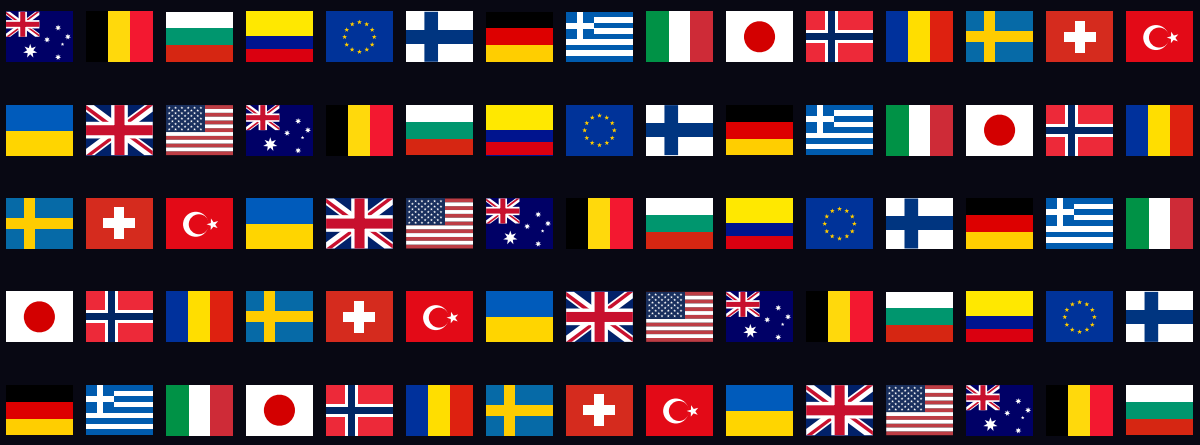
COMPETITION COMPLIANCE

Australia



LEXOLOGY
Getting The Deal Through

Consulting editor
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Competition Compliance

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Quick reference guide containing side-by-side comparison of local insights into Competition Compliance, including key legislation; standards and guidance for compliance programmes; how to demonstrate commitment to competition compliance; risk identification, assessment and mitigation; compliance programme review; managing risk in horizontal and vertical arrangements; market dominance; merger control; joint venture agreements; leniency programmes; investigations; settlement mechanisms; corporate monitorships; and recent trends.

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Table of contents

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LEGAL AND REGULATORY FRAMEWORK

Key legislation

What key legislation governs competition in your jurisdiction?

The Competition and Consumer Act 2010 (Cth) (the Act) is the key national legislation governing competition in Australia. The purpose of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading.

Law stated - 11 February 2022

Enforcement

Which authorities are charged with enforcing competition law in your jurisdiction and what is the extent of their powers?

Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the Act in Australia.

The ACCC has wide powers to:

- conduct investigations, including the power to obtain information, documents and evidence from persons where there is a suspected contravention of the Act; and
- issue civil proceedings against companies and both civil and criminal proceedings against individuals for suspected contraventions of the Act.

The ACCC releases specific compliance and enforcement priorities each year. These are in addition to enduring priorities in relation to cartel conduct and anticompetitive conduct. The 2021 priorities focus on:

- competition issues in the context of the covid-19 pandemic, including the domestic travel market;
- competition issues in the funeral services sector;
- competition issues relating to digital platforms;
- competition issues arising from pricing and selling of essential services with a focus on energy and telecommunications;
- promoting competition and investigating allegations of anticompetitive conduct in the financial services sector;
- conduct affecting competition in the commercial construction sector, with a focus on large public and private projects; and
- conduct impacting small business.

A separate regulator, the Australian Energy Regulator, was established under the Act to regulate competition in the Australian energy market. The Australian Energy Regulator regulates wholesale and retail energy markets, and energy networks, under national energy legislation and rules.

The ACCC can bring enforcement proceedings against individuals and corporations, including foreign corporations, and typically prioritises enforcement action against the conduct of larger companies.

Law stated - 11 February 2022

Consequences of non-compliance

What are the consequences of non-compliance with competition law?

The ACCC is able to issue proceedings against both companies and individuals for alleged breaches of the Act.

For corporations, the maximum penalties under the Act are the greater of:

- A$10 million;
- three times the value of the benefit obtained from the contravention; or
- 10 per cent of annual turnover in the preceding 12 months (if the benefit cannot be determined).

For individuals, the maximum penalty is A$500,000.

