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Options to strengthen the misuse of market power law

IAG welcomes the opportunity to provide a submission to the Treasury Discussion Paper 'Options to strengthen the misuse of market power law' (the Discussion Paper).

IAG endorses the view of the Final Report of the Competition Policy Review 2015 (Harper Review) that competition policy should:

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

However, IAG does not support the Harper Review's view that there is a deficiency in the current law pertaining to the misuse of market power.

IAG is pleased that the Government, noting the divided stakeholder views, decided to consult further on the misuse of market power provisions of competition law.

Further, IAG was pleased to participate in one of the Government's recent Roundtables to further discuss the Discussion Paper and the risks and unintended consequences that may result from any change to the legislative provision.

About IAG

IAG is the parent company of a general insurance group with controlled operations in Australia, New Zealand, Thailand and Vietnam employing more than 15,000 people.

IAG's current businesses underwrite over \$11 billion of gross written premium (GWP) per annum, selling insurance under many leading brands, including NRMA Insurance, CGU, SGIO, SGIC, Swann Insurance and WFI (Australia); NZI, State, AMI and Lumley Insurance (New Zealand); Safety and NZI (Thailand); AAA Assurance (Vietnam); and Asuransi Parolamas (Indonesia). We also have interests in general insurance joint ventures in Malaysia, India and China.

In 2015, our businesses insured: 121,189 farms, 131,160 employers, 633,223 businesses, 3.4 million homes and 10.6 million cars.

Background

On 24 November 2015, following the finalisation of the Harper Review, the Government indicated that in response to concerns raised through the review process that it would be conducting further consultation on options to strengthen the misuse of market power provision in the Competition and Consumer Act 2010 (CCA).

On 11 December 2015, the Government released a Discussion Paper on the options to reform the CCA in relation to the misuse of market power provision.

Harper Review

IAG made two submissions to the Harper Review process in June 2014 and in November 2014. The Insurance Council of Australia, of which IAG is a member, also provided a submission to the Competition Policy Review Final Report in May 2015.

IAG has previously expressed a number of concerns with proposed changes to section 46 of the CCA.

As highlighted in IAG's previous submissions to the Harper Review, it is IAG's view that:

- The current misuse of market power and cartel provisions of the CCA provide an adequate and appropriate legislative framework for preventing anti-competitive conduct.
- IAG does not support the introduction of an 'effects test' as it would have a negative effect on competition as well as imposing an additional unnecessary compliance burden on business.
- An 'effects test' would risk making strong but fair conduct by efficient businesses unlawful, thereby protecting competitors in a market, as opposed to protecting and promoting competition, and is thus not in the interests of consumers.

As noted in the Discussion Paper and evidenced through the Roundtable process, stakeholder opinions on the provision in the CCA relating to the misuse of market power are divided.

Likewise, the Hilmer Competition Policy Review handed down in 1993, also noted the diverse views raised as part of the consultation process on the misuse of market power provisions of competition law, before concluding:

"The Committee sees a need to strike a balance between deterring undesirable unilateral conduct, encouraging business certainty and minimising the regulatory interference in daily business decisions. The Committee is not satisfied that any perceived difficulties with the current operation of s.46 are sufficient to warrant an amendment that would create additional uncertainty and thus potentially deter vigorous competitive activity." National Competition Policy Review (Hilmer Review), 1993.

Insurance industry - Competition and the Regulatory Environment

IAG strongly supports the key principle underpinning competition policy that all sectors of the economy should be subject to competition unless it can be shown that there is a net public benefit not to.

The Australian general insurance market can be characterised as being strongly capitalised and highly competitive. As at 30 September 2015, there were approximately 112 authorised general insurance businesses operating in Australia (APRA, Quarterly General Insurance Performance Statistics, September 2015).

As noted in the Discussion Paper: "Competition and the threat of competition (contestability) promote efficient production which, over time, also drives innovation and investment in new technologies, and the development of new products and business models that meet consumers' needs."

The notion of efficiency and innovation was also considered by the Hilmer Review:

"Firms should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation. There is a serious risk of deterring such conduct by too broad a prohibition of unilateral conduct. The Committee takes the view that an effects test is too broad in this regard. The courts might develop a gloss upon an effects test to ensure that it did not prohibit economically efficient conduct, but it is not clear that the final result would differ from the existing interpretation of s.46, or that any such difference would constitute an improvement." National Competition Policy Review (Hilmer Review), 1993.

IAG supply chain

IAG's supply chain arrangements provide an example of how large and small businesses can work together for mutual benefit and how supply chain arrangements can sustain small businesses through efficiency and innovation.

