# HARPER AMENDMENTS TO AUSTRALIA'S COMPETITION LAWS PASSED: ACCC HERALDS A "NEW ERA" IN COMPETITION LAW

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## IN BRIEF:

- On 18 October 2017, Australia's Parliament passed into law long-awaited legislation to amend Australia's competition laws.
- The passing of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* and the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (**the Bills**) will make a number of significant changes to the *Competition and Consumer Act 2010* (**the Act**), and have been heralded by the ACCC as a "new era" in competition law in Australia.
- The changes to the Act will have wide-ranging effects on businesses and markets. These changes include:
  - **Introducing a prohibition on "concerted practices"** which have the purpose, effect or likely effect of substantially lessening competition and repealing the existing price signalling laws. This will have a far-reaching effect on the way businesses communicate with competitors and other market participants.
  - More **closely confining the application of the cartel laws** to conduct affecting competition in Australia and **broadening the joint venture exception** to the prohibition on cartel conduct. - At the same time, the **current prohibition on exclusionary conduct will be repealed** (primary boycotts) with the intention that such conduct be dealt with under the cartel laws.
  - **Broadening the misuse of market power prohibition** to prohibit any conduct engaged in by a firm with substantial market power which has the purpose, effect or likely effect of substantially lessening competition in a market.
  - **Amending the third line forcing prohibition** so it is subject to a competition test rather than illegal per se.
  - Combining the ACCC's formal **merger clearance process** with the Australian Competition Tribunal **authorisation process** so that the ACCC decides on applications for authorisation at first instance with its decisions reviewable by the Australian Competition Tribunal.
  - **Simplifying the authorisation and notification regimes** by consolidating the various authorisation processes available under the Act into a single, streamlined process. Businesses will be able to notify

the ACCC of resale price maintenance and the ACCC will also be able to issue **class exemptions** which will provide safe harbours for conduct that does not raise competition concerns.

- Amending the **criteria for access to infrastructure** in Part III of the Act.

## BACKGROUND: THE HARPER REVIEW

In 2014, the Government commissioned the Competition Policy Review, with a panel headed by economist Professor Ian Harper (**Harper Review**), to conduct a "root and branch" review of Australia's competition laws and policy. Following rounds of consultation, the Harper Review published its final report on 31 March 2015. The final report contained 56 recommendations in three main areas: competition policy; competition laws and competition institutions.

In relation to the competition laws contained in the Act, the Harper Review concluded that while the concepts, prohibitions and structure of the Act are sound, a number of provisions are unnecessarily complex and reform would improve flexibility and effectiveness of the law, increase certainty and reduce costs for business.

The Harper Review's most controversial recommendation was that the prohibition on misuse of market power in section 46 of the Act be amended to include an "effects test" to capture conduct that harms the competitive process (an anti-competitive "effect") as well as conduct with a proven anti-competitive purpose. However, the Harper Review also recommended a number of other changes to simply the competition laws, including amendments to cartel laws and changes to provisions regulating the granting of exemptions under the Act.

## THE KEY CHANGES AND MAIN "TAKEAWAYS" FROM THE CHANGES

### Concerted Practices

In our view, this change will result in the most significant impact in the way businesses interact with each other and is likely to result in the most significant level of investigations by the ACCC. In preparation for this change, the ACCC has already set up a specialised unit focusing on investigating conduct that may substantially lessen competition.

This change creates a prohibition in section 45 of the Act on "concerted practices" that have the purpose, effect or likely effect of substantially lessening competition. This change is intended to expand the scope of the current section 45 to "capture" conduct which falls short of the level of coordination that has been judicially interpreted as being required to establish an "arrangement or understanding".

The concerted practices prohibition will capture a range of conduct not currently covered by the cartel provisions and section 45 of the Act. In particular, certain arrangements involving horizontal, and in some cases vertical, information exchange may be at risk under the new prohibition.

The term "concerted practices" will not be defined in the Act. However, it is expected that the prohibition will be interpreted in accordance with a similar prohibition in European Union competition law and be focused on the anti-competitive disclosure of pricing and other confidential information.
The Bill's Explanatory Memorandum provides some guidance on the type of conduct intended to be captured by the new prohibition.