In respect of cartel conduct, criminal penalties are also available with individuals facing up to 10 years in jail for each criminal cartel offence.

For lesser non-compliance, the ACCC may accept a court-enforceable undertaking as a means of resolution.

Courts may also make a variety of orders as a penalty, including community service orders, adverse publicity orders and an individual's disqualification from managing corporations for a period of time.

Law stated - 11 February 2022

Guidance

Do the authorities issue guidance on compliance with competition law?

The ACCC publishes a range of guides providing information and guidelines relating to prohibited anticompetitive practices. The ACCC undertakes a number of compliance activities to help businesses and consumers understand their rights and obligations under the Act. These include targeted education campaigns, scams prevention, community and industry engagement and research and advocacy.

However, there is no ‘one size fits all’ approach when it comes to complying with competition law, and compliance requirements will be dependent on various factors, including the size of the company and the sector of the economy in which it operates.

Law stated - 11 February 2022

Other legislation and relevant practices

Do any other laws outside the main competition legislation regulate competition in your jurisdiction, including any sector-specific regimes? Do they cover any other anticompetitive practices not caught by the main legislation?

Yes. The restraint of trade doctrine in Australian common law provides that a restraint of trade is contrary to public policy and invalid unless it is reasonable, having regard to the interests of the parties and the reasonableness of the restraint. The onus is on the defendant to prove that the restraint provides adequate protection and does no more than that.

The general practice of Australian courts has been to strike down restraint of trade clauses that are found to be unreasonable but to refrain from rewriting (ie, ‘reading down’) the terms of the restraint to what the court considers reasonable. Accordingly:

- in New South Wales, the Restraint of Trade Act 1976 (NSW) was enacted to enable courts in NSW to 'read down' restraint of trade clauses to what is reasonable and reverse the common law's onus of proof; and
- for the balance of Australian States and Territories, 'ladder clauses' are utilised to facilitate a court in striking out the geographical and time restraints it considers unreasonable to maximise the likelihood that the court will give the restraint a reasonable level of operation.

Separately, the ACCC regulates mandatory industry codes that are prescribed under the Act. These include:

- the Dairy Code of Conduct;
- the Electricity Code of Conduct;
- the Franchising Code of Conduct;
- the Horticulture Code of Conduct;
- the Food and Grocery Code of Conduct;
- the Wheat Port Code of Conduct;
- the Oil Code of Conduct; and
- the Unit Pricing Code.

Law stated - 11 February 2022

COMPLIANCE PROGRAMMES

Commitment to competition compliance

How does a company demonstrate its commitment to competition compliance?

An effective and comprehensive compliance programme can demonstrate a company's commitment to competition compliance.

Key elements of an effective compliance programme include:

- a detailed and tailored compliance manual;
- a board policy whereby the company commits to develop and maintain a culture of compliance;
- regular compliance training for employees, including senior managers at least once a year;
- appropriate mechanisms to allow for reporting to senior management;
- an appropriate complaints handling system;
- appointment of a suitably qualified compliance officer to oversee the compliance programme;
- the provision of whistle-blower protections;
- regular reviews and updates to the compliance programme;
- appropriate approval processes, including legal approval processes before entering into arrangements that may give rise to competition law issues; and
- sanctions for individuals who do not comply with the compliance programme.

Law stated - 11 February 2022

Government compliance standards

Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no government-approved standard for compliance programmes in Australia. However, a market practice has been developed by Australian businesses whereby compliance programmes are prepared having regard to the Australian Standard, AS ISO 19600:2015 Compliance management systems – Guidelines .

In addition, the Australian Competition and Consumer Commission (ACCC) publishes guidelines and templates for businesses seeking to implement compliance programmes. These programmes are generally only voluntary but can be mandatory where they form part of an enforceable undertaking accepted by the ACCC in the exercise of its powers under the Competition and Consumer Act 2010 (Cth) (the Act). The templates are available on the ACCC's website and can be tailored to suit the size and needs of the individual business.

Law stated - 11 February 2022

Risk identification

What are the key features of a compliance programme regarding risk identification?

Compliance programmes will vary between companies as they need to be tailored to account for the company's size, industry sector and market power.

A key feature of risk identification involves promoting a culture of compliance within the organisation and educating all employees (at both senior and employee level) on competition risks that the company faces, along with a regularly updated compliance manual and other training materials.

