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Briefing note April 2017

Key changes to Australian competition laws in response to Harper Review are now on the table

The Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (**CCA Bill**) was tabled before Parliament on 30 March 2017. Together with the bill amending the misuse of market provisions (**Misuse of Market Power Bill**) tabled at the end of 2016, these two Bills reflect the results of Government's consultation on the wide ranging competition law reforms proposed by the 2014 Harper Review and the subsequent exposure draft Bill released on 5 September 2016 (**Exposure Draft Bill**).

This briefing identifies the proposed reforms which have survived the consultation process and those which have been scrapped or amended as a result of concerns raised, as well as briefly summarising the key implications of each for businesses operating in Australia.

Key issues

- Both the CCA Bill and Misuse of Market Power Bill have now been tabled in Parliament after consultation processes, progressing the long path to competition law reform which started in 2014.
- The cartel conduct regime is set to be amended (including an important change to the joint venture rules that businesses should note) but not as much as originally proposed.
- The amendments to the misuse of market power provisions are concerning to large businesses as they provide less guidance as to what may constitute a misuse of power.
- Other significant reforms, such as the amendment of the Part IIIA access regime, merger authorisation process and the introduction of a 'concerted practices' prohibition, survive the consultation process and remain on track for implementation.

Introduction

Both the CCA Bill and the Misuse of Market Power Bill encompass the final set of competition law reforms proposed for enactment by Parliament, following a lengthy process of review and consultation starting with the Harper Review in 2014 and culminating in the public consultation of the Exposure Draft Bill (a draft version of the CCA Bill published for comments in September last year).

The CCA Bill adopts many of the amendments contained in the Exposure Draft Bill (albeit with 'tweaks' made to some) but also has some notable exclusions, particularly in relation to the proposed cartel regime reforms. These exclusions and tweaks are explored below, along with the most recent amendments to the Misuse of Market Power Bill.

Key proposals not included as a result of the consultation

The CCA Bill has dropped two of the key reforms which had been proposed in the Exposure Draft Bill in relation to the scope of the cartel regime. The omissions signal a retreat from the significant (but arguably sensible) reforms originally proposed to simplify and narrow the scope of the cartel conduct provisions to better target only unambiguously anti-competitive conduct.

As a result of these omissions, even once or if enacted, the new cartel conduct regime will look very much like the old regime (except in relation to the joint venture exceptions – which are explored below), along with its attendant uncertainties.

Cartel provisions: Vertical supply relationships

The first of the key omissions from the Exposure Draft Bill is that in relation to the proposed broadening of the 'vertical trading restrictions' exception to cartel conduct provisions.

Currently there is an exception to cartel conduct for exclusive dealing restrictions between a supplier and a buyer. The Exposure Draft Bill had proposed a broadening of this exception to include not only exclusivity restrictions but all restrictions on the acquisition or supply of a good or service between a buyer and a seller (and which appeared would have encompassed 'most favoured nation' or 'MFN' type restrictions) in recognition that vertical restrictions can often have pro-competitive benefits and should not therefore be 'per se' offences.

This reform would have dealt with uncertainty arising from recent cases in Australia in which certain restrictions arising between a supplier and a buyer in a vertical context have been treated in different ways by the ACCC – see our briefings on the Expedia / Booking.com agreement and the Flight Centre decision.

The CCA Bill however omits these reforms. The vertical trading restrictions cartel exception was apparently removed from the Exposure Draft Bill in response to feedback that the vertical trading restriction exception to the cartel prohibitions had become too broad, and would be open to abuse by firms not genuinely in a vertical relationship. For example, the ACCC raised its concerns that many firms in a vertical relationship are now also competitors, an example being where the suppliers also have direct supply channels through the internet. This exception would mean conduct between parties in such a relationship could no longer be pursued as cartel conduct.

