

AMENDMENTS TO COMPETITION AND CONSUMER ACT 2010 (CTH)

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Legal Briefings – By **Patrick Gay** and **Robert Pietriche**

Significant amendments have been made to the *Competition and Consumer Act 2010* (Cth) with the passage of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) today.

While these amendments have been long in the making and follow the recommendations of the Harper Review, the changes are significant and will lead to a period of uncertainty and adjustment.

Key changes include the introduction of a concerted practices prohibition, the long-awaited repeal of the per se prohibition on third line forcing, as well as changes to the merger authorisation regime. The date that these changes will come into effect has not yet been determined. However, we expect that the changes, along with the changes to the misuse of market power provision (discussed in our [recent article](#)), will come into effect in the coming weeks.

IN BRIEF

On 18 October 2017, the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) (**Policy Review Bill**) was passed by the House of Representatives and the Senate.

The passage of the Bill signals the conclusion of one of the most significant reform processes to Australia's competition law framework since the Hilmer Review in 1993, and will implement many of the amendments to the *Competition and Consumer Act 2010* (Cth) (**CCA**) recommended by the Competition Policy Review 2014-2015 (known as the **Harper Review**), including:

- the introduction of a concerted practices prohibition (and consequential removal of the price signalling provisions);
- a single authorisation process for both mergers and non-merger conduct;
- simplification of the cartel conduct provisions, including exemptions, and amendments to the joint venture exemption; and
- the long-awaited repeal of the per se prohibition on third line forcing.

The Policy Review Bill also implements reforms to the declaration criteria in the National Access Regime (contained in Part IIIA of the CCA) proposed by the 2013 Productivity Commission inquiry (these reforms were further considered by the Harper Review, but the Government preferred the approach recommended by the Productivity Commission).

The Bill follows the passage of the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2017* (Cth) (**Section 46 Bill**) last month, which implemented a new prohibition on the misuse of market power which discarded the “take advantage” limb of the former prohibition in favour of a controversial “effects test” (discussed in our [recent article](#)). Both the Policy Review Bill and Section 46 Bill are due to commence on either:

- a date to be fixed by proclamation; or
- if no earlier day is fixed by proclamation, the day after 6 months from the date that the Bill receives Royal Assent.

Although no proclamation has been made at this point in time, the ACCC has [indicated](#) that it expects the Policy Review Bill to commence in the coming weeks. Similarly, the explanatory memorandum and supplementary explanatory memorandum to the Section 46 Bill indicated that the Policy Review Bill was intended for imminent introduction, and as such we expect the amendments to take effect shortly.

KEY AMENDMENTS

CONCERTED PRACTICES

The Policy Review Bill introduces a new prohibition against “concerted practices” which have the purpose, effect or likely effect of substantially lessening competition. While the concept of concerted practices is familiar internationally, the concept is new to Australian law and its operation will be uncertain.

The explanatory memorandum provides some guidance as to the type of conduct which could be characterised as a concerted practice:

- any form of cooperation (including conduct falling short of a contract, arrangement or understanding) between two or more firms or people or conduct which would be likely to establish such cooperation;
- it is not necessary that any of the parties act in the same manner or market or at the same time;
- a concerted practice may involve, but does not require:
 - the formality or legally-enforceable obligations of a contract;
 - the express communication of an arrangement (it may be established in the absence of any direct contact); or
 - the commitment of an understanding (it may be established even if none of the parties is obliged to act in a particular way);
- it is not necessary that a concerted practice have an anti-competitive provision, as the focus is on the purpose, effect or likely effect of the practice itself;

- the concept is not intended to capture innocent parallel conduct, such as where two firms determine prices independently but happen to charge similar prices for the same product, or public disclosure of pricing information which facilitates price comparison by consumers; and
- a concerted practice may arise from a single instance, rather than a course of conduct, will typically involve a communication of commercial information and does not require that the practice is reciprocated or that the actions of other parties are altered in response. This raises questions about whether businesses who are unwitting recipients of information may be caught up in concerted practices.

Implications

- The amendments remove the roundly-criticised price signalling prohibitions which currently apply only to the banking sector.
- A broader prohibition is introduced in its place, the limits of which have not been expressly circumscribed. In particular, there is no definition of “concerted practices”, and as such the exact scope of the prohibition is somewhat uncertain.
- Businesses will need to take extra care when interacting with competitors (both formally as well as at industry association meetings and through customers or peak bodies) to avoid any allegation of being involved in a concerted practice regarding the exchange of information.

