

## Long awaited changes to the Competition law

After what seems like an interminable period, the majority of competition law reforms recommended by the 2015 Harper Committee review were passed by Federal Parliament in late October. This follows on the passing of long awaited changes to the market power misuse regime, which took effect in August 2017.

Here are some key changes introduced by the 2 amendment Acts:

1. **Market Power Misuse**-the test for breaching section 46 now hinges on whether the conduct under examination fits the familiar formula of having the purpose or effect of substantially reducing competition in relevant markets. This simplifies the previous test, which involved having to determine if a company had a significant degree of market power and was exercising that power for a number of improper purposes. The relevant markets are limited to those in which the company supplies or acquires products or services-either directly or through distributors or resellers. A company may now apply to ACCC to authorise conduct that may breach s46, if it can show that the public benefit outweighs any anti-competitive effect.
2. **Third line forcing**-Following the change, it is no longer an automatic breach of section 47 if a company agrees or offers to supply a product or service on condition that the recipient must buy the products or services of a third party. The test for breaching now hinges on whether the requirement has the purpose or effect of substantially reducing competition in the relevant market. This may give a supplier more freedom to 'tie' the supply of its product to an external product supplier, as long as it keeps an eye on the overall impact on its position in the market.
3. **Resale Price Maintenance (RPM)**-Any conduct falling within the scope of section 48 is still automatically illegal, ie without the need for the ACCC to prove a substantial lessening of competition. However, a company can now notify the ACCC of conduct that may breach the RPM ban and get immunity from prosecution, if ACCC does not object to the conduct within 60 days. Furthermore, under the change, the RPM ban will no longer apply to transactions between companies that are 'related' under the Corporations Act. This means that a parent company can enter an agreement to supply product to a subsidiary and impose a minimum price at which its subsidiary is authorised to resell the products.
4. **Corporate Mergers**-The section 50 tests to determine if a merger is allowed remains unchanged-either the merger must not have the purpose or likely effect of substantially reducing competition in the relevant market or alternatively the public benefits of the merger must be likely to outweigh any anti-competitive effect. The ACCC will have 90 days to make a decision,

which will be open to being varied or set aside by the Australian Competition Tribunal.

5. **Concerted Practices**-there is now a ban on “concerted practices” that have the purpose or likely effect of substantially reducing market competition. “Concerted Practices” are not defined in the amending act but are described in the Explanatory Memorandum as being conduct between companies and/or individuals that is likely to create cooperation instead of the uncertainties of competition. This ban is directed for example at the sharing of commercially sensitive pricing information between competitors.
6. **ACCC Authorisation of potentially illegal conduct**-The competition law has allowed a company to apply to the ACCC to authorise conduct that potentially breaches the competition law. The basis for the ACCC to grant such authorisation has been simplified to the following alternative tests:
  - a. Either that the conduct (not being a type that is ‘automatically illegal eg resale price maintenance) will not substantially lessen competition; or
  - b. That the conduct will result in a public benefit that is likely to outweigh any resulting detriment.

**What to do?** Companies should review their policies and procedures to bring them into line with the changes. Compliance Australia can assist with the following:

- An impact assessment based on your current competition law compliance program
- An upgrade in your compliance policies and procedures
- Training at a high level for your compliance staff or more detailed training for business lines based on your specific products and services
- Validation for your senior management and board that they have adequately addressed their obligations under the new regime.