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Message from the Editor

Prudence Smith

In this edition of the *Update*, we comment on the ACCC's digital platform inquiry and the ACCC's expanding oversight of the financial services sector. We also look at the increasing focus on cartel conduct as illustrated by the ACCC's first criminal action against an individual. Finally, we look at Australia's new prohibition against concerted practices.

Highlighting Changes of Interest in Competition and Consumer Law

ACCC Issues Paper on Digital Platforms Inquiry

Summary

In December 2017, the Australian government directed the ACCC to conduct an inquiry into the role of digital platforms in media and advertising services markets, particularly in relation to the supply of news and journalistic content. On February 2018, the ACCC released an Issues Paper identifying the issues on which it seeks feedback.

The Digital Platforms Inquiry ("Inquiry") seeks to assess the current state of competition and fairness in the media and advertising services industries by investigating the role of digital search engines, social media platforms, and digital aggregation platforms.

The ACCC accepted submissions in response to its Issues Paper until 3 April 2018.

What Feedback is Sought by the ACCC?

As set out in the Issues Paper, the ACCC sought feedback on:

1. Whether digital platforms have bargaining power in their relationships with media content creators and advertisers.
2. How digital platforms have impacted the supply of news, journalistic content, and advertising content, and whether digital platforms now have excessive control over the supply of content.
3. Broadly, how technological change and digital platforms have impacted the media and advertising services markets.
4. How digital platforms use algorithms to determine which content is displayed, and whether this limits consumers' exposure to a variety of news.
5. The impact of digital platform growth on media organisations—in particular whether it is becoming unviable for traditional media organisations to fund "public interest" and investigative journalism.
6. How digital platforms collect consumer data, and how this information is used.

Points of Interest and Concerns

As set out in the Issues Paper, the ACCC sought submissions on which "digital platforms" are relevant to the Inquiry. The Issues Paper identifies certain preliminary examples of such platforms. However, as digital platforms interact with consumers and content providers in any number of ways (for example, through search functionality or social media), the ACCC would like to understand which other platforms impact competition.

The ACCC sought submissions on how the scope of "news and journalistic content" should be defined for the purposes of their investigation. The Issues Paper indicates the Inquiry will focus on news content directed at Australian consumers as well as Australian-produced content. The ACCC will focus on "both well-established news providers and publishers as well as newer online-only suppliers of news and journalistic content, including podcasts."

The ACCC is concerned that the digitalisation of news (for example, the use of algorithms to select content) has restricted consumers' access to a diverse range of news and journalistic content. Further, the ACCC is concerned the level of competition in the media industry reduces the amount of funds available to invest in journalism, which limits the breadth of content produced. The ACCC requested feedback to help develop the appropriate metrics for measuring "choice and quality" of content.

Although the ACCC stated that the Inquiry will primarily focus on media markets, the ACCC has also stated it would like to understand how digital platforms impact competition in the advertising services industry.

Finally, the Issues Paper outlines privacy concerns over the collection of consumer data. Further, the ACCC would like to understand how "big data" technologies and algorithmic selection impacts content and "the flow of revenue between different industry participants."

Outcomes

The Issues Paper states the Inquiry may lead to:

1. Findings regarding structural, competitive or behavioural issues in the relevant markets;
2. Increased information about competition, pricing and other practices;
3. Improved transparency for Australian consumers;

4. ACCC action to address any behaviour that raises concerns under the CCA; and
5. Recommendations to the government for law or policy change.

Confidential Information

Although the Inquiry is a public process, and feedback is generally posted on the ACCC website, the CCA allowed parties to make a claim for confidentiality. Where confidentiality is an issue, parties were asked to submit public and private versions of their submissions.

The ACCC encouraged parties to submit their private version on the basis that other parties may view the submission under confidentiality undertakings. Where information is highly sensitive, parties may apply to have the information withheld from other parties entirely.

International Investigations

The ACCC's Inquiry mirrors those recently undertaken in Germany and France by competition regulators. This suggests that regulators are grappling with how to ensure that the laws they enforce provide them with the legislative structure to deliver competition law objectives and the remedies to resolve any contraventions.

Key Takeaways

As mentioned, inquiries indicate where the ACCC will focus its resources in the future. An Inquiry is therefore a good opportunity for any party to put their concerns or advice forward.

ACCC Expands Oversight of the Financial Services Sector

Summary

Businesses can expect to see continued focus on competition scrutiny in the financial services industry throughout 2018. This is an area of increasing investigation by regulatory authorities, including the ACCC, which continues to expand its oversight of the sector.

