreement also stated that the companies would focus on competing against other companies in the industry instead of each other.
- In December 2022, the Federal Court held that BlueScope Steel Limited and its former general manager of sales and marketing, Jason Ellis, engaged in cartel conduct in relation to the supply of flat steel products in Australia. The court found that, between September 2013 and June 2014, BlueScope and Ellis attempted to induce eight steel distributors in Australia and overseas manufacturer Yieh Phui to enter agreements to fix and raise the level of pricing for flat steel products supplied in Australia. A hearing on penalties and other orders has been scheduled for 3 April 2023.

New gas market provisions

In December 2022, the CCA was amended to include a new part relating to the gas market, which:

- allows a mandatory code of conduct to be introduced;
- permits the relevant minister to make orders, known as emergency gas market price orders, to regulate the terms (including prices) on which gas is supplied or acquired; and
- prohibit conduct engaged in for the purpose of avoiding the application of such an order.

The ACCC is responsible for enforcing the new laws, and has published interim compliance and enforcement guidelines on how it intends to exercise its enforcement role.

The amendments and relevant order followed record-high domestic gas prices with the average price of supply offers increasing by 88 per cent to A$19.77 per gigajoule between March and August 2022 compared to the previous six-month period. Under the order, the relevant minister has introduced a temporary

12-month price cap of A$12 per gigajoule on gas primarily sold by east-coast and Northern Territory producers to wholesale customers in Australia. In addition to its enforcement role, the ACCC will continue to monitor gas prices as part of its ongoing inquiry into the supply of and demand for natural gas in Australia, which is currently due to conclude in December 2025.

Mergers

The principal form of merger clearance in Australia is informal clearance, an administrative process whereby merger parties consult with the ACCC on whether the proposed acquisition is likely to have the effect of substantially lessening competition. The 2017 amendments to the CCA resulted in a fusion of what was an unused formal merger clearance process administered by the ACCC and a separate merger authorisation process before the Australian Competition Tribunal. Under the current regime, formal merger clearance and merger authorisation are considered in the first instance by the ACCC under a single process.

Legal prohibition

The CCA prohibits mergers and acquisitions that have the effect or likely effect of substantially lessening competition in any market in Australia.

The prohibition applies to direct and indirect acquisitions of shares or assets. Accordingly, the acquisition of a controlling interest or of a minority shareholding that does not confer control may be sufficient to attract competition law review. The ACCC Merger Guidelines encourage merger parties to notify the ACCC well in advance of completing a merger where:

- the products of the merger parties are either substitutes or complements; and
- the merged firm would have a post-merger market share of greater than 20 per cent in the relevant markets.

The ACCC does not have direct power to prevent a merger and instead must take enforcement action in the Federal Court. Where the ACCC considers that an acquisition contravenes the CCA, it can apply to the Federal Court for injunctions, divestiture orders and penalties. While uncommon, this occurred in 2021 in relation to Virtus Health's proposed acquisition of Adora Fertility. The ACCC obtained an interim injunction in October 2021 preventing the parties from completing the proposed transaction until the Federal Court had determined the case on its merits (the transaction was ultimately abandoned by the parties prior to a hearing). Although third parties cannot apply for injunctions preventing a transaction, they can apply for declarations and divestiture orders (including setting aside the acquisition in certain cases).

As noted above, there is no mandatory requirement to notify the ACCC about a proposed merger or acquisition. However, because of the risk that the ACCC may take enforcement action, merging parties generally seek ACCC clearance where the merger may potentially raise competition law concerns. Even if the ACCC is not notified, it can investigate any merger that it considers may raise competition issues.

Clearance options

Following the 2017 changes to the CCA, the two main routes for obtaining regulatory certainty or comfort in relation to a proposed merger are informal merger clearance from the ACCC or merger authorisation. In addition to these options, merger parties themselves may seek a declaration from the Federal Court that their merger does not contravene the CCA. This approach is rarely used.

Informal clearance is a form of regulatory comfort letter in which the ACCC states that it does not propose to take any action in relation to the proposed merger. Informal clearance is not legally binding on the ACCC or third parties. However, it is overwhelmingly the most popular form of clearance for merger parties.

