

What are the major competition/anti-trust issues generated by the growth of online sales platforms, and how should they be resolved?

Australia

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1. Introduction

Competition law issues arising with regard to online sales platforms centre around computer software, services provided online by online sales platforms, contractual relationships between the online platforms and sellers or buyers, information exchange, power and integration. Specifically they may include: algorithms which can coordinate and monitor prices and other business practices among competitors; collecting, exchanging and blocking information and targeting specific customers (consumers or businesses); and creating innovation-driven new monopolistic markets or markets where one online platform possesses significant market power.

Many specific features of online sales platforms and their implications for competition policy have been identified by academic commentators¹ and have been the subject of study by several competition authorities.² Competition issues identified in these studies relate to bargaining power, unfair treatment and market power of the online platforms. They include:

- Lack of level-playing field;
- Lack of choice;
- Unfair licensing/parity clauses;
- Lack of transparency and non-neutrality of rankings in online searches; and
- Contract enforcement.³

The Australian Competition and Consumer Commission ('ACCC') has also been interested in competition within the digital economy. For example, it commissioned a study on 'The Sharing Economy and the Competition and Consumer Act' (Deloitte Study)⁴ which reported in 2015. The study identified two pivotal areas of competition concern: 1) vertical and horizontal integration of

¹ See, e.g., A Ezrachi and M. E. Stucke, *Virtual Competition - The Promise and Perils of the Algorithm Driven Economy* (Harvard University Press 2016); Martyn Taylor, 'Competition Law in High Technology Industries: Insights for Australia' (Competition Law Conference, Sydney, 30 May 2015).

² For example, in May 2016, the European Commission released its study on online platforms: A. Gawer, Study on Online Platforms - Contrasting perceptions of European stakeholders: A qualitative analysis of the European Commission's Public Consultation on the Regulatory Environment for Platforms, (European Commission, DG Communications Networks, Content & technology, 25 May 2016), available at <https://ec.europa.eu/digital-single-market/en/reports-and-studies/76009> ("EU Study").

³ EU Study, pp. 14-15.

⁴ Deloitte Access Economics, *The sharing economy and the Competition and Consumer Act* (2015, ACCC), available at <https://www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf> ('Deloitte Study').

online platforms; and 2) vertical restrictions, referred to in the study as ‘exclusive practices’. Importantly, it found ‘regulatory neutrality’ was a key concern for competition policy in the ‘sharing economy’. In particular, there is concern that, at present, sharing economy providers have fewer regulations applied or enforced than traditional businesses and this puts them at competitive disadvantage.⁵ For instance, although there are competitive advantages flowing from the ‘disruption’ caused by ride-sharing platform, Uber and other emerging innovative technologies,⁶ it is clear that Uber is subject to significantly less regulatory restrictions and obligations than its key competitors in the taxi industry.⁷

Other recent Australian official reports, which discuss competition law issues related to online sales platforms and the potential need for modifications to the existing approaches, include the Harper Report on competition policy and the Productivity Commission’s ‘Digital Disruption’ report.⁸

Australia does not have any specific provisions relating to online sales platforms and competition; the generic competition law (and consumer law) apply to online sales platforms. In addition, there have been no cases in which the court has suggested modification of the existing competition law in the context of online sales platforms. In this chapter, we survey the areas of Australian competition and consumer laws relevant to this topic and identify and discuss potential strengths and weaknesses of the existing and proposed law.

After a general introduction of Australian competition law and policy, we explain areas of Australian competition law relevant to online platforms. Later sections of the chapter deal with vertical restraints which could potentially occur in connection with online sales platforms. Then, we briefly explain the protection (or overprotection) of IP rights in connection with competition law. In the last section, we explain one of the strengths of Australia’s competition law in capturing a wide range of potentially anti-competitive behaviour involving online sales platforms.

2. Australian Competition Law Legislation - *Competition and Consumer Act 2010*

2.1. Legislation and Proposed Amendments

Australian competition law is contained in the *Competition and Consumer Act 2010* (Cth) (the “CCA”).⁹ Recently, Australian competition law and policy was reviewed extensively by the ‘Harper Review’, with its final report, the ‘Harper Report’ (2015), proposing many changes to the CCA. Currently, two bills, which incorporate many of the recommendations in the Harper Report, have been introduced by the Australian Government:

- Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (“Bill 2017”)
- Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 (“Bill 2016”)

⁵ Deloitte Study, p iii.

⁶ I. Harper, P. Anderson, S. McCluskey and M. O’Byrne QC, Competition Policy Review: Final Report, March 2015, available at <http://competitionpolicyreview.gov.au/final-report/>. (“Harper Report”), p 26.

⁷ Deloitte Study, pp 9-11.

⁸ Australian Government Productivity Commission, ‘Digital Disruption: What do government need to do?’ (Research Paper, June 2016), p. 61, available at <http://www.pc.gov.au/research/completed/digital-disruption. We refer to all these reports and their relevant sections in the text below.>

⁹ The Act was previously named the *Trade Practices Act 1974* (Cth). The Australian Constitution, the *Commonwealth of Australia Constitution Act (1900)*, limits the extent to which the federal government can legislate. For that reason, states and territories enacted a ‘schedule’ version of the Part IV of the CCA, which contains core provisions on competition law. The CCA and the enacted schedule ensure a nationally consistent competition law.

Another bill, reflecting one of the issues discussed in the Harper Report, the Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017, was introduced as a private members' bill on 16 February 2017 and proposes to address the issue connected with access to justice for small businesses. It recognises that small businesses do not possess the sufficient or significant financial resources necessary for litigating anticompetitive practices. This is particularly an issue for s 46 of the CCA ("misuse of market power") litigation where the accused party possesses significant market (and/or bargaining) power while a potential private plaintiff will in most cases be a much smaller entity. The Harper Report stated in connection with this issue that:

From submissions and consultations with small business, the Panel is convinced that there are significant barriers to small business taking private action to enforce the competition laws. A private action would be beyond the means of many small businesses. In some cases, a small business might not wish to bring a proceeding for fear of damaging a necessary trading relationship.¹⁰

The aim of the bill is to provide a 'no adverse cost order' for small business litigation in private cases and to assist with the process of a small business requesting a no adverse cost order.

2.2. Substantial Lessening of Competition

With regards to the current CCA, Australian competition law prohibits mergers or acquisitions which have the effect or likely effect of substantially lessening competition and certain other conduct, including exclusive dealing (s 47) and horizontal agreements (s 45),¹¹ where it has the purpose, effect, or likely effect of substantially lessen competition.

The ACCC approaches this assessment by considering the likely state of competition with and without the relevant conduct. Although efficiencies which bare on the level of competition in the market can be considered, there is no separate 'rule of reason' weighing of efficiencies that can occur as part of the process; in other words, should the conduct produce efficiencies which, despite substantially lessening competition, enhance consumer or total welfare, it will nevertheless contravene the Act.

It is not sufficient that competition be lessened; it must be lessened 'substantially'. This has been interpreted as meaning something 'meaningful or relevant to the competitive process' and is a relative concept.¹² Lessening competition is defined in section 4G of the CCA as including 'references to preventing or hindering competition' and the ACCC has defined it as meaning 'that the field of rivalry is diminished or lessened, or the competitive process is compromised or impacted'.¹³ Competition, in turn, 'refers to a process, rather than a situation, and is expressed in the form of rivalrous behaviour',¹⁴ is 'a means of protecting the interests of consumers, rather than individual

¹⁰ Harper Report, p. 407.

¹¹ In theory, s 45 also covers vertical agreements which do not contravene s 47 ("exclusive dealing") and/or s 48 ("resale price maintenance"). See below.

¹² ACCC, *Framework for misuse of market power guidelines* (September 2016) ('MMP Framework') (<https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark/>) ('MMP Framework'), para 4.4. See also *Rural Press Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 para 41, *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 para 114, *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193 par 242 and *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909 para 329

¹³ MMP Framework, para 4.4.

¹⁴ MMP Framework, para 4.4. See also Harper Report, p. 341.

competitors' and is 'assessed looking at both market structure and the strategic behaviour of market participants.'¹⁵

Several forms of anticompetitive practices are expressly subject to *per se* prohibition, meaning that substantial lessening of competition does not have to be proved,¹⁶ but it is assumed:

- Cartels [Part IV, Division 1, ss 44ZZRA-44ZZRV];¹⁷
- Primary boycotts [s 4D, s 45(2)(a)(i) and s 45(2)(b)(i)];¹⁸
- Third line forcing (form of exclusive dealing) [s 47(6) and (7)];¹⁹ and
- Minimum resale price maintenance (including vertical price fixing) [s 4, s 48, ss 96-100].

If Bill 2017 is passed, third line forcing and primary boycotts will no longer be *per se* prohibited but will be evaluated under the substantial lessening of competition requirement.

2.3. Immunity and Efficiency

All forms of prohibited anti-competitive conduct, with the exception of misuse of market power (s 46), may be authorised in advance²⁰ on public benefit grounds, rather than a direct assessment of whether the conduct will substantially lessen competition. In addition, exclusive dealing and collective bargaining can be individually exempted from prohibition through the 'notification' process, which, while also based on a public benefit test, is procedurally less demanding than authorisation.

A public benefit test has two forms depending on which conduct is the subject of authorisation. Authorisation is granted either if public benefit outweighs any anticompetitive harm or if the public benefit is such that the conduct in question should be permitted. In practice, both tests have been used in a similar way.

The notification process is a faster, cheaper²¹ and simpler way for obtaining immunity. It is available only for exclusive dealing conduct and collective bargaining conduct as discussed below.²² If Bill 2017 passes, it will also be possible to notify RPM conduct.

¹⁵ *MMP Framework*, para 4.4.

¹⁶ It is also not required for s 46. Currently, the prohibition on misuse of market power requires demonstration of, in part, a prohibited 'purpose', rather than relying on proof of anti-competitive effect.

¹⁷ Part IV, Division 1 of the *Competition and Consumer Act 2010* (Cth). This incorporates price-fixing, output restrictions, allocation of customers, suppliers or territories and bid rigging. This conduct is both a criminal offence and subject to civil penalties. Certain joint venture activity is excluded from the scope of the *per se* prohibition, but remains subject to the general prohibition against anticompetitive agreements in s 45.

¹⁸ In Australia these are referred to as 'exclusionary provisions' and are *per se* prohibited where they involve an agreement between competitors having the purpose of preventing, restricting or limiting supply or acquisition to defined persons or classes of persons: ss 45 and 4D of the CCA. Joint ventures benefit from a limited competition defence: s 76C of the CCA.

¹⁹ Unlike other forms of exclusive dealing, it is *per se* prohibited, but it is possible for the conduct to be 'notified' and receive immunity on public benefit grounds. This occurs when supply is made on the condition that goods or services are purchased from an unrelated third party (or there is a refusal to supply because of failure to agree to such a condition).

²⁰ It is not possible for conduct to be retrospectively authorised; approval must be provided in advance of the conduct occurring or it will contravene the Act notwithstanding any demonstrated public benefits.

²¹ Fees vary depending on the conduct. For collective bargaining notification the fee is currently AUD 1,000. For exclusive dealing conduct other than third line forcing the fee is AUD 2,500. For third line forcing the fee is AUD 100.

²² The notification process is also available to price signalling contained in Division 1A of Part IV. However, price signalling provisions apply only to the banking sector and Bill 2017 proposes their repeal.

One potential public benefit justification for authorisation or notification could be that the conduct was introduced in order to protect brand name. In this respect, 'public benefit' is a broad concept and is capable of including any benefit to the public, not just economic benefits. However, mere protection of brand name has not yet been recognised as a public benefit in an authorisation proceedings.²³ It was argued in connection with an RPM case (not a notification/authorisation case)²⁴ and, although the court expressed some sympathy for the argument that RPM was utilised for this purpose, as RPM is a per se prohibition it was not able to provide a defence to the proceedings; however, the apparently sympathetic reception from the court suggests that it is an argument that may be successfully invoked in RPM authorisation applications in the future.

Public benefit claims associated with protecting a prestigious or well-known trademark may, however, carry less weight in Australia given that s 51(3) limits the application of the CCA in connection with trademarks (as further discussed below) which provides that only provisions on misuse of market power and RPM can apply to arrangements between trademark owners and holders.²⁵ In connection with s 46, such a justification could potentially be relevant when defending claims that a corporation 'took advantage' of their market power or did so with a prohibited purpose.

In contrast, efficiency can play an important role when considering whether public benefit would prevail over the restriction of competition. The decision *Re Queensland Co-operative Milling Association*²⁶ states that:

...[T]he widest possible conception of public benefit [is]... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of *efficiency* and *progress*. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.²⁷

In addition:

...the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency

²³ For instance, the list of potential public benefits contained in *Re ACI Operations Pty Ltd* (1991) ATPR (Com) ¶150-108 does not include the protection of brand names.

²⁴ *ACCC v Jurlique International Pty Ltd* [2007] FCA 79.

²⁵ Section 51(b) and (c) provide

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or

(c) the inclusion in a contract, arrangement or understanding between:

(i) the registered proprietor of a trade mark other than a certification trade mark; and

(ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

²⁶ *Re Queensland Co-operative Milling Association Ltd., Defiance Holdings Ltd. (Proposed Mergers with Barnes Milling Ltd.)*, (1976) ATPR ¶140-012.

²⁷ *Re Queensland Co-operative Milling Association Ltd., Defiance Holdings Ltd. (Proposed Mergers with Barnes Milling Ltd.)*, (1976) ATPR ¶140-012, at 17,242 (emphasis added).

is a concept that is usually taken to encompass “progress”; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.²⁸

Indeed, when referring to efficiency in connection with competition law, it is common that such a reference include dynamic efficiency arising from innovation.²⁹ The ACCC summarises the concept of efficiency for the purposes of economic public benefits in its *Authorisation Guidelines* (2013)³⁰ in the following way:

Economic efficiency has three aspects:

- allocative efficiency — refers to the allocation of society’s scarce resources to their most valuable use. Allocative efficiency is achieved when the price paid for an extra unit of a product (which reflects consumers’ willingness to pay or marginal utility) equals the cost of the resources used to produce that product (marginal cost). Allocative efficiency can only be achieved if all the costs and benefits, including externalities, are fully brought into account. Furthermore, allocative efficiency will not be achieved if prices are distorted by market power (which drives a wedge between price and marginal cost).
- productive efficiency — refers to the production of goods and services using the most cost-effective means.
- dynamic efficiency — refers to the economically efficient use of resources over time - incorporating process and product innovation in response to changes in the market. For example, arrangements that provide incentives for efficient investment in research and development will promote dynamic efficiency.³¹

The references to efficiency have also been made in connection with other areas of competition law. For instance, enhancing efficiency is relevant when proving that the substantial lessening of competition requirement is not satisfied if, for instance, exclusive dealing restricting intrabrand competition increases interbrand competition via enhancing of efficiencies.³² It could also, at least theoretically, assist with an argument that there is no anticompetitive purpose under s 46 and thus no contravention of misuse of market power.³³

2.4. ‘Agreements’ under s 45 of the CCA

The test of substantially lessening competition also applies in connection with s 45(2) for conduct other than primary boycotts, which are governed by s 45(2)(a)(i) and s 45(2)(b)(i) and prohibited *per se*.³⁴ It is a general provision, which states that:

²⁸ *Re 7-Eleven* (1994), ATPR 41-357 at [42,777].

