

Article by Professors Stephen King and Graeme Samuel published in Australian Financial Review on 14 January 2016. Lodged as a submission in response to the Treasury Discussion Paper 'Options to strengthen the misuse of market power law'.

The debate around the Misuse of Market Power provisions of Australia's Competition laws continues. With misinformation abounding in public commentary, some clarification may assist the rational consideration of the main issues.

What is the debate about?

Section 46 of the Australia's competition laws is a broad protection against a business with market power misusing that power to stifle competition. Similar laws exist in most developed countries and they 'link' the business behavior to the market power, either in the wording of the law or, as in the US, through judicial precedent.

This 'link' is critical. Remove the 'link' and large businesses risk breaking the law every time they innovate, compete hard and help consumers but harm competitors. As the High Court has stated:

"Competition by its very nature is deliberate and ruthless. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor."

So remove the 'link', and we potentially have an 'anti-competition' law.

The 'link' in section 46 is two words: 'take advantage'.

The Harper report recommended removing these two words. This would take Australia out of line with other developed countries and may make some competitive behavior illegal.

So the debate is easily summarized. The Harper Recommendation and its supporters wish to remove the critical link in the law that makes a misuse, and only a misuse, of market power by big business illegal. In our view, this risks harming competition and hurting consumers.

Can the Harper recommendation be fixed?

The Harper Report recognized the anti-competitive potential of its recommendation. So it added two 'directions' to the Court to try and offset the anti-competitive consequences. But these 'directions' are narrow, vague and, in our opinion, poorly worded. They would continue to leave big business wary of pro-competitive innovation.

The ACCC could also issue guidelines to try and clarify any amended law. But these will not be binding on the Courts or private litigants. And how much certainty will they provide business if the corporate policeman can alter the guidelines whenever it sees fit?

It is suggested that if business is worried about being submitted to a lengthy, costly and uncertain process of litigation by the ACCC or a private party, it can submit itself to an

equally lengthy, costly and uncertain process of seeking authorisation from the ACCC, where its competitive strategies will be laid out in full public view for its competitors to examine, criticise and complain about!

Inevitably, businesses will curb their competitive behaviour because of the legal risk.

Is this the price we need to pay for stronger laws?

Proponents of the reform argue that some reduction of competition is simply a cost we need to bear to prevent real anti-competitive abuse. But the cited examples often have nothing to do with section 46 and are covered by other parts of our competition laws.

If a business has concerns about a rival's anti-competitive bundling, then that can already be prosecuted directly under section 47 of the laws. Concerns about supplier relations? That is dealt with through the unconscionable conduct provisions of the laws. Concerns about threats from a supplier to cut off supply if you discount? That is section 48. What about an anti-competitive contract? Section 45!

The proponents of amendments to section 46 view the law in a vacuum and want to create a law that uses vague wording to capture a whole range of conduct by big business. Maybe that broad law will capture some anti-competitive conduct that falls through the cracks in the thousands of pages of our current competition laws. However, more likely, it will capture poorly defined complaints about conduct that benefits consumers but harms inefficient competitors. And that will be both bad law and bad economics.

There are better alternatives.

One alternative is to keep the words 'take advantage' in the current test. The Courts have examined these words over time and directly link the conduct to a business 'using' its market power. While legal precedent has varied over time, and supporters of change like to refer back to some anomalous cases of the past, the law is now clearly understood.

Alternatively, if there is a need to clarify what constitutes the 'taking advantage' of market power, then let's focus on that issue.

For this reason we have suggested that if there is felt to be a need to strengthen the section, it might be drafted along the following lines -

46(1) a corporation that has a substantial degree of power in a market shall not misuse that power in that or any other market if to do so has the purpose or would have or be likely to have the effect of substantially lessening competition in that market or any other market.

(2) For the purposes of sub-section (1) a corporation shall be deemed to have misused its power in a market if the conduct alleged to constitute the misuse of its power in that market would be inconsistent with conduct that would be engaged in by a corporation that does not have a substantial degree of power in that market.

This approach clarifies the concept of a business 'misusing its market power' and ensures the law has a true 'misuse of market power' test. Importantly, let's ensure that we do not

so broaden the law to capture "any" conduct by big business, because such a law will undermine the very competition that it is meant to protect.

The debate is not about an 'effects test'.

Our alternative wording includes the so-called 'effects test'. This is part of the Harper recommendation. For anyone who understands the current law, which allows the Courts to infer 'purpose' from 'effect', the change is trivial. The debate about the change to our misuse of market power laws needs to concentrate on the key issue: do we limit the law to a business misusing its market power or do we broaden it so that even pro-competitive conduct can be illegal? Broadening the law may make life easier for the ACCC. But it will harm everyone else.

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