

Unclassified**English - Or. English****13 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Australia**

4 December 2019

This document reproduces a written contribution from Australia submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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1. The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for enforcing compliance with the Competition and Consumer Act 2010 (the CCA).

2. The term ‘hub-and-spoke arrangement’ describes the situation where firms operating at the same functional level in the supply chain use an intermediary to facilitate indirect information exchanges or other anti-competitive restraints. In this analogy, the competitors are the ‘spokes’ and the intermediary is the ‘hub’. The intermediary may be at a different functional level of the supply chain,¹ or the intermediary may be a third party, such as a trade association,² which operates outside of the supply chain. Extending the analogy further, in circumstances where the horizontal competitors can be said to engage in the impugned conduct with the requisite degree of awareness and commitment, the ‘rim’ of the wheel will be complete.

3. This submission sets out the Australian approach to dealing with anti-competitive hub-and-spoke arrangements. Section 1 provides an overview of the key sections of the CCA relevant to a legal assessment of hub-and-spoke arrangements and notes the operation of anti-overlap provisions which dictate the treatment of some conduct that could be characterised as hub-and-spoke arrangements. Section 2 sets out the role of vertical restraints, including resale price maintenance (RPM) and exclusive dealing, and explains the role of vertical restraints in regulating hub-and-spoke arrangements in the Australian context. Section 3 looks at the hub-and-spoke arrangements in the context of e-commerce. Finally, section 4 considers the ACCC’s approach to promoting compliance with the CCA by providing guidance on permissible indirect information exchanges and other types of hub-and-spoke arrangements.

1. The relevance and investigation of hub-and-spoke cases

4. The ACCC gives priority to conduct which falls within its compliance and enforcement policy. The compliance and enforcement policy is revised each year, however there are some forms of conduct, such as cartels and anti-competitive conduct, which are enduring priorities.

5. The key provisions of the CCA relevant to a legal assessment of hub-and-spoke arrangements are the prohibitions on cartels, anti-competitive agreements, exclusive dealing, and RPM.

¹ For example, see *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676.

² For example, see *NSW Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

1.1. Cartels

6. The CCA prohibits competitors (or potential competitors) from making or giving effect to contracts, arrangements or understandings that contain a “cartel provision”. A provision will be a cartel provision only if it has the:

- purpose of restricting outputs, market sharing, or bid rigging; or
- purpose, effect or likely effect of price fixing.

7. Under the CCA, there are parallel criminal and civil sanctions for engaging in cartel conduct.

8. The law refers to an arrangement where two or more parties are competitors, so it contemplates situations where a hub (who is not a competitor) can be involved in the arrangement. The liability of the hub is considered further below.

	Criminal cartel offence	Civil cartel prohibition
Elements	Two or more competitors or potential competitors; make or give effect to a contract, arrangement or understanding, with the fault element described in 4 below; that contains a cartel provision (see paragraph 6(a)-(b)); and the parties have “knowledge or belief” that the contract, arrangement or understanding contains a cartel provision.	Two or more competitors or potential competitors; make or give effect to a contract, arrangement or understanding; that contains a cartel provision (see paragraph 6(a)-(b)).
Standard of proof	Beyond reasonable doubt.	On the balance of probabilities noting that when evaluating the evidence the Court must take into account the nature of the cause of action, the subject-matter, and the gravity of the matters alleged. ³

9. There are a number of anti-overlap provisions which limit the application of the cartel regime. For example, conduct that would constitute RPM or exclusive dealing will not be considered under the cartel regime. The respondent or defendant bears the evidentiary burden to prove that the anti-overlap provision applies.

1.2. Anti-competitive contracts, arrangements, understandings and concerted practices

10. A contract, arrangement or understanding that does not contain a cartel provision may still contravene the CCA if a provision of the contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition.

11. Section 45(1)(a)-(b) of the CCA prohibit making or giving effect to contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition. Section 45(1)(c) prohibits concerted practices which have the purpose, effect or likely effect of substantially lessening competition (these are considered further below).

1.2.1. Contracts, arrangements and understandings

12. Unlike the prohibition on cartel conduct, the prohibition on anti-competitive agreements applies to both vertical and horizontal conduct; there is no requirement in

³ Section 142(2) of the *Evidence Act 1995* (Cth).

section 45 of the CCA for the anti-competitive agreement to be between competitors or potential competitors. The anti-overlap provisions in section 45 limit the application of the concerted practices provision so that it applies to conduct which does not contravene the prohibitions on RPM and exclusive dealing.

