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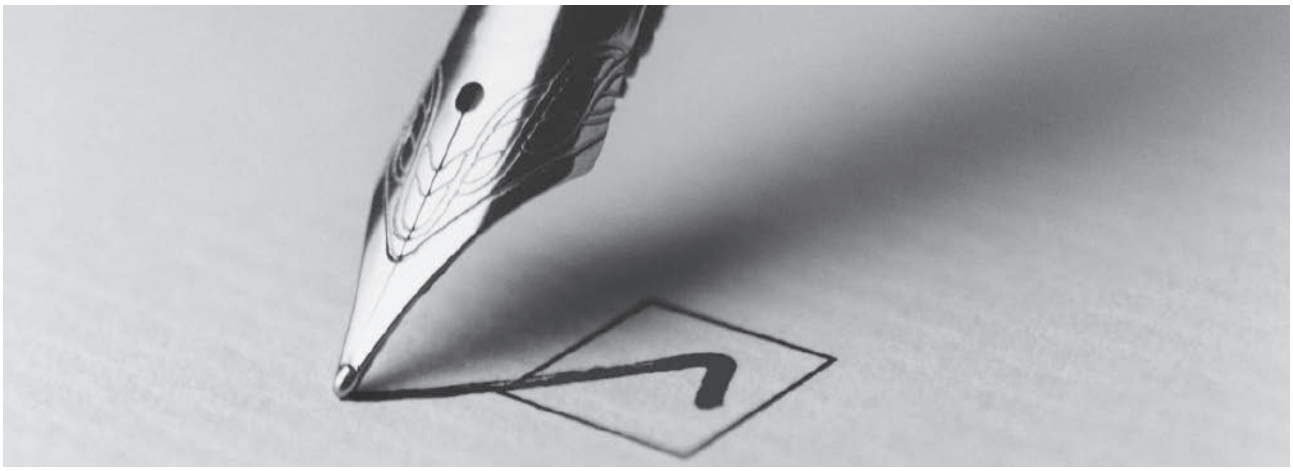
Competition Law News – Special Edition 2015 – The Year Ahead

February 2015



In this Issue

2015 has started badly in terms of regulatory certainty for Australian businesses – with the Federal Government focused on its survival rather than effective business regulation, and State Governments reconsidering their policies on infrastructure ownership and development.

Nevertheless, in this publication we have drawn together some insights on how we see the year unfolding for Australian competition regulation and its administration.

You may have seen already that the ACCC has just published its 2015 compliance and enforcement priorities (on 19 February). We comment on these first up. More broadly though, we include our views on where Australian businesses might focus their attention, in managing compliance risks under the *Competition and Consumer Act 2010* (CCA) most effectively, and navigating the strategic regulatory landscape around them.

This special edition includes:

- The ACCC's 2015 focus areas
- The Harper Review likely outcomes
- Developments in unconscionable conduct claims
- Cartel immunity and criminal prosecution in Australia
- The rise in importance of Asian regimes

What you need to do

- Look out for the Harper Committee's report to the Federal Government on Australian Competition Law and Policy in March 2015. It will include proposals to change the Competition & Consumer Act which will affect all businesses.
- Keep unconscionability in mind in all commercial interactions, especially those with individuals, smaller parties or those in weaker bargaining positions. The courts are applying a lower, more encompassing standard for unconscionable conduct claims than has previously been the case. Consider training staff on what unconscionability means in practical terms for your business. There is no "one-size fits all" approach here.
- Refresh your knowledge of the ACCC's Immunity Policy for Cartel Conduct, which was updated by the ACCC in late 2014. Ensure that staff have direct and immediate access to the legal team via a hotline or similar. Speedy access to legal advice on cartel concerns is essential if companies wish to utilise the ACCC's Immunity Policy.

1. The ACCC's 2015 focus: compliance and enforcement priorities

The ACCC's enforcement priorities for 2015 are again a mix of established and new priority areas, with half of its enforcement resources directed to competition matters this year.

