

## **Misuse of Market Power: Update of the Progress of the Effects Test**

Dear Member,

The Competition and Consumer Amendment (Misuse of Market Power) Bill 2017, amends the Competition and Consumer Act 2010 to strengthen the prohibition on corporations with substantial market powers from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in markets in which they directly or indirectly participate; remove provisions in relation to telecommunications-specific anti-competitive conduct and the competition notices and exemption order regime; and make consequential amendments. The bill is currently before the House of Representatives.

### **What you need to know**

- The Federal Government has accepted certain changes to the misuse of market power prohibition, including the introduction of an “effects” test. This change is likely to be implemented soon (refer progress of the Bill here).
- There may be certain strategic decisions or projects that require a more detailed market competition assessment when dealing with other businesses.
- More rigorous forward looking legal and economic analysis will be necessary where decisions could have significant market consequences. For example, decisions to cease offering goods or services, limit access or terminate particular arrangements should be examined more closely to determine their likely effect on competition in any market and whether they can be associated with enhanced efficiency, product quality or price competitiveness over a reasonable time period.
- Small businesses facing significant competitors, suppliers or customers may be able to challenge – either directly or via complaints to the ACCC – a broader range of unilateral conduct. Moreover, the competition regulator will have a strong incentive to test the scope of the revised prohibition, which is likely to produce more ACCC investigations.

### **Key elements of the effects test**

The Harper Review recommended s46 be re-framed to prohibit a business with a substantial degree of market power from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect of substantially lessening competition in that or any other market (the Effects Test). The key changes are:

- The “take advantage” element would be removed.
- The current purpose test would be replaced with a test of whether the conduct has the “purpose, effect or likely effect of substantially lessening competition” in any market.
- The provision would specify mandatory factors that a court must have regard to, when determining whether there has been a breach, including:
  1. The extent to which the conduct has the purpose or effect of increasing competition, including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and
  2. The extent to which the conduct has the purpose or effect of lessening competition, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market; and
  3. Conduct at risk could be authorised by the ACCC, subject to meeting a net public benefit test.

References:

Harper Review Report pp. 337 - 340

See US Sherman Act (section 2), the Canadian Competition Act (section 79) and Article 102 of the TFEU (prohibits abuse of a dominant position)

Sims, R (ACCC) Section 46: The Great Divide (2015): <https://www.accc.gov.au/speech/section-46-the-great-divide>

Yours sincerely

**John Guest**

Industry Policy & Division Leader

P: 03 9829 1142

M: 0418 329 527

E: [jguest@vacc.com.au](mailto:jguest@vacc.com.au)