²⁹ For instance, the High Court of Australia quoted from the Australian Competition Tribunal decision in *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 (2001) 162 FLR 1, stating that ‘...On the basis of many studies and long experience, economists have concluded that the main virtue of competition is that it provides a very powerful means of securing important gains in allocative and especially dynamic efficiency.’ *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

³⁰ ACCC, *Authorisation Guidelines* (June 2013), available at <https://www.accc.gov.au/system/files/Authorisation%20guidelines.pdf>.

³¹ *Authorisation Guidelines* (2013), p. 57.

³² *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at [20].

³³ S.G. Corones, *Competition Law in Australia* (6th ed., Thomson Reuters Australia, 2014), pp. 494 – 496.

³⁴ The boycott will not be prohibited anymore and will be governed by the general provision of s 45 if Bill 2017 will amend the CCA.

- (a) A corporation shall not make a contract or arrangement, or arrive at an understanding, if... a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition;³⁵ or
- (b) give effect to a provision of a contract, arrangement or understanding, ... if that provision... has the purpose, or has or is likely to have the effect, of substantially lessening competition.³⁶

It applies to all horizontal 'agreements' (except for primary boycotts) as well as vertical restraints which are not covered by s 48 (resale price maintenance) or by s 47 ('exclusive dealing'). It can also apply to cartels; in particular, price fixing, territorial or customer allocation, output restriction and bid rigging, which are also prohibited *per se* under the cartel regime in Part IV, Division 1 of the CCA.

In 2016, the ACCC investigated agreements on amending price and availability parity clauses, which Booking.com, Expedia, and other online sale platforms reached, or were trying to reach, with Australian hotels and other accommodation providers. The ACCC was concerned that this conduct restricted price and other competition. During the investigation, the online sales platforms involved agreed to change the parity clauses, which was sufficient to satisfy the ACCC's concern so that no further action was taken. It is not clear which provision(s) would have been used if this matter had been litigated;³⁷ however, sections 45 (anti-competitive agreements) and 48 (resale price maintenance) might have been argued.

The next part of the chapter will deal with potential issue areas related to online sales platforms and specific provisions of competition and consumer laws which can be (or have been) applied. It will reveal weaknesses and strengths in the relevant Australian regime in the context of this topic. Indeed, there are a number of ways in which Australian competition law (and consumer law) may be applied to address potentially restrictive practices occurring in online sales platforms. These include:

- the prohibition of vertical restraints which does not require proof of anti-competitive 'agreement'; rather, they are typically treated as a form of unilateral conduct under s 47 and s 48.
- the fact that, in certain circumstances, agents can be found liable for anti-competitive conduct engaged in with their principals.
- the fact that market power under s 46 may include bargaining power.
- the fact that Australia's broad consumer laws are capable of capturing a range of conduct stemming from market power.
- the possibility for smaller firms to lawfully collectively bargain to overcome or limit the effects of buyer or seller power.

3. Criterion for Market Definition and Market Power

3.1. Market Definition

Australia's competition provisions typically require that competition be lessened 'in a market', that power be held in 'a market' or that parties be competitors in 'a market'. As a result, market

³⁵ Section 45(2)(a)(ii) CCA.

³⁶ Section 45(2)(b)(ii) CCA.

³⁷ For further information see, ACCC, 'Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels' (Media Release, 2 September 2016) (available at <https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels>).

definition remains essential to an assessment of whether or not the competition provisions have been contravened.

Market is defined³⁸ as:

a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, other otherwise competitive with, the first-mentioned goods or services’.

Market is defined separately in relation to mergers as a market for goods or services in Australia, or a State, or a Territory or a region of Australia.³⁹

The meaning of market under Australian law has been ‘very stable’,⁴⁰ with the concept of substitutability as means of defining the market, articulated by the (then) Trade Practices Tribunal in the *QCMA* case in 1976.⁴¹ The Tribunal there defined market as:

the area of close competition between firms or ... the field of rivalry between them. ... Within the bounds of a market there is substitution—substitution between one product and another and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive ... in determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to ‘give less and charge more’ would there be, to put the matter colloquially, much of a reaction.⁴²

This definition has endured, with this passage from *QCMA* still regularly referenced by the courts. Substitutability, for the purpose of market definition, has been acknowledged to occur along a spectrum; to be considered in the same market the product or services in question be ‘close’ substitutes. Nevertheless, the precise boundaries of the market are always likely to be a matter of contention, with the ACCC acknowledging in its merger guidelines that it is ‘rarely possible to draw a clear line around fields of rivalry’.⁴³

In the context of mergers⁴⁴ the ACCC focusses on product and geographic market dimensions,⁴⁵ starting by ‘identifying the products and geographic regions actually or potentially supplied by the merger parties’ and then focussing on ‘defining markets in areas of activity where competitive harm could occur’.⁴⁶ More than one market can, and frequently is, recognised as relevant for the assessment.⁴⁷

³⁸ CCA, s 4E.

³⁹ CCA, s 50(6).

⁴⁰ Harper Report, p. 314.

⁴¹ *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481.

⁴² *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481, 518.

⁴³ ACCC, Merger Guidelines (November 2008) (*‘Merger Guidelines’*), para 4.10: This is done on a case by case basis, with market definition recognised as ‘purposive’ (para 4.9).

⁴⁴ Although the approach is set out in the *Merger Guidelines*, the ACCC has indicated that this approach to market definition would apply consistently in relation to other competition provisions. For example, in the MMP Framework, the ACCC indicated that the ACCC’s approach to market definition would not change for s 46 and the approach is set out in the *Merger Guidelines*.

⁴⁵ *Merger Guidelines*, para 4.8.

⁴⁶ *Merger Guidelines*, para 4.10: This is done on a case by case basis, with market definition recognised as ‘purposive’ (para 4.9)

⁴⁷ *Merger Guidelines*, para 4.10:

When identifying substitutes for purposes of delineating the market the ACCC focusses on demand side substitution, but also considers supply-side substitutes. The hypothetical monopolist (HMT) test is adopted for this assessment, explained by the ACCC as follows:

The HMT determines the smallest area in product and geographic space within which a hypothetical current and future profit-maximising monopolist could effectively exercise market power. In general, the exercise of market power by the hypothetical monopolist is characterised by the imposition of a small but significant and non-transitory increase in price (SSNIP) above the price level that would prevail without the merger, assuming the terms of sale of all other products are held constant.⁴⁸

In making this assessment the ACCC and courts are alive to the dangers of the cellophane fallacy, as recently highlighted in the *Cement Australia* case,⁴⁹ in which the ACCC's expert testimony in relation to market definition considered that the market price for the product in question 'persistently exceeded the competitive price by significantly more than a SSNIP'.⁵⁰

A market 'in Australia'

Both the general definition of market and the merger-specific definition reference a market 'in Australia', although this limitation does not extend to the (relatively new) cartel laws.⁵¹ This reference to 'in Australia', which applies to most of the competition prohibitions, continues to cause some uncertainty in relation to conduct occurring principally outside Australia, but which nevertheless might impact on Australian markets. This issue recently came before Australia's highest court⁵² in the context of contracts for the carriage of air cargo. The plurality in that case observed that reconciling the 'abstract notion of a market with the concrete notion of location, so that they work coherently, presents something of a challenge' (para 14). Nevertheless, 'the task of attributing to the abstract concept of a market a geographical location in Australia is to be approached as a practical matter of business' and, as such, it is important that 'any analysis of the competitive processes ... is not divorced from the commercial context of the conduct in question' (para 14). Importantly, a 'market in Australia does not cease to be so located because it encompasses other places as well' (para 15).

In assessing the market 'it is the substitutability of services as the driver of rivalry between competitors [and] not the circumstances of the act of substitution itself' which is relevant. Consequently, the place where substitution occurs (and contracts are entered) does not necessarily define the geographic market; the rivalry preceding the act of substitution is relevant. In this case, the fact that contracts were arrived at in one jurisdiction (outside Australia) did not preclude the geographic market being in Australia, given that the 'rivalrous behaviour', in which supply was matched with demand, occurred in a market which, geographically, included Australia (para 33).

There is no 'effects test' approach to competition jurisdiction in Australia with the result that, absent a finding that there is a market 'in Australia', there will be no contravention of the Act.

⁴⁸ *Merger Guidelines*, para 4.19.

⁴⁹ *ACCC v Cement Australia* [2013] FCA 909.

⁵⁰ See further Rhonda Smith, 'Market definition and substitution options' (2014) 22 *Competition & Consumer Law Journal* 105 at 117 (although Smith notes that not all cellophane fallacy concerns were recognised in that case (p 118)).

⁵¹ Section 44ZZRD of the CCA, which defines cartel conduct, requires only that parties be 'in competition with each other', without further reference to being in competition in a market in Australia. See also *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235 (in particular para 228).

⁵² The High Court: *PT Garuda Indonesia Ltd v. Australian Competition and Consumer Commission* [2017] HCA 21 (14 June 2017).

Notwithstanding concerns that defining an ‘Australian’ market may fail to give proper consideration to global markets and may result in competition analysis being ‘focussed too narrowly’,⁵³ particularly in the case of mergers, the Harper Panel recommended retention of the requirement that a market be in Australia. It is, they concluded, ‘necessary and appropriate for the term “market” to be defined as a market in Australia’ because ‘the CCA is concerned with the economic welfare of Australians’ and ‘the law is intended to protect competition in Australian markets for the benefit of Australian consumers’.⁵⁴

It appears clear, however, that global or regional markets which include Australia can satisfy this requirement and when assessing market power and competitive effects that the courts can consider constraints from imports or from other forces external to Australia.⁵⁵ In this respect the Harper Report recommended strengthening the definition of ‘competition’ to remove any doubt that it includes competition from *potential* as well as existing imports;⁵⁶ this recommendation has been accepted and forms part of a current reform bill.⁵⁷

Two-sided markets

The ACCC recognises the two-sided nature of online platforms and their implications, evidenced in the recent review of Expedia’s proposed acquisition of Wotif.⁵⁸ The ACCC described the relevant product market in that case as being ‘a two-sided market where positive network effects exist’.⁵⁹

Although ‘two-sided platforms can create unique challenges for competition agencies’, it has been suggested that the existing Australian ‘legislative framework has been sufficiently flexible to date in accommodating the consideration of two-sided platforms and the issues they create for market analyses’.⁶⁰

‘Issues arising in two-sided markets are assessed by the ACCC and dealt with under the [CCA] using an equivalent approach as toward other markets. This approach involves the ACCC defining the market/s under consideration in terms of product and geographic space and proceeding to consider the competitive constraints on the market.

⁵³ Harper Report, p. 315. Notably, these comments were made before the recent High Court decision in *Air New Zealand Ltd v ACCC; Pt Garuda Indonesia Ltd v ACCC* [2017] HCA 21, which adopted a broad and pragmatic approach to the concept of ‘market in Australia’.

⁵⁴ Harper Report, p. 316.

⁵⁵ Section 4 of the CCA currently provides that competition ‘includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia’. The Harper Report stated that ‘geographic boundaries of many markets extend beyond Australia’ and in those circumstances ‘a corporation that competes for the supply of goods or services in Australia does so in the broader geographic market’ and any competition assessment ‘must take account of those market realities’ and has ‘been recognised’ in decisions of the courts: page 316.

⁵⁶ Harper Report, p. 317; recommendation 25.

⁵⁷ Bill 2017, Schedule 1, section 1, proposes that s 4 be amended to read: *competition* includes: (a) competition from goods that are, or are capable of being, imported into Australia; and (b) competition from services that are rendered, or are capable of being rendered, in Australia by persons not resident or not carrying on business in Australia’.

⁵⁸ Expedia Inc – proposed acquisition of Wotif.com Holdings Limited (ACCC Public Register, reference 55142, <http://registers.accc.gov.au/content/index.phtml/itemId/1182044/fromItemId/751046> (“Expedia/Wotif”) (accessed 6 June 2017).

⁵⁹ ACCC, ‘Expedia Inc – proposed acquisition of Wotif.com Holdings Limited’ (Public Competition Assessment, 13 January 2017), para 43 (‘Expedia/Wotif PCA’).

⁶⁰ OECD, ‘Two-Sided Markets’ (Policy Roundtables, DAF/COMP(2009)20, 17 December 2009), p. 80.

... In the case of a two-sided platform, the ACCC first defines markets separately for each customer class, and considers the potential relevance of any indirect network effects as part of the subsequent competition analysis.⁶¹

3.2. Market Power

A necessary pre-requisite to a contravention of the misuse of market power provision is a finding that the corporation in question has substantial market power. Market power, and changes in market power attributable to certain conduct, is also relevant to competition assessments in other parts of the CCA, particularly in relation to the merger law, where merger-related changes to market power are a particular concern.

Substantial market power for purposes of Australian law does not equate with dominance; importantly, the threshold was lowered to 'substantial market power' from the original threshold of substantial 'control' in 1986.⁶² Legislation also makes clear that more than one corporation may have substantial market power in the same market.⁶³

Assessment of market power has traditionally required an initial determination of the relevant market (or markets) prior to an assessment of whether or not the corporation in question has substantial market power within it.⁶⁴ However, it has also long been recognised by the courts that, in the context of the misuse of market power provisions, the object is to discover the degree of market power held by the defendant and that '[d]efining the market and assessing the degree of market power within it are part of the same process' and are separated only 'for the sake of simplicity of analysis'.⁶⁵ Consequently, although market definition will form an important part of an assessment of market power, it will not always be an essential step toward the court forming a preliminary view about whether or not a firm has substantial market power.⁶⁶

The first High Court case to consider the concept of market power in relation to s 46 of the CCA was *QWI*⁶⁷ and the approach adopted in that case has been endorsed in subsequent decisions and by the ACCC, most recently in its MMP Framework (September 2016). Justice Dawson, in *QWI*, stated that:⁶⁸

The term 'market power' is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner...But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal...The ability to engage persistently in these

⁶¹ OECD, 'Two-Sided Markets' (Policy Roundtables, DAF/COMP(2009)20, 17 December 2009), p. 79.

