

Article Information

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Competition and Consumer Act - Legislative Change Following the Election

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With the recent Federal Election now done and dusted, it is likely the Turnbull Government will push on with legislative change to competition law in Australia. **Partner, Ian Nathaniel** and **Senior Associate, Ben Hartley**, discuss and explain the likely implications.

In March this year the Turnbull Government indicated that it would replace the current misuse of market power provision in section 46 of the Competition and Consumer Act 2010 (the Act) with a new provision that introduces what is known as an effects test. In so doing the Government was endorsing the Harper Review's recommendation regarding section 46. Put simply, 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.

The reason for the recommended change to the current law was as a result of the failure of the regulator to successfully pursue corporations for a breach of section 46. Currently, businesses with a substantial degree of market power are prohibited from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a business into a market and deterring or preventing a business from engaging in competitive conduct. The proposed changes to the legislation remove the element of 'taking advantage' and amend the current purpose test with an effects test.

It is unclear at present how this mooted legislative change will operate in practise. It may result in additional complexity when considering a breach of section 46 and there will be a period of uncertainty while the regulator, businesses and the Courts grapple with the operation of the effects test.

The proposed legislative change is relevant to businesses, large and small. For those businesses with a significant degree of market power, they will need to consider their business decision making in the context of the competitive effect or impact on the market. This is likely to require a degree of rigour and complexity before strategic business decisions are made. Likewise for smaller businesses, the effects test promises an equal opportunity to compete, but likewise complexity and uncertainty in the face of anti-competitive behaviour. For the time being, and until the new Government unveils its legislative agenda for the new term of Government, for businesses of all shapes and sizes it is a case of watch this space.