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# The Ashurst View

COMPETITION LAW IN 2017

March 2017



# Foreword

Welcome to our annual publication *The Ashurst View – Competition Law in 2017*. This publication offers our perspective on the most important developments in competition and consumer law and practice in Australia in 2017.

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# The ACCC's key themes for 2017

Recently, three important and wide-ranging themes for its activities in 2017 have emerged from the ACCC.

These three broad themes are the most important factors for Australian business to have in mind, as it engages with the ACCC in 2017 (on a voluntary, or involuntary basis!). Most importantly, they each point to the ACCC taking action in less predictable ways in the year ahead.

1

## INCREASING PENALTIES

First, the ACCC is revisiting its approach to penalties and has signalled it will seek higher penalties for those who contravene the competition and consumer laws.<sup>1</sup> In a press report in early February 2017, following on from judicial criticism of penalties proposed by the ACCC (particularly in the *Coles*, *Nurofen* and *ANZ/Macquarie* cases), Rod Sims, Chairman of the ACCC, said that “we have both encouragement and direction from the courts that will allow us to seek much higher penalties from large companies in both consumer and competition cases and we will be doing that”.

More recently, Mr Sims has confirmed this theme, stating that the ACCC “must work to ensure that penalties are sufficiently high to deter large companies from contravening the law”, and that “this approach may lead to fewer agreed settlements (on penalties), at least initially”.<sup>2</sup>

We also expect that the ACCC will also continue to lobby for consumer protection penalties (currently a maximum of \$1.1 million per breach by a corporation) to be brought into line with competition penalties, which are a maximum of \$10 million, three times the benefit or 10% of turnover per breach.

## CONCENTRATION OF AUSTRALIAN INDUSTRY – POSSIBLY A DIFFERENT APPROACH?

Secondly, in a speech by Mr Sims in late 2016, he observed how increasingly concentrated the Australian economy had become and laid out several serious questions on how the ACCC might best administer Australia’s merger regulations, so as to prevent potentially anticompetitive outcomes in Australia’s concentrated markets.<sup>3</sup>

In doing so, Mr Sims stated that the ACCC will bring greater focus to markets where smaller emerging, and perhaps disruptive, rivals are being acquired by incumbent firms, as part of the ACCC’s wider analysis of mergers and the markets they affect.

## A FOCUS ON “LARGER BUSINESSES”

Thirdly, the ACCC has recently emphasised its own practical capacity constraints, across its otherwise “wide spectrum of activity”. In this context, the ACCC proposes that its “focus will increasingly gravitate towards larger businesses”.<sup>4</sup>

This will not mean that smaller businesses can expect a free pass: the ACCC will continue to pursue clear contraventions of the competition and consumer law, and it will look to existing State and other specialist regulators (such as the Therapeutic Goods Administration, and the State fair trading, building and electrical regulators) to pursue many appropriate cases. Rather, the ACCC is reconfirming its approach to its enforcement functions, to focus on the cases involving larger businesses, because “their footprint and impact will be more significant and their influence on market behaviour (more) telling”.

This approach may mean that the ACCC will not pursue clearly contravening conduct by small business in some cases (leaving the task to others), but will pursue less clear allegations against larger and more prominent businesses.

<sup>1</sup> See AFR report, 5 February 2017, “Rod Sims says ACCC ‘too cautious’ on penalties in the past”. (see: <http://www.afr.com/business/legal/rod-sims-says-acc-too-cautious-on-penalties-in-the-past-20170205-gu55gc>)

<sup>2</sup> See the address by Rod Sims, Chairman of the ACCC, on 24 February 2017 to CEDA Sydney, “CCA compliance in interesting times” (see <https://www.accc.gov.au/speech/cca-compliance-in-interesting-times>)

<sup>3</sup> See the address by Rod Sims on 27 October 2016 to the RBB Economics Conference, “Is Australia’s economy getting more concentrated and does this matter?” (see: [http://www.accc.gov.au/speech/keynote-address-rbb-economics-conference-0#\\_ftn5](http://www.accc.gov.au/speech/keynote-address-rbb-economics-conference-0#_ftn5))

<sup>4</sup> See footnote 2.



