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Harper reforms become law: implications for business

Key issues for General Counsel

Significant changes to Australia's competition laws commenced on 6 November 2017. The changes implement key recommendations of the Harper Panel's review of Australian competition law and policy. The Allens Competition, Consumer & Regulatory team look at the key changes and the implications for your business.

1. Misuse of market power

The boldest reform is to s46, the prohibition on misuse of market power. The *Competition and Consumer Act 2010* (Cth) (***CCA***) now 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.

There are two key changes to be aware of.

- First, the prohibition is expanded so that it captures any conduct that has the purpose, effect or likely effect of substantially lessening competition. Previously, the law prohibited firms from using their market power for one of three proscribed purposes: damaging competitors, preventing market entry or deterring competitive conduct. This change is intended to refocus the prohibition on harm to the competitive process rather than on harm to individual competitors.
- Second, the 'taking advantage' test is removed which means there is no need for any causal connection between the conduct and the firm's market power. The ACCC strongly advocated for this change on the basis that enforcement was hindered by the need to establish such a causal connection.

An additional change is that the substantial lessening of competition must now take place in a market in which the company supplies or acquires goods or services directly or indirectly. The Explanatory Memorandum suggests such supply could be through agents or distributors depending on the level of influence the corporation has. It remains to be seen how broadly this will be interpreted.

Parliament did not adopt the list of mandatory factors contained in the exposure draft legislation which were intended to guide a court in determining whether conduct is pro-competitive or anti-competitive. However, companies now have the option to seek authorisation for conduct that may otherwise contravene s46. The company seeking authorisation will need to demonstrate that the conduct results in public benefits that outweigh any public detriments arising from the conduct.

IMPLICATIONS

The new prohibition has the potential to capture a far broader range of conduct than the previous prohibition. Companies with substantial market power will need to incorporate appropriate compliance protocols for assessing commercial strategies which have the potential to affect competitors and competition. This includes carefully assessing and documenting how a commercial strategy may impact competitors or new entrants and developing and documenting a clear rationale for the strategy, including the extent to which it will enhance efficiency, innovation, product quality and price competitiveness.

Conduct which could potentially raise risks includes:

- buying up essential inputs or services;
- bundling products or services;
- pricing below or close to cost or 'loss leader pricing';
- cross-subsidisation;
- price discrimination;
- margin squeezing;
- loyalty rebates; and
- refusing to supply a competitor.

Section 46 now more closely resembles the prohibition in the EU contained in Article 102 TFEU on abuse of dominance. Australian courts are yet to endorse the principles emerging from the EU case law. However, companies may benefit from familiarising themselves with the guidance and principles that apply to Article 102 TFEU.

2. Mergers

The Harper reforms maintain the popular ACCC informal merger clearance process and combine the formal ACCC clearance process with the Australian Competition Tribunal merger authorisation process. Under the combined process, the ACCC will now be the initial arbiter of authorisation applications and parties dissatisfied with the outcome will have the option of a full merits review in the Tribunal. This removes the option for merger parties to seek authorisation directly from the Tribunal.

The ACCC now has the power to authorise a proposed merger or acquisition if it is satisfied that:

- the transaction will not, or is unlikely to, result in a substantial lessening of competition; or
- the public benefits of the transaction outweigh any lessening of competition.

The ACCC will have 90 days to determine the application (extended to 120 days if new information is admitted, see below). This time frame, may be extended by a further 90 days if the applicant agrees in writing prior to the end of the initial period. The ACCC will be deemed to have refused the application if the applicant has not agreed to an extension and the ACCC has not issued a determination.

The Tribunal will have the power to review ACCC decisions by affirming, setting aside or varying the ACCC determination. The scope of the Tribunal's review is limited to the information before the ACCC (subject to the Tribunal being able to consider new information it is satisfied was not in existence at the time of the ACCC's determination or information sought by the Tribunal to clarify information before the ACCC).