Risk identification involves consideration and identification of:

- the competitors of a company and how the company interacts with those competitors (eg, if they collaborate or cooperate in respect of business ventures or share information);
- supply and distribution arrangements that the company has in place (eg, whether they are exclusive);
- the industry or market sector in which the company operates and the level of competition that exists in the market; and
- the market share of the company.

Law stated - 11 February 2022

Risk assessment

What are the key features of a compliance programme regarding risk assessment?

Ideally, any risk assessment should be undertaken by senior management, with appropriate input from the company's appointed compliance manager as well as external legal advisers.

A formal process and protocol to assess risk should be developed and adhered to, with specific regard to the requirements of the Act. It may also be appropriate to develop a classification system in respect of risks that different functions of the company may face ensuring they are escalated accordingly.

Law stated - 11 February 2022

Risk mitigation

What are the key features of a compliance programme regarding risk mitigation?

As part of any risk mitigation strategy, a compliance programme should include:

- appropriate training for employees (in particular, senior managers), to identify and avoid potential competition risks;
- identifying particular areas of risk for the company (eg, procurement and sales functions of the business and having appropriate protocols in place to avoid competition risks);
- having an appropriate risk assessment and approval process, with input from external legal advisers;
- implementing a system for logging complaints and decisions; and
- whistle blower protection mechanisms to protect those coming forward with competition complaints.

Law stated - 11 February 2022

Compliance programme review

What are the key features of a compliance programme regarding monitoring and review of business practices?

Any monitoring and review should:

- be broad in scope in confirming that the company is complying with the requirements of the Act;
- be conducted annually;
- be undertaken by a suitably qualified and independent compliance professional (who is provided with all relevant sources of information relevant to conducting the review); and
- result in a compliance report evaluating the company's compliance and providing areas for improvement.

Law stated - 11 February 2022

Effect on penalties

Will an established competition compliance programme have any effect on penalties?

A compliance programme by itself may not necessarily impact penalties. However, the ACCC and the courts have recognised that compliance programmes can be a mitigating factor where they have been meaningfully implemented. The courts have considered that various factors will impact the extent of mitigation, including:

- prior compliance and contraventions of the Act;
- whether the company has a corporate culture conducive to compliance (evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention);
- whether there is an effective compliance programme in place; and
- whether, and the extent to which, the contravention resulted from a deviation of the compliance programme.

The ACCC and the courts have also recognised that failure to improve an inadequate compliance programme after a breach of the Act can be an aggravating factor.

Law stated - 11 February 2022

HORIZONTAL DEALINGS

Arrangements with competitors

How does competition law govern arrangements with competitors?

The Competition and Consumer Act 2010 (Cth) (the Act) sets out a number of prohibitions on anticompetitive behaviour (including formal and informal arrangements or understandings) that involve or impact competitors and include:

- cartel conduct, such as price-fixing, outputs restrictions, market allocation and bid rigging;
- anticompetitive agreements, arrangements and concerted practices that have the purpose, effect or likely effect of substantially lessening competition;
- conduct involving misuse of market power;
- arrangements involving third line forcing and exclusive dealing; and
- resale price maintenance.

These prohibitions apply to companies that would, or would likely, have been competitors but for the prohibited arrangement.

There are some limited exceptions to the above arrangements and legal advice should be sought to determine their applicability.

Law stated - 11 February 2022

Exchanging information

Can a company exchange information with its competitors?

Permissible exchange of information will be dependent on the type of information being shared. Information that is commercially sensitive and confidential in nature (such as a company's historical and future sales information) and disclosed to competitors is more likely to contravene the prohibition of entering into or giving effect to contracts, arrangements or understandings or engaging in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition (compared to other information that is publicly available).

The Australian Competition and Consumer Commission (ACCC) has published guidelines noting that industry and professional associations often prepare reports for members based on information provided by members through voluntary surveys. This information can include commercially sensitive data such as sales, input costs and future price intentions. While the aggregating and anonymising of this information can greatly reduce the risks of hindering competition, the disclosure of future pricing removes a key competitive uncertainty otherwise inherent in the market and as such, is likely to be seen as an agreement or concerted practice that has the purpose, effect or likely effect of substantially lessening competition.

The ACCC is likely to conclude that an information exchange has the purpose of harming competition where the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market and where the recipient acts or intends to act on the sensitive information.

Law stated - 11 February 2022

Cartel behaviour

What form must behaviour take to constitute a cartel?

