

THE NEW LABOR GOVERNMENT IN AUSTRALIA: WHAT THIS MAY MEAN FOR THE AUSTRALIAN COMPETITION AND CONSUMER LAW REGIME

On 23 May 2022, the Australian Labor Party led by Mr Anthony Albanese replaced the Liberal National Coalition Government that had been in power in Australia since 2013. The new Labor Government has announced its intention to strengthen existing competition and consumer law regulation, in particular to protect small businesses. The Labor Government's election policies included promises to increase penalties for contraventions of the Competition & Consumer Act 2010 (Cth) (**CCA**), refine the unfair contract terms provisions to increase protection for small business and add an ability to fast track "super" complaints to the Australian Competition and Consumer Commission (**ACCC**) from consumer and small business associations.

The Hon Dr Andrew Leigh, who was sworn into the role of Assistant Minister for Competition, Charities and Treasury on 1 June 2022, has indicated he believes that a less innovative economy has resulted from a rise in industry concentration and resultant market power. The Labor Government's proposed legislative changes will seek to address this perceived market power by providing enhanced protections for small businesses and consumers. Although implementing its election promises will be a focus of the new Government, it would also be expected that it may introduce other competition and consumer law reforms.

The Australian Government's Competition Reform Agenda is already refocusing

As with any plan, the Labor Government's reform agenda has already been impacted by changing Australian and global dynamics. Since coming to power, the Labor Government, facing community concerns with increased electricity and gas prices and their impact on households and industry, has directed the ACCC to investigate the electricity and gas markets and to advise the Government of any regulatory changes that may be required to ensure these "markets are functioning properly". The ACCC has also been tasked to investigate any concerns about "anticompetitive" or false and misleading conduct in these markets and take appropriate action.

Key issues

- The Hon Dr Andrew Leigh was sworn into the role of Assistant Minister for Competition, Charities and Treasury on 1 June 2022.
- The Labor Government's announced competition policy indicates a strong emphasis on protecting small businesses.
- The Labor Government is also proposing that penalties for anti-competitive conduct be increased from AUD 10 million to AUD 50 million per contravention.
- The Labor Government proposes to provide an avenue for high-priority complaints by introducing a 'Super Complaint Function' of the ACCC.
- The Labor Government has also promised to revive the lapsed Bill on Unfair Contract Terms to penalise businesses that propose, apply, or rely on unfair terms in dealing with small business and consumers.

C L I F F O R D

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It will be interesting to see whether the Labor Government, having particular regard to Dr Andrew Leigh's concerns that Australian markets are highly concentrated (which he views as causing decreases in quality and service, as well as increased prices), will adopt more prescriptive rules in energy and other sectors, such as those in the European Union which set out consumer rights (e.g. in relation to air lines) and adopt ex ante regulation such as recently implemented in relation to digital platforms in respect of the Digital Markets Act (DMA) and Digital Services Act (DSA).

INCREASE IN PENALTIES FOR ANTI-COMPETITIVE CONDUCT

In an attempt to "*drive down the cost of living*" for Australian families, the Labor Government proposes increasing the penalty for anti-competitive conduct from AUD 10 million to AUD 50 million per contravention. Having only been referred to in respect of the CCA generally, it is unclear to what extent, if any, these proposed increases will apply to the Australian Consumer Law (ACL). The ACCC has sought higher penalties for anti-competitive conduct for some time and this move will bring penalty figures in Australia closer to fines imposed in other jurisdictions, such as for example maximum fines that can be imposed by the European Commission. Although the details and timing of the amending legislation have not been released, the Labor Government expects this measure to raise over AUD 500 million in penalties.

INTRODUCTION OF A SUPER-COMPLAINT FUNCTION OF THE ACCC

The Labor Government proposes to introduce an avenue for high-priority complaints to be made to the ACCC for serious breaches of the ACL. Akin to similar policies introduced in the United Kingdom, consumer groups including CHOICE and the Council of Small Business of Australia, will be able to request that the ACCC investigate serious, high-priority complaints with a quicker turnaround. Dr Andrew Leigh has expressed Labor's intention to legislate this within its first year of government. The main aim of the regime is to provide what is viewed as more efficient avenues for redress where serious anti-competitive behaviour threatens the viability of small businesses.

REVIVING THE UNFAIR CONTRACT TERMS (UCT) REGIME

The Labor Government also proposes to revive the Draft Legislation for the *Treasury Laws Amendment (Measures for a Later Sitting) Bill* which was first introduced to Parliament in February 2022, to include pecuniary penalties for UCT contraventions rather than the provisions being declared void. This bill lapsed as it was not passed prior to Parliament being dissolved on 11 April 2022 when the Federal Election was called.

The Bill makes UCTs illegal for dealing with businesses with fewer than 100 staff or a turnover of less than AUD 10 million. Although no timeframe has been provided for this reform, it is expected that this will happen relatively quickly given that it has already been drafted and received bipartisan support.

Given that what could be viewed as an "unfair" contract term can be subject to some disagreement (and depend on the factual circumstances), this reform may need to see additional compliance reviews for business operating in Australia.

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REFORM ACROSS SECTORS OF THE AUSTRALIAN ECONOMY

As noted earlier in this briefing, it will be interesting if the new Government, having asked the ACCC to focus on energy markets and possible reform, will provide greater regulation and guidance so as to seek to provide businesses and consumers with certainty in these markets as they transition energy sources.

Equally, it will be interesting to see the extent of the Labor Government's interest in digital platforms, an area where the ACCC was previously globally leading, to establish pro-competitive, pro innovation and pro-business laws that assist the Australian economy in general. There is an important question whether by the time the Government turns to this sector after the ACCC provides their report to Treasury at the end of September 2022, that Australian businesses will essentially need to be following the DMA and DMS in any event, as many global businesses will have already started to align their businesses with those rules.

WHAT DO THESE REFORMS MEAN FOR YOUR BUSINESS?

The Labor Government's pre-election policy announcements will sharpen a focus on small business and consumer protection under the CCA.

Businesses operating in Australia will need to be conscious of that redirection in Government and likely ACCC focus by enhancing compliance programmes and also examining overall conduct issues in how their businesses operate to seek to ensure compliance with new rules when these are introduced.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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