Competition Law Reforms 2017

Relevance to the Telecoms and Media Sector

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Background to the Reforms

In December 2013, the Commonwealth Government announced it would undertake a fundamental 'root and branch' review of Australian competition policy. The subsequent review was chaired by Professor Ian Harper and was the most comprehensive review of Australia's competition and regulatory framework in 20 years. The report of the Harper review committee was released in March 2015, containing some 56 recommendations. All but 12 of these recommendations were accepted in whole or part by the Government.

During 2016 and 2017, the Government introduced two bills into Parliament to amend the *Competition and Consumer Act 2010 (Cth)* (**CCA**) to give effect to various reforms. Both Bills have now been passed into law, namely the:

(a) *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (**MMP Act**); and

(b) *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (**CPR Act**).

Both Acts commenced as from 6 November 2017 so are now operative. This article explores the relevance of the reforms within the MMP Act and CPR Act to the telecommunications and media sector.

Overview of the Reforms

The following diagram provides an overview of the various reforms implemented by the MMP Act and the CPR Act and the implications of those reforms.

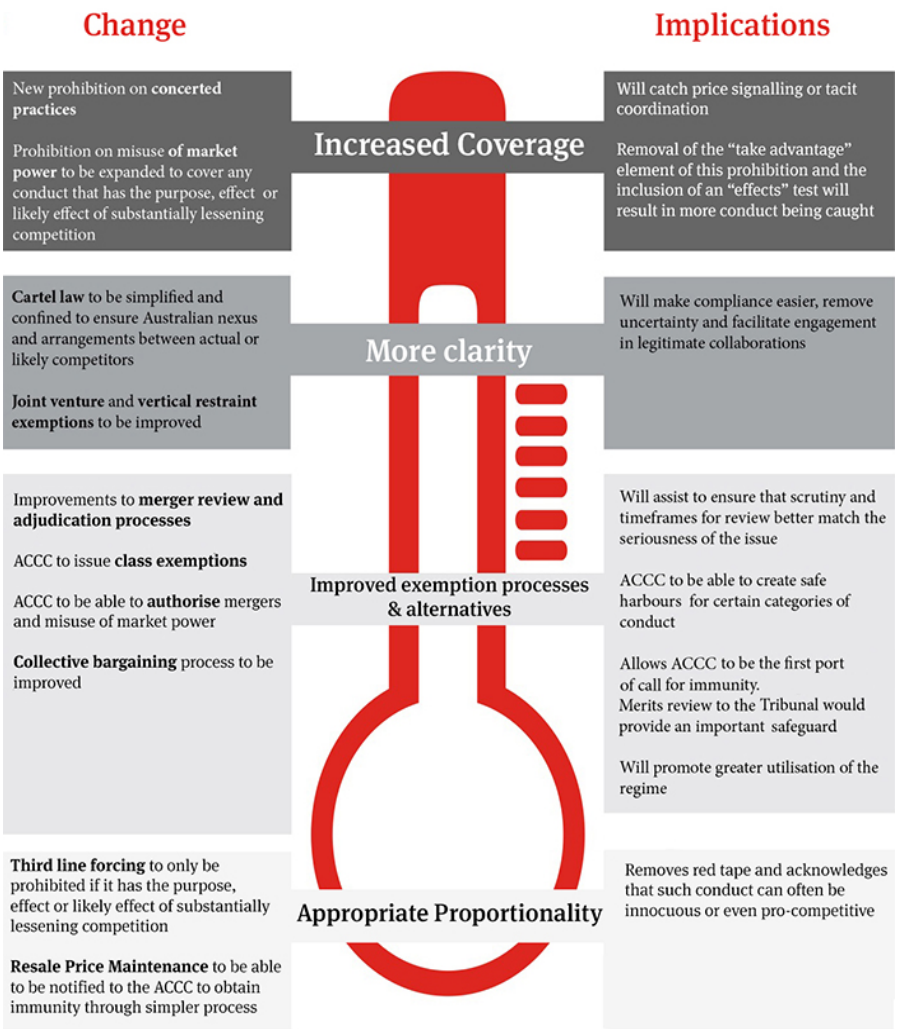
The reforms led to increased coverage, particularly in relation to unilateral conduct (misuse of market power) and concerted practices. The reforms provide more clarity in Australian competition law, particularly in relation to the treatment of joint ventures. A range of improvements has been made to exemption and authorisation processes. Some of the unnecessarily severe application of our competition laws has been made more proportionate to the mischief being regulated.

