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Briefing note January 2016

Government response to Harper Review

The Government on 24 November 2015 released its response to the Competition Policy Review chaired by Professor Ian Harper (**Harper Review**). The Harper Review had reportedly been sidelined by the Abbott government, however, following the Liberal party leadership change in September, 2015 the new Turnbull government accepted many of the Harper Review's recommendations, supporting 39 in full, 5 in part and remains open to the remaining 12 recommendations. On 11 December 2015, the Treasurer released a discussion paper on section 46, the misuse of market power provision. The discussion paper is aimed to encourage debate on the Harper Review proposal to strengthen the provision. Submissions on the discussion paper close on 12 February 2016.

This alerter considers the key recommendations in relation to the *Competition and Consumer Act 2010* (Cth) (**CCA**) accepted by the Government.

Cartel conduct provisions

The Government supported the Harper Review recommendations that the cartel provisions should be simplified and the cartel provisions should be amended to:

- apply to cartel conduct involving persons who compete to supply goods or services to or acquire goods and services from persons resident or carrying on business in Australia;
- be confined to conduct involving firms that are actual or likely competitors, where likely means on the balance of probabilities.

The simplification of the cartel provisions is a welcome change. There was a general consensus that the cartel provisions in their current form were considered to be unnecessarily confusing and render it difficult for companies and their advisors to reach a clear and certain view on their interpretations and

Key issues

- Australian competition law is set to undergo a number of significant reforms following the Government's support for 39 of the 56 recommendations arising from the Competition Policy Review.
- There will be further consultation on the misuse of market power provisions in 2016 as the Government considers whether this area of the law has been effective in regulating abuse of dominance.
- The reform agenda is wide ranging with proposed amendments to the merger notification regime, access to essential infrastructure provisions, cartel provisions and the joint venture exception to the cartel laws.
- The proposed reforms also include the introduction of a concerted practices provision to prohibit certain information exchanges and price signalling conduct more closely aligning Australian competition law with EU and US law.
- It is anticipated that the Government will seek to bring forward draft legislation in 2016.

application to specific conduct. As noted by the Harper Review Panel, one explanation for their complexity is that they must comply with the requirements of the *Criminal Code Act 1995* (Cth) as they impose criminal sanctions. Nonetheless, simplification is possible and will make the provisions significantly more workable.

Confining the cartel provisions to conduct involving firms that are actual or likely competitors removes the uncertainty which arose from the decision of Justice Gordon in *Norcast v Bradken (No 2)* [2014] FCA 235 (***Norcast v Bradken***). In that case, her Honour concluded that Bradken, a mining consumables company and Castle Harlan, a private equity fund, were in competition with each other (the competition "conditions") because there was a "*possibility, not remote*", that the parties would compete for the acquisition of an asset. While the correctness of this interpretation is debateable, it raised questions as to the application of a lower threshold for the competition condition required to establish cartel conduct and, in particular, led to uncertainty for consortiums bidding for assets as it could be argued that the consortium parties were competitors for the acquisition of the asset. This reform should give companies greater certainty when structuring transactions to comply with the CCA.

The proposed reform to more expressly limit the cartel provisions to conduct affecting competition in Australia brings the cartel provisions into line with the CCA's primary concern as to the economic welfare of Australians and the approach of comparable overseas jurisdictions to cartel regulation.

Joint venture exemption

The Government supported the Harper Review's recommendation that the joint venture exemption to cartel conduct should be broadened to include the acquisition and marketing of goods and/or services. While the Australian Competition and Consumer Commission (**ACCC**) has not chosen to pursue this perceived gap in the exemption, the current limitation of the joint venture exemption only to joint ventures related to the production and/or supply of goods and services is arbitrary and excludes legitimate pro-competitive joint activities. The expansion of the joint venture exemption to the acquisition and marketing of goods and/or services will therefore ensure a broader range of legitimate pro-competitive joint activity is assessed under the usual test of substantially lessening competition rather than under the per se prohibition in the cartel provisions.

The Government also supported the recommendation to broaden the exemption to cover vertical supply relationships, covering trading restrictions which are imposed by one firm on another in relation to the supply or acquisition of goods and services (including intellectual property licensing). If such a vertical supply relationship has the purpose or effect of substantially lessening competition it will be prohibited by section 45 or section 47 (if retained). This is another welcome change as vertical supply arrangements can lead to efficiencies in production and distribution. Trading restraints on the supply of goods or services may be essential for companies to agree to any vertical supply arrangement or may enhance the efficiency of such arrangements.

Concerted practices

The Government has supported the Harper Review recommendation that section 45 should be extended to prohibited a person from engaging in concerted practices with the purpose, effect or likely effect of substantially lessening competition. The current "price signalling" provisions (which apply exclusively to banking services) will also be repealed.

This reform seeks to capture anticompetitive information exchanges and price signalling which lack the mutual commitment of a contract, arrangement or understanding but nonetheless involve anticompetitive collusion. Mere parallelism in pricing will in itself be unlikely to contravene the new concerted practices provisions. Indeed, EU and US authorities apply a "parallelism plus" approach, with requires additional factors such as evidence of contact between competitors to contravene the relevant provisions. It is likely a similar approach will be taken in Australia.

Nonetheless, companies in highly concentrated industries which have a tendency towards interdependence in pricing should be mindful of increased scrutiny of their pricing decisions. Further, companies will need to ensure that any direct or indirect information exchanges with competitors are limited and to the extent they are necessary, closely scrutinised for compliance with the new provisions.

