



# ICLG

The International Comparative Legal Guide to:

## **Vertical Agreements and Dominant Firms 2019**

**3rd Edition**

A practical cross-border insight into vertical agreements and dominant firms

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## Country Question and Answer Chapters:

1	<b>Australia</b>	Johnson Winter & Slattery: Sar Katdare & Jaime Campbell	—
2	<b>Brazil</b>	Pinheiro Neto Advogados: Leonardo Rocha e Silva & Daniel Costa Rebello	—
3	<b>China</b>	DeHeng Law Offices: Ding Liang	—
4	<b>Denmark</b>	Gorrissen Federspiel: Martin André Dittmer & Kristian Helge Andersen	—
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# Australia



Sar Katdare



Jaime Campbell

Johnson Winter & Slattery

## 1 General

### 1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Australian Competition & Consumer Commission (ACCC) is the Australian independent statutory authority that has the role of investigating and enforcing laws relating to vertical agreements and dominant firm conduct under the *Competition and Consumer Act 2010* (Cth) (the Act). Whilst there is no single “vertical agreements” prohibition in the Act, the Act regulates vertical agreements and vertical conduct through the following prohibitions:

- Anti-competitive agreements and concerted practices.
- Misuse of market power.
- Exclusive dealing conduct.
- Resale price maintenance (RPM).

The Act regulates dominant firm conduct through the misuse of market power and exclusive dealing prohibitions. These prohibitions are explained in more detail in sections 2 and 3.

### 1.2 What investigative powers do the responsible competition authorities have?

The ACCC has compulsory information-gathering powers under section 155 of the Act that enable it to obtain information, documents and oral evidence to determine whether a party’s agreement or conduct contravenes the Act.

The ACCC also has search warrant and seizure powers (i.e. “dawn raid” powers) under the Act to gather evidentiary material.

Under a search warrant, the ACCC can seize goods or documents, inspect, handle and measure goods and equipment, take samples of goods and make copies of documents. The ACCC inspector, pursuant to a search warrant, may also require any person on the premises to answer questions and produce documents that relate to the reasons for entry to the premises.

The ACCC can also request parties to provide information and documents to it voluntarily in response to an investigation.

### 1.3 Describe the steps in the process from the opening of an investigation to its resolution.

After the ACCC commences an investigation, it will ordinarily request (voluntarily) or require (by compulsory notice under section

155 of the Act) the relevant party to provide information and documents relating to the alleged contravention. Such requests can be made more than once (i.e. for different types of information and documents) and the ACCC can also require individuals to provide evidence under oath or affirmation.

Once the ACCC has gathered sufficient information, it will determine whether to take enforcement action and if so, what type of action to take. If the ACCC decides to take some type of enforcement action, the next steps in the process will depend upon the action taken (i.e. the process will be different for administrative resolutions, court-enforceable undertakings or legal proceedings).

### 1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The ACCC has the ability to accept an administrative resolution from a party that it considers is likely to be in contravention of the Act. An administrative resolution is a written undertaking from a party setting out detailed terms and conditions of the resolution and may include agreeing to stop the conduct, compensating those who have suffered loss and/or taking other measures to ensure that the conduct does not recur.

The ACCC can also resolve contraventions of the Act by accepting court-enforceable undertakings from a party under section 87B of the Act. Section 87B undertakings usually require a party to remedy the harm caused by the alleged contravention, accept responsibility for its actions and/or establish or improve its trade practices, compliance programs and culture.

There are also a number of remedies and penalties available to the ACCC by way of court order including declarations, injunctions, pecuniary penalties and other remedial orders.

### 1.5 How are those remedies determined and/or calculated?

Whether the ACCC will accept an administrative resolution or court-enforceable undertakings from a party or pursue more serious enforcement action in declarations, remedies and penalties through court action will depend on a number of factors. These factors include whether the alleged contravention is of significant public interest or concern, whether the conduct results in substantial consumer or small business detriment and/or whether the ACCC action will have a deterrent effect or clarify aspects of the law.

