Australian Competition Law

3rd Edition
This text is dedicated to
Professor Michael Coper,
former Dean, ANU College of Law
Australian Competition Law
3rd Edition

Alex Bruce
LLB (QUT), LLM (Syd), MA (Theology) (ACU), PhD (ANU),
DPhil candidate (Oxon)
Associate Professor, Australian National University College of Law

LexisNexis Butterworths
Australia
2018
Contents

Detailed Contents vii
Preface xvii
Acknowledgments xix
Cases xxix
Statutes xxxi

Chapter 1 The Development of Competition Law 1
Chapter 2 Common Law Restraint of Trade Doctrine 13
Chapter 3 Market Definition 25
Chapter 4 Market Power and Substantial Lessening of Competition 57
Chapter 5 Understanding Competition Law Cases 83
Chapter 6 Application of the Competition and Consumer Act 2010 (Cth) 93
Chapter 7 Cartels and Anti-competitive Arrangements and Concerted Practices 119
Chapter 8 Taking Advantage of Market Power 143
Chapter 9 Exclusive Dealing 165
Chapter 10 Resale Price Maintenance 195
Chapter 11 Anti-Competitive Mergers and Acquisitions 223
Chapter 12 Authorisation and Notification 249
Chapter 13 Access Regimes 259
Chapter 14 Public Enforcement: Policies and Procedures of the Australian Competition and Consumer Commission 279
Chapter 15 Public Enforcement: Orders and Remedies Available to the Australian Competition and Consumer Commission 309
Chapter 16 Private Actions and Remedies 347

Index 375
Detailed Contents

Preface xvi
Acknowledgments xix
Cases xxi
Statutes xxxi

Chapter 1  The Development of Competition Law  1
  Introduction  1
  The world's first antitrust trial?  2
  Aristotle's solution to university funding  3
  The Romans  4
  When competition legislation had real penalties  4
  Monopolies and the downfall of empires  5
  The United States of America  6
  The Australian context  8
    Australian Industries Preservation Act 1906 (Cth)  8
    Trade Practices Act 1965 (Cth)  8
    Trade Practices Act 1974 (Cth)  9
    Competition Policy Reform Act 1995 (Cth)  9
    Dawson Review — 2003–2015  10
    2015 and Beyond: The Harper Review  10
    Competition and Consumer Act 2010 (Cth) and
    the Australian Consumer Law  11
  Competition law and popular culture  11
    Matt Damon and the lysine price-fixing cartel  11
    May the Act be with you!  12

Chapter 2  Common Law Restraint of Trade Doctrine  13
  Overview  13
  Introduction  13
  Modern formulation
    Legitimate interest to protect  16
    Restraint of trade clause — the questions to ask  18
    Shifting of the onus  19
Chapter 3  Market Definition
Overview  25
Introduction  25
Why are competitive markets preferred?
Markets are not perfect  25
The primacy of efficiency  26
Efficiencies in theory  27
Efficiencies in practice — competitive tension  28
The structure, conduct, performance paradigm  29
Principles of market definition  30
Purpose exercise  31
Basic principles of market definition  32
Dimensions of the market  33
Substitution  34
Defining the product dimension of the market  35
The 'hypothetical monopolist' test and the SSNIP test  36
Where there has been no substitution  37
Defining the geographic dimension of the market  38
International limits of geographic market definition?  39
Where do the substitutable goods or services come from?  40
The hypothetical monopolist/SSNIP test  41
The ACCC's approach to geographic market definition  42
Defining the functional dimension of the market  43
Anti-competitive conduct at different functional levels  44
Constraints at different functional levels  45
Defining the temporal dimension of the market  46
Sub-markets, single-brand markets and single-product markets  47
Further reading  48

Chapter 4  Market Power and Substantial Lessening of Competition
Overview  57
Introduction  57
Market power  58
Identifying market power  59
Market power identified by price and non-price strategies  60
How do these factors indicate the existence of market power?  61
Market power not established by conduct alone  62
Detailed Contents

Market power must be non-transitory .......................... 65
The ACCC’s view of market power .......................... 66
A summary of the principles relating to market power .......... 67
Competition and substantial lessening of competition .......... 68
Competition ................................................................ 68
'Substantial' lessening of competition ........................ 69
Evaluating SLC — the ‘future with and future without’ test ... 72
Illustration of the ‘future with and future without’ test ........ 75
The merger factors and the ‘future with and future without’ test 78
Summary of principles from Baxter Healthcare ............... 79
A common theme of substitution ................................. 80
Further reading ......................................................... 81