Particularly in light of the uncertainties flowing from the ACCC's approaches to vertical conduct last year (in cases such as Flight Centre[1] and Booking.com/Expedia[2]), the decision to exclude this reform means that businesses which operate in two-sided platforms or within a supplier and distributor/agent relationship will need to exercise particular care.

All may not be lost however quite yet – it appears that the approach adopted by the Government and recommended by the ACCC is to give this reform further consideration and if accepted, have it be progressed in a future legislative package together with amendments to section 47 of the CCA.

Cartel provisions: Meaning of 'likely' in the context of assessing competitors

The impact of not implementing the vertical restrictions reforms noted above may be compounded by the decision to also exclude the amendment repealing the existing definition of 'likely'.

The existing definition of likely introduces an arguably artificial meaning to the word – the word is currently defined as "more than a remote possibility" which would appear to have a lower threshold than the ordinary common use meaning of the word which is generally "more probable than not".[3]

The definition was not removed due to concerns raised during the consultation as to uncertainty about the meaning of the word that may arise if the definition was removed.

While it has been repealed for now, the Government has noted that it intends to give it "further consideration".

Reforms tweaked as a result of the consultation

Cartel provisions: joint venture exception

The one area of cartel conduct reform which has survived, albeit in a slightly stripped down form, are the reforms proposed in relation to the joint venture exceptions to cartel conduct.

Currently, the joint venture exception only applies to joint ventures reflected in written contracts related to the production and/or supply of goods and services. The Exposure Draft Bill reflected the Harper Review recommendation to broaden this defence by adding joint ventures for

the acquisition and marketing of goods and services to the types of joint ventures exempted.

Notably however, a decision was made after the consultation to not extend the exceptions to joint ventures for the *marketing* of goods and services. The key concern with this proposed reform was that a joint venture established only for the marketing of goods and services would effectively constitute a price-fixing cartel, and this would weaken the prohibition on price-fixing cartels.

Another aspect of the joint venture exception which has been narrowed from its draft form is that the proposed exception now only applies to joint ventures that are not carried on for the purpose of substantially lessening competition. This change to the Exposure Draft Bill aims to ensure that the exceptions are confined to joint ventures established for genuine commercial purposes.

The proposed amendment removing the requirement for an arrangement to be recorded in a written contract has survived. However, as a means of balancing the impact of this reform, the joint venture exceptions were also amended to increase the standard of proof that a defendant must meet in proving the elements of a joint venture exception.

Under the current defence provisions, the defendant only has to satisfy an evidential burden to raise either the civil or criminal joint venture defence, meaning that the defendant only needs to produce evidence suggesting a reasonable possibility that the matters set out in the relevant defence provisions exist. Following these reforms, the defendant will need to provide stronger evidence to show, on a 'balance of probabilities' test, that the joint venture exception applies. The CCA Bill amends the Exposure Draft Bill in this way due to a concern raised that it would be significantly more difficult and expensive for the prosecution to obtain sufficient evidence to prove in the first instance that the relevant joint venture exception did not apply, because of the removal of the requirement that the arrangement be recorded in a written contract.

Merger review processes

The reforms relating to the transfer of merger authorisations from the Australian Competition Tribunal to the ACCC at first instance survive the consultation relatively unchanged except for an amendment in relation to the scope of the Tribunal's review powers.

Following release of the Exposure Draft Bill, stakeholders expressed concern that the Tribunal's review of the ACCC's decision in relation to a merger authorisation was a limited merits review. In response, the CCA Bill gives the Tribunal discretion to allow parties to admit new evidence, if that evidence was not in existence at the time of the ACCC's decision. This is a sensible change.