IAG's business strategy creates sustainable, equitable partnering arrangements with businesses, best exemplified by our partner smash repairer network.

When IAG customers make a claim under a car insurance policy, we rely on a network of businesses across Australia to undertake over 400,000 repairs each year. IAG's supplier network is made up of numerous businesses, including paint and panel repairers, mechanics, paint-less dent repairers, windscreen suppliers and fitters.

There have been some contentious issues concerning the commercial relationship between insurers and smash repairers which have arisen as a result of a convergence of a variety of trends influencing both the operations of insurers and the changing nature of the smash repair industry. These influences include broad changes in the automotive market, changing consumer preferences and increasing consumer demands for quality repair work and structural changes in the Australian insurance industry. For instance, as a result of accident rates declining and repair efficiency rates increasing, there has been some natural consolidation in the industry.

Appropriately structured and organised supply chain arrangements between businesses are good for competition and reward efficient, innovative and customer-focussed businesses.

IAG has made a conscious decision to work more closely with industry and support a sustainable, competitive, independent smash repair industry into the future.

Options

The Discussion Paper canvasses a number of reform options to alter the operation of section 46. In relation to these specific options, IAG strongly supports Option A which makes no amendment to the current provisions. It is our strong view that section 46 is well understood and works as intended.

As outlined in our previous submissions to the Harper Review process, and as referenced above, IAG does not support changes to the CCA that would introduce an “effects test” and believes the current section 46 provides the right balance in preventing the abuse or misuse of market power.

IAG is concerned that changes to competition law to either introduce an “effects test” or in another way alter the operation of section 46 could potentially deter or defer conduct beneficial to consumers.

Until such time as a comprehensive cost benefit analysis of an “effects test” is undertaken, IAG submits that an “effects test” should not be considered. Importantly, any legislative or regulatory response should be proportional to the size of the problem.

As noted by IAG in previous submissions, and as acknowledged in the Draft Report delivered by Professor Harper, “effects tests” by their nature, are at risk of capturing pro-competitive conduct and vigorous competition between competitors.

In relation to the option canvassed to remove “take advantage”, IAG is of the view that this would disconnect the market power from the conduct and could deter or defer pro-competitive behaviour. Likewise, the proposal to include a “substantially lessening of competition” test may impede legitimate, agile, business conduct.

A number of unintended consequences could result from the implementation of these proposed amendments. For instance (assuming the requisite degree of market power):

- How would a multinational entering a one-competitor market in Australia be treated if they subsequently withdrew from the market? Could they be argued to be in breach of a new section 46 for substantially lessening competition and what impact would such a risk have on investment decisions?
- If a business is selling a product, but subsequently decides to cease selling the product due to lack of profitability or to pursue an alternative business strategy, is there a risk that this will be deemed a substantial lessening of competition if the product happened to be selling in a small regional market with few or no other competitors?
- Consider a regional centre with three suppliers in operation. A business with undertakes a tender process to procure services from these suppliers with the aim of lifting quality, efficiency and standards of service for consumers. Suppliers unsuccessful in the tender eventually go out of business. Is the business who initiated the tender liable under an amended section 46?

It would be a concern if any finding of the current consultation process created a risk to businesses of pro-consumer conduct being prohibited or subject to uncertainty, or requiring more time and cost to analyse thus potentially deferring or deterring activities beneficial to consumers. Unintended consequences such as these would ultimately impact on consumers.

IAG does not believe it has been proven that there is a functional deficiency in the existing law that cannot be addressed through existing legislative or industry-led mechanisms.

As outlined in our previous submissions, IAG is of the view that any changes to section 46 are likely to increase uncertainty in the law which may only be resolved through the testing of the legislation in court and developing new case law over several years with the consequential time and cost involved.

Rather than the expansion of legislation or regulation, IAG supports consideration of the use of industry codes in relation to protecting small business. Industry codes, due to their flexibility and relative low cost, may be of greater benefit to small business than legislation and regulations that are by their nature potentially adversarial, less flexible, more time consuming and expensive to enforce.

Conclusion

IAG supports strong competition that delivers outcomes for innovation, efficiency and consumers and believes the current operation of section 46 allows for this. The risks and unintended consequences of change, when there is no clear articulation of the current deficiency and whether it would be addressed, appear significant.

For the reasons outlined above, IAG does not support changes to the misuse of market power provision of the CCA and believes the recommendation put forward by the Harper Review should not be implemented.

Should you require further information please do not hesitate to contact David Wellfare, Senior Manager, Public Policy & Industry Affairs, IAG on (02) 9292 8593 or David.Welfare@iag.com.au

Yours sincerely



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