PARLIAMENT PASSES SWEEPING CHANGES TO AUSTRALIA'S MISUSE OF MARKET POWER LAWS

Substantive changes to the misuse of market power prohibition of the *Competition and Consumer Act 2010* (Cth) (**CCA**) were passed by both houses of Australia's parliament on 15 August 2017. Once implemented, these reforms will introduce an 'effects' style test into the section 46 prohibition in a shift towards a much broader legal test.

Importantly, since the introduction of the draft statutory language, a number of further amendments have been made to the new section 46 that remove safeguards that were initially proposed to protect pro-competitive conduct from being caught by the wider ranging 'effects' test.

The implications of these further amendments and the practical implications of the *Competition and Consumer Amendment (Misuse of Market Power) Bill* (**Bill**) passing both houses of parliament are discussed below.

REFORMING SECTION 46 OF THE CCA—FROM BEGINNING TO END

Reform of section 46 of the CCA has been a key focus of Australia's Competition Policy Review (otherwise known as the **Harper Review**), with proposed reforms to this provision of Australia's competition laws proving to be the most controversial and drawing the most vocal views from business groups and the Australian Competition and Consumer Commission (Please refer to our previous briefings for a more detailed analysis of the proposed changes to section 46 here and here).

Following extensive public consultation during the Harper Review, the Government introduced the Bill to Parliament on 1 December 2016.

The Bill adopts the recommendations of the Harper Review and will replace the current section 46 with a provision that prohibits:

- a corporation with a *substantial degree of market power*;

Key issues

- Parliament has passed amendments to Australia's misuse of market power laws by introducing an 'effects' style limb to the applicable legal test.
- The new section 46 (misuse of market power provision of the CCA) will prohibit corporations with a **substantial degree of market power** from engaging in conduct if it has the **purpose, effect or likely effect** of substantially lessening competition.
- Proposed amendments to introduce mandatory pro-competitive and anti-competitive factors into the new section 46 to prevent potential overreach and to safeguard legitimate pro-competitive conduct from extensive scrutiny have been removed.
- The new section 46 will not commence (or become operative) until further reforms to the CCA, including the ability to seek authorisation for conduct to which the new section 46 may apply, are passed and commence. We anticipate that this is likely to occur later in 2017 or early in 2018.
- Corporations in highly concentrated markets or with high market shares will need to be more diligent and undertake more comprehensive assessments of existing or proposed conduct to ensure compliance with competition laws.

- from engaging in conduct that has the *purpose, or has or is likely to have the effect* of substantially lessening competition;
- in that market or in any other market in which the corporation or a related corporation supplies, acquires or is likely to supply or acquire goods or services directly or indirectly.

Notably, the 'take advantage' limb of the existing section 46 is absent from the new section 46.

Previously proposed amendments to the new section 46 to include mandatory pro-competitive and anti-competitive factors recommended by the Harper Review, which were proposed to mitigate concerns that the new prohibition may capture legitimate pro-competitive conduct, have not been adopted. These recommendations would have required courts and the ACCC to have had regard to these mandatory factors in determining whether conduct had the purpose, effect or likely effect of substantially lessening competition.

The new section 46 will also repeal the existing predatory pricing-specific section 46(1A) of the CCA, which has never been successfully used by the ACCC in bringing proceedings against a corporation in respect of pricing conduct (although pricing conduct will remain susceptible to challenge under the new section 46).

TIMELINE FOR IMPLEMENTATION

Following further amendments to the Bill, the new section 46 will become operative and officially replace the existing misuse of market power provision at the same time as Schedule 1 to the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (**CPR Act**) commences. If Schedule 1 to the CPR Act does not commence, the new section 46 will not become law.

The significance of this amendment to the Bill is that the CPR Act contains amendments to the authorisation provisions of the CCA that will allow corporations to seek legal immunity for conduct that would contravene the new section 46 through the ACCC's authorisation process on the basis that the conduct is unlikely to substantially lessen competition or is likely to result in a public benefit. Therefore, the operation of the new section 46 will not commence until, and unless, authorisation is available for conduct to which section 46 may apply.

In terms of timing, the Supplementary Explanatory Memorandum to the Bill notes that the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* is intended for imminent introduction and it is currently before the House of Representatives. We believe that the CPR Bill is likely to be passed before the end of 2017. Once passed, the new section 46 and other reforms to Australia's competition laws will be likely to come into operation (and enforced) relatively quickly.

PRACTICAL IMPLICATIONS OF THE NEW SECTION 46

The Supplementary Explanatory Memorandum to the Bill notes that the amendment removing the mandatory factors from the language of the new section 46 seeks to reduce uncertainty as to how the courts may interpret and weigh each of the factors, and reduce the risk that 'substantially lessening competition' would unintentionally take on a different meaning when applied to unilateral conduct.

The practical effect of removing the mandatory factors from the language of the new section 46 is to force courts (and the ACCC) to rely solely on existing jurisprudence that relates to other types of anticompetitive conduct which already incorporate the concepts that will form the constituent thresholds of the new section 46 (as jurisprudence relating to the existing prohibition will be of limited utility under the new test). Accordingly, in the absence of any bright line safe harbours or meaningful guidelines from the ACCC on how they propose to apply and enforce the new section 46 in respect of the large range of unilateral conduct that may fall within the remit of the new section 46, there will be a considerable degree of uncertainty for businesses with 'substantial market power' while the ACCC and courts work through to apply concepts under existing jurisprudence to unilateral conduct and enforce the revised law (and assess applications for authorisation for such conduct).

The ability to seek authorisation for such conduct arguably provides corporations that possess a 'substantial degree of market power' with some form of safeguard against attracting liability under the new section 46 for legitimate precompetitive conduct. However, the practical utility and benefit of using the authorisation process in practice in respect of unilateral conduct will remain to be seen, particularly as the process has historically been a relatively time-consuming public process involving extensive public consultation. It will also be likely to be problematic to seek authorisation in advance of undertaking the particular unilateral conduct that is contemplated as it will forewarn competitors and give them the ability to delay or seek to prevent (potentially legitimate and pro-competitive) conduct through the public consultation process that is associated with authorisation applications.

Importantly, the new section 46 will not have any exception or defence for conduct which could be deemed to have a legitimate commercial objective or otherwise be efficiency enhancing. Although a corporation's subjective purpose may be relevant, it will no longer be the only consideration for the purpose of assessing compliance with the new section 46. Rather, corporations in highly concentrated markets or with large market shares will need to take more active steps to ensure that their conduct does not intentionally or unintentionally lessen competition in a relevant market. This will require consideration of a broader range of 'market' factors that have typically been relevant to a competition analysis in order to determine the effect or likely effect of the conduct on the relevant markets. As such, corporations will need to prepare for the commencement of the new section 46 and consider whether existing or proposed conduct is likely to create compliance risks under the new law.

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