
Misuse of market power prohibition broadened

Authors: [Claire Forster](#), [Nick McHugh](#)
Publication | October 19, 2017

- **Background**
 - **What this means for businesses**
 - **Way forward**
 - **Summary of the new and old section 46**
 - **Other reforms**
-

Background

On 6 November 2017, changes to section 46 of the *Competition and Consumer Act 2010 (Act)* became effective.

The new section 46 prohibits a business with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition. A comparison of the new and old section 46 is in section 4 of this briefing. Penalties can exceed \$10 million per contravention.¹

Numerous other significant changes to the Act commenced at the same time.

What this means for businesses

If a business has a substantial degree of power in a market, any conduct engaged by it could potentially fall within the purview of the new section 46. It is no longer necessary to find that a business took advantage of its market power, only that its conduct had an anti-competitive purpose or effect.

Therefore, a business with one of more of the following characteristics may be affected by this change in law:

- fewer than three competitors;
- products or services with high market share (greater than 30 percent);
- patented, unique or otherwise market-leading goods or services;
- facilities that are difficult for competitors to easily or profitably replicate; or
- exclusive access to essential inputs.

The introduction of an “effects” test in particular means that these types of businesses will need to carefully consider the likely effects of its conduct on competition, not just the purpose. This may necessitate revisiting strategies including:

- refusals to supply;
- pricing (especially heavy discounting or margin/price squeeze); and
- tying and bundling.

Way forward

Businesses with potential market power should begin reviewing current arrangements, existing practices and future strategies.

Your business may benefit from a **Market Power Health Check**. Norton Rose Fulbright competition law experts have put together affordable, fit-for-purpose packages to assist. [Click here](#) to find out more.

Recent publications

- **Guide to doing global deals: 10 things for in-house to consider**
Antitrust and competition
 - **Updates on the Australian merger control regime**
Antitrust and competition
 - **Foreign Investment screening: the other merger review**
Antitrust and competition
 - **Competition World**
Antitrust and competition
 - **Imminent Australian competition law changes present new risks and opportunities**
Regulation and investigations
-

Stay up to date...

Subscribe

We expect that the Australian Competition and Consumer Commission (ACCC) will focus upon campaigns to promote awareness of the changes to section 46, rather than enforcement action in the immediate future. The ACCC is also re-publishing guidance about its approach to enforcement of the new prohibition and the types of conduct it views as being caught (and not caught).

However, the change to section 46 is something that the ACCC strongly advocated for and has been anticipated for some time. As such, the ACCC will be eager to take investigative and enforcement action when the new section 46 comes into effect.

Summary of the new and old section 46

A summary of the new and old section 46 is in the table below:

New section 46	Old section 46
<p>A corporation that has a substantial degree of power in a market must not:</p> <ul style="list-style-type: none">engage in conduct;that has the purpose, effect or likely effect of substantially lessening competition in that or any other market in which the corporation (or a related body corporate) supplies or acquires goods or services.	<p>A corporation that has a substantial degree of power in a market must not:</p> <ul style="list-style-type: none">take advantage of that power in that or any other market;for the purpose of:<ol style="list-style-type: none">eliminating or substantially damaging a competitor in that or any other market;preventing entry of a person into that or any other market; ordeterring or preventing a person from engaging in competitive conduct in that or any other market.

Other reforms

As mentioned, the change in the misuse of market power law became effective at the same time as a number of other significant changes to the Act. These include improvements and simplifications to the cartel laws, the introduction of a new prohibition against concerted practices and removal of the outright prohibition against third line forcing. To read more about these changes, [click here](#).

Thanks go to Louie Liu for his assistance in preparing this article.

- ¹ Also removed will be the specific prohibition against predatory pricing in section 46, which is confusing, duplicative and has never been used.

Practices:

Regulation and investigations **Antitrust and competition**

Tweet

Contacts



Nick McHugh
Sydney



Claire Forster
Sydney



Andrew Riordan
Melbourne



Martyn Taylor
Sydney



Dylan McKimmie
Perth

Subscribe and stay up to date with the latest legal news, information and events...

[Register now](#)