In general, the more serious the alleged contravention, the more likely the ACCC will seek declarations, remedies or penalties through court proceedings.

The maximum penalties for contraventions of the vertical agreement or dominant firm conduct provisions of the Act are the greater of: (for corporations) AUD 10 million, three times the gain derived from the illegal conduct (if calculable) or 10% of annual turnover in the 12 months preceding the conduct; and (for individuals) AUD 500,000.

A number of factors are taken into account by the court in calculating the appropriate level of penalty for a contravention, including the nature and extent of the contravening conduct, the amount of loss or damage caused, the circumstances in which the alleged contravention took place, the financial size and market power of the contravening party, the deliberateness of the contravention, the period over which the alleged contravention extended, whether the contravention arose out of the conduct of senior management, whether the party has a corporate culture conducive to compliance with the Act and whether the party has cooperated with the ACCC.

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### 1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

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Unless the ACCC has decided that it will not accept administrative resolutions or court-enforceable undertakings from a party because it otherwise wishes to pursue court action, either the ACCC or the party can seek to resolve the matter by administrative resolution or court-enforceable undertakings.

There is no formal process for such negotiations – a party can offer to resolve a matter with the ACCC by preparing an administrative resolution and if the ACCC does not wish to take legal action, it will consider the proposal and may seek amendments to it. For the proposal to be accepted by the ACCC, the party would need to commit to the relevant resolution in writing to the ACCC. In other instances, the ACCC will actively inform a party that a matter can be resolved by the party giving a certain written administrative resolution or a court-enforceable undertaking. Parties can negotiate the form of the resolution with the ACCC.

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### 1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

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If the ACCC seeks declarations, remedies, penalties or other orders against a party for contravention of the Act, it is required to prove its case before the courts.

The ACCC will take into account a number of factors in deciding whether to pursue litigation, including whether the relevant conduct is of significant public interest or concern and whether ACCC action will have a deterrent effect or clarify aspects of the law. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious, the party is a repeat offender, there is reason to be concerned about future behaviour or the party is unwilling to provide a satisfactory resolution.

The legal standard of proof of contraventions of the vertical agreement and dominant firm conduct provisions is the balance of probabilities.

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### 1.8 What is the appeals process?

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The ACCC and/or the relevant party can appeal a decision of the court on liability and/or penalty within 21 days.

For an appeal to succeed, a party must convince the appeal court that there was an error of law and that the error was of such significance that the decision should be overturned.

The hearing of the appeal does not consider any new evidence or information that was not presented in the original case (except in special circumstances) and does not call witnesses to give evidence. The appeal court, however, will review all the relevant documents filed by the parties for the original case and consider legal argument from both parties to the appeal.

The appeal court's decisions can further be appealed to the High Court by either party within 28 days through a two-step process. First, the ACCC or party will need to apply for and be granted special leave to appeal to the High Court. The High Court will grant special leave to appeal for questions of law that are of public importance, where there are differences of opinion between courts or if the case is in the interests of the administration of justice. Once leave is granted, an appeal hearing is conducted to hear the matter. The High Court's decision is final.

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### 1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

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Private actions for contravention of the vertical agreement, vertical conduct and/or dominant firm conduct provisions of the Act are available, but rare. Any individual or corporation that has suffered loss may bring a claim for damages for the amount of loss or damage suffered as a result of the contravention. Punitive damages are not available.

Private legal actions differ from ACCC actions in a few respects. Firstly, a private party does not have the benefit of obtaining information and documents through an investigative process like the ACCC before commencing legal proceedings (although a party will generally be able to obtain documents in the usual discovery process). Secondly, the private party cannot seek penalties and thirdly, a private party need not be a "model litigant" like the ACCC.

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### 1.10 Describe any immunities, exemptions, or safe harbours that apply.