Merger authorisation, a statute-based clearance process, is also available, and is binding on the ACCC and third parties on the basis that either:

- the merger will not (or is not likely to) substantially lessen competition; or
- the public benefits of the merger outweigh the public detriments.

Prior to the 2017 amendments, parties could opt to pursue formal merger clearance with the ACCC or make an application to the Australian Competition Tribunal for merger authorisation on public benefit grounds. While there were a number of applications to the Australian Competition Tribunal for merger authorisation, due to perceived procedural challenges, the formal merger process was never used and parties continued to rely on the informal merger process.

Since November 2017, when the current merger authorisation regime was introduced, there have been six applications for merger authorisation, of which three have been successful (one cleared unconditionally and two cleared subject to conditions), one has been unsuccessful (Telstra and TPG's proposed spectrum sharing in 2022) and two remain under consideration.

There is no right of appeal in relation to the ACCC's decision in an informal merger clearance process. If the ACCC chooses to oppose a proposed merger, the merger parties could offer an undertaking to attempt to address the ACCC's concerns, defend any court proceedings initiated by the ACCC or institute court proceedings themselves, seeking a declaration that the proposed acquisition

does not contravene the CCA. There have been few court proceedings following a decision by the ACCC not to grant informal merger clearance. For example, on 8 May 2019, the ACCC announced that it would oppose the proposed merger between TPG Telecom Limited and Vodafone Hutchison Australia Pty Ltd. Not accepting the ACCC's clearance decision, in early 2020, the parties successfully sought a declaration in the Federal Court that the merger would not substantially lessen competition.

Following the amendments to the CCA, the Australian Competition Tribunal acts as a merits review body of ACCC authorisation decisions. Both the ACCC and the Australian Competition Tribunal are subject to strict time limits for making authorisation decisions.

Timing of processes

For informal clearance, according to the ACCC's Informal Merger Review Process Guidelines, a Phase I review typically takes approximately six to 12 weeks after an initial pre-assessment stage, during which the ACCC confidentially considers whether, based on the information provided, a public review is required. The pre-assessment process itself typically takes around two to four weeks.

If a statement of issues is released at the end of Phase I, the timeline will be extended to allow a Phase II review (typically for a further six to 12 weeks).

Timelines are indicative and can be suspended or extended at any stage. Parties may request that the time frame be suspended for commercial reasons or the ACCC may suspend the time frame if it is awaiting additional information from the parties.

Under the merger authorisation regime, the ACCC is required to make a decision within 90 days unless the applicant agrees to an extension. If appealed, the Australian Competition Tribunal is required to issue its determination on an authorisation application within 90 to 120 days of receiving a valid application. Each time period can be extended.

Undertakings

Merger parties can provide the ACCC with a court-enforceable undertaking to implement structural, behavioural or other measures that address the competition concerns identified by the ACCC. The ACCC Merger Guidelines indicate a preference for undertakings that include structural rather than behavioural remedies.

The ACCC will ordinarily consult the market on a proposed draft undertaking. The ACCC will not accept undertakings if it is not satisfied that they address its competition concerns.

Prohibited anticompetitive conduct

Cartels

The CCA strictly prohibits any contract, arrangement or understanding (CAU) between competitors (or potential competitors) that has:

- the purpose or effect of fixing, controlling or maintaining prices; or
- the purpose of:
    - restricting output or acquisitions;
    - colluding in tender or rigging bids; or
    - sharing markets by allocating customers, suppliers, territories, product lines or areas of business.

Parallel criminal and civil sanctions exist for making or giving effect to a cartel provision.

The criminal offence requires proof that there was knowledge or belief that the CAU contained a cartel provision. Under the CCA, the offence applies to companies, but individuals can be held liable, including criminally (eg, a person who attempts to contravene, or who aids, abets, counsels, procures or induces, or is in any way 'knowingly concerned' in a contravention).

