DEVELOPMENTS IN COMPETITION LAW IN AUSTRALIA IN 2018

Dave Poddar, *Clifford Chance*

INTRODUCTION

The past 12 months have seen significant developments in Australia in the competition law area, in terms of both important policy developments and groundbreaking antitrust litigation. These cases have been brought either by the Australian Competition and Consumer Commission (ACCC) or, where criminal cartels have been alleged to exist, the Commonwealth Director of Public Prosecutions (CDPP).

The significance of these developments has not yet been fully recognised. It is worth reflecting on both the legislative changes and the reform process that have brought them about. These legislative changes are an important background to Australia's recent significant antitrust litigation, which has refocused the attention of the business community on the need to be in compliance with antitrust laws.

LEGISLATIVE REFORMS

On 6 November 2017, broad changes to Australia's Competition and Consumer Act 2010 (Cth) (CCA) came into effect. These amendments to the CCA were a culmination of the reform process arising from the wide-ranging government review of Australia's competition laws that commenced in 2013, led by Professor Ian Harper. This, the Competition Policy Review, is known as the Harper Review.


Dave Poddar

While the competition law changes have largely been enacted, the government has not been able to take forward some of the broader competition policy reforms that the Harper Review recommended in relation to other competition reforms, such as planning restrictions and social services. This has left a considerable amount of potential competition-related productivity gains on the table, and has meant that the Harper Review has not had as great an impact on Australia's economy as the National Competition Policy Review Committee (known as the Hilmer Committee).

The government's legislative reforms were implemented under the Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth) and the related Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Cth).

The most significant changes were to section 46 (misuse of market power) and section 45 (which has been amended to include a new concept in Australia of so called "concerted practices" and remove the price-signalling provisions). Another key amendment was to change the merger authorisation process and formal clearance process.

Under the amended section 46, corporations with substantial market power are now prohibited from engaging in conduct which has the purpose or effect, or likely effect, of substantially lessening competition in:

- the market in which the corporation has substantial market power; or
- any other market in which the corporation directly or indirectly supplies or acquires (or is likely to supply or acquire) goods or services.

The ACCC now no longer needs to show that a corporation has taken advantage of its market power, or that the conduct was undertaken for an anticompetitive purpose.

Section 45 of the CCA was amended to repeal the previous price-signalling provisions (which were limited in their application to the banking sector and were never used) and to impose a new concept of prohibiting corporations engaging in concerted practices with the purpose, effect or likely effect of substantially lessening competition. A concerted practice is not defined in the CCA, although the Explanatory Memorandum to the amending legislation stated that a concerted practice is:

> *any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such competition, where this conduct substitutes, or would likely substitute, cooperation in place of the uncertainty of competition.*

The merger control provisions were amended to consolidate the formal merger and authorisation processes, and to require merger parties seeking formal clearance of authorisations to first seek approval from the ACCC. The ACCC is now able to authorise mergers and acquisitions that it considers will result in a net public benefit with parties having appeal rights to the Australian Competition Tribunal. From the perspective of merger parties, this is a mixed blessing as, while the ACCC's consideration of public benefits in assessing the competition impact of a merger is technically broad, merger parties now no longer have an ability to proceed directly to the Tribunal to have a merger litigated. In circumstances where

the merger parties anticipate that the ACCC is likely to object to an informal clearance application, the ability to have the matter determined by the Tribunal within three months or so, rather than also having to go through at least a three-month ACCC authorisation process, was a commercially attractive option in some cases.

OTHER POLICY DEVELOPMENTS

One of the most important recent policy developments, which will substantially enhance the role of the ACCC, arises from the Australian government adopting the recommendations of the Australian Productivity Commission in its Data Availability and Use Inquiry Report, released in May 2017.

One of the Productivity Commission's 41 recommendations was the establishment of a new a comprehensive right for consumers and small and medium-sized businesses (SMEs) to access and transfer their data held by businesses. This would include the right to require one business to transfer the data to another potential service provider, as selected by the consumer (or SME).

What is the proposed consumer data right?

