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Briefing note March 2016

Misuse of market power - Lost in translation? Proposed changes to Australia's abuse of dominance provisions

Following an extensive period of consultation the Australian Government has announced its intention to repeal the existing misuse of market power provision in section 46 of the Competition and Consumer Act 2010 (Cth) (**CCA**). It will be replaced with a misuse of market power provision prohibiting firms with substantial market power from engaging in conduct that has the purpose, effect or likely effect, of substantially lessening competition.

Introduction

On 16 March 2016, the Turnbull Government released a statement announcing that it will introduce legislation to repeal the current section 46 and replace it with a new provision that prevents firms that have a substantial degree of power in a market 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. In announcing the proposed changes in a joint statement, the Prime Minister, Treasurer and Assistant Treasurer emphasised their views on the benefits of the changes to small business and consumers and to economic growth and innovation.

There is nothing inherently problematic with an abuse of dominance or misuse of market power provision that prohibits conduct by a corporation from using its market power to damage the competitive process to the material (substantial) detriment of consumers. The question is whether this new test has lost in this translated form this element of "abuse" and whether it is a policy over reach in that it will inadvertently capture vigorous competition.

It will be very important with the new provision to ensure high standards of transparency and due process in investigating such cases to ensure the line is correctly drawn between competitive and anti-competitive conduct.

Harper Review and the reasoning behind the proposed changes

The decision to reform section 46 is consistent with the recommendation of the Competition Policy Review chaired by Professor Ian Harper released in 2015 (**Harper Review**) and followed a further period of consultation by the Government.

Key issues

- The Government has announced contentious changes to the misuse of market power provisions in Australia.
- The Government is understood to be proposing to issue an exposure draft of the Harper Reforms to Australia's competition laws before the Australian Budget in May.
- The Harper Reforms will therefore be unlikely to be considered before the forthcoming federal election anticipated to be in July 2016.

Harper Review Recommendation 30 - misuse of market power

The primary prohibition in section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market 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.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the 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.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

Contrary to what some commentators have suggested –the new provisions are not consistent with the international position.

The revised section 46 in this manner is likely to potentially capture a broader spectrum of conduct than the current provisions. First, the proposed section 46 dispenses with the need to prove a firm "takes advantage" of its market power. Conduct which "takes advantage" of market power has been held by the High Court to mean conduct which uses market power and could not be undertaken absent substantial market power.[1] The courts and the legislature have long grappled with the application of the "take advantage" limb and the interpretational difficulties associated with it have been frequently blamed for the consistent failure of section 46 cases by the Australian Competition and Consumer Commission (**ACCC**).

The proposed section 46 will replace the current purpose test with a substantial lessening of competition test (which has colloquially been called an "effects test"). The current purpose test has been criticised as it is said to focus on harm to individual competitors – prohibiting conduct which has the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market or deterring a person from engaging in competitive conduct. This has been criticised as it focuses on individual competitors rather than the competitive process. The current "purpose" element is also inconsistent with the approach taken in comparable jurisdictions.

The removal of the "taking advantage" element

The proposed reform is contentious as there has been widespread concern that by removing the "taking advantage" element of the test leaving only the substantial lessening of competition test, then potentially pro-competitive conduct will be captured and this will have a chilling effect on competition.

This concern arises particularly from large businesses which may have a substantial degree of market power in a market, that their unilateral actions could have unforeseen or secondary consequences in the markets in which they operate or in related markets in which the firm does not have market power. This concern is particularly acute given that in Australia the concept of substantial market power is considerably less than being "dominant" and based on Australian case law a firm could be considered to have a substantial degree of market power with a market share of 30% or more.

At the moment the concept of "taking advantage" means that a company takes advantage of its market power if it undertakes competitive activity that depends on the use of market power. That is, if its conduct would be undertaken by a company that does not have market power, then that conduct is not a contravention of the provision.