The ACCC is responsible for investigating cartel conduct and will refer serious cartel conduct to the CDPP, which is responsible for prosecuting offences under Commonwealth law. The ACCC has entered into a memorandum of understanding (MOU) to this effect with the CDPP. Among other things, the MOU outlines factors that are indicative of serious cartel conduct. The ACCC and CDPP also work together in assessing applications for immunity from criminal proceedings.

Joint venture exception

The CCA contains a joint venture exception to cartel conduct. Where the exception applies, a cartel provision will only contravene the CCA if it has the purpose, effect or likely effect of substantially lessening competition.

The joint venture exception will apply if:

- the cartel provision is for the purposes of the joint venture;

- the cartel provision is reasonably necessary for undertaking the joint venture; and
- the joint venture is for the production, supply or acquisition of goods or services.

Concerted practices

The 2017 amendments to the CCA introduced a prohibition against concerted practices that have the purpose, effect or likely effect of substantially lessening competition. While the concept of concerted practices is familiar internationally, the concept is new to Australian law and proceedings are yet to be brought under the new legislation.

The term 'concerted practice' is not defined in the CCA but is intended to capture conduct that falls short of a CAU, which constitutes a form of cooperation between two or more companies or people with the proscribed purpose or likely effect. The explanatory memorandum for this prohibition refers to the European law on concerted practices as an example of what the law is intended to capture.

The explanatory memorandum provides some guidance on the type of conduct that could be characterised as a concerted practice. It is not necessary for any of the parties to act in the same manner or market, or at the same time. A concerted practice may involve, but does not require:

- the formality or legally enforceable obligations of a contract;
- the express communication of an arrangement (it may be established in the absence of any direct contact); or
- the commitment of an understanding (it may be established even if none of the parties is obliged to act in a particular way).

It is not necessary for a concerted practice to have an anticompetitive provision as the focus is on the purpose, effect or likely effect of the practice itself.

The concept is not intended to capture innocent parallel conduct – such as where two firms determine prices independently but happen to charge similar prices for the same product – or public disclosure of pricing information that facilitates price comparison by consumers.

A concerted practice may arise from a single instance, rather than a course of conduct, and does not require that the practice is reciprocated or that the actions of other parties are altered in response. This raises questions about whether businesses that are unwitting recipients of information may be caught up in concerted practices.

The ACCC has not yet commenced proceedings regarding a contravention of the concerted practices provision. However, the ACCC has publicly stated that bringing proceedings under this provision is a particular focus. Although no proceedings have been commenced, the ACCC has accepted a court-enforceable undertaking relating to alleged concerted practices in the turf and roofing industry.

Misuse of market power

The CCA prohibits corporations with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition:

- in a market where it has a substantial degree of power; or
- in any other market in which the corporation or a related corporation supplies or acquires, or is likely to supply or acquire, goods or services directly or indirectly.

A party may now seek authorisation for conduct that would otherwise contravene the misuse of market power prohibition on public benefit grounds.

Applicable test for market power

The applicable test is whether a corporation has a substantial degree of power in a market. Market power is determined in part by the ability to act free from constraints by competitors, customers or suppliers in a market. Market power can be evidenced by factors such as:

- a corporation's ability to raise prices without rivals taking away customers;
- whether a corporation is vertically integrated (although this is not, on its own, determinative);
- a corporation's ability to set non-price terms and conditions; or
- the barriers to entry into the market by new entrants.

'Substantial' is generally understood to mean 'large or weighty' or 'considerable, solid or big'. A corporation may have substantial power in a market even if it does not control the market or have absolute freedom from constraint by the conduct of competitors, customers or suppliers.

There is no market share threshold above which a corporation will be presumed to have substantial market power. However, a high market share is often a factor that tends to indicate, along with the other factors listed above, that a corporation has substantial power in a market.

It is possible for two or more corporations to simultaneously have a substantial degree of power in the same market.

Vertical arrangements

The main provisions that govern specific vertical arrangements are the prohibitions against:

- exclusive dealing (including third-line forcing) where the arrangements have the purpose, effect or likely effect of substantially lessening competition; and
- RPM, which is strictly prohibited.

The prohibition on RPM does not apply to:

- genuine recommended resale prices;
- genuine maximum resale prices; and
- a refusal to supply loss-leading sellers.

