

Client alert

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Misuse of Market Power Bill introduced in Parliament

On 1 December 2016, the Federal Government took a further step towards implementing the Harper Review recommendations regarding the prohibition against misuse of market power in the *Competition and Consumer Act 2010 (CCA)*, with the introduction in the House of representatives of the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 (Bill)*.

The introduction of the Bill follows public consultation on the Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (Exposure Draft)* released on 5 September 2016. While the Exposure Draft contained a range of substantive amendments to the CCA arising out of the Harper Review recommendations, the Bill only deals with proposed changes to the misuse of market power prohibition (as well as some telecommunications specific provisions). The proposed amendments to misuse of market power set out in the Bill are largely identical to those proposed in the Exposure Draft.

For further information on the Exposure Draft, see our earlier alert *New Laws to introduce "effects test" for misuse of market power*. The consultation period for the balance of the Exposure Draft was extended until 28 October 2016. Bills implementing the balance of the proposed changes have not yet been introduced.

Changes to the current misuse of market provisions

The current prohibition against misuse of market power in section 46 of the CCA prohibits a corporation that has a substantial degree of market power from taking advantage of that market power for one of three proscribed anti-competitive purposes.

The Bill introduces a revised section 46 aiming to strengthen the current prohibition on misuse of market power and better target anti-competitive unilateral conduct by corporations with a substantial degree of market power. In particular, the revised section 46:

- removes the requirement that a corporation 'take advantage' of its substantial market power;
- replaces the current 'purpose test' with a new test that prohibits a corporation with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition; and
- provides mandatory but non-exhaustive factors which must be considered in determining whether there has been a substantial lessening of competition (set out below).

There has been one important change to the proposed amendments set out in the Exposure Draft. Under the Bill, the market in which the conduct giving rise to a misuse of market power must occur is limited to *only* those other markets in which the corporation supplies or acquires (or is likely to

supply or acquire) goods and services. Under the Exposure Draft, the prohibition applied to conduct which had the purpose, effect or likely effect of substantially lessening competition in *any* market. This change was made in response to stakeholder consultation revealing a concern about the broad scope of section 46 applying to conduct in "any market".

Comparison of new law and old law

The Bill contains a useful comparative table between the section 46 elements of the current law and the proposed law, which is extracted here.

New Law	Current Law
Section 46 only applies to corporations with substantial market power.	Section 46 only applies to corporations with substantial market power.
The conduct must have the purpose, effect or likely effect of substantially lessening competition.	The conduct must have one of three specific purposes, related to damaging an actual or potential competitor.
The conduct must occur in a market where there is an actual or likely supply or acquisition of goods or services, by the corporation or another prescribed entity.	The conduct may occur in any market.
The conduct does not need to 'take advantage' of substantial market power.	The conduct must 'take advantage of substantial market power.
There is a general provision only, with no specific prohibition on predatory pricing or other forms of conduct (however described).	Predatory pricing and other specific forms of conduct are expressly prohibited.
Certain pro-competitive and anti-competitive factors must be taken into account when considering a substantial lessening of competition.	'Substantial lessening of competition' is not an element of section 46.

Bill requires a holistic approach to be taken to substantial lessening of competition analysis

The Bill introduces a requirement that certain pro-competitive and anti-competitive factors must be taken into account in assessing whether conduct has the requisite purpose, effect or likely effect of substantially lessening competition in a market. Specifically:

- the pro-competitive factors include whether the conduct has the purpose or effect of enhancing efficiency, innovation, product quality or price competitiveness in the market; and
- the anti-competitive factors include whether the conduct has the purpose or effect of preventing, restricting, or deterring the potential for competitive conduct or new entry into the market.

The Explanatory Memorandum to the Bill explains that: "The requirement to consider both anti-competitive and pro-competitive conduct emphasises that section 46 is not intended to capture conduct that is pro-competitive overall". Further, the requirement to consider pro-competitive aspects of conduct means that they are not "left out of a holistic analysis of the conduct". The Explanatory Memorandum notes that it is possible that in certain circumstances one anti-competitive factor or one pro-competitive factor may be so significant as to outweigh the other factors.

What's next?

After being introduced and read a first time in the House of Representatives, the Bill was referred to the Senate Economics Legislation Committee for review, with a report due on 16 February 2017.

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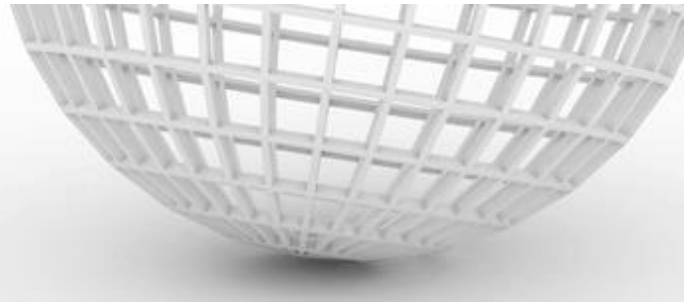
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