⁶² The change was brought about following a recommendation to 'lower' the threshold. See *The Trade Practices Act: Proposals for Change* (Commonwealth of Australia, Green Paper, 1984) para 29. Section 46(3C) of the Act also makes clear that it is possible for a firm to have substantial market power even though it 'does not substantially control the market' or enjoy 'absolute freedom from constraint' by competitors, potential competitors or persons to whom it supplies or acquires goods or services.

⁶³ CCA, s 46(3D).

⁶⁴ See, eg, Rhonda Smith, 'Market definition and substitution options' (2014) 22 *Competition & Consumer Law Journal* 105 at 121.

⁶⁵ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 [15] per Mason CJ and Wilson J.

⁶⁶ See, eg, Rhonda Smith, 'Market definition and substitution options' (2014) 22 *Competition & Consumer Law Journal* 105 at 121.

⁶⁷ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

⁶⁸ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 200 (footnotes omitted).

practices may be as indicative of market power as the ability to influence price. Thus Kaysen and Turner define market power as follows:

A firm possesses market power when it can behave persistently in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions. ...

A range of factors can influence the degree of competitive constraint faced by a firm and are likely to be relevant in assessing whether a firm has a substantial degree of market power. The structural factors considered relevant to this assessment were set out by the Tribunal in early *QCMA* decision:

- (i) the number and size distribution of independent sellers, especially the degree of market concentration;
- (ii) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
- (iii) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
- (iv) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and
- (v) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.⁶⁹

These factors have regularly been endorsed by the courts and some have found their way, through legislative amendments, into s 46, which now sets out a number of factors that must be considered when determining whether a corporation has substantial market power.⁷⁰

Although the *QCMA* decision dates back to 1976 and focuses on static market structures, it is clear that the ACCC and courts consider dynamic market characteristics when making competition and market power assessments. For example, in relation to the review of Expedia's acquisition of Wotif, the level and pace of dynamic change in the market was a key factor in the ACCC's decision not to challenge the acquisition. Nevertheless, concerns remain in some quarters that the current approach by the ACCC and courts to market definition and assessment of market power continues to place too much reliance on static market definitions and existing levels of market concentration.⁷¹

4. Section 46 'Misuse of Market Power' in General

The CCA prohibits misuse of market power, which occurs when a corporation with substantial market power takes advantage of that power for a prohibited anti-competitive purpose.⁷² The provision is of general application and the recent Harper Review reinforced the principle that Australia's competition laws should have economy-wide application and not be directed toward the conduct of any specific sector.⁷³ Consistent with this approach there are no 'safe harbours' or other presumptions in relation to the legality or otherwise of online platforms based on their nature or

⁶⁹ *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481, 515[40]; (1976) ATPR 40-012, 17,24.

⁷⁰ See, ss 46(3)-(3D).

⁷¹ Harper Report, p. 317 referencing the Business Council of Australia's (BCA) draft report submission.

⁷² As noted in section 2.1, above, this test will change to a competition based test if Bill 2016 is passed.

⁷³ Harper Report, p. 307.

scope. There are also no formal (or informal) ACCC guidelines setting out likely treatment in relation to online platforms.⁷⁴

Although there is currently no separate guidance for misuse of market power, it is clear that large online sales platforms will frequently feature firms with substantial market power and there are some general principles that can be drawn from other cases to theorise how they might operate in relation to these platforms.

First, before conduct will contravene the provision it is necessary to establish the corporation holds 'substantial market power'. The process for making this assessment was set out above. Second, whether this conduct will be prohibited depends crucially on demonstration that the conduct was referable to the substantial market power (that it involved a 'taking advantage' of that power) and that the corporation had the purpose of '(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; (b) preventing the entry of a person into that or any other market; or (c) deterring or preventing a person from engaging in competitive conduct in that or any other market'.⁷⁵

The take advantage element⁷⁶ has traditionally been the most problematic and, although there have been no such cases, this would be equally true of cases involving online sales platforms. In particular, if a corporation lacking market power could engage in the conduct, or it would be commercially rational for them to do so, then a firm with substantial market power will not be held to have 'taken advantage' of their market power, regardless of the competitive effect that might flow from the conduct. Types of conduct that could potentially fall within the scope of the provision include anti-competitive rebates, tying, bundling, exclusive dealing (or related sales distribution restrictions), predatory pricing⁷⁷ and price discrimination.⁷⁸

4.1. Leveraging Market Power

For purposes of the misuse of market power provision it is important to note that market power need not exist in the market in which the exclusion or other harm to competition is alleged to be taking place. Consequently, for example, a large supermarket with substantial market power in the retail grocery market can contravene the provision if it takes advantage (uses) that power for the purpose of harming competition or competitors in another market in which it lacks market power. This was the scenario in the *QWI* High Court case. BHP was found to have misused its market power by leveraging the substantial market power it held in the upstream market for steel products to reduce competition (and thereby aid its subsidiary) in the downstream market for rural fencing.⁷⁹ In

⁷⁴ The ACCC released *Platform Operators in the Sharing Economy: A guide for complying with the competition and consumer law in Australia* in 2016, available at <<https://www.accc.gov.au/publications/platform-operators-in-the-sharing-economy>> ("*Platform Operators in the Sharing Economy*"). However, this is a general guide covering competition and consumer issues and does not address the issue of misuse of market power directly.

⁷⁵ Subsection 46(1) CCA.

⁷⁶ See generally Katharine Kemp, 'Taking Advantage' of Substantial Market Power, and Other Profit-Focused Tests for Unilateral Anticompetitive Conduct' (2015) 41(3) *Monash University Law Review* 655.

⁷⁷ Existing separate predatory pricing provision, based on market share and potentially problematic for two-sided platforms, is likely to be repealed.

⁷⁸ There was previously a separate price discrimination provision but it was repealed in 1995. Periodically there are calls to revive it but these have been repeatedly rejected, most recently by the Harper Panel (Harper Report, recommendation 31). Consequently, price discrimination is only unlawful if it satisfies the general conditions for misuse of market power.

⁷⁹ It did this by constructively refusing to supply the 'Y-Bar' steel product to downstream competitors of its wholly owned subsidiary, AWI, which prevented them making and supplying 'star picket fences' in competition with QWI's subsidiary.

this way leveraging market power in one market to gain competitive advantage, either for itself or another entity (whether related or otherwise), in a market in which the corporation does not enjoy market power can be captured by the prohibition.

4.2. Cases

There have been few s 46 cases and none of those fully litigated have involved online sales platforms. However, there has been one case involving an online sales platform. In 2011 a consent decision was made in *Ticketek*,⁸⁰ in which Ticketek admitted it had contravened the CCA. The nature of the consent decision, which involved parties agreeing to certain facts and conduct, means that it is not possible to evaluate the court's approach to online sales platforms. Ticketek agreed it held a large share of the Ticketing Related Services Market, that there were barriers to entering into the market to provide 'full service' offerings, such as that provided by Ticketek to Venue Operators and Promoters,⁸¹ that there was limited existing competitive constraint (with only one other large rival, Ticketmaster, operating at the time) and that, at the relevant time, Ticketek had a substantial degree of market power in the Ticketing Related Service market. Ticketek also agreed that its conduct had been 'materially facilitated' by that market power, and that therefore the 'take advantage' element had been satisfied and that the conduct had been engaged in for one of the prohibited purposes.

Despite the admissions resulting in reduced published competition analysis, the case does provide a useful example of a refusal to deal involving an online sales platform constituting a contravention of Australia's misuse of market power provision. Ticketek is an event ticketing company, claiming to host 'Australia's number one Entertainment Events website' and that it operates a 'market leading mobile platform' for sports and entertainment events.⁸² In 2009 it refused requests by certain entertainment companies to implement in its Ticketing System certain discounted prices to be published by a competitor, Lasttix Pty Ltd, for certain events. Lasttix, while promoting the sale of tickets, including publishing details of prices, did not have the capability or scale to provide full service in the way Ticketek did at the time.⁸³ The refusals were admitted by Ticketek and found to have been engaged in for the purpose of deterring or preventing Lasttix from engaging in competitive conduct in the 'Ticketing Related Service Market'.⁸⁴ Total penalties of AU\$2.5 million were ordered against Ticketek, incorporating a substantial discount for their cooperation with the ACCC.

4.3. Review and Changes

A competition based test

The recent Harper Review considered whether or not the existing misuse of market power provisions should be amended to focus more directly on the effect of conduct rather than its purpose. The review panel concluded that the existing provision was not 'fit for purpose'⁸⁵ and

⁸⁰ *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489.

⁸¹ *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489 (para 70).

⁸² Ticketek homepage (<http://premier.ticketek.com.au/>) (accessed 8 June 2017).

⁸³ Para 18. Lasttix's business was described in the Statement of Agreed Facts (para 24) as 'the business of supplying, or offering to supply, Ticketing Related Services in Australia to promote the sale of tickets. Lasttix's primary means of promoting the sale of tickets was through the provision of services to Promoters in relation to discount ticket offers for events through either the Lasttix or MyTickets businesses.' Those who chose tickets promoted by Lasttix would be re-directed to actually purchase the ticket elsewhere, such as Ticketek (para 26).

⁸⁴ *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489 (para's 1 and 2)

⁸⁵ Harper Report, p. 347.

recommended that it be repealed and replaced with a provision which would prohibit a corporation with substantial market power engaging in conduct having the purpose or effect of substantially lessening competition.⁸⁶ This recommendation was subsequently accepted by the government after further public consultation⁸⁷ and the substance of the recommendation has been incorporated into Bill 2016, currently before Parliament. If passed, it will no longer be necessary to demonstrate a direct link between the market power held and the anti-competitive purpose or effect.

It is anticipated that Bill 2016 will pass and that, if it does, the ACCC will release guidelines to assist parties to determine whether or not their conduct is likely to contravene the Act. The ACCC released a draft *MMP Framework* in September 2016. The *MMP Framework* makes clear that the new provision will not alter the ACCC's approach to market definition or to assessing substantial market power and would not change its approach to analysing whether conduct substantially lessened competition.⁸⁸

The *MMP Framework* identifies refusals to deal, predatory pricing, tying and bundling and margin/price squeeze, as types of conduct that may give rise to misuse of market power claims and provides several examples of conduct that might constitute anti-competitive conduct of this nature are given; none specifically relate to online sales platforms. The *MMP Framework* also sets out conduct unlikely to raise concerns, including innovation, 'efficient conduct designed to drive down costs', price matching and 'responding efficiently to other forms of competition in the market such as product offering and terms of supply'.⁸⁹

Exemptions and authorisation

It is not currently possible for conduct that contravenes section 46 to be pre-authorized by the ACCC. The Harper Review recommended both that individual authorisation and block exemptions be available for s 46 conduct and other anti-competitive conduct. This would enable the ACCC to weigh public benefits, including efficiencies, against likely anti-competitive effects to determine whether proposed conduct should be authorised. Importantly, it is only possible to receive authorisation in advance of conduct taking place. Individual authorisation has been available for all other forms of conduct for decades, but has not been available for the purpose-based misuse of market power provision. There are, therefore, a considerable number of successful authorisation applications parties can look to form a view about whether or not conduct is likely to be authorised.⁹⁰

It has not, however, previously been possible to obtain 'block exemptions' for any categories of anti-competitive conduct under the CCA. If proposed changes are passed, it will be possible for the ACCC to create block exemptions for categories of conduct that are unlikely to substantially competition or which are likely to produce public benefits (including through efficiencies) that would outweigh any anti-competitive detriment.⁹¹ It is not clear whether, for example, the ACCC might consider that certain types of distribution arrangements by large firms might be considered to produce welfare-enhancing efficiencies such that they should benefit from block exemptions.

⁸⁶ Harper Report, recommendation 30.

⁸⁷ Treasury, 'Consultation on Competition Policy Review Final Report', 31 March 2015 and Treasury, 'Options to Strengthen the Misuse of Market Power Laws: Discussion Paper' (11 December 2015).

⁸⁸ MMP Framework (para 4.4).

⁸⁹ MMP Framework (para 4.7) None of these examples refer specifically to online platforms.

⁹⁰ The ACCC does not provide any guidance in its *draft Framework*, but indicates that guidance 'on the implementation of the revised authorisation test will be provided in the final s 46 guidelines' (para 5.1)

⁹¹ Harper Report, recommendation 39.

5. Integration

As the Deloitte Study pointed out, there is a growing trend of online sale platforms becoming vertically and horizontally integrated. This then 'raise[s] the prospect of any integrated platforms with market power using that market power to force or incentivise their suppliers and/or consumers to support the integrated business model, in order for the platform to maximise revenues.'⁹²

5.1. Merger Law

Mergers, which include acquisitions of share or assets, are prohibited where they substantially lessen competition. There is no level of asset or share acquisition required in order to trigger the prohibition. As a consequence, non-controlling share or asset acquisition can contravene s 50 of the CCA if they have the effect of substantially lessening competition.

Procedurally, there is no formal requirement to notify the ACCC of a proposed merger; however, in practice, parties proposing to merge typically notify the ACCC of the proposed merger, which is then informally reviewed by the ACCC to assess its likely impact on competition. The legality of mergers is rarely litigated, with merging parties generally withdrawing merger plans or modifying arrangements to satisfy the ACCC's concerns, if any.

When assessing whether the proposed acquisition is likely to substantially lessen competition the ACCC compares the likely future competitive environment with the proposed acquisition to the likely future without the acquisition.⁹³ As noted above, the term 'substantial' has been interpreted as meaning 'real or of substance',⁹⁴ although the ACCC has noted that the 'precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and will always depend on the particular facts of the merger under investigation. Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.'⁹⁵

In the context of mergers, online sales platforms have been considered new and disruptive technologies with relatively low barriers to entry with the result that significant mergers have been permitted. One of the most prominent merger reviews involving online platforms took place in 2014 when the ACCC considered a proposed acquisition by Expedia of Wotif, both online travel agents ("OTAs"). Wotif was an Australian company⁹⁶ which derived the vast majority of its revenue from the supply of online accommodation booking services⁹⁷ and had, at one time, been the leading online travel agent in Australia.⁹⁸ Wotif had, however, 'lost its position' as the leading Australian

⁹² Deloitte Study, p. 22.

⁹³ Expedia/Wotif PCA, para 31 and Merger Guidelines, para 3.16.

⁹⁴ Trade Practices Legislation Amendment Bill 1992, explanatory memorandum, paragraph 12, as cited in *Merger Guidelines*, para 3.5.

⁹⁵ *Merger Guidelines*, para 3.5

⁹⁶ Wotif promotes the fact that it was 'founded in a Brisbane garage' and has 'heaps of local knowledge' (Wotif homepage, www.wotif.com, accessed 6 June 2017).