The CCA contains notification and authorisation processes that will provide legal immunity for exclusive dealing and RPM. A notification process for RPM was introduced following the 2017 amendments. Prior to this, authorisation was the only way to obtain legal protection for RPM conduct. Authorisation will continue to be available, so businesses proposing to engage in RPM now have the choice of lodging a notification or seeking authorisation. Compared to authorisation, notification is a simpler and more timely process. The ACCC may grant authorisation for RPM if satisfied that the relevant conduct will provide a net public benefit.

Public enforcement

The ACCC is the principal regulatory body charged with enforcement of Australian competition laws. In respect of any criminal contraventions, the ACCC works closely with the CDPP and Australian Federal Police (AFP).

A competition investigation typically commences with an information-gathering phase where the ACCC seeks to obtain information relating to suspected contraventions of the CCA.

There is no set timetable governing the period in which the ACCC must complete an investigation or decide to bring court proceedings. However, the ACCC must bring any civil action for damages, pecuniary penalties or other remedial orders within six years of the contravention. Criminal prosecution of cartel provisions is not subject to any statutory limitation period.

ACCC investigatory powers

Voluntary and compulsory production

In the first instance and outside of cartel investigations, the ACCC will usually consider whether it is appropriate to gather relevant information, documents and evidence on a voluntary basis.

However, where the ACCC has reason to believe that a person or corporation is capable of furnishing information, producing documents or giving evidence that relates to a possible contravention, it may issue a section 155 notice to the relevant person or corporation that compels them to provide relevant information or documents. Privileged documents do not need to be provided to the ACCC.

The ACCC can also compel individuals named in a section 155 notice to appear before the ACCC to give oral evidence in relation to a possible contravention.

Dawn raids

The ACCC has the power to conduct dawn raids in circumstances where a search warrant is issued. While dawn raids were historically less common in Australia compared with some other jurisdictions, the ACCC had begun using them with increased frequency prior to the onset of the covid-19 pandemic. The ACCC must apply to a magistrate for a search warrant. A search warrant will only be granted where the ACCC can satisfy the magistrate that the ACCC has reasonable grounds for suspecting there is evidence on a premises that is relevant to a contravention of the CCA.

A search warrant gives the ACCC wide-ranging powers, including the power to copy or seize documents or electronic equipment, operate electronic equipment on a premises and take photographs or video recordings. The ACCC can also require that individuals answer questions or produce documents that may provide evidence in relation to a contravention.

Cartel investigations

As noted above, the ACCC and the AFP may conduct a joint investigation in relation to suspected criminal cartel conduct.

If the ACCC becomes aware of ongoing cartel conduct that could constitute a criminal offence, it may notify the AFP, which may obtain one or more of the following warrants for:

- telephone interception;
- stored communication (voicemail and emails);

- surveillance device; and
- telecommunications data collation.

Immunity and cooperation policies

Consistent with other jurisdictions, the ACCC maintains immunity and cooperation policies as a key component of its compliance and enforcement arsenal. The Immunity Policy only applies to cartel conduct, whereas the Cooperation Policy extends to any matter that may involve a contravention of the CCA.

The policies provide for the granting of immunity from civil cartel proceedings by the ACCC to the first eligible cartel participant to report involvement in a cartel, subject to satisfying the criteria outlined below.

An application for immunity can only be made by an individual or a corporation. However, where a corporation is granted immunity, this may be extended to related corporate bodies, and to current and former directors, officers and employees of the corporation in certain circumstances. The Immunity Policy and the Cooperation Policy were updated on 1 October 2019 and now require applicants seeking immunity to enter into a cooperation agreement early in the immunity process, which clearly sets out the steps required for conditional civil and criminal immunity.

An immunity applicant must satisfy the following criteria to receive immunity:

- the party must admit that their conduct may contravene the cartel provisions of the CCA;
- the party must be the first party to apply for immunity in respect of the cartel;
- the party must not have coerced others to participate in the cartel;
- the party must have ceased involvement in the cartel;
- any admissions made by a corporation must be a 'truly corporate act' (rather than isolated confessions of individual representatives);
- the party must provide full disclosure and cooperation with the ACCC's investigation and any ensuing court proceedings;
- the party has entered into a cooperation agreement; and
- the party has maintained, and agrees to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuing civil or criminal proceedings.

