

# MISUSE OF MARKET POWER

Competition Policy Review (Harper Review) Final Report

On 16 March 2016 the Government announced that it would introduce an effects-test in line with the Harper Recommendation.

## 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 Harper Panel final recommendation (rec 30)

### Substantive law

- Section 46(1) should 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- Section 46(1AA) should be repealed
- If amendment made to s 46(1) post-2007 amendments (including s 46(6A) directed toward the 'take advantage' element) should be repealed

### Authorisation

- Authorisation should be available for conduct which might contravene s 46 and the ACCC should issue guidelines relating to its approach to the provision.

### Remedies

- No new divestiture power should be introduced (existing range of penalties sufficient)

## 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.

## Proposed model provision (Appendix A of Harper Review Final Report)

- (1) A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.
- (2) Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to:
  - (a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and
  - (b) the extent to which the conduct has the purpose, or would have or be likely to have the 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.
- (3) 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.
- (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, 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.
- (5) 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 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.

- (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) 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 the market;
  - (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;
  - (c) one or more other bodies corporate have a substantial degree of power in that market.
- (8) 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, 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.

Final report extracts

© Commonwealth of Australia 2015

Recommendations sourced from The Australian Government Competition Policy Review and reproduced pursuant to Creative Commons By Attribution 3.0 Australia

Current legislation extracts sourced from ComLaw and reproduced pursuant to Creative Commons CC BY-NC-SA 3.0 licence

[prepared by Julie Clarke: 16 March 2016]