The most important of the reforms are discussed in further detail below.

Unilateral Conduct

The most controversial of the various competition law reforms is the amendment to section 46 that is implemented by the MMP Act. Section 46 is Australia's 'unilateral conduct' provision and has historically prohibited a firm with a 'substantial degree of market power' (**SMP**) from 'taking advantage' of that SMP with a proscribed anti-competitive purpose.

As from 6 November, the law has now changed. The new section 46 prohibits a firm with SMP from engaging in conduct that has the



purpose, effect or likely effect of substantially lessening competition in a market (**SLC**). The new provision therefore removes the historical concept of 'taking advantage'. The new provision also requires a focus on market effect. These changes are dramatic and broaden the scope of the prohibition.

In a telecoms context, section 46 is supplemented by the telecommunications competition regime in Part XIB of the CCA. Section 151AJ(2) prohibits a carrier or carriage service provider (**C/CSP**) with SMP in a telecoms market from taking advantage of that SMP with the effect or likely effect of SLC in that or any other telecoms market. If the ACCC has a reason to suspect a contravention of this provision, the ACCC may issue a 'competition notice' that can provide a basis for subsequent enforcement.

The Government's attempt during 2017 to repeal Part XIB was unsuccessful. This means that the telecommunications sector is now regulated by two different 'misuse of market power' provisions with different wording, but both focussed on market effects.

Those firms that have market power in telecommunications or media markets will need to take greater care that their conduct does not inadvertently contravene the new section 46. Significant uncertainty now exists as to how the new section 46 will be interpreted by the courts. A much more granular analysis of market effects will be required, making the legal analysis more fact-specific and complex. Carriers and carriage service providers with SMP also continue to be subject to regulation under the historic Part XIB regime administered by the ACCC.

Concerted Practices

Australian law now has a 'concerted practices' prohibition, echoing the concept used in jurisdictions such as the European Union. A concerted practice is (surprisingly) not defined in the CCA, but is relevantly described in the Explanatory Memorandum as "*any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition*". Whether this definition will be adopted by Australian courts remains to be seen.

The amendment is not intended to capture innocent parallel conduct or conduct which would enhance competition, such as public disclosure of pricing information. However, it is intended to capture a broader array of coordinated conduct than the current law. The current law has required evidence of a contract, arrangement or understanding before collusion can be found, whereas the intent of the new provision is to capture any form of co-operation between firms that reduces competition.

In essence, if a firm co-ordinates with another firm with the purpose, effect or likely effect of SLC, this may be illegal. The most risky conduct will involve communication of confidential information between competitors where this could lead one or both of the competitors to alter their behaviour towards greater co-operation.

In the telecommunications and media sectors, firms will need to be particularly wary of any communications with competitors that could lead to consistent pricing, particularly in concentrated markets with only a few competitors.

Joint Ventures

Joint ventures are a common feature of the technology sector. In a fast-moving industry, joint ventures enable expertise and resources to be pooled and shared between different entities for a co-operative endeavour without full economic integration. Joint ventures are normally permitted between competitors if the joint venture is of a beneficial nature and not detrimental to competition overall. The extent to which joint ventures have been permitted has been regulated by the joint venture 'exception' or 'defence'.

The new reforms expand the joint venture exception to allow entities in to develop and implement legitimate collaborations between competitors more readily. Specifically, the CPR Act broadens the joint venture exemption, by allowing the exemption to apply to:

- arrangements or understandings (in addition to contracts); and
- joint ventures for the acquisition of goods and services (in addition to the production of goods and services).

However, the exception applies only to provisions for the purpose of, and reasonably necessary for, undertaking the joint venture. Therefore, any ancillary restraints in the context of joint ventures must still have an appropriate nexus to the purpose and activity of the joint venture. In this manner, while the scope of the joint venture defence has expanded, the circumstances in which it may be applied have changed slightly. Some care may be required if relying on historic advice.

As with the existing joint venture exception, the relevant joint venture provision cannot have the purpose, effect or likely effect of substantially lessening competition, otherwise it may contravene other provisions of the CCA. If a joint venture were to substantially lessen competition, but has a net public benefit, then a public benefit authorisation from the ACCC will continue to be possible.