⁹⁷ It also supplied booking services for flights and other travel products.

⁹⁸ See, eg, Jamie Freed, 'Why the ACCC approved the Expedia purchase of Wotif' (*Australian Financial Review*, 15 January 2015, <http://www.afr.com/it-pro/why-the-acc-approv-ed-the-expedia-purchase-of-wotif-20150114-12qneo> (accessed 6 June 2017)).

OTA, with its shares declining at the same time Booking.com experienced 'significant growth' to become Australia's largest OTA at the time.⁹⁹ Expedia was, and remains, a leading global OTA. Combined with Booking.com, they represented the top three OTAs in Australia, with smaller OTAs not generally considered a 'significant source of bookings' by accommodation providers.¹⁰⁰

The ACCC undertook market inquiries and expressed the preliminary view that the acquisition may raise competition concerns in the 'market for the online distribution/booking of Australian competition'; in particular the ACCC was concerned that the acquisition may increase the commission rates charged by Expedia to accommodation providers in Australia and reduce the amount of promotional opportunities offered by online travel agents to accommodation providers within Australia.¹⁰¹ The ACCC also indicated, however, that the merger was unlikely to raise competition concerns on the 'consumer side of the two-sided market for the online distribution/booking of Australian accommodation'¹⁰² or the market for the online distribution of air travel or other travel products.¹⁰³

After receiving further submissions in response to its initial concerns, the ACCC concluded that the acquisition was unlikely to substantially lessen competition.¹⁰⁴ Despite not challenging the merger, the ACCC released a 'Public Competition Assessment' setting out the reasons for its decision. As part of its assessment the ACCC considered a number of markets, most significantly the market for the 'online distribution/booking of Australian accommodation', which was described by the ACCC as a 'two-sided market where positive network effects exist'.¹⁰⁵ It was, the ACCC concluded, the 'eyeballs' generated by the OTA's through their investment that was considered of value to accommodation providers, with the result that the ACCC focused on the supplier rather than consumer side of the market when assessing competitive effects.

Applying the HMT and the SSNIP test the ACCC concluded that brick and mortar stores were not in the same market as online channels because 'accommodation providers are unlikely to switch enough inventory from online channels to bricks and mortar travel agents to make a small but significant increase in online distribution costs [commission rates] unprofitable'.¹⁰⁶ This was largely because a significant portion of consumers expressed a 'preference for comparing a wide range of accommodation providers', assessing traveller reviews and the convenience of booking online and that they did not consider bricks and mortar travel agents a close substitute for OTAs.¹⁰⁷ Conversely, customers who typically purchased from travel agencies valued the planning and advice services they offered and were unlikely to switch to online channels.

OTA's did, however, compete with hotels who could restrict rooms offered through OTAs and adopt strategies to channel customers directly to them to avoid the commission fee.¹⁰⁸ In addition, while 'metasearch sites' were not considered in the same market, the ACCC observed that they

⁹⁹ Expedia/Wotif PCA, para's 64 and 65

¹⁰⁰ Expedia/Wotif PCA, para 60.

¹⁰¹ Expedia/Wotif PCA, para 28.

¹⁰² Expedia/Wotif PCA, para 29.

¹⁰³ Ibid.

¹⁰⁴ The acquisition, worth AU\$703, subsequently took place (<http://www.wotif.com/vc/media/corporate-news-and-innovation/expedia-inc-completes-acquisition-wotif-group-266> (accessed 8 June 2017)).

¹⁰⁵ Expedia/Wotif PCA, para 43.

¹⁰⁶ Expedia/Wotif PCA, para 49.

¹⁰⁷ Expedia/Wotif PCA, para 49.

¹⁰⁸ Expedia/Wotif PCA, para 54.

‘increasingly compete with OTAs for consumer eyeballs’¹⁰⁹ and were ‘important to the competitive’ market dynamic because they ‘provide an expanding avenue for accommodation providers to bypass OTAs and transact directly with consumers’.¹¹⁰

In relation to its competition evaluation, the ACCC noted that, despite Wotif’s decline in market share, many industry participants considered Wotif a ‘vigorous and effective competitor’; in particular, it offered lower rates of commission compared with Expedia and Booking.com.¹¹¹ Wotif also enjoyed brand awareness, as the first major Australian OTA, and had more hotels in Australia listed than any other OTA.¹¹² Concern was expressed that Expedia and Booking.com would increase their commission rates post-acquisition when the competitive constraint imposed by Wotif was removed.¹¹³

Nevertheless, the ACCC noted that the industry was highly dynamic and that in recent years metasearch engines had emerged which imposed a ‘significant competitive threat to OTAs’,¹¹⁴ with some, like TripAdvisor, incorporating features resembling the services of an OTA. The various ‘innovative commercial responses to consumer demand for online booking facilities’¹¹⁵ was considered likely to continue with the ‘pace and breadth’ of new methods for online distribution strongly suggesting ‘that it is a dynamically competitive market’.¹¹⁶ The proposed acquisition was considered unlikely to ‘impede the degree of dynamic change in the market’.¹¹⁷

The ACCC observed that barriers for a new entrant to achieve sufficient scale to compete with Expedia, Wotif or Booking.com would be high and would include significant sunk costs in the form of advertising.¹¹⁸ However, the ACCC observed that recent changes to the market, which included consideration of significant global players, like Amazon, who might have the ability to overcome those barriers, combined with developments in adjacent markets, such as metasearch platforms like TripAdvisor and Google, would ensure the market remained dynamic and there would be significant competitive constraints on OTA incumbents.¹¹⁹

Although the ACCC conceded that there was potential for Expedia to ‘raise commission rates to accommodation providers post-acquisition’,¹²⁰ the ACCC also concluded that the dynamic nature of

¹⁰⁹ Even where they do not ‘currently provide a booking function in their own right’, but rather ‘connect consumers to an OTA or other site’ (Expedia/Wotif PCA, para 56).

¹¹⁰ Expedia/Wotif PCA, para 56.

¹¹¹ Expedia/Wotif PCA, para 58.

¹¹² Expedia/Wotif PCA, para 61.

¹¹³ Expedia/Wotif PCA, para 62.

¹¹⁴ Expedia/Wotif PCA, para 83: metasearch websites help consumers bypass OTA’s which increases ‘the ability of accommodation providers to reduce their reliance on the major OTAs’ and obtain a ‘greater proportion of bookings directly’ (para 81).

¹¹⁵ Expedia/Wotif PCA, para 76.

¹¹⁶ Expedia/Wotif PCA, para 77.

¹¹⁷ Ibid.

¹¹⁸ The ACCC concluded that ‘a new OTA would be able to access a sufficient volume of hotel inventory to enter the market as accommodation providers generally have an incentive to distribute their inventory across a wide range of platforms to access as many potential consumers as possible’ and this is ‘facilitated by channel managers’ – but, acknowledges that ‘a new OTA would face significant costs in engaging a sufficient number of staff to approach, enter contracts and maintain relationships with these accommodation providers’ (para 88) – there would be significant sunk costs through advertising (Expedia/Wotif PCA, para 89) and this may present a barrier to an OTA ‘achieving a sufficient scale to constrain the incumbents’ (Expedia/Wotif PCA, para 89). In current form ACCC accepted there may be significant barriers to entry or expansion to compete with Wotif, Expedia or Booking.com

¹¹⁹ Expedia/Wotif PCA, 41 PCA.

¹²⁰ Expedia/Wotif PCA, 92 PCA.

the market meant that accommodation providers would have opportunities to reduce reliance on OTA's and this would restrict the ability of the OTAs to increase commissions.¹²¹

5.2. Bottleneck Issue: National Access Regime Law and Section 46

A law dealing with the essential facility doctrine could be also relevant to online sales platform. For instance, an online platform can act as an essential facility for suppliers because a duplicated online platform does not attract customers to the same extent as does the original, established platform with specific innovative features.¹²² Thus a specific online platform can behave as a monopolist (or, at least, an entity with significant market power).¹²³ However, as we explain below, the Australian specific law dealing with essential facilities, the national access regime law, will not apply to this example for a number of reasons, including the fact that duplication of an online platform is both possible and not 'uneconomical'.

Australia does not apply the essential facility doctrine in the same way as, for instance, the United States of America. In general, s 46 (misuse of market power) deals with situations where a natural monopolist and/or an owner of a bottleneck in a bottleneck industry misuses its market power; for example, in the form of a refusal to supply or provide access. This section has been used successfully in such situations in the past.¹²⁴

Nevertheless, since the enactment of the *Competition Policy Reform Act 1995* (Cth), which amended the CCA, Australia has also made provision for the regulation of 'essential facilities' markets. This takes the form of both generic and industry-specific access regimes¹²⁵ which provide a mechanism for entities operating in upstream or downstream 'dependent markets' to obtain access to essential facilities in some situations. In the context of online sales platforms, it will be difficult to obtain access via this regime.¹²⁶ The primary mechanism for obtaining such access is to have a service 'declared', after which negotiation for access can take place. The first hurdle is to establish that there is a service. Although the definition of service in s 44B includes 'a communications service or similar service',¹²⁷ which could capture online sales platforms, the 'supply of goods',¹²⁸ 'the use of intellectual property'¹²⁹ and 'the use of a production process'¹³⁰ are expressly excluded from the definition of 'service' for the purposes of the access regime. As online sales platforms frequently involve the supply of goods, and this is excluded from the scope of the access regime, the circumstances in which the regime will apply are quite limited.

In addition, before a service can be declared, five criteria must be satisfied, including that:

¹²¹ Expedia/Wotif PCA, 81 PCA.

¹²² See, e.g., A Ezrachi and M. E. Stucke, *Virtual Competition - The Promise and Perils of the Algorithm Driven Economy* (Harvard University Press 2016); Martyn Taylor, 'Competition Law in High Technology Industries: Insights for Australia' (Competition Law Conference, Sydney, 30 May 2015).

¹²³ For instance, Google search engine; Facebook, Amazon.

¹²⁴ *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90; *Queensland Wire Industries v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

¹²⁵ The industry-specific access regimes include a telecommunications access regime, contained in Pt XIC of the CCA and the *Telecommunications Act 1997* (Cth).

¹²⁶ Indeed, the generic access regime was drafted in the mid-1990s, well before the rapid development of the digital world and it has never been used in connection with the digital economy, in particular, online sales platforms.

¹²⁷ CCA, s 44B(c).

¹²⁸ CCA, s 44B(d).

¹²⁹ CCA, s 44B(e).

¹³⁰ CCA, s 44B(f).

- (a) that access... would promote a material increase in competition in at least one dependent market...;
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the 'facility is of national significance, having regard to: (i) the size...; or (ii) the importance... to trade or commerce; or (iii) the importance of the facility to the national economy;
- (e) [that it is not already subject to a certified access regime (this may be the case if individual states have provided access to a facility) and]
- (f) that access (or increased access) to the service would not be contrary to the public interest'.¹³¹

Of these, the second (that it would be uneconomical to duplicate) and the third (that it be of national significance) are likely to be the greatest hurdles in relation to online sales platforms. It will generally not be 'uneconomical' to duplicate online sales platforms.¹³²

It is also likely to be difficult to demonstrate that an online platform is of 'national significance', although there may be some instances in which the 'volume of commerce' associated with the platform may be sufficient to satisfy this criterion.

There are, as a result, likely to be limited circumstances in which a third party can obtain access to an online sales platform by way of Australia's generic access regime. However, it is important to recall that the general prohibition on misuse of market power may also be contravened where a corporation takes advantage of a bottleneck created by their online sales platform to prevent or deter competition. This was usefully demonstrated in the case of *ASX v Pont Data*,¹³³ discussed in the next section.

5.3. Exclusionary conduct and exclusive dealing: Control over Digital Information

The competition law case of *ASX v Pont Data* was discussed in the Productivity Commission's research paper on 'Digital Disruption'¹³⁴ as an example of the recognition in Australia 'that commercial controls over the flow of computerised information can breach competition law.'¹³⁵ In this case, ASX's restrictive contractual conditions preventing Pont Data from reselling electronic information and imposing a new fee structure were held to have contravened s 46 (misuse of market power).¹³⁶

¹³¹ CCA, s 44H(4).

¹³² Precisely what measure of 'uneconomical' is used for this purpose has been the subject of extensive litigation and several reviews. This criterion has been interpreted in different ways by the courts. The current interpretation is based on a 'private profitability test' where the word 'uneconomical' means 'unprofitable' and the criterion would be satisfied if it is not profitable for anyone including the owner of the existing facility to duplicate it: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58; *Re Fortescue Metals Group Limited* [2010] ACompT 2; *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2; *Re Sydney International Airport* (2000) ATPR ¶ 41-754 at 40, 793. The Harper Review and Productivity Commission Review (Productivity Commission 2013, *National Access Regime*, Inquiry Report No 66 (Canberra), p. 160) recommended that the test be refused to one of 'natural monopoly', which is reflected in the Bill 2017. If passed, the criterion will assess the facility 'used 'to provide the service could meet the total foreseeable demand in the market' over the declaration period 'at the least cost compared to any 2 or more facilities' (proposed s 44CA, Bill 2017).

¹³³ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1990) 21 FCR 385, appealed (1991) 27 FCR 492; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 26, (1990) 27 FCR 460 at 486.

¹³⁴ Australian Government Productivity Commission, 'Digital Disruption: What do government need to do?' (Research Paper, June 2016), pp. 60-61, available at <http://www.pc.gov.au/research/completed/digital-disruption> ('[Digital Disruption](#)'). The Productivity Commission provides independent research and advice to the Australian Government.

¹³⁵ *Digital Disruption*, p. 61.

¹³⁶ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492 at 486.

This case is important for considering potential anticompetitive conduct in connection with online sale platforms for a number of reasons, including:

- It establishes that digital flow of information can constitute a relevant market.
- In that context, any ownership and trading with digitalised information is important for determining the relevant market and potentially market power.
- It also illustrates and proves the points of vertical integration and bottlenecks in online sales as introduced and discussed above.

ASX is an Australian public company which operates the Australian Securities Exchange (at the time of the case known as the Australian Stock Exchange). At the relevant time, it had a legislated monopoly on share clearing in Australia. It also operates in another relevant market – ‘an “information market” - for the supply of information about activities on stock exchanges.’¹³⁷ In this case, the information market was divided into the upstream wholesale market, where ASX had substantial market power, and the downstream retail market, where ASX competed, via its subsidiary JECNET, with others retailers, including Pont Data. The upstream market was a bottleneck market, as the wholesale information was essential for operation in the dependent downstream market. In that regard the Federal Court pointed out that ‘...wholesaling activities, actual or potential, are to be seen as an important feature or element in the information market as understood in this case.’¹³⁸ Thus ASX was a vertically integrated entity operating in the dependent market via its subsidiary JECNET.

