Submission to Final Harper Report

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The Competition Policy Review (Harper Review) and subsequent Report has confirmed that small and medium business may have adequate protection from predatory behaviour of larger business within the existing law. The suitability of the current law and legal framework to new emerging global and internet based markets needs to be considered. The traditional idea of markets, competition, and behaviour is challenged by disruptive technology, practices and tastes. A fundamental component of the Review is a review of the track record of enforcement of the existing legal regime and access to relief / remedies to those injured by anti-competitive behaviour.

In essence the question is that of access to "justice" not only to resolve disputes, but to provide the confidence and perhaps even assurance that retribution against the smaller supplier is discouraged and remedies will be granted.

The Report explains the administrative and cultural changes that have taken place in the past two decades in particular in developing industry codes with practical and effective dispute resolution processes aimed at helping small business access to justice, however, the Report appears to be less strident in pursuing "relief" or "remedy" options to those injured. There is some focus on "dealing" with the "needs" of small business in an administrative rather than judicial manner, the question of do it yourself relief for small business requires a proactive approach.

Of particular note is Recommendation 53 which deals with small business access to remedies.

The Reports highlighted the resource challenges faced by the Australian Competition and Consumer Commission (ACCC). This submission examines amendment to the current Competition legislation and Court procedures to grant actual relief to small business without the fear of costs orders and retribution. It is argued that there has been relatively little put forward to outline exactly how small business can access relief in a fast and commercially viable manner.

Predatory Behaviour

The Report is a useful reminder of the prevalence of potential and actual instances of misuse of market power as reflected in the range of submissions. Predatory behaviour is perhaps the most far reaching type of belligerent market behaviour. Such behaviour is often designed to capture the market, by running the competitors out of the market, then increasing price / reducing choice in short creating a lesser competitive environment.

It is also a tool to threaten smaller suppliers, so that a " market" culture evolves over time determine by the predatory supplier. In either instance, it's not only bad for the smaller suppliers, exposed to the power of larger rivals, its bad for consumers, it may reduce economic activity and diversity and commercial opportunity.

Economic Impact

The Report and submissions highlight the economic impact predatory behaviour has not just on smaller competitors but on economic activity, diversity and the nation's economic health.

Small business is the canary in the mine. The canary may not be well. The canary may need relief.

We know this from the volume and diversity of complaints handled by an army of small business complaint handling bureaucracies which have sprung up in the last decade. It would appear the future of these bureaucracies according to the Report seems bright.

Complaints and Outcomes

The Report noted that complaints from small business took time to be processed, in many instances they were not dealt with at all. In other instances the outcome or resolution was perhaps akin to keeping the peace rather than sourcing the problem and dealing with it conclusively. In short the remedies do not appear to be aligned with the damage / injury caused to small business by such behaviour. It was noted that often the problem was not communicating clearly and promptly with those making the complaints or laying out the reasons for the ACCC actions / decisions.

Clearly, some disputes will not be dealt with by the ACCC for whatever reason. In the ebb and flow of a competitive market place the interference of a regulator such as the ACCC needs to be a delicate balancing act. In the final analysis the ACCC is not a small business marketing tool it's an enforcer of a fairer competitive market place. If the ACCC was to be more pro-active in setting the agenda in key markets, which it does with the various industry codes, this sets the rules of engagement in the market it has the tools to do so. Small and medium size business is generally best equipped to understand the impact of predatory behaviour and its consequence on the very survival of the business.

The outcomes of "making good" or "stopping" predatory behaviour is short of the mark to discouraging the behaviour in the first instance. If the likelihood of prosecution, fines or even the ability of small and medium size business to enforce the law is doubtful or the opportunity costs are not so burdensome it is less likely that the law will have a prevailing effect on moulding a less predatory culture. An important role of the law is to set the limits and the possibility of private enforcement. Competition law should provide such an opportunity.

