

MISUSE OF MARKET POWER BILL PASSED

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Legal Briefings - By **Patrick Gay** and **Robert Pietriche**

The *Competition and Consumer Amendment (Misuse of Market Power) Bill 2017* was passed by both houses of parliament on 15 August 2017, introducing a new misuse of market power prohibition under section 46 of the *Competition and Consumer Act 2010*. The changes to section 46 are significant, particularly in requiring scrutiny of the effects or likely effects of market behaviour in assessing breach. There will, undoubtedly, be a period of uncertainty as both the ACCC and the courts consider how the amended law will apply to unilateral conduct. In preparation for the changes, businesses with large market shares or influence within their respective markets will need to consider the competition consequences of their strategies by reference to the new and untested prohibition.

MISUSE OF MARKET POWER CHANGES PASSED

On 15 August 2017, the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2017* (Cth) (**the Section 46 Bill**) was passed by the Senate.

This landmark Bill implements the recommendations of the Harper Review regarding reform of the misuse of market power prohibition by removing the current “take advantage” limb in favour of the controversial “effects test” - or, more accurately, a “purpose or effects test”.

The Section 46 Bill is linked to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) (**the Policy Review Bill**), which is currently before the House of Representatives. We expect that the Policy Review Bill will be passed by the end of the current sitting period (which is due to conclude on 18 August 2017) or during the next sitting period (which will commence on 4 September 2017).

The new section 46 will not come into effect until commencement of Schedule 1 of the Policy Review Bill. The Policy Review Bill will commence either:

- on a date to be fixed by proclamation; or,
- if no earlier day is fixed by proclamation, the day after 6 months from the date that the Policy Review Bill receives Royal Assent.

The explanatory memorandum and the supplementary explanatory memorandum to the Section 46 Bill indicate that the Policy Review Bill is intended for imminent introduction. Consequently, we would anticipate that the new section 46 and the other amendments to the *Competition and Consumer Act 2010* (Cth) (**CCA**) contained within the Policy Review Bill will come into effect relatively quickly following the passage of the Policy Review Bill.

The changes to section 46 are significant. There will, undoubtedly, be a period of uncertainty as both the ACCC and, ultimately, the Court consider how the amended law will apply to unilateral conduct. In preparation for the changes, businesses with large market shares or influence within their respective markets will need to consider the competition consequences of their strategies by reference to the new and untested prohibition.

OBSERVATIONS

The new section 46 prohibits corporations with a substantial degree of market power from engaging in conduct that has the purpose, or has or is likely to have the effect of substantially lessening competition in that market or in any other market in which the corporation or a related corporation supplies, acquires or is likely to supply or acquire goods or services directly or indirectly.

The explanatory memorandum seeks to provide some guidance, noting that:

- the “substantial lessening of competition” and “purpose, effect or likely effect” concepts will be informed by existing jurisprudence with respect to other provisions of the CCA which already incorporate that test; and
- while “purpose” will primarily involve a subjective enquiry, the enquiry will not be limited to subjective factors and will not prevent a finding by inference that a corporation acted with a purpose to substantially lessen competition.

The original version of the Section 46 Bill mandated pro- and anti-competitive factors to be considered in assessing a substantial lessening of competition. However, the Senate Economics Legislation Committee recommended in its report of 16 February 2017 that those factors be removed to reduce the complexity of the new section 46, reduce uncertainty as to how the courts may interpret and weigh each of the factors and reduce the risk that the substantial lessening of competition test would unintentionally differ in its application to section 46 in comparison to other provisions of the CCA.

The revised explanatory memorandum concludes that it is not possible to prescribe specific forms of conduct which always will or will not contravene the prohibition, and that a wide range of conduct and circumstances may satisfy the test and would require a holistic assessment of the conduct in issue.

While we acknowledge the drawbacks in overly prescriptive legislation, the explanatory memorandum does not provide much comfort to those who considered that there was no compelling reason to change section 46 and, in so doing, removes the guidance offered by a long line of cases considering the existing prohibition.

While not a component of the Section 46 Bill, we note that the Policy Review Bill provides that conduct which would otherwise contravene section 46 may be authorised by the ACCC where it is unlikely to substantially lessen competition or is likely to result in a net public benefit. Section 46 conduct cannot currently be authorised. It will be interesting to see when and if any authorisation application is made.

BACKGROUND

On 24 November 2015, the Federal Government released its response to the Harper Review. Of the 56 Harper Review recommendations, 39 were supported in full or in principle, 5 were supported in part, and the Government indicated that it remained open to 12 recommendations.

Since that time, the Government has taken steps to implement the Harper Review's recommendations. On 5 September 2016, the Government released an Exposure Draft of proposed changes to the CCA and following public consultations introduced two separate bills amending the CCA:

- on 1 December 2016, the Section 46 Bill was introduced by the Treasury to the House of Representatives. Following recommendation by the Senate Economics Committee that the bill be passed subject to minor modifications, the Bill was introduced to the Senate on 29 March 2017, with its second reading in the Senate moved that same day; and
- on 30 March 2017, the Policy Review Bill was introduced to the House of Representatives, with its second reading moved that same day.

The Section 46 Bill was debated on second reading on 14 August 2017, with a revised version of the Section 46 Bill, a revised explanatory memorandum and a supplementary recommendation released that same day. Although passed by the Senate in amended form that day, the Section 46 Bill was returned to the House of Representatives to be passed in its final amended form, and was ultimately passed by both houses of parliament on 15 August 2017.

ENDNOTES

1. [The Government response to the Competition Policy Review.](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PATRICK GAY
PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com



LIZA CARVER
PARTNER, SYDNEY

+61 2 9225 5574
Liza.Carver@hsf.com

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