The facts presented in the court showed that JECNET had not been successful. In particular, it had lost money for several years and had been described in an internal report as ‘poorly regarded’.¹³⁹ Pont Data, on the other hand, had been making a profit on the downstream market. ASX decided to address that situation by leveraging its power in the upstream market into the dependent downstream retail market for the sale of information. It did this by forcing Pont Data and others to sign a new contract which included a restriction on the resale of information and an increase of the wholesale price. Pont Data alleged that this conduct amounted to ASX subsidising its unsuccessful business, JECNET, and that this had an adverse impact on JECNET’s competitors and contravened both s 46 (misuse of market power) and s 47 (exclusive dealing).¹⁴⁰ On appeal, the Full Federal Court upheld the decision at first instance that:

[ASX] took advantage of market power for the purpose of deterring the retail competitors of JECNET from engaging in competitive conduct, by imposition of the fee structure in the agreements, as well as by imposing other terms in the agreements and by requiring a tripartite form for the Dynamic Agreement.¹⁴¹

In reaching its decision the court made clear that merely charging monopolistic prices is not anticompetitive;¹⁴² Australia’s misuse of market power provision is focussed on exclusionary and not exploitative conduct. However, in this case, ASX was a vertically integrated entity and evidence demonstrated that the imposition of the higher fees was designed to prevent its competitors from

¹³⁷ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1990) 21 FCR 385 at 412.

¹³⁸ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1990) 27 FCR 460, at 462.

¹³⁹ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1990) 27 FCR 460 (para 6).

¹⁴⁰ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1990) 21 FCR 385 at 409.

¹⁴¹ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 486.

¹⁴² *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492 at 502.

competing, was not justified by any increase of cost and was not applied to JECNET, with the result that JECNET's competitors were discriminated against.¹⁴³

As a result, ASX was held to have contravened both s 46 and s 47, the latter of which required demonstration that the conduct did, in fact, have the purpose or effect of substantially lessening competition. This implies that the same situation could also contravene the proposed section 46, contained in Bill 2016, which applies the same competition test.

6. Bargaining Power

6.1. Section 46 'Misuse of Market Power' and Bargaining Power

A corporation with significant bargaining power can contravene s 46 by demanding a most favoured nation clause from suppliers. This was demonstrated in the case of *Safeway*.¹⁴⁴ Safeway was the largest supermarket chain and the largest bread retailer in Victoria (the second most populous state in Australia). The relevant market was the market 'for the sale and acquisition of bread by wholesale in Victoria'.¹⁴⁵ Safeway's conduct, which involved refusing to acquire bread from a supplier if the supplier sold bread for less to another buyer, was held to constitute a misuse of market power. In order to find a contravention, the court was required to find that Safeway held substantial market power and that it had taken advantage of that power for an anticompetitive purpose.

In relation to the first of these requirements, the Full Court of the Federal Court of Australia found that significant 'monopsony power' satisfies the requirement of significant market power and, in this case, could be determined by Safeway's ability to secure more favourable terms of purchase than competing buyers, including the best prices from its suppliers.¹⁴⁶ The Court explained that, despite the fact that Safeway was not always successful in forcing the best price policy upon its suppliers, it had substantial market power because it was able to reduce the quantity sold by the plant bakers concerned. Indeed, due to its bargaining power, it was able to effectively increase the pressure on plant bakers to comply with Safeway's price condition because there was not another retailer (or retailers) to whom they could supply all of their products.¹⁴⁷

In relation to the second requirement, Safeway's refusal to buy if the supplier in question was selling for less to another retailer constituted taking advantage of Safeway's substantial power. Finally, it was done with the prohibited purpose of deterring or preventing a person from engaging in competitive conduct;¹⁴⁸ in particular, Safeway had the purpose of deterring or preventing its suppliers (plant bakers) and certain of the independent retailers to whom those plant bakers supplied, from engaging in competitive conduct in the form of discounting.¹⁴⁹

6.2. Collective Bargaining

Entities, most likely suppliers, dealing with an online sales platform which possesses (significant) bargaining power can utilise the provisions in the CCA allowing for collective bargaining

¹⁴³ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1990) 21 FCR 385 at 418.

¹⁴⁴ *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339.

¹⁴⁵ *Ibid*, at [297].

¹⁴⁶ *Ibid*, at [300].

¹⁴⁷ *Ibid*, at [314]-[315], [323].

¹⁴⁸ Section 46(1)(c).

¹⁴⁹ See *ibid*, at [335]-[346].

notification¹⁵⁰ or authorisation.¹⁵¹ These processes are designed to allow for smaller vertical participants, with minimal bargaining power on the vertical chain, to negotiate their conditions collectively without infringing the cartel laws. In the case of notification, collective bargaining can take place on the condition that the small businesses involved notify the ACCC and that the ACCC does not object to that notification for the reason that any public benefit likely to result from the conduct would not outweigh the anti-competitive detriment associated with the notified conduct. Alternatively, a group of small suppliers or buyers can apply to the ACCC for authorisation of their agreement to bargain collectively. Unlike notification, which will result in the conduct being allowed to take place unless the ACCC objects, collective bargaining authorisations require the ACCC to make a positive finding that the collective bargaining proposed would result in a benefit to the public and that that benefit would outweigh any lessening of competition likely to flow from the conduct.

The collective bargaining notification and authorisation provisions have been used in practice,¹⁵² although typically in relation to traditional markets rather than online platforms.¹⁵³ A recent example including sales platforms that was not successful, involved the 2016 application by five Australian banks for authorisation to enter into collective bargaining with Apple, regarding access to the Apple Pay platform and the Near-Field Communication (NFC) controller in Apple's iPhone devices.¹⁵⁴ The ACCC decided in March 2017 that the public benefit claimed by the banks, such as increased innovation and investment in digital wallets, increased consumer choice in digital wallets and mobile payments and increased adoption of mobile payment technology in Australia, did not outweigh the potential distortion in the competitive application of new technology by the banks. Granting authorisation, the ACCC concluded, could 'reduce the competitive tension between the banks for the supply of different payment options to consumers and may distort competition between the mobile operating systems.'¹⁵⁵

6.3 Bargaining Power and Consumer Law

The Australian Consumer Law ("ACL")¹⁵⁶ compliments and sometimes overlaps with the Australian Competition Law. The ACL is particularly important in relation to online sales platforms. Although, historically, penalties have been much more limited for consumer rather than competition law breaches under the CCA, recent reviews of the ACL have recommended significant increases to these penalties.¹⁵⁷

¹⁵⁰ CCA, Part VII, Division 2, Subdivision B of division 2.

¹⁵¹ CCA, Part VII, Division 1.

¹⁵² The Harper Report notes that 'the provisions are not being used as frequently as they might', at p. 86.

¹⁵³ For example, in 2016 a group of dairy farmers notified the ACCC that it intended to collectively bargain in relation to terms and conditions of raw milk supply arrangements with Woolworths (a major supermarket) and Milk2Market Pty Ltd. The notification was allowed to stand, with the ACCC indicating that it considered the likely public benefit associated with the arrangement would outweigh any anti-competitive detriment. Manning Valley Dairy Farmers – Collective Bargaining Notifications – CB00326 and CB00327 (ACCC collective bargaining notifications register, <http://registers.accc.gov.au/content/index.phtml/itemId/1194750/fromItemId/815577>).

¹⁵⁴ Available at <http://registers.accc.gov.au/content/index.phtml/itemId/1197444/fromItemId/401858>.

¹⁵⁵ ACCC, '(media release, 31/3/2017), available at <https://www.accc.gov.au/media-release/accc-denies-authorisation-for-banks-to-collectively-bargain-with-apple-and-boycott-apple-pay>.

¹⁵⁶ The Australian Consumer Law is contained in Schedule 2 of the CCA. For constitutional reasons it operates federally and within Australian territories via the CCA and within Australian states via state enabling legislation.

¹⁵⁷ Commonwealth of Australia, 'Australian Consumer Law Review: Final Report' (Consumer Affairs Australia and New Zealand (CAANZ), 19 April 2017) (recommending that the maximum penalties be aligned with breaches of the competition provisions (p 87)); Productivity Commission, 'Consumer Law Enforcement and Administration' (Research

Broadly, the ACL prohibits misleading or deceptive conduct and false or misleading representation, unconscionable conduct and unfair contract terms. They also impose mandatory consumer guarantees on suppliers. The ACCC has developed Guidance for platform operators focussing predominantly on the consumer law in the CCA.¹⁵⁸

Unconscionable conduct

The unconscionable conduct prohibition in the ACL is the one most likely to overlap with the competition provisions of the CCA and, at times, appears to have been used as an alternative to a misuse of market power claim.¹⁵⁹ It prohibits a person who supplies or acquires goods or services from engaging in conduct that is, 'in all the circumstances, unconscionable'.¹⁶⁰ Factors the court may have regard to when making this assessment include the relative bargaining power of the supplier and customer, whether 'undue influence or pressure was exerted on, or any unfair tactics were used against, the customer', 'the extent to which the supplier was willing to negotiate terms,' the terms themselves and the conduct engaged in after the contract was entered into and the extent to which the parties 'acted in good faith'.¹⁶¹

The most prominent case involving unconscionable conduct was decided in 2014, with the Federal Court declaring that Coles, one of Australia's two major supermarket chains, had engaged in unconscionable conduct in its dealings with certain suppliers. In the course of her judgment, Justice Gordon observed:

Coles' misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was 'not done in good conscience'. It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold.

Coles' practices, demands and threats were deliberate, orchestrated and relentless.

Although the circumstances in which conduct will become unconscionable will always be open to debate, it is not difficult to imagine how the prohibition might operate in relation to online sales platforms, particularly when large and dominant platforms impose strict conditions on their much smaller suppliers. In those circumstances, the ACCC may prefer to bring an action under the broader unconscionable conduct law than the misuse of market power law.

Report, March 2017) (<http://www.pc.gov.au/inquiries/completed/consumer-law/report/consumer-law.pdf>) (agreeing with the CAANZ review that 'there is a strong case for increasing maximum financial penalties for breaches of the ACL' (p 11) and finding that '[m]aximum financial penalties available under the ACL are small relative to the benefits that a business can accrue by breaching the ACL' (finding 4.5, p 143)).

¹⁵⁸ *Platform Operators in the Sharing Economy*.

¹⁵⁹ See, eg, Alexandra Merrett, 'ACCC signals strategic change in battle with supermarkets' (The Conversation, 6 May 2014, <https://theconversation.com/acc-signals-strategic-change-in-battle-with-supermarkets-26288>), suggesting that the 'facts upon which the case is based could have been framed as a misuse of market power.'

¹⁶⁰ Section 21. Where section 21 does not apply the ACL also prohibits a person engaging in unconscionable conduct 'within the meaning of the unwritten law' (section 20). This is typically more difficult to demonstrate and is less relevant in the context of online sales platforms.

¹⁶¹ Section 22; the same considerations apply if the party accused of unconscionable conduct is an acquirer of goods or services rather than a supplier: section 22(2).

Misleading conduct

The ACL contains broad and strict prohibitions on misleading conduct¹⁶² and false advertising.¹⁶³ Most significantly, section 18 of the ACL, which is among the most litigated provision in Australia,¹⁶⁴ provides that '[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

Any conduct, including formal advertising as well as labelling, imagery, statements and even silence, can contravene the prohibition if it creates a false impression about the product or service. In relation to online platforms this is likely to take the form of false advertising about the quality or price of the product or service being advertised. This might include false product reviews.¹⁶⁵ The provision cannot be excluded and it is not possible to rely on small print or disclaimers to avoid the operation of the provision.

One area in which online platforms may risk contravening the law is in relation to 'drip pricing', in which various fees and charges are displayed only incrementally. This practice has been held to constitute misleading conduct under s 18 of the ACL, most notably in relation to the airlines, Jetstar and Virgin Australia.¹⁶⁶ In addition to possibly constituting misleading conduct, 'drip pricing' may also contravene the ACL if an online sales platform promotes a price that represents only part of the price, without also including the total price at least as prominently (known as 'component pricing').¹⁶⁷ The single price advertised must include, for example, any tax, duty, fee, levy, or other charge. Consequently, for example, an online platform selling airfares must not advertise a fare which excludes airport taxes and a car sales site must not advertise a price which excludes mandatory delivery costs, unless the total price is also displayed at least as prominently.

Importantly, although contained in the ACL, the prohibition on misleading conduct is not restricted to conduct that misleads consumers. Consequently, a business misled by the conduct of another business may bring a claim under the provision or, perhaps more commonly, rely on the provision as a defence to a breach of contract claim. Component pricing, on the other hand, applies only to the supply or promotion of goods or services 'ordinarily acquired for personal, domestic or household

¹⁶² Section 18 ACL.

¹⁶³ Section 29 ACL.

¹⁶⁴ It is clearly the most litigated provision in the CCA: see, eg, Seelieem Seah, 'Unfulfilled Promissory Contractual Terms and Section 52 of the Australian Trade Practices Act' [2000] *MurUEJL* 33 (the Act was renamed the Competition and Consumer Act and the development of the Australian Consumer Law resulted in section 52 being repealed and replaced by s 12 of the Australian Consumer Law; the prohibition remains substantively the same and its reputation as most litigated has not changed).

¹⁶⁵ See, ACCC, 'Managing online reviews' (<https://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews>, accessed 8 June 2017) observing that it considers 'encouraging family and friends' to write favourable reviews without disclosing their personal connection, writing poor reviews on other websites which 'do not reflect a genuinely held opinion' and soliciting others to write reviews about your business, or another business, when they have not experienced the good or service, to constitute misleading conduct. Failure to remove reviews known to be fake may also be misleading. See also Robert Walker and Rosannah Healy, 'Triple A Rated? Regulating Online Information Disclosures' (2017) 25 *AJCL* 4 (pp 10-11).

¹⁶⁶ See ACCC, 'Court finds that Jetstar and Virgin Australia engaged in misleading 'drip pricing' practices' (Media Release, 17 November 2015, <https://www.accc.gov.au/media-release/court-finds-that-jetstar-and-virgin-australia-engaged-in-misleading-drip-pricing-practices>) See also Julie Clarke and Philip Clarke, 'Jetstar and Virgin caught out for overlooking mobile commerce' (The Conversation, 20 November 2015, <https://theconversation.com/jetstar-and-virgin-caught-out-for-overlooking-mobile-commerce-50907>) and Robert Walker and Rosannah Healy, 'Triple A Rated? Regulating Online Information Disclosures' (2017) 25 *AJCL* 4 (pp 8-9).

¹⁶⁷ ACL, s 48.

use or consumption.’¹⁶⁸ This would, however, apply to the majority of sales made through online sales platforms.