The Chairman of the ACCC has stated that, "[c]*ompanies that want to compete on their own merits have nothing to fear. Only those who wish to exclude their competitors and damage the competitive process will need to re-examine their conduct".* Nonetheless there is considerable uncertainty as to what conduct will be captured by the proposed section 46. Could a highly efficient and competitive firm be alleged to be creating barriers to entry by its

conduct and therefore lessening competition substantially?

This is particularly the case as the Harper Review recommendation includes a suggestion to mitigate inadvertently capturing pro-competitive conduct having regard to:"the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing or deterring the potential for competitive conduct in the market or new entry into the market". At the very least, the uncertainty of how the ACCC will treat such conduct and how it will use compulsory section 155 notices to investigate potential contraventions of section 46 could create a significant regulatory burden and costs on business.

That burden and the potential disruption of being subject to an investigation by the ACCC will act as a constraint on companies and their management from being aggressive given the time and cost of litigation, together with the adverse reputational consequences associated with litigation, irrespective of whether the ACCC are ultimately successful in any litigation.

Accordingly unclear unilateral conduct provisions could have the unintended effect of chilling decisions by boards of management in their competitive decisions.

Authorisation and Guidelines

The Turnbull Government has recommended consistent with the Harper Review that authorisation should be available in relation to section 46 and that the ACCC should issue guidelines regarding its approach to section 46. However authorisation of conduct by the ACCC involving seeking to demonstrate that public benefits outweigh the detriments is unlikely to be practically attractive. Companies would not ordinarily want their unilateral business decisions to be telegraphed in a public authorisation application and publicly scrutinized (including by competitors), in a process that will take at least six months. That form of regulation even if well intentioned, is misconceived and impractical for commercial decision making involving unilateral conduct.

The Government's requirement that the ACCC propose guidelines on its approach to the amended section 46 while welcome is not a complete solution as guidelines are just that and do not have the force of law as it is up to a Court to interpret the legislation. By way of example the European General Court in the Intel Case (T-286/09) upheld the then record fine by the European Commission of €1.06billion on Intel for abusing its dominant position in the market for computer chips. Intel appealed the Commission's decision in relation to both its reasoning and the amount of the fine.

However the General Court agreed with the Commission's decision but found that an effects based approach in its analysis of abuse of dominance under section 102 TFEU was not necessary and adopted a more prescriptive approach on rebates in relation to Intel's rebate scheme and alleged price abuse. In particular, while the Commission advocated a test in its published guidelines which focused on whether the conduct is likely to prevent competitors that are as efficient as the dominant firm expanding or entering in the market, the General Court expressly rejected the need for the as "efficient competitor test" as set out in the Commission's guidance and adopted a strict approach to such exclusivity rebates.

Exposure Draft of Harper Reforms

The Turnbull Government has noted its intention to consult on exposure draft legislation prior to introducing legislation to Parliament later in 2016. At this stage it is unknown whether the legislative guidance proposed in the Harper Review in relation to section 46 will form part of the proposed legislation.

However, the successful passage of the legislation to amend section 46 is by no means assured, with the Labor Party (currently in opposition) coming out forcefully against any changes to section 46 and a Federal election is imminent. Further, such contentious legislation may need support from the Greens Party and be heavily amended to obtain passage through the Senate. Accordingly the precise form of section 46 may be subject to further change.

[1] *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

Contacts

Sydney

Dave Poddar
Partner
T: +61 2 8922 8033
E: dave.poddar@cliffordchance.com

Diana Chang
Partner
T: +61 2 8922 8003
E: diana.chang@cliffordchance.com

Mark Grime
Associate
T: +61 2 8922 8072
E: mark.grime@cliffordchance.com

Tim Grave
Partner
T: +61 2 8922 8028
E: tim.grave@cliffordchance.com

Perth

Paul Vinci
Partner
T: +61 8 9262 5504
E: paul.vinci@cliffordchance.com

Justin Harris
Partner
T: +61 8 9262 5503
E: justin.harris@cliffordchance.com