IMPLICATIONS

Direct authorisation by the Tribunal had become a popular option in recent years. The Tribunal granted authorisation in all three of the applications that proceeded to a final determination and in three out of four cases the parties had originally sought informal clearance from the ACCC.

Following the ACCC's recent appeal in relation to the Tabcorp/Tatts authorisation decision, the Federal Court has clarified the test that should be applied in a merger authorisation context. First, when considering competition related public detriments, any lessening of competition is relevant (it need not be substantial). This can be contrasted to the informal merger clearance process where only a substantial lessening of competition is relevant.

Second, and more positively for merger parties, internal efficiencies such as cost savings and revenue increases are recognised public benefits. As with any other claimed benefit, internal efficiencies are to be assessed as part of the overall balancing exercise and it is not necessary to assign a specific weighting to each claimed benefit.

In practice, many merger parties will continue to use the flexible informal clearance route rather than authorisation. However, now that the Tribunal is no longer a 'back up' option, we may see an increase in authorisation applications from the outset, particularly in complex mergers where the competition arguments are finely balanced. It may also be attractive that parties can apply either on the basis that the merger does not substantially lessen competition or on public benefits grounds.

However, 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 data, business records, economic reports and witness statements to ensure that the Tribunal can take these materials into account during any subsequent review.

3. Cartels and joint ventures

The Harper reforms simplify and amend the scope of Australia's cartel laws in a number of ways.

First, the prohibition on **exclusionary provisions** has been repealed. To address any resulting gap in the law, the prohibition on output restrictions has been extended to include acquisitions so as to capture the same conduct previously dealt with under the exclusionary provisions prohibition.

Second, the Harper reforms narrow the **jurisdictional reach** of the cartel laws by introducing a requirement that the conduct be in 'trade or commerce', which is defined to mean trade or commerce within Australia or between Australia and places outside Australia.

Third, the exemption for **joint ventures** is expanded so that it applies to:

- cartel provisions contained in joint venture arrangements and understandings (the exemption is currently limited to joint venture contracts);
- joint ventures for production, supply and acquisition of goods or services (the exemption is currently limited to production or supply joint ventures).

However, the Harper reforms introduce additional requirements that narrow the joint venture exemption in two respects. Previously, to rely on the exemption, it was necessary to show that the cartel provision was for the purpose of the joint venture. Parties will now also bear the burden of proving, in addition, that:

- the cartel provision is reasonably necessary for undertaking the joint venture; and
- the joint venture is not carried on for the purpose of substantially lessening competition.

IMPLICATIONS

The repeal of the specific prohibition on exclusionary provisions will reduce unnecessary complexity in the law.

Although the joint venture exemption will apply to a broader range of joint ventures, it may be harder to rely on the exemption for two reasons.

- First, joint venture parties will now need to turn their mind to whether the provision they wish to include is reasonably necessary to undertake the joint venture or whether a less restrictive provision could achieve the same end. It is unclear what this will mean in practice but in the United States and New Zealand the regulator has looked at whether a less restrictive provision could achieve the same commercial outcome.
- Second, parties will be unable to rely on the defence if their joint venture is found to have the purpose of substantially lessening competition. While joint venture parties have always had to consider whether their arrangement could amount to an anti-competitive contract, arrangement or understanding under s45 CCA, the reforms mean that an anti-competitive joint venture may now expose the parties to criminal sanctions under the cartel provisions. Parties should carefully assess and document the commercial rationale for their joint venture, including the extent to which the joint venture introduces a new competitor to the market or results in innovation or efficiencies. Parties should also consider the extent to which the joint venture may impact on competitors or new entry.

