

30 September 2016

MISUSE OF MARKET POWER

Submission to Treasury on the Exposure Draft
– Competition and Consumer Amendment
(Competition Policy Review) Bill 2016

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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INTRODUCTION

CHOICE appreciates the opportunity to provide comments to Treasury on the Exposure Draft – *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (the Exposure Draft). CHOICE is pleased to see that the Exposure Draft reflects the recommendations made in the Harper Competition Policy Review (the Harper Review).

The Final Report of the Harper 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. This view was expressed while also acknowledging 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. CHOICE supports the proposed changes to the law. This submission is restricted to making comments on Chapter 7 of the Exposure Draft, dealing with the misuse of market power.

The misuse of market power provisions, as they currently exist, are not sufficient to protect the competitive process, and pose significant hurdles for regulators seeking to address anti-competitive conduct. CHOICE supports the changes to s46 outlined in the Exposure Draft, and recommends that the amendments be made.

In addition, section 46 could be amended in order to better achieve its goals and improve its policy effectiveness, by reframing the law so that the court is directed to consider the long-term interests of consumers. However, the existing list of factors to be taken into account should go some way towards achieving this aim, when taken as a whole. On this basis, CHOICE supports the proposed amendments.

1. Misuse of market power: the current s46

The misuse of market power provision of the *Competition and Consumer Act 2010* (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.

Section 46 has been criticised in submissions to the Harper Review on the following basis:

- a) the “purpose” element of the test is directed at the impact of the conduct on individual competitors, rather than the impact of the conduct on the competitive process in the market; and
- b) the words “take advantage” are given significant weight and are considered separately to the overall operation of the section and from analysis of the competitive impact of the actual conduct.¹

These two problems 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 anti-competitive effect, the technical requirements of section 46 make it difficult to establish that a firm has “misused” its market power. While cases have been brought under section 46, many matters involving anti-competitive effects have been abandoned at the investigation stage due to a lack of sufficient evidence of the ‘purpose’ element.

2. The effects test

The Harper Review recommended amending section 46 to apply where conduct has the “purpose, effect or likely effect” of substantially lessening competition in “that or any other market”. It also recommended directing the court to have regard to the extent to which the conduct has the purpose, effect or likely effect of increasing or lessening competition in the market.

This element of the recommendation should serve to mitigate concerns raised by critics of the effects test proposal regarding the potential for such a test to act as a disincentive to pro-competitive conduct by large businesses. For example, it has been argued that a large business that conducts research on its products, leading to better products but harming less innovative competitors, will be in breach of a provision that includes an effects test. A small business (i.e. one without substantial market power) doing the exact same thing would not contravene the same provision, according to critics. However, supporters of the effects test have argued that

¹ Australian Competition and Consumer Commission, 25 June 2014, ‘Submission to the Competition Policy Review - Reinvigorating Australia’s competition policy’, pp76-81 and Supplementary Submission dated 22 August 2014.

conduct that enhances competition, like research and development or innovation, by definition cannot 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 an approach that includes legislation to direct the court to consider the extent to which the conduct increases or lessens competition in the market is unnecessary. Including these mandatory factors in the legislation addresses criticisms levelled at the proposed effects test, and while CHOICE does not believe the criticisms are well-founded, we do not oppose the inclusion of mandatory factors to guide the court in making its decisions.

3. The proposed new law

The current section 46 is inconsistent with accepted competition law jurisprudence. It focuses on conduct that has the purpose of harming a competitor, rather than conduct that harms the competitive process. 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 the proposal for amending section 46 as outlined in the Exposure Draft, but suggests also reframing the provision to focus on whether conduct harms or benefits the long-term interests of consumers.

The Exposure Draft, puts forward a change to the law so that the conduct of a corporation must have the purpose, effect or likely effect of substantially lessening competition. This deals with the key deficiencies in the current law, which were thoroughly explored in the Harper Review. The proposed new law also removes the specific prohibition against predatory pricing, and enables a person to seek an exemption through ACCC authorisation. Additionally, the new law will give consideration to pro- and anti-competitive factors not currently included in the law.

CHOICE supports these inclusions but recommends that the Court also be directed to explicitly consider the long-term interests of consumers – bolstering competition and the competitive process should always be done with the aim of enhancing consumer welfare, rather than increasing competition for its own sake. The combination of mandatory factors taken together

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

can provide insight into whether the conduct benefits the long-term interests of consumers, but it would be clearer still if consumer interests were directly addressed in a specific mandatory factor for consideration.