Many submissions' noted that the boom in state and Commonwealth small business commissioners, small business offices and ombudsmen services to be a positive step, however, it is difficult to measure whether this has reduce or discouraged such behaviour. Further, the bureaucratic approach to dealing with a complaint appear to be akin to a "venting" process that is borne by the tax payer with no clear big picture public policy benefit nor is there any enhanced access to a viable relief regime for those complaining.

A separate tribunal to provide remedies/ relief will just add to the bureaucracy.

There is an existing legal system which has the track record and infrastructure to deal with these issues. The reason the legal system is the last place to consider is "cost" and the risk of financial failure as noted in the recommendations found in the Productive Commission's Access to Justice Arrangements report. Litigants are aware that adverse cost orders may be fatal.

Enforcement Issues

The Report highlighted the range of obstacles to a pro-active enforcement of competition law and public policy in the past. As a consequence the four key markets in the Australian economy, mining, food, groceries and banking which account for over a third of the nation's economic activity are not only dominated by oligopolies their very structure makes them prone to act in a predatory nature.

Many submissions documented the problem in terms of resources, priorities, adequate collection of data/ evidence, distinguishing between complaints and serious breaches and the resource priorities / agenda of the ACCC. It was further submitted that the ACCC was neither designed nor has the ability to adequately pursue all small business complaints.

Small / medium size businesses did not have the time / resources and risk the relationship with suppliers and even much larger competitors to take action to discourage predatory behaviour.

In short, the market structure in key sectors is such that many businesses have learnt to live and survive under these circumstances.

The impact any private enforcement would have on both the finances/ resources and ongoing business relationships with financiers/ suppliers/ customers and the like should be of concern if a free dynamic market is the object of the exercise. A market functioning under a regime "fear" to pursue anti-competitive behaviour is contrary to the objectives of the current legislation. Access to a legal process provides confidence to the injured and fear to the prospective predator. If the prospective predator is aware that they may be compelled to account for their behaviour chances are a culture will evolve to avoid such behaviour. The effectiveness of any law is through its enforcement and relief it delivers to those it seeks to protect.

The Productivity Commission's (PC's) review of *Access to Justice Arrangements* is a snap shot of the problem. The establishment of the Small Business and Family Enterprise Ombudsman, and equivalent State based Small Business Ombudsman is an attempt to deal with much more than a perceived state of market behaviour.

The codification and proposed extension of unfair contract terms legislation to small business contracts is again another attempt to set up the structure to deal with a perceived permanent feature on the market landscape.

Providing any assurance that complaints will be pursued by the regulator is based on a series of assumptions which in the business world are less than realistic. It is appreciated that not all complaints may be legitimate/ provable or pursued by the ACCC. It is acceptable that any tax payer funded institution such as the ACCC should and needs to have an agenda / priority to signal to the market that predatory behaviour is not acceptable. There is a role of the private aggrieved person/business to enforce such laws. The ACCC monopoly to deal with these issues is unrealistic. The market place is increasingly very complex, the speed of transactions/ market behaviour often places those injured at the coal face with the motivation and ability to pursue the objectives of the legislation in a timely manner.

Prospect of Litigation

In 5.1 of the Report "Access to Justice" forms a critical element of the entire debate. The pronouncement of public policy, legislation, good intentions to protect the weaker party, the establishment of new bureaucracies, etc is of diminished value if the complainant has for whatever reason obstacles to seek and be granted relief in a commercially viable manner.

Competition lawyers charge between $550 to $950 per hour, and then there are paralegal fees, court fees and service fees and disbursements. A simple initiating process in the Federal Court would exceed $30,000 in addition to the cost to prepare the case in the first instance. This is even before a hearing date is locked in. The threat of costs order from a much larger counter party is a discouraging factor.

Obstacles to the market form a central theme to promoting a competitive free market place. The same cannot be said about seeking relief in the legal system.

The cost of justice is neither competitive nor efficient in its current form. This is reflected in the boom in state small business handling bureaucracies, making government bigger than it needs to be. If the law was to change to bring about "prospect" of litigation that may have an impact on market behavior.

Access To justice

Recommendation 53 is the centrepiece of the entire debate. Arguing that the ACCC pursue a pro-active policy to deal with small business complaints / provide accessible alternative dispute resolution avenues is a sound starting point, but not realistic.