13. As with the prohibition on cartels, in order to prove a contravention of section 45(1)(a) or (b), it is first necessary to establish a contract, arrangement or understanding. The term ‘contract’ is given its normal common law meaning. Australian courts have interpreted the terms ‘arrangement’ and ‘understanding’ to require a “meeting of the minds” of the parties under which one or both are committed to a particular course of action. There must be more than a mere hope or expectation that something might be done or happen or that a party will act in a particular way.

14. Sometimes the court has searched for the ‘rim’ to complete the analogy of the hub-and-spoke arrangement, with the ‘rim’ being the knowledge of each spoke that there are other spokes that are also participating in the conduct.⁴ In such a case, it must be found that the spokes had the requisite awareness and commitment to engage in the anti-competitive arrangement or understanding with each other. In other cases the court has been willing to infer the knowledge and commitment from circumstantial evidence relating to the parallel conduct.⁵ Where it cannot be established that the each of the spokes are aware of the conduct of the other spokes, the conduct may be characterised as a series of independent vertical arrangements or understandings between the spoke and the hub. If any of these independent vertical arrangements or understandings substantially lessens competition, then there may be separate breaches of section 45.

Box 1. Case study: News Ltd v Australian Rugby Football League Ltd⁶

News Ltd (News) attempted to establish a new professional rugby league competition in Australia, to be known as “Superleague”. News intended Superleague to operate in competition with the established national rugby league competition which was conducted by the Australian Rugby Football League Ltd (ARL). In response to News’ decision to establish the rival rugby league competition, the ARL asked its existing rugby league clubs (the Clubs) to sign “Commitment Agreements” agreeing to remain with the ARL.

News argued that the ARL acted as the ‘hub’ between each of the Clubs to establish a horizontal arrangement or understanding between the Clubs. In particular, News alleged that the ARL and the Clubs breached the prohibition on making or giving effect to contracts, arrangements or understandings which contain an exclusionary provision. At the relevant time, exclusionary provisions between competitors were prohibited per se by section 45 of the CCA.⁷ News argued that the Clubs, who were found to be in competition

⁴ *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 4)* [2017] FCA 1590.

⁵ *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.

⁶ *Ibid.*

⁷ Section 45(2)(a)(i) of the *Trade Practices Act 1974* (Cth) (TPA), the precursor to the CCA, prohibited the making of a contract, arrangement or understanding which contained an exclusionary provision. Following a reform of Australia’s competition law in 2017, exclusionary provisions are now covered by the cartel prohibitions.

with each other, agreed among themselves to remain with the ARL to the exclusion of News as a potential rival rugby league competition organiser.

At first instance, the Federal Court of Australia declined to draw an inference that there was a horizontal arrangement or understanding between the rugby clubs to enter into the Commitment Agreements. Rather, the primary judge held that there were multiple separate vertical agreements between the ARL and each of the Clubs. Noting the absence of direct and express communications between the Clubs, the primary judge held that it was not possible to infer a horizontal arrangement or understanding out of the series of vertical agreements.

On appeal to the Full Federal Court, the court unanimously found that the Commitment Agreements contravened the prohibition on making or giving effect to exclusionary provisions. The Full Federal Court relied on the following facts to infer that the requisite degree of consensus was agreed between the Clubs:

- the knowledge of all the Clubs that each was being offered and was entering into the Commitment Agreements which were identical form;
- the Commitment Agreements were executed by the Clubs within a short time of each other;
- the role played by representatives of the ARL as the ‘hub’ communicating with each of the Clubs.

The Full Court concluded:

Notwithstanding the absence of evidence of direct communications among the clubs ... it is difficult to resist the conclusion that the clubs were consenting, through the medium of [the ARL] to carry out a common purpose. They were not merely hoping that the other clubs would join in; what they were doing made sense only as a common understanding.

15. There are a number of exceptions to the application of section 45 in the context of hub-and-spoke arrangements. Most relevantly, if a contract, arrangement or understanding is considered to be conduct which constitutes RPM or exclusive dealing, the anti-overlap provisions mean that the same conduct will not also contravene section 45. The operation of these provisions is discussed below.