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The Act contains the following general exceptions that may apply to certain vertical agreements, vertical conduct and/or dominant firm conduct that would otherwise contravene the Act:

- where the agreement or conduct is specifically authorised by law;
- acts or provisions of a contract relating to employment conditions;
- restraints of trade during or after the termination of employment;
- compliance with particular standards;
- partnership conditions between individuals;
- contracts for the sale of a business or shares of a company with respect to the protection of goodwill;
- exclusivity conditions on the export of goods or services from Australia; and
- acts done in concert by ultimate users or consumers of goods or services against the supplier of those goods or services.

Exclusive dealing (supply or acquisition of goods or services on restrictive conditions) and anti-competitive agreements are subject to a related body corporate exemption.

With respect to RPM and exclusive dealing, a party can obtain immunity from contravention of the Act by lodging a **notification** with the ACCC and showing that the public benefits from the conduct would outweigh any public detriments.

A party may also seek immunity for vertical agreements, vertical conduct or dominant firm conduct if it can show that the public benefits from the conduct would outweigh any public detriments or, for some forms of conduct, that it would not have the effect (or likely effect) of substantially lessening competition. This process is known as “**authorisation**” and is a longer and more expensive process than notification.

The ACCC also has the power to grant class exemptions for specific types of business conduct if it is satisfied that the conduct would not substantially lessen competition or would be likely to result in overall public benefits. At this stage, no class exemptions have been granted by the ACCC.

### 1.11 Does enforcement vary between industries or businesses?

While the ACCC generally takes the same approach to enforcing the Act across different industries and businesses, it will take a more vigorous enforcement approach where the alleged contravention is:

- in an industry involving essential goods or services;
- in a concentrated industry and has a serious impact on consumers or small business;
- in a significant, new or emerging industry;
- industry-wide or is likely to become widespread if the ACCC does not intervene; or
- engaged in by a larger or well-known company.

In addition, each year the ACCC outlines its enforcement priorities which may target particular industries or businesses. This year, the ACCC has indicated that its enforcement action for vertical agreements and dominant firm conduct will focus on the commercial construction, agricultural, financial services and essential services sectors (such as energy and telecommunications).

### 1.12 How do enforcers and courts take into consideration an industry’s regulatory context when assessing competition concerns?

The ACCC and the courts will take into account all the relevant circumstances, including an industry’s regulatory context, in determining whether a party is in contravention of the vertical agreement or dominant firm conduct provisions of the Act.

### 1.13 Describe how your jurisdiction’s political environment may or may not affect antitrust enforcement.

While the ACCC is a statutory authority that is independent of the government, its enforcement priorities can be influenced by the political environment.

In recent years, the conduct of financial institutions (including the Financial Services Royal Commission established in late December 2017), electricity retailers and digital platforms has come under political scrutiny. As a result, the ACCC has been given increased powers to deal with conduct by market participants in these sectors and the ACCC has enforced the Act where appropriate.

### 1.14 What are the current enforcement trends and priorities in your jurisdiction?

The ACCC’s priorities for 2019 include:

- investigating conduct that may contravene the misuse of market power and concerted practices provisions of the Act;

- competition issues concerning the use of customer loyalty schemes, digital platforms and consumer data;
- competition issues arising from pricing in the financial services and essential services (such as energy and telecommunications) sectors;
- criminal and civil cartel conduct; and
- anti-competitive conduct in the agricultural, commercial construction, financial services, energy and telecommunications sectors.

### 1.15 Describe any notable case law developments in the past year.

There have not been any significant dominant firm conduct cases determined in the past year but the ACCC’s case against Ramsay Health Care Australia Pty Limited was part-heard and is expected to conclude in December 2019. The ACCC alleges that Ramsay threatened to substantially reduce or entirely withdraw surgeons’ access to operating theatres at Ramsay’s Baringa Private Hospital if those surgeons carried out procedures at a competing day surgery. In circumstances where Baringa is the only private in-patient facility in Coffs Harbour, the ACCC alleges that this was a misuse of market power and constituted exclusive dealing. The case was brought under the now repealed misuse of market power prohibition. The ACCC is yet to commence proceedings under the new misuse of market power provisions which came into effect in November 2017.

