
Harper update: Major Australian competition law changes one step closer

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In brief

The most significant changes to competition law in Australia in the last 20 years are one step closer to reality, with the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) (Harper Review Bill) passing the House of Representatives on 5 September 2017.

The Harper Review Bill gives effect to the remainder of the Australian Government's response to the Competition Policy Review. If passed by the Senate, the Harper Review Bill will commence at the same time as the new misuse of market power prohibition.

In detail

Harper Review Bill passed by House of Representatives

The Harper Review Bill passed the House of Representatives without amendment on 5 September 2017, and was introduced to the Senate on 6 September 2017. The Harper Review Bill gives effect to the remainder of the Australian Government's response to the Harper Review (see our LegalTalk Alert: [Harper Review into Competition Policy – final report](#)), which was revised following public consultation on the Exposure Draft of the Harper Review Bill (Exposure Draft) released for public consultation on 5 September 2016 (see our LegalTalk Alert: [Draft legislation to implement Harper Review reforms to Australia's Competition Laws](#)).

Key changes proposed by Harper Review Bill

The Harper Review Bill makes substantive amendments to the *Competition and Consumer Act 2010* (Cth) (CCA). A brief summary of the key changes is set out below:

- *Definition of 'competition'* – the definition of 'competition' in section 4 of the CCA is amended to clarify that competition includes competition from goods and services that are capable of importation, in addition to those actually imported.
- *Cartel conduct* – the cartel conduct provisions of the CCA are confined to cartel conduct affecting competition in Australian markets. The joint venture exception is also amended to:

- a) apply to arrangements or understandings (in addition to contracts), and to joint ventures for the acquisition of goods or services (in addition to the production or supply of goods or services);
 - b) only apply to cartel provisions for the purposes of a joint venture and reasonably necessary for undertaking a joint venture, and do not apply where the joint venture has the purpose of substantially lessening competition;
 - c) increase the standard of proof that a defendant must discharge to establish the relevant exceptions, on the balance of probabilities; and
 - d) broaden the 'output restriction' purpose condition to refer to acquisition (in addition to production, capacity and supply), to address any gap due to repeal of exclusionary provisions.
- *Price signalling and concerted practices* – the price signalling provisions in Division 1A of Part IV of the CCA, and the separate prohibition on exclusionary provisions in the CCA, are repealed. In addition, section 45 of the CCA is extended to prohibit a corporation from engaging in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition (except where the only parties to a concerted practice are the Crown and one or more government authorities).
 - *Secondary boycotts* – the maximum penalty applying to breaches of the secondary boycott provisions are increased to align with the penalties for other breaches of the competition law.
 - *Third line forcing* – the current per se prohibition on third line forcing is to cease and the practice will be prohibited only where it has the purpose, effect or likely effect of substantially lessening competition.
 - *Resale price maintenance* – the resale price maintenance and notification provisions are amended to allow a corporation or a person to notify the Australian Competition and Consumer Commission (ACCC) of resale price maintenance conduct, as an alternative to seeking authorisation from the ACCC for such conduct. There is also an exemption from the resale price maintenance prohibition for conduct between related bodies corporate.
 - *Authorisations, notifications and class exemptions* – key amendments include the following:
 - a) the various authorisation provisions, including those relating to mergers, are consolidated into a single authorisation process. For merger authorisation, the ACCC will be the decision maker at first instance, with the ACCC's decision reviewable by the Australian Competition Tribunal on appeal;
 - b) the ACCC is granted a 'class exemption' power which enables it to determine that one or more provisions of Part IV of the CCA do not apply to a kind of conduct specified in the determination;
 - c) the ACCC is granted power to impose conditions on notifications for resale price maintenance and collective bargaining that involves collective boycott conduct; and
 - d) the ACCC is granted a 'stop notice' power which enables it to issue a stop notice requiring notified collective boycott conduct that is the subject of a notification to cease.
 - *Admissions of fact* – section 83 of the CCA is extended such that a party bringing certain proceedings may rely on admissions of fact made by a person, as well as findings of fact made by a Court, in certain other proceedings against that person.
 - *ACCC power to obtain information, documents and evidence* – the ACCC's power to obtain information, documents and evidence under section 155 of the CCA is extended to cover investigations of alleged contraventions of court enforceable undertakings and merger authorisation

determinations. In addition, a ‘reasonable search’ defence is introduced to the offence of refusing or failing to comply with section 155 of the CCA, and the fine for non-compliance with section 155 is increased.