Recent amendments to the Misuse of Market Power Bill

The Misuse of Market Power Bill was tabled in December 2016 in largely the same form as that proposed in the Exposure Draft Bill. In March 2017 the Bill was passed from the House of Representatives to the Senate in slightly amended form. The commencement date was amended to coincide with the commencement of Schedule 1 of the CCA Bill (due to related misuse of market power authorisation provisions) and the list of pro and anti-competitive 'mandatory factors' to which the court would have had to have regard in determining whether the new test had been contravened, has been removed. This was as a result of the ACCC's concerns that the changes increased the complexity of the new section 46, creating uncertainty as to how the courts may interpret and weigh each of the facts, and in particular a perceived risk that 'substantially lessening competition' would unintentionally take on a different meaning in the context of section 46, compared to other provisions which use the same concept but do not contain mandatory factors.

Presently, it is unclear whether this amendment will have a detrimental effect on businesses and competition by removing what appears to be one of the key measures recommended by the Harper Review to mitigate concerns about inadvertently capturing pro-competitive conduct.

Part IIIA Access Regime

The proposed reforms to Part IIIA as contained in the Exposure Draft Bill remain largely unchanged in the CCA Bill except for small amendments, and additional explanation in the accompanying Explanatory Memorandum, in relation to the declaration criteria for access to services.

The Exposure Draft Bill contained reforms to declaration criterion (a) which was explained as being to change the test for declaration of an essential facility from that which was a comparison of competition "with and without access" to a comparison of competition "with and without declaration". It was explained that this would also mean that existing levels of access being provided voluntarily (even where there was no 'right' to access, pursuant to a declaration) would be relevant as reflecting what

competition would look like in the "without declaration" scenario.

In response to these proposed amendments and explanations, various parties raised concerns that the proposed wording was ambiguous and may introduce additional uncertainty in the application of the access regime (ie that the proposed wording did not necessarily change the test as intended and explained by the Government). However, the ACCC and others also rightly raised concerns about the intended test not being the right test in any case due to the new test making declaration less likely in a situation where a bottleneck facility owner is already providing some level of access yet imposing monopoly pricing.

The changes contained in the CCA Bill and accompanying explanatory memorandum are aimed at addressing the concerns raised in relation to the ambiguity of the wording (with questionable success). The new criterion (a) replaces the words "following a declaration" with "as a result of declaration" to suggest a stronger causal connection between access and declaration. Additionally, the Explanatory Memorandum confirms that the new test is to take into account current levels of 'access' or use already being provided without declaration.

The amendments strengthen/confirm the reforms and as a result, as raised by the ACCC, raise serious concerns of there being a real possibility that the access regime will be rendered ineffective and inapplicable to those monopoly infrastructure owners who are not vertically integrated and therefore always have an incentive to provide at least some level of access but at monopoly prices, with serious consequences for investment incentives in up and downstream markets.

As a result of the apparent watering-down of the access regime, it may be that businesses will need to turn to exploring industry specific codes instead, as suggested by the ACCC in its consultation submission.[4]

Other amendments to have survived the consultation

The majority of the other reforms proposed in the Exposure Draft Bill have been retained in the same, or substantially the same, form, including those pertaining to concerted practices. For further detail, please refer to our briefing on the Exposure Draft Bill and our briefing on the Government's response to the Harper Review.

Timing and next steps

The CCA Bill was moved for a second reading in the House of Representatives on 30 March 2017, and the Misuse of Market Power Bill was moved for a second reading in the Senate on 29 March 2017.Sittings of the Senate and House of Representatives are not scheduled to resume until 9 May 2017, with further breaks then scheduled during the period until 13 June 2017. Both bills will be read again, and given the Easter Break and upcoming budget discussion in May, it is likely that any significant developments will occur after June.

In the meantime, companies should consider whether any business practices should be reviewed or other action taken to address the upcoming reforms.

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[1] See https://www.accc.gov.au/media-release/high-court-allows-accc-appeal-in-flight-centre-attempted-price-fixing-case

[2] See https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels

[3] The court confirmed the definition imputed a low threshold into the provisions in its decision in *Norcast v Bradken (No 2)* [2013] FCA 235.

[4] See the ACCC submission here: https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments/consultation/view_respondent?uuId=458281969

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