1.3. Concerted practices

16. The recently introduced concerted practices provision recognises that the exchange of commercially sensitive information, such as future pricing information, between competitors through intermediaries may facilitate anti-competitive conduct.

17. Section 45(1)(c) of the CCA prohibits a corporation from engaging with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition. There is no requirement for the persons engaging in a concerted practice to be competitors or potential competitors; other parties such as suppliers, distributors, and industry associations may engage in a concerted practice.

18. The term ‘concerted practice’ is not defined in the CCA and is yet to be interpreted by the Australian courts. The ACCC published a guideline (the **Concerted Practice**

Guidelines) which details the proposed approach to interpreting and applying the concerted practice provisions.

19. It is necessary to distinguish between strategic responses to competitive conditions from anti-competitive concerted practices. As such, the Concerted Practice Guidelines explicitly note that parallel behaviour by competitors is not by itself evidence of a concerted practice. Without additional evidence of direct or indirect communication, or economic evidence suggesting that parallel behaviour may be arising from a concerted practice, the ACCC is unlikely to investigate.

20. Consequently, the ACCC draws a distinction between anti-competitive concerted practices and parallel behaviour arising as a result of independent responses to market conditions. In circumstances where there is no direct or indirect communication, but parties are able to observe the conditions of the market and adjust their behaviour accordingly, this is unlikely to constitute a contravention of the concerted practices provision.

21. The introduction of a prohibition on concerted practices is an important tool to address anti-competitive hub-and-spoke arrangements. For example, the exchange of information about future pricing intentions among competitors through an intermediary may be a breach of the concerted practices provisions, provided the conduct has the purpose, effect or likely effect of substantially lessening competition. This may be the case even if there is insufficient evidence to establish that the competitors had the requisite degree of awareness or commitment to make an arrangement or understanding required to establish a breach of the cartel provisions or the prohibition on anti-competitive agreements.

Box 2. Case study: ACCC v Colgate-Palmolive Pty Ltd (No 4) ⁸ [2017] FCA 1590

This case concerned the largely simultaneous and almost uniform transition from standard to ultra-concentrated laundry detergents in Australia in 2009 (the laundry detergent cartel).

PZ Cussons Australia Pty Ltd (Cussons), Colgate-Palmolive Pty Ltd (Colgate), and Unilever Australia Limited (Unilever) (collectively, the Suppliers) were the largest manufacturers and wholesale suppliers of laundry detergents in the Australian market. One of the Suppliers' main customers was a national retailer, Woolworths Limited (Woolworths).

The ACCC commenced action against Colgate, Cussons and Woolworths alleging the simultaneous and uniform transition from standard to ultra-concentrated laundry detergents was the result of an anti-competitive arrangement or understanding between the Suppliers, aided and abetted by Woolworths and an officer of Colgate. The ACCC did not commence proceedings against Unilever as it was an immunity recipient and agreed to have this fact disclosed.

Colgate admitted liability and was ordered to pay \$12 million for the impugned conduct and \$6 million for another information sharing arrangement. Woolworths admitted liability in relation to the supply to it and was ordered to pay \$9 million. Only Cussons defended the proceedings.

⁸ *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 4)* [2017] FCA 1590.

In proceedings against Cussons, the ACCC relied on a series of meetings and interactions between Woolworths, the alleged downstream ‘hub’, and the Suppliers. The ACCC argued that an arrangement or understanding could be inferred from the simultaneous and uniform transition from the standard to the ultra-concentrated formula. It was argued that this understanding was reached to mitigate the risk of losing sales if a single manufacturer transitioned to the ultra-concentrated formula, but its competitors did not.

The primary judge held that the ACCC did not establish that Cussons had made a commitment to the other Suppliers to coordinate the transition to the coordinate the introduction of the ultra-concentrated formula to coincide with the cessation of supply of standard formula. The primary judge found that Cussons did not intend, when disclosing the strategic commercial information to Woolworths, that the statements would be passed on to its competitors. The primary judge declined to draw an inference that the parallel conduct of the Suppliers was evidence of an arrangement or understanding. While the primary judge noted that, in some circumstances, parallel conduct may provide circumstantial support for the existence of a collusive arrangement or understanding, the expert economic evidence in this case did not support a conclusion of anti-competitive conduct.

