

# AUSTRALIAN JOURNAL OF COMPETITION AND CONSUMER LAW

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## EDITORIAL

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## ARTICLES

**Agents as Competitors? The Implications of ACCC v Flight Centre for Dual Distribution** – *Andrew McClenahan*

In *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd*, a majority of the High Court held for the first time that an agent could be a competitor of its principal under Australia’s cartel laws. French CJ prudently observed in his dissenting judgment that the approach of the majority “opens the door to an operation of the Act which would seem to have little to do with the protection of competition”. This article expands upon the Chief Justice’s concerns by analysing how the decision has fundamentally redefined the way in which agency law interacts with competition law in the context of dual distribution arrangements. The article concludes that legislative reform is warranted to attenuate the serious risk of characterising dual distribution arrangements as cartel conduct, given such arrangements are commonly pro-competitive. .... 235

**The Challenge of Applying s 47 of the Competition and Consumer Act in Cases Based on Purpose** – *Justin Oliver*

Recent amendments have highlighted the importance of understanding both the purpose and the effect of conduct in order to assess compliance with the *Competition and Consumer Act 2010* (Cth). In particular, the analysis of purpose, independently of effect, may play an increasingly important role. Cases since the turn of the century demonstrate that conduct can have the purpose of substantially lessening competition, even in markets that show signs of workable competition. This article analyses the principles from such cases, and considers the challenges that emerge when they are applied to certain conditions, caught by s 47 of that Act, which necessarily restrict competition between the person imposing the condition and the person upon whom it is imposed. While such conditions are not necessarily unlawful, a careful study of their purpose, before they are imposed, is necessary, and parties should consider notification under Pt VII of the Act if a proscribed purpose might be inferred. .... 252

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