
Draft legislation to implement Harper Review reforms to Australia's Competition Laws

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In brief

Federal Treasury has now released an Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (Exposure Draft legislation), giving effect to the Australian Government's response to the Competition Policy Review (Harper Review). [View a copy of the complete Exposure Draft and the Draft Explanatory Memorandum.](#)

The Exposure Draft legislation includes significant amendments to the *Competition and Consumer Act 2010* (CCA) in line with the majority of the Harper Review recommendations, including:

- amendments to the misuse of power prohibition
- broadening the definition of 'competition' to include potential imports of goods and services, to fully reflect the range of competitive pressures facing Australian firms
- confining the cartel conduct provisions to apply to conduct affecting trade or commerce in Australia, or between Australia and places outside Australia
- broadening the exceptions for joint ventures and vertical trading restrictions to allow common, pro-competitive business arrangements
- amending the National Access Regime declaration criteria to ensure third-party access is only mandated where it is in the public interest
- consolidating the various authorisation processes into a single, streamlined process
- simplifying the CCA by repealing separate, specific prohibitions on price signalling and exclusionary provisions
- introducing a prohibition against concerted practices, and
- extending the ACCC's powers in relation to section 155 notices and introducing a 'reasonable search' defence.

Submissions on the Exposure Draft legislation can be made to the Treasury until Friday, 30 September 2016.

Additionally, the ACCC has released draft guidelines on the misuse of market power and concerted practices prohibitions. Interested parties are also invited to make submissions on these guidelines until Monday, 3 October 2016.

In detail

On 24 November 2015, the Government released its response to the Competition Policy Review (the Harper Review) and supported in full or in principle 39 of the Harper Review's 56 recommendations and a further 5 recommendations in part. The Government also noted or remained open to the remaining 12 recommendations, following further review and consultation.

On 16 March 2016, the Government agreed to implement the Harper Review's recommended changes to the misuse of market power law.

The Government is now consulting on the Exposure Draft legislation. It is the next stage to giving effect to the most substantive Harper Review recommendations relating to Australia's competition laws, with the broader competition law simplification plan to follow in a future legislative package.

Submissions on the Exposure Draft legislation are due by 5pm Friday 30 September 2016.

The Exposure Draft legislation includes the following significant amendments to the CCA.

Misuse of Market Power

The Exposure Draft legislation strengthens the prohibition of misuse of market power by corporations and is intended to more effectively target anti-competitive conduct by corporations with a substantial degree of market power.

Key features of the proposed amendments include:

- the removal of the 'take advantage' requirement in s46 and the introduction of an 'effects' test i.e. the conduct must have the purpose, effect or likely effect of substantially lessening competition in a market,
- certain pro-competitive and anti-competitive factors must be taken into account when considering whether a substantial lessening of competition has occurred,
- the removal of the specific prohibitions on predatory pricing and other practices, and
- market participants can seek exemption from s46 by applying to the ACCC for authorisation.

The ACCC have also released for consultation a framework for guidance on s46 which includes examples of the type of conduct that may or may not contravene the amended provision.

Definition of 'competition'

The Exposure Draft legislation extends the definition of 'competition' to include competition from goods and services that are imported or capable of being imported.

The express inclusion of goods and services that are 'capable of' being imported is not qualified to require consideration of only those goods and services that could be economically imported into Australia. However, the Explanatory Memorandum clarifies that only credible threats of import competition should be relevant to the competition analysis. This change seeks to ensure any competition analysis would consistently take into account any goods or services that affect markets in Australia, regardless of their origin.

Cartel Conduct

The Exposure Draft legislation makes a number of amendments to simplify the cartel conduct provisions and to better target these provisions as anti-competitive conduct.

The cartel provisions would:

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- consistent with the treatment of cartel conduct in comparable overseas jurisdictions, be confined to cartel conduct affecting competition in Australian markets, and
 - apply between actual or likely competitors.

To encourage pro-competitive economic activity and to reflect the reality of business, the exemptions to cartel conduct for joint ventures would be broadened to apply to:

- arrangements or understandings (in addition to contracts),
- joint ventures for the production, supply or acquisition of good and services, and
- cartel provisions that are reasonably necessary for undertaking a joint venture.

The exemption for vertical trading restrictions would also be broadened to apply to various types of vertical trading restrictions, rather than only to exclusive dealing restrictions. The 'output restriction' purpose condition would be broadened to address any gap resulting from the repeal of the separate prohibition on exclusionary provisions.