Chapter 5 Understanding Competition Law Cases ............. 83
Overview ................................................................... 83
Introduction ............................................................. 83
What are the elements of a competition law case? ........... 83
Relevant questions .................................................... 84
How and why these questions are important to understanding 85
competition law cases .................................................. 85
What is the factual and commercial relationship between .... 85
the parties to a case? .................................................... 85
What is the actual conduct complained of that is ............... 85
the subject of the case? ............................................... 85
What are the commercial implications of the conduct? ..... 85
How is the conduct legally characterised in terms of the Act? 85
What are the legal issues to be decided? ......................... 86
Are there economic thresholds involved? ....................... 86
What did each party argue? ......................................... 86
How did the court resolve the dispute and what were ......... 86
the orders made? ....................................................... 86
What is the significance (if any) of the decision? ............. 86
Working with the questions — a practical example ......... 87
Questions and case analysis ........................................ 88
What is the factual and commercial relationship ......... 88
between the parties? ................................................... 88
What is the actual conduct complained of that is ......... 88
the subject of the case? ............................................... 88
What are the commercial implications of the conduct? ... 88
How is the conduct legally characterised in terms of the Act? 88
What are the legal issues to be decided? ....................... 88
Are there economic thresholds involved? ....................... 89
What did each party argue? ......................................... 89
How did the court resolve the dispute and what were ......... 89
the orders made? ....................................................... 89
Australian Competition Law

What is the significance (if any) of the decision? 91

Summary 91

Chapter 6 Application of the Competition and Consumer Act 2010 (Cth) 93

Overview 93

Introduction 93

Why did these gaps exist? 94

Application to corporations 95

What is a 'trading or financial corporation'? 95

Application to the Crown 99

What is 'the Crown'? 99

The Crown in right of the Commonwealth 100

The Crown in right of the states 100

Local governments 107

Application to non-corporate entities 108

Principal liability 108

Ancillary liability 113

Further reading 118

Chapter 7 Cartels and Anti-competitive Arrangements and Concerted Practices 119

Overview 119

Introduction 119

What is a 'cartel' for the purposes of the Act? 120

Price-fixing 121

Restricting outputs 121

Bid-rigging 122

Allocating customers, suppliers or territories 123

Brief background to the 2017 Amendment Act 123

Part IV Div 1 — overview 125

Criminal liability 125

Civil liability 125

Part IV Div 1 — in detail 125

The criminal cartel regime 126

The civil cartel regime 126

Fundamental concepts 126

Cartel provision 127

What exactly is a 'provision'? 127

Putting the cartel regime together 128

Contract, arrangement or understanding 130

Definition of 'contract, arrangement or understanding' 131

Part IV Div 2 s 45(1) 135

What is a concerted practice? 136

What about exclusionary provisions? 138

Section 45(1) — contracts, arrangements or understandings 140
# Detailed Contents

Elements required to establish a breach of s 45(1) | 140
---|---
Consequences of a breach | 141
Further reading | 141

## Chapter 8 Taking Advantage of Market Power

Overview | 143
---|---
Introduction | 143
A difficult history | 145
Structure and elements of s 46 | 146
Elements of s 46 | 147
Protection of competition or of individual competitors? | 148
A substantial degree of market power | 149
Market power versus other forms of power | 150
Specific forms of prohibited conduct | 153
Price strategies | 154
Non-price strategies | 158
Further reading | 161

## Chapter 9 Exclusive Dealing

Overview | 165
---|---
Introduction | 165
Why is exclusive dealing 'bad' for competition? | 166
The structure of s 47 | 167
The practice of exclusive dealing | 167
Products, customers and territories | 169
Product restrictions | 169
Customer restrictions | 169
Territorial restrictions | 169
Positive and negative conduct | 170
Product 'forcing' and 'tying' | 170
Forms of exclusivity | 171
Product exclusivity | 171
Customer exclusivity | 176
Territorial exclusivity | 176
Third line forcing conduct | 176
Exclusivity in relation to property leases | 177
Supply 'on condition' | 178
Definition of 'on the condition' | 178
'Supply on condition' and not 'imposition of a condition' | 179
Third line forcing issues | 181
Form over substance? | 181
'Another person' | 183
Exclusive dealing and substantial lessening of competition | 183
A reminder | 184
Examples from the case law | 184
Chapter 10  Resale Price Maintenance