ACCC Views on Competition in the Financial Services Sector

The Productivity Commission released its draft report into competition in the financial services sector in February 2018. The report states that competition has taken a back seat in favour of financial stability due to Australian Prudential Regulation Authority ("APRA") regulatory actions and the overlapping and conflicting responsibilities of regulators. The ACCC agrees that there is a need for greater competition advocacy and has stated that it is willing to work more closely with APRA, the Australian Securities and Investments Commission ("ASIC"), and the Reserve Bank ("RBA") to achieve this outcome. The ACCC believes that it is well placed to pick up the shortfall in the current regulatory regime.

The ACCC has also provided support for the government's open banking system, where the ACCC will adopt a role as dual regulator with the Office of the Australian Information Centre. The ACCC perceives open banking to be necessary to increase competition as it provides customers with more scope to compare competing offers, more easily move their business, and make more informed choices.

Where is the ACCC Devoting its Resources?

Following the federal government's 2017/18 financial year budget, the ACCC established the Financial Services Unit ("FSU"). This unit comprises 12 staff members and in-house legal professionals who undertake inquiries into competition in the Australian financial services sector. The current focus of the unit is the Residential Mortgage Price Inquiry, which has an interim report due imminently and a final report coming in June 2018. The ACCC has stated that from July 2018, the unit will commence market studies work and focus on key areas identified in the Productivity Commission Draft Report, including regulatory measures affecting the ability of smaller banks to compete, consumer switching, and the barriers to entry into the market.

The ACCC also continues to devote resources to cartel behaviours with its 2016/17 annual report and 2018 priorities, both of which emphasize the importance of these prosecutions to the ACCC's work. Comments made by the general manager of the specialised enforcement unit in the Senate Estimates hearing in March 2018 also indicate that there are similar investigations concerning collusion in the foreign exchange markets underway. These investigations are separate to the investigations of the FSU.

As well as the focus on cartel behaviour, the influence of the ACCC in the financial services sector can be expected to increase with its identification of the industry as one area of focus in its 2018 priorities. The ACCC intends to use the FSU in order to increase its investigative role regarding competition issues.

Potential for Even Greater Influence

As a part of its Draft Report, the Productivity Commission ("Commission") recognised the strength of the current financial services sector regulatory framework but criticised the absence of a specific competition regulator. The Commission therefore proposed the introduction of a new "competition champion" specific to the industry suggesting that either the ACCC or ASIC may adopt the role.

In its media release in response to the Draft Report, the ACCC recognised that the appointment is a choice of the government and supported the Commission's draft recommendation. The ACCC also proposed closer consultation with the champion if it were to be ASIC. In addition, the media release explains that the responsibilities proposed by the Commission for the competition champion significantly align with the current mandate of the FSU. The ACCC then discusses the scope of the FSU and its increased focus on promoting competition in the financial services sector.

The possibility of the ACCC gaining a more active role in the financial services sector could dramatically alter the industry. The ACCC has purported to place its focus on barriers to entry and the regulatory measures that make it difficult for smaller banks to compete. If the ACCC were to be appointed the competition champion, it appears likely that the financial services landscape would move away from the current oligopolistic structure. However, the Draft Report seems to place greater emphasis on ASIC as the correct regulator, citing both the substantial legislative change and the need for the ACCC to divert a large proportion of its resources to the sector at the price of neglecting other areas as significant barriers to it being chosen.

Lessons

The ACCC's response to the Productivity Commission's Draft Report regarding competition in the financial services sector serves to highlight that the competition watchdog, along with ASIC, have both commenced more active roles in the regulation of this sector. The comments made by ACCC's representatives have indicated that regulation will not be confined to ASIC investigations or the operation of the FSU, but will also include ongoing investigations concerning collusion in foreign exchange markets.

For small businesses in the financial services sector, the ACCC's diversion of resources towards this industry presents opportunities as the focus will be on regulatory measures affecting the ability of smaller banks to compete, the difficulty of consumer switching, and barriers to entry. However, for all financial services sector businesses, the ACCC's reach beyond the scope of ASIC creates no immunity, highlighting the need for all participants in the market to review company practice to ensure compliance with competition laws.

ACCC Brings First Criminal Cartel Prosecution Against Individuals

Summary

The ACCC has brought the first ever criminal cartel proceedings against an Australian corporation, Country Care, and two individuals. This comes after ACCC Chairman Rod Sims announced that the regulator would likely be pursuing three to four domestic criminal cartel actions in 2018.