## The ACCC's “priorities” for 2017

# 2

At a more granular level, each year the ACCC publishes its enforcement “priorities” for the year ahead.

In his address to CEDA in Sydney on 24 February 2017,<sup>5</sup> Mr Sims mapped out several areas as the ACCC’s priorities for 2017. Briefly stated, they are as follows:

- **Criminal cartels** – Cartel enforcement is always a top priority. Building upon two criminal charges being laid during 2016 (in the shipping sector, against two Japanese corporations), the ACCC “expects to see more criminal prosecutions over the next couple of years”. However, there is no indication yet as to when the first individuals will be charged.
- **Price parity obligations** – Particularly where online channels compete with bricks and mortar businesses, price parity obligations (traversing a wide range of conduct from “most favoured customer” obligations, to “no undercutting” assurances) have been common. The ACCC contends that these obligations “can cause great anticompetitive harm through higher prices or reduced innovation”. This is a new area of particular focus for the ACCC – following on from the controversial *Flight Centre* judgment by the High Court in December 2016, in which an airline and its agent (Flight Centre) were found to be in competition with each other.

<sup>5</sup> See footnote 2.

- **Sector focus for competition issues** – The ACCC has identified the following sectors for its focus in 2017:
  - *“Commercial construction”* – in the Commonwealth Government’s mid-year economic update released in December 2016,<sup>6</sup> the ACCC was allocated \$2 million over 2 years to investigate competition issues in the commercial construction sector, following on from the Royal Commission into Trade Unions. Since then, the ACCC has established and staffed a new Commercial Construction Unit. The ACCC has now announced that it “will put additional resources” into this area. While the conduct of unions (in relation to cartel and secondary boycott conduct) will be a principal focus for the Commercial Construction Unit, we expect that the ACCC will want to be seen to be “even-handed” in investigating conduct across the sector, including potentially that of the major contractors and developers.
  - *Energy* – the ACCC is pursuing several matters following from the East Coast gas inquiry.
  - *Health* – as in previous years, the health sector remains a priority, with several investigations “at a very advanced stage”.
  - *Agriculture* – the ACCC’s dedicated Agriculture Unit has consulted widely across the sector, in beef, grains and horticulture. It is also working on a market study in the dairy industry. More pointedly, Mr Sims has also said that “we expect to launch some cases alleging breaches of the Act by some firms in the agriculture sector” in 2017.
- **Consumer law priorities** – Foremost among the ACCC’s consumer law priorities in 2017 will be the enforcement of the new small business “unfair contract terms” provisions. These came into force in November 2016. During 2016, many businesses spent significant time and effort reviewing their standard form contracts with small businesses, to remove any terms which may be viewed as unfair. Nevertheless, in the ACCC’s lead-up work during 2016 (where it consulted extensively with many large companies dealing with small business), it has identified three types of “problematic terms” which it says are “amazingly widespread in business-to-business standard form contract terms”, being:
  - rights to vary contract terms unilaterally;
  - “broad”, “unreasonable” and “excessive” indemnities and limitations of liability; and
  - rights to “unreasonably” cancel or terminate agreements.

The ACCC also has concerns in relation to potentially unfair “roll-over” clauses, extended payment terms and exclusivity requirements. We can expect to see considerable activity in this area in 2017.

As to particular sectors for attention in 2017, the ACCC has highlighted the following:

  - *broadband performance and speed claims*, which the ACCC is concerned are “triggering high levels of consumer complaint, confusion and dissatisfaction”. The ACCC has issued “principles” in relation to speed claims by service providers which it will firm up into “guidelines” in the first half of 2017;
  - *new motor vehicles*, where the ACCC is presently conducting a market study as well as investigations, and in relation to which the ACCC has stated that it and other consumer regulators “continue to receive a high volume and broad range of reports that indicate many consumers find it difficult to enforce their rights under Australian consumer law”; and
  - *private health insurance*, where the ACCC says it will “intensify [its] focus... to improve compliance with the Act”, at the same time as it brings proceedings against Medibank Private (set down for trial in March 2017).