4. Price signalling and concerted practices

The Harper reforms repeal the price signalling prohibitions, which were introduced in 2011 and have never been enforced. In their place, the Harper reforms introduce a prohibition (which applies across all sectors) on 'concerted practices' that have the purpose, effect or likely effect of substantially lessening competition. The CCA does not contain a definition of a concerted practice, however, the Explanatory Memorandum defines the concept 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

The concept of concerted practices is well known in the EU and its Member States and is used to regulate the sharing of competitively sensitive information between competitors. It is likely that it will be used in a similar way in Australia. However, there is an important distinction between the Australian and EU regimes. In the EU, concerted practices are subject to an 'object' analysis, whereby certain forms of conduct are deemed to restrict competition and there is no need to demonstrate an anti-competitive effect on the market (although there is the potential to put forward an efficiency defence). By contrast, in Australia, the prohibition will only apply to conduct which has the purpose, effect or likely effect of substantially lessening competition.

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. A company which receives unsolicited commercially sensitive information from a competitor may be at risk of engaging in a concerted practice unless the company expressly rejects the competitor's approach and does not use or circulate within their organisation the information received.

Under the previous law, the ACCC lost a number of enforcement actions on the basis that the court was not satisfied there was a contract, arrangement or understanding. In October 2017, the Full Federal Court dismissed the ACCC's appeal against the Federal Court's decision in relation to an alleged cartel in the egg industry. In that case, the Full Federal Court held that a unilateral 'call to action' which lacked any reciprocal obligations was not sufficient to amount to a contract, arrangement or understanding. The ACCC will likely now argue that this type of conduct amounts to an anti-competitive concerted practice.

Businesses will need to be even more vigilant about dealing with competitors (for example, in joint ventures, trade association meetings etc) or disclosing commercially sensitive information (for example, in press or analyst briefings or to trade associations). It may be necessary to review existing policies and procedures on information exchanges to ensure they minimise the risk of engaging in a concerted practice.

5. Third line forcing and resale price maintenance (*RPM*)

The Harper reforms amend the prohibition on third line forcing so that the practice is now subject to a competition test, consistent with other types of supply and acquisition restrictions. Third line forcing is now only prohibited where it has the purpose, effect or likely effect of substantially lessening competition and no longer involves an automatic breach of the CCA.

RPM is now permitted if it occurs between related bodies corporate. In addition, parties may now notify RPM to the ACCC as an alternative to seeking authorisation. Notified conduct will be immune from prosecution unless the ACCC objects to the notification within 60 days.

IMPLICATIONS

The need to notify most third line forcing conduct to the ACCC will now cease. Only conduct that raises genuine competition issues will be subject to the prohibition and require notification. This reform is a welcome development and long overdue.

The exemption for related bodies corporate for RPM is also overdue and allows parents to control prices of their subsidiaries without needing to seek authorisation. This will align RPM with the approach taken in s45 on anti-competitive agreements and s47 on exclusive dealing.

The option to notify will make it easier for businesses to obtain immunity in circumstances where RPM is pro-competitive and beneficial for consumers. Notification involves filing a simpler submission and the timeframes are considerably shorter than for authorisations (60 days versus 6 months).

6. Exemption and authorisation

The Harper reforms simplify the authorisation procedures under which parties can gain exemption for particular arrangements. The principal change is that the ACCC is now empowered to authorise all conduct (excluding cartel conduct, secondary boycotts and RPM) if it is satisfied that the conduct meets either of two tests: the conduct is unlikely to substantially lessen competition; or the conduct is likely to result in a net public benefit. Previously, the ACCC was only able to grant an exemption if it was satisfied that the conduct would result in a net public benefit. Cartel conduct, secondary boycotts and RPM will continue to be subject to one authorisation test only (net public benefit test).

The Harper reforms also insert a provision which empowers the ACCC to create class exemptions or 'safe harbours' for particular kinds of conduct. The ACCC will have the power to determine that one or more specified provisions of the CCA do not apply to conduct of a kind specified in the class exemption determination. Parties will be required to self-assess whether their conduct falls within the class exemption.

IMPLICATIONS

As outlined above in relation to mergers, the ability for parties to seek authorisation on the grounds that the conduct does not substantially lessen competition (rather than having to demonstrate public benefits) may make authorisation a more attractive route.