As for vertical agreements and conduct, the most notable development is the *Pacific National* case outlined under question 2.24 below.

## 2 Vertical Agreements

### 2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Other than RPM (which is a *per se* contravention of the Act), a vertical agreement or vertical conduct is prohibited by the Act if it has the purpose, effect or likely effect of substantially lessening competition in a market. Accordingly, while vertical agreements and vertical conduct in contravention of the Act can attract significant penalties, they are not considered to be as serious as horizontal agreements or conduct (which are *per se* contraventions under the Act and can attract criminal sanctions).

### 2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Vertical agreements must take the form of a contract, arrangement, understanding or concerted practice which includes a legally binding contract, an informal agreement whereby the parties accept mutual rights and obligations, a meeting of minds to proceed in a particular way or cooperative or joint activity that removes the uncertainty of competition.

An agreement will be considered vertical if none of the parties to the agreement is, or is likely to be, in competition with each other in respect of the goods or services which are the subject of the alleged conduct. If the parties are, or are likely to be, in competition but the conduct falls under both horizontal and vertical agreement or conduct laws, there is a “carve-out” provision that requires the conduct to be assessed under the vertical agreement or conduct laws (i.e. subject to a competition test and not a *per se* contravention).

### 2.3 What are the laws governing vertical agreements?

There are several types of laws governing vertical agreements and vertical conduct; namely, exclusive dealing, general anti-competitive conduct, misuse of market power and RPM.

Exclusive dealing is a vertical agreement or conduct that contains some type of restriction on acquisition, supply or resupply of goods or services which has the purpose, effect or likely effect of substantially lessening competition in a market. Vertical agreements or concerted practices can also contravene the law if they have the purpose, effect or likely effect of substantially lessening competition in a market regardless of any vertical restriction.

Misuse of market power is conduct by a party that has a substantial degree of power in a market that engages in conduct (which can be vertical) that has the purpose, effect or likely effect of substantially lessening competition in a market.

RPM can be a vertical agreement or vertical conduct that involves conduct by the supplier of goods or services imposing minimum resupply prices on re-suppliers of those goods or services.

### 2.4 Are there any types of vertical agreements or restraints that are absolutely (“*per se*”) protected?

As mentioned above, RPM is a *per se* breach of the Act.

### 2.5 What is the analytical framework for assessing vertical agreements?

For vertical agreements or vertical conduct that are *per se* contraventions, the relevant analysis is determining whether the relevant agreements or conduct fall within the particular provisions of the Act. There is no competition analysis.

For vertical agreements or conduct that only contravene the Act if they have the purpose, effect or likely effect of substantially lessening competition in a market, the first step in the analysis is to determine whether the conduct falls under the relevant provisions of the Act. This may include ascertaining whether a contract, arrangement, understanding or concerted practice exists or whether the agreement or conduct falls within the exclusive dealing or misuse of market power provisions. Once it has been determined that the relevant vertical agreement or conduct falls within the relevant provision, the next question is whether it has the purpose, effect or likely effect of substantially lessening competition in a market.

Purpose is a subjective test but objective circumstances can be taken into account. The effect or likely effect of a vertical agreement or conduct starts with identifying the relevant market in which the agreement or conduct has or is likely to have an impact, and then undertaking a counterfactual analysis to determine the state of competition in the market with and without the relevant agreement or conduct. Where there is a substantial lessening of competition between the factual and counterfactual worlds, the Act is contravened.

### 2.6 What is the analytical framework for defining a market in vertical agreement cases?

Where the competition test is applicable, market definition is the first step in determining whether there is a substantial lessening of competition. In defining a market, it is necessary to look at the product, geographic, functional and temporal aspects of a market in the context of substitution possibilities.

