

Current Issues in Competition Law, Volume 2: Practice and Perspectives

Michael Gvozdencovic and Stephen Puttick (editors)

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Many questions in competition law are both timely and timeless. The law must continually strike the right balance between restricting anti-competitive conduct and allowing competitors to compete against one another. The first volume of this series deals more with those questions.¹ This volume delves deeper into specific problems with regulating competition in contemporary Australian markets. Just as the early oil industry created monopolies that birthed modern competition law, digital platforms' firm grip on information generates pressing and new challenges.² But the challenges are broader than that. This volume engages with both recent and proposed changes to the *Competition and Consumer Act 2010* (Cth) ('CCA') as well as criminalisation of contravening proscriptions in this area of law.

The text is split into three parts, each focusing on a particular kind of anti-competitive conduct.

Part I considers cartels, contracts, arrangements, understandings, and concerted practices, with a particular focus on cartel conduct. The first essay considers the complexities of finding and applying criminal liability to corporations. While a strong piece, its focus is squarely on criminalising corporate conduct, with limited application to competition specifically. When the author directly considers cartel provisions, they focus on the difficulties of proving cartel conduct rather than delving the unique challenges posed by the criminalisation of this conduct. The next essay considers the joint venture defence, with emphasis on the only series of cases to have dealt with it significantly: *ACCC v Cascade Coal*.³ It is an excellent summary of the recent Federal and Full Federal Court's decisions. However, it does not engage much beyond this. For example, in

¹ Michael Gvozdencovic and Stephen Puttick (eds) *Current Issues in Competition Law: Volume 1: Context and Interpretation*, (Federation Press, 2021).

² Foreword, Michael Gvozdencovic and Stephen Puttick (eds) *Current Issues in Competition Law, Volume 2: Practice and Perspectives*, (Federation Press, 2021).

³ *ACCC v Cascade Coal Pty Ltd (No 3)* [2018] FCA 1019; *ACCC v Cascade Coal Pty Ltd* [2019] FCAFC 154.

considering the future implications of the decision, the author is content to simply conclude that a similar result would likely be reached under the current (admittedly similar) statutory provisions to the previous ones which *Cascade* was determined under.

The third essay considers the ACCC's policy which encourages entities involved in cartel conduct to admit their misdeeds and provide evidence in exchange for immunity or significant leniency. The authors expertly show how recent changes to this immunity policy, while stricter, may be less effective than its predecessor. This work draws upon international comparisons as well as simple behavioural models, both of which have limitations that the authors acknowledge. Despite having significant ground to cover, this piece is nuanced and accepts the inherent uncertainties of crafting policy in this area. The final essay in this part grapples with the thorny question of how to calculate damages, particularly compensatory damages, stemming from cartel conduct or concerted practices. Although the *Australian Consumer Law* provides avenues for this, no Australian case has dealt with this to date. As such, the author draws on European, English, and American authorities to consider how this question might be dealt with here. The essay weighs up considerations before concluding that judges will likely defy any consistent approach in favour of one that best fits a case's evidentiary base.

Part II looks at the prohibition against misusing market power ('s 46' of the CCA). This is perhaps the most contentious provision of Australian competition law, compounded by recent changes which broadened its operation. The first essay considers this change and how the proscription applies to digital platforms. The author succinctly summarises the known issues in this area. However, the essay shines when it considers the precise kinds of conduct that could be relevantly litigated under s 46. An underdeveloped area was probing the ambiguities of what constitutes 'conduct'. Such a broad term encompasses any unilateral action, but it is also unclear how remote the subsequent impact on competition can be before it is no longer attributable to the original conduct.

The second essay takes a closer look at the significance of removing the 'taking advantage' requirement. The author notes that many of those considerations could be judicially transposed into a broader use of the 'substantially lessening competition' test. This is because when determining the effect on competition, those 'taking advantage' considerations will be relevant.

The third and final essay of this part is a condensed version of the author's recently released book.⁴ The author argues that the current legal standard of 'market power' is insufficient, particularly as it fails to engage with real world markets. The preferable alternative is to conceptualise power as the ability to manipulate markets and distort their efficiency. Many of the questions this essay begs are addressed in the author's longer work. Nevertheless, the emphasis on efficiency does raise the serious question of whether courts are competent to understand such arguments. Additionally, what is efficient on a market level may be unclear to the individual entity charged with breaching the misuse of market power section. Overall, this trio of essays provide numerous provocative arguments which, regardless of whether the reader agrees, are emblematic of the types of detailed reflections needed to advance Australian competition law.

Part III engages with regulations surrounding mergers and acquisitions, ('s 50' of the CCA). The first essay in this part tackles a new suggestion, that where a merger or acquisition is contested, the burden of proof should shift from the regulator to the party wishing to merge. Ultimately, though acknowledging the limited number of cases, the author soundly concludes that there is insufficient cause to presume all mergers or acquisitions substantially lessen competition. The second essay considers Australia's lack of a mandatory merger notification system and associated suspension powers. The argument for why this should be altered is cleanly articulated. However, the authors intentionally shy away from the most important parts of their suggested proposal: the precise thresholds, practices, and procedures. These are crucial because in theory, providing information in advance to regulatory bodies is prudent and smooths business-regulator interactions. But how this requirement is imposed could mean the detriments outweigh the benefits, particularly in Australia's small market. The next piece is an outstanding essay on a question thrown up by a recent case *ACCC v Pacific National Pty Ltd (No 2)*.⁵ Can the Federal Court impose or accept an undertaking from a party and take that into account to ameliorate any anti-competitive concerns? If so, how should the Court approach assessing the suitability of such undertakings? The authors conclude that undertakings are likely outside the Court's power and inappropriate for judicial determination is well-argued. The sole downside

⁴ George Raitt, *The Metaphysics of Market Power: The Zero-Sum Competition and Market Manipulation Approach* (Bloomsbury Publishing, 2019).

⁵ [2019] FCA 669. See also *ACCC v Pacific National Pty Ltd (No 3)* [2019] FCA 866.

of this essay is that a High Court decision will likely soon settle this question definitively. The final essay focuses on the practical difficulties of evidence in contested merger proceedings. While the author shows considerable familiarity with the focal points of such litigation, ultimately, most of the concerns identified are just usual evidentiary complexities in a competition law context. Issues such as deference to a regulatory body's knowledge, potential bias in witnesses, and whether the standard of proof applies to intermediate facts or ultimate questions are all raised, but none are unique to s 50 proceedings.

Overall, this collection expertly addresses many specific issues faced by contemporary Australian competition law. Many essays scrutinise proposals and claims made by the ACCC, serving to counterbalance and consider the true necessity or benefits of any changes.

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