



# Competition Law: Local Government Risks

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# Key Risk Areas for Councils

- Council as communicator: misleading and/or deceptive conduct
- Council as supplier: consumer guarantees
- Council as co-operator: collective initiatives requiring authorisation
- Council as co-ordinator: inducing, “knowingly concerned”
- Council as victim: bid-rigging
- Council as subsidiser: NCP complaints

# Competition and Consumer Act

- A law that regulates relationships with:
  - customers
  - competitors
  - suppliers
- Encourages fair and ethical competition & efficiency in business
- Anyone can take action under this law, not just the ACCC

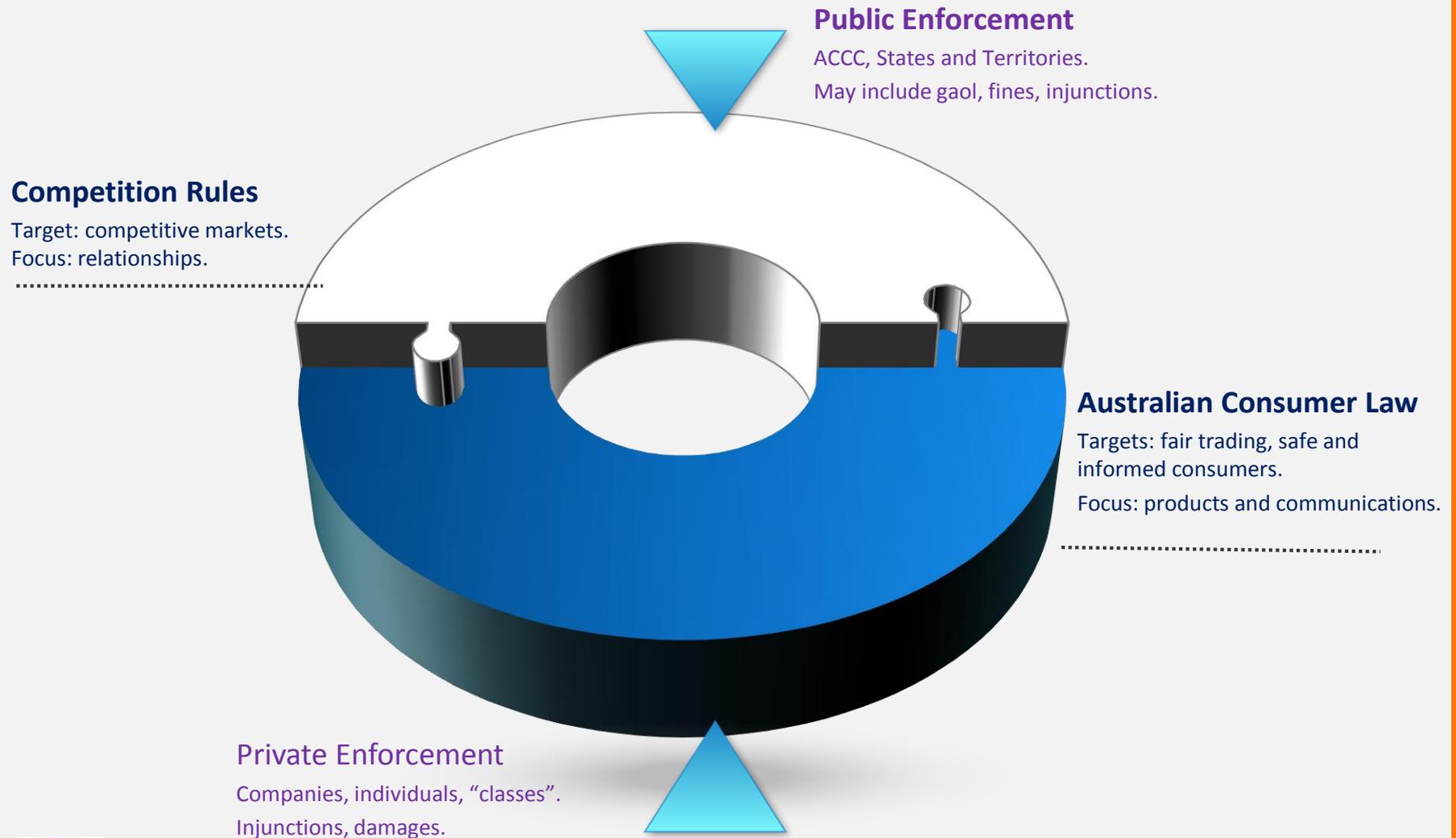
# Business?

Key considerations in “carrying on a business” include:

- whether the entity or authority carries on its commercial activities continuously rather than as a one-off activity; and
- whether its activities are conducted in a business-like manner.

Ultimately, the determination requires an assessment of the facts, circumstances and evidence in each case.

