

MISUSE OF MARKET POWER

Competition and Consumer Amendment (Competition Policy Review) Bill 2016

Exposure Draft Bill (September 2016)

Overview of current position

Substantive law

- Section 46(1) prohibits a corporation with substantial market power taking advantage of that power for the purpose of either (a) eliminating or substantially damaging a competitor; (b) preventing entry; or (c) deterring or preventing a person engaging in competitive conduct (*supported by various interpretative sub-sections*)
- Section 46(1AA) prohibits a corporation with a substantial share of a market from supplying, or offering to supply, goods or services for a sustained period at a price less than the relevant cost to the corporation of supply, for a prohibited purpose (same as for s 46(1))

Authorisation

- Not directly available for s 46

Remedies

- Various remedies available but no divestiture power

Overview of Exposure Draft Bill (rec 30)

Substantive law

- Section 46(1) to be amended to prohibit a corporation with a substantial degree of market power from engaging in conduct if it would have the purpose, or would have or be likely to have the effect, of substantially lessening competition (SLC)
- When assessing whether conduct has purpose or effect of SLC court directed to consider:
 - Extent to which conduct has purpose, effect or likely effect of increasing competition in the market (including by enhancing efficiency, innovation, product quality or price experience) and
 - Extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market
- Section 46(1AA) and sub-sections relating to the take advantage element are repealed

Authorisation

- Authorisation available on public benefit grounds

ACCC Guidance

- ACCC has released framework for guidance on section 46
 - Examples of conduct the framework suggests might contravene s 46 include certain refusals to deal, predatory pricing, tying and bundling used to extend or leverage market power into another market and margin/price squeeze
 - Examples of conduct the framework suggests would not be likely to contravene s 46 include innovation, efficient conduct designed to drive down costs, responding to price competition with matching or more competitive (but above cost) prices and responding efficiently to other forms of conduct, such as product offering and supply terms

Side by side comparison of key prohibitions in current and proposed law

Current section 46	Exposure Draft Bill proposal 2016
<p>(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:</p> <ul style="list-style-type: none"> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; (b) preventing the entry of a person into that or any other market; or (c) deterring or preventing a person from engaging in competitive conduct in that or any other market. <p>(1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.</p> <p>(1AA) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of:</p> <ul style="list-style-type: none"> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or (b) preventing the entry of a person into that or any other market; or (c) deterring or preventing a person from engaging in competitive conduct in that or any other market. 	<p>(1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.</p> <p>(2) Without limiting the matters to which regard may be had in determining for the purposes of subsection (1) whether conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, regard must be had to the extent to which:</p> <ul style="list-style-type: none"> (a) the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competitiveness in that market; and (b) the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring the potential for competitive conduct or new entry into that market.

Full current provision (section 46 CCA)

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.

(1AA) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of:

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1AB) For the purposes of subsection (1AA), without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has a substantial share of a market, the Court may have regard to the number and size of the competitors of the corporation in the market.

(1A) For the purposes of subsections (1) and (1AA):

- (a) the reference in paragraphs (1)(a) and (1AA)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
- (b) the reference in paragraphs (1)(b) and (c) and (1AA)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

(2) If:

- (a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or
- (b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;

the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.

- (3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
- (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
 - (b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.
- (3A) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate or bodies corporate has or have in that market that results from:
- (a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties; and
 - (b) any covenants, or proposed covenants, that the body corporate or bodies corporate is or are, or would be, bound by or entitled to the benefit of.
- (3B) Subsections (3) and (3A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.
- (3C) For the purposes of this section, without limiting the matters to which the court may have regard for the purpose of determining whether a body corporate has a substantial degree of power in a market, a body corporate may have a substantial degree of power in a market even though:
- (a) the body corporate does not substantially control the market; or
 - (b) the body corporate does not have absolute freedom from constraint by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate in that market; or
 - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.
- (3D) To avoid doubt, for the purposes of this section, more than 1 corporation may have a substantial degree of power in a market.
- (4) In this section:
- (a) a reference to power is a reference to market power;
 - (b) a reference to a market is a reference to a market for goods or services; and
 - (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