FORMAL MERGER CLEARANCE AND MERGER AUTHORISATIONS

The Policy Review Bill repeals the never-used formal merger clearance process and integrates merger authorisations with a single authorisation process which applies for authorisation of all Part IV conduct. In doing so, the Policy Review Bill abolishes the streamlined approach of filing merger clearance applications directly with the Tribunal.

Under the proposed merger authorisation process:

- the decision maker at first instance for merger authorisation will be the Commission (and not the Tribunal as was previously the case);
- the Commission can grant authorisation if it is satisfied that the conduct will not, or is not likely to, substantially lessen competition, or is likely to result in a net public benefit; and
- on application, the Tribunal may review a merger authorisations determination of the Commission.

Importantly, in considering a matter, the Tribunal will be limited to information that was before the Commission. The Tribunal also has limited powers to allow merger parties to present new information not in existence at the time of the Commission’s determination.

Implications

- Removing the ability to proceed directly to the Tribunal has the potential to create delays in mergers where there are clear public benefits. The amendments would preclude the process which was recently used in the Tabcorp / Tatts acquisition.
- The limitations on the Tribunal process may impact its ability to fully assess the issues before it.
- Integrating the former merger clearance process with a merger authorisation process significantly increases the likelihood of a formal merger application in circumstances where the prior process has never been used.

CARTEL CONDUCT AND AMENDMENTS TO THE JOINT VENTURE EXEMPTION

The Policy Review Bill modifies the cartel conduct provisions to clarify and simplify the existing regime. Under the Policy Review Bill, the application of the prohibition is confined to cartel conduct affecting business and consumers in Australia. Further, the technical complexity of the joint venture defence will be removed by broadening its application beyond mere contractual joint ventures to also include arrangements and understandings and joint ventures for the production, supply or acquisition of goods or services. The ability to invoke the joint venture exemption, however, will require that the relevant provisions be reasonably necessary for undertaking the joint venture. This may be more restrictive than the current requirement that the provisions be for the “purposes” of the joint venture.

Implications

- Simplification of the cartel conduct provisions should provide greater certainty and facilitate better understanding of previously complex provisions for businesses.
- The expansion of the joint venture exemption provides greater scope for legitimate joint ventures to avoid a per se prohibition.
- The requirement that the cartel provision is reasonably necessary for undertaking the joint venture may, however, increase the risks for legitimate joint ventures as conduct may benefit or be in the legitimate interest of the joint venture, but nevertheless not be found to be reasonably necessary for the joint venture.

THIRD LINE FORCING

The Policy Review Bill effects a long-awaited repeal of the per se prohibition on third line forcing. Under the new law, third line forcing will only be prohibited where the conduct has the purpose, effect or likely effect of substantially lessening competition. This amendment brings the provision in line with the treatment of similar exclusive dealing provisions.

Implications

- Businesses will no longer need to seek immunity from per se liability for common “third line forcing conduct” which poses no legitimate competitive concern.

OTHER AUTHORISATIONS AND NOTIFICATIONS

(a) Authorisations

In addition to the changes noted above with respect to merger authorisations, there are other changes to notification processes. Under the Policy Review Bill:

- the ACCC may grant authorisation for a person to engage in conduct which would otherwise contravene Part IV (including misuse of market power, which could not previously be authorised);
- authorisation may be granted where the Commission is satisfied either that the conduct would not have the effect or would not be likely to have the effect of substantially lessening competition or that the conduct would result or be likely to result in a net public benefit;
- cartel conduct, resale price maintenance or secondary boycotts may only be authorised where the ACCC is satisfied that the conduct would result or be likely to result in a net public benefit (regardless of whether the conduct would not have the effect of substantially lessening competition); and
- the ACCC may create class exemptions for particular types of conduct so as to create safe harbours for business and reduce compliance and administration costs associated with individual authorisations.

(b) Resale price maintenance notifications

The Policy Review Bill introduces a notification process for resale price maintenance. Notification is a simpler process than authorisation.

The ACCC can impose conditions on such a notification and is also authorised to revoke the notification on the basis that the public benefits of the conduct will not outweigh the detriments or where any conditions imposed on the notification are contravened.

