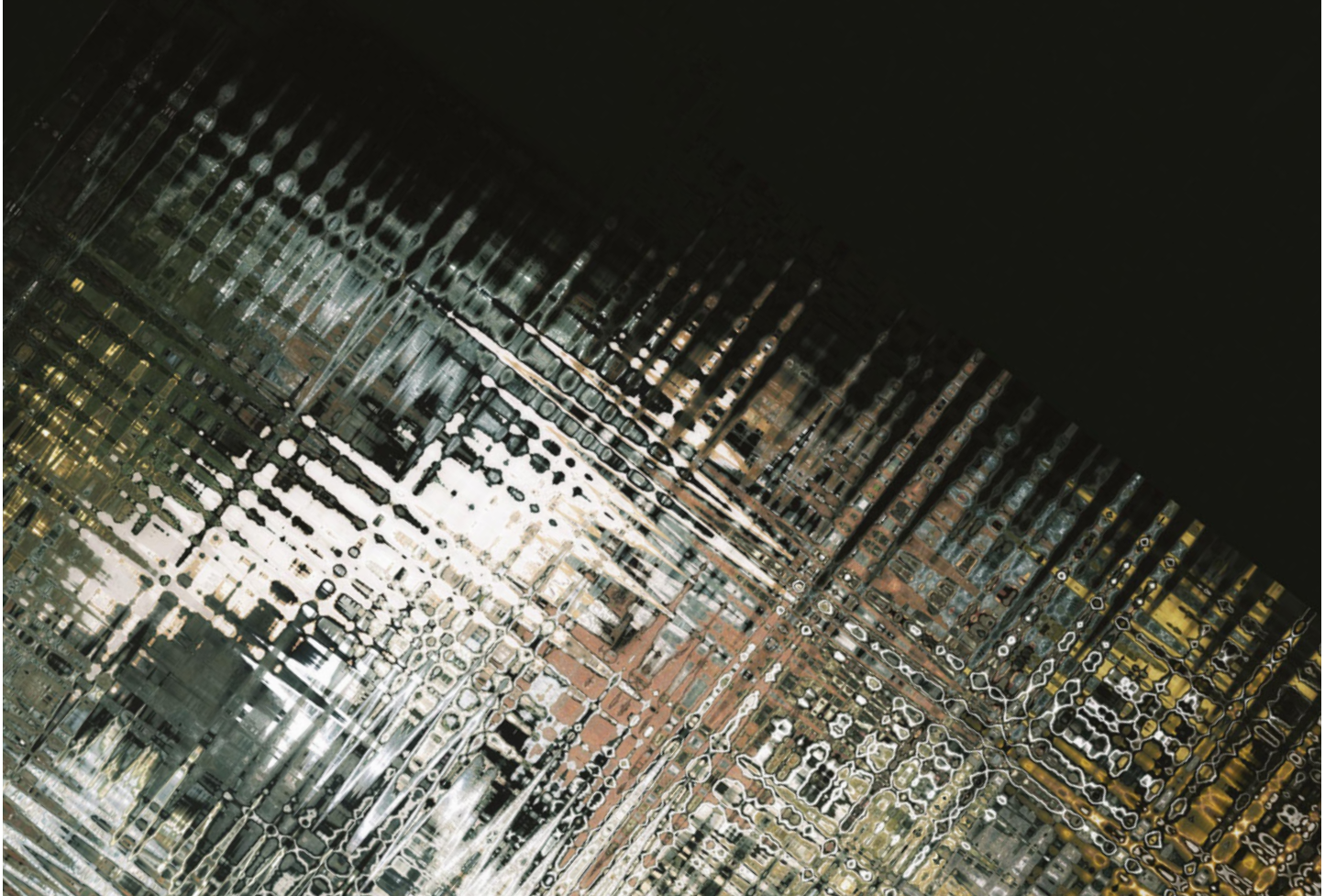




The Government's proposed amendments to Australia's competition laws



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MISUSE OF MARKET POWER (s46)

- > Prohibits any conduct engaged in by a firm with substantial market power that has the purpose, effect or likely effect of substantially lessening competition in a market.
- > Removes the specific prohibition on below cost pricing for an anti-competitive purpose by a firm with substantial market share.
- > Removes the list of mandatory factors contained in the Exposure Draft Bill that were intended to guide a court in determining whether conduct is pro-competitive or anti-competitive.
- > Incorporates a process for seeking ACCC authorisation for conduct which may amount to a 'misuse of market power'.
- > The new misuse of market power prohibition will not come into effect until the new ACCC authorisation process comes into effect.

Implications:

- The Government considers removal of the mandatory factors will reduce complexity and uncertainty. However, the lack of any legislative guidance on how to interpret the new prohibition may not be helpful for businesses seeking to comply.
- Aligning the commencement date of s46 and the ACCC authorisation process will mean that if the new authorisation laws do not commence, the new s46 prohibition will not come into effect. The Bill providing for the ACCC authorisation process for s46 matters was introduced into the House of Representatives on 30 March 2017.