Overview
Introduction
Approach of the Act
Why is RPM considered 'bad' for competition and consumers?
Benefit and detriment
Product image and RPM
Discounting
Practical examples
RPM, market power and consumer detriment
Elements of the prohibition
Structure of Pt VIII
The practice of RPM
'Positive' and 'negative' conduct
Corporate and non-corporate parties
Goods and services
Common concepts
'A price specified'
The 'smoking gun' evidence of RPM
Making it known
No need for 'meeting of the minds'
The certainty and language of the threat
Who is the supplier?
Inducing and attempting to induce RPM
Recommended retail prices
Refusing to supply goods
Section 96(3)(d)(i)
Section 96(3)(d)(ii)
Section 96(3)(e)(i)
Section 96(3)(e)(ii)
Deemed withholding
The 'loss leader' defence
Successfully navigating s 96(3)
A simple example
A complex example
Further reading

Chapter 11  Anti-Competitive Mergers and Acquisitions

Overview
Introduction
Forms of mergers and acquisitions
The Act
Chapter 12 Authorisation and Notification

Overview
Introduction
The structure of Pt VII
What conduct can be authorised, notified or cleared?
What is the result of authorisation and notification?
Tests for authorisation and notification
Conduct involving substantial lessening of competition thresholds
Conduct involving notification applications
Public benefit
Public detriment
The test for evaluating public benefits and public detriments
ACCC authorisation procedure
Variation and revocation of authorisations
Notification of exclusive dealing conduct
Notification of resale price maintenance conduct
Merger authorisations by the ACCC
Review by the Tribunal
Further reading

Chapter 13 Access Regimes

Overview
Introduction
Natural monopolies, essential facilities
and access regimes
Part IIIA — overview of the three pathways to access
Access pathway 1 — access through declaration process
The NCC decision-making process
Time limits on the NCC making a recommendation
The Minister’s response
Review of the Minister’s decision to declare a service
In the Tribunal
Services that cannot be declared
Chapter 14

Public Enforcement: Policies and Procedures of the Australian Competition and Consumer Commission

Overview

Role of the ACCC in enforcing Australian competition law
  Purpose and function of the ACCC
  Role of the ACCC
  The ACCC's approach to enforcement
  The ACCC's 'compliance pyramid'
  ACCC cooperation policy
    Leniency for individuals
    Leniency for corporations
  Immunity policy for cartel conduct
  Information-gathering powers
  The 'search and seizure' regime — Pt XID
    Entry to premises with consent
    Entry to premises without consent
    Legal professional privilege
  The s 155 regime — Pt XII
    Overview of legislation
    ACCC's common law power to question
    Role and importance of s 155 of the Act
    Administrative, not judicial, power
    ACCC's approach to use of s 155 notices
  Factors relevant to the issue of a s 155 notice
    Reason to believe
  Purpose of issue of a s 155 notice
  Principles of construction — s 155
  Prima facie obligation to comply with a s 155 notice
  Privilege against self-incrimination/exposure to penalty
  Legal professional privilege
  The ACCC's burden of proof in Pt IV enforcement
    Standard of proof in civil litigation
    How does the ACCC satisfy the burden of proof in civil litigation?
  Criminal standard of proof
    What is the criminal standard of proof?
    Standard expected of ACCC as a model litigant
    How the ACCC is bound by the model litigant direction
Detailed Contents

What are the ACCC’s obligations in complying with the model litigant direction? 303
Boundaries of the model litigant direction 304
Further reading 306