Adapting the definition of concerted practices developed in European Union jurisprudence, the Explanatory Memorandum states 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." [1]

The Explanatory Memorandum notes that a concerted practice does not require:

- the formality or legally enforceable obligations characteristic of a contract
- the express communication characteristic of an arrangement
- the commitment characteristic of an understanding. [2]

However, the Explanatory Memorandum also states that the following types of conduct are not intended to be captured by the new prohibition:

- mere innocent parallel conduct, for example where two firms who are determining their prices independently happen to charge similar prices for the same product
- conduct such as the public disclosure of pricing information which facilitates price comparison by consumers, as this conduct will increase rather than substantially lessen competition. [3]

Despite the guidance provided in the Explanatory Memorandum, there will be a period of uncertainty for businesses in relation to the types of conduct that may be captured by the new prohibition. Businesses should carefully review their current practices, particularly in relation to sharing of confidential information between competitors or through industry bodies.

The current per se prohibition on price signalling which only applies to the banking sector has also been repealed. The Government considers that these sector specific laws will be unnecessary given the broader application of the prohibition on concerted practices.

The **key takeaway** for this change is that businesses will need to take great care in circumstances where they may be interacting with or sharing information with competitors. Such circumstances may include industry association meetings, meetings to undertake lobbying efforts and other formal or informal interactions, particularly where sensitive information that may affect their future market conduct is disclosed.

It will be important for businesses to train their representatives attending these types of forums about the risks and how they should conduct themselves.

## Cartel Laws

The Harper changes make a number of amendments to the cartel conduct prohibitions, particularly to the joint venture exception for cartel conduct. These amendments are intended to provide greater clarity and certainty regarding the application of the cartel laws.

In particular, the amendments:

- confine the application of the provisions to cartel conduct affecting competition in Australia or between Australia and other places

- change the scope of the exemption to the cartel laws for joint ventures.

Sensibly, the joint venture exemption to cartel conduct will be broadened for certain collaborations so that certain restrictive provisions which may otherwise be alleged to amount to per se illegal cartel conduct will no longer be illegal. The joint venture exception will now apply to:

- arrangements and understandings (not just provisions contained in a contract)
- the acquisition of goods or services, as well as joint ventures for the supply and production of goods or services
- cartel provisions that are both for the purpose of, and reasonably necessary for, undertaking the joint venture (previously, it had to be "for the purposes" of the joint venture).

Finally, the standard of proof that a defendant must discharge in raising the joint venture exemption will be raised to "on the balance of probabilities".

The Harper changes also repeal the prohibition on exclusionary provisions (or primary boycotts) currently contained in section 45 and defined in section 4D of the Act. Contracts, arrangements and understandings between competitors in relation to the acquisition of goods and services will instead be caught by the cartel provisions. In order to achieve this, the cartel provisions will be expanded to capture cartel provisions with the purpose of directly or indirectly preventing, restricting or limiting acquisition of goods or services.

Notably, the legislation does not otherwise simplify the cartel conduct provisions contained in Division 1 of Part IV of the Act. These provisions have been widely criticised for their complexity. Although the Harper Review final report contained model legislation for new simplified cartel laws, the Bill maintained the provisions largely in their current form, except for the amendments outlined above.

The **key takeaway** is that the cartel laws now allow greater scope for competitor collaborations to proceed without the need to seek formal Authorisation from the ACCC where there is good commercial rationale and the collaboration will not otherwise substantially lessen competition.

## Misuse of Market Power

The misuse of market power amendments have been by far the most contentious issue of the Harper reforms. The "lowering of the threshold" for this prohibition has led to arguments that the changes will capture pro-competitive conduct.

The prohibition previously made it illegal for a corporation with substantial market power to "take advantage" of that power for certain proscribed purposes, essentially to damage a competitor or potential competitor.

The new prohibition does not require evidence that the corporation has “taken advantage” of its market power (i.e does not require a nexus between the conduct and the market power). It will instead be illegal for a corporation that has a substantial degree of power in a market to engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market in which the corporation (or a related company) participates (i.e. supplies or acquires goods or services).

The **key takeaway** from this change is that businesses that have a significant market position now need to assess the likely effect of their conduct on competition, particularly where they:

 

- have "key" inputs and are considering "refusing to deal" with counterparties
- price below cost (even in a fiercely competitive market)
- provide discounts, particularly significant discounts for a bundle of their products/services (especially if some of these are "must have" products)
- provide "loyalty" discounts, or exercise "first mover advantage" by buying up potentially scarce inputs.

Businesses should still take care to ensure that their internal documents avoid making statements that could be construed as demonstrating an anti-competitive purpose, as well as their statements to "the market" or third parties.

## Third Line Forcing

This will be one of the most administratively welcome changes of the Harper reforms.

The Act will be amended so that the prohibition on third line forcing is no longer a per se prohibition. Rather, it will be subject to a competition test (like other forms of exclusive dealing in section 47 of the Act).