Merger Clearances

Under section 50 of the CCA, any share or asset acquisition is prohibited where it has the effect or is likely to have the effect of substantially lessening competition in a market. The reforms do not change the substantive law.

Where an acquisition could breach section 50, it has been possible to seek 'authorisation' which confers a statutory immunity from the application of section 50.

An authorisation has historically been provided where the likely public benefit from the acquisition outweighs the likely public detriment, including any lessening of competition. From 2007, an application could be made directly to the Australian Competition Tribunal for authorisation, bypassing the ACCC.

The new reforms have now removed this so-called 'direct route to the Tribunal' following concerns that that merger parties could potentially apply to the Tribunal without giving sufficient time for the ACCC to gather evidence and contradict the application. Applications for authorisation must now be made first to the ACCC. An appeal to the Tribunal would then be possible.

Currently, almost all M&A transactions that are reviewed by the ACCC are reviewed outside the statutory framework of the CCA in a process known as an 'informal clearance'. This process is unique to Australia and provides an unusually high degree of flexibility to negotiate solutions with the ACCC to address any competition concerns.

Due to concerns that the ACCC was not subject to any accountability by way of merits or judicial review, a so-called 'formal clearance' process was introduced from 2007. However, the 'formal clearance' process was regarded as too inflexible by practitioners and has never been used. The ACCC also improved its informal clearance process to address industry concerns. The new reforms now consolidate the 'formal clearance' process into the authorisation process, so it is possible to obtain an authorisation if the proposed acquisition would not result in a substantial lessening of competition.

The net effect of these reforms is that most M&A will continue to be assessed under the informal clearance process by the ACCC. However, if an M&A transaction provides significant public benefits that outweigh the anti-competitive effects, it will be open for the acquirer to make a formal application to the ACCC for a public benefit authorisation. If the ACCC declines to grant authorisation, an appeal to the Tribunal may occur. This was the situation that existed in Australia prior to 2007.

Given the highly concentrated nature of markets in the telecoms and media sectors, as well as the potential for significant wider public benefits from M&A transactions in the sector, the new authorisation route will remain relevant. However, an application for authorisation to the ACCC is a less flexible process and does involve some trade-offs. The media sector also remains subject to the various rules on media cross-ownership set out in the *Broadcasting Act 1992 (Cth),* as recently amended, noting the ACCC has now issued new guidelines as to how it will assess M&A activity in the media sector.

Other Notable Reforms

While the four reforms identified above are the most important of the various reforms, there are also a range of other changes that are relevant to the media and telecoms sectors:

Exclusionary provisions: The CPR Act has repealed the prohibition against exclusionary provisions, as currently defined in section 4D of the CCA. Instead, vertical exclusionary conduct will now be regulated under the cartel provisions. This change is long overdue and will bring Australian competition law in line with international best practice.

Resale price maintenance: We now have a simplified notification process for seeking immunity from a potential breach of the prohibition against resale price maintenance. This amendment acknowledges that it is not always detrimental to consumers for a supplier to seek to maintain resale prices or prevent discounting. The new route of notification to the ACCC will often be simpler, quicker and less resource-intensive than going through the in-depth authorisation process.

Third line forcing: Third line forcing is no longer prohibited outright. Third line forcing is now only illegal if it has the purpose, or would have or be likely to have the effect, of substantially lessening competition. The historical third line forcing provisions had become increasingly problematic in the telecoms and media sector given their application to situations of bundling by different legal entities. The new reforms result in a more sensible approach consistent with international best practice.

Class exemption powers: The ACCC now has a class-exemption power. The ACCC can pre-judge certain types of arrangements and deem them to be immune from the CCA. Accordingly, the ACCC may create a safe harbour for certain categories of conduct unlikely to raise competition concerns.

Access: There have been substantial revisions and clarifications to the criteria and processes for declaring access to nationally significant infrastructure in Part IIIA of the CCA. However, telecommunications has traditionally been regulated instead under the telecoms access regime in Part XIC, which has not been amended in the current round of reforms.

Conclusions

The changes to Australia's competition laws present both risks and opportunities. Some of the risks arise for firms with substantial market power. Other risks arise in the context of communications between competitors. Opportunities arise for more flexible structuring of joint venture arrangements. Opportunities also arise for ACCC consideration of public benefits in merger clearances.

These changes to Australia's competition laws update and streamline our laws, ensuring they are more suitable for economic activity in the 21st Century. From a media and telecommunications perspective, the changes are to be welcomed.