ashurst

COMPETITION LAW NEWS 18 OCT 2017

Parliament passes Harper reforms to Competition Law in Australia

What you need to know

- Parliament has passed the long-awaited *Competition & Consumer Amendment (Competition Policy Review) Bill 2017*.
- The Bill makes significant changes to the *Competition & Consumer Act 2010*, many of which were recommended in the Competition Policy Review (Harper Review) led by Professor Ian Harper, which reported in March 2015.
- The changes include broadening the scope of the joint venture exception to cartel conduct, introducing a controversial prohibition on "concerted practices", changing the treatment of third line forcing and the approach to resale price maintenance, providing the ACCC with a new "class exemption power" and much more.
- The changes will take effect on the earlier of a day to be fixed by Proclamation, or the day after 6 months from the day the changes receive Royal Assent. The changes made in the *Misuse of Market Power Act 2017* (which was passed by Parliament on 15 August 2017) will take effect at the same time.
- This Competition Law News briefly outlines the key changes to Australian competition law as a result of the Competition Policy Review Bill.

Competition law reform - the Harper Review

In 2014, the Government commissioned the first review of the *Competition & Consumer Act 2010* (CCA) since 2002. The review was chaired by Professor Ian Harper and conducted a wide-ranging and detailed assessment of whether Australia's competition policy, laws and institutions remain "fit for purpose".

The Harper Panel's Final Report (released in March 2015) made 56 recommendations to government, most of which the Government adopted.

The *Competition & Consumer Amendment (Competition Policy Review) Bill 2017* (the CPR Bill) implements many of the recommendations made by the Harper Review.

The changes will take effect on the earlier of a day to be fixed by Proclamation, or the day after 6 months from the day the changes receive Royal Assent. The changes made in the Misuse of Market Power Act 2017 (which was passed by Parliament on 15 August 2017) will take effect at the same time.

In the notes below we have summarised the key changes which the Competition Policy Review Bill makes.

Broadening the joint venture exception to cartel conduct

The CPR Bill broadens the "joint venture exception" to cartel conduct, so that it will apply to arrangements and understandings (in addition to contracts). This should make the exception easier to apply going forward.

In order to rely on the revised exception, the provisions must be "for the purposes of the joint venture" and "reasonably necessary for undertaking the joint venture" and the joint venture must be for the production, supply, or acquisition of goods or services.

In addition, the joint venture exception will only apply to joint ventures that are not carried out for the purpose of substantially lessening competition. A defendant seeking to rely on the exception bears the onus of proof, on the "balance of probabilities" (a higher burden than previously required).

Exactly what the new requirement of "reasonably necessary for undertaking the joint venture" means is not clear. However, its interpretation will be central to the construction of the provision.

Introducing a new prohibition on "concerted practices"

The CPR Bill introduces a new prohibition on a corporation engaging in a "concerted practice" that has the purpose, effect or likely effect of substantially lessening competition. (This prohibition will not apply where the only persons engaging in the conduct are the Crown and one or more government authorities.)

"Concerted practice" is not defined in the legislation, though 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 the place of the uncertainty of competition".

The Explanatory Memorandum also states that it is intended that the concept of a concerted practice should "fall short of a contract, arrangement or understanding as the courts have interpreted each of those terms in section 45". As this is new territory for the CCA, European case law may be of assistance in understanding the scope of this new prohibition.

As part of this reform, the existing prohibitions on price signalling (Division 1A of Part IV) and on exclusionary provisions (ss 45(2)(a)(i) and 45(2)(b)(i) and s 4D) are repealed. In the case of the price signalling laws, the conduct that was previously prohibited by these provisions will instead be prohibited as "concerted practices". In relation to exclusionary provisions, the CPR Bill makes a consequential amendment to the existing cartel provisions, to close a small potential gap and ensure that all "exclusionary provisions" are captured under the prohibition on cartel conduct. With this change, the separate provisions on exclusionary provisions can be repealed.

Changing the treatment of third line forcing from "per se" to SLC

The CPR Bill makes a long-awaited change to the treatment of third line forcing under the CCA, changing it from a "per se" contravention, to conduct which will be treated the same way as other exclusive dealing. This means that third line forcing will be prohibited only where it has the purpose, effect or likely effect of substantially lessening competition.