# Competition and Consumer Act



# Consequences of breach

## Australian Consumer Law

- Companies (per offence)
  - (Court) \$1.1 million, or
  - (infringement notice) \$10,200  
[\$102,000/\$2,040]
- Individuals (per offence)
  - \$220,000

## Competition rules

- Companies (per offence)
  - \$10 million or
  - 3 times gain or
  - 10% of turnover
- Individuals (per offence)
  - 10 years gaol and/or
  - \$500,000

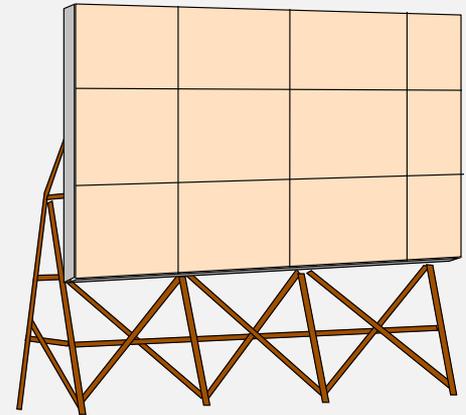
**Other consequences may be much more significant. Court Orders and/or negotiated settlements often include damages, restitutions, corrective advertisements, refunds, community service orders and compliance programs – all of these cost money. Then consider the legal costs and management/executive distraction.**

# Key Principles of Misleading Conduct

- In our **business activities**, we should not engage in conduct that is likely to mislead or deceive
  - intention is NOT an issue
  - whether anyone was actually misled is NOT an issue
- It's the overall impression on the **target audience** that counts
  - silence can be misleading - if there is a duty to speak
  - a prediction can be misleading - if there's no reasonable ground to make it

# What conduct can be misleading?

- The Australian Consumer Law is all about communication, not just advertising
- So misleading conduct can occur in any business communication, such as
  - customer bills
  - telephone conversations
  - business proposals
  - ... in fact, just about everywhere



# ACL: Some Recent Cases

- Product features
  - Coles, Australian origin signage/ “Baked Today” bread
  - Victoria Honey – infringement notice
  - Byron Bay Beer/ Maggie Beer/ Saskia Beer
- Consumer guarantees/warranties
  - Hewlett Packard \$3m penalty
  - Harvey Norman – franchisee penalties \$234,000 so far
- Door to door
  - Energy Australia, \$1.2 million penalty
  - Titan Marketing, \$750,000 penalty
- Pricing: Jetstar/Virgin– “drip” pricing, in court
- Free/ Bonus: Bet365
- Social media: Smirnoff\*

# Consumer Guarantees - Goods

- Acceptable quality
  - fit for all ‘common’ purposes
  - acceptable in appearance and finish
  - free from defects
  - safe
  - durable
- Fit for specified purpose
  - specified by supplier
  - specified by consumer
- Goods must match ...
  - description
  - sample
  - demonstration model
- Manufacturers/ importers must provide ...
  - spare parts
  - repair facilities
  - for a reasonable time

# Consumer guarantees - Services

- Due care and skill
  - acceptable level of skill or technical knowledge, and
  - all necessary care to avoid loss or damage
- Fit for any specified purpose
- Within a reasonable time (when no time is set)
- **PLUS** – *any representation by the supplier becomes a **consumer guarantee** (both goods and services)*

# Consumer guarantees - Remedies

- When there is a major failure, the consumer can
  - reject goods/ cancel services and get a refund
  - reject goods and get a replacement, or
  - keep goods/ service contract and ask for compensation for any drop in value
- Compensation for consequential loss
  - cost of the problem to the consumer
  - should put the consumer in the position they would have been in if guarantee met

# Compliance Tools for ACL

- Communications audit
  - Comprehensive map of external communications
  - Identification of critical points
  - Introduction of review/clearance measures
- Training for communicators
  - Often low-level staff
  - Also consider controls over external communicators, eg agencies
- Job aids such as scripts and manuals
- CULTURE
- COMPLAINTS

# Anti-competitive conduct



Rules prohibiting anti-competitive agreements & actions in business, including:

- price fixing
- market sharing
- boycotts
- resale price maintenance
- third-line forcing
- exclusive dealing
- misuse of market power

# Competition Law – the basics

- Competition
  - make decisions *independently*
  - don't use power/position to *reduce competition*
- Markets
  - product
  - geography
  - time
  - level of function
- 'Per se' contravention vs substantial lessening of competition



# Market Risks

- horizontal risks
  - collective actions of any sort
  - mergers
- vertical risks
  - unilateral action taking advantage of market power



# Competition Rules - Recent Cases

- **Sydney councils – “household cleanup” waste tender**
- **Melbourne councils – joint organic waste tender**
- **Egg cartel – in court**
- **Informed Sources (petrol) – in court**
- **Air freight cartel – \$98m penalties to date**
- **Flight Centre – \$11m penalties**
- **Coles behaviour to suppliers – in court**
- **CabCharge – \$14m misuse penalty**

# Price fixing



- A ‘contract, arrangement or understanding’ with the purpose, effect or likely effect of fixing prices
  - Note: “understanding” can be as little as a nod and wink
- Does not have to work, or to involve a specific price
- Can be authorised where there is public benefit



# Exclusionary agreements



- ‘Primary boycotts’ arise when a company agrees with a competitor not to supply (or buy from) particular entities
- Another form is ‘market sharing’, where competitors agree not to try to take customers from each other
- One form of this is collusive tendering or “bid rigging”