### 2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called “dual distribution”)? Are these treated as vertical or horizontal agreements?

Whether an agreement or conduct is considered to be vertical or horizontal will depend on the circumstances of each case. Where the relevant agreement or conduct is clearly between supplier and customer, the law will treat it as vertical. However, where the facts demonstrate some form of competitor-competitor conduct, the relevant agreement or conduct may be characterised as horizontal. There is a “carve-out” provision for agreements or conduct that fall within both horizontal and vertical agreement or conduct laws, such that the agreement or conduct will be examined under the vertical agreement or conduct laws (i.e. subject to a competition test).

### 2.8 What is the role of market share in reviewing a vertical agreement?

Market share is not directly relevant to the assessment of whether vertical agreements or conduct are in contravention of the Act. However, market share is usually taken into account in considering whether a firm has substantial market power for the purposes of the misuse of market power prohibition and in assessing whether the effect of the vertical agreements or conduct is likely to substantially lessen competition.

### 2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is often used in determining whether a vertical agreement or conduct substantially lessens competition. This includes market definition issues, market power issues and the state of competition in the market with and without the relevant agreement or conduct.

### 2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies may be taken into account in assessing whether a vertical agreement or vertical conduct has the effect or likely effect of substantially lessening competition in a market. For instance, if the vertical agreement or conduct enhances a firm’s efficiency, leading to more competitive outcomes in the market, the agreement or conduct may be unlikely to contravene the Act. Efficiencies will also be considered if a party is seeking authorisation or notification (immunity) from the ACCC for a vertical agreement or conduct.

### 2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

At present, the Act provides for an exemption for vertical arrangements and other general anti-competitive arrangements in relation to certain intellectual property rights (IPR) (such as patents, registered designs or copyrights) but only to the extent that the relevant arrangement relates to particular aspects of IPR (for example, the invention to which the patent relates). However, from 12 November 2019 this exemption will be repealed.

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**2.12 Does the enforcer have to demonstrate anticompetitive effects?**


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Not necessarily – other than RPM, the vertical agreement and vertical conduct provisions under the Act require proof of either the purpose, effect or likely effect of a substantial lessening of competition in a market. Accordingly, the ACCC could demonstrate anti-competitive purpose but not effect to successfully prosecute a case.

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**2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?**


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The ACCC will only weigh public benefits including efficiencies against anti-competitive harm if the party proposing to enter the vertical agreement or engage in the vertical conduct seeks authorisation or notification from the ACCC. Authorisation or notification is a form of immunity granted for agreements or conduct that would otherwise be in contravention of the Act, where the public benefits outweigh the public detriments or, for some types of conduct, there is no substantial lessening of competition.

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**2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?**


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A “related bodies” defence is available to allegations of anti-competitive vertical agreements or conduct. There is also a limited defence to RPM conduct that involves withholding supply from re-suppliers but only if certain requirements are met.

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**2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?**


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Yes – the ACCC has issued guidelines with respect to exclusive dealing, misuse of market power and concerted practices.

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**2.16 How is resale price maintenance treated under the law?**


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RPM is a *per se* contravention of the Act but a party can seek authorisation or notification from the ACCC for RPM which provides immunity from prosecution if the public benefits of the conduct outweigh the public detriments.

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**2.17 How do enforcers and courts examine exclusive dealing claims?**


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Exclusive dealing is prohibited by the Act if it has the purpose, effect or likely effect of substantially lessening competition in a market.

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**2.18 How do enforcers and courts examine tying/supplementary obligation claims?**


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Tying/supplementary obligations are prohibited if they have the purpose, effect or likely effect of substantially lessening competition in a market.

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**2.19 How do enforcers and courts examine price discrimination claims?**


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There is no specific prohibition against price discrimination. Such conduct would be prohibited if it fell within the elements of the vertical agreement/conduct or dominant firm conduct provisions of the Act.