Following tighter financial control in 2014 and securing approximately A$20 million in additional funding from the Federal Government, the ACCC proposes to focus on the following new priority areas in 2015:

- *cartel conduct in government procurement* with public sector purchasing viewed by the ACCC as an attractive target for cartels, given the large budgets and unique processes;
- *competition and consumer issues in the medical and health sector*, with the ACCC focusing on attempts to limit access to products, patients, procedures or facilities, and unconscionable conduct and misleading or deceptive conduct by medical professionals;
- *ensuring compliance with industry codes of conduct* – in particular, the introduction of the Grocery Code of Conduct will be a major area of focus (see below); and
- *truth in advertising*, with a focus on misleading claims made by large businesses that may result in significant consumer detriment, or where the conduct is likely to become far reaching.

On broader policy issues, the ACCC sees its key roles for 2015 to be:

- to ensure privatisation of public infrastructure delivers better outcomes for consumers (by encouraging governments to focus on fostering competitive markets post-privatisation);
- to improve the functioning of the financial system given the competition focus of the Murray Report; and
- to address any competition issues arising from the construction of the NBN and ensure a smooth transition for consumers to new NBN services.

In addition to these "new" fields of endeavour, the ACCC has promised to maintain its focus on cartel conduct, anti-competitive arrangements and practices, misuse of market power and product safety. Competition and consumer issues in highly concentrated sectors such as in the fuel and supermarket sectors (in particular, the conduct of larger businesses in their commercial dealings with smaller suppliers) and ensuring that carbon tax cost savings are being passed through to consumers, also remain priority areas for 2015.

2. The Harper Review – likely outcomes

The Harper Committee is due to finalise its wide-ranging report on Australian Competition Law and Policy to the Federal Government in March 2015 (required within a year of the publication of the Terms of Reference on 27 March 2014).

There has been a great deal written and discussed in the course of the Harper Review. The Harper Committee has, much to its credit, been at pains to consult widely and constructively, seeking submissions across a wide range of topics. The Committee published a long Draft Report in September 2014, in which it sought further submissions on the views expressed, in the lead up to Christmas (click here for our *Competition Law News* 22 September 2014 on the Draft Report).

Once the Review is finished, there is, of course, still a distance to run before any of the recommendations of the Harper Committee are implemented. The Committee's report will be received by the Federal Government in March – with publication of the report expected (but not assured) to follow shortly after. Even if the Federal Government were to then promptly introduce legislation to implement the recommended changes, the risk of protracted Parliamentary debate, a further Senate inquiry or other intermediate step before a Bill is passed is appreciable. This is especially the case in relation to contentious policy areas, such as the regulation of dominant firm conduct (under s46 of the CCA). While Professor Harper has been reported as contending that the extent of consultation undertaken by the Committee in the current process may reduce the need for any further inquiry or review – more politics, manoeuvring and "review" cannot be ruled out.

Ashurst will publish a special *Competition Law News* immediately upon the publication of the Harper Committee Report (expected in March), setting out and explaining its main recommendations.

For now though, we speculate that the recommendations of the Harper Committee in its Final Report will include:

- the removal of the *per se* prohibition of third line forcing conduct (to bring Australia into line with the major competition law regimes around the world);
- there will be a simpler, "broad exemption" (under the cartel rules) for joint venture activities which do not have the purpose or likely effect of substantially lessening competition;
- minimum resale price maintenance conduct should remain *per se* prohibited;
- the introduction of a new prohibition of "concerted practices" (being regular practices undertaken by two or more firms) which have the purpose or likely effect of substantially lessening competition (and the current "price signalling" laws applicable to banks should be repealed);