Under the Act, prohibited cartel behaviour relates to the making of a contract, arrangement or arriving at an understanding that contains a cartel provision or giving effect to a contract, arrangement or understanding that contains a cartel provision.

A cartel provision is a provision relating to price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories or bid rigging.

A written agreement is not required, simply a requisite meeting of the minds of two or more competitors.

Moreover, the Act prohibits attempts to engage in cartel conduct (through the making of a contract, arrangement or arriving at an understanding which contains a cartel provision) even where the resultant cartel conduct is unsuccessful or does not occur. In 2018, Flight Centre was ordered to pay penalties totalling A$12.5 million for attempting to induce three international airlines to enter price fixing arrangements. Flight Centre attempted to persuade three airlines to agree not to offer airfares on their own websites that were less than those offered by Flight Centre.

Law stated - 11 February 2022

Suggested precautions

What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

Companies should determine at first instance whether the arrangement is prohibited under the Act on a per se or strict basis, such as for cartel conduct. If this is the case, legal advice should be sought before any further action is undertaken.

In other cases, where the arrangement is competition tested under the Act, companies need to undertake a two-step analysis:

- whether the arrangement is for legitimate business purposes or reasons (and not for any anticompetitive purposes or reasons); and
- whether the arrangement would have the effect or likely effect of substantially lessening competition in the market (regardless of any legitimate business purposes or reasons).

In industries where it might be common for companies to collaborate, it would be prudent to have a protocol setting out how employees and senior management are to engage with competitor companies in any negotiations, discussions and arrangements. In the event of any concern, external legal advice should be sought.

Law stated - 11 February 2022

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive agreements with competitors to escape sanction?

The Act contains a number of exemptions, including:

- arrangements between related bodies corporate;
- joint ventures for production of goods and supply or acquisition of goods and services (subject to the joint venture not being carried on for the purpose of substantially lessening competition);
- acquisition of shares in the capital of a body corporate or any assets of a person;
- collective acquisition of goods or services; and
- restraints of trade (to the extent they are not inconsistent with the operation of the Act).

Additionally, the Act provides both notification and authorisation approval mechanisms that permit the otherwise prohibited activity to occur.

The notification mechanism is a process available for certain restrictive trade practices whereby protection from legal action commences 14 days after lodgement of the notification unless the ACCC objects within the 14-day period. The notification is assessed by the ACCC on the basis of whether any benefit to the public that is likely to result will outweigh any detriment to the public that is likely to result.

The authorisation process is a more involved process that involves submissions from the public and competitors in the market. The ACCC is required to make a decision within six months (however, this can be extended by agreement with the applicant). The application for authorisation is assessed on the basis of whether the proposed conduct would not likely substantially lessen competition or the likely public benefit from the conduct would outweigh the likely public detriment.

Two general defences to a consumer protection prosecution exist under the Act which are reasonable mistake of fact (including reasonable reliance on information supplied by a third party), and an act or default of another person, accident or cause beyond the defendant's control, where the defendant took reasonable precautions and exercised due diligence.

Law stated - 11 February 2022

VERTICAL DEALINGS

Vertical agreements

How does competition law govern vertical arrangements with commercial partners?

The vertical arrangements prohibited under the Competition and Consumer Act 2010 (Cth) (the Act) relate to exclusive dealing and resale price maintenance.

Exclusive dealing (including third line forcing) is prohibited where it has the purpose, effect or likely effect of substantially lessening competition (therefore, it is prohibited both 'by object' and 'by effect').

Resale price maintenance is a strict prohibition under the Act (although, this does not apply to related bodies corporate).

While the Act is silent on agency agreements, the recent decision of the High Court of Australia in Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd sheds light on agency principal relationships. The case involved a travel agent company, which was an authorised reseller of international airline tickets, attempting to stop airlines from selling tickets at lower prices by threatening to stop reselling the airline's tickets through its travel agency. The Court found that an agent may be in competition with its principal where certain factors are present, such as the agent having the freedom to set its own prices and to prioritise its own interests over the principal.

Over a period of two years B & K Holdings (Qld) Pty Ltd on 328 occasions provided terms of trade to dealers making it known it would not supply goods unless the dealer agreed not to advertise goods for sale below the recommended retail price and made 242 written agreements with dealers, including terms requiring them not to advertise goods

below a recommended retail price. The court ordered injunctions prohibiting certain conduct, B & K Holdings establish a compliance program, send corrective letters and pay a penalty of A$350,000.