The first instance decision was affirmed by the Full Court of the Federal Court of Australia on appeal.

It is important to note that this conduct in this case took place prior to the introduction to the concerted practices regime. The extent to which conduct of a similar nature would be subject to the concerted practices provisions is yet to be determined by the courts.

1.3.1. Liability of the ‘hub’

22. The liability of the ‘hub’ in anti-competitive hub-and-spoke arrangements will vary depending on whether the conduct is treated as a criminal offence or a civil contravention. In circumstances where the hub is a natural person and is in breach of the criminal cartel provisions, the individual faces the prospect of imprisonment or fines and the stain of criminal conviction. If a corporate entity is found to engage in criminal cartel conduct, it may be ordered to pay significant fines. For all other breaches of the CCA, including the civil cartel provisions, the hub may be liable for civil pecuniary penalties and other remedial action.

23. The severity of the substantive penalties ordered by the court is dependent on the extent of the culpability of the hub when in engaging in the impugned conduct.

24. The court may order the person to pay such pecuniary penalties in respect of each act or omission as the court deems appropriate. The maximum penalties are set out below and apply equally irrespective of whether the party is liable as a principal or as an accessory.

	Criminal cartel offences	Civil contraventions (including civil cartel contraventions)
Corporate entities	For corporations, the maximum fine for each criminal cartel offence is the greater of: AUD \$10 million; three times the total value of the benefit obtained that is reasonably attributable to the conduct; or if the benefit cannot be determined, 10 per cent of the annual turnover of the corporation (including related bodies corporate) during 12 months ending at the end of the month in which the conduct occurred.	For corporations, the maximum pecuniary penalty per contravention is the greater of: AUD \$10 million; three times the total value of the benefit obtained that is reasonably attributable to the conduct; or if the benefit cannot be determined, 10 per cent of the annual turnover of the corporation (including related bodies corporate) during 12 months ending at the end of the month in which the conduct occurred.
Individuals	Individuals found guilty of criminal cartel conduct face imprisonment of up to 10 years and/or fines of up to AUD \$420,000 per offence.	The maximum pecuniary penalty for individuals found to have breached a civil contravention is AUD \$500,000 per contravention.

Criminal

25. A corporation or individual involved in a criminal cartel as an accessory rather than principal may also be taken to have contravened the criminal cartel offences. In this way, the ‘hub’ may be liable for a criminal offence in circumstances where it can be established, beyond a reasonable doubt, that the ‘hub’:

- attempted to contravene a cartel offence provision;
- aided, abetted, counselled or procured a person to contravene;
- induced, or attempted to induce, a person to contravene;
- was in any way, directly or indirectly, knowingly concerned in, or party to a contravention; or
- conspired with others to contravene a cartel offence provision.

Civil

26. The ACCC may apply to the Federal Court of Australia to impose a pecuniary penalty on the ‘hub’ provided it is established, on the balance of probabilities, that the intermediary:

- contravened or attempted to contravene a relevant provision of the CCA;
- aided, abetted, counselled or procured a relevant contravention;
- induced, attempted to induce, or were knowingly concerned in a relevant contravention; or
- conspired with others to contravene the CCA.

27. In the laundry detergent cartel discussed above, the ACCC had some success in its action against the ‘hub’ which facilitated the indirect information exchanges between the laundry detergent manufacturers.⁹ In this case, Woolworths admitted that it was directly or indirectly knowingly concerned in the contraventions of the prohibition on anti-competitive understandings, in relation to supply to itself. The Federal Court ordered Woolworths to pay pecuniary penalties of \$9 million and update its compliance program to minimise the risks of it

⁹ *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676.

being in any way directly or indirectly, knowingly concerned in or party to making or giving effect to an anti-competitive contract, arrangement or understanding.

28. Importantly, an attempt to induce does not require the ACCC to establish that the ‘hub’ was successful in its attempts to induce a contravention of the CCA. The decision in *ACCC v Australian Egg Corporation Ltd* was not pleaded as a ‘hub-and-spoke’ arrangement, but the principles are nevertheless relevant to an analysis of the circumstances in which a ‘hub’ may be liable to pay a pecuniary penalty.

Box 3. Case study: ACCC v Australian Egg Corporation¹⁰

The Australian Egg Corporation Limited (AECL) is an industry association. One of its key functions is analysis and communication of information within the egg industry.