Private actions

The Government supported the recommendation that admissions of fact made in ACCC civil penalty proceedings should be admissible in follow on proceedings. Admissions of fact include statements of agreed facts, pleadings and admissions of fact made under cross examination. Currently, section 83 of the CCA enables findings of fact made against a company in one proceeding (an

ACCC proceeding), to be used as evidence against the company in another proceeding (a private proceeding). This does not extend to admissions of fact, which are commonplace in ACCC proceedings. This reform is intended to reduce the cost and risk of follow on proceedings for plaintiffs, thereby increasing the likelihood of follow on actions. Given the risk that any admission will be used in follow on proceedings, defendants will need to further consider whether it is in their best interest to make admissions of fact.

Mergers

Merger control in Australia does not require mandatory pre-merger notification to the ACCC. In these circumstances, the Government has indicated that it considers the informal merger review process administered by the ACCC to be working quickly and efficiently for most mergers. While no specific changes have been recommended, the Government has concluded that there should be consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal merger review process.

However, in a significant change, the has Government supported the Harper Review's recommendation that the formal merger clearance process and merger authorisation process should be combined into a single formal merger exemption process, with the ACCC acting as first instance decision maker, with review to the Australian Competition Tribunal (**Tribunal**). At present, the formal processes are sparsely used, with the formal clearance process unused since its introduction in 2007 and the authorisation process for mergers which are made directly to the Tribunal being rarely used until recently.

The ACCC expressed a desire to the Harper Review that the merger authorisation process should return to being commenced before the ACCC rather than going straight to the Tribunal. Given the Tribunal has been expeditious in recent matters, the approach of going to the Tribunal on a merger authorisation basis has been taken in some complex mergers over the last two years.

The reform may lead to the formal process being utilised more readily in complex mergers. Under the proposed regime, if a merger is opposed by the ACCC in the formal review process, this could be appealed to the Tribunal for reconsideration. Given the significant time involved in such a process, (notwithstanding the proposal for strict timelines that cannot be extended without the permission of the merger parties), parties to mergers which raise significant competition issues may find it more appealing to apply for formal clearance at first instance rather than going through a lengthy informal review process and risk having to go to Court or the tribunal before a transaction can complete if the ACCC raises concerns during an informal clearance merger process.

As a result, the merger control reforms may require merger parties in complex mergers to consider at the outset whether there are any public benefits of the transaction in order to assess whether going directly to the formal clearance process is the most appropriate approach. The procedural processes are still to be discussed in conjunction with the business community, but care will be needed not to decrease the utility of the informal clearance merger processes which are widely viewed as working reasonably well in Australia.

Intellectual Property

The Government supported the recommendation that the Productivity Commission should undertake an overarching review of intellectual property. This review which was commissioned by the Australian Treasurer on 18 August 2015, will have regard to incentives for innovation and investment, Australia's international trade obligations, the relative contributions of intellectual property to the Australian economy, the economy wide and distributional consequences of recommendations and ensuring an efficient and robust intellectual property system over time, in light of economic changes. The issues paper was released on 7 October 2015 with the final report due to the Government in August 2016. It is anticipated that the report will consider the tensions which can exist between competition and intellectual property in the digital economy. In an interesting submission to the Productivity Commission Review, the ACCC recommended the Productivity Commission to consider access frameworks for IP and remarked that one means to ensure effective access in the future may be to remove the IP exclusion from the national access regime in Part IIIA.

The Harper Review also recommended the repeal of subsection 51(3) of the CCA which provides a limited exception from competition law for certain types of transactions involving intellectual property. As section 51(3) will be the subject of consideration by the Productivity Commission, the Government noted this recommendation and has stated it will reconsider its response to this recommendation following the release of the Productivity Commission's report.

Part IIIA – Access to essential infrastructure provisions

Prior to the Harper Review, in 2014

the Productivity Commission conducted a comprehensive review of the effectiveness of the Part IIIA National Access Regime (**Access Regime**) in the CCA. The Productivity Commission and the Harper Review Panel held differing views of what changes were required to enhance the effectiveness of the Access Regime.

The Government did not support the Harper Review Panel's recommendations insofar as they conflicted with the changes proposed by the Productivity Commission.

In respect of the declaration criterion, the Government supported the Productivity Commission's recommendations to:

- amend criterion (a) so that the relevant test for whether access will promote competition in a dependent market will involve a comparison of the access under the current situation versus access on reasonable terms and conditions through declaration;
- amend criterion (b) so that the relevant test for whether it would be uneconomical for anyone to develop another facility to provide the service is satisfied where the total foreseeable market demand over the declaration period could be met at least cost by the facility that is the subject of the declaration application; and
- amend criterion (f) to require that access or increased access to a service *will* promote the public interest (as opposed to the current requirement that access not be contrary to the public interest).

The Government's view is that the proposed changes will provide access seekers with greater certainty as to the relevant thresholds their applications are expected to satisfy in respect of the criteria. The reforms will also seek to ensure that Part IIIA is applied in a more practical way in scenarios where third parties may technically already have the right to use the essential infrastructure but that use is subject to arbitrary and unfair terms.

The Government also adopted the Harper Review's recommendation to seek to amend the Competition Principles Agreement to reflect the proposed changes to the declaration criteria.

Contacts

Dave Poddar
Partner
T: +61 2 8922 8033
E: dave.poddar@cliffordchance.com

Kiran Gill
Associate
T: +61 2 8922 8098
E: kiran.gill@cliffordchance.com

Mark Grime
Associate
T: +61 2 8922 8072
E: mark.grime@cliffordchance.com

Gemma Stooke
Associate
T: +61 2 8922 8025
E: gemma.stooke@cliffordchance.com