AUSTRALIA – MID YEAR COMPETITION AND CONSUMER LAW REVIEW

PROPOSED CHANGES TO AUSTRALIA'S COMPETITION AND CONSUMER LAW FRAMEWORK

Introduction

Competition law reform "disrupted"?

One of the key challenges with reforming Australia's competition and consumer laws stems from the dynamic and rapidly evolving business landscape, with 'disruptors' of traditional business models such as Netflix, Facebook and Google in the media sector and Uber and Airbnb in the ride sharing and hotel accommodation sectors. Each of these companies has already made significant impacts in Australian markets and, if international experience provides a guide, further disruption is inevitable.

The disruption created by these international businesses has been recognised by the Australian Government, which has proposed regulatory responses in some areas. For example, it is widely acknowledged that the Government's media law reform proposals have been put forward because of the impact of Netflix, Google and Facebook in the traditional media sector, particularly in the area of advertising revenue.

This briefing looks at the reforms proposed to Australia's competition and consumer laws in this context. It discusses how the perception of increasing concentration in particular markets has been a catalyst for reform, in particular for the misuse of market power provisions in **se**ction 46 of the *Competition and Consumer Act (2010)* (Cth) (**CCA**), and considers whether the reforms are fit for purpose given Australia's evolving markets.

Having regard to both the extent of competition and consumer law reforms and market changes due to the activities of "disruptors", it is important that the Government ensures its reforms are clearly articulated and subject to meaningful and constructive guidelines. By providing certainty, the Government will assist market participants to ensure compliance with the law, make investments which promote employment and growth and importantly facilitate vigorous competition. This of course will benefit consumers.

Key issues

- Not since the Hilmer Report reforms in the early 1990s has the Government proposed such wide ranging competition law reforms as those currently being considered.
- Unfortunately many of the competition law changes that are in the pipeline address perceived historical market failures, and do not fully recognise that Australia's economy faces significant disruption from global corporations such as Netflix, Facebook and Google in the media sector and Uber and Airbnb in the ride sharing and hotel accommodation sectors.
- A failure to recognise and respond to the competition challenges arising from this disruption may disadvantage Australian companies and consumers.
- In these circumstances, the Government needs to seek to ensure its competition and consumer reforms are clear to business so that businesses are able to compete vigorously with the "disruptors" to the benefit of consumers.

**This Briefing is based on an article by the author published in Who's Who Legal: Australia on 1 July 2017

Competition and consumer law reform - driven by reviews

The Australian Government commissioned a Competition Policy Review (called the Harper Review, after the chair of the Review panel) in 2014. That review was the first comprehensive review of Australia's competition laws and policy undertaken in 20 years, with the last broad review being the National Competition Policy Review chaired by Professor Hilmer, completed in 1993. The final report of the Harper Review was released on 31 March 2015 and contained 56 broad-ranging recommendations. The Government released its initial responses to the Harper Review (including a response on Australia's national access regime) on 24 November 2015 and since that time has continued to consult in relation to the recommendations.

Overview of the changes introduced by the *CCA Bill* and the *Misuse of Market Power Bill*

Reflecting the Harper Review and the Government's ongoing consultation processes, on 30 March 2017 the Government tabled in Parliament the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (**CCA Bill**), with wide-ranging changes to the CCA. Those changes relate to:

- Misuse of market power;
- Mergers;
- Cartels and Joint Ventures;
- Concerted Practices;
- Part IIIA Access; and
- Third Line Forcing and Resale Price Maintenance.

For an overview of the key changes to Australian competition laws in the CCA Bill, please see our briefing here.

The CCA Bill was introduced two days after the Australian House of Representatives passed the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2017* (**Misuse of Market Power Bill**), which is also an outcome of the Harper Review. The Misuse of Market Power Bill, which must still pass the Australian Senate before it becomes law, amends section 46 of the CCA. The amended section 46 will provide that a corporation with a substantial degree of market power will be liable for engaging in conduct which has the purpose or effect of substantially lessening competition in any market. This Bill is quite controversial, with many businesses concerned that it will inadvertently capture pro-competitive conduct.

The changes that will be introduced to Australia's competition law by the combined impact of the CCA Bill and the Misuse of Market Power Bill, including changes to the merger processes under the CCA, will be very significant. Reflecting conclusions of the Harper Review, the bills address perception issues raised by community, business and consumer groups as to the negative impact of increased concentration in Australian markets, particularly in the reforms proposed to conduct provisions dealing with abuse of dominance/misuse of market power.

Unfortunately, however, implementation of many of the recommendations of the Harper Review in relation to specific sectors such as town planning and human services (including health, education, job services, social housing and

aged care), has been deferred for political reasons. The Government has been unable to reach agreement with State and Territory governments, which also have regulatory responsibilities in these areas, on the appropriate approach to implementation.

Government review of the Australian consumer law

Not content with only undertaking a comprehensive review of Australia's competition law, the Australian Government also commenced a review of the Australian Consumer Law (ACL) in mid-2015. As the ACL is jointly administered and enforced at both the Commonwealth and State/Territory levels, the review was jointly commissioned with State and Territory governments. The terms of reference for that review required it to consider the effectiveness of the ACL, having regard to the first five years of the operation of that law and whether the ACL is sufficiently flexible to address new and emerging consumer issues. The final report of the ACL Review was provided to relevant ministers in April 2017. To paraphrase Simon Cohen, the chair of Consumer Affairs Australia and New Zealand (which undertook the review), the ACL has been successful – it has enabled consumers to become more empowered, allowed for a reduction in business costs and also reduced the number of disputes.

