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General Manager
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By email to: competition@treasury.gov.au

Dear Sir or Madam,

OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW

Thank you for giving the Office of the NSW Small Business Commissioner (OSBC) the opportunity to provide feedback on the Options to Strengthen the Misuse of Market Power Law Discussion Paper of December 2015 (Discussion Paper).

The intent of the Discussion Paper is to further debate on the Final Report of the Competition Policy Review (the Harper Review) recommendation concerning section 46 (the misuse of market power provision) of the *Competition and Consumer Act 2010* (CCA).

Given the importance of section 46 to the Australian economy and widespread contention surrounding the recommendation, the Australian Government is seeking to ensure the provision offers a commercially and legally robust, practical approach to preventing the misuse of market power.

The OSBC and the NSW small business sector

The OSBC is focused on supporting and improving the operating environment for small businesses throughout NSW. The role of the OSBC is to:

- provide dispute resolution services;
- deliver quality business advice through our Small Biz Connect program; and
- speak up for small business within government.

Small businesses represent 96 per cent of all businesses in Australia. There are around 680,000 small businesses in NSW alone, providing nearly half of all employment in the state.

Section 46 synopsis

The purpose of section 46 is to distinguish vigorous competitive conduct from economically inefficient, monopolistic practices that may exclude rivals and harm the competitive process.

The current misuse of market power provision prohibits corporations with a substantial degree of power in a market from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

Few cases have been brought under the current misuse of market power provision. In the past 15 years, seven cases have been considered by the Federal Court or High Court¹. Such a low volume of cases draws into question how accessible this provision is for most businesses.

Whether section 46 should be based solely on a 'purpose' test or should also (or alternatively) have an 'effects' test has been considered in 11 different independent reviews and parliamentary inquiries since 1976 – none of which recommended such a change².

Clarifying the intent of section 46

It is important to distinguish between damage to a competitor, and damage to the competitive process. Small business operators may look to the current misuse of market power provision as a possible means of relief to what they might consider to be unfair or egregious conduct by a competitor. A reading of the current provision itself, with its focus on 'competitor' and 'person' makes apparent how small business could arrive at this understanding.

However, in practice, the OSBC understands that the courts, the ACCC, and the Harper Panel, all have tended to view the current provision as concerned not with issues of fairness or equity for market participants, but with the state of competition in markets.

As noted in the Discussion Paper, competition is a process of rivalry between businesses seeking to out-do each other for their individual commercial gain. Indeed, harming the businesses of competitors is an expected outcome of vigorous competition. For this reason, the Panel recommended reframing the provision to focus on whether behaviour 'substantially lessens competition' to enable the courts to assess whether conduct is harmful to the competitive process, rather than to individual competitors.

Redrafting the provision in a way consistent with its intent and interpretation, i.e. to protect the competitive process, rather than competitors, may serve to reduce a misplaced expectation of protection, and investment of resources by some aspiring potential litigants.

Harper Review consideration and recommendation

The Harper Panel considered that section 46 is deficient in its current form, both holistically and with respect to the 'take advantage' and 'purpose' limbs individually. The panel was of the view that the current provision is not reliably enforceable and permits conduct that undermines the competitive process.

The Panel found the 'take advantage' limb of section 46 not to be a useful test by which to distinguish competitive from anti-competitive unilateral conduct, and that the 'purpose' limb, that prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches.

The Panel stated that the provision should be directed to conduct that has the purpose, or would have, or be likely to have, the effect of substantially lessening competition. And the provision should include legislative guidance directing courts and firms to weigh the pro-competitive and anti-competitive impact of conduct.

¹ *Misuse of Market Power Law*, Discussion Paper, December 2015

² Ibid

The Harper Panel recognised that as with any change to the law, amending section 46 would involve some uncertainty, but states its proposal adopts the long standing expressions 'substantial degree of power in a market' and 'substantial lessening of competition'. Although uncertainty may lead to some cost, the Panel considered this outweighed by the benefit of a more effective prohibition on unilateral anti-competitive conduct.

The Harper Panel went on to recommend the following:

The primary prohibition in section 46 of the CCA should be re-framed 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.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

Discussion Paper issues

In relation to the specific questions contained in the Discussion Paper, the OSBC offers the following comments.

What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provision?

In relation to difficulty bringing action under the current provision, there are 'access to justice' issues pertinent to specialised areas of law such as this, that require nuanced legal interpretation, are heard at the Federal Court or High Court, and for these reasons require significant investment of resources to pursue.

