

**SUBMISSION IN RESPONSE
TO
AUSTRALIAN GOVERNMENT'S DISCUSSION PAPER
"OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW"**

1. Introduction

I welcome the opportunity to make a submission in relation to the potential reform of section 46, as I have acted for many corporations which are subject to and need to comply with Australia's competition laws.

2. The challenge

It is important that Australia's competition law contains an effective prohibition against misuse of market power. As the Discussion Paper acknowledges, the challenge is to frame the prohibition so as to capture anti-competitive unilateral behaviour without constraining vigorous competitive conduct and to adopt a legal test that can be reliably applied by the Courts and the business community to distinguish between competitive and anti-competitive conduct.

3. The threshold issue: the level of market power

From an economic perspective, competition can be said to be effective when no firm, either acting individually or in concert, is able to exercise substantial market power. Where a firm has substantial market power, it could act unilaterally to foreclose competition, which would be likely over time to reduce consumer welfare in the form of higher prices, less variety, lower quality or less innovation. Accordingly, the economic justification for a prohibition against misuse of substantial market power is well accepted.

In framing the prohibition against misuse of market power, the threshold issue is what level of market power should a firm possess before its decision making should be constrained by the prohibition?

It is important that the prohibition be framed so as to apply only to those firms which possess substantial market power, because it is only those firms which are able to act independently of their competitors and therefore pose a potential threat to the efficient operation of the competitive process. It is only those firms with substantial market power which have the potential by unilateral conduct to foreclose or otherwise distort competition.

Other firms which lack substantial market power should not be caught by this prohibition, as they do not have the ability or propensity to engage in unilateral conduct which would be materially harmful to competition. The behaviour of these smaller firms is likely to be constrained by their competitors. As the competitive pressure of the market exercises sufficient discipline over these smaller firms, there is no need to impose this statutory prohibition upon them.

It is not surprising that this element of section 46 did not attract much attention during the Harper Competition Policy Review, because most stakeholders focused upon the foreshadowed introduction of an "effects test", which is directed to the substantive test, not the market power threshold which activates the test.

At present, section 46 is expressed to apply to any firm which has "*a substantial degree of power in a market*". It would be more consistent with economic theory if this language was simplified to apply to any firm which has "*substantial power in a market*". The reference to "degree" is unhelpful as it distracts attention from the fundamental requirement that this prohibition should not apply to any firm without substantial market power. This is important because without this clarification, there is a risk that Australia's market power threshold will be lower than the threshold set by other leading economies, causing distortions in the global economy.

It needs to be recalled that when section 46 was first enacted in 1974, it was titled “*Monopolisation*” and was expressed to apply to a corporation that was in “*a position substantially to control a market*”.¹ Following the Blunt Review in 1979 and a Green Paper in 1984, the market power threshold of “*control*” was lowered in 1986 to the present threshold of a corporation having a “*substantial degree of power in a market*”.² At the time, the Attorney General, Mr Lionel Bowen stated that the lowering of the threshold would make it clear that the section would apply to “*major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market*”, as well as monopolists.³

By contrast to Australia, most of the developed world has set a higher market power threshold to attract the misuse of market power prohibition. For example, in the United States, under section 2 of the Sherman Act, the Court’s focus is upon “*evidence of monopoly power and proof of exclusionary conduct*” (our emphasis)⁴. In Canada, section 79 of the Competition Act focuses only upon anti-competitive conduct by a “*dominant firm*”. In the European Union, Article 102 of the TFEU only seeks to regulate undertakings which hold a dominant position in the relevant market.

In light of Australia’s earlier lowering of the market power threshold, there is a risk that Australia has adopted a threshold which is lower than that used in many other developed economies. In the face of this risk, there is no place in the statute for any language which might suggest that anything less than “*substantial market power*” should trigger the application of our misuse of market power prohibition. This refinement of the market power threshold should be introduced to section 46

4. *The importance of a safe harbour*

Whether the market power threshold is expressed to require “*substantial market power*” or “*a substantial degree of market power*”, its meaning will remain unclear to the business community. It would be unfortunate if any reforms created ongoing uncertainty as to which firms in Australia are subject to the constraints imposed by the prohibition.

It is therefore important that the Australian Government take steps to ensure that the Australian business community is provided with a clear understanding as to who is subject to the constraints imposed by the prohibition and, equally important, who may conduct their business without reference to those constraints, as the constraints are real and have a significant impact upon the robustness of business decision making.

The vitality and growth of the economy is as much secured by an effective prohibition, as it is by clear delineation as to who is not subject to the prohibition.

To provide greater certainty, it is essential that the Australian Government direct the ACCC to provide clear guidance as to which firms are subject to the prohibition. Unlike elsewhere in the world, the business community in Australia has long suffered from uncertainty as to whether or not the prohibition is applicable. By contrast, in Europe, a dominant position has been defined under EU law to mean “*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers*”⁵. Importantly, regulatory

¹ Trade Practices Act, 1974

² Trade Practices Revision Act 1986.

³ Second Reading Speech, when introducing the Trade Practices Revision Act 1986.

⁴ American Bar Association submission, at page 7.

⁵ *Case 27/76, United Brands Company v Commission* [1978] ECR 207, paragraph 65. This definition was adopted by the European Commission in its 2009 guidance regarding Article 82 of the EC Treaty, the predecessor to Article 102 of the TFEU.

guidance has been published in Europe which creates a safe harbour by stating that dominance is not likely if the market share of the firm is below 40%.⁶

Similarly, the Canadian Competition Bureau's guidance is that it will not generally examine a firm with a market share of less than 35% and will only examine a firm with a 35-50% market share if the firm is likely to increase its market share through the alleged anti-competitive conduct⁷.

Given the globalisation of business and the interconnected nature of modern markets, it is important that the Australian Government takes this opportunity to clarify that its market power threshold is aligned with other major economies of the world. It is equally important to ensure that guidance is available to clarify that the prohibition is limited to those firms which are able to act independently of their competitors, and not to those firms which have a market share less than 40%, particularly if the Australian Government is proposing to strengthen the substantive misuse of market power test.

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⁶ *The European Commission's Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal of the European Union (2009/C45/09 at paragraph 14.*

⁷ Competition Bureau Enforcement Guidelines, September 20, 2012, at paragraph 2.3.1.