Third line forcing

Third line forcing will no longer be prohibited per se, but would be subject to a competition test and only prohibited where it has the purpose, effect or likely effect of substantially lessening competition.

Resale price maintenance

The Exposure Draft legislation:

- will allow a corporation or person to notify the ACCC of resale price maintenance conduct, in addition to seeking authorisation from the ACCC for resale price maintenance conduct, and
- amend the CCA to provide that actions between related bodies corporate will not be caught as resale price maintenance.

National Access Regime

The Exposure Draft legislation amends the National Access Regime to ensure that it better addresses the economic problem of an enduring lack of effective competition in markets for nationally significant infrastructure services. The three primary changes include:

- amending and clarifying the declaration criteria that must be used by the Council and designated Minister,
- amending the default position, whereby if a Minister does not respond to a declaration recommendation by the Council within 60 days, the Minister will be deemed to have made a decision in accordance with the recommendation, and
- amending and clarifying the scope of a determination made by the Commission to 'extend' a facility in an access dispute.

Authorisation processes

The Exposure Draft legislation amends and simplifies the various authorisation processes in the CCA to:

- consolidate the various authorisation provisions, including the formal clearance process (which has never been used) into a single authorisation process;
- for merger authorisation, the ACCC will be the decision maker at first instance. The ACCC's determination on mergers will be reviewable by the Tribunal on appeal;
- grant the ACCC a 'class exemption' power for conduct or categories of conduct if it is unlikely to raise competition concerns or is likely to generate net public benefits;
- allow the ACCC to impose conditions on notifications for collective bargaining; and

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- grant the ACCC a power to issue a ‘stop notice’ requiring collective boycott conduct to cease.

Price signalling and concerted practices

Under the Exposure Draft legislation:

- the price signalling provisions will be repealed. The anti-competitive disclosure of pricing and other information will be dealt with under the more general prohibitions in the CCA; and
- section 45 will be extended to prohibit a person from engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition. The amendment aims to capture coordinated practices which may not involve any understanding between competitors.

The ACCC have also released for consultation a framework for guidance on the prohibition of concerted practices.

Power to obtain information, documents and evidence

Under the Exposure Draft legislation, the ACCC’s power to obtain information, documents and evidence pursuant to a section 155 notice is extended to cover investigations of alleged contraventions of court enforceable undertakings. The aim is to assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

The Exposure Draft legislation also introduces a defence to section 155(5) if a person refuses or fails to comply with a notice to produce documents if the person has undertaken a reasonable search for those documents.

The maximum penalty for non-compliance with a section 155 notice is also increased from \$3,600 or 12 months imprisonment to \$18,000 or 2 years imprisonment.

Submissions on the Exposure Draft legislation

Submissions on the Exposure Draft legislation may be made in one of two ways:

- through the online survey, with specific questions and the opportunity to upload a general written submission; or
- by emailing or posting in a written submission, which can include answers to the specific questions.

Submissions must be sent no later than 5pm Friday 30 September 2016.

If you wish to discuss any aspect of these proposed legislative reforms or would like assistance in formulating submissions, please get in contact.

ACCC consultations on draft frameworks for misuse of market power and concerted practices guidelines

The ACCC has also released for comment its draft guidelines on the frameworks for its:

- misuse of market power guidelines. [A copy of this draft framework can be accessed online](#), and
- concerted practices guidelines. [A copy of this draft framework can be accessed online](#).

The ACCC invites feedback on these frameworks which it will take into account in preparing and publishing the guidelines if and when the CCA is amended. Interested parties can make a submission on the proposed framework by 5pm, Monday 3 October 2016.

The Department of Communications and the Arts is also seeking comment on what, if anything, needs to change in the telecommunications-specific anti-competitive conduct laws in Part XIB in light of the proposed amendments to s46. [A copy of the discussion paper can be accessed online.](#)

The takeaway

The proposed amendments in the Exposure Draft legislation represent some of the most significant amendments to the competition laws in Australia in the last 20 years. To have your say on the proposed amendments, you can make submissions over the next two weeks. If you require any assistance in formulating submissions, please get in touch.

In the coming weeks we will be shining the spotlight on a number of the specific proposed amendments in the Exposure Draft legislation with a focus on how these amendments may affect certain industries and businesses.

Let's talk

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

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