The Australian Competition and Consumer Commission ("ACCC") has brought criminal charges against The Country Care Group Pty Ltd ("Country Care"), its managing director, Robert Hogan, and a former employee, Cameron Harrison.

This marks the first criminal prosecution of an Australian corporation under the criminal cartel provisions of the *Competition and Consumer Act 2010* (Cth) ("Act") against individuals. The criminal cartel action against Country Care serves as a reminder to corporations and individuals of their obligations under the Act and the consequences of engaging in cartel conduct.

It is alleged that Country Care, a Mildura-based company, engaged in cartel conduct involving assistive technology products used in rehabilitation and aged care, including beds and mattresses, wheelchairs, and walking frames.

These proceedings come after the ACCC successfully brought a prosecution under the criminal cartel provisions in 2017.

Cartel Conduct

The ACCC has extensive powers under the Act to investigate cartels. It can also refer serious cartel conduct to the Commonwealth Director of Public Prosecutions ("CDPP") for possible criminal prosecution under the Memorandum of Understanding between the CDPP and ACCC regarding Serious Cartel Conduct.

The Act prohibits cartels and makes it a criminal offence for businesses and individuals to participate in a cartel. A cartel exists when businesses act together rather than compete. Cartel conduct involves businesses engaging in price fixing, sharing markets, rigging bids, and/or controlling the output or limiting the amount of goods and services available to buyers.

In the Act, there are both criminal and civil prohibitions against making a contract, arrangement, or understanding which contains a cartel prohibition and gives effect to a contract, arrangement, or understanding which contains a cartel prohibition.

There is an additional fault element of "knowledge or belief" in respect of the criminal offence. Knowledge is defined in the *Criminal Code Act 1995* (Cth) ("Code"). A person has "knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events." The term "belief" remains undefined in the Code and the Act, however, case law suggests that in relation to criminal offences, it refers to a degree of awareness falling short of actual knowledge.

Corporations found guilty of criminal cartel conduct are liable for a fine, which will be the greater of \$10 million, and three times the total value of the benefits obtained by one or more persons and that are reasonably attributable to the offence or, for a contravention where benefits cannot be fully determined, 10 per cent of the annual turnover of the company (including related corporate bodies) in the preceding 12 months.

Individuals are liable for up to 10 years imprisonment and/or fines of up to \$420,000 per criminal offence, and a financial penalty of up to \$500,000 per civil breach.

Immunity Policy

However, corporations and individuals are able to seek both civil and criminal immunity in respect of cartel conduct. Immunity is granted conditionally and is only available to the first party that discloses the cartel conduct.

Civil Immunity

Corporations and individuals (directors, officers, and employees of the corporation) are assessed against separate criteria in the ACCC's immunity and cooperation policy for cartel conduct.

Amongst other factors that need to be satisfied, applicants must:

1. Admit that their conduct in respect of the cartel may constitute a contravention of the Act;
2. Not have coerced others to participate in the cartel;
3. Provide full, frank, and truthful disclosure and cooperate fully and expeditiously throughout the ACCC's investigation and any ensuing proceedings; and
4. At the time the ACCC receives the application, the ACCC must have not received written legal advice that it has reasonable grounds to institute proceedings against the applicant relating to at least one contravention of the Act arising from the cartel conduct.

A corporation is also able to seek derivative immunity for related corporate entities and/or for current and former directors, officers, and employees of the corporation who engaged in the cartel conduct.

The ACCC will grant final civil immunity where the applicant has:

1. Maintained the eligibility criteria for conditional immunity;
2. Provided full, frank, and truthful disclosure and cooperated fully and expeditiously throughout the ACCC's investigation; and
3. Maintained confidentiality regarding its status as an immunity applicant and the details of the investigation as well as any ensuing civil or criminal proceedings.

Criminal Immunity

After determining that the applicant has satisfied the conditions for conditional civil immunity under the policy, the ACCC is then able to make a recommendation to the CDPP that criminal immunity should be granted to the applicant. The CDPP exercises independent discretion when considering a recommendation by the ACCC. Immunity becomes final when the CDPP provides the applicant with a written undertaking and the applicant fulfils ongoing obligations and conditions.

Key Takeaways

1. The proceedings against Country Care highlight that the ACCC is seriously pursuing both corporations and individuals engaged in cartel conduct.
2. To avoid criminal prosecution and penalties, companies should review their conduct and seek legal advice to ensure they do not breach the criminal cartel provisions under the Act.
3. Companies should seek legal advice if they believe they have contravened the criminal cartel provisions.
4. Companies and individuals may be able to apply for immunity from proceedings if they satisfy the criteria outlined in the ACCC's immunity and cooperation policy for cartel conduct.