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**2.20 How do enforcers and courts examine loyalty discount claims?**


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Loyalty discounts are prohibited if they fall within the vertical agreement/conduct or dominant firm conduct provisions of the Act (i.e. if they have the purpose, effect or likely effect of substantially lessening competition in a market).

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**2.21 How do enforcers and courts examine multi-product or “bundled” discount claims?**


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Multi-product or bundled discounts are prohibited if they fall within the vertical agreement/conduct or dominant firm conduct provisions of the Act (i.e. if they have the purpose, effect or likely effect of substantially lessening competition in a market).

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**2.22 What other types of vertical restraints are prohibited by the applicable laws?**


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Any other type of vertical restraint that has the purpose, effect or likely effect of substantially lessening competition in a market is prohibited.

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**2.23 How are MFNs treated under the law?**


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The Act does not include a specific prohibition on MFN clauses. However, MFNs are prohibited if they fall within the vertical agreement/conduct provisions of the Act (i.e. if they have the purpose, effect or likely effect of substantially lessening competition in a market).

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**2.24 Describe any notable case developments concerning vertical merger analysis.**


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In May 2019, the Court dismissed the ACCC’s case relating to the acquisition of Acacia Ridge Terminal by Pacific National (PN). PN is a dominant supplier of intermodal rail services and the ACCC alleged that a post-acquisition vertically integrated PN would have the ability to limit or deny access to competing rail operators, thereby increasing barriers to entry and deterring new entrants to the intermodal rail services market. Had PN not offered an unconditional undertaking which removed any significant ability to discriminate, the Court would have found that the proposed arrangement would substantially lessen competition in breach of the Act. The ACCC has criticised the Court’s decision and maintains the view that the undertakings will not be effective in enabling competition in the relevant market. The case is notable because the ACCC blocked the deal as part of its merger review process, only to be overturned by the Court. It also shows that courts are willing to accept merger remedies to alleviate foreclosure concerns arising from vertical mergers, something for which the ACCC is usually responsible in the merger review context.

### 3 Dominant Firms

#### 3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Unilateral conduct, called misuse of market power in Australia, is considered to be serious conduct by the ACCC. Misuse of market power is a key enforcement priority for the ACCC and the penalties for engaging in misuse of market power are significant (and the same for vertical agreements and vertical conduct).

#### 3.2 What are the laws governing dominant firms?

It is not illegal to have market power or to use it. However, a firm with a substantial degree of market power will be in breach of the Act if it engages in conduct that has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

#### 3.3 What is the analytical framework for defining a market in dominant firm cases?

Identifying the relevant market is an important step in determining whether a party has substantial market power in that market and whether a firm's conduct has the purpose, effect or likely effect of substantially lessening competition in a market. In defining a market, it is necessary to look at the product, geographic, functional and temporal aspects of a market in the context of substitution possibilities.

#### 3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no market share threshold that determines whether a firm is dominant or a monopolist or, in the language of the Act, has a substantial degree of market power. Market share will be taken into account as a factor of market power but it is not determinative.

#### 3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

While parties with a dominant or monopolist position in a market are likely to receive closer scrutiny by the ACCC than other parties, being a dominant firm or monopolist is not itself a contravention of the Act. A firm with a substantial degree of market power will only contravene the Act if it engages in conduct that has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

#### 3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis can be used to assess whether a firm has a substantial degree of market power in a market by taking into account a number of matters, including barriers to entry and economies of scale and scope. It can also be used to examine whether conduct has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

#### 3.7 What is the role of market share in assessing market dominance?

Although not determinative, market share can be taken into account in assessing whether a firm has a substantial degree of power in a market.

#### 3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

There are no legislative defences to a misuse of market power allegation. However, a corporation with a substantial degree of power in the trans-Tasman market will not contravene the misuse of market power prohibition by reason that it acquires only plant or equipment.

A party can seek authorisation (immunity) from the ACCC for conduct that would otherwise be in breach of the misuse of market power prohibition. The party would need to demonstrate that the public benefits from the conduct outweigh any public detriments.