Once passed, businesses will be able to engage in third line forcing unless there is a risk it may substantially lessen competition.

The **key takeaway** from this change is that it will reduce business compliance costs as the majority of third line forcing conduct will no longer need to be notified to the ACCC.

## Merger Clearance

This is also potentially a very significant change that will affect the alternatives that parties to more "difficult" mergers (from a competition law perspective) have for obtaining clearance for their mergers.

In addition to the current Informal Clearance Process that is very effective for securing "clearance" from the ACCC for proposed mergers, the Bills now provide for a viable formal clearance process.

The Bills combine the ACCC's as yet unused formal merger clearance process with the Authorisation process. Under the new regime, the ACCC will be able to authorise a merger if it does not substantially lessen competition or if it considers the public benefits arising from the transaction outweigh the detriments. The Australian Competition Tribunal will then have the power to review the ACCC's determination.

The **key takeaway** from this change is that there will now be a more commercially reasonable and viable avenue for merger parties to seek merger clearance in more difficult mergers that may have anticompetitive implications but that have other factors of benefit to the parties and Australia more broadly such as significant efficiencies, employment issues.

Although most merger parties are likely continue to use the ACCC's informal clearance process, as the formal/authorisation merger process is now more viable, more parties may use this route in the future.

## Resale Price Maintenance

The Act maintains the current per se prohibition on resale price maintenance (**RPM**).

However, businesses will now be able to seek immunity from action for RPM by using the Notification process (previously clearance for RPM had to be by way of the more onerous Authorisation process).

 

Where proposed RPM conduct is sought to be Notified, immunity will automatically be granted unless the ACCC objects to the conduct within 28 days of lodging the Notification.

The Act now also expressly adds an exemption for RPM between related bodies corporate.

The **key takeaway** is that while it will still be difficult for a party to seek immunity for RPM conduct, there is now a streamlined process for seeking to do so.

## Authorisation and Notifications

The amendments remove the previously cumbersome process for parties seeking immunity for conduct/arrangements where there were slightly different tests and processes for different types of conduct meaning that often, multiple applications for Authorisations were required for the same conduct, resulting in a complicated, time consuming and expensive process.

The Act now simplifies this process by streamlining the various authorisation processes, including those relating to mergers, into a single process.

Other changes in relation to authorisations and notifications (in addition to the procedure for RPM referred to above) include:

- providing for the ACCC to issue "class exemptions"
- making the Notification process for collective bargaining more flexible (allowing the immunity to be extended to parties joining the bargaining group after lodgement of the Notice)
- granting the ACCC a power to issue a "stop notice" requiring notified collective boycott conduct that is the subject of a notification to cease.

The **key takeaway** from the changes is the greater flexibility and streamlined process available to parties seeking immunity for conduct and arrangements under these processes. The parties still need to evidence that the benefits to the public from the proposed conduct outweigh any detriments resulting from the conduct - however, the process will be more user friendly.

## National Access Regime

Part IIIA of the Act, which contains the National Access Regime is amended to clarify the declaration criteria that must be used by the National Competition Council and the designated Minister in determining whether a service should be declared under the Act.

From both a legal and practical perspective, the amendments will increase the threshold/burden for an access seeker seeking a declaration under Part IIIA of the Act.

## Information Gathering Powers

The amendments extend the ACCC's powers to obtain information, documents and evidence under section 155 of the Act to cover the investigation of alleged contraventions of court-enforceable undertakings.

However, the Act now contains an express "reasonable search" defence to the offence of refusing or failing to comply with section 155 (at the same time it increases the fine for non-compliance with section 155).

## Private Actions (Follow-on Class Actions)

The amendments increase the scope and likelihood of successful follow-on class actions by enabling admissions of fact by a person in prosecution proceedings commenced by the ACCC to be used in private damages actions against that person.

The position prior to the changes was that only findings of fact made by a court may be used in follow on proceedings.

## LOOKING FORWARD

The above changes are very significant and it will be interesting to see how the ACCC approaches its investigations and enforcement activities to "test" the scope of the changes to the Act and how the Courts will interpret the changes.

We will early in 2018 offer presentations about the changes. In the meantime, if you want further details, do not hesitate to contact a member of K&L Gates Competition and Consumer Law team.

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[1] Explanatory Memorandum, [3.19], pg 28.
[2] Explanatory Memorandum, [3.22], pg 28-29.
[3] Explanatory Memorandum, [3.25]-[3.26], pg 30.

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