Harper Reforms Introduces Concerted Practices Prohibition

Summary

As part of the Harper reforms to Australia's competition law, a new concerted practices prohibition has been introduced that represents a significant broadening of the prohibition on anticompetitive conduct.

In late 2017, the *Competition and Consumer Act 2010* (Cth) ("CCA") was amended to insert, among other things, a new prohibition on concerted practices. Although it remains to be seen how the new legislation will be interpreted by Australian courts, the amendment represents a significant broadening of the scope of co-operative behaviour between competitors that can breach the CCA. Businesses should be conscious that conduct with competitors that was not previously prohibited may now be caught by the new laws.

Concerted Practices

In November 2017, the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* came into effect, introducing a prohibition into the CCA against engaging in "concerted practices" that have the purpose, effect, or likely effect of substantially lessening competition. The amendments also repealed the previous prohibitions on price signalling conduct.

Subsection 45(1)(c) contains the following prohibition:

(1) A corporation must not:

...

(c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

A concerted practice is considered by the ACCC to involve "communication or cooperative behaviour between businesses that may not amount to an understanding but goes beyond a business independently responding to market conditions." This accompanies the other prohibitions in section 45, on making, or giving effect to a provision of, a contract, arrangement or understanding containing a provision that has the purpose, effect, or likely effect of substantially lessening competition.

As per section 45, a concerted practice will only breach the legislation if it has the purpose, effect, or likely effect of substantially lessening competition. Additionally, it should be noted that establishing a concerted practice still requires that the relevant behaviour of the parties is not independent. That is, parallel behaviour by competitors is not sufficient to prove a concerted practice, because it may merely be the natural response of the parties to market conditions.

The pecuniary penalty payable by a company that breaches the prohibition is up to the maximum of the following:

1. \$10,000,000;

2. If the total value of the benefits obtained that are reasonably attributable to the concerted practice can be determined, three times that value; and
3. If the total value of the benefits obtained that are reasonably attributable to the concerted practice cannot be determined, 10 per cent of the annual turnover of the company during the previous 12 months.

In addition, individuals found to be in breach are also liable for fines of up to \$500,000.

Guidance on Concerted Practices

In late 2017, the ACCC released its *"Interim Guidelines on concerted practices"* ("Guidelines"). The Guidelines set out how the ACCC proposes to interpret the legislation, and the approach it will take in investigating alleged contraventions. However, although the ACCC may interpret the provision in a particular way, it should be noted that the courts retain the ultimate jurisdiction to determine whether there has been a breach.

Although concerted practices had not previously been contained in the CCA as a separate concept, it is a well-established prohibition in other jurisdictions including the European Union, Hong Kong, and Singapore. In addition to the Guidelines, it is possible that we can glean an understanding of the application of the provision from an examination of how it has been considered in these jurisdictions. For example, In Europe, one of the key principles in establishing whether there has been a breach is whether "the parties, even if they did not enter into an agreement, knowingly substituted cooperation between them for the risks of competition."

Takeaway Points

Previously, to establish a breach of the anticompetitive agreements prohibition the ACCC was required to establish that an actual "contract, arrangement or understanding" had been made, or given effect to. This required the ACCC to prove, broadly speaking, that there was communication, consensus, and commitment between the relevant parties. The introduction of the concerted practices prohibition represents a significant lowering of the standard of conduct that is considered a breach, which will arguably give the ACCC a wider jurisdiction, and discretion, to investigate anticompetitive conduct by multiple parties. Establishing the three elements identified above is no longer a necessity for the ACCC to establish a breach of section 45, because cooperative behaviour that does not rise to the level of a commitment between the parties may contravene the concerted practices prohibition.

Although the amendments repealed the previous price signalling prohibitions, including the per se offence, and there is no new per se offence for concerted practices, businesses should not take this as a sign that the law has been relaxed. In fact, the concerted practices prohibition is significantly more simplified in the legislation than the price signalling prohibitions, which may make it easier for the ACCC or third parties to bring actions.

It remains to be seen how the Australian courts will interpret the new legislation, however the scope of conduct between parties that will breach section 45 has been significantly widened. Businesses should be aware that co-ordinated conduct that was previously not prohibited under the CCA may now leave them liable for significant fines, if engaged in after 6 November 2017.

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

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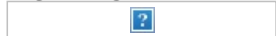
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