MERGERS

- > Combines the current unused ACCC formal merger clearance process with the Australian Competition Tribunal authorisation process for mergers.
- > The ACCC will approve a merger if it does not substantially lessen competition or the public benefits outweigh the detriments.
- > The Tribunal may review a determination of the ACCC and affirm, set aside or vary the determination.
- > In its review, the Tribunal can only have regard to information referred to in the ACCC's reasons and information provided by and to the ACCC, unless the information was not in existence at that time.
- > The ACCC and Tribunal will be subject to strict timelines.
- > The form of merger authorisation application may require a court enforceable undertaking that the applicant will not complete the acquisition while the ACCC is considering it.

Implications:

- Most merger clearances are likely to continue to use the flexible informal clearance route.
- However, recently there have been a number of mergers authorised directly by the Tribunal.
- These mergers will now need to be assessed by the ACCC under the revised formal clearance process with the option to seek review of the ACCC's decision by the Tribunal.
- If the process for obtaining formal clearance is simplified, there is greater scope for more mergers to use this process, although the review by the Tribunal is limited.



CARTELS & JOINT VENTURES

- > Narrows the reach of the cartel provisions to conduct in trade or commerce (ie conduct in Australia or between Australia and places outside of Australia).
- > Expands the exception for JVs to:
 - include JVs in an arrangement or understanding (not just contracts as is the current position); and
 - include JVs for the acquisition of goods or services (currently limited mainly to JVs for production and/or supply).
- > Narrows the exception for JVs so that it applies only to:
 - cartel provisions that are both for the purposes of the JV and reasonably necessary for undertaking the JV; and
 - JVs that are not carried on for the purpose of substantially lessening competition.
- > Increases the standard of proof that a defendant must discharge in relying on the exception to the balance of probabilities.
- > No longer provides for any expansion of the vertical restraint exception in the cartel laws (the current exception will be retained).

Implications:

- Although the JV exception will apply to a broader range of JVs, it may be harder to rely on the exception. The cartel provision must not only be for the purpose of the JV, it must also be reasonably necessary. This second limb is intended to narrow the exception but it is unclear how this will be applied.
- JVs found to be for the purpose of substantially lessening competition will be subject to the cartel provisions.



CONCERTED PRACTICES

- > Prohibits 'concerted practices' that have the purpose or effect of substantially lessening competition. The prohibition will apply to all industry sectors.
- > Repeals the prohibition on 'price signalling' (which currently only applies to the banking sector).
- > The EM defines a 'concerted practice' as: 'any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition'.

Implications:

- Businesses should focus on how they interact with their competitors in the light of the new prohibition, which will apply to lesser forms of co-ordination than is currently prohibited (the prohibition currently only captures contracts, arrangements or understandings).
- The proposed definition of 'concerted practice' is intentionally broad and will likely capture a wide range of conduct.
- The examples contained in the EM reflect a strict approach as to what may amount to a 'concerted practice', capturing, for example, one-off interactions and one-way exchanges of information.
- Important to remember that the prohibition only applies where the 'concerted practice' has the purpose or effect of substantially lessening competition.



ACCESS

- > For access to be mandated, a number of criteria need to be satisfied.
- > Amends the first criterion so that access on reasonable terms must promote a material increase in competition compared to the current extent of access provided (criterion A).
- > Amends the second criterion to be a 'natural monopoly' test which is satisfied where total foreseeable market demand for the declaration period could be met 'at least cost' by a single facility compared to any two or more facilities (criterion B). Also permits a facility, which is at capacity, to be declared if it is reasonably possible for it to be extended or expanded to meet total foreseeable demand.
- > Amends the 'public interest' criterion to ensure that services are only declared where it would promote the public interest (making it harder for an access seeker to satisfy this criterion).

Implications:

- Greater clarity for infrastructure owners and access seekers on the application of the declaration criteria.
- Criterion A used to be easy for access seekers to meet. Now access providers may be able to more readily resist declaration. This is because the comparison is between competition with regulated access, to competition with the level of access actually being provided (rather than 'no access' even if access is in fact being provided).
- Criterion B will now, on balance, be easier for access seekers to meet by changing the threshold from a test based on private profitability to a 'natural monopoly' test.



THIRD LINE FORCING & RESALE PRICE MAINTENANCE

- > Makes the third line forcing prohibition subject to a competition test. Once the Bill is passed, a party can engage in third line forcing unless it substantially lessens competition.
- > Introduces notification for resale price maintenance, which will be allowed in circumstances where it is pro-competitive and beneficial for consumers.
- > Clarifies that resale price maintenance between related bodies corporate is not prohibited.

Implications:

- At last! The need to notify most third line forcing conduct will cease. Only conduct that raises genuine competition issues will be subject to the prohibition.
- The new provision for notification of resale price maintenance will make it easier for businesses to obtain exemption in circumstances where it is pro-competitive and beneficial for consumers (eg, where it incentivises retailers to invest in training).

> Contacts

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