

Australian Government releases exposure draft legislation amending Australia's Competition Laws and provides businesses the opportunity to make their final comments and suggestions

On 5 September 2016 the Australian Government released exposure draft legislation which seeks to implement the majority of the wide-ranging competition law reforms recommended by the Competition Policy Review (Harper Review).

Businesses should consider how they might seek to respond to the proposed implementation of the Harper Review reforms as set out in the exposure draft legislation, as this is likely to be the final opportunity to comment on the appropriate formulation of reforms to Australia's competition laws, before they are introduced to Parliament.

Introduction

The Competition Policy Review (**Harper Review**), which is Australia's 'root and branch' review of its competition laws, has entered the final phase of consultation. The Government has released for public comment, its exposure draft legislation which sets out how the proposed reform will be implemented.

The exposure draft legislation brings the implementation of wide-reaching reform to Australia's competition laws one step closer to reality and is the first practical iteration of the recommendations since the proposed model legislative text was released with the Harper Review's final report of 31 March 2015.

To date, consultation on Australia's competition regime has focussed on the theoretical principles that underpin Australia's competition laws.

For an overview of the full suite of supported reforms, see our briefing regarding the [Government's response to the Harper Review](#).

Key issues

- Australian competition law is set to undergo a number of significant reforms following the Government's endorsement of 39 of 56 recommendations of the Harper Review into Australia's competition laws and in particular the polarising misuse of market power provisions.
- Provisions changing the merger processes, cartel and joint venture provisions as well as introducing the concept of 'concerted practices' are also very important.
- This may be the final opportunity for the business community to consider how the proposed reforms from the Harper Review will impact them and to make appropriate submissions as part of the Government's public consultation on the exposure draft legislation.

The Harper Review so far and scope of reform

The proposed reforms touch on almost all aspects of the current Australian competition law regime and much of everyday commerce in Australia. The Harper Review made 56 recommendations to amend Australia's current competition laws.

On 24 November 2015 the Australian Government announced that it would adopt 39 of the Harper Review recommendations in full, 5 in part and that it remained open to the remaining 12 recommendations. Following additional consultation, the Government also announced that it will repeal the current provision dealing with misuse of market power (section 46 of the *Competition and Consumer Act 2010* (Cth) (CCA)), and adopt the Harper Review's recommendation for this provision. The accompanying Table sets out an overview of the key areas of reform.

The impact of the reforms will ultimately depend on the drafting of the provisions in the final legislation. It is very important therefore for businesses to consider how the proposed changes to these areas of competition law are brought about in practice, and whether or not to make a submission on the exposure draft legislation.

At this stage of law reform processes in making submissions businesses should focus on providing practical examples of issues and how the legislation can be refined and improved. In particular, given the late stage of the legislative process, the focus should be on seeking to make it more effective and clear for business in terms of compliance and business certainty.

Overview of Reforms

Government response to the Harper Report has been largely reflected in the Exposure Draft Legislation.

Area of reform	Key changes following Harper Review
Merger Review Processes	The formal merger review process and the merger authorisation process will be combined, and vest the Australian Competition and Consumer Commission (ACCC) with first instance decision making powers for each of these types of review. For further details of this proposed reform see our briefing regarding the Harper-proposed merger authorisation reforms .
Cartel Regime	The current cartel regime is to be narrowed by: <ul style="list-style-type: none">■ increasing the threshold level of competition between entities that is required in order for cartel conduct to be established. The provisions will be confined to conduct involving firms that are actual or likely competitors, where 'likely' is defined as on the balance of probabilities instead of 'a more than remote possibility'.■ broadening the Joint Venture defence to cartel conduct by adding Joint Ventures for the acquisition and marketing to the types of Joint Ventures exempted, and removing the requirement for the arrangement to be recorded in a written contract.
Misuse of Market Power	Section 46 of the CCA will be amended to an 'effects test', whereby conduct must have the effect or likely effect of substantially lessening competition (as an alternative test to the current proscribed 'purpose' test). The 'taking advantage' requirement will also be removed. For further details of this proposed reform, see our briefing regarding the misuse of market power .

Area of reform	Key changes following Harper Review
Introduction of Concerted Practices	<p>Section 45 of the CCA will be extended to prohibit concerted practices that substantially lessen competition, for example information exchanges and price signalling.</p> <p>The current price signalling provisions, which apply exclusively to banking services, will be repealed.</p> <p>The banking industry may need to consider ordinary business exceptions as with the current 'price signalling laws'.</p>
Part IIIA – Access to services (Infrastructure)	<p>The Government does not support the Harper Review to the extent it conflicts with the views of the Productivity Commission's Recommendations in relation to section 44G(2)(a) where the Productivity Commission recommended that criterion (a) becomes a comparison with and without access on reasonable terms and conditions through declaration.</p>

Timing and next steps

On 5 September 2016, the the Australian Government released an exposure draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill* (and accompanying Explanatory Materials), to implement reforms identified by the Harper Review, including amendments to the section 46 misuse of market power provision to introduce an "effects test" and the introduction of a prohibition against concerted practices that have the purpose or effect of substantially lessening competition, as recommended by the Harper Review. Submissions on the Exposure Draft Legislation are open until **5pm Friday on 30 September 2016**.

The ACCC has released draft frameworks for proposed guidelines that will explain the ACCC's enforcement approach to each of the misuse of market power and concerted practices prohibitions that will be published if the *Competition and Consumer Amendment (Competition Policy Review) Bill* is enacted. Although it will ultimately be a matter for the courts to determine whether specific conduct will amount to a contravention of either of these provisions, this would appear to be an attempt by the ACCC to help provide the business community with some practical certainty in light of the shift in the regulatory landscape that is likely to follow the implementation of the Harper Reforms. The ACCC is seeking feedback on the frameworks for guidance, which can be made to the ACCC up until close of business on **3 October 2016**.

The Department of Communications and the Arts (DCA) is also concurrently seeking comments from interested stakeholders on the ongoing operation of the telecommunications specific prohibitions against anti-competitive conduct in Part XIB of the CCA. The DCA has released a discussion paper focusing on the interaction between section 46 and Part IXB, and the need for the ongoing operation of the telecommunications specific-anti-competitive conduct laws in light of proposed reforms to section 46 that will introduce a somewhat similar "effects test" to that already existing under Part XIB, that will apply to all corporations, including carriers and carriage service providers. The DCA is seeking comments on whether the Part XIB provisions need to be amended in light of the Harper Reforms until **30 September 2016**.

Conclusion

Given the legislative steps any proposed reforms, will need to go through, it will likely still be a substantial time before any legislation becomes law. However, the Harper Review changes, once implemented, will have a significant impact on businesses. As such, companies should pay close attention to the likely practical impacts of the drafting of the reforms and whether or not an appropriate submission should be made during the period of consultation.

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