

---

# *What the effects test for section 46 means for you*

*16 March 2016*

*Authors: Tony O'Malley, Murray Deakin, Yolanda Chora, Sylvia Ng*

---

## ***In brief***

On 16 March 2016 the Australian Federal Government decided to replace the misuse of market power provision in section 46 of the Competition and Consumer Act 2010 (CCA) with a new provision that introduces an effects test.

Government has now endorsed the Harper Review's recommendation on section 46 in full. An exposure draft of the revised CCA is expected later in 2016.

The Harper Review recommended that the prohibition against misuse of market power be reframed to prohibit a corporation with a substantial degree of power in a market from engaging in conduct if it has the **purpose**, or would have or be likely to have the **effect**, of substantially lessening competition in that or any market.

This new test is likely to expand the application of section 46 to capture new forms of conduct. Clients with a substantial degree of power in a market need to carefully review their decision making processes to ensure that relevant decisions are captured and evaluated in terms of their competitive impact. This review should extend to internal controls and delegations within corporations such that key decision points are flagged for a more rigorous competition analysis before they are made or implemented.

## ***In detail***

Section 46 has long been a controversial provision. The Federal Government recognized the heated debate generated by the recommendation of the Harper Review and elected to engage in a further round of consultation rather than making a decision in late 2015 along with the rest of the Harper Review recommendations.

The failure to achieve successful prosecutions under the section has long been perceived by critics of the current section as a failure of the law to achieve the underlying policy rationale for the prohibition – essentially to prevent corporations with significant market power from damaging competition.

Those arguing for the status quo favoured the certainty of the existing prohibition which caught the most egregious of conduct, with other parts of the CCA effectively capturing most other kinds of anti-competitive conduct. However, from a political perspective, the argument has been framed as one of the interests of large businesses pitted against those of small business (and the Australian Competition and Consumer Commission).

---

The current wording of the section is as follows:

*“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.”*

The language proposed by the Harper Review is as follows:

*“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.*

*...in determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, the court must have regard to:*

- a) 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*
- b) 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 entrant into the market.”*

It is important that the new test is carefully considered by clients with a significant degree of power in a market. The new test brings less certainty as to its application to specific conduct engaged in by corporations, particularly in the early period of the new legislation until it is tested and interpreted by the courts.

Importantly, the proposed provision will undoubtedly capture new forms of conduct. For clients with a significant degree of power in a market, it means that consideration of the new test needs to occur in relation to decisions that were previously free from such constraints. As such, affected clients need to carefully review their decision making processes to ensure that relevant decisions are captured and evaluated in terms of their competitive impact. This review should extend to internal controls and delegations within corporations such that key decision points are flagged for a more rigorous competition analysis before they are made or implemented.

A relevant competition analysis will need to consider the market as it presently exists, including any "market imperfections" such as a small number of competitors, high concentration levels, lack of innovation, poor product quality, lack of consumer choice or low levels of price competition. The market assessment will underpin any assessment of the likely competitive impact expected to result from a particular strategy or decision.

Clients should ensure that their competition assessment operates in practice as an efficient decision making tool, to mitigate any risk that the development of a corporation's business is not adversely affected by extending the time frame between strategy formulation and strategy execution. Contact your usual PwC adviser, or one of the below PwC Legal specialists for a deeper discussion on this issue.

---

## ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

Tony O'Malley, Partner  
+61 (2) 8266 3015  
[tony.omally@au.pwc.com](mailto:tony.omally@au.pwc.com)

Murray Deakin, Partner  
+61(2) 8266 2448  
[murray.deakin@au.pwc.com](mailto:murray.deakin@au.pwc.com)

Yolanda Chora, Director  
+61 (2) 8266 2471  
[yolanda.chora@au.pwc.com](mailto:yolanda.chora@au.pwc.com)

Sylvia Ng, Director  
+61 (2) 8266 0338  
[sylvia.ng@au.pwc.com](mailto:sylvia.ng@au.pwc.com)

© 2016 PricewaterhouseCoopers. All rights reserved. In this document, "PwC" refers to PricewaterhouseCoopers a partnership formed in Australia, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. This publication is a general summary. It is not legal or tax advice. Readers should not act on the basis of this publication before obtaining professional advice. PricewaterhouseCoopers is not licensed to provide financial product advice under the Corporations Act 2001 (Cth). Taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services License before making a decision on a financial product.

*Liability limited by a scheme approved under Professional Standards Legislation.*