Unfair terms

Consumers and, more recently, small business,¹⁶⁹ enjoy legislative protection from unfair terms in standard form contracts.¹⁷⁰ Where major platforms deal with multiple small businesses through standard form contracts this is likely to be particularly relevant. The ACL renders a term of a consumer or small business contract void if it is ‘unfair’ and contained in a standard form contract. A term is considered unfair if ‘(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.’¹⁷¹

Consumer guarantees

The ACL also imposes guarantees on suppliers in relation to goods or services supplied to consumers. They cannot be excluded and apply to anyone selling goods or services, including platform operators.¹⁷² The key guarantees are that goods are of acceptable quality,¹⁷³ that they will be fit for any purpose made known to the supplier,¹⁷⁴ that they will match any description of the goods provided by the supplier¹⁷⁵ and, in relation to services, that they will be rendered with due care and skill.¹⁷⁶

7. Vertical restraints: RPM and Exclusive Dealings

The Deloitte Study on the sharing economy and the recent EU Study on online platforms both recognised that there are incentives for vertical restraints to be applied in connection with online platforms and the sharing economy. This includes situations where a particular online platform¹⁷⁷ does not have significant market power. For instance, the Deloitte Study identified two common ways of imposing vertical restraints taking the form of exclusive practices:

1. Exclusive practices are imposed by traditional businesses because of a lack of regulatory neutrality: Because fewer regulations are applied to online sales platform than to traditional businesses, the traditional businesses can be motivated to ‘engage in anti-competitive conduct [such as protecting their territories and exclusive distribution] in order to maintain market share.’¹⁷⁸

¹⁶⁸ ACL, s 48.

¹⁶⁹ Since 12 November 2016. To be a small business contract, at the time it was entered into at least one party must employ fewer than 20 people and either (a) the up front price must not exceed \$300,000 or (b) if the contract operates for more than 12 months, the upfront price payable does not exceed \$1,000,000 (Australian Consumer Law, section 23)

¹⁷⁰ Australian Consumer Law section 23. Section 27 provides that a contract is presumed to be a standard form contract unless demonstrated otherwise.

¹⁷¹ ACL, s 24.

¹⁷² Supplier is defined as the person who supplied the goods.

¹⁷³ ACL, s 54.

¹⁷⁴ ACL, s 55.

¹⁷⁵ ACL, s 54.

¹⁷⁶ ACL, s 61.

¹⁷⁷ For the purposes of this chapter, an online sales platform.

¹⁷⁸ Deloitte Study, p. iii.

2. Exclusive practices are imposed by online sales platforms: 'sharing platforms could impose exclusivity on users of the platform, especially suppliers'.¹⁷⁹

Australian competition law treats vertical restraints as unilateral practices. This includes not only misuse of market power (s 46) involving the imposition of restrictions on the conduct of buyers or sellers, but also restraints imposed by corporations which lack any significant market power, including resale price maintenance (s 48), which is prohibited *per se*, and exclusive dealing (47), which is prohibited when it has the purpose or effect of substantially lessen competition.¹⁸⁰

In relation to horizontal concerns, it is possible that vertical distribution arrangements may be found to constitute cartel conduct where the parties involved are found to be competitors or potential competitors in a relevant market. Importantly, this might extend to principal/agent arrangements, common in relation to online sales platforms. In this respect, the High Court¹⁸¹ recently confirmed that, in appropriate circumstances, principals may be found to be 'in competition' with their agents for sales and that, as a result, agreements between them might fall within the scope of the cartel laws. The issue of principal and agent is discussed further in section 8, below.

7.1. RPM

Resale price maintenance ("RPM") is *per se* illegal under section 48. Part VIII, sections 96 to 100, then sets specific rules on RPM.¹⁸² Part VIII, s 96(3), defines RPM for purposes of the prohibition, making clear that it applies to minimum resale price maintenance, not maximum resale price maintenance. The use of genuine recommended resale prices is excluded from *per se* prohibition.¹⁸³ The cases of *Prestige Motors*¹⁸⁴ and *Commodore Business Machines*¹⁸⁵ have made clear that the prohibition captures preventing buyers from advertising below a certain price (or only at a certain price), even if they can sell below (and above) the 'recommended price'.

Prohibited RPM is based on the unilateral conduct of the supplier, rather than multilateral/bilateral conduct. Although it covers any agreements with buyers, under s 96(3), the supplier is primarily liable; it is the supplier that is presumed to be forcing, or in other ways influence, its buyers to maintain prices or it stop supplying because of RPM. Subsection 96(3) also includes situations where three persons of a vertical chain are involved in RPM; thus, the supplier would contravene s 96(3) of the CCA if it forced or influenced its buyer to sell a product to the third person (the second buyer in the vertical chain) only on the condition that the second buyer maintains and/or agrees to maintain its retail price.¹⁸⁶ Importantly, however, while primary liability under the provision resides with the supplier, a buyer who initiates or encourages a supplier to engage in RPM can be found guilty of aiding and abetting RPM conduct.¹⁸⁷

¹⁷⁹ Deloitte Study, p. iv.

¹⁸⁰ Except for one form of exclusive dealing, third line forcing, which is prohibited *per se* under the current s 47 of the CCA; however, the Bill 2017, in its Schedule 7, proposes to change the *per se* rule in relation to third line forcing to the rule of substantial lessening of competition.

¹⁸¹ *ACCC v Flight Centre Travel* [2016] HCA 49.

¹⁸² Section 4, which defines terms used in the CCA, only refers to Part VIII.

¹⁸³ See, ss 97, 99 and 96(3)(b).

¹⁸⁴ *TPC v Prestige Motors Pty Ltd* (1994) ATPR 41-359.

¹⁸⁵ *TPC v Commodore Business Machines Pty Ltd* (1990) 92 ALR 563.

¹⁸⁶ Subsection 96(3)(e); see also, s 96(3)(d)(ii).

¹⁸⁷ See, for example, *Australian Competition and Consumer Commission v OmniBlend Australia Pty Ltd* [2015] FCA 871.

There is currently only one defence to per se RPM liability, which arises when the supplier's product has been used as a 'loss leader'. The 'loss leader defence' is applicable when a supplier withholds goods from a retailer who has, within the preceding year, sold those goods at less than cost, for the purpose of promoting their business or otherwise attracting customers who are likely to purchase *other goods*.¹⁸⁸ Furthermore, since 1995, suppliers have been able to apply for authorisation of RPM on public benefit grounds. Although there has only been one such application, it was successful.¹⁸⁹

RPM and Digital Online Sales

The Harper Report discussed RPM in connection with digital retailing, highlighting the change of doing business since the introduction of anti-RPM law.¹⁹⁰ It did not suggest changing the relevant provisions on RPM in the CCA, but did recommend the introduction of the notification system for RPM. The Harper Report justified this recommendation by arguing that an exception for RPM via the notification process would be easier and faster than via the authorisation exemption process and thus is likely to be used more frequently than the authorisation process. The Harper Report also recommended including an exemption for RPM conduct between bodies corporate, as currently the RPM prohibition can cover maintaining prices between subsidiaries and/or a parent company and its subsidiary.¹⁹¹ Bill 2017 includes both recommendations and proposes to change the CCA accordingly.

7.2. Exclusive Dealing – Non-price Vertical Restraints

Unlike the approach to RPM, where only suppliers are primarily liable, both suppliers and buyers can be held liable for different forms of exclusive dealings which contravene s 47. Section 47 is descriptive. It includes, among other things, tying, exclusive distribution and territorial and customer allocation. Except for third line forcing,¹⁹² such practices are only prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

Section 47 includes situations where third parties are involved. For instance, the prohibition on third line forcing applies where a supplier forces its customer to purchase another product or service from a third party, in order to obtain goods or services from the supplier at all, or on particular terms.¹⁹³ For example, it is third line forcing to offer discounted petrol on condition that the purchaser acquire goods or services from another party (such as a supermarket). This conduct is currently *per se* illegal; however, if Bill 2017 amends the CCA as proposed, third line forcing will be prohibited only if, in a particular case, it substantially lessens competition in its purpose, effect or likely effect.¹⁹⁴ Third line forcing could be relevant for the online sales platforms if, for instance, the platform forces its customers to purchase or sell other services or products, or only offers a discounted price for product (a) on condition that the purchaser also purchase product (b).

¹⁸⁸ Section 98(2) of the CCA. See also, *TPC v Orlane Australia Pty Ltd* (1984) 1 FCR 157.

¹⁸⁹ On 5 December 2014, the ACCC granted authorisation no. A91433 to Tooltechnic to set minimum retail prices on Festool products. The authorisation was granted until the end of 2018. The ACCC has been monitoring the situation. The principal argument for granting the authorisation was the prevention of free riding. The recent Bill 2017 proposes the notification system for RPM.

¹⁹⁰ Harper Report, p. 378.

¹⁹¹ Harper Report, pp. 378-380.

¹⁹² Subsections 47(6)-(7).

¹⁹³ The prohibited third line forcing always includes two contracts of purchase or sale. It does not apply if there is only one contract and the product or service is considered a 'bundle'. Consequently, in e.g., *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* [1986] HCA 72, the court held that 'packaged beer' was a single bundled product, and not two separate products, for purposes of the third line forcing provisions.

^e Despite the per-se prohibition, third line forcing can be and frequently is notified.

Another example of a third party role in an exclusive dealing case (where the third party was competing with the infringer) is the recent case of *Visa*.¹⁹⁵ Indeed, this case shows how a restriction on using a third party for a specific services, in this case a digital financial service,¹⁹⁶ can contravene s 47 (and potentially also s 46). The ACCC and Visa Inc made a joint submission, in which they agreed that this conduct contravened exclusive dealing in the form of s 47(2)(d); no admissions were made in relation to misuse of market power and the ACCC did not pursue this claim.

This case involved the conduct of Visa and its modification of the Visa International Operating Regulations (VIOR) in order to prevent the expansion of providers of Dynamic Currency Conversion (DCC) services relevant for international transactions. In practice, if the DCC was involved in an international transaction, such a transaction was submitted in the cardholder's currency as opposed to merchant's currency, amounting into a single currency transaction. In situations where such DCC international transactions occurred, Visa did not earn fees it would have otherwise earned if the transactions had happened as multi-currency transactions without any involvement of DCC and in some circumstances Visa was not earning any foreign exchange revenue from the DCC single currency transactions either.¹⁹⁷

The modified version of the VIOR from the 27th of April 2010, among other things, allowed only 'DCC providers and merchant outlets already actively offering DCC services as at 30 April 2010'¹⁹⁸ to re-register. Potential new entrants were not allowed to register DCC services.¹⁹⁹ It was alleged that 'the effect was to restrict the expansion of DCC services on the Visa payment card network in Australia.'²⁰⁰

An example of exclusive distribution where an online sale platform was involved is an unsuccessful notification under s 47 of eBay Inc ("eBay"). In April 2008 eBay lodged a notification to obtain an immunity from conduct which could potentially breach s 47. Specifically, eBay was intending to enter into an exclusive dealing arrangement with PayPal proposing to 'mandate the use of PayPal for almost all transactions on the eBay site.'²⁰¹ The ACCC revoked the notification on the basis that this conduct could restrict competition substantially, among other things, due to the fact that eBay was Australia's leading online sales platform and the notified conduct would restrict the payment choice of buyers.²⁰²

Selective Distribution System

Selective distribution as a type of distribution where buyers (or sellers) are selected based on given, selective criteria, such as those prohibiting online sales, or prohibiting sales to particular customers or customer groups, can contravene both s 47 and s 46. In certain circumstances these arrangements might also contravene the general prohibition on anti-competitive agreements, s 45.

¹⁹⁵ *ACCC v Visa Inc* [2015] FCA 1020 ('*Visa*').

¹⁹⁶ This could apply to online sales platforms too.

¹⁹⁷ *Visa*, [6]-[46].

¹⁹⁸ *Visa*, [49].

¹⁹⁹ *Visa*, [49]-[50].

²⁰⁰ *Visa*, [50].

²⁰¹ ACCC, 'ACCC proposes to revoke immunity for eBay's PayPal only policy' (media relies, 12 June 2008), available at <https://www.accc.gov.au/media-release/accc-proposes-to-revoke-immunity-for-ebays-paypal-only-policy>.

²⁰² See, ACCC, 'ACCC proposes to revoke immunity for eBay's PayPal only policy' (media relies, 12 June 2008), available at <https://www.accc.gov.au/media-release/accc-proposes-to-revoke-immunity-for-ebays-paypal-only-policy>.

There have not yet been any cases in Australia dealing with genuine selective distribution, in which platforms have prohibited online sales, or sales via online platforms.

Section 47 is a descriptive provision which prohibits only specific forms of vertical restraints, collectively referred to as 'exclusive dealing'. Despite the reference to 'exclusive dealing', section 47 covers a much broader range of restrictive distribution arrangements than those that would typically be considered 'exclusive dealing' in other jurisdictions such as the US and EU. For example, it covers situations where a corporation restricts its buyers to selling²⁰³ online or to resupplying online. For instance, s 47(2)(f) prohibits supplying or offering to supply goods or services (at all or at a particular price or on particular conditions) on condition that those goods or services will not be re-supplied to 'particular persons or classes of person' (which may include online sales platforms) or 'in particular places or classes of places' (such as online).

Refusal to supply for the reason that the buyer does not follow such a selective condition is also captured,²⁰⁴ and the provision also captures equivalent acquisition restrictions;²⁰⁵ thus, for example, if an online sales platform acquired goods on condition that the person from whom they acquired did not (or did not except to a limited extent) supply goods to particular people or in particular places (for example via their own online distribution channels) then that would fall within the scope of the exclusive dealing provision.

Importantly, all of these forms of exclusive dealing are prohibited only when the conduct has the purpose, effect, or likely effect of substantially lessening competition.²⁰⁶ This requires proof that the 'effect on competition... is real or of substance',²⁰⁷ although it does not need to be 'large or weighty'.²⁰⁸ Conduct is likely to be anti-competitive if, for example, it raises barriers to entry or reduces price competition.²⁰⁹ Although not all refusals to supply will satisfy this test, refusal to supply a single buyer (or to acquire from a single supplier) in a competitive market can lead to substantial lessening of competition where such a buyer (or supplier) is a vigorous competitor; for example, if it involves refusal to supply an important discounter with the result that the refusal will lead to an increase in prices for consumers.²¹⁰

Exclusive dealing, particularly where it involves refusal to supply, may also constitute a misuse of market power. However, the application of s 47 and s 46 has its limits. The potential overlap between the exclusive dealing and misuse of market power provisions and potential limits of both provisions centred around selective distribution were demonstrated in *TPC v CSR Ltd*.²¹¹ In that case the parties were in disagreement whether the conduct in question involved a form of exclusive dealing (single-branding) or selective distribution. The competition authority argued that North Perth Plaster Works Pty Ltd ('NPPW') habitually purchased all its plasterboard from CSR Ltd; however, once it started to acquire plasterboard from one of CSR's competitors, CSR ceased supply.