The Policy Review Bill also excludes from the resale price maintenance prohibition actions between related bodies corporate, thereby bringing the provision into line with sections 45 and 47 as well as the general principle of competition law that companies within a corporate group are treated as a single economic entity.

(c) Collective bargaining and boycotts notifications

The notification procedure for collective bargaining and collective boycotts has been amended such that:

- the notice may extend to include people who join the bargaining group after notice is given to the Commission;
- parties to the bargaining group may deal with multiple counterparties without giving separate notices for each counterparty;
- the Commission may impose conditions on such notifications where it reasonably believes that it would have grounds to issue an objection notice relating to the notification and that such grounds would not exist if the conditions sought to be imposed were met; and
- the Commission may issue a “stop notice” requiring collective boycott conduct to cease where there has been a material change of circumstances since the notice came into force and the conduct has resulted in serious detriment to the public or serious detriment to the public is imminent.

Implications

- The current authorisation and notification processes were overly-limited in scope (ie. the inability to apply for authorisation for a misuse of market power) as well as overly-technical which required, in certain instances, multiple notifications where a single notification should have sufficed. The amendments should be welcomed as a simplification to the process.

NATIONAL ACCESS REGIME

Under the National Access Regime, a service (e.g. the use of an infrastructure facility) can be ‘declared’ – granting access seekers the right to access the service – where certain ‘declaration criteria’ are satisfied. The Policy Review Bill amends the declaration criteria, making it more difficult for access seekers to obtain declaration.

The recent decision of the Full Federal Court in the *Port of Newcastle* decision (discussed in our recent article [here](#)) affirmed the principle established in the *Sydney Airport* decision that the current criterion (a) (the ‘competition criterion’) requires a comparison of competition with/without access (i.e. ignoring any existing access rights to use the service). The amended competition criterion will return the law to the test that was applied prior to *Sydney Airport*, requiring a comparison of competition with/without declaration (i.e. taking into account existing terms and conditions of access).

Criterion (b) (the ‘monopoly asset criterion’) will be changed from a ‘privately profitable’ test to the ‘notoriously difficult’ ‘total foreseeable demand test’, reversing the 2012 decision of the High Court in *Pilbara*.

Other noteworthy amendments include:

- the threshold for the public interest criterion being raised slightly, requiring an access seeker to positively establish that declaration would promote the public interest rather than declaration not being contrary to the public interest;
- certification of State-based access regimes becoming a threshold test rather than a substantive criterion (this is primarily a formulaic, rather than substantive, change);
- legislative confirmation that the terms ‘extend’, ‘extensions’ and ‘extending’ include expansions of a facility’s capacity; and
- several minor improvements to processes and procedures.

Implications

- The amended declaration criteria should mean that a declaration is less likely to succeed in circumstances where some form of voluntary access is given.
- The amendments may have an effect on services that are already declared – the NCC can make a recommendation to the Minister to revoke the declaration (applying the new declaration criteria).

MINOR AMENDMENTS

The Policy Review Bill also introduces the following minor amendments:

- the prohibition on exclusionary provisions is repealed due to substantial overlap with the cartel conduct prohibition;
- the concept of “covenants” is introduced into the definitions of “contract” and “party” such that section 45 will now apply to covenants which restrict dealings or affect competition;
- a party which brings certain proceedings against a corporation for contravention of the CCA may rely upon admissions of fact and findings of fact made in certain other proceedings brought by the Commission; and
- the power of the Commission in relation to Section 155 notices is amended such that:
 - a notice may be issued in relation to an alleged contravention of a court-enforceable undertaking made to the Commission under s 87B or section 218 of the *Australian Consumer Law* or in relation to a merger authorisation;
 - it will be a defence to failing to comply with a notice to produce documents that a person is not aware of the documents after undertaking a reasonable search; and
 - the maximum penalty for non-compliance will be increased to 100 penalty units or 2 years imprisonment (for an individual).

LOOKING AHEAD

The introduction of the concerted practices prohibition, as well as the changes to the misuse of market power provisions, are most likely to attract attention from businesses who will be seeking guidance as to the scope of these new and untested prohibitions.

Businesses which are engaged in benign and often pro-competitive third line forcing conduct will be relieved of the administrative burden of filing notifications in order to obtain immunity for this conduct.

It will be interesting to see when, and under what circumstances, the new formal merger clearance and authorisation provisions will be used.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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