



Australian & New Zealand Competition & Consumer Law Update

Message from the Editors

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The holiday and new year period was not a quiet one in Australian competition law. Many of the recommendations from an extensive assessment of the Australian competition law were implemented. In this edition of Jones Day's *Australian and New Zealand Competition Law Update*, we discuss the implementation of these changes, in particular the ACCC's regime for obtaining merger clearances and its statutory information gathering powers.

The Australian federal government announced in December 2017 that the ACCC will undertake an inquiry into digital platforms. The ACCC's function when undertaking an inquiry such as the digital media inquiry enables the ACCC to review an industry without the constraints of a particular set of facts such as an allegation of conduct or proposed acquisition. The ACCC's inquiry will not be finalised until 2019, but will provide a timely opportunity for market participants to highlight emerging issues.

Also within this edition, we look at a recent price fixing case, highlighting the increasingly active regime of the New Zealand regulator.

Highlighting Changes of Interest in Competition and Consumer Law

Merger Clearance Process in Australia

Summary

Harper reforms implemented in Australia's competition laws introduce changes to the ACCC's merger or acquisition clearance processes. The ACCC now has sole first-instance jurisdiction to assess a merger or acquisition.

In November 2017, the long-awaited reforms in the *Competition and Consumer Act 2010* (Cth) ("CCA") went into effect to significantly alter several aspects of Australia's competition laws. One such change is to Australia's merger or acquisition clearance procedures, which have given the Australian Competition and Consumer Commission ("ACCC") broader jurisdiction to control the passage of mergers or acquisitions in Australia. The amendments have essentially consolidated the Australian Competition Tribunal's ("Tribunal") merger or acquisition authorisation jurisdiction (which in the past had only been used a handful of times) and the ACCC's merger or acquisition clearance jurisdiction (which had never been used) into a single process (authorisation by the ACCC).

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Changes to the ACCC's Power to Obtain Information

Summary

In November 2017, amendments to Australia's competition laws changed the ACCC's power to obtain information and documents in relation to its investigations under section 155. The reforms have introduced a defence for recipients of these ACCC-issued notices to produce evidence and

documents. Where notice recipients can demonstrate that a "reasonable" search has been undertaken and that documents or information have not been deliberately withheld, they are unlikely to be found to have contravened the often-burdensome notice requirements. The ACCC's power has also been extended to investigations of alleged breaches of s87B undertakings. Finally, the penalty for failing to comply with a notice have risen considerably to a maximum of \$21,000.

ACCC's Power to Obtain Information

The Australian Competition and Consumer Commission ("ACCC") has a powerful investigative tool conferred upon it by section 155 of the of *Competition and Consumer Act 2010* (Cth) ("CCA"). Under this section, the ACCC can issue a notice requiring any person or company capable of giving information in relation to a possible breach of the CCA to provide that particular material. The ACCC needs only to have a "reason to believe" that the person is capable of furnishing the material. It does not matter whether the person has engaged in the contravening conduct or not. In fact, significant numbers of these notices are issued to third parties.
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The ACCC's Digital Media

Summary

In December 2017, the federal government announced that it had directed the ACCC to undertake an inquiry in relation to media, specifically digital platforms. The digital platforms inquiry was initiated in order to address concerns regarding market power and the current state of fairness in competition between platform service providers within media and advertising markets. As part of its investigation, the ACCC will invite stakeholders, including businesses, to put forward submissions to be taken into account prior to generating a draft, and later, final report of the inquiry. It is recommended that submissions are made, particularly by individuals and business who are affected by the actions of Facebook.

What is an Inquiry?

The ACCC's role is to protect, strengthen, and supplement the way competition works in Australian markets and industries to improve the efficiency of the economy and to increase the welfare of Australia. The CCA guides the ACCC in performing its role in the inquiry.

Ultimately an inquiry results in the publishing of a formal report following an in-depth investigation and analysis of a particular question or area of concern. The process is open to interested parties who wish to put forward their opinion, including members of the general public. Subject to confidentiality, these submissions are published on the ACCC's website.

Upon reflection of previous ACCC inquiries it is evident that the matters considered are often of significant interest to both businesses and consumers. Many of the matters have attracted high levels of attention. Recent inquiries include the electricity supply and prices inquiry, the residential mortgage products price inquiry, and, of course, the digital platforms inquiry. There is no denying that the concerns at the crux of each of these matters have all been subject to widespread speculation and ongoing scrutiny.
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Hot Off the Bench—Discussion and Interest from the Courts

Commerce Commission v Lodge Real Estate Limited & Ors [2017] NZHC 1497

Summary

The NZCC brought an action against companies and individuals for engaging in price fixing. The decision at first instance confirms that discussions in relation to price with competitors may *not* constitute price fixing in NZ. The decision is under appeal.

A New Zealand Court has found in favour of two real estate agencies and two directors, dismissing an action by the New Zealand Commerce Commission ("NZCC") against alleged price fixing conduct.

The NZCC brought proceedings in 2015 against 17 defendants, including 13 real estate agencies, across New Zealand, as well as one company owned by a number of national real estate agencies (realestate.co.nz) and four individuals (all directors of one of the 13 defendant real estate agencies).

In the proceedings the NZCC alleged breaches of the *Commerce Act 1986* (NZ) ("Act") by the defendants, which can broadly be referred to as prohibiting 'price fixing' behaviour. All but two of the real estate agencies and two of the individual directors settled the actions brought against them by the NZCC prior to the hearing, with the matter proceeding to judgment against only Lodge Real Estate Limited, Monarch Real Estate Limited, and the directors, Mr. King and Mr. O'Rourke.

Businesses should be alert to the NZCC's ongoing monitoring of price fixing behaviour and willingness to impose significant fines on those that breach the Act.

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Matthew Whitaker, an associate in our Sydney Office, assisted in the preparation of this Update.

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