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Competition and consumer law

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Competition and consumer law

1. Competition laws

Australia has comprehensive competition laws similar to competition laws in North America and Europe.

Australia's competition laws are contained in the Australian Competition and Consumer Act (CCA), which is administered and enforced by the Australian Competition and Consumer Commission (ACCC).

Key prohibitions

Australia's competition laws prohibit:

- **Anti-competitive mergers:** Any acquisition of shares or assets likely to substantially lessen competition in a market in Australia (see 'Merger control' section below).
- **Cartels:** Competitors making or implementing any contract, arrangement or understanding to fix prices, restrict supply, share markets, or rig bids. Both civil penalties and criminal penalties (including substantial fines and, for individuals, imprisonment) apply to both corporations and individuals involved in cartel conduct. There are limited exceptions for cartel conduct, most importantly, the joint venture exception (but this is tightly defined).
- **Market power:** Corporations that have substantial market power must not engage in conduct that has the purpose or which has the effect or likely effect of substantially lessening competition in a relevant market. Legitimate conduct such as vigorous jockeying for sales is not prohibited even if it damages a competitor, however some conduct, such as raising barriers to entry to competitors in order to exclude them, or otherwise deterring competitive conduct may amount to a breach of this prohibition.
- **Resale price maintenance:** Suppliers of goods or services seeking to ensure that resellers maintain specified minimum prices when advertising or selling the relevant goods or services.
- **Specific anti-competitive vertical arrangements:** Vertical arrangements which have the purpose or likely effect of substantially lessening competition in a market in Australia such as forcing (supplying goods or services on the condition that other goods or services are acquired from the supplier – or from an unrelated third party – third line forcing) and other forms of exclusive dealing (including imposition of product, customer and territorial restrictions).
- **Anti-competitive arrangements:** Any contract, arrangement or understanding, whether between competitors or not, which has the purpose or likely effect of substantially lessening competition in a market in Australia.

A key concept in the application of most competition laws in Australia is that of a 'market'. A 'market' is a mixed legal and economic concept. It does not, necessarily mean a 'product market' in ordinary business terminology. In the CCA it is referred to as a 'relevant' market and takes into account both actual competitive products and services and likely substitutes for those products (including likely entry) should an entity seek to raise or maintain prices or otherwise exercise market power. It is a wholly-future-looking concept.

Application of Australia's competition laws outside Australia

Australia's competition laws may apply to conduct outside Australia. For example, the key prohibitions outlined above apply to conduct outside Australia by Australian citizens, people ordinarily resident in Australia, companies incorporated in Australia and companies carrying on business in Australia.

Foreign companies can be held to be themselves carry on business in Australia through the operations of Australian subsidiaries, depending on the relationship between the foreign company and the Australian subsidiary.

In addition, overseas suppliers of goods or services in Australia are subject to the prohibitions against resale price maintenance and specific anti-competitive vertical tying arrangements.

Merger control

As indicated above, Australia's competition laws prohibit any acquisition of shares or other assets which is likely to substantially lessen competition in a market in Australia.

The current practice currently is to informally approach the ACCC when:

- The merger is likely to exceed the ACCC's notification threshold. The ACCC has published Informal Merger Review Process Guidelines and encourages notification where the merger parties' products are substitutable or complementary and the merged entity will have 20 per cent or more of the relevant market).
- The merger otherwise risks substantially lessening competition by, for example, removing a vigorous competitor; or the merger is likely to otherwise attract ACCC scrutiny because of, for example, complaints to the ACCC or other regulators notifying the ACCC of the merger.

Various forms of transactions are caught by the merger regulations, where the transaction involves an acquisition of shares or assets. This might include forms of joint ventures or other collaborations.

Where merger clearance is sought, there are three processes currently available in Australia:

- An 'informal' (that is, not mandated or recognised by the CCA) merger clearance process, under which the ACCC reviews mergers to determine whether they are likely to substantially lessen competition and therefore whether it will challenge that merger.
- A formal merger clearance process (authorisation), under which the ACCC reviews mergers to determine whether they are likely to substantially lessen competition. Authorisation requires the party seeking authorisation to prove that 'public benefits' outweigh any anti-competitive detriment.
- The parties may seek a declaration from the Federal Court that a particular acquisition does not breach the prohibitions in the CCA. The onus of proving that it does not breach the CCA lies upon the party commencing proceedings. The ACCC may also commence proceedings seeking injunctions to prevent a merger proceeding.
- There is currently no legal requirement to notify the ACCC of any merger in Australia. A mandatory notification of mergers regime is planned to commence on 1 January 2026. The compulsory notification regime will operate on 'typical' business metrics. The details of the new regime are still to be announced but will shift power substantially to the ACCC, limiting the power of any review and the role of the courts.