From 2011, the AECL became increasingly concerned about the oversupply of eggs, which was placing downward pressure on egg prices. In an attempt to resolve the oversupply, the AECL directors convened an urgent meeting (the Summit) between the largest egg producers to encourage destocking and egg disposal. Documentary evidence was produced which established the AECL’s purpose in convening the Summit was to “to seek a path forward for the egg industry in a coordinated and consolidated fashion to ensure its profitable sustainability”.

In 2014, the ACCC commenced proceedings against AECL, three officers of the AECL, and two corporate entities. The ACCC alleged that each of the respondents was liable under s 76(1)(d) of the CCA because they had attempted to induce the egg producers at the Summit to make an arrangement, or enter into an understanding, to limit the supply of eggs in contravention of the prohibition on making a contract, arrangement or understanding which contains a cartel provision.

The Full Court of the Federal Court of Australia did not accept the proposition that the AECL attempted to induce a contravention of the cartel provisions. The Court noted:

*... trade associations and their officers may legitimately encourage their members to examine their profitability and to make production and pricing decisions in order to maintain profitability. Conduct of that kind, at least when directed to the decisions of industry participants in their own businesses and without any suggestion of cooperative action, does not amount to cartel conduct, or even an attempt to induce cartel conduct.*¹¹

This conduct in this case took place prior to the introduction to the concerted practices regime. The extent to which conduct of a similar nature would be subject to the concerted practices provisions is yet to be determined by the courts.

¹⁰ *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2017] FCAFC 152.

¹¹ *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2017] FCAFC 152, [107].

1.3.2. Investigatory powers relevant to approach to detecting and investigating hub-and-spoke arrangements

29. The ACCC takes an active approach to detecting and investigating hub-and-spoke arrangements. This approach is not distinguishable from the approach to other cartel investigations.

30. The *ACCC Immunity and Cooperation Policy for Cartel Conduct (Immunity Policy)*¹² is one of the ACCC's key strategies for detecting cartels and hub-and-spoke arrangements. Under the Immunity Policy, the first party to report cartel conduct to the ACCC may be eligible for civil and criminal immunity, subject to satisfying certain criteria. The ACCC is responsible for granting civil immunity, while the Office of the Commonwealth Department of Public Prosecutions (**CDPP**) is responsible for granting criminal immunity. The ACCC will, where relevant, make recommendations to the CDPP to grant criminal immunity subject to conditions.¹³

31. The ACCC also may also identify hub-and-spoke arrangements following complaints from whistleblowers. The ACCC's Cartels Branch and Commercial Construction Unit use an online portal which allows whistleblowers to contact the ACCC anonymously and communicate two-ways with an investigator about potential cartel conduct. The portal encrypts the information and removes the person's IP address so their identity is anonymous to the ACCC.

32. The ACCC has the power to compel a person to furnish information, produce documents or to appear before the ACCC to give evidence, provided the Chair of the ACCC has a reason to believe that the recipient of the request has information or materials relevant to an alleged contravention of the CCA.¹⁴

33. Where the ACCC has reasonable grounds for suspecting there is evidence on a premises that is relevant to a contravention of the CCA, it may apply to a magistrate for an order for a search warrant. Search warrants are particularly useful tools in the investigation of hub-and-spoke arrangements, or other anti-competitive conduct, which has an international element. This is because the CCA provides that if, when executing a search warrant, the ACCC officer believes on reasonable grounds that any data accessed by operating electronic equipment (including data not held at the premises) might contain relevant evidential material, the ACCC officer may make copies of the relevant documents or data. Importantly, 'data not held at the premises' may include overseas servers or cloud data of an international entity.

34. The ACCC uses other pro-active intelligence gathering and data assessment tools to monitor targeted industries and sectors.

¹² The Immunity Policy can be found online <https://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct-october-2019>

¹³ See also, Roundtable on challenges and co-ordination of leniency programmes – Note by Australia: [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2018\)22/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)22/en/pdf)

¹⁴ In the context of criminal cartel investigations, there are procedural limitations which must be considered prior to compelling individuals to give evidence.

2. The role of Vertical Restraints

2.1. Resale price maintenance

35. RPM in Australian law occurs when a supplier of goods or services (for example, a manufacturer or wholesaler) specifies a minimum price below which a reseller must not resell, or advertise for sale, those goods or services.