Law stated - 11 February 2022

Exemptions and defences

What exemptions, defences or other circumstances will allow otherwise anticompetitive vertical agreements or restrictions to escape sanction?

Both resale price maintenance and exclusive dealing can be exempted by the Australian Competition and Consumer Commission (ACCC) through notification or authorisation.

Both notification and authorisation require an assessment by the ACCC as to whether the likely public benefits from the proposed conduct will outweigh the likely public detriments. Notification provides protection unless it is revoked by the ACCC or withdrawn by the applicant, whereas authorisation continues for the period authorised. Retrospective immunity cannot be granted in either case.

A defence exists under the Act to a resale price maintenance claim for withholding in order to allow the supplier to withhold supplies of goods to a person who, within the preceding year, has sold goods obtained from the supplier at less than their cost for the purpose of promoting business or attracting to that person's establishment persons likely to purchase other goods.

Law stated - 11 February 2022

DOMINANT POSITION

Determining dominant market position

Which factors does your jurisdiction apply to determine whether a company holds a dominant market position?

In Australia, the test to evaluate whether a company holds a dominant market position is referred to as having a 'substantial degree of power in a market' (as distinct from control or absolute freedom from constraint). In assessing whether a company has a substantial degree of power in a market:

- regard must be had to the extent to which the company's conduct is constrained by competitors, potential competitors, customers and suppliers; and
- regard may also be had to the power of the company that results from any actual or proposed contracts, arrangements and understandings.

Law stated - 11 February 2022

Abuse of dominance

If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance?

In Australia, abuse of market dominance is called 'misuse of market power'.

Misuse of market power occurs where a company with a substantial degree of power in a market engages in conduct

that has the purpose, effect or likely effect, of substantially lessening competition in that market or any other market in which that company (or any of its related bodies corporate) directly or indirectly supplies or acquires, or is likely to supply or acquire, goods or services.

The prohibition under the Competition and Consumer Act 2010 (Cth) (the Act) was recently amended to also capture misuse of market power where the conduct has the effect or likely effect of substantially lessening competition. The ACCC filed proceedings against Tasmanian Ports Corporation Pty Ltd in the Court under the new effects test in December 2019. Tasmanian Ports Corporation Pty Ltd admitted that by maintaining to Grange (a publicly listed mining company that owns and operates ship loading infrastructure) that it would need to pay a 'marine precinct tonnage charge' it engaged in conduct that was likely to have the effect of substantially lessening competition in the markets for towage and pilotage services in northern Tasmania and provided the ACCC with an undertaking regarding tonnage charges, berthing and port communications.

Law stated - 11 February 2022

Exemptions and defences

What exemptions, defences or other circumstances will allow a dominant company's otherwise abusive conduct to escape sanction?

Misuse of market power can be exempted from sanction or excluded from enforcement where the company has obtained authorisation from the ACCC.

The Act also contains exemptions from misuse of market power that is authorised by law or which pertains to certain employment matters.

Law stated - 11 February 2022

MERGER CONTROL

Competition authority approval

Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

No. There is no general requirement in Australia to notify or obtain prior approval from the Australian Competition and Consumer Commission (ACCC) for mergers and acquisitions. However, the Competition and Consumer Act 2010 (Cth) (the Act) prohibits companies from directly or indirectly acquiring shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

Where a company is concerned that a proposed acquisition would be likely to substantially lessen competition, a practice has developed of seeking an informal 'no action' clearance letter from the ACCC, which indicates that the ACCC will not oppose the proposed acquisition.

Alternatively, a company may apply for formal statutory authorisation from the ACCC, which the ACCC may grant where it is satisfied:

- that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- the conduct would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

No action letters and authorisations should be obtained from the ACCC prior to completion.

Law stated - 11 February 2022

Timing

How long does it normally take to obtain approval?

In respect of an informal 'no action' clearance letter, there is no statutory timetable. The ACCC guidance states that the process can take up to 24 weeks, however, a longer period may be required if undertakings need to be given or public market inquiries are required to be undertaken.

Formal statutory authorisations can be:

- a 90-day statutory review period that applies to proposed domestic acquisitions and if no determination is made the authorisation is deemed to be refused; and
- a 30-day statutory review period (not including delays required to obtain information from the applicant), which applies to overseas merger authorisations (which the ACCC may extend to 45 days by written notice to the applicant) and if no determination is made the authorisation is deemed to be granted.

Applicants can also agree to a longer period of time.