Nonetheless, the ACL review did put forward a number of proposals (both legislative and non-legislative), including in the areas of product safety, the regime applicable to product recalls, consumer guarantees and the like to further improve the consumer protection framework. The review also recommended increasing the monetary threshold that would apply to consumer transactions captured by the ACL from A$40,000 to A$100,000 and expanding the unfair contract terms regime to contracts regulated under the Insurance Contracts Act 1984 (Cth).The review considered that changes in these and other areas would be necessary to ensure the ACL remains relevant as Australia's economy and marketplace s continue to evolve. As in the case of the Harper Review, a concern with concentration in markets and the need to protect the consumer is evidenced in the ACL Review report.

No formal response has yet been provided by any government to the ACL Review. Any legislative changes arising from the review will take quite some time to implement, given the need for these to be agreed not only at the federal level but also at the State and Territory level. However, some initial steps have been taken. The Australian Government recently announced that, subject to passage of the necessary legislation, from 1 July 2018 penalties for breach of the ACL will be increased to A$500,000 for individuals and the greater of A$10 million and three times the benefit received or, if that cannot be determined, 10% of annual turnover for companies.

Misuse of market power- protecting vigorous competition

The catalyst for many of the regulatory changes made, and proposed to be made, to Australia's competition and consumer protection framework has been concern regarding the actions of dominant market participants in what are perceived to be increasingly concentrated Australian markets.

- An example is the proposal to introduce tougher misuse of market power provisions to regulate anti-competitive unilateral conduct by large corporations.

Regulatory protections for consumers and small businesses have also been enhanced, aimed at least in part at addressing imbalances in bargaining power.

- For example, from late 2016 the unfair contracts terms regime was extended from business to consumer to also include business to small business dealings.

Reforming the section 46 test

The current section 46 test essentially involves a prohibition on a corporation with a substantial degree of power in a market from taking advantage of that power for an anti-competitive purpose, with such purposes including:

(a) eliminating or substantially damaging a competitor in that or any other market;

(b) preventing the entering of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The new misuse of market power test will, as mentioned previously, provide for important changes. There will no longer be a need, to establish a breach, that the relevant corporation took advantage of its market power and there will be no need to prove that such a corporation had an anti-competitive intent. Therefore it is feasible that Australia's anti-trust regulator, the Australian Competition and Consumer Commission (**ACCC**) could take action against a corporation under the new test where the corporation itself believes that it has simply been fiercely competing with its rivals.

For further discussion on the proposed section 46 changes, please see our briefing here.

Implications for the Australian economy and local businesses

At the same time as these changes to Australian competition and consumer laws have been introduced (or are being considered), the Australian economy, which is a relatively open economy with low barriers to entry and virtually no import restrictions, has in fact been subject to growing disruptive influences from global corporations in a broad range of sectors. This has occurred in sectors such as media, transport and tourism. To take two examples, Netflix was launched in Australia in March 2015 and by May 2016 was estimated to have more than 1.8 million subscribers and the share of Australia's aggregate advertising spend for online advertising went from 19% in 2011 to an incredible 38.3% in 2015. Both of these changes have had a significant disruptive impact on Australia's traditional media sector.

Assuming the Australian courts apply the new section 46 test in the manner that appears to be intended, not only will large businesses in Australia be faced with disruption, but the competitive response by these large firms to the "disruptors" will be complicated by a concern that their actions may inadvertently breach the section. This is unlikely to be in the best interests of consumers, who benefit from robust competition.

Australian businesses, in times of such uncertainty, will therefore benefit not only from the Government taking steps to ensure that there is as much clarity and certainty as possible in the competition and consumer regulatory framework, but also from the ACCC providing clear guidance, including "bright line tests" and, wherever possible, appropriate guidelines on the interpretation

of new laws and its associated enforcement focus. Having such certainty will assist in promoting vigorous competition by business for the benefit of consumers.

Disruption in traditional markets: other regulatory changes

The disruptive changes in the media sector have been recognised by the Australian Government in its recently announced media reform package. Although that package was announced before Ten Network, one of the three commercial free-to-air television operators in Australia, entered into insolvency proceedings, the difficulties faced by the Ten Network demonstrate the challenges the media sector is facing.

The Australian Government is proposing the removal of two of the rules governing Australian media mergers: the "75% reach rule" and the "two out of three rule". These rules provide that no person may be in a position to exercise control of commercial television broadcasting licences where the total licence area population exceeds 75% of the Australian population and prohibit any merger if it could involve a person having control of media platforms in each of television, radio and associated newspapers in any market.

Should these changes become law, merger activity among free-to-air television broadcasters is anticipated to occur, allowing metropolitan broadcasters to consolidate with their regional counterparts, reduce costs and respond to changing customer viewing preferences, particularly the demand for streaming services. It is very likely that other merger activity will also occur. While, of course, any merger in the media sector will still be subject to the general merger provisions in the CCA, that the Australian Government is considering changes to these long standing media sector specific rules is an explicit recognition of the impact of disruptive changes to Australia's economic and industry structures.

Need for balance between innovation and regulation

Although in some cases the Australian Government has recognised the impact of disruption in the Australian market place and is taking steps to allow industry to move quickly to compete, this is not always the case. Concerns about perceived market dominance have led to legislative proposals that may affect the ability of Australian companies to respond to the challenges that they face. It is hoped that the ACCC will not enforce competition and consumer laws in a manner that dampens innovation by Australian businesses, which would ultimately negatively affect consumers. However, only time will tell.

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