

Chapter 1

Introduction

1.1 On 1 December 2016, the Senate referred the provisions of the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 (the bill) to the Senate Economics Legislation Committee for inquiry and report by 16 February 2017.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting submissions by 9 January 2017. The committee received 35 submissions, which are listed at Appendix 1.

1.3 The committee did not hold any public hearings for the inquiry.

1.4 The committee thanks all individuals and organisations that contributed to the inquiry.

Overview of the bill

1.5 The bill contains two schedules. Schedule 1 to the bill amends section 46 of the *Competition and Consumer Act 2010* (the CCA) to strengthen the prohibition of the misuse of market power by corporations and better target anti-competitive conduct by corporations with a substantial degree of market power.¹

1.6 Schedule 1 achieves this by amending section 46 to prohibit a corporation with a substantial degree of market power engaging in conduct with the purpose, effect or likely effect of substantially lessening competition.² For conduct to be considered a misuse of market power, it must occur in a market where there is an actual or likely supply or acquisition of goods or services by the corporation or another prescribed entity.³

1.7 Schedule 1 also amends section 46 to:

- provide guidance in the form of a list of factors that must be taken into account when assessing whether conduct has the purpose, effect or likely effect of substantially lessening competition;⁴ and
- simplify the provision by removing the specific prohibition against predatory pricing.⁵

1 Explanatory Memorandum, p. 3.

2 Explanatory Memorandum, p. 6.

3 Explanatory Memorandum, p. 7.

4 Explanatory Memorandum, p. 10.

5 Explanatory Memorandum, p. 13.

1.8 The concept of the 'purpose, effect or likely effect of substantially lessening competition', commonly referred to as an 'effects test', is new to section 46, but is consistent with existing legal concepts within the CCA.⁶

1.9 Schedule 2 to the bill makes consequential amendments to repeal the telecommunications-specific anti-competitive conduct provisions in Division 2 of Part XIB of the Act, and the competition notices and exemption order regime in Division 3 of Part XIB. These provisions are no longer necessary or appropriate given the proposed amendments to section 46 (as outlined in schedule 1 to the bill).⁷

Financial impact

1.10 The bill has no significant financial impact on Commonwealth expenditure or revenue. The amendments contained in schedule 1 of the bill are expected to have a compliance cost impact of \$2.5 million per year over the next 10 years.⁸

Background and consultation

Misuse of market power provision

1.11 The misuse of market power provision (section 46) of the CCA regulates unilateral anti-competitive conduct. The role of section 46 straddles a fine line to distinguish between vigorous competitive activity, which provides certainty and underpins successful and efficient market outcomes, from anti-competitive, monopolistic practices that harm the competitive process.

1.12 In determining whether particular conduct of a firm constitutes a misuse of market power under section 46 in its current form, two legal tests must be satisfied:

- First, the conduct must have involved **taking advantage** of the firm's market power.
- Second, the conduct must have been undertaken for the **purpose** of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.⁹

Harper Review

1.13 On 24 March 2014, the government commissioned an independent Competition Policy Review (the Harper Review) of Australia's competition framework. A key focus of the Harper Review was to identify impediments across the economy that restrict competition and reduce productivity.¹⁰

1.14 Described as the first 'root and branch' review of Australia's competition laws for 20 years, the review panel, chaired by Professor Ian Harper, undertook extensive

6 Explanatory Memorandum, p. 9.

7 Explanatory Memorandum, p. 3.

8 Explanatory Memorandum, pp. 3–4.

9 Competition Policy Review, *Final Report*, March 2015, p. 337.

10 Explanatory Memorandum, p. 5.

consultation with businesses, consumers and other industry stakeholders. The misuse of market power was one of the top issues raised in submissions to the review, with stakeholder opinions divided as to the efficacy of section 46 in deterring anti-competitive conduct.¹¹

1.15 On 31 March 2015, the Harper Review released its Final Report. The report made 56 recommendations on Australia's competition framework, covering most sectors of the economy and with implications for all levels of government.

