HARPER REVIEW CHANGES TO AUSTRALIAN COMPETITION LAWS TAKE EFFECT- THE GOOD, THE BAD AND THE UGLY

On 6 November 2017 significant changes to Australia's competition laws commenced, that is, the legislative response to the key recommendations of the 2015 Competition Policy Review (**Harper Review**). This update provides an overview of the key changes to the *Competition and Consumer Act 2010* (Cth) (**CCA**) and considers their implications for businesses. Businesses need to consider how these changes will affect their activities, as conduct that begins after, or continues past, 6 November 2017 will be subject to the new laws.

COMPETITION POLICY REVIEW AND KEY MILESTONES

On 4 December 2013, the then Prime Minister and Minister for Small Business announced a review of Australia's competition policy, with the terms of reference for the Harper Review released on 27 March 2014. Key milestones are:

- release of the final report of the Harper Review on 31 March 2015;
- release of the Government's response to the Harper Review on 24 November 2015;
- passing of the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth) (**Misuse of Market Power Act**) by Parliament on 15 August 2017;
- passing of the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**Competition Policy Act**) by Parliament on 18 October 2017; and
- commencement of the Misuse of Market Power Act and the Competition Policy Act on 6 November 2017.

The Harper Review reforms commenced somewhat sooner than had been anticipated, particularly given the Australian Competition and Consumer Commission (**ACCC**) is still consulting on various interim guidelines to the new provisions here.

THE GOOD, THE BAD AND THE UGLY

The Misuse of Market Power Act and the Competition Policy Act, which give effect to the Government's response to the Harper Review, usher in the most significant and wide-ranging changes to Australia's competition laws in over a decade. Some of these changes should be welcomed, such as the

Key issues

Significant changes to Australia's competition laws implementing recommendations of the Harper Review came into effect on 6 November 2017.

Amendments have been made to provisions regulating:

- misuse of market power;
- cartel conduct;
- third line forcing; and
- access to monopoly infrastructure.

The amendments also introduce:

- a prohibition against concerted practices that have the purpose or effect of substantially lessening competition; and
- changes to the processes available for parties to obtain merger clearance under Australia's merger control regime.

The ACCC has announced it will establish a specialist enforcement team to focus on substantial lessening of competition issues, which will be responsible for misuse of market power and concerted practices investigations and litigation within the ACCC.

The ACCC has also announced the formation of a unit to focus on anticompetitive conduct in the construction industry, including builders, subcontractors, unions and industry associations.

amendments to make third line forcing subject to a substantial lessening of competition test. Others, such as the change to the misuse of market power test to an effects based test, could be problematic for large Australian businesses which operate in concentrated industries, particularly given the lack of guidance as to how efficiencies will be treated in considering unilateral conduct under the new section. The repeal of the right for companies to go straight to the Australian Competition Tribunal (**Tribunal**) for merger authorisations is also seen as a concern, as that process was viewed by the business and legal communities as having worked very well in facilitating timely consideration of mergers. Time will tell whether that repeal will have a negative influence on the timeliness of the ACCC's informal merger clearance process.

Two other provisions are also worth highlighting. The first, the new so called "concerted practices" provision, has been introduced with high expectations as to its possible operation. It is intended to address concerns as to the inability of the ACCC to prohibit conduct that has an anti-competitive impact, but which falls short of the legal test under Australian competition law of an "understanding". Changes to the joint venture provisions, which mean that the joint venture defence may be activated even when the joint venture arrangement is not set out in writing, are beneficial. However, those changes were subject to a last minute legislative change that requires the relevant provision to be "reasonably necessary" for undertaking the joint venture. This could be problematic if it is viewed as setting a high threshold as to what is reasonably "necessary" for the joint venture.

The Harper Review reform proposals were initially welcomed in 2015 as being the most comprehensive competition reforms for Australia's economy since the widely acclaimed "Hilmer Reforms" of 1995. The Productivity Commission concluded in 2005 that the Hilmer Reforms increased Australia's GDP by AUD20 billion as a result of productivity gains. Given that the Government has determined not to implement all of the competition policy reforms recommended in the Harper Review, the business community has questioned whether the changes that have been implemented will have the same positive impact on Australia's wellbeing.

MISUSE OF MARKET POWER

Changes to the prohibition against (unilateral) misuse of market power introduced by the Misuse of Market Power Act have proved to be the most controversial Harper Review reforms implemented by the Government.

Section 46 of the CCA now prohibits a corporation with a substantial degree of market power from engaging in conduct with the "purpose, effect or likely effect" of substantially lessening competition in a market in which that corporation (or its related bodies corporate) supplies or acquires goods or services. The hotly-debated change from a "purpose" test to a test that is based on assessing unilateral conduct on the basis of either its purpose or, in the alternative, its effect or likely effect, seeks to strengthen the prohibition. The regulator, the ACCC, will no longer need to meet the difficult evidentiary purpose standard if it can establish the effect or likely effect of the conduct. The reforms also remove the need for the ACCC to establish a causal link between a firm's conduct and its market power, meaning it is essentially a misnomer to continue to refer to section 46 as a "misuse of market power" prohibition. Finally, under the new regime, there is a process for seeking authorisation (or legal immunity) for conduct that may otherwise constitute a

misuse of market power if it can be demonstrated that the public benefits of the conduct outweigh the anti-competitive detriments.

