



Practical Law Australia

Competition and Consumer Protection Legal Update

Competition law changes in force from 6 November 2017

After over 20 years of debate and governmental reviews, and over 2.5 years after the most recent reform recommendations, major competition law changes were specially proclaimed to commence on 6 November 2017. The new guidelines, forms and related regulations required have not yet been finalised. This legal update offers a quick overview of everything you need to know.

Competition law changes in force from 6 November 2017

by Practical Law Australia Competition and Consumer Protection

The most significant changes to Australian competition law in over 40 years came into effect on 6 November 2017. Practical Law Competition and Consumer Protection will be providing detailed analysis when launched on 24 November.

New competition law in force

The most significant changes to Australian competition law in over 40 years came into effect on 6 November 2017 by amendment to the *Competition and Consumer Act 2010* (Cth) (CCA) as a result of the:

- Proclamation of the *Competition & Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (CPRA).
- Effective commencement of the linked *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth) (MMPA).

The introduction of the changes immediately by special proclamation is surprising given the following matters:

- The breadth of the changes made to substantive competition law.
- Substantial changes to process and procedure. The *Competition and Consumer Amendment (Competition Policy Review) Regulations 2017* were made on 2 November 2017, but they do not include the prescribed forms required to comply with changes to authorisation and notification (and presumably other related new regulations) which appear not to have been finalised.
- Long promised ACCC guidelines in relation to the new law have not been finalised. Three draft guidelines and various related draft documents were released by the ACCC for a public consultation period on 25 October 2017, but will not be finalised until after the consultation period concludes on 24 November 2017.
- The changes were the subject of extensive debate and governmental reviews over in excess of 20 years including the Harper Review Report in March 2015, followed by delayed acceptance of many of its recommendations and passage of the legislation which did not receive Royal Assent until 27 October 2017. The CPRA had provided (subject to special proclamation) for effective commencement six months after Royal Assent.

Practitioners need to become familiar with the new law and its application to ensure their clients' compliance as soon as possible.

This legal update does not attempt to explain or summarise all changes, but practitioners should be aware that they extend beyond publicised areas to a number of matters of significant detail in not only competition but also consumer protection law (the CPRA alone is 109 pages and the Explanatory Memorandum to it is 176 pages).

The principal competition law changes are briefly highlighted below. For further guidance explaining the most significant competition law changes, see Ashurst's *Legal Update, Parliament passes Harper reforms to Competition Law in Australia*.

Practical Law Competition and Consumer Protection service live 24 November 2017

The service provides detailed guidance in relation to all changes to the CCA and on both:

- The substantive law that remains relevant in relation to all transactions, practices and other conduct up to 5 November 2017.
- The substantive and procedural law and processes that apply in relation to all transactions, practices, other conduct, applications and notices from 6 November 2017.

Substantive law changes

Misuse of market power

The long contentious prohibition in section 46 of the CCA which focussed on taking advantage of market power for a proscribed purpose has been repealed.

The MMPA introduces a new section 46 which now prohibits corporations with substantial market power from engaging in conduct that has the purpose, or that has or is likely to have the effect of substantially lessening competition in any market in which the corporation (or a related body corporate) supplies or acquires (or is likely to supply or acquire) goods or services. It is possible now to apply for authorisation to protect against contravention.

Draft ACCC guidelines were published for consultation on 25 October 2017 and await finalisation.

Cartel conduct

The law has not been fully simplified as recommended, but significant changes have been made including:

- **Per se** civil and criminal prohibitions on **output restrictions** have been expanded to restrictions on acquisition.
- The scope of application of the law is clarified to apply the prohibitions to acquisition and supply “in trade or commerce”.
- Civil and criminal joint venture defences have been expanded in part, but additional requirements have been introduced and a higher burden of proof is now imposed on the respondent/defendant.
- All of the **cartel conduct** provisions have been renumbered.

Arrangements affecting competition and “concerted practices”

The main changes are as follows:

- The contentious existing prohibitions on price signalling (section 44ZZS to section 44ZZZB, CCA) and the longstanding **per se** prohibition on **exclusionary provisions** (sections 45(2)(a)(i) and 45(2)(b)(i) and section 4D, CCA) have been repealed.
- Separate prohibitions on covenants affecting competition have also been repealed.

- A new prohibition on (undefined) **concerted practices** which have the purpose, effect or likely effect of substantially lessening competition has been introduced into section 45 of the CCA.

Draft ACCC guidelines on concerted practices were published for consultation on 25 October 2017 and await finalisation.

Exclusive dealing

Harper Review recommendations to simplify or repeal and rationalise section 47 of the CCA with section 45 were not accepted, but **third line forcing** is no longer a **per se** contravention. It is now treated the same way as other **exclusive dealing**, so that it is prohibited only where it has the purpose, effect or likely effect of substantially lessening competition.