# Price fixing & boycotts

- Issue – **Benchmarking**
- Risk areas:
  - Saleyards
  - Function centres
  - Aquatic centres
- Issue – **User exclusion**
- Risk areas:
  - Tourist agencies
  - Function centres
  - Aquatic centres



# Exclusive dealing

*'conditional'  
contravention*

- Company supplies goods or services on condition that the purchaser will not take products from a competitor
- Subject to 'competition test', ie conduct is OK unless it has the purpose, effect or likely effect of substantially lessening competition in a market
- May apply to arrangements with suppliers and joint venturers

# Third line forcing



- Occurs when a company supplies goods/services on condition that a person takes other products from another supplier
- Can be 'notified'
- Raises risks when 'bundling' products

# 3LF & Exclusive Dealing Risks

- Risk areas:
  - Saleyards
  - Function centres
  - Aquatic centres



# Compliance Tools for Competition Rules

- Association register
- Education programs
- Disciplinary measures
  - Known to risk-exposed people
  - Actually imposed
- Legal advice available, clear triggers to obtain it
- CULTURE
- COMPLAINTS



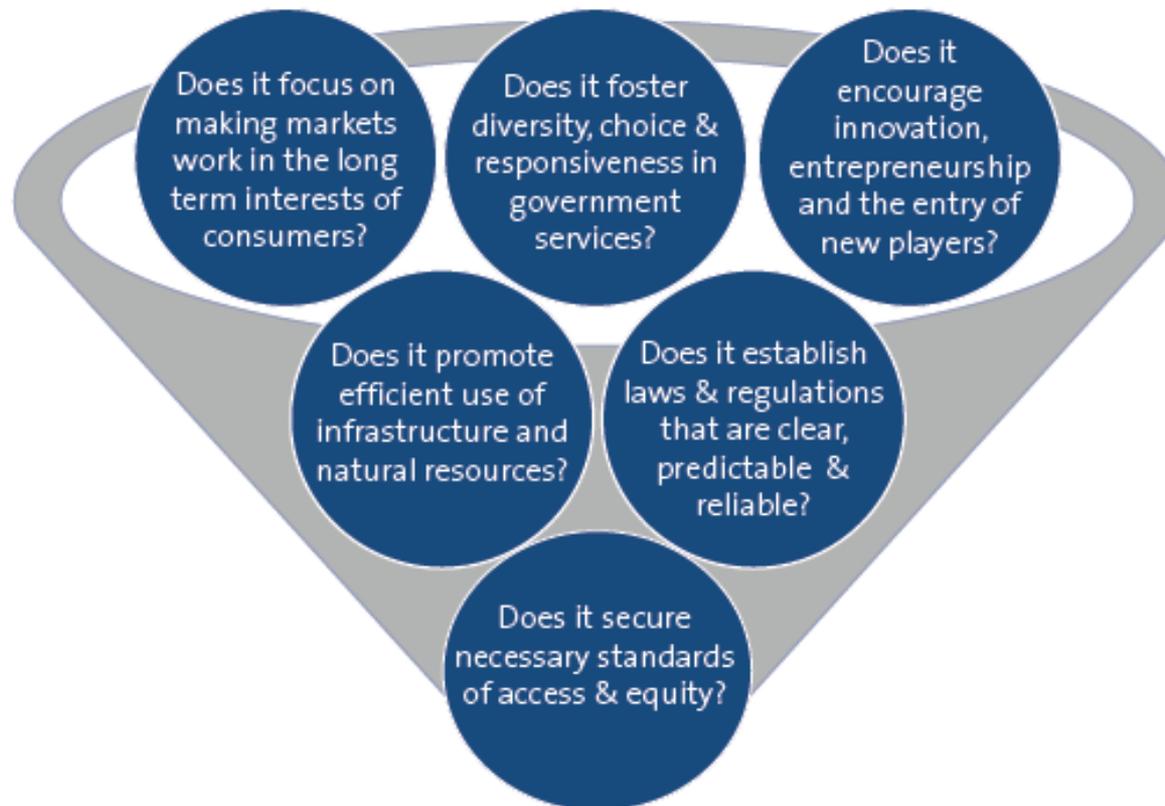
Supportive  
Culture

# Harper Review of Competition Policy

Both the world and Australian economies have changed significantly since the Hilmer Review of the 1990s.



We have assessed Australia's competition policy to see if it is still 'fit for purpose'.



# Harper Review of Competition Policy

We recommend changes in three main areas.

## COMPETITION POLICY

### Needs reinvigorating:

- competition principles should apply to all activities of government
- review regulations restricting competition
- 7 priority reform areas covering new and unfinished business

## COMPETITION LAWS

### Reforms to enhance effectiveness:

- reformulate s46 to protect competition
- simplify and clarify some provisions
- streamline approval processes
- access to remedies

## COMPETITION INSTITUTIONS

### A gap exists in the competition framework:

- a new national competition reform body to replace the NCC
- a new governance structure for the ACCC
- a separate access & pricing regulator

Consultation runs until 17 November 2014



Thank you for your time and energy



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