

COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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Competition Enforcement Agencies Handbook 2019

A Global Competition Review Special Report

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This article was first published in May 2019

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Competition Enforcement Agencies Handbook 2019

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ISBN: 978-1-83862-222-0

Printed and distributed by Encompass Print Solutions

Tel: 0844 248 0112

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CONTENTS

Albania.....	1	El Salvador.....	88
Algeria.....	5	Estonia.....	91
Argentina.....	8	European Union.....	94
Armenia.....	11	Andrzej Kmiecik and Andreas Reindl Van Bael & Bellis	
Australia.....	17	Faroe Islands.....	109
Austria.....	21	Fiji.....	110
Azerbaijan.....	24	Finland.....	111
Barbados.....	26	France.....	114
Belarus.....	28	Gambia.....	119
Belgium.....	29	Germany.....	121
Bosnia and Herzegovina.....	32	Greece.....	127
Botswana.....	34	Honduras.....	128
Brazil.....	38	Hong Kong.....	129
Bulgaria.....	42	Hungary.....	132
Canada.....	46	Iceland.....	138
Channel Islands.....	47	India.....	142
Chile.....	50	Indonesia.....	146
China.....	54	Ireland.....	149
Colombia.....	57	Israel.....	153
COMESA.....	63	D Ziv Abramovich Lapidot, Melchior, Abramovich & Co	
Costa Rica.....	66	Italy.....	162
Croatia.....	67	Jamaica.....	165
Cyprus.....	70	Japan.....	167
Czech Republic.....	73	Setsuko Yufu, Tatsuo Yamashima, Saori Hanada and Masayuki Matsuura Atsumi & Sakai	
Denmark.....	77	Jordan.....	176
Ecuador.....	80	Kazakhstan.....	178
EFTA.....	84	Kenya.....	179
Egypt.....	87	Korea.....	182

Kosovo	186	Serbia.....	280
Latvia	187	Seychelles	284
Lithuania	192	Singapore	287
Luxembourg.....	195	Slovakia	290
Macedonia	196	Slovenia	295
Malaysia	199	South Africa	298
Malta.....	201	<i>Maryanne Angumuthoo and Shakti Wood</i>	
Mauritius	203	Bowmans	
Mexico	207	Spain.....	306
Moldova.....	212	Sri Lanka	310
Mongolia	215	Swaziland	312
Montenegro	216	Sweden.....	315
Morocco	219	Switzerland	320
Namibia.....	220	Taiwan	325
Netherlands	221	Tanzania	328
New Zealand.....	224	Thailand.....	329
Nicaragua.....	228	Turkey	330
Norway	229	<i>Gönenç Gürkaynak and K Korhan Yıldırım</i>	
Panama	233	ELIG Gürkaynak Attorneys-at-Law	
Papua New Guinea	235	Ukraine	343
Peru	236	United Kingdom	348
Philippines	241	<i>Becket McGrath and Christine Graham</i>	
Poland	242	Cooley	
Portugal.....	248	United States.....	359
<i>Gonçalo Anastácio and Luís Seifert Guincho</i>		<i>David Meyer and Mary Kaiser</i>	
SRS Advogados		Morrison & Foerster LLP	
Romania	256	Uruguay	373
Russia	261	Uzbekistan	375
Saudi Arabia	279	Venezuela	376
		Vietnam	377
		Yemen.....	378
		Zambia.....	379

Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

The information listed is correct as of April 2019.

Global Competition Review

London

April 2019

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Questions and answers

How long is the head of agency's term of office?

Rod Sims was appointed chair of the Australian Competition and Consumer Commission (ACCC) in August 2011. Mr Sims was reappointed for a further three years in 2016 and a further three years in 2018.

When is he or she due for reappointment?

Mr Sims's appointment expires on 31 July 2022.

Which posts within the organisation are political appointments?

The ACCC has six commissioners, including the chair and two deputy chairs, all of whom are appointed by the Governor General after consultation with the state and territory jurisdictions. Terms are set for up to five years and are not affected by changes of government.

What is the agency's annual budget?

The ACCC's 2017-2018 budget was A\$198 million. The budget covers the range of the ACCC's functions and responsibilities, which includes enforcement of the Competition and Consumer Act 2010 (CCA) as well as other regulatory functions.

How many staff are employed by the agency?

As of 31 December 2018, the ACCC has 1,071 staff (including ACCC and Australian Energy Regulator employees, part-time employees and employees absent on leave and secondments).

To whom does the head of the agency report?