- some amendment to s46 (misuse of market power), but it is not clear quite what – this has been a highly contentious area in the Review process and, in our view, the proposed revised form of s46 set out in the Draft Report casts too wide a net and has several significant flaws;
- a new "formal" merger clearance process should be introduced (to exist in parallel with the ACCC's long-standing "informal" clearance process), which involves assessment of both whether there is a substantial lessening of competition and whether there is a (net) public benefit, to be adjudicated by the ACCC initially, and subject to review by the Australian Competition Tribunal;
- the introduction of a facility for the ACCC to grant "block exemptions" for particular types of business conduct;
- the establishment of the *Australian Council for Competition Policy*, to provide leadership nationally on the competition policy agenda; and
- a narrowing of the application of Part IIIA of the CCA, dealing with access to infrastructure, so as to respond to the Committee's view in its Draft Report that:

  "Unless it is possible to identify those facilities or categories of facilities [to which the application of Part IIIA is required], it is difficult to reach a conclusion that the regulatory burden and costs imposed by Part IIIA on Australian businesses are outweighed by economic benefits, or that the benefits can only be achieved through the Part IIIA framework."[1]

There are many other, more wide-ranging policy issues which have been addressed by the Harper Committee and which will feature in its Final Report. Of particular note to businesses are likely recommendations for:

- a "refresh" of the principles of, and commitment to, competitive neutrality (in government business enterprises);
- principles establishing and increasing choice and competition principles in the field of human services (which may foster more private involvement in health and other human services);
- more cost-reflective policy approaches to road transport;
- substantial changes to shipping services, with the potential abolition of liner shipping agreement exemptions and cabotage restrictions;
- the removal of the IP licensing exemption under the CCA; and
- a further review of State and local government regulation to remove unnecessarily anticompetitive provisions.

If these broader, policy-based recommendations are adopted by Governments, they may be the areas in which the Harper Committee makes the most lasting impression on the Australian economy – just as the Hilmer Committee did some 20 years ago.

3. Unconscionable conduct claims – the "new black" in commercial disputes

There have been important developments in relation to "unconscionable conduct" claims under s21 of the Australian Consumer Law (ACL). In a string of recent cases, the law on unconscionable conduct has broadened considerably, such that these issues should be on every corporate counsel's radar.

Section 21 of the ACL sets out the simple prohibition that:

> "A person must not, in trade or commerce, in connection with:
>
> (a) [the supply of goods or services] ... to a person (other than a listed public company); or
>
> (b) [the acquisition of goods or services] ... from a person (other than a listed public company),
>
> engage in conduct that is, in all the circumstances, unconscionable."

The provision also states expressly a Parliamentary intention that the provision not be limited by "the unwritten law relating to unconscionable conduct". Section 22 then sets out a long list of factors to which the court "may have regard" in determining whether conduct is "unconscionable".[2]

In an important case in 2005 (in relation to provisions in the *Retail Leases Act 1994* (NSW), which were similar to equivalent provisions in the *Trade Practices Act*, as it then was), the NSW Court of Appeal determined that, "... restraint in decision making remains appropriate. Unconscionability is a concept which requires a high level of moral obloquy." (per Spigelman CJ in *AG v World Best Holdings*[3]).

Chief Justice Spigelman's memorable expression, "high moral obloquy",[4] guided subsequent courts in this field – and, in doing so, curtailed the application of the unconscionable conduct prohibition.

> The case law on unconscionable conduct has broadened considerably, such that these issues should be on every corporate counsel's radar

[1] See Competition Policy Review, Draft Report, page 267. Click here to review the Draft Report

[2] Note that since 1 January 2011, a contravention of s21 may attract a penalty of up to $1.1m for a corporation and $220,000 for an individual (s224), among other sanctions.

[3] *AG v World Best Holdings* [2005] NSWCA 261

[4] For those readers who, like the author, don't find themselves using the word regularly, "obloquy" means strong public condemnation or disgrace.

