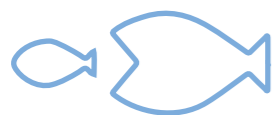


# Harper reforms become law: what you need to know



## MISUSE OF MARKET POWER

- > 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 in which the firm directly or indirectly supplies or acquires goods or services.
- > Removes the requirement for the ACCC to demonstrate a causal link between the firm's conduct and its market power (the 'taking advantage' test).
- > Removes the specific prohibition on below cost pricing for an anti-competitive purpose by a firm with substantial market share.
- > Incorporates a process for seeking ACCC authorisation for conduct which may amount to a 'misuse of market power'.

### Implications:

- The new prohibition applies to a broader range of conduct and firms which have substantial market power will need to take care when undertaking commercial strategies which have the potential to affect the ability of rivals to compete e.g. buying up essential inputs or services, bundling, pricing below or close to cost, cross-subsidisation, price discrimination, loyalty rebates, or refusing to supply a competitor.
- The Harper reforms also introduce the option to seek authorisation to undertake conduct that may otherwise contravene s46. The firm seeking authorisation will need to demonstrate that the conduct results in public benefits that outweigh any public detriments arising from the conduct.



## MERGERS

- > Maintains the informal clearance process but combines the unused ACCC formal merger clearance process with the Australian Competition Tribunal merger authorisation process.
- > Under the new combined process, the ACCC will approve a merger if it does not substantially lessen competition or the public benefits outweigh the detriment to the public.
- > 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 to the ACCC, unless the new information clarifies the information that was before the ACCC or was not in existence at the time.
- > The ACCC and Tribunal processes will be subject to strict timelines.

### Implications:

- Authorisation by the Tribunal had become a popular option in recent years. These mergers will now need to be assessed by the ACCC in the first instance, with the option to seek review of the ACCC's decision by the Tribunal.
- Most merger parties are likely to continue to use the flexible informal clearance route, which generally works well.
- Some merger parties may seek authorisation from the ACCC, particularly in complex mergers where the competition arguments may be finely balanced. This option may be attractive as merger parties can argue the merger does not substantially lessen competition or results in a net public benefit, whereas previously authorisation was only available on public benefits grounds.
- Merger parties seeking authorisation should bear in mind that any review by the Tribunal will be based primarily on information provided to the ACCC. Accordingly, in contentious mergers, it may be important to provide additional materials to the ACCC up front such as economic reports and witness statements.



## 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).
- > Simplifies the cartel provisions by removing the prohibition on exclusionary provisions and amending the cartel prohibition on output restrictions so it covers acquisitions.
- > Expands the exemption for JVs to:
  - include cartel provisions contained in JV arrangements or understandings (previously limited to JV contracts); and
  - include JVs for the acquisition of goods or services (previously limited to JVs for production and/or supply).
- > Narrows the exemption 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 JV exemption to the balance of probabilities.

### Implications:

- The repeal of the specific prohibition on exclusionary provisions will reduce unnecessary complexity in the law.
- Although the JV exemption will apply to a broader range of JVs, it may be harder to rely on the exemption. JV parties will need to consider whether the provision they wish to include is *reasonably necessary* to undertake the JV or whether a less restrictive provision could achieve the same end.
- 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 applies to all industry sectors.
- > Repeals the prohibition on 'price signalling' (which only applied to the banking sector).
- > The Explanatory Memorandum 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 will need to be even more vigilant about interactions with competitors in light of the new prohibition, which applies to lesser forms of coordination (the cartel provisions only capture contracts, arrangements or understandings).
- The definition of a 'concerted practice' in the Explanatory Memorandum is intentionally broad and will likely capture a wide range of conduct across all sectors.
- The examples contained in the Explanatory Memorandum reflect a strict approach as to what may amount to a 'concerted practice', capturing, for example, one-off interactions, one-way exchanges of information and exchanges between non-competitors in some circumstances.
- If staff receive unsolicited competitively sensitive information from a competitor, it will be important to expressly reject the approach and not rely upon or share the information more broadly.
- It is important to remember that, unlike in the EU, the prohibition only applies where the 'concerted practice' has the purpose, effect or likely effect of substantially lessening competition.



## ACCESS

- > Amends the first criterion so that access on reasonable terms, as a result of declaration, 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 (previously criterion F, now criterion D) 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).
- > If the Minister has not made a decision within 60 days, he or she will be taken to have accepted the NCC's recommendation (currently, the Minister is taken to have not declared the service if he or she does not make a decision within this time frame).

### Implications:

- Greater clarity for infrastructure owners and access seekers on the application of the declaration criteria.
- Criterion A previously set a low threshold that was 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 and without regulated access. This new test takes into account the level of access currently being provided. Previously, criterion A compared competition in dependent markets with and without an ability to access the service at all (even if some access was already 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.
- Criterion D will be harder for access seekers to meet because declaration must promote the public interest (previously it was sufficient if declaration was not contrary to the public interest).



## THIRD LINE FORCING & RESALE PRICE MAINTENANCE

- > Makes the third line forcing prohibition subject to a competition test. A party may now engage in third line forcing unless it has the purpose, effect or likely effect of substantially lessening 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 to the ACCC will now cease. Only conduct that raises genuine competition issues is subject to the prohibition and requires notification.
- The exemption for resale price maintenance for related bodies corporate allows parents to control prices of their subsidiaries without needing to seek authorisation.
- The option to notify will make it easier for businesses to obtain immunity in circumstances where retail price maintenance is pro-competitive and beneficial for consumers.