The OSBC has heard from a major Australian business that it would promptly bring an action under the current provision, but for the size and nature of investment that would be required, uncertainty concerning judicial interpretation, and possibility of costs being awarded if unsuccessful.

Accordingly, to the average small business, bringing action under the current provision would be a major undertaking which could threaten the continuation of the business (even if successful). While there may be small businesses in NSW seriously considering bringing an action under the current provision, the OSBC is not aware of any at the time of writing. The infrequency of litigation under section 46 tends to suggest a relatively high degree of difficulty in bringing action under the current provision.

Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?

The OSBC understands that the 'take advantage' limb, interpreted together with the 'substantial degree of power in a market' and 'purpose' elements of section 46 has emerged from jurisprudence and legislative guidance to permit the defence that a firm with substantial market power can engage in exclusionary business conduct if a firm without market power could commercially engage in the same behaviour.

However, as noted by the Harper Panel and others, conduct engaged in by a firm with substantial market power has a greater propensity to have market-distorting effects, than the same conduct engaged in by a firm without substantial market power³. Such a defence appears to have been viewed by the Harper Panel as frustrating the public policy intent of the provision.

The OSBC believes that extending the 'purpose' test to also, or instead, consider 'effects' would go some way to eliminating the above defence because it would break the nexus required between 'take advantage' and 'purpose' under the current provision's interpretation. This is discussed further below.

Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed to certain 'exclusionary' conduct if the 'take advantage' limb is removed?

The OSBC notes that a number of stakeholders with significant experience of the CCA have raised concerns to the effect that economically rational behaviour on the part of firms could be delayed or restricted if the 'take advantage' limb were removed.

Some have said that firms might curb their competitive behaviour because of legal risk, increased uncertainty and a need to obtain economic and legal advice ahead of entering into transactions⁴. If they are correct, then economically beneficial behaviour may be restricted as a result of removal of the 'take advantage' limb.

Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?

If the 'take advantage' limb were retained and combined with a 'purpose or effect' limb, this might better restrict economically damaging behaviour, while limiting restriction of economically beneficial behaviour. It may break the nexus required between 'take advantage' and 'purpose' under the current provision's interpretation.

³ Final Report of the Competition Policy Review

⁴ Samuel, G. and King, S. 2015, 'Competition law: Effects test would have shackled competition', Financial Review 9 September. Available from: <http://www.afr.com>

Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?

Inclusion of an effects test would permit a focus on the effect of commercial conduct on competition, rather than the purpose of the conduct, which is a difficult element to prove because to do so would require evidence of a deliberate act.

The phrase 'likely effect', however, while perhaps introducing a desirable level of flexibility, would appear to the OSBC to introduce some complexity, which courts and litigants would need to navigate.

It may be instructive to examine whether the comparable 'likely effect' test has in practice been challenging through the proximate CCA provisions where it already operates, or in overseas experience.

Alternatively could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?

The 'purpose' test and whether it should be amended to include an 'effects' test has been the main focus of debate in relation to the provision. The OSBC is of the view that retaining 'purpose' alone may be expected to have the effect of restraining the litigation of, and finding of, misuse of market power.

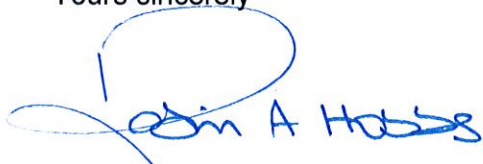
Testing 'purpose' alone seems analogous to applying the concept of *mens rea* or 'guilty mind', a necessary element for proving some crimes in criminal law, but usually not necessary to prove in administrative law⁵. This sets a high bar for investigators and aspiring litigants, which it would seem can only be hurdled if evidence is discovered that serves as a clear indicator of intended 'purpose' or outcome.

Are there any other options (not outlined above) that should be considered?

The OSBC encourages the Treasury to consider the merits of an approach that amends the existing provision by retaining the words 'take advantage', and includes a 'purpose or effect of substantially lessening competition' test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision.

Should you like to discuss any of the issues raised in this submission, please contact Murray Johnston, Principal Advisor, Advocacy on 02 8222 4842 or murray.johnston@smallbusiness.nsw.gov.au.

Yours sincerely



Robyn Hobbs OAM
NSW Small Business Commissioner

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⁵ Available online at: https://en.wikipedia.org/wiki/Mens_rea