Harper Review – Cartels and concerted practices

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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.
- The Final Report contained a number of recommendations aimed at simplifying and improving the cartel provisions which have been roundly criticised for their complexity and prescriptiveness. The recommendations, if adopted, should provide greater territorial nexus with Australia, clarify that the provisions apply to likely competitors where "likely" is to be determined on the balance of probability; provide a broad joint venture exemption and broaden the exemption relating to vertical supply agreements.
- It is in their treatment of the price signalling provisions that the recommendations of the Harper Panel may be more controversial. The current provisions, which by regulation only apply to the banking sector, have been recommended for repeal. This is likely to be broadly welcomed. However, in their stead, the Harper Panel have recommended a prohibition on "concerted practices" subject to a test of substantially lessening competition. This may introduce business uncertainty and should be carefully considered.

In detail

The Cartel Provisions

The changes to the cartel provisions recommended by the Harper Panel, if adopted, should assist with providing clients greater certainty in their business dealings. The recommended changes are likely to be broadly supported, however, the Australian Competition and Consumer Commission (ACCC) may continue their opposition to the recommendations on joint ventures and vertical supply agreements.

Greater territorial nexus with Australia

The current cartel provisions are extended extraterritorially through section 5 of the Competition and Consumer Act 2010 (**the Act**) which extends Part IV 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. Moreover, unlike cases brought under section 45 which are subject to a substantial lessening of competition test (which means competition in any market and "market" means a market in Australia), the cartel provisions do not require an effect on competition in a market in Australia. As noted in the Final Report, this was highlighted in Norcast S.ar.L v Bradken Limited (No 2)[2013] FCA 235 where the cartel provisions were found to be applicable to an arrangement concerning the tender for the sale of a Canadian corporation, which had business operations in Canada, Malaysia and Singapore, where the seller was based outside of Australia and the tender was conducted outside of Australia[1].

To resolve this issue, the Harper Panel has recommended framing the cartel provisions such that they relate to the supply of goods or services in trade or commerce[2]. The Act defines trade or commerce to mean trade or commerce within Australia or between Australia and places outside of Australia. Therefore, if this recommendation is adopted, to the extent any cartel conduct carried on by an Australian entity is wholly related to offshore activity, it should no longer be caught by the Act, noting that such conduct would still be subject to the laws of the relevant jurisdiction.

Actual Competitors

The cartel provisions apply to parties that are in competition with each other. The Federal Court has interpreted this to apply to an arrangement between corporations if there is a possibility (other than a remote possibility) that they are or would be in competition with each other. The Harper Panel considers that this threshold is too low and has recommended that it be changed to corporations that are in competition with each other or are likely to be in competition with each other, where likelihood is assessed on the balance of probabilities (that is, more likely than not)[3].

Joint Ventures

The Harper Panel has recommended a broadening of the scope of the joint venture exemption to cartel conduct which can only be received warmly by business (although the ACCC may be less enthusiastic[4]). The recommendations comprise exempting:

- joint venture provisions whether contained in a contract, or form part of less formal arrangements such as management or operating protocols;
- any joint venture for the production, supply, acquisition or marketing of goods or services; and
- provisions that satisfy any of the following:
    - the provision relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture;
    - the provision is reasonably necessary for the joint venture;
    - the provision is for the purpose of the joint venture[5].

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[1] Competition Policy Review, Final Report, March 2015, page 361.

[2] The Harper Panel also recommended more generally that section 5 of the Act be amended such that the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside of Australia. See page 418 of the Final Report.

[3] Final Report, page 362.

[4] As noted in the Final Report at page 364, the ACCC expressed a concern that, in its experience, cartelists have claimed their collaboration is a joint venture and sought to disguise their activities to evade the law.

