

## Syndicated loans – Australian competition law primer

### Syndicated loans are on the radar

Syndicated lending is a well-established and critical way for banks to share risk in financing larger or riskier projects. However, syndicates also involve otherwise competing banks talking to each other about the terms of the financing, sometimes with the potential to reduce competition between them.

On the heels of a high profile criminal cartel case launched against three major financial institutions and individuals last year, the financial services sector has been identified as a key focus area for the Australian Competition and Consumer Commission (**ACCC**) in 2019. A Financial Services Unit has been established to undertake regular inquiries into specific financial competition issues.

Syndicated lending processes may well feature in the ACCC’s consideration, particularly given the recent release by the European Commission of its final report on loan syndication, and its impacts on competition in credit markets (**EC Report**). The report highlights certain practices that could give rise to competition risks, involving the close cooperation or potentially collusive behaviour of syndicate members. Our firm’s detailed analysis of the EC Report can be accessed [here](#).

Whilst the EC Report relies on European precedent and data, many of the issues raised have global relevance. Below we summarise the findings of the report and apply them to the Australian banking sector.

### Australian context

Australian competition law prohibitions		
Cartels		Anti-competitive conduct
Contracts, arrangements or understandings between competitors		Contracts, arrangements, understandings or concerted practices
<ul style="list-style-type: none"> <li>Price fixing</li> <li>Market / customer allocation</li> </ul>	<ul style="list-style-type: none"> <li>Restricting output</li> <li>Bid rigging</li> </ul>	With the purpose or effect of substantially lessening competition – e.g. price signalling

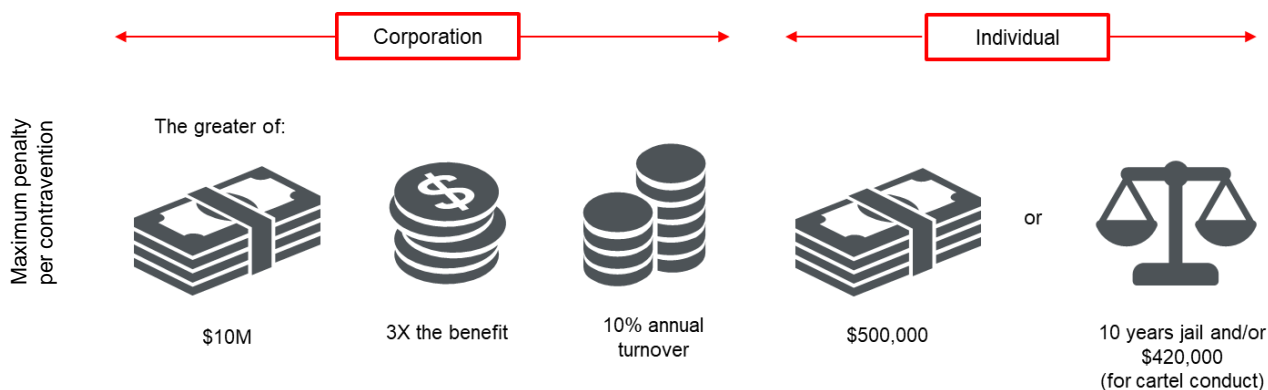


Competition law risks can arise at various stages of the loan syndication process.

Potential exposure areas	
<b>Before selection of the syndicate</b>	<u>Market soundings</u> : At the pre-bid stage, any exchange of information can impact the competitive outcome of the bidding process, as it has the potential to remove uncertainty between competitors. However, where the level of liquidity and contention to lend is high, the likelihood of anti-competitive conduct occurring is lessened.
<b>After syndicate selection</b>	<u>Post-mandate collusion</u> : While the EC Report remarked that this risk is relatively low, it raises a competition risk where multiple interactions between lenders on transactions over time can mean that lenders may be able to observe other’s strategies. It was noted that joint discussions between lenders post-mandate in relation to loan terms should be limited to settling the loan documentation and syndication strategy to avoid collusion. The risk is higher where an unsophisticated borrower is involved or where the market is concentrated.

Potential exposure areas	
<b>End of syndicate</b>	<p><u>Refinancing / anticipated refinancing</u></p> <p>Caution must be taken not to pre-empt or reduce the competitive process in the lead up to refinancing. Examples may include:</p> <ul style="list-style-type: none"> <li>• Two or more syndicate members agree to ‘oust’ another bank from the syndicate in order to further their own interests in the next round; or</li> <li>• Agreement between banks on an existing panel about pricing / terms to be proposed, before the syndicate for the refinancing is decided.</li> </ul> <p><u>Refinancing in conditions of default:</u></p> <p>Discussions around restructuring in the event of default are performed collaboratively by syndicate members, potentially generating efficiencies but also increasing the risk of coordination.</p>
<b>Syndicate as a forum for other anti-competitive behaviour</b>	<p><u>Allocation of ancillary services across banks, and the pricing of such services</u></p> <p>Banks may make provision of ancillary services a condition of the loan, which may be sub-optimal for borrowers/sponsors. Where banks have market power, this could be viewed as anti-competitive bundling or tying.</p> <p><u>Discussing / agreeing pricing and terms after selection of the syndicate but in relation to financing arrangements separate to the syndicate</u></p> <p>There is a cartel risk where two or more syndicate members agree pricing / terms, outside the context of negotiations in the sanctioned syndicate. Even if no understanding is reached, sharing competitively sensitive information in relation to other financing arrangements should not take place as this may reduce competition.</p>

### Significant penalties can apply



Syndicating lending is a fundamental activity in markets around the world. The competition law risks are usually navigable, especially if members and potential members of the syndicate follow certain rules and appropriate safeguards are in place. **Please contact us to learn more.**

### Contact

**Claire Forster** | Partner  
 Norton Rose Fulbright Australia  
 claire.forster@nortonrosefulbright.com  
 Tel +61 2 9330 8168

**Nick McHugh** | Partner  
 Norton Rose Fulbright Australia  
 nick.mchugh@nortonrosefulbright.com  
 Tel +61 2 9330 8028

The above is an outline of key competition law exposure points. It is not an exhaustive explanation of the applicable laws. Many thanks to Madeline Begg-Cotter and Andrew Pattinson for their assistance in preparing this note.