However, over the last few years, the law has clearly shifted to a broader approach. Kicking off the trend, in 2011, the NSW Court of Appeal in *Tonto Home Loans v Tavares*,[5] suggested that Spigelman CJ may have been "too stringent". Allsop P moved away from Spigelman's approach, finding that (while conduct involving "a high level of moral obloquy" is included within the prohibition), more broadly:

> "What is required is some degree of moral tainting in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party."

In 2013, several cases confirmed this shift away from Spigelman CJ's approach. In *DCA of Vic v Scully*,[6] the Victorian Court of Appeal confirmed that explanatory phrases used to elucidate the meaning of a statutory provision should not substitute for the statutory provision: in this context, "high moral obloquy" was not to be imposed as the standard, when the statutory provision refers to conduct which is "unconscionable".

In August 2013, the Full Federal Court, in *ACCC v Lux Distributors*, found that unconscionable conduct extended to:

- "something not done in good conscience"; or
- "conduct against conscience by reference to the norms of the society in question".[7]

The Full Court also found that:

> "The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty."

The Full Court's *Lux* decision reversed the findings at trial, which had referenced the previous "high moral obloquy" benchmark.

Following on from *Lux*, in *PT Ltd v Spuds Surf Chatswood*,[8] the NSW Court of Appeal allowed an appeal in relation to unconscionable conduct in a retail tenancy context. This decision reinforced the broader construction of the unconscionable conduct prohibition. Importantly, the Court determined that a finding of unconscionable conduct is not dependent upon finding that the respondent's officers acted in bad faith or engaged in some form of conscious wrongdoing.

Moving forward another year, in late 2014, just 3 days before Christmas, Coles settled proceedings with the ACCC in relation to its dealings with suppliers in 2011, conceding that it had engaged in illegal unconscionable conduct.

In her decision, Gordon J, determined that the applicable test for unconscionable conduct was as set out by the Full Court in *Lux Distributors* – the judgment makes no reference to the word "obloquy"! Her Honour's judgment and an extensive Statement of Agreed Facts and Admissions set out the details of Coles' conduct, but in brief summary, it included:

- demanding payment by suppliers of rebates under Coles' "Active Retail Collaboration" program, and making threats of commercial consequences if not paid, in circumstances of Coles' superior bargaining position and its failure to disclose sufficient information such that suppliers could understand the requests for payment made by Coles (to which a penalty of A$3.7 million was fixed, and an order for costs of A$1 million was made); and
- demanding "profit gap", "retrospective waste" and "deferred deal" payments from suppliers, in circumstances of Coles' superior bargaining position, its unwillingness to negotiate with suppliers, failing to disclose sufficient information so that suppliers could understand the basis of the requested payments, Coles having no reasonable basis for asserting an entitlement to payment and exerting undue pressure on suppliers to make payments, and its use of unfair tactics (eg in unilaterally extending deferred deal payment requirements) (to which a penalty of A$6.3 million was fixed, and an order for costs of A$250,000 was made).

It is important for businesses to take note of these proceedings to avoid being the next target of complaints. We expect more cases of this kind in the future.

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[5] *Tonto Home Loans Australia v Tavares* [2011] NSWCA 3889

[6] *Director of Consumer Affairs v Scully* [2013] VSCA 292

[7] See *ACCC v Lux Distributors* [2013] FCAFC 90, with the Bench including Allsop CJ, who had been appointed from the NSW Court of Appeal in the period since the *Tonto Homes* judgment. The Full Court reversed the finding at trial that no unconscionable conduct had occurred.