More broadly, the ACCC will also focus on “commission-based sales”, across sectors as diverse as energy, health services, education and fund-raising for charities. The ACCC’s concerns are focused on “incentives (for) a culture of misleading or unfair selling practices (to) develop”.

<sup>6</sup> See <http://www.budget.gov.au/2016-17/content/myefo/html/>



## Law reform in 2017

### 3

Since the Harper Committee Report was published in March 2015, recommending extensive competition policy and law reform, a long political process has unfolded.

There are also several other reviews underway, particularly in relation to Australian consumer law. The following notes summarise where things are up to:

- **Misuse of market power** – The Harper Committee recommended that the misuse of market power provision (section 46 of the *Competition and Consumer Act 2010* (Cth) (CCA)) be amended to prohibit a corporation with substantial market power engaging in conduct which has the purpose, effect or likely effect of substantially lessening competition. Having conducted extensive further consultation (most recently, in the form of a Senate committee inquiry – which reported on 16 February 2017), the government is essentially proceeding with this proposal. A Bill to implement this change has been introduced into the House of Representatives, and now awaits debate. Based on the Senate committee report, we anticipate significant opposition to the Bill.

In Ashurst's view, the proposed changes to section 46 of the CCA are a triumph of politics over good law-making. The two most prominent short-comings of the new provision are that:

- conduct which has the “purpose” of substantially lessening competition (evident from an internal email, say), but does not have any anticompetitive effect, may nevertheless contravene the provision – an outcome which will fuel wide-ranging investigations and discovery, looking for a “smoking gun” purpose document; and
  - contravening conduct may have nothing to do with a firm's substantial market power – for example, a conglomerate organisation may contravene even if its market power lies in one industry, and the conduct with the purpose or effect of lessening competition lies in a completely unrelated enterprise within the conglomerate.
- **Other Harper Committee recommendations**
    - Draft legislation has been prepared to enact the other law reforms proposed by the Harper Committee and adopted by the Government. This legislation is expected to be introduced into Parliament during 2017. It will contain several important reforms of real practical utility, notably to:
      - remove the *per se* “third line forcing” prohibition;
      - simplify the “joint venture” exception to the cartel prohibition (of particular importance in the energy and resources sector);
      - rationalise the several procedures for merger review, but retain the most common, practical approach; and
      - introduce a power to grant “block exemptions” for conduct of widespread application.

More extensive reforms will include introducing a new prohibition for “concerted practices” which substantially lessen competition, the removal of the prohibition of exclusive dealing, and some important (and controversial) amendments to the access to infrastructure provisions.

- **Reviews to be delivered** – The reviews by Consumer Affairs Australia and New Zealand and the Productivity Commission into the Australian Consumer Law (ACL) will both be released in March this year. We are hopeful (though not optimistic) that the Government might use these reports as an impetus to make some changes to the ACL to make it easier for businesses and consumers alike to understand their rights and obligations. Whether or not the political climate will allow for this, remains to be seen.
- **Market studies and inquiries finalised; more to come** – The ACCC's current Communications market study is expected to report in November 2017, as is its wide-ranging Dairy industry inquiry. The ACCC's New Car Retailing study is expected to be released “late 2017”, while the time frame for release of the Cattle and Beef market study is yet to be announced (though is likely to be some time in 2017). We expect that there may be yet more market studies in 2017, as the ACCC has enthusiastically taken up this vehicle for gaining valuable industry information and insights.



## More subtle, but important changes – for attention during 2017

# 4

### COMPETITION BETWEEN SALES CHANNELS – AGENCY vs COMPETITION

In December 2016, the High Court published its decision in the ACCC’s proceedings against Flight Centre.<sup>7</sup> In short, Flight Centre was found to have been “in competition” with the airlines for whom it was agent, in selling their fares. In this context, an attempt by Flight Centre to reach an arrangement with various airlines not to undercut one another contravened the cartel provisions of the CCA.