36. The prohibition of RPM in the Australian context is unique. RPM is a ‘per se’ breach of the CCA. This means that it is prohibited outright regardless of whether it has the purpose, effect or likely effect of substantially lessening competition. The relevant sections of the CCA which prohibit and define RPM are directed towards conduct engaged in by a supplier. The manner in which the RPM section of the CCA is drafted, with the focus on the supplier, means that RPM is only indirectly applicable to hub-and-spoke arrangements initiated by retailers. The anti-overlap provisions mean that retailers that acquiesce with a supplier’s requirements to engage in RPM conduct are not liable under the cartel regime.

37. In circumstances where a supplier engages in RPM in response to requests from retailers, the impugned conduct may resemble a hub-and-spoke agreement. In this scenario, the relevant retailer may be ordered to pay pecuniary penalties where it can be established that it induced, or counselled or procured, the supplier to engage in a contravention of the RPM provisions. If two or more retailers entered into a contract, arrangement or understanding, among themselves, to induce the supplier to impose RPM (e.g. to restrain other retailers), the conduct could be a cartel, although it would not be a hub-and-spoke arrangement. Similarly, if some retailers and the supplier agreed that the supplier would impose RPM, the conduct could be a cartel.

38. Under the CCA, it is possible to obtain protection from legal action for RPM by lodging a notification or authorisation application with the ACCC.¹⁵ The ACCC uses a public benefit test to assess applications for authorisation or notifications to engage in RPM.¹⁶ For example, in 2018 the ACCC allowed an RPM notification to stand when the applicant demonstrated the RPM was necessary to enable resellers to invest in facilities and staff necessary to provide better levels of pre- and post-sales retail services for the sale of sophisticated power tools.¹⁷

2.2. Exclusive dealing

39. In Australia, certain vertical non-price restraints are prohibited under an exclusive dealing provision in section 47 of the CCA. Exclusive dealing occurs where there is a condition imposed on the supply, re-supply or acquisition of goods or services, with the purpose, effect or likely effect of substantially lessening competition. This encompasses a range of tying conduct, including third line forcing and refusal to deal. As mentioned above,

¹⁵ Prior to November 2017, ACCC authorisation was the only way to obtain legal protection for RPM conduct. However, amendments to the CCA from November 2017, mean that it is now possible to obtain protection from legal action for RPM conduct by lodging a notification or applying for authorisation.

¹⁶ The first authorisation to engage in RPM conduct was granted in 2014. In 2018, the ACCC accepted the first notification to engage in RPM conduct.

¹⁷ Tooltechnic Systems (Aust) Pty Ltd - RPM20181 – 12 February 2018.

there is an anti-overlap provision that applies so that conduct which would constitute exclusive dealing will not be considered under the cartel provisions.

40. If a hub-and-spoke arrangement were pursued under the exclusive dealing provisions, both the ‘hub’ and ‘spokes’ could be liable as the supplier and acquirer of the goods or services.

41. In some cases, there are complexities distinguishing a hub-and-spoke arrangement from parallel exclusive dealing arrangements. Although not strictly a hub-and-spoke arrangement, because two competing parties communicated directly with each other and reached an agreement following communications to at least one of them from their supplier, the Oakmoore case study below is an example of where the ACCC initially pursued vertical arrangements involving two competitors as a cartel. The ACCC pleaded its case against the parties involved as cartel conduct, or in the alternative as exclusive dealing. One participant in the conduct admitted to making and giving effect to an anti-competitive agreement (rather than participating in cartel conduct, which the ACCC had pleaded). Although there was no judicial consideration on this point as the parties ultimately settled, the ACCC anticipated that the anti-overlap provisions would apply to deal with the conduct as a series of parallel exclusive dealing arrangements with a common party involved in both vertical arrangements.

Box 4. ACCC v Oakmoore Pty Ltd¹⁸

Oakmoore (trading as EGR) started manufacturing polycarbonate roof sheeting (polycarb) in 2008. Shortly after, EGR began negotiating to supply polycarb distributors, including Ampelite and Palram Australia (Palram). During negotiations, EGR threatened the existing suppliers, Ampelite and Palram, that if they did not enter into a supply agreement for a minimum guaranteed yearly volume of polycarb, EGR would sell directly to the retail market, thereby competing with the distributors.