The ACCC is an independent statutory agency and reports to the Australian parliament. Its competition and consumer functions fall principally within the responsibility of the Treasury and the Treasurer.

Do any industry-specific regulators have competition powers?

No.

If so, how do these relate to your agency's role?

Not applicable.

May politicians overrule or disregard authority's decisions? If they have ever exercised this right, describe the most recent example.

No.

Does the law allow non-competition aims to be considered when your agency takes decisions?

Generally, no. However, entities that wish to engage in certain anticompetitive arrangements or conduct can apply to the ACCC for an exemption. An exemption provides protection from legal action under the CCA and may be granted when such arrangements or conduct results in a net public benefit. When considering whether a net public benefit will result, the ACCC is able to consider relevant non-competition benefits.

Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?

In competition matters, the ACCC does not have the power to determine that the CCA has been contravened. If the ACCC considers an entity is likely to have contravened the CCA, it takes action in the Federal Court of Australia. Criminal cases are referred to Australia's independent prosecutor, the Commonwealth Director of Public Prosecutions (CDPP).

Where a contravention of the CCA is proven, the Federal Court has the power to order penalties and redress under the CCA. Decisions of the Federal Court can be appealed to the Full Federal Court and then to the High Court of Australia. The Australian Competition Tribunal conducts merits review of determinations made by the ACCC in respect of authorisation and notification (exemption) decisions, merger authorisation decisions and various regulatory decisions under the CCA, matters of access to regulated infrastructure services.

In addition, some ACCC actions and decisions are subject to judicial review by the Federal Court or administrative review by the Administrative Appeals Tribunal.

Has the authority ever blocked a proposed merger? If yes, please provide the most recent instances.

Under the informal merger regime, the most recent merger that the ACCC decided to oppose was the Pacific National and Linfox proposed acquisition of Intermodal assets from Aurizon.

Where the ACCC decides to oppose a merger and the parties decide to proceed, the ACCC can apply to the Federal Court to determine whether the merger breaches section 50 of the CCA.

In 2018, the ACCC instituted proceedings in the Federal Court alleging that Aurizon and Pacific National breached section 50 of the CCA by reaching an understanding that would have the purpose or would be likely to have the effect of substantially lessening competition in the supply of intermodal and steel rail line haul services.

Has the authority ever imposed conditions on a proposed merger? If yes, please provide the most recent instances.

The ACCC cannot impose conditions, but where the ACCC has concerns that a proposed merger or acquisition is likely to substantially lessen competition in contravention of section 50 of the CCA, the ACCC can accept a court-enforceable undertaking from the merger parties under section 87B of the CCA to remedy those concerns. The ACCC has also alleged that the proposed acquisition would contravene section 45 of the CCA, which prohibits contracts, arrangements or understandings that would, or would be likely to, substantially lessen competition.

The most recent remedy accepted from a merger party to address competition issues was in relation to the Thales SA proposed acquisition of Gemalto NV.

Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.

In relation to its informal merger clearance process, a Phase II review is triggered with the issue of a statement of issues (which is a public statement released by the ACCC outlining the basis and facts upon which we have come to a preliminary view that a proposed merger or acquisition raises competition concerns and requires further investigation) or when remedies are proffered by the mergers parties.

In 2018, five merger reviews concluded by the ACCC involved the release of a statement of issues, two involved remedies and two involved a statement of issues and remedies.

Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.

On 2 November 2016, following an investigation by the ACCC, the CDPP laid charges against Kawasaki Kisen Kaisha Ltd (K-Line), under section 44ZZRG(1) of the CCA, for allegedly giving effect to cartel provisions in an arrangement or understanding with other shipping lines relating to the transportation of motor vehicles to Australia between 2009 and 2012. K-Line is a global shipping company based in Japan. In April 2018, K-Line entered a guilty plea in the Federal Court to criminal cartel conduct. The ACCC's investigation into other cartel participants is continuing. See details here: <https://www.accc.gov.au/media-release/second-shipping-company-pleads-guilty-to-criminal-cartel-conduct>.

These charges follow the first criminal cartel charge laid against another cartel participant Nippon Yusen Kabushiki Kaisha (NYK). NYK pleaded guilty to that charge in the Federal Court in July 2016. The Federal Court convicted NYK of criminal cartel conduct and ordered it to pay a fine of A\$25 million in August 2017.

Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?

Yes. The ACCC's immunity policy for cartel conduct, which provides for immunity to the first eligible applicant, is available at: www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct. All applications for immunity from criminal prosecution and civil penalty proceedings should be made to the ACCC. An application for immunity can only be made by, or on behalf of, a party to the cartel, be they an individual or a corporation.