For criminal cartel conduct, the ACCC will make recommendations to the CDPP about whether immunity from criminal prosecution should be granted. While the CDPP exercises independent discretion, it is unlikely to refuse immunity from criminal prosecution if the ACCC has granted immunity from civil prosecution.

When a person or entity is not eligible for first-in immunity from cartel proceedings, the ACCC recognises individual and corporate cooperation in both civil and criminal cartel investigations.

The ACCC will identify cooperation to the court in any proceedings by way of submissions to the court. Cooperation is ordinarily a mitigating factor relevant to determining penalties. While the ACCC may make penalty recommendations on the basis of cooperation, ultimately, penalties are a matter for the court.

The ACCC's Cooperation Policy sets out possible leniency measures that the ACCC may adopt when dealing with entities that cooperate with ACCC investigations.

The ACCC is most likely to consider adopting leniency in respect of a corporation or individual that:

- comes forward with valuable and important evidence of a contravention of the CCA of which the ACCC is otherwise unaware or has insufficient evidence to initiate proceedings;
- provides the ACCC with full and frank disclosure, including all relevant documentary evidence available to it;
- cooperates fully with the ACCC's investigation and any ensuing litigation; and
- has not compelled or induced any other person or corporation to take part in the contravening conduct and was not a ringleader or originator of that conduct.

Penalties

Civil pecuniary penalties apply to contraventions of the competition prohibitions of the CCA. The maximum civil penalty per contravention is:

- for companies, the greater of A$50 million or three times the value of the benefit obtained that is reasonably attributable to the contravention, or, where the benefit obtained cannot be calculated, 30 per cent of the adjusted turnover of the body corporate during the breach turnover period; and
- for individuals, up to A$2.5 million.

For companies, the same maximum penalties apply in respect of a criminal cartel contravention.

For consumer law contraventions in particular, a single course of conduct may give rise to numerous contraventions.

An individual convicted of a criminal cartel offence can face up to 10 years' imprisonment and a fine of up to A$550,000. It is illegal for corporations to indemnify officers, employees or agents in respect of penalties and legal costs.

Other non-pecuniary penalties include declarations, injunctions, community service orders, adverse publicity orders and disqualification of a person from managing corporations.

Penalties in Australia have not generally been anywhere near the statutory maximum. The ACCC has been seeking larger penalties and its approach appears to be resonating with the courts. For example, in the *Nippon Yusen Kabushiki Kaisha* criminal cartel decision, the maximum penalty that could have been imposed was A$100 million. The court concluded that the appropriate penalty would have been A$50 million, which would have been the largest penalty ever in Australia, but ordered a A$25 million penalty that included a 50 per cent discount for the early plea, past and future assistance, and cooperation and contrition on the part of Nippon Yusen Kabushiki Kaisha.

The highest fines imposed under the CCA (all of which occurred prior to the introduction of the new maximum penalties) include the following.

In August 2019, the Federal Court ordered Japanese shipping company K-Line to pay a fine of A$34.5 million for engaging in criminal cartel conduct. This is the largest-ever criminal fine imposed under the CCA, although it is lower than the A$46 million civil penalty issued to Yazaki Corporation in 2018 in relation to its involvement in cartel conduct.

In December 2019, the Federal Court ordered Volkswagen AG to pay A$125 million in penalties for breaching the Australian Consumer Law[2] by making false representations about compliance with Australian diesel emissions standards. In April 2021, Volkswagen's appeal against this penalty was dismissed by the Full Federal Court and, in November 2021, the High Court refused special leave to appeal the penalty decision.

In December 2021, the Federal Court ordered A$153 million in penalties against the Australian Institute of Professional Education (AIPE) for breaching the Australian Consumer Law. This followed declarations that the AIPE had engaged in a system of unconscionable, misleading and deceptive conduct when enrolling customers into online diploma courses, including by telling vulnerable and disadvantaged customers that their courses were free.