Chapter 15 Public Enforcement: Orders and Remedies Available to the Australian Competition and Consumer Commission 309
Overview 309
Introduction 309
The ACCC’s powers and orders it can seek 310
ACCC regulates in the public interest 311
Declarations 311
Pecuniary penalties and criminal fines 314
Civil pecuniary penalty regime 314
Criminal fines and terms of imprisonment 314
Statutory framework for pecuniary penalties 315
Policy rationale for civil penalties 315
Standard of proof in penalty proceedings 318
Principles employed in assessing pecuniary penalties 319
Other factors 324
Preference for victims 325
Indemnifying officers of corporations 325
Joint submission on penalties 325
Recent practice on negotiated penalty submissions 326
Policy rationale for submissions 328
Issues associated with negotiated settlements on penalties 329
Injunctions 331
Nature of injunctive relief 331
The standing of the ACCC to seek injunctive relief 331
Circumstances in which the ACCC would seek injunctions 332
Forms of injunctive relief available to the ACCC 333
Threshold tests in seeking interim injunctions 334
Mareva orders 337
Divestiture orders 338
Non-punitive orders — s 86C 339
Orders for competition law/trade practices compliance programs 339
Punitive orders — s 86D 340
Disqualification orders 341
Court-enforceable undertakings — s 87B 341
Nature of s 87B as an enforcement option for the ACCC 342
ACCC’s policy on s 87B enforceable undertakings 343
Use of s 87B undertakings in mergers 344
‘Other orders’ — s 87 344
Further reading 345
Chapter 16  Private Actions and Remedies

Overview  347
Introduction 347
Injunctions 348
Three important differences 350
Application of the principles in private litigation 351
Some points to note 354
Damages 355
The statutory provision 356
How are damages under s 82 calculated? 357
The limitation period 361
Section 83 — evidentiary mechanism 364
Value of s 83 to private litigants 365
A procedural difficulty? 366
Section 87 — 'other orders'
Section 87(1) action — ancillary to existing action 367
ACCC representative proceedings 367
The orders available under s 87 368
Section 87 — limitation periods 371
ACCC intervention policy
Principles that guide intervention by the ACCC 372
Requests for intervention 373
Further reading 375

Index
Preface

After several years of review, inquiry and debate, the recommendations of the Harper Review into Competition Law and Policy have been implemented in the form of very significant amendments to the Competition and Consumer Act 2010 (Cth) changing the Australian Competition Law and Regulation landscape. These changes have therefore necessitated a complete review and re-writing of this text and I am delighted to present this third and updated edition of Australian Competition Law.

It is difficult to over-estimate the significance of the changes implemented by the Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth) and the Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Cth). Familiar prohibitions have been repealed and new prohibitions added. Gone is the prohibition against creating and giving effect to exclusionary provisions, subsumed into the cartel regime in Part IV Div 1, the enumeration of which has been mercifully simplified. Added to s 45(1) is a new prohibition against concerted practices' falling short of arrangements or understandings.

The former per se prohibition against third-line forcing exclusive dealing is repealed, as is the former moribund s 46 prohibiting misuse of market power in favour of a 'reincarnated' s 46. Both prohibitions are now evaluated under a substantial lessening of competition threshold, emphasising the growing importance of the familiar ‘future with and the future without’ standard for evaluating SLC.

Authorisation and Notification procedures have been streamlined to cast the Australian Competition and Consumer Commission as the first line agency in evaluating applications relating to conduct subject to an SLC threshold, including the new prohibition in s 46 concerning misuse of market power and resale price maintenance.

And it’s not just the legislature that has generated change. Decisions of the High Court in Air New Zealand Ltd v Australian Competition and Consumer Commission (2017) 91 ALJR 648 and Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd (2016) 91 ALJR 143 have much to say about fundamental competition law concepts such as ‘market power’, ‘competition’ and ‘market definition’. Likewise, decisions of the Federal Court in Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 159, Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd (2015) 323 ALR 429 and Australian Competition and Consumer Commission v Australian Egg Corporation Ltd (2017) ATPR 42-553 add some interesting dimensions to competition law jurisprudence.
Australian Competition Law

Reworking this text to both accommodate and explain these very significant changes has involved the hard work of many people. I would especially like to extend my thanks to Philippa Findlay for expertly transfiguring my hieroglyphic-like 'track change' amendments into sensible, readable text. And this text would not have been possible without the kind guidance of Jocelyn Holmes of LexisNexis, Jocelyn has patiently guided all of my legal texts from an initial odd-ball idea to a polished, final product. I greatly value her friendship and look forward to many more years of collaboration.

I would like to dedicate this text to Professor Michael Coper of the Australian National University College of Law. I first saw Michael's seminal text on s 92 of the Constitution when I was still at school, and it was then that I decided that one day I would also write a law text. It was therefore a great privilege, many years later to work with Michael at the Australian National University.

The law in this text is current as at 30 January 2018. Any errors or omissions are my responsibility alone and I ask for your kind indulgence.