The complainant should have the ability in law to pursue their own remedies, even the propensity to do so would provide a powerful message to would be predators. The bureaucratisation of the complaint process may not be avoidable; it is more than likely to cause further bureaucratic approach to the problem. This has perhaps become a useful means of pacifying rather than dealing with the issue.

Although the Panel endorsed recommendations from the Productivity Commission's Access to Justice Arrangements it is more than likely that it will just add additional public servants, and extend existing complaint processes. Financing private litigation with tax payer's money is a moral hazard to be discouraged. Fast tracking litigation in the Federal Court is a court management issue. All the recommendations appear to manage rather than resolve the issue and give access to relief.

Cost orders are typically used in litigation to "set" the state of mind of the adversary. The more resourceful and influential the counter party the more likely they will seek security for costs.

In the most basic of predatory based disputes the complainant would need to cover their costs which would be in excess of $30,000 then cost of the counter party which would be another $30,000 minimum.

Then there is the litigation process itself : seeking/ responding to better particulars, pursuing discovery and other orders, preparing affidavits, collecting expert opinion, etc within a very short period of time the legal costs would hit $100,000 even before one day of hearing is set. This does not include hiring expert opinion, retaining senior counsel if needed and other disbursements in addition to court filing fees.

It is likely than not that a basic predatory matter would exceed $200,000 per party.

Reducing the filing fee, providing "legal aid" of some form, requesting ACCC funding or ACCC support are all important but essentially the threat of security for costs and cost orders prevail over any litigant.

It is perhaps cruel to wave the carrot of a remedy without reasonable and feasible prospect of attaining it. On the other side of the argument is that of the frivolous vexatious litigant. This argument is not new. The legal system has developed the process, techniques and expertise to weed out such litigation. As commercial matters often use the opportunity cost model to pursue the matter, there will always be a danger in allowing an open door policy to all complainants regardless of the merits of their case. And this is the central question to all disputes and the pursuit of relief: "has the case got any merit?"

Prima Facie case

It is not uncommon for a defendant to seek to strike out a claim on its merit. Striking out a claim is an important gate keeper to ensure that the public funded legal system is not the playground of vexatious litigants. Further, in most state and the Federal jurisdictions counsel is required to sign off a declaration that they believe there is an arguable / defendable cause to be pursued. Either way the courts have in place gates to manage entry to genuine arguable cases to best manage the publicly funded legal system. The legal system assumes equality of bargain when it comes to legal fees and that the adversary left to their own devices can best weight the opportunity and commercial costs in pursuant of their claims in court.

A small business complainant should be able to compile a prima facie case which can be scrutinised by a judge as to its merits before the matter is initiated. In the inquisitorial legal systems (French model) it is not uncommon for investigative or junior magistrates or judges to test a complainant's argument before leave is granted to file and serve the claim. This serves as an important tool to ensure public monies are not wasted in the legal system and ensure parties dragged to the court are done so on more than the simple lodging of a claim. The threat of having a claim thrown out and cost awarded against the claimant is an over-burdensome consideration, a calculated risk in the litigation process. In the event the predator has the resources to engage in strategic litigation to convince the claimant to abandon their claim, the system should have built in assurance for both parties that the case has merit

The merit hearing may be as simple as determined on the "documents" as to the claims made, the evidence they seek to gather and why they believe the evidence exists and why does the claimant believe damage was caused and how is the damage calculated. It would be something people do in business every day. They know why sales are falling or suppliers are being difficult they know whether changes in the marketplace are organic, contrived or predatory with intent and effect or effect only.

Filing Fee and Bond

The cost of filing a claim has become a good revenue stream for the courts and a means of keeping many out of the legal system. This should not be the case. Consideration should be given to seeking the complainant to put up a bond of a nominal sum for instance $50,000.00 and the filing fee to be set under $2,000.00 with CPI increase every three years.