1.16 In examining the misuse of market power provision, the review panel considered section 46 to be deficient in its current form. It noted the uniqueness and size of the Australian market and the need to have an effective mechanism to deal with market consolidation and excessive power:

An effective provision to deal with unilateral anti-competitive conduct is a necessary part of competition law. This is particularly the case in Australia where the small size of the Australian economy frequently leads to concentrated markets. The Panel considers that section 46 can be re-framed in a manner that will improve its effectiveness in targeting anti-competitive unilateral conduct.¹²

1.17 In particular, the panel noted the limitations of the 'take advantage' and 'purpose' limbs of the current legislation, remarking that:

The 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The 'purpose' limb, that prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches.¹³

1.18 The review panel also commented on the substantial difficulties in interpretation of the expression 'take advantage', commenting that its meaning is 'subtle and difficult to apply in practice'.¹⁴

1.19 Consequently, the review recommended that section 46 be re-framed to prohibit firms with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that or any other market.¹⁵

1.20 To ensure that conduct is considered in a holistic manner, the review also recommended that re-framed legislation list particular factors indicative of pro-competitive and anti-competitive conduct, and that these factors must be

11 Explanatory Memorandum, p. 5; Competition Policy Review, *Final Report*, March 2015, p. 335.

12 Competition Policy Review, *Final Report*, March 2015, p. 340.

13 Competition Policy Review, *Final Report*, March 2015, p. 347.

14 Competition Policy Review, *Final Report*, March 2015, p. 338.

15 Explanatory Memorandum, p. 6. For the full detail of the Harper Review's recommendation, see Competition Policy Review, *Final Report*, March 2015, p. 348.

considered when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition.¹⁶

1.21 While the factors are not exhaustive, they are indicative of pro-competitive and anti-competitive conduct, and provide guidance about the typical effect of these types of conduct on competition in a market. The mandatory factors also aim to make it clear that the re-framed section 46 is not intended to prevent pro-competitive conduct, and therefore ensure that conduct is considered in a holistic manner.¹⁷

Government response to the Harper Review

1.22 On 24 November 2015, the government released its response to the Harper Review. The government acknowledged the concerns raised throughout the review process regarding the operation of the misuse of market power provision and, given the importance of the issue for affected stakeholders, committed to consult further on options to reform the provision.¹⁸

1.23 Following on from the government's response to the Harper Review, on 11 December 2015 the Treasurer, the Hon Scott Morrison MP, released a discussion paper on section 46. The Treasurer explained the importance of this final round of consultation:

This is an issue on which many people have strong views and it is important those views are heard on a range of options, not only that recommended by the Harper Review.

...

The Government acknowledges concerns about the operation of the provision and the need to ensure it enhances, rather than inhibits competition. For this reason, we want to explore all the options available.¹⁹

1.24 On 16 March 2016, the government announced its final position on the Harper Review's recommendation, agreeing to adopt in full the review's recommended changes to section 46 of the CCA.²⁰ The Prime Minister, Treasurer and Assistant Treasurer emphasised the government's commitment to strengthening Australia's competition policy, commenting that:

16 Competition Policy Review, *Final Report*, March 2015, p. 348.

17 Explanatory Memorandum, pp. 10–11.

18 Australian Government Response to the Competition Policy Review, p. 25.

19 The Hon Scott Morrison MP, Treasurer of the Commonwealth of Australia, 'Release of section 46 discussion paper', *Media Release*, 11 December 2015.

20 Extensive consultation with stakeholders following the release of the Harper Review's final report revealed a concern that the reference to substantially lessening competition in 'any market', as recommended by the review, made section 46 excessively broad in scope. To address this issue, the scope of section 46 is limited in the bill to those markets in which a corporation's conduct is most likely to have a purpose, effect or likely effect of competition concern.

...the amendment of Section 46 to deal with unilateral anti-competitive conduct is an important step to ensure Australia has the best possible competition framework to support innovation and boost economic growth and jobs.²¹

1.25 The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, explained how the proposed amendments will support and promote pro-competitive conduct of businesses for the ultimate benefit of Australian consumers:

These amendments will make markets work better for the benefit of all Australians and help to lift our long-term productivity growth. They will ensure that all business can compete on a level playing field, rewarding innovative and dynamic businesses that provide the best services at the lowest cost. This will benefit households by giving them more choice and better value products and services.²²

1.26 The next chapter of this report considers the views expressed in submissions received by the committee.

21 The Hon Malcolm Turnbull MP, Prime Minister, the Hon Scott Morrison MP, Treasurer, and the Hon Kelly O'Dwyer MP, Assistant Treasurer, 'Fixing competition policy to drive economic growth and jobs', *Media Release*, 16 March 2016.

22 The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, *House of Representatives Hansard*, 1 December 2016, p. 17.