The ability to obtain authorisation for conduct that may contravene the misuse of market power prohibition is also important, given the significant changes to the scope of the law, though it remains to be seen whether corporations will wish to seek ACCC authorisation on the basis that they have or may have 'market power'. The authorisation process will also provide the ACCC with an opportunity to develop principles on the types of conduct that raise competition concerns outside of an enforcement context.

Class exemptions are already utilised in a number of overseas jurisdictions, in particular in the United Kingdom, the EU and Singapore. These exemptions will be particularly useful for vertical agreements, which are more often likely to produce pro-competitive effects. Following the High Court's decision in *Flight Centre* and the increased regulatory scrutiny of vertical restraints, such as Most Favoured Customer clauses, a well-tailored class exemption for vertical agreements would provide business with much needed clarity as to the interaction between the per se cartel prohibitions and the competition tested prohibitions.

7. Enforcement

The Harper reforms extend the ACCC's s155 power to investigations of breaches of court enforceable undertakings and merger authorisation applications. The maximum penalty for non-compliance with a s155 notice is also increased from 12 months imprisonment or a fine of up to 20 penalty units (currently $4,200) to two years imprisonment or a fine of up to 100 penalty units (currently $21,000).

Importantly the Harper reforms introduce a new defence to non-compliance with a s155: if a person has refused or failed to comply with a notice to produce documents, it is a defence if, after a reasonable search, the person is not aware of the documents. In determining whether a search is reasonable, relevant factors include the nature and complexity of the matter under investigation, the number of documents involved and the ease and cost of retrieving documents relative to the company's resources.

Private litigants seeking to institute actions for breach of the CCA will no longer need to seek Ministerial consent to bring an action for conduct that takes place overseas.

Amendments to the 'follow-on' provisions will allow third party litigants to rely on admissions of fact (as well as findings of fact) in one proceeding in a subsequent proceeding.

IMPLICATIONS

The introduction of a reasonable search defence is a welcome development and consistent with discovery obligations in the Federal Court. The defendant bears the burden of proof and must prove on the balance of probabilities that it conducted a reasonable search. When responding to a s 155 notice, companies should ensure they keep contemporaneous records of the inquiries and searches undertaken.

The reforms to the private enforcement of competition law are intended to enhance the overall enforcement of the CCA via standalone and follow-on damages actions. However, the amendments to the follow-on provisions may make parties more reluctant to admit facts in ACCC proceedings.

8. Access

The new law also makes a number of changes to the National Access Regime in Part IIIA, including changes to the declaration criteria.

To be declared under the new law, a service must meet the following declaration criteria:

- Criterion A (competition criterion) – that access (or increased access) to the service on reasonable terms, as a result of declaration, would promote a material increase in competition in a market (other than the market for the service);
- Criterion B (natural monopoly test) – that the facility could meet the total foreseeable demand in the market over the declaration period, at least cost, compared to any two or more facilities.
- Criterion C (national significance) – that the facility used to provide the service is of national significance; and
- Criterion D (public interest) – that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration, would promote the public interest.

The deemed decision provisions have also been amended: if the Minister has not made a decision within 60 days, he or she will be taken to have accepted the National Competition Council's recommendation. Currently, the Minister is taken to have not declared the service if he or she does not make a decision within this timeframe.

IMPLICATIONS

The new law gives greater clarity to infrastructure owners and access seekers on the application of the declaration criteria.

In particular, the new law:

- raises the threshold for meeting criterion A: 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);
- on balance, lowers the threshold for meeting criterion B, which previously asked whether it would be 'privately profitable' to duplicate the facility; and
- raises the threshold for meeting criterion D (previously criterion F), which previously asked whether access would *not be contrary* to the public interest.

The new law does not amend criterion C.

Meet the team

Please feel free to contact a member of the team to discuss the Harper Review in more detail.

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