

Harper Review – Overview of changes to conduct provisions

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In brief

- The Final Report of the Federal Government's independent review of competition policy in Australia – the so called “Harper Review” – was released on 31 March 2015. We have issued a series of [LegalTalk Alerts](#) including a summary of the Final Report and deep dives on the recommendations on [section 46](#) (misuse of market power provisions); [cartels and price signalling](#); and [merger approvals](#).
- This Alert aims to draw together the recommended changes to Part IV of the Competition and Consumer Act (CCA) (other than those relating to mergers) contained in the Harper Review Final Report to assist clients navigate the recommendations. Appendix A provides a summary of these recommendations.
- This Alert also reviews the recommended changes to exemptions under Part IV, the enforcement provisions, extra-territorial reach and section 155 provisions.

In detail

The recommended changes to sections 47 and 48

Section 47 of the CCA prohibits various forms of exclusive dealing. Exclusive dealing often takes the form of vertical restraints such as manufacturers seeking to impose restraints on retailers or distributors.

As we set out in our Alert on section 46, the Harper Panel recommended removing the take advantage element of that section and introducing an effects and substantial lessening of competition test. Its recommendations on section 47 are dependent on whether the recommendations on section 46 are adopted or not adopted. If they are adopted, the Harper Panel recommends abolishing section 47 in its entirety. If the section 46 recommendations are not adopted, the Harper Panel recommends that the prohibition on third line forcing (subsections 47(6) and 47(7)) should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition (rather than a per se prohibition).

Section 48 of the CCA prohibits resale price maintenance. The Harper Panel recommended continuing the per se prohibition of resale price maintenance with notification to be made available as well as introducing a related bodies corporate exemption.

Clients should welcome these recommendations.

Exemption processes

Authorisations are granted by the Australian Competition and Consumer Commission (ACCC) for a number of the prohibitions in Part IV (see Appendix A) where the ACCC is satisfied that the conduct generates a net public benefit.

Notifications are available in respect of exclusive dealing under section 47, collective bargaining under the cartel provisions and section 45 and the price signalling provisions. Notification provides exemption from the date of filing although the ACCC can withdraw the exemption if it forms the view that the notified conduct does not give rise to a net public benefit.

The Harper Panel has recommended that exemption (in the form of both authorisations and notifications) from section 45, section 46 (as proposed to be amended) and section 47 (if retained) be available if the conduct would not be likely to substantially lessen competition while retaining the net public benefit test.

Currently, the authorisation process may require several different applications in respect of a single commercial transaction. The Harper Panel has recommended that only a single application is required for a single business transaction.

Both these recommendations should be welcomed by clients.

Collective bargaining enables two or more competing businesses to come together to negotiate with a supplier or a business customer over terms, condition and prices. It particularly benefits small business. The Harper Panel recommended changes to the process such that:

- nomination of the members of the bargaining group should cover future (unnamed) members;
- nomination of the counterparties should cover multiple counterparties;
- timeframes for different notifications be based on the circumstances of the application.

In addition, the Harper Panel recommended that:

- the ACCC be empowered to impose conditions on notifications involving collective boycott activity;
- ACCC assessment be extended from 14 to 60 days; and
- the ACCC should have a limited stop power to require conduct to cease.

The Harper Panel also recommended the introduction of block exemptions which would enable the ACCC to create safe harbours where conduct or categories of conduct are unlikely to raise competition concerns – in relation to conduct that would not substantially lessen competition or that has a net public benefit.

Enforcement and Remedies

Section 83 enables findings of fact made against a corporation in one proceeding (e.g. one brought by the ACCC) to be used as prima facie evidence against the corporation in another proceeding (e.g. one brought by a private litigant). However, many proceedings are resolved by admissions of fact and a number of Federal Court decisions suggest that section 83 is confined to findings of fact made by the court after a contested hearing¹. The Harper Panel has recommended that section 83 be amended so that it extends to admissions of fact in addition to findings of fact made by the court.

If adopted, this recommendation will make private enforcement and damages claims easier to bring for private litigants following action by the ACCC. Query whether, if adopted, this change will lessen enthusiasm to reach a more co-operative outcome with the ACCC.

¹ Competition Policy Review, Final Report, March 2015, page 408.