#### 3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are often used by parties alleged to have engaged in a misuse of market power to show that the purpose of the conduct was legitimate rather than anti-competitive.

Efficiencies will also be considered by the ACCC if a party seeks authorisation for conduct that would otherwise contravene the misuse of market power prohibition of the Act.

#### 3.10 Do the governing laws apply to "collective" dominance?

The Act does not prohibit collective dominance by independent entities. In determining whether a corporation has "substantial market power", however, the Act provides for the aggregation of power held by the corporation and its related bodies corporate, as well as by a corporation through its agreements with third parties.

#### 3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The misuse of market power laws apply equally to purchasers as well as to suppliers.

#### 3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

While there are no prescribed types of conduct that constitute misuse of market power, the following types of conduct are often claimed or held to be a misuse of market power: refusals to supply or acquire; bundling; predatory pricing; exclusivity arrangements; and exclusionary conduct.

#### 3.13 What is the role of intellectual property in analysing dominant firm behaviour?

IPRs may be a source of market power. In each case, it will be necessary to assess whether the IPRs in question give rise to substantial market power and whether the relevant conduct gives rise to a misuse of that power.



### 3.14 Do enforcers and/or legal tribunals consider “direct effects” evidence of market power?

Whilst not determinative to an analysis of whether a dominant firm has contravened the Act, the direct evidence of abusive behaviour, being the actual harm caused by the contravening conduct, is one of the factors that the ACCC will take into account when pursuing an action for misuse of market power.

### 3.15 How is “platform dominance” assessed in your jurisdiction?

The ACCC assesses a firm’s dominance in a particular platform in the same way it would assess any firm’s substantial market power in any market. However, the ACCC is currently considering the dominance and competitive effects of digital platforms, algorithms and consumer data.



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Sar has been advising multinational and ASX listed companies on cartels, mergers and competition and consumer law matters for 20 years. In 2017, he won the Client Choice Award for best competition/antitrust lawyer in Australia and is consistently ranked in international directories as one of Australia’s leading competition lawyers for his “great depth of knowledge of the broader matters that drive competition law”, his “technical and oratorical skills, client service and commercial acumen” and his “invaluable solution-focused approach and calm assurance” (*Chambers* 2012–2019; *The Legal 500* 2012–2019; *Best Lawyers Australia* 2016–2019; *Who’s Who Legal* 2018–2019). Sar has been involved in a number of landmark matters, including the first criminal cartel case involving the Australian Federal Police (*Vina Money*), the first ACCC “hub and spoke” cartel prosecution (*Unilever*), cases on misuse of market power (*Baxter*) and price-fixing (*Mayne*), consumer law prosecutions (*Jetstar*), access to infrastructure matters (*BHP Billiton*) and “bet the farm” mergers (BHP/Rio, Microsoft/Yahoo!, Qantas/Emirates and Nutrien/Ruralco).

### 3.16 Under what circumstances are refusals to deal considered anticompetitive?

Refusals to deal are anti-competitive if engaged in by a firm with substantial market power for the purpose, effect or likely effect of substantially lessening competition in a market.

## 4 Miscellaneous

### 4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Australia remains one of the only jurisdictions in the world with prescriptive exclusive dealing prohibitions and a RPM law that is a *per se* contravention rather than being subject to a competition test. However, in recent years, there has been a trend for provisions in the Act having a competition test to be breached (most recently, misuse of market power and concerted practices).



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Jaime is an Associate with experience advising commercial clients on all aspects of competition and consumer protection law. Most recently she has acted for Ramsay Health Care Australia Pty Limited in defending Federal Court proceedings brought by the ACCC for misuse of market power and exclusive dealing. In addition to her experience in dispute resolution and enforcement matters, she also has experience advising clients on competition and consumer issues arising from day-to-day commercial transactions and proposed mergers and acquisitions.

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