The Australian government announced in May 2018 that it will legislate for a new consumer data right. The consumer data right will be created primarily through amendments to the CCA and the Privacy Act 1988 (Cth) (Privacy Act). The first sector in which the right will be rolled out is the banking sector, via "open banking" reforms that are discussed in more detail below. The type of data that may be accessed and transferred will be determined on a sector-by-sector basis, but will be likely to include transaction, usage and product data so as to create information packs allowing a consumer (or SME) to seek to bargain with one or

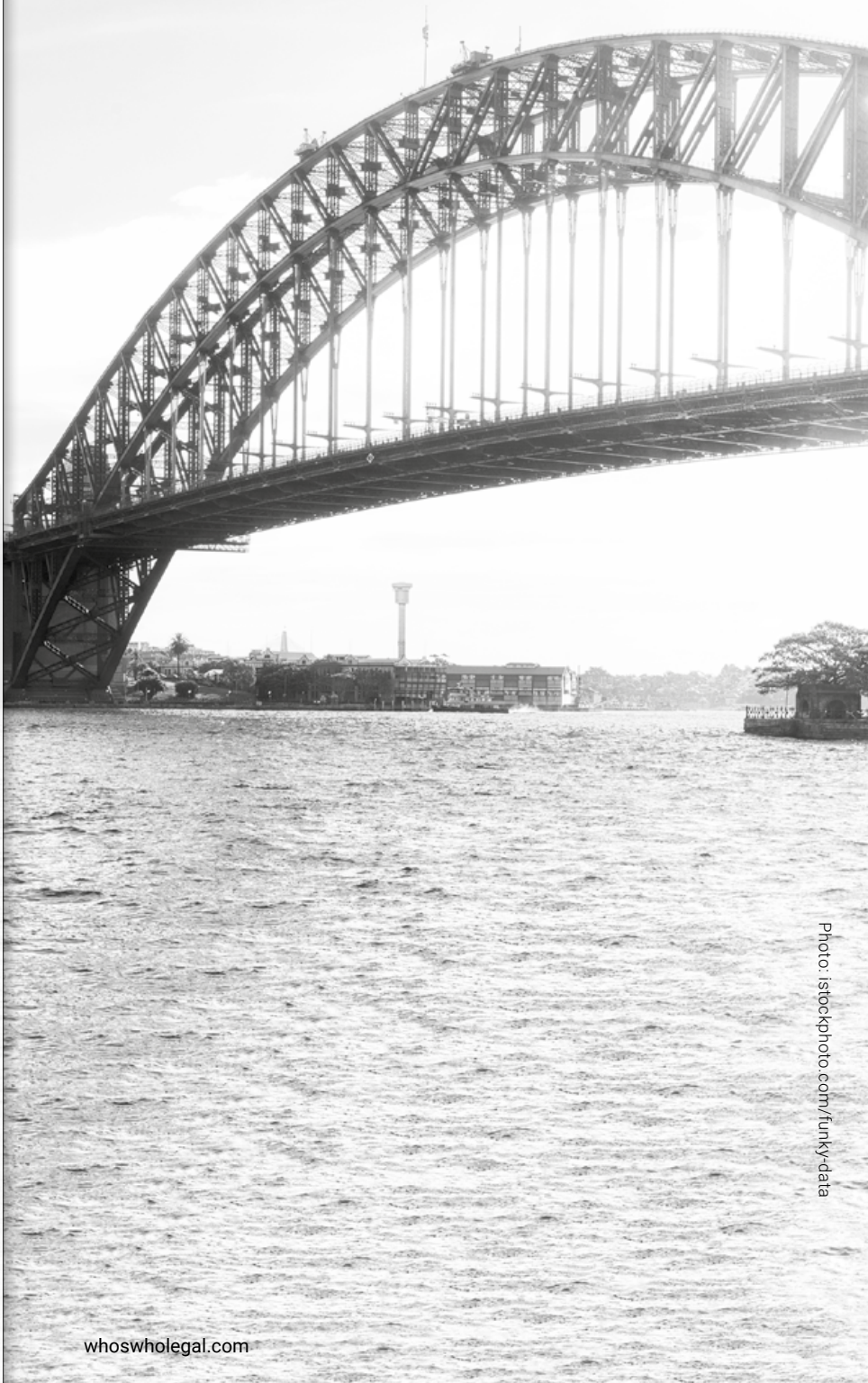

Photo: istockphoto.com/funky-data

more service providers, based on their usage profile, to obtain the best bargain.