The Court found that a relationship of agency between Flight Centre and an airline did not prevent them from being “in competition” with each other, under the cartel laws. While some agents will lack the ability or incentive to compete with their principal, that was not the case for Flight Centre: it was free to pursue its own interests in deciding whether or not to sell tickets and at what price. According to Gordon J, the pursuit of those interests meant that it was, in fact, wrong to describe Flight Centre as a true “agent” for the relevant airlines when it dealt with customers in its own right. Particularly, there was a functional rivalry between the sale of tickets by Flight Centre and the relevant airlines. If Flight Centre sold a ticket to a customer, the airline did not.

<sup>7</sup> *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49 (see: <http://www.austlii.edu.au/au/cases/cth/HCA/2016/49.html>)

In dissent, French CJ adopted the “traditional” (and hitherto, widely adopted) view that because Flight Centre acted as an agent in selling tickets, those sales should be “regarded as the action of the airline itself” – and thus not “in competition” with the airline.

This decision has wide-ranging implications for selling products (both goods and services) through multiple channels – wherever an “agent” is appointed to sell through another channel (be it online or elsewhere). The ACCC is enthusiastically taking up the task of reviewing multi-channel distribution systems to ensure that “price parity” and other similar arrangements made across those channels comply with the High Court’s approach to when firms are “in competition” with one another.

For a more extensive analysis, see our publication, of 16 December 2016 [Competition Law News](#).

## ACCESS TO INFRASTRUCTURE – PRICE REGULATION OR NOT?

Since May 2015, Glencore Coal Pty Ltd (Glencore) has been seeking a third party access declaration at the Port of Newcastle (the Port). The Port is Australia’s biggest coal port, and is already operated on a multi-user basis. If “declared”, then Glencore (and any other current or potential users) can seek regulated access terms and pricing for its use of the Port’s shipping channels and berths.

Glencore’s application is a response to the decision by the operators of the privatised Port to substantially increase port charges. Glencore is seeking declaration of the use of the Port’s shipping channel and berths (the Service) not to obtain use of the Service (as ships servicing Glencore and other producers already regularly use it), but so that negotiations with the Port operator over the price and other terms of use are subject to arbitration by the ACCC.

Glencore was initially unsuccessful: the National Competition Council (NCC) recommended against declaration, and on 8 January 2016 the Acting Commonwealth Treasurer decided not to make the declaration. However Glencore sought review of the Minister’s decision by the Australian Competition Tribunal, and on 31 May 2016 the Tribunal decided that the declaration should be made.

The critical issue was whether access or increased access to the Service would “promote a material increase in competition in (another) market” (declaration criterion (a)), and whether that question should be assessed having regard to the fact that Hunter Valley coal producers already use the Service. In substance, this is a question about whether regulation of major infrastructure should be based on a factual analysis of the incremental benefits of introducing declaration/ regulation, or on a more hypothetical analysis that ignores the fact that the service is already available to, and commonly used by, those who seek it.

The Tribunal considered that it was bound by a decision of the Full Federal Court (*Sydney Airport*) not to consider the prevailing use of the service in applying this test, and so applied the more hypothetical analysis. The Tribunal’s decision considerably lowers the bar for declaration of infrastructure, and may have particular significance for multi-user infrastructure. Historically, the orthodox view has been that third party access declaration is critically concerned with promoting competition, not simply with infrastructure price regulation. However, if the fact that infrastructure is already operated on a multi-user basis ceases to be relevant to declaration criterion (a), it is possible that infrastructure may be declared – and regulatory oversight imposed – where declaration would achieve few, if any, incremental competition benefits. This will introduce additional challenges for those operating, selling, buying or seeking to use multi-user infrastructure.

Since the Tribunal’s decision in May 2016, the Full Federal Court (with 5 Judges sitting) has heard an application for judicial review (in late 2016). Its decision is reserved, but is expected to be published in the first half of 2017. The Full Court may be less constrained in relation to the *Sydney Airport* decision and hence its view will be critical for the future of Australian infrastructure regulation.

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