Ampelite and Palram were concerned that they would lose sales to EGR and lose profit margins. As a result, Ampelite and Palram communicated directly with each other (knowing that the same threat was being made to the other) and verbally agreed that they would both enter into separate supply agreements with EGR on the basis that EGR would agree to refrain from supplying polycarb to commercial purchasers, so that EGR would not compete against them in the distribution market. These supply agreements included an arrangement to the effect that EGR would not supply or seek to supply polycarb directly to retail customers.

The ACCC instituted proceedings against EGR, Ampelite and Palram. Each respondent admitted that their conduct was in breach of section 47. Ampelite made a further admission that its arrangement with Palram prior to entering into their separate supply agreements constituted a breach of sections 45(2)(a)(ii) and 45(2)(b)(ii), which at the time contained the prohibition on anti-competitive agreements.

¹⁸ *Australian Competition and Consumer Commission v Oakmoore Pty Ltd* [2018] FCA 1472; *Australian Competition and Consumer Commission v Oakmoore Pty Ltd* [2018] FCA 1169; *ACCC v Oakmoore Pty Ltd* [2018] FCA 1169; *Australian Competition and Consumer Commission v Oakmoore Pty Ltd (No 2)* [2018] FCA 1170;

3. E-commerce

42. The ACCC has extensive experience addressing competition issues arising in the e-commerce context. The ACCC recently completed an inquiry into the impact of online search engines, social media, and digital platforms on competition in the media and advertising services markets (**Digital Platforms Inquiry**).¹⁹ The Digital Platforms Inquiry focussed on unilateral rather than collusive conduct and covered a broad range of issues, including privacy, intellectual property, media regulation and funding, and consumer protection. The findings of the Digital Platforms Inquiry will have significant implications for the detection, investigation, and enforcement of anti-competitive conduct in online markets and platforms more generally.

43. Based on a recommendation from the Digital Platforms Inquiry, a new digital platforms branch will be established within the ACCC. This new branch will engage in proactive detection of anti-competitive conduct in an online context, including cartels.

44. As a result of the proactive examination of the conduct of digital platforms completed during the Digital Platforms Inquiry, the ACCC has already commenced some investigations. One of the investigations involves a digital platform allegedly engaging in anti-competitive unilateral conduct.²⁰

45. The ACCC has experience taking enforcement action to address anti-competitive conduct in e-commerce. For example, in the proceedings initiated against Informed Sources Pty Ltd (**Informed Sources**) and several petrol retailers, the ACCC alleged that the arrangements between Informed Sources and the respective petrol retailers were likely to increase retail petrol price coordination and cooperation. In this example, set out below, Informed Sources can be considered the ‘hub’ and the petrol retailers can be considered the ‘spokes’.

Box 5. Case study: Informed Sources and others

Informed Sources operated an electronic retail price information exchange service (the Oil PriceWatch Service). Subscribers to the Oil PriceWatch Service provided retail petrol pricing data to Informed Sources at frequent, regular intervals and in return received collated data from other subscribers at the same frequency and level of detail.

The ACCC commenced an investigation because it was concerned that subscription to the Oil PriceWatch Service facilitated information sharing arrangements and non-rivalrous behaviour in the retail sale of petrol in Melbourne, Australia’s second largest city. The ACCC alleged that petrol retailers used the Oil PriceWatch Service as a near real time communication device in relation to petrol pricing. It was also alleged that Oil PriceWatch Service allowed petrol retailers to propose a price increase to their competitors and monitor the response to it. If, for example, the response is not sufficient, they could quickly withdraw the proposal. They could also punish competitors that have not accepted the proposed increased price

¹⁹ The Digital Platforms Inquiry was published on 26 July 2019: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

²⁰ Ibid, pp 38.

In 2014, the ACCC instituted proceedings in the Federal Court of Australia against Informed Sources and five petrol retailers. The ACCC alleged that the price information sharing arrangements between Informed Sources and the petrol retailers, had the effect or likely effect of substantially lessening competition in markets for the sale of petrol in Melbourne in contravention of section 45 of the Competition and Consumer Act 2010.