[8] *PT Ltd v Spuds Surf Chatswood* [2013] NSWCA 446

Moving again to 2015, on 29 January, in *ACCC v SE Melbourne Cleaning (formerly Coverall)*,[9] the Federal Court found that the respondent had engaged in unconscionable conduct in the context of its dealings with several franchisees. Particularly, Coverall's conduct was unconscionable, in the context of misleading representations as to the revenue achievable from a franchise business, and the respondent's failure to pay moneys owed to, demanding payment from, and taking other steps contrary to the interests of its franchisees, in the context of a superior bargaining position. The judgment helpfully sets out principles from the cases, including:

- whether or not conduct is unconscionable will depend on careful consideration of all of the conduct and involves standing back and looking at the whole episode;
- the Court must evaluate conduct by reference to a normative standard of conscience which may develop and change over time, and must be applied in the relevant context; and
- notions of "moral obloquy" or "moral tainting" are relevant, but ultimately it is conduct which is against conscience by reference to the norms of society which is in issue.

Also hot off the press, Cofco Distributors, a supplier to Metcash, has issued Federal Court proceedings alleging that some of the terms on which Metcash deals with it are unconscionable. An amended Statement of Claim was filed by Cofco in January 2015 – no doubt with the benefit of the Court's judgment in *Coles*. Similarly to the *Coles* proceedings, Cofco alleges that Metcash engaged in unconscionable conduct in relation to the payment of rebates for advertising, promotional and other expenses (including Metcash executives conducting overseas "study tours"), in the context of:

- Metcash's substantially stronger bargaining position;
- the use of unfair pressure and tactics;
- refusals by Metcash to negotiate terms;
- Metcash not disclosing the terms on which rebates were calculated; and
- a lack of good faith.

What to draw from these cases?

The following important points emerge:

- the law on unconscionable conduct has become more inclusive and wide-ranging: "unfairness", "dishonesty" and "taking advantage" of superior bargaining power and other asymmetries, are each potent elements of what may be "unconscionable" – it is no longer the case that a "high level" of morally repugnant conduct must be evident;
- unconscionability is to be determined from the broad context and circumstances: therefore it is difficult to be precise about whether conduct is unconscionable; and
- a lack of good faith, or an intention to do wrong, is not a necessary condition.

These mean that corporations, especially where they deal with consumers or small business, and a significant asymmetry of bargaining power is evident, must increasingly be aware of and manage the fairness and transparency of their conduct.

Practically, we are seeing an increasing prevalence of claims of unconscionable conduct in commercial disputes (provided a publicly listed company is not the alleged "victim").

This is difficult territory. At Ashurst, as external counsel, we are endeavouring to assist with clear guidance for our clients as to the principles involved, as well as a "feel" for the Courts' approach from the unfolding case law. Ultimately though, it is necessary to make informed moral judgments, drawing on a deep understanding of the broad context in which a corporation's business operates. This is a field in which corporate counsel can and will add great value, with their deep understanding of the corporate business and operations and drawing on their sense of "right and wrong" in that context.

[9] *ACCC v SE Melbourne Cleaning (Coverall)* 29 January 2015, per Murphy J.

4. Enforcement – cartels

Immunity

As discussed above, the ACCC, as always, remains very focused on cartel enforcement. As a result, Australian businesses should continue to ensure that their approach to compliance in this area is robust and clear. Any business with an appreciable risk of cartel conduct by its employees should have:

- a clear and regular competition law training program for its people;
- a clear commitment from senior management not to engage in anti-competitive conduct; and
- an internal telephone "hotline" to the legal team, available to staff members with any queries or concerns.

The last of these elements is critical. The ACCC has just recently refreshed its Cartel Immunity Policy (Click here to view Immunity Policy), with the latest version released in November 2014 after a thorough review by the ACCC, drawing on submissions from many interested parties.

Although the review has seen some important changes made in the detail, the fundamental principles of the ACCC's Cartel Immunity Policy remain that a corporation (or individual) who has been involved in a cartel, and is the first person to apply to the ACCC for immunity in relation to that cartel, may receive complete immunity from prosecution (both civil and criminal) if:

- it admits that it may have contravened the Australian competition law;
- it is prepared to cease its involvement in the cartel;
- it has not coerced others to be involved in the cartel;
- most importantly, it makes a full disclosure of the facts and circumstances of the cartel and assists the ACCC (and DPP) to prosecute the co-conspirators; and
- it keeps its immunity application confidential.