Immunity and leniency

The ACCC maintains an Immunity Policy for cartel conduct under which eligible applicants may obtain immunity. To be eligible for immunity, applicants must, among other things, be a party to a cartel, admit their involvement in the cartel, be the first applicant for immunity regarding the cartel and must not have been the leader of the cartel. Applicants may request a 'marker' to preserve their position as first 'in the queue'.

A grant of immunity is conditional on all conditions of the grant being satisfied, including a requirement of full disclosure and cooperation. The Immunity Policy applies to international cartels which affect Australia.

The ACCC also maintains a Cooperation Policy which provides for 'flexible' leniency in return for cooperation in all enforcement matters. Participants in a cartel who are not eligible for immunity under the Immunity Policy may be eligible for leniency under the Cooperation Policy.

Investigations

The ACCC has extensive powers to investigate suspected contraventions of the CCA.
These include:

- The power to require a person to provide the ACCC with information, documents and oral evidence under oath.
- The power to raid residential or business premises, where the occupier consents or where the ACCC has obtained a warrant.

In addition, in criminal investigations (such as the investigation of criminal cartel conduct), the Australian Federal Police may intercept telecommunications, access stored communications and use surveillance devices with the appropriate warrants.

The ACCC collaborates with competition regulators in other countries in the context of investigations into conduct connected to multiple countries.

Access to facilities of national significance (or essential facilities)

The CCA contains a process under which facilities of national significance may be declared and subject to a regulatory regime. To be subject to an access regime requires showing that competition in a market is substantially increased. That other market is one other than the market in which a supplier of services itself operate in, that is, one upstream or downstream of that provider) is substantially increased. Once declared under the CCA, access to the declared facilities must be provided on terms agreed between the access provider and access seeker. In the absence of such an agreement, access terms may be determined by arbitration.

The general provisions of the CCA in relation to market power might independently provide a cause of action in respect of conduct of a corporation that holds market power.

2. Consumer laws

Australia has comprehensive consumer laws which include provisions governing unfair consumer contracts, consumer guarantees and product safety.

The laws are contained in the Australian Consumer Law (**ACL**), which is part of the CCA. The ACL is administered and enforced by the ACCC and state-based consumer regulators. Penalties under the ACL are significant, and in November 2022 the maximum penalties for breaches of certain provisions increased five-fold.

Key prohibitions

A wide range of conduct is prohibited, including misleading or deceptive conduct, unconscionable conduct, specific types of misleading representations regarding the supply of goods or services, certain types of marketing activities, and unfair contract terms in standard form consumer contracts.

Australia has broad laws under the ACL which prohibit the inclusion of unfair contract terms (**UCT**s) in standard form contracts with consumers or small businesses. UCTs in such contracts are unenforceable and significant penalties apply.

The maximum financial penalties for businesses under the new unfair contract terms law are the greatest of:

- A$50 million;
- three times the value of the "reasonably attributable" benefit obtained from the conduct, if the court can determine this; or
- if a court cannot determine the benefit, 30 per cent of adjusted turnover during the breach period.

The maximum penalty for an individual is A$2.5 million.

These laws apply to standard form contracts made or renewed on or after 9 November 2023 or terms varied or added on or after that date.

The definition of small business, for the purpose of deciding if the laws apply to a standard form contract with a small business, is a business with fewer than 100 employees or with an annual turnover of less than A$10 million.

Consumer guarantees

Every supply of goods or services to a consumer is subject to certain consumer guarantees. Both manufacturers and suppliers have potential liability under them.

Express warranties

Any express warranty against defects provided by a manufacturer or a supplier to a consumer must comply with prescribed requirements. As a result, warranties used by offshore manufacturers in other countries will require modification for use in Australia.

Product safety

The ACL also contains extensive provisions concerning the safety of consumer goods and product-related services supplied in Australia. These provisions include requirements regarding the issue of product safety warning notices, product bans, and the imposition of mandatory safety standards for particular goods.

The Commonwealth Minister has the power to order a compulsory recall if they consider that the suppliers have not taken satisfactory recall action.

The ACL also imposes mandatory reporting requirements where a consumer product has caused, or may cause, death, serious injury, or illness to any person. This includes even where the cause was due to a "foreseeable misuse" of the product. Within two days of becoming aware of any such incident, a supplier is required to make a mandatory report to the Commonwealth Minister.

The ACCC commonly works with other domestic and international regulators and government agencies in relation to particular issues.

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