Law stated - 11 February 2022

Impact of merger clearance

Does merger clearance by the authority constitute confirmation that the terms in the documents comply with competition law?

No. Any informal 'no action' clearance letter or formal statutory authorisations only relate to the proposed acquisition (to the extent of the information provided by the applicant) and not to any other terms of any agreements between the parties. The company would need to apply separately in order to obtain authorisation for other restrictive provisions in the agreements themselves.

Law stated - 11 February 2022

Exchanging information before completion

Are there limits on the information that can be exchanged with the other party before completion of a merger?

Prior to completion, parties will need to be mindful of whether disclosure of the information may lead to the parties engaging in anticompetitive behaviour, either prior to completion or in the event the merger does not proceed. In circumstances where commercially sensitive information is disclosed this could potentially lead to issues, such as pricing-fixing.

It is also important that parties do not engage in gun-jumping, as prior to completion the parties are still considered to be independent companies. The ACCC was successful in an action against gun-jumping cartel conduct in ACCC v Cryosite Limited , in which Cryosite Limited was ordered to pay A$1.05 million in penalties.

The ACCC has released gun jumping guidelines to ensure that merger parties do not start behaving as one entity

before completion of a merger.

Law stated - 11 February 2022

Failure to file

What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any notable recent cases?

There is no general requirement in Australia to obtain approval from the ACCC for mergers and acquisitions in Australia.

However, if an acquisition that would likely have the effect of substantially lessening competition proceeds to completion without the acquirer having obtained an informal 'no action' clearance letter or a formal statutory authorisation, the acquirer may be exposed to liability for contravening the Act if the ACCC takes the view that the acquisition breached the Act. Liabilities may include:

- a person who suffers loss or damage as a result of the acquisition being awarded damages;
- a court imposing pecuniary penalties;
- a court requiring that assets or shares acquired pursuant to the acquisition be disposed of; and
- a court declaring the acquisition as void.

Law stated - 11 February 2022

JOINT VENTURES

Competition authority approval

Are joint ventures required to seek clearance from the competition authority?

No, joint venture arrangements are exempt from the cartel prohibitions, subject to the arrangements meeting certain requirements, being:

- that they are for the purpose of a joint venture;
- are reasonably necessary for undertaking the joint venture;
- the joint venture is for the production of goods, the supply of goods or services, or the acquisition of goods or services; and
- the joint venture is not being carried on for the purpose of substantially lessening competition.

Companies seeking to rely on the joint venture exemption must prove the matter on the balance of probabilities.

Companies should, however, consider seeking authorisation where they may not fall under those requirements.

Law stated - 11 February 2022

Joint venture arrangements

When will joint venture arrangements fall within the scope of competition law?

Joint venture arrangements will fall within the scope of the Competition and Consumer Act 2010 (Cth) when they do not fall or are unlikely to fall within the exemption requirements. Arrangements that are carried on for the purpose of substantially lessening competition should be avoided.

Law stated - 11 February 2022

LENIENCY

Leniency programmes

Is a leniency programme available to companies or individuals who participate in a cartel or other anticompetitive conduct in your jurisdiction?

The Australian Competition and Consumer Commission (ACCC) immunity programme is contained in the ACCC Immunity and Cooperation Policy for Cartel Conduct (October 2019) (the Policy). The Policy only applies to cartel conduct and not other anticompetitive practices. However, companies can apply for leniency in relation to these other practices under the ACCC Cooperation Policy for Enforcement Matters.

Under the Policy, the first applicant is granted a 'marker', which preserves for a limited time, their position to demonstrate they are entitled to conditional immunity. Upon being granted a marker, the process moves to the 'proffer' stage whereby the company is required to demonstrate that it meets the requirements for conditional immunity, being:

- an admission that the company is engaging in, or engaged in, cartel conduct;
- the company is the first party to apply for immunity in respect of the cartel under the Policy;
- the company has not coerced others to participate in the cartel;
- the company has either ceased its involvement or undertakes to the ACCC that it will cease its involvement in the cartel;
- the company's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives);
- the company has provided full, frank and truthful disclosure and has cooperated fully and expeditiously and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings;
- the company has entered into a cooperation agreement with the ACCC; and
- the company will maintain confidentiality about its status as an immunity applicant, the ACCC's investigations and any ensuing proceedings.