Alex Bruce
Oxford
30 January 2018
The author and publisher are grateful to the holders of copyright in material from which extracts appear in this work.

While every care has been taken to establish and acknowledge copyright, the publisher tenders its apologies for any accidental infringement. The publisher would be pleased to come to a suitable arrangement with the rightful owner in each case.
Australian Competition Law
Alex Bruce • 3RD EDITION

A clear and accessible guide to the regulation of competition in Australia

Australian Competition Law provides an engaging and authoritative treatment of Australian competition law and is an ideal text for both practitioners and students. The clear explanations of complex concepts foster a sound understanding of the legal principles and their economic underpinnings. It includes a chapter how to understand competition law cases to develop skill in area-specific case analysis. The work focuses on the contemporary situation and recent developments but also explains the historical context.

The fully revised new edition covers recent developments in case law, policy and legislation, including:

- Legislative changes to the substance and structure of competition law and policy under the Competition and Consumer Amendment (Competition Policy Review) Act 2017
- The decisions of the High Court in Air New Zealand Ltd v Australian Competition and Consumer Commission (2017) and Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd (2016) concerning market definition, market power, competition and cartels
- New ACCC enforcement policies, including the Informal Merger Review Process Guidelines.

Contents
1. The Development of Competition Law
2. Common Law Restraint of Trade Doctrine
3. Market Definition
4. Market Power and Substantial Lessening of Competition
5. Understanding Competition Law Cases
6. Application of the Competition and Consumer Act 2010 (Cth)
7. Cartels and Anti-competitive Arrangements and Understandings and Concerted Practices
8. Taking Advantage of Market Power
9. Exclusive Dealing
10. Resale Price Maintenance
11. Anti-Competitive Mergers and Acquisitions
12. Authorisation and Notification
13. Access Regimes
15. Public Enforcement: Orders and Remedies Available to the ACCC
16. Private Actions and Remedies

About the Author
Alex Bruce is an Associate Professor of Law at the ANU College of Law, Australian National University. He was formerly a Senior Lawyer with the Australian Competition and Consumer Commission. His teaching and research interests include competition and consumer law and animal law.

Related LexisNexis Titles
- Bruce, Consumer Protection Law in Australia, 2nd ed, 2014
- Steinwall, Annotated Competition and Consumer Legislation 2017 edition

academic@lexisnexis.com.au
www.lexisnexis.com.au

Australian Competition Law
Alex Bruce • 3RD EDITION

A clear and accessible guide to the regulation of competition in Australia

Australian Competition Law provides an engaging and authoritative treatment of Australian competition law and is an ideal text for both practitioners and students. The clear explanations of complex concepts foster a sound understanding of the legal principles and their economic underpinnings. It includes a chapter how to understand competition law cases to develop skill in area-specific case analysis. The work focuses on the contemporary situation and recent developments but also explains the historical context.

The fully revised new edition covers recent developments in case law, policy and legislation, including:
• Legislative changes to the substance and structure of competition law and policy under the Competition and Consumer Amendment (Competition Policy Review) Act 2017
• The decisions of the High Court in Air New Zealand Ltd v Australian Competition and Consumer Commission (2017) and Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd (2016) concerning market definition, market power, competition and cartels
• New ACCC enforcement policies, including the informal Merger Review Process Guidelines.

Contents
1. The Development of Competition Law
2. Common Law Restraint of Trade Doctrine
3. Market Definition
4. Market Power and Substantial Lessening of Competition
5. Understanding Competition Law Cases
6. Application of the Competition and Consumer Act 2010 (Cth)
7. Cartels and Anti-competitive Arrangements and Understandings and Concerted Practices
8. Taking Advantage of Market Power
9. Exclusive Dealing
10. Resale Price Maintenance
11. Anti-Competitive Mergers and Acquisitions
12. Authorisation and Notification
13. Access Regimes
15. Public Enforcement: Orders and Remedies Available to the ACCC
16. Private Actions and Remedies

About the Author
Alex Bruce is an Associate Professor of Law at the ANU College of Law, Australian National University. He was formerly a Senior Lawyer with the Australian Competition and Consumer Commission. His teaching and research interests include competition and consumer law and animal law.

Related LexisNexis Titles
• Bruce, Consumer Protection Law in Australia, 2nd ed, 2014
• Steinwall, Annotated Competition and Consumer Legislation 2017 edition

academic@lexisnexis.com.au
www.lexisnexis.com.au