²⁰³ The term 'supply' is defined widely in s 4 of the CCA and includes not only sale but also 'exchange, lease, hire or hire-purchase; and ...in relation to services—provide, grant or confer'.

²⁰⁴ Subsection 47(3).

²⁰⁵ Subsections 47(4)-(5).

²⁰⁶ Subsections 47(10).

²⁰⁷ Trade Practices Legislation Amendment Bill 1992, Explanatory Memorandum, p 4.

²⁰⁸ Trade Practices Legislation Amendment Bill 1992, Explanatory Memorandum, p 4.

²⁰⁹ *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) ¶ATPR40-327, at 43, 987.

²¹⁰ See, *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) ¶ATPR 40-809, [1987] FCA 282.

²¹¹ *TPC v CSR Ltd* (1991) ATPR ¶41-076.

CSR argued that it was not refusing supply because of the acquisition from competitor, but rather that it utilised a selective distribution system in which it chose to supply only to buyers who were interested in carrying a full range of its plasterboard and this did not include NPPW. The Court agreed with the competition authority that this conduct constituted refusal to supply contravening both sections 46 and 47.²¹² If the Court had agreed with CSR that this was a genuine implementation of a selective distribution system it may not have found an anti-competitive purpose or taking advantage of market power under s 46 or a contravention of s 47.

In order to contravene section 46 it must be demonstrated that the application of the selective distribution system amounts to a taking advantage of market power for an anti-competitive purpose. Where there is a clear business justification for the application of a particular distribution system it may be difficult to demonstrate that its application is related to its market power or that it has the necessary anti-competitive purpose. This was illustrated in the High Court decision of *Melway*,²¹³ which included exclusive dealership and not selective distribution.

In this case Melway published the 'Melway's Street Directory', a detailed street directory of the Greater Melbourne area and, at the time, enjoyed a market share of around 80-90% for Melbourne street directories. The case involved the application of an exclusive distribution arrangement; the supplier, *Melway*, appointed exclusive distributors for specific sectors of the retail market and refused to supply to other distributors. Robert Hicks Pty Ltd (t/a Auto Fashions) placed an order for between 30,000 and 50,000 Melways and was refused. Hicks alleged the refusal constituted a taking advantage of market power for an unlawful purpose; Melway claimed it was merely implementing its successful exclusive distribution system. The High Court agreed with Melway, finding that Melway was not trying to foreclose the market and that Hicks was free to obtain street directories from other wholesalers, but was merely implementing its long-running distribution system and that this, while limiting intra-brand competition, could improve inter-brand competition. The Court observed:

There was no legal obligation upon Melway to have any wholesale distributors at all. If it had chosen to do so, it could have supplied retailers directly itself, or it could have supplied the retail market through a single wholesale distributor. Distributorship arrangements may restrict intrabrand competition but promote interbrand competition.²¹⁴

Importantly, the Court held, this was not an exercise of market power because it could have refused to supply in the absence of market power and its refusal in this case did not deny Melway any extra sales (it simply meant the sales went to its preferred segment distributor instead of to Hicks). The Court held:²¹⁵

²¹² *TPC v CSR Ltd* (1991) ATPR ¶41-076, at 52,148.

²¹³ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1998) FCA 1379, appealed (1999) FCA 664, appealed (2001) 205 CLR, at 21. However, the proposed provision 46 under Bill 2016 requiring proving substantial lessening of competition could cover such conduct.

²¹⁴ *Ibid*, at [19].

²¹⁵ By majority; in a strong dissent, Justice Kirby held that there was misuse of market power. His Honour considered that the conclusion that the refusal to supply was unrelated to the market power was 'unrealistic' (para 75) and observed that in Sydney, where Melway did not enjoy the same sort of market dominance (holding closer to 10% of that market), there was an 'understandable willingness to embrace a different distribution' (para 85), suggesting that in enforcing its closed distribution system in Melbourne, Melway was 'not pursuing some universal philosophy of efficient market distribution' but was taking advantage of its market power (para 85).

... there are cases in which it is dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage. That is especially so when, in a context such as the present, the purpose as referred to in s 46 is relatively narrow. The purpose presently in question is that of deterring a person from engaging in competitive conduct in a market. If a manufacturer supplies to a single distributor, or a limited number of distributors, then, from one point of view, turning down an application from a person who wishes to become an additional distributor will have the effect of preventing that person from engaging in competitive conduct. Purpose, in this connection, involves intention to achieve a result. Where distributorship arrangements are concerned, an intent to give a particular distributor exclusivity may constitute a very insecure basis for concluding that there had been a taking advantage of market power.²¹⁶

These quotes show, among other things, that the threshold for proving misuse of market power under s 46 is currently very high (although if Bill 2016 passes the threshold will be lowered to focus on competitive effects) and that the court is willing to accept arguments that conduct which limits intra-brand competition may nevertheless be held not to be anti-competitive if offset by improvements in inter-brand competition, both in the context of misuse of market power claims and when applying the competition test in the context of exclusive dealing.

7.3. International Price Discrimination – Geo-blocking

In Australia, international price discrimination, including the use of geo-blocking measures via online sales platforms, was raised as a potential competition issue in the Harper Report and, prior to that, in the House of Representatives Standing Committee on Infrastructure and Communications in July 2013.²¹⁷ Discrimination based on market segmentation can, these studies found, lead to Australian customers paying up to 200 per cent more for cosmetics and up to 60 per cent more for clothing.²¹⁸ There are arguments for and against such a measure where the supporters of this form of price discrimination are local Australian entities protecting their business.²¹⁹ The Harper Report did not recommend changing legislation in order to address this issue. Instead, it recognised the existence of ‘the growth of distribution channels, both physical and technological [that] can help consumers and businesses overcome price discrimination.’²²⁰ Thus the Harper Report recommended alternatives to legislative mechanisms to overcome geo-blocking, in particular ‘market solutions that empower consumers.’²²¹

International price discrimination can also be facilitated by restricting parallel imports, which can negatively impact, for instance, online sale platforms such as Amazon and local online retailers. Some Australian legislation, such as the *Trade Marks Act 1995* (Cth) and the *Copyright Act 1968* (Cth), restrict certain parallel imports. With regard to the *Copyright Act 1968* (Cth) the ACCC explains that:

²¹⁶ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR, at [31].

²¹⁷ Harper Report, p. 351; The House of Representative Standing Committee on Infrastructure and Communications, ‘Inquiry into IT Pricing’ in July 2013, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/report.htm>.

²¹⁸ Harper Report, p. 351, referring to CHOICE, submission, pp. 13-15.

²¹⁹ For instance, Foxtel submitted that ‘any attempt to assist Australians to circumvent geo-blocks will have a real impact on the Australian businesses that invest in Australian content, create Australian jobs and pay tax in Australia.’ Harper Report, p. 353, (quoting Foxtel, DR sub, pages 11-12).

²²⁰ Harper Report, p. 352.

²²¹ Harper Report, p. 354.

Such restrictions effectively provide an import monopoly to the domestic distributor and protect owners of the local IP rights from competition. The restrictions may also enable copyright owners to practice international price discrimination to the detriment of Australian consumers.²²²

The Harper Report recommended removing such restrictions ‘unless it can be shown that the benefits of the restrictions to the community as a whole outweigh the cost; and the objectives of the restrictions can only be achieved by restricting competition.’²²³

8. Enforcement and Liability

There are a range of mechanisms by which settlements or ‘Consent Decrees’ might operate in relation to competition law generally. There are no special rules in relation to e-commerce platforms.²²⁴

The ACCC does not have judicial powers to rule on conduct that has taken place, but may submit agreed facts and propose agreed penalties to the court. The court is not bound to follow the agreed penalty or penalty range, but typically does so provided it considers the penalty within an appropriate range for the conduct involved.²²⁵ Parties are incentivised to agree facts by the ACCC’s cooperation policy for enforcement matters.²²⁶ An example is the Ticketek misuse of market power case, referred to above.²²⁷ In that case Justice Bennett accepted the agreed facts submitted by the parties and with the jointly proposed penalties. In relation to penalties, Justice Bennett observed:

It is in the public interest for litigation ... to be concluded in the shortest time frame that is consistent with justice being done between the parties, freeing the Court and the Commission to deal with other matters. To that end, the Court has looked with favour upon negotiated settlements, provided that their terms recognise that the ultimate responsibility for terms and making of the orders that resolve the proceedings lies with the Court.²²⁸

Provided that the Court is satisfied that the terms of the orders are appropriate, it is in the public interest for the Court to make orders in part IV litigation on the terms that have been agreed between parties, so as to encourage parties to assist the Commission in its investigations and achieved negotiated settlements. The Court has recognised that, in addition to savings in time and costs, there is a public benefit in imposing agreed pecuniary penalties where appropriate as parties would not be disposed to reach such agreements were there unpredictable risks involved ...²²⁹

8.1. Enforceable Undertakings

²²² Harper Report, p. 166 (quoting submission by ACCC, sub 1, page 60).

²²³ Harper Report, Recommendation 13, p. 178.

²²⁴ This is separate to ‘authorisation’ which the ACCC can grant on public benefit grounds ahead of the conduct occurring.

²²⁵ It remains for the Court to determine whether the jointly submitted penalties are appropriate. However, as long as they are within an acceptable range courts typically approve the agreed penalty. Recent doubt about the legality of joint civil penalty submissions was resolved by the High Court (*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; CFMEU v Director, Fair Work Building Industry Inspectorate (CFMEU)* [2015] HCA 46) which confirmed that joint submissions on penalty were acceptable.

²²⁶ ACCC, *ACCC cooperation policy for enforcement matters* (31 July 2002) (<https://www.accc.gov.au/publications/accc-cooperation-policy-for-enforcement-matters>)

²²⁷ *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489. See section 4.2.

²²⁸ *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489 para 30.

²²⁹ *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489 para 31.

The ACCC may receive from parties ‘enforceable undertakings’.²³⁰ These constitute commitments, enforceable in court, that the party will or will not engage in particular forms of conduct. They are frequently used as merger remedies; for example, the ACCC may indicate it will not oppose a merger subject to an enforceable divestiture commitment. However, they may also be adopted by the ACCC instead of pursuing formal enforcement in the courts or as part of a formal court remedy. For example, in 2009 the Federal Court declared by consent that Skins Compression Garments Pty Ltd had engaged in RPM in contravention of the CCA and, with the consent of the ACCC and the defendant, ordered that Skins give a s87B undertaking to the ACCC that it would undertake compliance training.²³¹ In other cases the ACCC has sought undertakings as an alternative to bringing Court action. All such undertakings are public, with the ACCC publishing them on its website.

These arrangements are not without controversy. For example, in 2013, rather than institute proceedings alleging anti-competitive conduct or exclusive dealing, the ACCC received undertakings from Coles and Woolworths, the two largest supermarket retailers in Australia, that each would not provide ‘shopper docket’ fuel discounts of greater value than 4 cents per litre.²³² In some cases such discounts had reached up to 45 cents per litre prior to the undertaking.²³³ In addition to concerns that this effectively facilitated an agreement between the two major supermarket competitors to cap their discounts, the ‘settlement’ meant that the ACCC did not publish findings of its investigation into potential anti-competitive effects of the discounts and the matter was never litigated. A decision on the merits may have increased certainty about the legality of this form of conditional discounting in Australia.²³⁴

8.2. Informal agreements

The ACCC has also at times accepted informal agreements from parties under investigation which have been sufficient to mitigate its competition concerns. For example, in September 2016 the ACCC announced that Expedia and Booking.com ‘have each reached agreement to amend price and availability parity clauses in their contracts with Australian hotels and accommodation providers’, which it claimed would ‘remove barriers to price competition between major online travel sites for hotel bookings’.²³⁵ Little detail of how the agreement was reached and whether there would be any monitoring of its implementation was provided. It does not appear to have been accompanied by any formal undertakings, but nevertheless brought to an end an ACCC investigation into online travel sites.

8.3. Private actions

²³⁰ Section 87B CCA. The ACCC maintains an undertakings register:
<http://registers.accc.gov.au/content/index.phtml/itemId/6029>

²³¹ See <http://registers.accc.gov.au/content/index.phtml/itemId/875264>

²³² Coles: <http://registers.accc.gov.au/content/index.phtml/itemId/1128691>; Woolworths:
<http://registers.accc.gov.au/content/index.phtml/itemId/1128693>.

²³³ ‘ACCC concerned about escalating shopper docket discounts’ (ACCC Media Release, 29 July 2013)

²³⁴ The ACCC does not have judicial powers to find a contravention of the competition laws; only the courts have this power and they must provide reasons for their decision.

²³⁵ ‘Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels’ (ACCC Media Release 158/16, 2 September 2016).

Private actions may be brought for any contravention of the CCA. Remedies available include injunctions to prevent the conduct continuing,²³⁶ damages²³⁷ and such other orders as the court thinks appropriate to compensate the claimant or prevent or reduce loss or damage.²³⁸ Damages are compensatory in nature, with a claimant able to recover 'the amount of the loss or damage' suffered as a result of the conduct.²³⁹ Punitive damages are not available.

Class actions for cartel or other anti-competitive conduct are relatively rare,²⁴⁰ despite a mechanism for representative proceedings being introduced in 1992.²⁴¹ There are a number of reasons for this, but one significant challenge is the fact that, where public proceedings taken by the ACCC are resolved by consent orders,²⁴² facts admitted by parties are not able to be used in subsequent private litigation. This is because they are not considered 'findings of fact' by the court.²⁴³ There has been significant criticism of this limitation and the Harper Panel recommended²⁴⁴ that it be removed, so that facts agreed by the parties could be used in follow-on private proceedings. Bill 2017 includes this modification and may result in more private litigation in the future.²⁴⁵

The competition laws may also be used as a form of defence to a breach of contract claim, although there are limited examples and none involving online platforms.²⁴⁶ The way in which this could arise is through a claim that the contract, or a provision within it, is 'illegal'. It will be illegal if the conduct involved (ie, the terms of the provision) contravenes the CCA; consequently, a cartel provision could not be enforced by the courts, so any party litigating to enforce such a clause would have it struck down by the courts as illegal. It is less clear whether other provisions of a contract which includes an illegal clause, such as a cartel clause, would still be enforced. Provided the 'illegal' clause or clauses could be severed from the contract the rest of the contract may still be able to be enforced.

8.4. General Liability

One of the issues involved in online sales on online platforms is the specific relationship between the platform and the supplier or buyer. For instance, it is common that online sales platforms operate as agents for the suppliers. The liability provisions under the CCA are broad enough to hold an online sales platform operator liable for restrictions of competition.