Except as required by law, the identity of the immunity applicant is kept confidential by the ACCC. However, the ACCC will seek consent (and a waiver as to confidentiality) as a matter of course, particularly in relation to disclosure to foreign competition regulators. While a waiver is not required for conditional immunity to be granted, a failure to provide a satisfactory explanation may be regarded as a failure to provide full cooperation as required under the immunity criteria.

At the same time, the ACCC will provide a recommendation to the Commonwealth Director of Public Prosecutions (CDPP) as to whether immunity from criminal prosecution should also be granted. This decision is made by the CDPP by independently assessing the immunity application.

Law stated - 11 February 2022

Beneficiaries of leniency

Can the company apply for leniency for itself and its individual officers and employees?

Yes, under the Policy, a company that qualifies for conditional immunity is able to seek derivative immunity for related corporate entities as well as current and former directors, officers and employees who were involved in the cartel

conduct.

Similarly, individual officers and employees can also be granted criminal immunity by the CDPP subject to ongoing obligations and conditions.

Law stated - 11 February 2022

INVESTIGATION

Commencement of investigation

How is an investigation into a suspected breach of competition law started?

An investigation is started following a report being made to the Australian Competition and Consumer Commission (ACCC). The report may be from:

- matters arising in the media, from parliamentary inquiries or referred by parliamentarians;
- external referrals (from report and enquiries made to its contact centre, from competitors, other regulators or other third parties); or
- internal referrals (from monitoring and intelligence gathering activities, market studies etc).

Law stated - 11 February 2022

Limitation period

What are the limitation periods for investigation of competition infringements?

There are no statutory time limits in relation to investigations. Ordinarily, the ACCC will complete its preliminary investigations within three months after which it is either closed or escalated to an in-depth investigation which is usually completed within 12 months.

There is a six-year limitation period that applies to compensatory orders and pecuniary penalties pursuant to the Competition and Consumer Act 2010 (Cth) (the Act). However, there is no legislated limitation period in relation to criminal offences.

A private action for damages pursuant to the Act in respect of restrictive trade practices may be commenced at any time within six years after the day on which the cause of action accrued.

Law stated - 11 February 2022

Information-gathering powers

What powers does the competition authority have to gather information?

The ACCC has wide compulsory information-gathering powers. These include:

- compulsory notices requiring an individual to provide information or documents;
- search and seizure powers to enter premises under a search warrant;
- information collected from certain industries, such as telecommunications providers that have ongoing record-keeping obligations; and
- summons, where the ACCC may summon a witness to give evidence and provide documents.

Law stated - 11 February 2022

Dawn raids

For what types of infringement will the competition authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

While the ACCC has executed dawn raids, particularly in respect of cartel conduct, the ACCC more often relies on its broad information-gathering powers under the Act.

The Act contains specific procedural rules for dawn raids, including that:

- a warrant must be obtained from a magistrate;
- executing officers may investigate the premises (including by seizing, copying and photographing evidence); and
- investigating officers must announce their entry to the premises and provide the relevant warrant to the occupier.

Law stated - 11 February 2022

Dawn raids – rights and obligations

What are the company's rights and obligations during a dawn raid?

The Act grants the occupier of the premises the right to observe the search being conducted (subject to not impeding the search) and to request copies and receipts of all documents seized.

The Act imposes obligations on the occupier of the premises to:

- allow entry to, and searching of, the premises;
- provide reasonable facilities and assistance to allow the warrant to be exercised;
- have a person with appropriate computer knowledge provide access to relevant material; and
- answer questions and produce material to which the warrant relates.

Law stated - 11 February 2022

Refusal to cooperate

What are the penalties and other consequences for refusing to cooperate with the authorities during an investigation?

Failure to comply with a notice to produce documents can leave individuals liable for fines of up to A$21,000 or imprisonment of two years. Failing to properly answer questions, produce relevant material, or allow ACCC officers to seize relevant material during a dawn raid can lead to fines of up to A$6,300 or 12 months imprisonment (or both). Failure to provide reasonable facilities and assistance to ACCC officers executing a dawn raid can also result in fines for individuals of up to A$25,200 or imprisonment for two years (or both) and for companies of up to A$126,000.

Law stated - 11 February 2022

SETTLEMENT

Settlement mechanisms

Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Yes. The Competition and Consumer Act 2010 (Cth) (the Act) provides a mechanism whereby the company can offer to enter into, and the Australian Competition and Consumer Commission (ACCC) can accept, an enforceable undertaking as an early resolution to an investigation or an alternative to an infringement decision being reached.