The ACCC has published interim guidelines which outline how it intends to approach the significantly changed test. Examples of conduct the ACCC has indicated in the interim guidelines as potentially attracting higher levels of scrutiny include:

- tying and bundling of goods or services;
- "margin squeezing" (where a vertically integrated entity sets the wholesale price of inputs in a way that may mean competitors acquiring those inputs have difficulty competing in the market for the finished product);
- significant loyalty rebates;
- predatory pricing (that is, selling goods or services at below cost);
- restricting a competitor's (or competitors') access to essential inputs (including, for example, land); and
- refusing to deal with a competitor or competitors who operate in downstream markets.

Given the practical implication of the reforms to section 46 means that it is likely to capture a broader range of conduct than the previous section 46, businesses with the requisite degree of market power will need to more carefully assess their conduct. In order to ensure compliance with section 46, a relevant entity will need to undertake comprehensive assessments of its commercial strategies and the ways in which its conduct affects the ability of others to compete in any market in which that business (or its related bodies corporate) supplies or acquires goods or services.

In appropriate circumstances, businesses may also wish to consider the merits of making an application to the ACCC for authorisation if proposed conduct may breach the new section 46 but the public benefit of such conduct is able to be substantiated (and is likely to outweigh any anti-competitive detriment). This approach may not be viewed as commercially practical as companies may not wish to signal their proposed conduct in advance in the public authorisation process.

Our previous update, *Parliament passes sweeping changes to Australia's misuse of market power laws* (here), provides further detail on the changes to the misuse of market power laws.

CONCERTED PRACTICES AND PRICE SIGNALLING

The Competition Policy Act introduces a new prohibition against "concerted practices" that have the purpose, effect or likely effect of substantially lessening competition and repeals the former banking sector-specific price signalling provisions.

A "concerted practice" is not defined in the CCA. The Explanatory Memorandum for the Competition Policy Act (**EM**) provides 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 cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition". The EM also notes that "it is intended that the concept of a 'concerted practice' should capture conduct that falls short of a

contract, arrangement or understanding as the courts have interpreted each of those terms in section 45".

The view of the High Court is that where the meaning of legislation is clear on its face, courts should not revert to extrinsic material to determine its meaning[1]. Therefore, although ultimately the courts may not consider the EM in interpreting the section, it provides an understanding of why this new prohibition has been introduced into the CCA. It is intended to capture conduct when something less than a "meeting of the minds" can be established by the ACCC.

As it has done for the new section 46, the ACCC has issued interim guidelines on the new prohibition to provide some guidance (albeit not particularly detailed) regarding the ACCC's proposed approach to enforcement of the new concerted practices prohibition. The ACCC has identified the following issues as relevant in identifying a concerted practice:

- concerted practices are a form of cooperative, rather than independent, behaviour in the market;
- the degree of uniformity of purpose or actions may be a factor in assessing whether conduct is a concerted practice, although parties do not need to act the same way at the same time in order to be acting in concert;
- a concerted practice must be distinguished from parallel behaviours which arise as an independent response to market conditions;
- the parties to a concerted practice do not have to be competitors – it could also involve suppliers, distributors, trade or professional associations or consultants; and
- the communication between the parties may be in public (such as by way of public statements to the media) or in private, in formal or informal settings, and with or without the involvement of agents or other intermediaries. Most commonly, concerted practices will involve a pattern of cooperative behaviour or communications, although it is possible that a concerted practice could arise from a single instance.

The ACCC has, in its interim guidelines, referred to other jurisdictions for guidance, given that "concerted practices" prohibitions have existed in Europe and the UK for a relatively long period of time. However, the drafting of the Australian prohibition differs markedly from the prohibitions existing in other jurisdictions. Ultimately, it may be that the scope of the Australian prohibition will not be known until it is tested in court.

In Australia the relevant provisions provide as follows:

> *"A corporation must not… engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect of, substantially lessening competition."*

In contrast, in Europe and the UK, Article 101(1) of the Treaty on the Functioning of the European Union and section 2 of the Competition Act, 1998 UK provide:

> *"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by*

[1] *Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (2009) 239 CLR 27 at [47]* and *Australian Education Union v. Department of Education and Children's Services [2012] HCA 3*

> *associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition."*

Although the interim guidelines from the ACCC follow many of the concepts from the EU, the Australian provisions require a corporation to engage with one or more persons in a "concerted" (arguably an act done together in cooperation) "practice" (which normally suggests more than one occurrence).