- (4A) Without limiting the matters to which the court may have regard for the purpose of determining whether a corporation has contravened subsection (1), the court may have regard to:
- (a) any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services; and
 - (b) the reasons for that conduct.
- (5) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that it acquires plant or equipment.
- (6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 49 and 50, by reason that an authorization or clearance is in force or by reason of the operation of subsection 45(8A) or section 93.
- (6A) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:
- (a) whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;
 - (b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
 - (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;
 - (d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.
- This subsection does not limit the matters to which the court may have regard.
- (7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

The prohibition

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.
- (2) Without limiting the matters to which regard may be had in determining for the purposes of subsection (1) whether conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, regard must be had to the extent to which:
 - (a) the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competitiveness in that market; and
 - (b) the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring the potential for competitive conduct or new entry into that market.
- (3) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:
 - (a) a body corporate that is related to that corporation has, or 2 or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or
 - (b) that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in that market.
- (4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market:
 - (a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
 - (ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and
 - (b) regard may be had to the power the body corporate or bodies corporate has or have in that market that results from:
 - (i) any contracts, arrangements or understandings that the body corporate or bodies corporate has or have with another party or other parties; or
 - (ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

- (5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:
- (a) the body corporate does not substantially control that market; or
 - (b) the body corporate does not have absolute freedom from constraint by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate in that market; or
 - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.
- (6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.
- (7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.
- (8) In this section:
- (a) a reference to power is a reference to market power; and
 - (b) a reference to a market is a reference to a market for goods or services; and
 - (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

Authorisation

88 Commission may grant authorisations

Granting an authorisation

- (1) Subject to this Part, the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

Note: For an extended meaning of engaging in conduct, see subsection 4(2).

Effect of an authorisation

- (2) While the authorisation remains in force, the provisions of Part IV specified in the authorisation do not apply in relation to the conduct to the extent that it is engaged in by:
- (a) the applicant; and
 - (b) any other person named or referred to in the application as a person who is engaged in, or who is proposed to be engaged in, the conduct; and

- (c) any particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct.

Conditions

- (3) The Commission may specify conditions in the authorisation. Subsection (2) does not apply if any of the conditions are contravened.

Single authorisation may deal with several types of conduct

- (4) The Commission may grant a single authorisation for all the conduct specified in an application for authorisation, or may grant separate authorisations for any of the conduct.

Past conduct

- (5) The Commission does not have power to grant an authorisation for conduct engaged in before the Commission decides the application for the authorisation.

Withdrawing an application

- (6) An applicant for authorisation may at any time, by writing to the Commission, withdraw the application.

90 Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.

...

- (6) The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless the Commission is satisfied in all the circumstances:
 - (a) that the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition; or
 - (b) that:
 - (i) the conduct would result, or be likely to result, in a benefit to the public; and
 - (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

...

- (10) If the Commission does not determine an application for an authorisation (other than an application for a merger authorisation) within the relevant period, then it is taken to have granted the application at the end of that period.
- (10A) For the purposes of subsection (10), the **relevant period** is the period of 6 months beginning on the day the Commission received the application. However, if, before the end of that 6 month period:

- (a) the Commission has prepared a draft determination under subsection 90A(1) in relation to the application; and
 - (b) the Commission determines in writing that that period is extended by a specified period of not more than 6 months; and
 - (c) the applicant agrees to that period being so extended;
- the *relevant period* is that period as so extended.

...

Comparison with Harper Recommendations

The Exposure Draft Law in relation to section 46 is substantively the same as the model law suggested by the Harper Panel; minor stylistic changes to the drafting do not appear to alter the substance of the proposed law.

Original consolidated legislation extracts sourced from the Federal Register of Legislation at 6 September 2016. For the latest information on Australian Government law please go to <https://www.legislation.gov.au>.

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[prepared by Julie Clarke: 8 September 2016]