While the ACCC can accept the enforceable undertaking without an infringement decision being reached, the ACCC requires that enforceable undertakings contain an acknowledgement of contravention or likely contravention.

The circumstances for entry into an enforceable undertaking are typically where the ACCC believes that a breach of the Act has occurred or was likely to have occurred and the enforceable undertaking represents (in the ACCC's view) the best resolution, taking into account the fact that is most likely to produce lasting compliance and redress for injured parties.

Law stated - 11 February 2022

Impact of compliance programme

What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The weight the ACCC may place on a company implementing a compliance programme or amending a compliance programme in settlement negotiations varies on a case-by-case basis, including based on the size of the business and the nature of the alleged breach.

Law stated - 11 February 2022

Corporate monitorships

Are corporate monitorships used in your jurisdiction?

An independent auditor may be appointed as part of a company's undertaking to the ACCC to monitor compliance with the undertaking and to report to the ACCC.

Law stated - 11 February 2022

Statements of facts

Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Agreed statements of fact are not automatically admissible, however, because the ACCC maintains a public register of enforceable undertakings, it is possible that prospective litigants may have statements of facts contained in publicly available undertakings admitted as evidence in an action for private damages.

Law stated - 11 February 2022

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for competition law reform in your jurisdiction?

The Australian Competition and Consumer Commission (ACCC) is undertaking a number of investigations into digital platform markets and has established a Digital Platforms Branch to inquire into the concentration of power, barriers to expansion in digital platform markets, including digital search engines and social media and how they are in competition with media and advertising companies.

These investigations include:

- the Digital Platforms Inquiry report handed down on 26 July 2019 and which led to the development of a mandatory News Media and Digital Platforms Mandatory Bargaining Code, which was passed by Parliament on 25 February 2021;
- the Digital Advertising Services Inquiry investigating the markets for the supply of digital advertising technology services and digital advertising agency services, with the final report due 31 August 2021; and
- the ongoing Digital Platform Services Inquiry 2020-2025 investigating markets for the supply of digital platform services with interim reports due every six months concluding with a final report due 31 March 2025.

In 2021 the ACCC started a debate on merger reform proposals. Reforms proposed include a new formal merger review process, changes to the mergers test and reforms to deal with acquisitions by large digital platforms. The proposals would mean mandatory notification for acquisitions over specified thresholds by parties and providing their best information upfront to support their notification. Changes to the mergers test would include new merger factors and defining 'likely to be' as a 'possibility that is not remote'.

In a sign of the courts' willingness to impose greater penalties for breaches of the Act, in Commonwealth DPP v Kawasaki Kisen Kaisha Ltd [2019] FCA 1170 the Court imposed an A$34.5 million fine on the defendant for cartel involvement. This is the largest criminal fine to ever be imposed under the Act.

A shipping company (Wallenius Wilhelmsen Ocean AS) was fined A$24 million after admitting to intentionally giving effect to cartel provisions six times over 14 months. The cartel involved sharing information about proposed freight rates, fixing prices for particular bids and agreeing not to submit bids in certain cases (CDPP v Wallenius Wilhelmsen Ocean AS [2021] FCA 52).

The Australian federal government has also recently legislated to provide Australian consumers with a general right to control their data (the Consumer Data Right), which is to be implemented in several stages. After several delays, on 5 February 2020, the ACCC made rules to implement the Consumer Data Right in the banking sector, some of which are already in effect at the time of writing and the balance of which will be progressively rolled out between now and 20 June 2022. The Consumer Data Right will next be implemented in the energy sector with the telecommunications sector currently proposed to follow.

Law stated - 11 February 2022

Jurisdictions

Australia	Piper Alderman
Belgium	Fieldfisher
Bulgaria	EY Law Partnership
Colombia	Holland & Knight LLP
European Union	O'Melveny & Myers LLP
Finland	Eversheds Sutherland (Finland)
Germany	SCHULTE RECHTSANWÄLTE. Rechtsanwaltsgesellschaft mbH
Greece	Law Offices Papaconstantinou
Italy	Ashurst LLP
Japan	Mori Hamada & Matsumoto
Norway	CMS Kluge
Romania	MPR Partners
Sweden	Advokatfirman Cederquist KB
Switzerland	Niederer Kraft Frey
Turkey	ACTECON
Ukraine	Vasil Kisil & Partners
United Kingdom	Winston & Strawn LLP
USA	Winston & Strawn LLP