

# THE ACCC PILOTS ITS FIRST 'EFFECT TEST' IN MISUSE OF MARKET POWER PROCEEDINGS

10 December 2019 | Australia

Legal Briefings - By **Liza Carver, Patrick Clark and Tomas Kemmery**

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*On 6 December 2019, the ACCC launched its first enforcement proceedings under the new 'effects test' prohibition on misuse of market power. The proceedings will provide much needed guidance as to how the much-debated 'effects test' will apply to unilateral conduct.*

*It is noteworthy that the two proceedings to date that invoke the 'effects test' - i.e., this case and Qube's recent and well-publicised private action against Port of Newcastle Operations - have involved port operations given that, post-privatisation, the sector has been a key ACCC focus and historically the subject matter of several leading competition cases.<sup>1</sup>*

*However, these proceedings will have ramifications for businesses beyond the ports sector, particularly in sectors that the ACCC may consider to involve participants with a substantial degree of market power.*

## **BACKGROUND: THE HARPER REVIEW AND THE SECTION 46 'EFFECTS TEST'**

In March 2015, the Harper Panel released its Final Report, which contained 56 reform recommendations concerning Australia's competition law. One significant recommendation was that section 46 of the *Competition and Consumer Act 2010* (Cth) be amended to include an 'effects test'. The ACCC had made extensive submissions to the Harper Panel recommending reform.

The Panel concluded that the then-current test – that a corporation must 'take advantage' of its substantial market power for the 'purpose' of eliminating competition – was '*misdirected as a matter of policy*', '*out of step with international approaches*' and '*undermin[ed] confidence in the effectiveness of Australian competition law*'.

The Panel recommended adopting a more standard 'purpose or effect' of substantially lessening competition test, which came into effect in November 2017.

The Panel also recommended listing pro- and anti-competitive factors to be considered by a court when applying the test. However, these factors were not included in the final version of the legislation, with the revised Explanatory Memorandum stating that it would not be possible to prescribe specific forms of conduct which always will or will not contravene the prohibition.

Whilst that may be true, it also meant that significant uncertainty remains for businesses about the potential application of this new and untested prohibition to their conduct.

## **ACCC V TASPOTS: THE FIRST ACCC PROCEEDINGS INVOLVING THE AMENDED SECTION 46**

The Federal Court is likely to soon provide that guidance: on 6 December 2019, the ACCC instituted proceedings against Tasmanian Ports Corporation Pty Ltd (**TasPorts**).

The ACCC alleges that TasPorts has substantial market power in relevant markets for marine services (in particular pilotage and towage services) and berthing facilities, because it is the owner of all but one port in northern Tasmania, the sole provider of marine pilot training in Tasmania, and the sole provider of marine services in Tasmania (other than towage services at Port Latta since July 2018).

In August 2017, Engage Marine (**Engage**) competed for and won a contract from TasPorts to provide towage and pilotage services to Grange Resources Limited at Port Latta. Engage began providing towage services in July 2018.

But the ACCC alleges that TasPorts' conduct has prevented Engage from providing pilotage services under that contract (Engage has instead had to sub-contract TasPorts) and has prevented Engage from expanding in pilotage or towage services beyond Port Latta.

The ACCC relevantly alleges that various anticompetitive actions by TasPorts had the effect or likely effect of substantially lessening competition in the relevant pilotage and towage markets.<sup>2</sup> But for TasPorts' actions, the ACCC claims, Engage would likely have expanded into providing pilotage services at Port Latta, and towage services at other Tasmanian ports.

The ACCC alleges that TasPorts undertook the following actions, which led to that anticompetitive effect.

- **Imposing a new charge on Grange.** TasPorts introduced a new charge for each vessel calling at Port Latta payable from 1 July 2018. TasPorts had never imposed such a charge upon Grange, and it was imposed without TasPorts conducting any proper cost assessment. TasPorts then offered to discount the charge if Grange agreed to acquire pilotage services from TasPorts, in place of Engage.
- **Imposing new charges on temporary berths.** TasPorts imposed new charges and requirements on Engage's tug boats in June and July 2018, which made it uneconomic for Engage to use TasPort's temporary berths.
- **Failing or refusing to provide long term berths.** TasPorts refused consent for Engage to sub-lease a long-term berth from a third party, forcing Engage to deploy a temporary offshore mooring outside of another port. This has prevented Engage from deploying a second tug, which is required under its Grange contract and to expand beyond Port Latta.
- **Failing or refusing to provide marine pilot training.** Marine pilot training is necessary to provide pilotage services in Tasmania, including at Port Latta. TasPorts is the only pilot training provider, and has refused to provide training to Engage.

By June 2018, TasPorts' refusal required Engage to enter into an Memorandum of Understanding whereby TasPorts was sub-contracted to provide pilotage services until Engage received training. TasPorts agreed to enter into a Pilot Training Agreement, but has not done so and has still not provided any training.

- **Failing or refusing to place Engage on the Shipping Schedule.** TasPorts has not listed Engage as a towage service provider on the Shipping Schedule. Without that listing, Engage cannot provide towage services beyond Port Latta.

The ACCC seeks injunctions, declarations, penalties and costs. The case has been filed in the Victorian Registry of the Federal Court and we would expect it to be heard in 2020.

The ACCC's pleadings provide some insight into the ACCC's approach to framing contraventions under the 'effects test', and the types of conduct that it will consider of concern.

## ENDNOTES

1. See, for example, *Stirling Harbour Services Pty Limited (ACN 008 767 600) v Bunbury Port Authority* [2000] FCA 1381; *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115. There are also ongoing proceedings, such as *ACCC v NSW Ports Operations Hold Co Pty Ltd* (NSD2289/2018).
2. The ACCC also alleges that TasPort's actions demonstrate an anti-competitive *purpose* of preventing or hindering Engage from competing, by seeking to limit Engage to only providing a single tug towage service at Port Latta.

## KEY CONTACTS

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



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