Section 76 of the CCA (and s 79 of the CCA for criminal conduct that requires a 'knowingly concerned' person) together with s 75B, set the liability for anticompetitive conduct under Part IV.

²³⁶ An exception to the availability of injunctions relates to mergers; although the ACCC may seek an injunction to prevent a merger, a private litigant does not have this option: s 80(1A). However, a private party may complain to the ACCC who may, if appropriate, seek an injunction and may, if the merger proceeds, seek damages for contravention of the Act.

²³⁷ Section 82

²³⁸ Section 87

²³⁹ Section 82.

²⁴⁰ See Brooke Dellavedova and Rebecca Gilson, 'Challenges in Cartel Class Actions' (2009) 32 *UNSWLR* 1001

²⁴¹ *Federal Court of Australia Act 1976* (Cth).

²⁴² The parties may agree, for purposes of the proceedings, agree that certain conduct has taken place and that there have been contraventions of the Act. They may jointly submit facts and propose orders (consent orders) which they court may adopt.

²⁴³ Section 83 allows findings of fact to constitute prima facie evidence of that fact in subsequent proceedings.

²⁴⁴ Recommendation 41 provided that the CCA should be amended so that admissions of fact could be considered prima facie evidence of those facts in subsequent proceedings.

²⁴⁵ Bill 2017, Schedule 10. See also Caron Beaton-Wells, 'Private enforcement of competition law in Australia – inching forwards?' (2016) 39 *Melbourne University Law Review* 681

²⁴⁶ Contract claims are ubiquitous; there are no litigated claims of which the authors are aware. There may have been settlements reached as a result of the potential for an illegality claim to be made.

Broadly, both persons directly involved in anticompetitive conduct and persons who *assisted* or *attempted* to contravene Part IV of the CCA can be liable. In particular, in addition to persons found to directly contravene the CCA, the court can order penalties against a person who:²⁴⁷

- (b) has attempted to contravene such a provision; or
- (c) has aided, abetted, counselled or procured a person to contravene such a provision;
or
- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision.

This is a valuable tool for online sales by online platforms. For instance, if a platform or related computer software is set in such a way that it leads to collusion or other anticompetitive practices and the provider of the platform or the owner of the software is aware of it, s/he can also be held liable.

A more specific and common issue for online sales platforms is the agent-principal relationships. As mentioned above, vertical restraints are perceived as unilateral conduct, unlike in the US or the EU, which require proving an agreement. This eliminates one of potential hurdles when dealing with the conduct of suppliers via online platforms operating as an agent. However, in general, conduct between principals and their agents can be also covered by the ACCC where an ‘agreement’²⁴⁸ is required.

8.5 Agency Issues

Australia’s competition laws raise some interesting issues regarding agency arrangements. Genuine agency arrangements²⁴⁹ will not be captured within the ambit of the *per se* resale price maintenance laws, because the prohibition requires two separate sales or supplies. However, agency arrangements, as they involve agreements between principal and agent, can be considered under the general anti-competitive conduct prohibition in section 45 of the Act.

More controversially, agency arrangements will not necessarily prevent the agent and principal being held to operate in the same market, with the result that they may be considered competitors and subject to the strict cartel laws. Importantly, no ‘agency defence’ exists under Australian law. There are anti-overlap provisions in the CCA, which means that where the conduct involved also constitutes resale price maintenance or exclusive dealing, as may be the case, for example, if a principal carves out territorial restrictions with its agents, the conduct will not fall within the scope of the cartel laws. However, the anti-overlap exemptions apply only *in so far as* the conduct overlaps.²⁵⁰ Consequently, if the conduct separately involves exclusive dealing and cartel conduct, both prohibitions will apply.

²⁴⁷ CCA, section 76.

²⁴⁸ The CCA refers to a ‘contract, arrangement or understanding’.

²⁴⁹ In which a supplier contracts directly with the consumer, albeit facilitated by the agent.

²⁵⁰ Sections 44ZZRR (relating to resale price maintenance) and section 44ZZRS (relating to exclusive dealing). See, eg, *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235.

There have recently been two significant cases considering this issue. In the first the ACCC alleged that ANZ, a major Australian bank, had required one of its brokers to agree to limit the refund it would provide in relation to ANZ home loans it arranged to ensure that it did not exceed the loan establishment fee waivers offered by ANZ bank branches. The second involved allegations by the ACCC that Flight Centre (a travel agent) had attempted to induce airlines to lower their direct-to-public ticket sales to help facilitate its 'Lowest Airfare Guarantee'. In each case the ACCC alleged the conduct in question constituted price fixing, which required that they establish that ANZ and Flight Centre were in competition with the broker and the airlines respectively.²⁵¹

At first instance the ACCC succeeded in its case against Flight Centre, but failed in its case against ANZ. Both matters were appealed and heard before the same three members of the Full Federal Court. The Court upheld Flight Centre's appeal and rejected the ACCC's appeal in the ANZ case, finding in each case that the parties were not competitors in any relevant market.²⁵² Despite the similar agency issues raised in each, the ACCC elected to appeal only the Flight Centre decision, which was heard before the High Court in 2016. The primary issue on appeal was whether Flight Centre was *in competition* with the airlines, when it engaged in the relevant conduct.

In December 2016 the High Court determined, by majority,²⁵³ that Flight Centre competed with airlines for the supply of airline tickets and that, as a result, its attempts to induce the airlines to lower their ticket sales prices constituted unlawful price fixing.²⁵⁴ Although the relationship between Flight Centre and the airlines was essentially one of principal and agent, with Flight Centre receiving commissions from the airlines for selling seats on their flights, the majority of the High Court held that the relevant market in this case was the 'market for the supply, to customers, of contractual rights to international air carriage' and the parties competed in this market 'notwithstanding that Flight Centre supplied in that market as agent for each airline'.²⁵⁵

In this respect Justices Kiefel and Gageler observed that a contractual right is a service under the CCA and conferring a contractual right constitutes supply under the CCA,²⁵⁶ with the result that making a contract conferring the right to supply of a service (air travel) was a supply of a service. Their Honours further noted that it is not inconsistent with the CCA for 'an agent and a principal' to both be 'suppliers of contractual rights against the principal' or for them to supply such rights in competition.²⁵⁷

²⁵¹ The conduct involved preceded the current cartel laws and were therefore considered pursuant to the price fixing prohibitions which operated at the time; the principles relating to competition and price fixing remain the same under the current cartel laws and they also include *attempts* to collude.

²⁵² *ACCC v Australia and New Zealand Banking Group Limited* [2013] FCA 1206.

²⁵³ *ACCC v Flight Centre Travel* [2016] HCA 49. Then Chief Justice, Robert French, dissented.

²⁵⁴ For more detail see Julie Clarke, 'Flight Centre: Australian High Court finds agent competed with principal and breached cartel laws' (Competition Policy Blog, 9 January 2017), Justin Oliver and Paul Schoff, 'Agency and Competition Law in Australia Following *ACCC v Flight Centre Travel Group* (2017) 8 *Journal of European Competition Law & Practice* 321, Brent Fisse, 'The High Court Decision in *ACCC v Flight Centre – Crash Landings Ahead?*' (2017) 45 *ABLR* 61 and Brent Fisse, 'Facilitating practices, vertical restraints and most favoured customers: Australian competition law is ill-equipped to meet the challenge' (2016) 44 *ABLR* 325.

²⁵⁵ *ACCC v Flight Centre Travel* [2016] HCA 49, para 26.

²⁵⁶ *ACCC v Flight Centre Travel* [2016] HCA 49, para 80.

²⁵⁷ *ACCC v Flight Centre Travel* [2016] HCA 49, para 82.

In relation to arguments that principals should not be considered in competition with their agents, Justice Gordon observed that ‘agent’ was an abused word and held that in this case the description of Flight Centre as agent:

... masks the proper identification of the rivalrous behaviours that occur at the point at which Flight Centre is dealing with its own customers ... without reference to any interests of any airline. At that point, the description of Flight Centre as “agent” is simply wrong. At that point, Flight Centre in its own right was competing against all sellers of tickets, which includes the airlines and other travel agents. Flight Centre was not acting as agent.²⁵⁸

Her Honour went on to observe that, even if Flight Centre was a true agent of the airlines, this was irrelevant for purposes of the price fixing provisions.²⁵⁹ The other members of the majority considered that the relationship between the parties was an agency relationship, but nevertheless concluded that the nature of the agency in this case, in particular the ticket pricing discretion enjoyed by Flight Centre, meant that despite that relationship the parties did compete in this case. In contrast, Chief Justice French, dissenting, concluded that the agency relationship precluded there being competition between the parties.²⁶⁰

The decision removes any doubt that agents can be considered in competition with their principal, especially where they are free to set their own price or conditions. Principals are, therefore, now more likely to be found to be competing with their agents whenever they also supply the relevant goods or services directly to customers, a common scenario in the case of online sales platforms.

Recommendations to revise the law

Although the High Court decision post-dated the Harper Report, the issue was a live one at the time of the review and the Harper Panel recommended an exemption be added to the cartel laws for ‘trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services’.²⁶¹ The Panel considered that it was more appropriate for these arrangements to be considered under the general anti-competitive conduct provision, which would ensure they were ‘assessed under a substantial lessening of competition test rather than a per se prohibition’.²⁶² This would be broader than an ‘agency’ defence, as it would capture all vertical supply arrangements.

The Australian Government accepted this recommendation and it formed part of an Exposure Draft Bill released in September 2016. It does not, however, appear in Bill 2017 and the reasons for the omission are unclear. As a result, it is unlikely that any agency exemption or broader vertical trading exemption from the cartel laws will be introduced in the near future.

In relation to online platforms, dual distribution arrangements, in which the platform operator sells as agent for the retailer who also sells direct to the public, may now risk per se cartel liability in a wide range of situations.²⁶³ It is easy to imagine, for example, how this issue might arise in relation to online booking agencies which enter into price parity arrangements with their suppliers. The

²⁵⁸ *ACCC v Flight Centre Travel* [2016] HCA 49, para 175.

²⁵⁹ *ACCC v Flight Centre Travel* [2016] HCA 49, para’s 152-253.

²⁶⁰ *ACCC v Flight Centre Travel* [2016] HCA 49, para 21.

²⁶¹ Recommendation 27. See discussion on pages 364-365 of the Harper Report.

²⁶² Harper Report page 365.

²⁶³ See, eg, Brent Fisse, ‘The High Court Decision in *ACCC v Flight Centre* – Crash Landings Ahead?’ (2017) 45 ABLR 61, 66.

ACCC has yet to bring a cartel case involving online platforms, other than that involving Flight Centre, but may be emboldened by its success in Flight Centre to bring further actions. It is not clear, for example, whether or not Expedia and Booking.com might be considered in competition with accommodation providers and, if so, whether price parity and other arrangements might contravene the cartel laws. The ACCC's announcement that, following an investigation, Expedia and Booking.com had agreed to amend price and availability parity clauses pre-dated the High Court's decision in *Flight Centre*. The press release announcing the 'agreement' contains no discussion about whether or not the ACCC considered the parties in competition or any other detail about the specific competition concerns the ACCC held regarding these clauses.²⁶⁴

9. IP Protection – Section 51(3) of the CCA

The treatment of, and the interplay between, competition law and IP protection can also be relevant to online sales platforms. This is because such platforms can involve IP protection, most notably, copyright protection. However, subsection 51(3) of the CCA exempts intellectual property (IP), including copyright, licensing and trademark arrangements, from the application of competition law provisions in Part IV, other than misuse of market power (s 46) and resale price maintenance (s 48). The subsection 51(3) states:

A contravention of a provision of [Part IV] other than section 46, 46A or 48 shall not be taken to have been committed by reason of:

- (a) the imposing of, or giving effect to, a condition of:
 - (i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or
 - (ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design; to the extent that the condition relates to:
 - (iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;
 - (iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;
 - (v) the work or other subject matter in which the copyright subsists; or
 - (vi) the eligible layout in which the EL rights subsist;
- (b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or
- (c) the inclusion in a contract, arrangement or understanding between:
 - (i) the registered proprietor of a trade mark other than a certification trade mark; and
 - (ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;
 of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

²⁶⁴ See 'Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels' (ACCC Media Release 158/16, 2 September 2016). See also Brent Fisse, 'The High Court Decision in ACCC v Flight Centre – Crash Landings Ahead?' (2017) 45 ABLR 61, 66-67.

Section 51(3) has been widely criticised and its repeal has been proposed by many,²⁶⁵ including the Harper Report. The exempted IP rights can lead to a substantial lessening of competition, which would be prohibited in the CCA if not for the exemption under s 51(3). In this respect, the Harper Panel noted that '[i]n fields in which there are multiple and competing IP rights, such as the pharmaceutical or communications industries, cross-licensing arrangements can be entered into to resolve disputes but which impose anti-competitive restrictions on each licensee'.²⁶⁶

In the event the exemption was removed the authorisation and notification processes could effectively ensure that any potential public benefits outweigh the restriction of competition.²⁶⁷ At present, however, the exemptions in s 51(3) lead to the overprotection of IP and this can have a restrictive effect on the competitive process in the digital world. Despite this significant criticism, s 51(3) remains in the CCA and the current Bills do not propose its repeal.

10. Conclusion

Despite the fact that Australian Competition Law can effectively deal with various anticompetitive practices related to the growth of online sales platforms, such as anticompetitive restrictions between a principal and its agents, it may not be effective at capturing all potential concerns. For instance, the access regime is not fit for the purposes of the online sales platforms, which can potentially operate in bottleneck markets. Australia could consider changing the access regime in order to capture potential bottleneck issues created by online sales platforms or alternatively, the ACCC could utilise s 46 for such conduct; the scope for the ACCC to utilise s 46 in this way may be expanded if Bill 2016 passes.

Australia also overprotects IP rights in s 51(3). This can have restrictive effects on the competitive process in the digital world. Finally, the effectiveness of the CCA in connection with genuine selective distribution systems involving online platforms still needs to be tested.

²⁶⁵ See, e.g., ACCC, *ACCC submission to the Productivity Commission Inquiry into Intellectual Property Arrangements in Australia* (November 2015), p. 14. <https://www.accc.gov.au/system/files/ACCC%20Submission%20-%20PC%20inquiry%20into%20IP%20arrangements%20in%20Australia%20-%2030%20November.pdf>. Accessed 11 May 2016; Australian Law Reform Commission also recommended repealed of s 51(3) in its report on 'Copyright and the Digital Economy' (November 2013), pp. 71-74; also see, Harper Report, p. 108.

²⁶⁶ Harper Report, p. 109.

²⁶⁷ See, eg, Harper Report, p. 110.