Harper Reforms – what you need to know

Date : 16 November 2017

Author/s : Laura Hartley and Sarah Best

On 6 November 2017, significant changes to Australia's competition laws came into effect, introducing some of the key recommendations of the 2015 Harper Competition Policy Review. The ACCC has welcomed this new era in Australian competition law, saying the reforms will improve the ACCC's ability to target conduct harmful to the Australian economy and will enhance the benefits that should flow to consumers and businesses when markets operate efficiently.[1]

So, what are the key changes to the *Competition and Consumer Act* 2010 (Cth) (**CCA**) and what do you need to know about them?

1. New misuse of market power law with "effects test"

The most far reaching of the Harper reforms is the much talked about "effects test", which has been introduced to add to the old purpose-based misuse of market power test in section 46 CCA.

The new misuse of market power law prohibits a company with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in any market in Australia in which the company (or related body corporate) supplies or acquires or is likely to supply or acquire goods or services.

The new misuse of market power law continues to apply to any company with substantial market power in any market but the company does not need to "take advantage" of that market power for the law to be enlivened. This means that there appears to be no requirement for a connection between a company's market power and the conduct in question. The prohibition targets conduct that has the purpose or effect of substantially lessening competition in any market in which the company or a related body corporate operates. This change is intended to focus the prohibition on harm to the competitive process rather than on harm to specific individuals.

To offset the broader reach of the new law, the Harper reforms have extended the authorisation regime to the new misuse of market power law for the first time. This means that the ACCC is now able to grant protection from legal action for conduct that falls within the new section 46 where the conduct, if allowed, would result in public benefits outweighing any public detriment.

Interim guidelines have been released by the ACCC to provide guidance on this new law. See https://www.accc.gov.au/interim-guidelines-on-misuse-of-market-power. The ACCC has indicated through these interim guidelines that it takes an expansive view of the new law and that certain conduct could raise compliance risks including:

- refusal to supply an essential input
- restricting access to an essential input or services
- price discrimination
- predatory pricing or pricing below cost
- margin/price squeezing
- loyalty rebates
- tying/bundling goods or services.

The flip side of this is that the ACCC considers conduct that enhances efficiency, innovation and product quality or price competitiveness is generally speaking unlikely to raise compliance concerns.

The Explanatory Memorandum for the new law makes a number of things clear. Firstly, that the objective of the new law is to target anti-competitive behaviour of companies with substantial market power whilst allowing legitimate pro-competitive behaviour even if this results in harm to inefficient competitors. Secondly and importantly, that not all actions by companies with substantial market power will be a misuse of that power.

Despite this, there is likely to be a period of uncertainty as the parameters of the new law are tested and we see how broadly the courts in Australia interpret the new statutory prohibition. Certainly, companies in concentrated markets or with a dominant position need to take care until more guidance is provided and it would be prudent for them to develop compliance strategies to factor in the new law to ensure that both the effect of their commercial strategies and the drivers behind those strategies do not fall foul of the broader prohibition by significantly reducing competition in markets in which they operate or are likely to operate.

2. New concerted practices civil prohibition

The price signalling provisions have been repealed and replaced with a general prohibition on persons engaging in a concerted practice that has the purpose, effect or likely effect of substantially lessening

competition. This is a civil prohibition that applies across the board to all industries and not just the banking sector like the former price signalling provisions.

"Concerted practice" is not defined in the CCA but the Explanatory Memorandum defines it as "*any form of co-operation between two or more firms (or people) or conduct that would be likely to establish such co-operation, where the conduct substitutes … co-operation in place of the uncertainty of competition*".[2] The Harper Review made it clear that "*the word 'concerted'*" means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants. The expression "*concerted practice with one or more other persons*" conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants'.[3] This is somewhat at odds with the examples in the Explanatory Memorandum as to what amounts to a concerted practice as these suggest that one-off interactions, seemingly unilateral exchanges of information and exchanges between persons which are not competitors, may sometimes be caught by the new prohibition.