When read closely it is unclear that the ACCC's interim guidelines reflect the actual section. For example, paragraph 3.8 provides:

> *"Most commonly, concerted practices will involve a pattern of cooperative behaviour or communications between two or more persons. However, depending on the circumstances, a concerted practice may arise from a single instance of information being provided by one person to one or more other persons."*

Notwithstanding that there is a lack of clarity as to the scope of this new prohibition, the key take-away is that businesses should be careful about informal information sharing with third parties and acting on information that is received from their competitors. This is particularly the case where companies are involved in trade associations or other such forums where sensitive competitive information could be provided. Compliance processes should be put in place accordingly. The lack of a “contract, arrangement or understanding”, as required to establish a breach of the general anti-competitive prohibition in section 45 of the CCA, will no longer mean that a business does not fall foul of the law.

In paragraph 5.1 of the interim guidelines on concerted practices the ACCC has set out a non comprehensive list of concerted practices that may have the purpose, effect or likely effect of substantially lessening competition where the relevant practice "replaces or reduces" competitive, independent decision making by a corporation cooperating with its competitors regarding decisions such as:

- how the business determines the price of its product;
- when the business sells its products;
- to whom the business sells its products;
- whether the business bids for a tender and/or the terms of a tender; or
- the quantity of the product the business offers or produces.

While indicative only, this list highlights the types of information flows that the ACCC may take the view have a significant effect on competition in a market.

CARTEL CONDUCT

The reach of the cartel conduct provisions has been narrowed by the Competition Policy Act and the prohibition now applies to conduct “in trade or commerce”, being conduct occurring within Australia, or between Australia and places outside Australia. The prohibition against exclusionary provisions has been removed, due to the overlap with cartel prohibitions.

In addition, the current joint venture exception will be expanded. From 6 November 2017, the joint venture exception will apply to contracts, arrangements or understandings, rather than being limited to contracts. The

joint venture exception also now applies to joint ventures for the acquisition of goods, in addition to joint ventures for the production and/or supply of goods or services.

In order to rely on the joint venture exception for cartel conduct, the cartel provisions must be both for the purposes of a joint venture and be reasonably necessary for undertaking the joint venture, determined on the balance of probabilities. It is presently unclear how this “reasonably necessary” test will be interpreted by the ACCC and the courts.

The joint venture exception will not apply to joint ventures that are carried on for the purpose of substantially lessening competition.

THIRD LINE FORCING

Third line forcing, or “third party bundling” of goods and services, will no longer constitute a per se breach of the CCA. Instead, this type of conduct will be subject to a substantial lessening of competition test. This means that businesses do not need to lodge a notification with the ACCC for third line forcing conduct unless they are concerned that their proposed activity is likely to substantially lessen competition.

MERGER AUTHORISATIONS AND NOTIFICATIONS

Seeking an informal merger clearance or authorisation will remain voluntary. Merger parties will also retain the option of seeking an informal merger clearance (the process for this remains largely unchanged) or merger authorisation.

However, under the Competition Policy Act, parties may no longer apply directly to the Tribunal for authorisation, and must first apply to the ACCC. The largely unused formal ACCC merger process has also been removed. The effect of these changes is that merger parties no longer have the (strategic) option of deciding to seek an informal clearance from the ACCC (as to whether an acquisition will have the effect or likely effect of substantially lessening competition) or instead seek merger authorisation from the Tribunal (on the basis that the resulting public benefits will outweigh any public detriments), based on what will be more favourable to their situation. In this sense, the pressure implicit from the ACCC needing to compete with the Tribunal as a merger review forum has been removed.

The ACCC now has the power to authorise a proposed merger or acquisition if it is satisfied either that the merger or acquisition will not (or is not likely to) substantially lessen competition or the merger or acquisition is likely to result in a net public benefit.

There is a right to seek review of the ACCC's decision by the Tribunal. The material before the Tribunal will be limited to the material which was before the ACCC. Practically, this may mean that merger parties will need to consider putting more thorough evidence (including experts reports), before the ACCC when seeking merger clearances, such as expert evidence and witness statements.

The ACCC has released interim Merger Authorisation Guidelines for consultation, providing an overview of their proposed approach to the new authorisation process. The steps for authorisation are:

1. The proposed acquirer may consult with the ACCC before lodging an application. Only the acquirer in the merger may make an application for authorisation.
2. The application for authorisation and all relevant documents are lodged. The fee payable for the application will be AUD25,000.
3. The validity of the application is assessed by the ACCC within five business days of its receipt.
4. The ACCC will conduct market inquiries, invite submissions from interested parties and collect further information it considers necessary.
5. The ACCC will consult with other people where this is considered reasonable and appropriate.
6. Within 90 days (unless extended by agreement with the applicant), the ACCC will issue a determination as to whether or not it authorises the merger. Unlike an informal merger clearance, a determination under the merger authorisation process will provide merger parties with a higher degree of certainty by affording statutory protection that the transaction does not contravene the CCA.

The ACCC has released updated Media Merger Guidelines in response to recent media law reforms under the *Broadcasting Services Act 1992* (Cth). These changes removed the "75% audience reach rule" and "2 out of 3 rule". The Media Merger Guidelines recognise the changing nature of the media market arising from the ongoing impact of disruptive technologies and changing consumer preferences. A more detailed analysis of the media law reforms may be viewed here.

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