Allowing resale price maintenance to be notified

Prior to the CPR Bill, resale price maintenance was prohibited per se, though could be authorised by the Australian Competition & Consumer Commission (ACCC). Under the CPR Bill, resale price maintenance remains per se prohibited, though may be "notified" to the ACCC as an alternative to authorisation. Notification is a simpler and faster process than authorisation.

The ACCC may revoke a notification if it is satisfied that the public benefits of the notified conduct will not outweigh the detriments. In certain circumstances, the ACCC will also have the power to impose conditions on the notification.

The CPR Bill also introduces an exemption from RPM for conduct between related bodies corporate.

Providing the ACCC with a "class exemption" power

The CPR Bill provides the ACCC with a new "class exemption" power, to permit it to 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 not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- conduct of that kind would 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.

The intention of the new power is to create "safe harbours" for businesses engaging in particular kinds of conduct, so as to reduce the compliance and administration costs associated with seeking individual authorisations.

Parties will then need to self-assess whether their conduct falls within a class exemption.

Allowing misuse of market power to be authorised

As discussed in our previous *Competition Law News*, Parliament has recently (separately) passed changes to the prohibition on misuse of market power in section 46 of the CCA, to introduce an "effects" test. The new section 46 prohibits a firm 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.

The CPR Bill makes a further change, to allow conduct that would otherwise contravene the prohibition on misuse of market power to be authorised where the conduct either would not have the effect or would not be likely to have the effect of substantially lessening competition; or where the conduct would result or be likely to result in a benefit to the public which would outweigh the detriment to the public.

Changing the procedures for merger review

The CPR Bill implements the recommendations of the Harper Review to "streamline" the current merger review processes.

The CPR Bill repeals the formal merger clearance process (which has not been used since it was introduced in 2007) and makes changes to the existing merger authorisation process (which has been used a handful of times).

Notably, the decision-maker under the new merger authorisation process will be the ACCC (not the Australian Competition Tribunal). The test to be applied by the ACCC also differs from that which is currently applied by the Tribunal. Under the changes, 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.

As noted above, the CPR Bill, and hence the amendments to the merger processes, will come into effect on the earlier of a day to be fixed by Proclamation, or the day after 6 months from the day the changes receive Royal Assent. This means that merger parties may initiate an authorisation application directly with the Tribunal up to that date. From that date, while new applications for merger authorisation will have to be made to the ACCC, the transitional arrangements provide that merger authorisations which have been applied for and not yet determined before the commencement of the CPR Bill will still be decided by the Tribunal.

Importantly, the merger clearance process which is most frequently used (the "informal clearance process") is not changed by the CPR Bill and will remain available in addition to the amended formal process described above.

Introducing a limit to searches required under section 155 notices

The ACCC has long had powers under section 155 of the CCA to require a person to produce documents or give evidence. The CPR Bill introduces a new "defence" in relation to a failure or refusal to comply with a notice under section 155. The new law provides that where the notice relates to the production of documents, it will be a defence if, 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.

The new sub-section goes on to provide a non-exhaustive list of matters which may be taken into account when determining whether a search is reasonable, including the nature and complexity of the matter, the number of documents involved, the ease and cost of retrieving the documents relative to the resources of the recipient of the notice and any other relevant matter.

While it is possible that this new defence may reduce the costs of compliance in some cases, it is important to note that the defendant bears the legal burden of proof of this matter. In other words, it must be capable of proving on the balance of probabilities that it conducted a reasonable search and that after that search they were not aware of the requested documents. Practically, this may mean that there is little change to the searches that are typically required in order to properly comply with a section 155 Notice.

Penalties for secondary boycotts not increased

A secondary boycott involves two people engaging in conduct together, that hinders or prevents a third person from supplying goods or services to, or acquiring goods or services from, a fourth person. Sections 45D and 45DB of the CCA prohibit secondary boycotts, where the purpose and effect or likely effect is to cause substantial loss or damage to the fourth person's business or to prevent or substantially hinder the third person from engaging in trade or commerce involving movement of goods between Australia and overseas.

The CPR Bill had proposed to increase the maximum pecuniary penalty that applies to secondary boycotts in line with the penalty for other breaches of the competition law, to the greater of $10 million, three times the total value of the benefits obtained from the secondary boycott; or if the court cannot determine the total value of the benefits, 10% of the annual turnover of the corporation and related bodies corporate in the 12 months prior to the conduct.