Resale price maintenance

There is now an exemption from the **per se** prohibition for **resale price maintenance** for conduct between related bodies corporate, and resale price maintenance can be notified to protect against action.

Access to significant infrastructure

Significant changes have been made to Part IIIA of the CCA which contains the National Access Regime, particularly in relation to the criteria for the declaration of services, and the extent to which an expansion of a facility may be required.

Telecommunications

Some telecommunications-specific anti-competitive conduct laws have been repealed, with the sector still subject to the general **restrictive trade practices** regime of Part IV of the CCA.

Authorisation, notification and exemption

Merger authorisation

The process is now as follows:

- Applications for authorisation are now made to the ACCC, not the Australian Competition Tribunal (ACT). The process is somewhat streamlined, with unused provisions for formal merger clearance repealed.
- A revised consolidated authorisation test applies, so that the ACCC may grant an authorisation if it is satisfied that the conduct (merger) will not (or is not likely to) substantially lessen competition, or is likely to result in a net public benefit.
- The informal merger clearance process which is usually used remains available in addition to authorisation.

Draft ACCC guidelines and forms were published for consultation on 25 October 2017 and await finalisation.

Non-merger authorisation

The same authorisation test now applies to both merger and non-merger authorisations and authorisation is now available for misuse of market power.

Draft ACCC guidelines and forms were published for consultation on 25 October 2017 and await finalisation.

Notification

Resale price maintenance which is prohibited *per se* may now be notified to the ACCC as an alternative to authorisation (which was previously and remains available).

A number of other changes have been made to the availability and process of notification, including:

- All notification is for the most part treated the same way (for example, third line forcing was previously subject to separate provisions and forms).
- The ACCC may revoke a notification if it is satisfied that the public benefits of the notified conduct will not outweigh the detriments.
- In some circumstances, the ACCC will also have the power to impose conditions on the notification.
- The collective bargaining notification process for small businesses is modified, including changes to:
 - allow collective bargaining notifications to cover future members of a bargaining group and include multiple counterparties;
 - allow the ACCC to extend the time for considering a notification and impose conditions on collective boycotts; and
 - give the ACCC a “stop power” in certain circumstances.

Revised forms and related regulations are awaited.

ACCC “class exemption” power

The ACCC can now determine that one or more provisions of Part IV of the CCA do not apply to a kind of conduct which is specified in a determination, if it is satisfied in all the circumstances that conduct of that kind would either:

- Not have the effect, or would not be likely to have the effect, of substantially lessening competition.
- Result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or would be likely to result, from conduct of that kind.

Enforcement

Section 155 powers expanded and limited “reasonable search” defence

ACCC investigative power is extended to investigations of alleged contraventions of court-enforceable undertakings and merger authorisation determinations.

A limited “reasonable search” defence is introduced for the offence of refusing or failing to comply with a section 155 notice. Where the notice relates to the production of documents, it is a defence if the recipient can prove that, after a “reasonable search”, the person is not aware of the documents and the person provides a written response to the notice, detailing the scope and limitations of the search.

Fines and imprisonment for non-compliance with section 155 notices have increased.

Penalties

Penalties for contravention of the CCA otherwise remain the same. A proposal to increase penalties for secondary boycotts was removed before Parliament passed the CPRA.

Use of “admissions of facts” in separate proceedings

Admissions of fact made in one proceeding (most commonly a proceeding brought by the ACCC) may now be relied on in subsequent proceedings (in particular a proceeding brought by private parties against the same respondent).

Limits on review of decisions

With the ACCC now determining all merger authorisation applications, the ACT does not have that role but limited merits review of the ACCC determination is available in the ACT.

Separately, the *Competition & Consumer Amendment (Abolition of Limited Merits Review) Act 2017* (Cth) (ALMRA) recently abolished ACT review of decisions made under the National Electricity Law, the National Gas Law and the National Energy Retail Law, other than decisions relating to the disclosure of confidential or protected information. Decisions made by the Australian Energy Regulator under those laws are now not subject to merits review by the ACT or any other state or territory body.

Transitional provisions

From 6 November 2017, all new applications for merger and non-merger authorisation and notification must be made to the ACCC. Transitional arrangements provide that merger authorisations which have been applied for and not yet determined before 6 November will still be decided by the ACT.

The ALMRA amendments apply to all decisions made under the national energy laws, whether made before or after the commencement of the amendments, except that the pre-existing limited merits review regime continues to apply to any decisions already being reviewed by the ACT provided that the application to review the decision was made on or before 20 June 2017.

Generally, applications and notifications to the ACCC, and section 155 notices issued by the ACCC, before 6 November will be treated as applications and notices under the new provisions (except that pre-existing penalties will apply).

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