

Spier Consulting - Legal

4 Waller Cres, Campbell, ACT, Australia, 02 62812030- 0419 239 755

spierconsulting@netspeed.com.au

Mr Scott Rogers
General Manager
Competition Policy Unit
The Treasury

11 February 2016

Dear Sir,

Response to Government Discussion paper on “Options strengthen the misuse of market power law”. Dated December 2015.

This is a personal submission.

As I attended both of the recent Round tables, convened by the Minister for Small Business, I propose to keep this submission short.

Small business benefits potentially from the unfair contract terms, unconscionable conduct and code of conduct provisions of the CCA. Yet those provisions need to be supported by a provision that prohibits those with market power preventing or deterring competitive conduct by smaller players.

Section 46 of the CCA is part of a package and a necessary part. Misuse of market power/monopolisation provisions have been in the law since the **Trade Practices Act 1965** and is found in most overseas jurisdictions in various, yet similar, forms.

I see a crucial, albeit limited, role for section 46. The law is intended to condition behaviour and that is what the section should do.

In my view the policy and processes behind section 46 could comprise of the following,

Those with market power should not engage in conduct to prevent or deter others from engaging in competitive activity.

In other words not to foreclose competitive conduct by others or that others are subject to exclusionary conduct by those with market power. I do not favour “the substantial lessening of competition” proposal as that has been shown to be very difficult to enforce in unilateral situations and some conduct of concern to small business which will in many cases escape the reach of the provision. Conduct such as predatory pricing and price discrimination. I agree that the law should not protect individual business per se but it should allow them to compete.

The current requirement to show “taking advantage ‘should be removed unless the previous Court interpretations can be countered.

These words appears to be a major inhibition to enforcement of the provision. They have become something of a “safe harbour” to those with market power. One other possibility is to change to words to “use that market power’ and then include the current Section 6A by way of guidance. This may obviate the Court decisions on ‘taking advantage” and hopefully get some more sympathetic judicial interpretation. “Use” was actually recommended by the 1979 Trade Practices Consultative Committee Report “**Small Business and the Trade Practices Act**“

The prohibited conduct is to be for the “purpose, effect or likely effect.”

This gives the regulator options in any enforcement action as evidence in such cases is extremely problematic. Pleading both ‘purpose ‘and “effect’ gives more flexibility.

Further, such conduct is often meant to discipline others and there may not be the desired “effect” but enough of a threat to the smaller players.

List of factors to be taken into account to be contained in the legislation but not be mandatory.

Mandatory factors have the tendency of becoming the focus of the enforcement of the law and not the basic contravention.

The factors should include the longer term interests of competitive markets and not simply of consumers.

No private action for 3 years from the date of any change in the law.

Hopefully this prevents opportunistic litigation until the law has had a chance to settle down,

No monetary fines to be imposed by the Courts but all other orders such as injunction and damages.

The aim of the provision is to stop conduct and compensate those damaged. The absence of large monetary fines is likely to make the Courts less cautious.

Compliance notices to be able to be issued by the ACCC against those engaged in the alleged conduct to cease the conduct.

Subject to extensive safeguards. Again the goal is to stop the conduct and not litigation.

ACCC to issue draft guidelines explaining the new provision before the Bill becomes into effect and ideally when the Bill is in Parliament.

This will assist transparency and should overcome concerns about uncertainty.

Authorisation- to be possible but there needs to be strict time limits on the ACCC and the Australian Competition Tribunal on appeal.

It is unlikely that much of the potential section 46 conduct is suitable for authorisation but where authorisation is sought the processes should be fast.

I am happy to expand on the above if need be.

Yours truly,

A handwritten signature in black ink, appearing to read "Hank Spier". The signature is written in a cursive, flowing style.

Hank Spier