An immunity application or a request for a marker can be made orally or in writing. The only valid way to make an application or request a marker is by contacting the executive general manager, Specialised Enforcement and Advocacy Division (currently Marcus Bezzi), on the ACCC Immunity Hotline, +612 9230 3894, during ACCC business hours, or by sending an email to cartelimmunity@accc.gov.au.

The ACCC has a cooperation policy (under which it has the discretion to provide immunity or leniency) in circumstances flowing from cooperation in civil enforcement matters under the CCA that is viewable at: www.accc.gov.au/publications/accc-cooperation-policy-for-enforcement-matters. Prospective applicants

should contact the executive general manager during business hours.

Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?

Yes. The CCA provides criminal and civil sanctions for cartel conduct. Under the criminal regime, the ACCC is responsible for investigating cartel conduct and the CDPP is responsible for prosecuting offences under Commonwealth law, including cartel offences, in accordance with the Prosecution Policy of the Commonwealth.

Guidelines setting out how the ACCC will investigate alleged cartel conduct and make decisions in relation to referral of matters for possible criminal prosecution are available at: www.accc.gov.au/business/anti-competitive-behaviour/cartels.

In 2014, the ACCC entered a memorandum of understanding with the CDPP, setting out respective responsibilities for criminal matters.

Are there any plans to reform the competition law?

Australian competition laws were substantially reformed in 2017 following the Harper Review (see below). While the laws are subject to ongoing minor or machinery amendments, the ACCC is not aware of plans for substantial reform.

When did the last review of the law occur?

Australia's competition law has been reviewed on a number of occasions since its introduction in 1974, including as part of a comprehensive review of national competition policy in 1993 and a review of the competition provisions of the law in 2003, which were undertaken by the Hilmer and Dawson Committees, respectively.

The most recent review of Australian competition policy was the Harper Review in 2015, which considered and made recommendations concerning Australian competition law, and the Australian government accepted the majority of these recommendations.

Do you have a separate economics team? If so, please give details.

Yes, the ACCC has a full-time team of economists. In-house economics advice is provided by two groups:

- the Competition and Consumer Economic Unit, which provides economic advice to the ACCC's competition and consumer areas; and

- the Regulatory Economic Unit, which provides economic advice to the ACCC and the Australian Energy Regulator on regulatory matters.

The ACCC has a chief economist and engages external economic experts as needed.

Has the authority conducted a dawn raid?

Yes. The ACCC has strong powers to compel companies or individuals to produce information, produce documents and attend an interview. The ACCC may, in certain circumstances, seek search warrants from a magistrate and execute these on company offices and the premises of company officers.

Has the authority imposed penalties on officers or directors of companies for offences committed by the company? If yes, please provide the most recent instances.

Matters pursued by the ACCC through the courts have in some cases resulted in penalties on officers and directors of companies for offences committed by the company. For example, in August 2018 the Federal Court declared that Palram and Ampelite, two of Australia's largest distributors of polycarbonate roofing, each breached the exclusive dealing prohibition in the CCA. In addition to ordering penalties against the companies, the court ordered:

- Mr Hendrikus Verhagen, a director of Ampelite, pay a A\$100,000 penalty for being knowingly concerned in the conduct of Ampelite; and
- Ms Talila Horesh, a director of Palram, be disqualified from managing a corporation in Australia for three years, for being knowingly concerned in the conduct of Palram.

What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?

In Australia, there is no compulsory pre-merger notification process. However, parties are encouraged to approach the ACCC on a voluntary basis to seek the ACCC's view on those proposed mergers or acquisitions that may raise competition issues. The ACCC's indicative notification threshold (where the products of the merger parties are either substitutes or complements; and the merged firm will have a post-merger market share of greater than 20 per cent in the relevant markets) is intended to provide a starting point for identifying those mergers that may raise competition concerns and therefore require investigation.

Are there any restrictions on investments that involve less than a majority stake in the business?

There is no threshold shareholding for the purposes of section 50 of the CCA and all acquisitions are therefore subject to the CCA.

An acquisition of less than a controlling interest that nevertheless alters the incentives of all parties may give rise to a contravention of section 50 of the CCA. Where share acquisitions do not deliver control, the ACCC will take into consideration inter-company relationships, director's duties and a range of other factors including the:

- actual ownership share of the minority interest;
- existence of any contractual or other arrangements that may enhance the influence of the minority interest;
- size, concentration, dispersion and rights of the remaining ownership shares; and
- board representation and voting rights of the minority interests.

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ISBN 978-1-83862-222-0