International aspects

Extraterritorial application of CCA

Conduct occurring wholly outside Australia may come within the jurisdiction of the CCA if the contravening entity is:

2 Schedule 2, CCA.

- an Australian citizen;
- a person ordinarily resident in Australia;
- a body corporate incorporated in Australia; or
- a body corporate carrying on business in Australia.

What will amount to 'carrying on business in Australia' has been the subject of extensive judicial interpretation. It is possible that a foreign corporation operating in Australia through a wholly owned subsidiary may be considered to carry on business in Australia. Similarly, supplying goods or services to distributors in Australia (including from overseas), or supplying or acquiring intellectual property rights in Australia, may also amount to carrying on business in Australia.

In addition, specific provisions within the CCA require a territorial nexus to Australia. In particular, competition-tested prohibitions (ie, prohibitions that require there to be a purpose, effect or likely effect of substantially lessening competition in a market) require the affected market to be a market in Australia. Furthermore, the cartel prohibitions only apply to the extent that two parties to a contract, arrangement or understanding compete in relation to the supply or acquisition of goods or services in Australia, or between Australia and places outside Australia.

Cross-border ACCC cooperation

The ACCC has signed cooperation agreements with a number of countries or other bodies, including Canada, China, the European Commission, Fiji, India, Japan, New Zealand, the Organisation for Economic Co-operation and Development, Papua New Guinea, the Philippines, South Korea, Taiwan, the United Kingdom and the United States. The agreements deal with mutual assistance and coordination of enforcement activities. The ACCC is also a member of the International Competition Network, which focuses on addressing antitrust enforcement and policy issues of common concern to its members worldwide.

In addition, the CCA enables the ACCC to disclose protected cartel information (provided by successful immunity applicants) to overseas competition authorities.

Linda Evans

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Linda Evans is a partner in the competition, regulatory and trade team at Herbert Smith Freehills. She is a leading competition and regulatory lawyer with particular expertise in contentious matters, complex mergers and third-party access. She has provided Australian competition law advice to a wide range of clients, including Pacific National, Seven West Media, Origin Energy and Hydro Tasmania.

She is recognised as a leading individual for competition and antitrust by the legal directories published by Chambers and Partners and The Legal 500, as well as *IFLR1000, Doyle's Guide* and *Best Lawyers Australia*. Linda is highly regarded as a 'careful, excellent tactician who is not afraid of a fight'.

Patrick Gay

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Patrick Gay is a partner in the competition, regulatory and trade team at Herbert Smith Freehills. He has provided Australian competition law advice to a wide range of clients, including Tabcorp, Metcash and Visa. He is co-author of the chapter on 'Merger Clearance in Australia' in *Towns Under Siege: Developments in Australian Takeovers and Schemes* and the chapter on 'Competition Law and Joint Ventures' in *Before You Tie the Knot: Contemporary Issues in Joint Venture Law*.

He is recognised for his experience advising on high-profile contentious merger clearance matters relating to consumer products and well-known brands. Patrick is well known for his commercial approach, with clients describing him as having 'outstanding business acumen' and being 'commendable' for providing 'commercial and clear' advice for 'complex issues'.

Herbert Smith Freehills is one of the world's leading professional services businesses, bringing together the best people across our 27 offices to meet all your legal services needs globally. Our clients trust us with their most important transactions, disputes and projects because of our ability to cut through complexity and mitigate risk. Because technical ability alone is not enough, we seek to build exceptional working relationships with our clients, which enables us to develop a deeper understanding of their businesses, provide commercially astute, innovative advice, and create better business outcomes for each client.

Ranked among the Global Elite by GCR in 2022, our competition, regulation and trade practice is widely recognised by peers and legal directories as one of the leading teams in the field. We advise many of the world's blue-chip organisations in a wide range of industries across the full spectrum of competition work – including merger control, investigations, litigation and state aid – and provide advice on regulated sectors. Many of our lawyers have spent time working for regulatory authorities and for clients, enabling us to provide a unique insight. Our global network of offices allows us to provide a comprehensive and integrated cross-border service to our clients.

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