The concept of a concerted practice is very broad and means the provision has the potential to extend to a wide range of activities including information sharing and arguably some pro-competitive conduct. The prohibition is considerably broader than the current general prohibition on anti-competitive agreements and seeks to capture anti-competitive conduct that falls short of a contract, arrangement or understanding. The prohibition will seemingly apply even where an interchange between persons does not give rise to an actual understanding between them - that is, there is no need for a "meeting of minds" or actual commitment to follow the proposed course of action. Arguably, some degree of deliberateness will be required for co-operation to amount to a concerted practice and passive conduct will not suffice but it remains to be seen where Australian courts land with interpreting this aspect of the new law.

Caution will be required by businesses who have dealings with competitors whether by way of a joint venture or trade association meetings or who exchange commercially sensitive information say in the context of a potential merger or acquisition to ensure they do not fall foul of this new prohibition.

Interim guidelines have been released by the ACCC to provide guidance on this new law. See https://www.accc.gov.au/publications/interim-guidelines-on-concerted-practices.

3. Amended cartel provisions and joint venture defences

The Harper reforms simplify the cartel provisions and modify the joint venture exemption.

The reach of the cartel provisions is now restricted by introducing a requirement that the cartel conduct occurs in "trade or commerce", which is defined to mean trade or commerce within Australia or between Australia and places outside of Australia.

The exclusionary provisions prohibition in section 45 has been entirely repealed from the CCA and the prohibition on output restrictions in the cartel provisions has been expanded to capture the acquisition restrictions previously covered by section 45. This is welcome as it removes unnecessary complexity and duplication from the CCA.

The joint venture exemption from the cartel provisions has been expanded to apply to:

- contracts, arrangements or understandings and not just contracts as was previously the case; and
- joint ventures for the acquisition of goods or services and not just joint ventures for production and/or supply.

The exemption also includes two new additional requirements that narrow its application. As was previously the case, the exemption only applies to a cartel provision that is for the purpose of the joint venture. Now, parties will also bear the burden of proving 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.

The standard of proof that a defendant must discharge to rely on the exemption has been increased to the balance of probabilities.

So whilst the Harper reforms mean that the exemption applies to a broader range of joint ventures, they may mean in practice that it is harder for them to be relied upon and parties may be exposed to the cartel provisions' criminal sanctions should a joint venture be found to have the purpose of substantially lessening competition.

Parties will need to carefully consider whether a provision they wish to include in a joint venture arrangement is reasonably necessary to undertake the joint venture or whether a less restrictive provision would suffice. They also need to carefully consider their commercial drivers for the joint venture to ensure that the substantial purpose behind it is not anti-competitive.

Finally, following years of people grappling with the cumbersome numbering of the cartel provisions, these have thankfully been renumbered. The "ZZR" references have largely been replaced with "A", so

section 44ZZRD no longer defines "cartel conduct", rather this provision is now section 45AD.

4. Third line forcing no longer automatically prohibited

The automatic prohibition on third line forcing has been removed so now all forms of exclusive dealing (supply and acquisition restrictions) are subject to a competition test. This means that third line forcing (which sees a supply to a person being conditioned with that person acquiring goods or services from a third party) will not be an automatic breach of the CCA and it will only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.

This will greatly reduce the number of notifications which need to be lodged with the ACCC each year but it will require parties to self-assess whether a vertical restraint does in fact raise genuine competition concerns.

The ACCC has published new exclusive dealing notification guidelines to reflect the Harper reforms. See https://www.accc.gov.au/publications/exclusive-dealing-notification-guidelines. There is also a new form to be used for exclusive dealing notifications.

5. Resale price maintenance may be notified

The prohibition on resale price maintenance has been retained but it is now expressly permitted between related bodies corporate. It is also now possible for parties to notify the ACCC of resale price maintenance conduct where the conduct is pro-competitive. This is a far simpler process than authorisation, previously the only option available to companies seeking statutory protection from legal action for this conduct.