Extra-territorial Reach

Section 5 of the CCA extends certain parts of the CCA, including Part IV, extra-territorially to the engaging of conduct outside Australia by bodies corporate incorporated or carrying on business within Australia; Australian citizens; or persons ordinarily resident within Australia. Subsection 5(4) requires the Minister's consent to proceedings brought by private parties before relying on the extra-territorial provisions.

The Harper Panel recommends that the extra-territorial provisions be amended such that the relevant parts of the CCA apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia. It also recommends removing the need for Ministerial consent before private parties rely on the extra-territorial provisions.

Section 155 notices

Section 155 notices enable the ACCC to compel individuals to appear before it to answer questions about a potential contravention of the CCA and to compel corporations and individuals to provide information and to produce documents to it relating to a possible contravention of the CCA.

The Harper Panel has recommended:

- extending the scope of section 155 notices to cover the investigation of alleged contraventions of court-enforceable undertakings;
- due to the increasing burden imposed by notices to produce information in the digital age, a defence to a "refusal or failure to comply with a notice" be introduced for a recipient of the notice who can demonstrate that a reasonable search was undertaken in order to comply with notice; and
- fines for non-compliance with section 155 be increased from a maximum of \$17,000 to be in line with fines under the Australian Securities and Investments Commission Act 2001 which is currently a maximum of \$85,000 for a corporation.

Let's talk

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

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Appendix A

Summary of recommended changes to Part IV of the CCA (other than those relating to mergers) as contained in the Harper Review Final Report

Current Provisions	Current CBN ² / Notification/ Authorisation /RBC ³ exemption	Final Report Recommendations with section 46 changes	Final Report Recommendations without section 46 changes
s.4D Definition of Exclusionary Provision: CAU ⁴ between two or more persons competitive with each other and has the purpose of PRL ⁵ the supply or acquisition of Gs or Ss ⁶ from persons or classes of persons	N/A	Remove definition	Remove definition
ss. 44ZZRF and 44ZZRJ Cartel Conduct provisions: making or giving effect to a CAU with a cartel provision: price-fixing, restricting output, allocating customers, bid rigging	CBN / Authorisation / RBC exemption	Redraft in a simpler form	Redraft in simpler form
ss.44ZZW and 44ZZX Price Signalling provisions: Private disclosure of pricing information to competitors and disclosure for the purpose of an SLC (only apply to the banking sector)	CBN / Notification/ Authorisation /	Remove provisions	Remove provisions
s.45 Prohibits Exclusionary Provisions and CAUs that have the purpose or effect of SLC ⁷	CBN / Authorisation / RBC exemption /	Remove prohibition on Exclusionary Provisions and introduce concerted practices prohibition	Remove prohibition on Exclusionary Provisions and introduce concerted practices prohibition
s.46 Prohibits taking advantage of market power for the	None / RBC	Remove take advantage and	Status quo

² Collective bargaining notification

³ Related bodies corporate

⁴ Contract, arrangement or understanding

⁵ Preventing, restricting or limiting

⁶ Goods or services

⁷ Substantially lessening competition

Current Provisions	Current CBN²/ Notification/ Authorisation /RBC³ exemption	Final Report Recommendations with section 46 changes	Final Report Recommendations without section 46 changes
purpose of eliminating or damaging a competitor, preventing market entry or deterring or preventing competitive market conduct	exemption	introduce effects and SLC test (with legislative guidance). Authorisation available	
<p>s.47 Prohibits exclusive dealing:</p> <ul style="list-style-type: none"> • Supplying Gs or Ss on condition that: the purchaser does not acquire them from a competitor of the supplier (47(2)); or the purchaser accepts restrictions on the right to resupply (47(2)); or the purchaser acquires other Gs or Ss from a third party (47(6)) • Acquiring Gs or Ss on the condition that the supplier accepts a restriction as to the freedom to supply third parties (47(4)) • Refusing to supply Gs or Ss because the purchaser: has dealt or refused to cease dealing in a competitor's products (47(3)); or has failed to accept a restriction on the right to resupply (47(3)); or refuses to acquire other Gs or Ss from a third party (47(7)) • Refusing to acquire Gs or Ss because the supplier refuses to accept some restriction on the right to supply third parties (47(5)) • 	Authorisation / Notification / RBC exemption	Remove provisions	Ss. 47(6) and (7) – third line forcing provisions – subject to SLC
s.48 Prohibits resale price maintenance	Authorisation	Introduce Notification and RBC exemption	Introduce Notification and RBC exemption