A key element for a business to take advantage of the ACCC's Immunity Policy (offering complete immunity from prosecution for involvement in a cartel), is that the business must be the "first to the door" of the ACCC. For this to happen though, a business must be set up to respond quickly to any concerns that it may be involved in an illegal cartel.

This is why an internal telephone "hotline" to the legal team, for any queries or concerns from staff members about cartel (or other anti-competitive conduct), is critical. A phone call facility to the company's legal team has several advantages[10], but most importantly in this context, it is fast.

Why no criminal prosecutions yet?

Effective from mid-2009, the CCA was amended to include *criminal* cartel conduct offences. In over 5 years since then, however, the Commonwealth DPP has not commenced any criminal prosecutions under those provisions.

In its major "cartel" matters concluded in 2014, the ACCC prosecuted each of the cases under the *civil* cartel prohibitions:

- NSK Australia was penalised A$3m, in the ball bearings cartel (after Koyo Australia was penalised A$2m in late 2013);
- Renegade Gas and Speed-E-Gas were penalised A$7.9m between them, in relation to forklift gas cartel arrangements; and
- (in a matter which the ACCC considers to involve "cartel" conduct) Flight Centre was found to have attempted to enter into anti-competitive arrangements with several airlines, and was penalised A$11m (with the matter now on appeal).

In both the ball bearing and gas cartel matters, the illegal cartel conduct ran well beyond mid-2009 – through to 2011, in both cases – and yet the ACCC proceeded on the basis of a *civil* prosecution. Why is this so?

From a distance, and without being privy to the ACCC's thinking on these issues, we expect that the ACCC is waiting until the stars align and it has the "dream" cartel matter to run, before it will refer a matter to the DPP for criminal prosecution. The UK experience in 2011, of the then UK competition regulator, the OFT, losing spectacularly, its first contested criminal cartel prosecution (8 years after the introduction of the offence in 2003)[11], will still be fresh in the mind of the ACCC.

We speculate that the cartel case the ACCC is looking for will include some or all of the following features:

- an intentional, "smoky hotel room" cartel, among major market participants, who were fully aware that their conduct was illegal;
- a corporate immunity applicant with cooperative employees, who have assisted the ACCC in its investigation and will make reliable witnesses at trial, and who have produced contemporaneous documentary evidence which will prove the cartel's existence and operation;
- ideally, large "brand" name businesses involved in the cartel, so as to attract public attention; and
- several, preferably senior, employees of the corporate participants in the cartel who were clearly involved in the "smoky hotel room" meetings, knew their conduct was illegal, and in relation to whom the ACCC has strong evidence.

[10] A telephone hotline to Legal has several advantages: there are no written records in the initial query; the call to Legal may be properly privileged; confidentiality can be retained and everyday reporting lines avoided (as queries may concern the conduct of colleagues); and, most importantly, a phone call can be made quickly.

[11] The OFT prosecuted four British Airways executives in relation to allegations that they had dishonestly agreed fuel surcharges with arch-rival (and immunity applicant) Virgin Atlantic. The proceedings were dismissed in the early stages of the trial in light of the prosecution having failed to produce to the defence a large volume of email documents, some of which were exculpatory. The executives left court "with their reputations unsullied", per Owen J. The OFT was not so fortunate.

The last of these features may be the most important. While the legal community will appreciate the difference between criminal and civil prosecution of a corporate defendant, it is only when individuals are sent to jail that the broader public will appreciate the significance (and deterrent effect) of the ACCC's and DPP's first criminal cartel prosecution. Absent obvious candidates for a jail term, the ACCC may not refer a matter to the DPP, preferring instead to prosecute under the lesser civil standard.