Notified resale price maintenance conduct will be immune from prosecution unless the ACCC objects to the notification within 60 days on the grounds that it considers anti-competitive harm will outweigh any public benefit.

The form for notifications has been amended to reference the Harper reforms.

6. Merger Procedures streamlined

The Harper reforms have not touched the well-used informal merger clearance process of the ACCC. However, the ACCC's formal clearance process and the merger authorisation process of the Australian Competition Tribunal have been combined and streamlined, with the ACCC being the first-instance decision maker for merger authorisations. There is the possibility of a secondary, full merits review by the Tribunal if parties are not happy with the outcome from the ACCC but the ability to go straight to the Tribunal at the outset of a merger authorisation process is no longer an option.

The authorisation criteria have also been modified to allow the ACCC to clear a merger on the basis that it does not substantially lessen competition or on net public benefit grounds.

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 previously provided to the ACCC, unless new information clarifies the information before the ACCC or it was not in existence at the time.

The ACCC and Tribunal are both subject to strict timelines when considering a merger authorisation. For example, the ACCC will have 90 days to determine an application, subject to a number of possible extensions.

The ACCC has recently published updated guidelines for informal merger clearances which reflect the Harper reforms. See https://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013. The ACCC has also released interim merger authorisation guidelines. See https://www.accc.gov.au/publications/merger-authorisation-guidelines. Interim forms for merger authorisations have also been released for public comment and should be used until the draft forms are finalised.

7. Authorisation process simplified and class exemptions introduced

The main change to the authorisation process is that the ACCC will have the power to authorise or exempt any conduct (other than cartel conduct, secondary boycotts and resale price maintenance) if it is satisfied that the conduct meets one 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 authorisation if it was satisfied that the conduct would result in a net public benefit. The net public benefit test remains the sole authorisation test for cartel conduct, secondary boycotts and resale price maintenance.

Following the lead in the UK and various other countries, the ACCC also has been given new powers to create class exemptions or "safe harbours" for particular conduct or categories of conduct which may technically be caught by a competition law prohibition but is essentially pro-competitive. Whilst parties will need to assess whether their conduct falls within the parameters of a class exemption, it is hoped that these new exemptions will be used by the ACCC to provide some useful guidance for certain forms of conduct like vertical restraints in distribution or reseller agreements.

The ACCC has also released interim conduct (non-merger) authorisation guidelines. See https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger. Interim forms for these authorisations have also been released for public comment and should be used until the draft forms are finalised.

8. Enforcement changes

The Harper reforms extend the ACCC's section 155 powers to investigations of breaches of court enforceable undertakings and merger authorisation applications.

A new reasonable search defence has also been introduced for non-compliance with a section 155 notice, with the defendant bearing the burden of proof and being required to prove on the balance of probabilities that it conducted a reasonable search for the documents it has been asked to produce.

Interestingly, the ACCC has set up a Substantial Lessening of Competition Unit which will be responsible for the regulator's misuse of market power and concerted practices investigations and litigation. So we can expect the ACCC to really drive home the importance of compliance with these new laws in the coming months and years.

Have you read to the end? It was worth it right? In a rare display of a law firm giving you a thorough briefing for free, we hope you are now up to speed on this new law. Call us if there's anything you need help with!

Laura Hartley, Partner
Telephone +61 2 8915 1066
Email laura.hartley@addisonslawyers.com.au

Sarah Best, Special Counsel
Telephone +61 2 8915 1007
Email sarah.best@addisonslawyers.com.au

[1] ACCC media release, *"ACCC welcomes new era in competition law"*, 18 October 2017.
[2] Explanatory Memorandum, Competition and Consumer Amendments (Competition Policy Review) Bill 2017, page 28.
[3] Competition Policy Review Panel, Competition policy review: final report, Treasury, Canberra, March 2015, pp 369-372.