Vertical Supply Arrangements

The cartel provisions currently exempt vertical supply restrictions that constitute exclusive dealing within section 47 of the Act. However, as section 47 does not cover the field of all types of exclusive dealing, then some forms of exclusive dealing do not receive exemption from the cartel prohibitions. The Harper Panel has recommended a broader exemption from the cartel provisions for vertical supply arrangements (which would then be subject to a substantial lessening of competition test)[6]. Note that the ACCC does not support this recommendation, arguing that such amendments will inappropriately broaden the scope of the prohibition which, due to the anti-overlap provisions, will consequently narrow the application of the cartel and exclusionary provisions[7].

Price signalling/concerted practices

The Act currently contains price signalling provisions which, by regulation, only apply to the banking sector. The provisions prohibit the private disclosure of pricing information to a competitor on a per se basis and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market. The Final Report noted "*it is fair to say no-one seems happy with the provisions in their current form – submissions either argue for modification, or repeal or extension of the provisions to all sectors of the economy*."[8] The Harper Panel recommended their repeal, while at the same time proposing the introduction of a prohibition on engaging in a concerted practice if it has or is likely to have the effect of substantially lessening competition.[9]

Prohibitions on price signalling provisions suffer from the defect that in many circumstances price disclosure is pro rather than anti-competitive. Indeed, the economic concept of perfect competition includes the requirement of perfect information rather than information asymmetries. In the internet era, where information on a broad array of products, services and prices is instantly available and accessible, prohibitions on price disclosure can seem a bit incongruous. However, there are still circumstances and markets where the disclosure of price information may be anti-competitive, such as in a competitive bid process or in concentrated markets.

The general provisions of the Act already capture anti-competitive conduct related to price disclosure. Where disclosure occurs in the context of a contract, arrangement or understanding between competitors, then either the price fixing cartel provisions could apply or the conduct could be prohibited under section 45 if the contract, arrangement or understanding has the purpose or effect of substantial lessening. What then is left is the grey area of something that does not quite meet the threshold of a contract, arrangement or understanding[10] but where the price disclosure or other conduct between competitors does lead to anti-competitive outcomes. It is in this grey area where the Harper Panel has recommended a new prohibition on engaging in concerted practices where the concerted practice has the purpose, or has or is likely to have the effect, of substantially lessening competition.

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[5] Ibid, page 364.
[6] Ibid, page 365.
[7] Ibid.
[8] Ibid, page 372.
[9] Ibid, page 369.
[10] To establish an understanding, commitment by a party to a course of action was necessary. A mere expectation or hope is insufficient: Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission (2005) 159 FCR 452 at 464; Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (2007) 160 FCR 321 at 335.

The Harper Panel does not propose a definition of a concerted practice. It considers that the word 'concerted' has a clear and practical meaning and no further definition is required for the purpose of a legal enactment[11]. It notes that the word 'concerted' "*means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants*"[12]. Query how "jointly arranged" is different from an "arrangement" in the context of a contract, arrangement or understanding. If something is jointly carried out or co-ordinated then query whether it would also fall within the definition of a contract, arrangement or understanding.

In the EU, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical co-operation between them is knowingly substituted for the risks of competition[13]. With respect, this formulation provides a more cogent formulation of the intended concept.

If the Harper Panel recommendation on concerted practices is adopted, particularly without a further definition of the term 'concerted practice', there will be a period of uncertainty as to the scope of conduct to which it applies (until it is tested before the courts). In our view, policy makers should provide business with as much certainty on the legality of their conduct as is possible and practicable. In this regard, if the law is to move to regulating a previously unregulated area of business conduct, it should do so with caution and specificity to ensure overreach and uncertainty do not result.

The takeaway

The recommendations in the Final Report on the cartel provisions provide improvements to their scope and functioning and are likely to be welcomed by most businesses. Although the recommendation on the removal of the price signalling provisions are likewise to be welcomed (particularly for clients in the banking sector), the recommendation with respect to the introduction of a new prohibition in respect of concerted practices should be approached with caution.

[11] Final Report, page 372.

[12] Ibid, page 371.

[13] European Commission, Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), para 60.

Let's talk

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

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