As at February 2015, the ACCC has stated that it has a dozen in depth cartel investigations currently on its books, some of which may proceed to criminal prosecution in 2015. The ACCC has established a new dedicated group exclusively responsible for investigating serious cartel conduct. This group is focused on criminal cartel investigations and is working very closely with the DPP.

5. Asian regimes – on the rise in importance and relevance

In November 2014, Ashurst published its third edition of the *Asia-Pacific Competition Law Handbook*.

The Handbook sets out a clear and concise summary of the competition law regime in each of 27 countries around the Asia-Pacific region. If you would like to receive a copy of the Handbook, please contact one of our partners listed on the final page or email competition@ashurst.com.

2015 is yet another important year in the development of competition law regimes around the region. Highlights include:

- *China*: MOFCOM (the merger regulator in China) is confirming its place as the third great force in global merger review (after the US regulators and the European Commission). In the past year, it has blocked a proposed shipping industry joint venture (the second deal it has blocked, after *CocaCola/Huiyuan Juice* in 2009), increasingly enforced the requirements to notify mergers, acquisitions or joint venture arrangements under the Anti-Monopoly Law (and penalised those who don't), and introduced a "simple case notification" which is allowing notifications to be processed more quickly. MOFCOM is also continuing to impose "conditions" on transactions which are not commonly found elsewhere. These include:
  - obligations to "hold separate" the merging businesses for a period of time;
  - undertakings to reduce prices; and
  - in some cases, undertakings to sell or license products on fair, reasonable and non-discriminatory (FRAND) terms and not to impose bundling or exclusivity conditions.
- *Hong Kong*: Notwithstanding the *Competition Ordinance* being passed in 2012, it has still not come into effect. Much preparatory work is being done by the HK Competition Commission, with the publication of several Draft Guidelines on the operation of the new law, in late 2014. It is not until those Guidelines are finalised, that the Competition Ordinance is expected to come into effect.
- *Singapore*: The CCS is increasingly becoming an important player in SE Asian competition law enforcement. In late 2014, it imposed penalties of over S$7m on 10 participants in a freight forwarding cartel (with the 11th being an immunity applicant under the CCS' Immunity Policy). In merger review, the CCS imposed conditions on the *SEEK/Jobstreet* transaction in 2014, and also expressed sufficiently serious concerns in relation to the *Singapore Cruise Centre* transaction that it was withdrawn. The CCS is also playing a leading role in the introduction of modern competition law regimes around ASEAN.
- *Japan*: In 2014, the JFTC filed criminal proceedings (rather than imposing surcharges) in relation to a snow-melting equipment cartel, against 8 companies and 8 individuals. Although the Japanese law provides for a maximum penalty of up to 5 years imprisonment, no individual has ever served time in relation to an antitrust violation. Watch this space ...
- *Indonesia*: The KPPU has been active in enforcing its merger clearance rules, taking several proceedings to penalise companies which have not filed merger clearance notifications within the mandatory 30 day, post-closing, timeframe. Penalties of up to nearly A$500,000 have been imposed on non-compliant merger parties. In cartel enforcement, the KPPU has a full plate, in an economy rife with domestic cartels. Investigations and prosecutions over the last year or two include those into garlic, chicken meat, soybeans, shallots, beef, medical supplies, car tyres etc.

Keep up to date – across Australia and Asia

As keen observers of developments in *Australian competition law*, we will do our best to keep you abreast of the major changes – you are welcome to subscribe to our Ashurst *Competition Law News* distribution list, so as not to miss a beat. Please contact us by emailing competition@ashurst.com or click here.

To keep up to date with competition law developments across *Asia*, please contact us if you would like to receive a copy of the third edition of Ashurst's *Asia Pacific Competition Law Handbook 2014/15*: a comprehensive guide to and summary of the Competition law regimes across 27 countries around the Asia Pacific Region. If you would like to receive a copy of the Handbook, please contact one of our partners listed here or email competition@ashurst.com.

Awarded a *'Global Elite'* competition law practice, Global Competition Review, 2015

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