- *Access to services* – key changes to the National Access Regime in Part IIIA of the CCA include:
 - a) amending and clarifying the declaration criteria used by the Council and designated Minister;
 - b) amending the default position, such that the Minister is deemed to have accepted the Council’s recommendation if they do not publish a decision within the 60 day time limit;
 - c) amending and clarifying the scope of a determination to ‘extend’ a facility in an access dispute; and
 - d) providing the Minister with the power to revoke certification on recommendation by the Council.
- *Other amendments* – the definitions of ‘contract’ and ‘party’ are amended to expressly include covenants, whilst redundant provisions which separately deal with covenants are repealed. Various other amendments are made to streamline the CCA’s administration.

Harper Review Bill amendments to Exposure Draft

The Harper Review Bill contains several key amendments to the Exposure Draft circulated in late 2016. The amendments reflect the Government’s response to a number of stakeholder concerns raised during the public consultation period for the Exposure Draft, as set out in the Explanatory Memorandum to the Harper Review Bill and outlined below.

Stakeholder concerns regarding Exposure Draft	Government Response in Harper Review Bill
In the absence of the definition in section 44ZZRB, the meaning of ‘likely’ (as it applies to ‘actual or likely competitors’), was uncertain.	The amendment repealing section 44ZZRB was removed from the Harper Review Bill (the current definition of ‘likely’ in section 44ZZRB was retained in the cartel conduct provisions).
Some stakeholders had suggested that the joint venture and vertical trading restriction exceptions to the cartel prohibitions in the Exposure Draft had become too broad.	The joint venture cartel exceptions in the Harper Review Bill have been narrowed to joint ventures that are not for the purpose of substantially lessening competition, and the burden of proof on the defendant was increased. The vertical trading restriction cartel exception was also removed from the Harper Review Bill.
The meaning of ‘concerted practices’ was not sufficiently clear.	The Explanatory Memorandum to the Harper Review Bill includes additional guidance as to what may constitute a ‘concerted practice’.
The Tribunal review of the Commission’s decision in relation to a merger authorisation was a limited merits review.	The Harper Review Bill gives the Tribunal a discretion to allow parties to a review of the Commission’s decision in relation to a merger authorisation to admit new evidence if that evidence was not in existence at the time of the Commission’s decision.
The transitional treatment of certain merger authorisations and clearances was not sufficiently clear.	The Harper Review Bill includes detailed transitional provisions for the treatment of merger authorisations and clearances which were applied for, or granted, under the old law.
To allow an admission of fact to be proven by <i>any</i> document would allow	The Harper Review Bill limits proof of an admission of fact to either a document under the seal of the court from which

Stakeholder concerns regarding Exposure Draft	Government Response in Harper Review Bill
for documents not previously tested before a court to be relied on as prima facie evidence.	the admission of fact appears, or a document filed with the court.
The updated declaration criteria in section 44CA(1), and the costs to be taken into account under the different criteria, were not sufficiently clear.	The Harper Review Bill amends the declaration criteria to provide greater clarity and the Explanatory Memorandum to the Harper Review Bill includes additional guidance as to the costs to be considered under different criteria.

Next steps and timing

The Harper Review Bill is currently before the Senate. If passed, the new provisions will commence on the earlier of either a date fixed by proclamation or 6 months after receiving Royal Assent. The landmark misuse of market power prohibition, which was introduced by the separate *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth), and which received Royal Assent on 23 August 2017, is scheduled to commence at the same time.

The takeaway

The Harper Review Bill, if passed by the Senate, will give effect to some of the most significant amendments to Australia’s competition law regime in the last 20 years.

Let’s talk

For a deeper discussion of how these issues might affect your business, please contact:

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