Application to the Issue

The application should be framed as to focus on the "issue" rather than circumstances or the implied behaviour. It would need to be "actual" verifiable behaviour which regardless of its intent reflects a trend to be within the ambit definition of predatory. The "issue" or the "adverse" behaviour forming the basis of the action must be clear, neither hypothetical, speculative, but not narrow in scope either.

Joint to Class Actions

As noted in the submissions to the Inquiry, smaller suppliers are often adversary damaged by predatory behaviour as a whole. The Federal Court rules currently allow for class actions, with a nominal claimant. It is argued that there should be some recognition of class or joint actions in the legislation to enable small – medium size business to initiate class action.

No costs orders

There are ample examples of situations where "no costs orders" are available as a means of safeguarding access to justice for instance the Northern Territory Supreme Court Rules Reg 63.11 "No order for costs required in certain cases".

The argument that "costs follow the event" is counterproductive in predatory matters, as it serves to discourage private action. If costs could not be ordered it would have a far greater effect than dealing with a bureaucratisation of complaints.

The only reason costs orders were invented in the first instance was to "put your money on your case" principle. If it is good enough to be heard in court its good enough for you to underwrite its cost. This idea in the English speaking world is primarily based on 19th century concepts of having your day in court and paying for it if you lose.

Markets, economies and the idea of public benefit have moved on from there. The privatisation of competition law and the discouragement of predatory behaviour may not have a more potent tool than the legal system.

A legal system which is too expensive and fraught with costs orders against the complainant is designed to benefit the party with deeper pockets. The current solution of bureaucratisation rather than resolution and relief for the injured party and the setting up of budgets, legal aid programmes, and other form of resource/ people/ money support for the complaints process creates more red tape, bureaucracies, and overheads for the tax payer with little relief for the injured.

Federal Court Regulations

The Federal Court has developed rules and regulations to deal with class actions. Courts throughout Australia have evolved parallel rules to manage, cost and enforce a range of complex disputes. The court system has the expertise, the people the technology to deal with predatory behaviour. It's the complainant who needs the assurance that the access to justice is "feasible" and will have achievable and effective outcomes of a long lasting nature. Such regulations should be imbedded in current court procedures.

Misuse of substantial market power

Section 46(1) prohibits a corporation with substantial market power taking advantage of that power for the purpose of eliminating /substantially damaging a competitor/ preventing entry/deterring or preventing a person engaging in competitive conduct and Section 46(1AA) prohibits a corporation with a substantial share of a market from supplying, or offering to supply, goods or services for a sustained period at a price less than the relevant cost to the corporation of supply, for a prohibited purpose (same as for s 46(1)). In both instance it is an "active" use of the power to cause damage to both "competitive forces" and to competitors"

Recommendation 30 focuses on "why" or the purpose the power was used (ie to lessen competition and enhance the market dominance of the larger supplier). The misuse is linked to its "purpose" and often the damage is beyond the "market" as it causes injury to smaller suppliers.

It is the smallest supplier which potentially is the creature of competition, they drive the forces of competition, and they in turn are more likely to be damage from competitive forces, to the extent that such damage will lessen competition. The damage caused to smaller suppliers should be noted by way of an amendment to the current legislation.

Where a supplier can show a direct link between the behaviour of a rival and an ascertain loss in money terms, an action should arise to seek damages. The Panels proposed Section 46(1) amendment to look at the "purpose" of the conduct is a sound proposition, the basis on which private action can be initiated is not certain.

Section 46(1) should be amended to “any injury caused by such misuse of market power is actionable by an injury party subject to enforcement procedures as set out in Schedule one of the Act”.

Schedule One could outline the types of injuries a competitor may seek relief and refer back to the Federal Court Regulations for its enforcement. A similar approach is found in setting aside unconscionable contracts. This is not new territory for the law. Its absence makes the rhetoric to promote competition and relief for small business seem empty.

A fast track case management policy does not deal with the access issue, that of cost. Amendments to the existing legislation to protect small business from costs orders and the opportunity to initiate class actions with “gatekeeping” processes in place form a practical and viable approach to law enforcement aligned with the objectives of the legislation.

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