In 2015, the ACCC accepted court enforceable undertakings from Informed Sources and the petrol retailers. The undertaking from Informed Sources provided that it will not supply a petrol price information exchange unless it also makes available the retail petrol price information available to consumers and third party information service providers.

Several of the petrol retailers undertook not to enter into or give effect to any price information exchange services unless the petrol price information is made available to consumers and third party information services providers. Other petrol retailers undertook not to subscribe to the information exchange service.

46. The Flight Centre case demonstrates some of the complex issues surrounding an assessment of the competitive effects of vertical conduct in the context of e-commerce and changing distribution models.

Box 6. Case study: ACCC v Flight Centre Travel Group Limited²¹

Flight Centre, Australia's largest travel agent, obtained its revenue from commission from airlines for its travel arrangement services. However, with the rise in e-commerce, airlines increasingly recognised the benefits and opportunities of direct online sales to consumers. As a result of its 'Price Beat Guarantee' policy, Flight Centre was obliged to match cheaper fares offered by airlines direct to customers. In some cases, this resulted in Flight Centre forgoing commission from airlines.

The ACCC alleged that Flight Centre, in breach of section 45,²² attempted to enter into horizontal price-fixing arrangements with several airlines under which those airlines would not offer airfares directly (including over the internet) to the public at prices lower than those offered by Flight Centre. In some cases, Flight Centre accompanied this attempt with the threat of no longer offering flights operated by the airline if it refused to enter the agreements.

Flight Centre argued that as an agent of the airlines it could not be a competitor of the airlines. As such, a key issue in the case was whether Flight Centre was in competition with the airlines. This required consideration of the market in which competition took place, and whether an agent can be in competition with its principal.

The High Court of Australia (Australia's highest court) found that even though Flight Centre acted as an agent for certain international airlines, Flight Centre could still be in competition with those airlines because of the freedom to act that Flight Centre retained under the agency agreement. The majority of judges in the High Court reasoned that where an agent can exercise its own discretion in the pricing of the principal's goods or services,

²¹ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49.

²² In this case the conduct occurred under an earlier version of cartel law.

and where the agent is not obliged to act in the interests of the principal, it may mean that the principal and agent are in competition with each other.

The majority of the High Court held that Flight Centre was in competition with the airlines when it attempted to induce each airline to agree not to discount the price at which that airline offered international airline tickets directly to customers. The competition was in a market for the supply, to customers, of contractual rights to international air carriage via the sale of airline tickets. The High Court therefore found that Flight Centre had attempted to induce each airline to enter a price fixing agreement.

Flight Centre was ordered to pay pecuniary penalties totalling AUD \$12.5 million.²³

4. Guidance and compliance

47. The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading. One of the ways in which the ACCC promotes the legislative purpose is by publishing guidance for businesses on permissible conduct in vertical relationships. For example, guidance is available on anti-competitive agreements, concerted practices, RPM, and exclusive dealing.

48. As already discussed, under Australian law there is a clear demarcation between the treatment of horizontal and vertical anti-competitive conduct. Conduct that satisfies the legal test for vertical conduct, including RPM and non-price restraints such as exclusive dealing, would fall out of the scope of cartel conduct. In all such cases, apart from RPM, the conduct would be subject to the competition test of substantially lessening competition. For this reason, the ACCC's guidance on vertical relationships does not generally address the risks of horizontal collusion as a potential "side-effect" of conduct in vertical relationships, although the guidelines on concerted practices note that suppliers and distributors may engage in a concerted practice, depending on the nature of their involvement in the conduct.

49. The ACCC's role, as an independent government agency, is to investigate and enforce compliance with the CCA. Australian courts are responsible for interpreting the CCA, determining if a provision of the CCA has been contravened, and determining what, if any, remedy should be imposed.

50. Australia's competition laws recognise that many contracts, arrangements or other forms of cooperation between market participants benefit consumers and the Australian economy. For this reason, a competition test is a necessary element of several provisions of the CCA including misuse of market power, exclusive dealing, and the prohibition on anti-competitive agreements and concerted practices. In addition, authorisation and notification are also available for conduct that would contravene the Act but the public benefit outweighs the detriment. In such cases where the parties obtain an authorisation or lodge a notification, they are able to engage lawfully in the conduct.

²³ *Flight Centre Limited v Australian Competition and Consumer Commission* (No 2) [2018] FCAFC 53 (penalty judgment).