After the right is implemented in Australia's banking sector, it will then be put in place in the energy and telecommunications sectors, with the further rollout of the data right in other sectors to occur over time.

Oversight of the new regime will be shared jointly between two government regulators, the ACCC and the Office of the Australian Information Commissioner (OAIC). The government expects these regulators to work together closely to ensure the success of the regime. The ACCC's role will be to ensure that the system operates as intended, particularly in facilitating competition and positive consumer outcomes. Having regard to its existing privacy role, the OAIC will have primary responsibility for resolving consumer complaints regarding privacy breaches.

Initial implementation will be in the banking sector

The "open banking" reforms were in fact announced by the Australian government in 2017, as part of the 2017-2018 Australian Budget process, ahead of the government's general response to the Productivity Commission's Report. This means that planning is well under way in the banking sector to allow initial introduction from 1 July 2019.

Although it has not yet released draft legislation for open banking, the government has announced that the proposed elements of this regime will be as follows:

- All entities that are authorised deposit-taking institutions and hold an Australian banking licence, other than foreign bank branches, will be subject to the regime.
- Australia's four major retail banks will be required to make data available, at no cost, on credit and debit card, and deposit and transaction accounts by 1 July 2019, and on mortgages by 1 February 2020. Data, on the other categories of deposit and lending products that will be subject to the regime, must be made available by 1 July 2020. The ACCC will have the ability to adjust these dates.
- All other regulated institutions will be required to implement the regime on a 12-month delayed timeline (though, again, with the ACCC having the ability to adjust these time frames if necessary).
- All bank customers will be able to exercise the consumer data right, that is, individuals, SMEs and large businesses. This differs from the Productivity Commission proposal to limit this right to individuals and SMEs.
- The terms of the relevant products and services that are offered by the regulated institutions will also need to be made available in machine readable form to allow ready comparison.

The Australian regime is different to other jurisdictions in that the open banking regime will not (at least in the short term) give rights to third parties to initiate transactions on behalf of consumers.

Impact on other sectors

In respect of the telecommunications sector, the government has announced that the ACCC will analyse existing data sets that could be made available, assessing the costs, risks and benefits of each such data set. In relation to the energy sector, the Council of Australian Governments' Energy Council is consulting on what data sets should be made available, and is also considering options for the manner and timing in which the regime may be implemented in the energy sector. It may therefore be some time before the consumer data right is rolled out in these sectors, as the details of what information is able to be shared are worked through.

GROUNDBREAKING LITIGATION

So far in 2018, the ACCC chairman Rod Sims has initiated several groundbreaking cases that have made the business community sit up and take notice.

The CDPP, following referral by the ACCC, has brought criminal charges against major banks ANZ, Citigroup and Deutsche Bank, as well as senior executives of these banks, for alleged cartel conduct relating to the manner in which a shortfall in an underwriting arrangement of ANZ shares was managed.

The ACCC has also commenced its first so-called "gun jumping" case in relation to a proposed merger involving a company called Cryosite. The conduct that the ACCC objected to here was the arrangement, implemented before completion of the merger, for customers of the target business to be referred to the purchaser. The ACCC was of the view that the merger would not have obtained ACCC approval, on the basis that it would substantially lessen competition. Unfortunately for the vendors, their business has now closed without the sale having completed, and yet they are facing (together with the purchasers) ACCC litigation.

The ACCC has also brought proceedings against two of Australia's largest rail freight companies, Aurizon and Pacific National. This relates to an acquisition in one state that is alleged to have contravened sections 45 and 50 of the CCA in connection with the proposed sale by Aurizon of its Queensland intermodal business to Aurizon. It is alleged a higher price was paid for this transaction, as a result of an alleged understanding that the seller (Aurizon) would close its intermodal business operations in another state and stop competing with Pacific National.

Each of these cases will be hotly contested by the defendants and the results of the litigation are not yet known. Nonetheless, the litigation serves as a reminder to corporate Australia of the need to strictly comply with both the letter and the spirit of Australia's competition laws.