The Labor party successfully opposed this increase in penalties, with the result that the penalties for secondary boycotts will remain a maximum of $750,000 per contravention.

More flexibility in collective bargaining notification

A collective bargaining notification allows a bargaining group to notify the ACCC about a collective bargaining arrangement where the annual value is less than $3 million (subject to different rules for some industries) as a simpler alternative to authorisation. The conduct is then allowed after 14 days, unless the ACCC objects.

The CPR Bill makes changes which are designed to make the collective bargaining

notification process for small businesses more flexible, so that it may be more widely used. This includes 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" for use in exceptional circumstances.

Changing declaration criteria - access to infrastructure

There are wide ranging changes to be made in relation to Part IIIA of the CCA which contains the National Access Regime. This is particularly the case in relation to the "declaration" criteria, and the extent to which an expansion of a facility may be required (following an access dispute).

Changes to the declaration criteria are summarised in the table below, which is based on the Explanatory Memorandum to the CPR Bill:

NEW PROVISION	OLD PROVISION
Criterion (a): The decision maker must consider whether access (or increased access) on reasonable terms and conditions, as a result of declaration would promote a material increase in competition.	**Criterion (a):** The decision maker must consider whether access (or increased access) would promote a material increase in competition.
Criterion (b): The decision maker must consider whether total foreseeable market demand could be met by the facility over the declaration period at least cost when compared to two or more facilities.	**Criterion (b):** The decision maker must consider whether it is uneconomical for anyone to develop another facility to provide the service.
Criterion (c): no change	**Criterion (c):** The decision maker must consider whether the facility is of national significance having regard to its size, its importance to constitutional trade or commerce; or its importance to the national economy.
Criterion (d): The decision maker must consider whether access (or increased access) on reasonable terms and conditions, as a result of declaration would promote the public interest.	**Criterion (f):** The decision maker must consider whether access (or increased access) would not be contrary to the public interest.

These changes are likely to have a substantial impact on the Australian law in relation to access to facilities. On the whole, the changes are likely to assist in resisting declaration

applications.

Clarifying the use of "admissions of facts" in separate proceedings

One small yet potentially significant change which the CPR Bill makes, is to clarify that admissions of fact made in one proceeding (eg in proceedings brought by the ACCC) may be relied on in subsequent proceedings (eg in proceedings brought by private parties against the same respondent). The intention of this change is to reduce the cost of private actions, but it will be interesting to observe whether this has a side-effect of making parties more reluctant to admit facts in the primary proceedings.

Bill to abolish Limited Merits Review

Separately, Parliament has also passed a Bill (the *Competition & Consumer Amendment (Abolition of Limited Merits Review) Bill 2017*) which amends the CCA to prevent the Australian Competition Tribunal from reviewing 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) and provide that decisions made by the Australian Energy Regulator under those laws are not subject to merits review by any other state or territory body.

This amendment is made in response to concerns that limited merits review involves significant costs to all participants, has barriers to meaningful consumer participation, leads to significant regulatory and price uncertainty and fails to demonstrate outcomes that serve the long term interests of consumers.

The amendments made by the Abolition of Limited Merits Review Bill will commence on the day after the Bill receives Royal Assent. The amendments apply to all decisions made under the national energy laws, whether made before or after the commencement of the amendments. However, the existing limited merits review regime will continue to apply to decisions that were already being reviewed by the Tribunal, provided that the application to review the decision was made on or before 20 June 2017.

Authors: *Peter Armitage, Partner; Bill Reid, Partner; Amanda Tesvic, Senior Associate.*

Key Contacts

We bring together lawyers of the highest calibre with the technical knowledge, industry experience and regional know-how to provide the incisive advice our clients need.

Peter Armitage
PARTNER
SYDNEY
+61 2 9258 6119
peter.armitage@ashurst.com

Bill Reid
PARTNER
SYDNEY
+61 2 9258 5785
bill.reid@ashurst.com

Ross Zaurrini
PARTNER
SYDNEY
+61 2 9258 6840
ross.zaurrini@ashurst.com

Alyssa Phillips
PARTNER
BRISBANE
+61 7 3259 7352
alyssa.phillips@ashurst.com