

12 February 2016

Misuse of market power

Submission to the Treasury

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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Misuse of market power

CHOICE appreciates the opportunity to provide feedback to the Federal Government on options for strengthening section 46 of the *Competition and Consumer Act 2010*. As acknowledged in the recent *Final Report* of the Competition Policy Review, an effective unilateral anti-competitive conduct provision is essential to the proper functioning of Australia's national competition policy framework.

It is important for section 46 to be reframed to focus more clearly on the long-term interests of consumers. Our competition policy as a whole should be directed towards improving consumer welfare through robust competition. Section 46 is no different, and should promote consumer interests in the long-term.

Recommendations

CHOICE recommends that:

- Section 46 of the Competition and Consumer Act 2010 be amended in order to better achieve its goals and improve its policy effectiveness. This could be achieved by amending section 46 in the way recommended by the Harper Review final report (Option F in the Government's Discussion Paper). Option E in the Discussion Paper would also address identified issues in the current drafting of section 46.

The Harper Review findings

In March 2015, the *Final Report* of the Competition Policy Review (the Review) expressed the view that an effective unilateral anti-competitive conduct provision is essential to the proper functioning of Australia's national competition policy framework. However, the report also acknowledged that section 46 could be reframed to improve its effectiveness and focus more clearly on the long-term interests of consumers.

CHOICE believes that this is vital. Our competition policy as a whole should be directed towards improving consumer welfare through robust competition. Section 46 is no different, and needs to be reframed in a way that promotes consumer interests in the long-term.

The misuse of market power provision of the CCA currently prohibits a corporation with a substantial degree of power in a market from taking advantage of that power in that market for a prescribed anti-competitive purpose.

The Review identified two key problems with the current framing of Australia's misuse of market power law. Firstly, the report presented the view that the 'take advantage' element is not useful in distinguishing competitive from anti-competitive conduct, and that the case law demonstrates substantial interpretation difficulties. The report found that the 'take advantage' test is "not best adapted to identifying a misuse of market power" and that "business conduct should not be immunised merely because it is often undertaken by firms without market power".¹ CHOICE agrees with this assessment.

Secondly, the report found that the 'purpose' test is flawed. The report presented the view that the requirement that conduct must have been engaged in for the purpose of damaging a competitor is inconsistent with the primary objection of the *Competition and Consumer Act 2010* – that is, to protect competition. Instead, the 'purpose' test results in the provision protecting individual competitors. CHOICE agrees that section 46 should instead be directed to conduct that has the purpose or effect of harming the competitive process.

The two problems identified in the Review result in it being very difficult for a regulator to successfully bring an action for breach of section 46. Even where a dominant company engages in conduct for a clearly anti-competitive purpose resulting in a significant anticompetitive effect, the technical requirements of section 46 make it difficult to establish that a firm has "misused" its market power.

Options for strengthening the misuse of market power provision

The Federal Government's discussion paper presents six options for strengthening the misuse of market power provision. CHOICE supports both options E and F as valid alternatives for improving the effectiveness of section 46.

CHOICE accepts the conclusions of the Harper Review final report, being that section 46 could be reframed to improve its effectiveness, address identified problems with the provision, and better focus on the long-term interests of consumers. Consequently, CHOICE does not support Option A in the discussion paper: to make no amendment to the current law.

¹ Harper et al, March 2015, 'Competition Policy Review Final Report', p61.

CHOICE also supports the Harper Review final report's assessment of the shortcomings of section 46. Specifically, CHOICE is of the view that the 'take advantage' and 'purpose' tests are flawed, and not able to adequately distinguish competitive conduct from anti-competitive conduct. Options B, C and D in the discussion paper fail to address both of these concerns. CHOICE does not support these options.

Options E and F both address the problems identified by the Harper Review. They both act to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. Both options also recommend that authorisation be available, and that the ACCC issue guidelines on its approach to the provision. CHOICE strongly supports the recommendation that the ACCC issue guidelines. CHOICE has found that previous ACCC-issued guidelines for businesses, such as the Advertising and Selling Guide or the Debt Collector Guide, provide a handy touchstone for consumers in their dealings with businesses. While these guides are aimed at business, they can provide consumers with confidence when seeking to resolve disputes with a business.

Option F differs from Option E in that it also recommends the legislation direct the court to have regard to certain factors when determining whether conduct has the purpose or effect of substantially lessening competition. This element of the Review's recommendation appears aimed at addressing concerns of over-capture; that is, that an effects test will have the undesirable result of prohibiting conduct that is pro-competitive. Supporters of the effects test have argued that conduct that enhances competition, like research and development or innovation, cannot by definition substantially lessen competition and will not breach the law.² In order to be found to have substantially lessened competition, a business must have first acted in an anti-competitive manner. The courts have long recognised that competition is deliberate and ruthless, and consideration of whether conduct lessens competition will be considered through this lens. CHOICE agrees with this proposition, and consequently considers that requiring the court to consider the extent to which the conduct increases or lessens competition in the market is unnecessary. CHOICE does not oppose the Review's *Final Report* recommendation, but would accept Option E in the discussion paper as a valid alternative.

Section 46 is currently inconsistent with accepted competition law jurisprudence. It focuses on conduct that has the purpose of harming a competitor, rather than conduct that harms the

² J Walker and R Featherstone, 14 August 2014, 'ACCC suggestion is far from novel and not anti-competitive', The Australian Financial Review

competitive process. CHOICE believes that Australia's competition law policy should not seek to protect particular industries or businesses, but should focus on improving the competitive process as a whole. CHOICE broadly supports implementing either Option E or Option F.