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PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the tenth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for October 2017.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

In this issue

In our October 2017 issue:

- PricewaterhouseCoopers (Australia) reports on the most recent changes to Australian competition law, giving effect to the remainder of the Australian Government's response to the Competition Policy Review; and
- PricewaterhouseCoopers Statsautoriseret Revisionspartnerselskab (Denmark) considers new Danish legislation that enables limited liability companies the ability to grant loans to its minority shareholders.

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PricewaterhouseCoopers (Australia) – Harper update: Major Australian competition law changes one step closer

At a glance

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:

a 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.

b 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.

c 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).

d 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.

e 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.

f 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.

g 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.

h 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.

i 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.

j 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.

k 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.

a The meaning of 'likely' in s44ZZRB

Stakeholder concerns: In the absence of the definition in section 44ZZRB, the meaning of 'likely' (as it applies to 'actual or likely competitors'), was uncertain.

Government response: 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).

b Joint venture and vertical trading restrictions

Stakeholder concerns: 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.

Government response: 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.

c The meaning of 'concerted practices'

Stakeholder concerns: The meaning of 'concerted practices' was not sufficiently clear.

Government response: The Explanatory Memorandum to the Harper Review Bill includes additional guidance as to what may constitute a 'concerted practice'.

c The meaning of 'concerted practices'

Stakeholder concerns: The Tribunal review of the Commission's decision in relation to a merger authorisation was a limited merits review.

Government response: 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.

e Treatment of certain merger authorisations and clearances

Stakeholder concerns: The transitional treatment of certain merger authorisations and clearances was not sufficiently clear.

Government response: 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.

f Admission of fact evidence

Stakeholder concerns: To allow an admission of fact to be proven by any document would allow for documents not previously tested before a court to be relied on as prima facie evidence.

Government response: The Harper Review Bill limits proof of an admission of fact to either a document under the seal of the court from which the admission of fact appears, or a document filed with the court.

g Updated declaration criteria in s44CA(1)

Stakeholder concerns: The updated declaration criteria in section 44CA(1), and the costs to be taken into account under the different criteria, were not sufficiently clear.

Government response: 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.

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PricewaterhouseCoopers Statsautoriseret Revisionspartnerselskab (Denmark) – New Danish rules regarding loans to shareholders provides increased flexibility

At a glance

On 1 January 2017, new Danish legislation took effect providing the possibility for Danish limited liability companies to grant loans to its minority shareholders, which previously have generally not been allowed.

The new rules entail that if certain conditions are met these loans can now be granted legally.

However, the following criteria must to be met:

a the loan can be contained within the distributable reserves;

b the loan is on arm's length terms;

c a majority of the shareholders must agree; and

d the first financial statement of the company must have been adopted.

If the above criteria is complied with, the loan can be legally granted to minority shareholders. The new rules thus provides new means and an increased flexibility to distribute capital from Danish limited liability companies.

In detail

Shareholders loans

Historically, loans to shareholders have been an area of focus in Danish corporate law. This is mainly attributed to the fact that historically these loans have been illegal from a corporate law perspective except for loans to certain parent companies.

1. The illegal loan to shareholders

Prior to 1 January 2017 loans to shareholders (as well as management) was generally not allowed. This applied to corporate shareholders as well as individual shareholders.

However, prior to the new legislative framework from 1 January 2017, certain loans to shareholders was exempt from the ban:

a loans to corporate shareholders with the majority of shares/controlling influence of the lender;

b loans to shareholders as part of an ordinary business transaction; and

c loans to shareholders from financial institutions.

The above mentioned exception has been interpreted very strictly by the Danish Business Authority, which means their use was limited.

Additionally, having an illegal loan to shareholders carries a rather strict penalty in that penalty interest will apply of c. 10% as well as a fine of c. 5% of the principal loan amount. Additionally, having an illegal shareholder loan carries the risk of the Danish business authority dissolving the company due to non-compliance with Danish corporate law.

Based on the above, the possibility to utilize a loan to shareholders – not being the parent company - as a way to distribute/re-invest fund has historically been very limited.

2. The new legal loan to shareholders

On 1 January 2017 an amendment to the Danish Companies Act took effect, which provided means for Danish limited liability companies to grant loans to their shareholders legally.

To grant a legal loan to a shareholder in accordance with the new Danish rules, certain criteria must be met:

a the loan to the shareholder must be able to be contained in the distributable reserves from the lender;

b the loan to the shareholder must be on arm's length terms;

c a majority of the shareholders must agree to the loan on a general meeting; and

d a legal loan to the shareholders cannot be carried out prior to the approval of the fist financial statement of the lender

Please note that the "old" exemptions from the illegal shareholder loan still applies (i.e. loans to majority corporate shareholders are still legal even if the above "new" criteria is not met).

a Distributable reserves

Generally, distributable reserves are defined in Danish corporate law as equity, not bound by law or the article of association of the company. This means that revenue and capital injected – except for the registered share capital - can generally be utilized in accordance with the new rules.

The amount of distributable reserves are based on the last filed financial statement. However, any decrease, which have occurred since the last balance sheet day should be considered. However, increases in the distributable reserves since the last balance sheet day cannot be utilized according to the preparatory works associated with the new act. Thus, there is an imbalance in how the period after the last balance sheet day is handled.

Additionally, please note that if any tax obligations are applicable for the loan (i.e. any withholding taxes etc.), they must be able to be contained within the distributable reserves as well, as the distributable reserves needs to encompass the gross value of the loan.

b Arm's lengths terms

The loan must be on arm's length terms requirement concerns the interest rate, duration, collateral, credit rating etc. Generally, it was described in the preparatory works associated with the act that the loan needs to be on terms, which the borrower could have obtained with a third party. However, as this is based on an individual assessment there may be some flexibility in the exact terms.

c Adoption on the general meeting

The loan to the shareholders must be adopted on the general meeting of the lender. This can be accomplished on an ordinary general meeting or on an extraordinary general meeting. The majority of the shareholders (i.e. over 50%) must vote to pass the proposal. Furthermore, the general meeting can provide an authorization to the board of directors to issues loans to the shareholders, if flexibility is needed regarding the timing of the loans.

d A financial statement must have been approved

A loan to the shareholders under the new regime cannot be granted, unless the lender has approved a financial statement. This entails that a newly incorporated Danish limited liability company will not be able to utilize the new rules, as the first accounting year will not have past. Hence, the timing of the loan should be considered.

New opportunities

The possibility to legally grant loans to the shareholders will generally increase flexibility for Danish corporations, and investors in Danish businesses, as upstream lending to minority shareholders is now a tool that can be utilized to "distribute" capital. However, as described above, these new rules still require some consideration to be used in the most optimized way. Danish tax rules will also have to be carefully considered in connection with grant of such shareholder loans, since for example loans to individual controlling shareholders will generally according to Danish tax rules be considered dividend/salary at the time of providing the loan. Thus, it is very important also to include tax considerations in the planning.

We will be happy to assist, if any questions in this regard arises in relation to the new legislation.

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