

1. I make this Submission, in response to the Treasury's Dec. 2015 Discussion Paper on the Harper Review's recommendations concerning s. 46 on the Competition Act, because my experience with our competition law may be helpful in coming to a decision concerning that section. My experience is -

(a) as a Division Head in Treasury, taking part in the formulation of the Trade Practices Act 1974 (since re-named the Competition & Consumer Act); and

(b) as a former Deputy Chairman of the Trade Practices Commission (since re-named the Australian Competition & Consumer Affairs Commission), with 6 years experience in administration of that law (and therefore with first-hand experience of the law's pluses and minuses, and the effect it can have on businesses).

AN 'EFFECT' TEST

2. In my view, the Harper Report and recommendations are mainly very good, the only exception being recommendations in relation to the misuse of market power provisions (s. 46) of the Act – and I would support even some of the recommendation relating to that section. What I would **NOT** support is the inclusion of an “effects” test in that section. In my view, that would dramatically REDUCE competitive conduct, not enhance it – as competition law is supposed to do. In short, it would make our competition law anti-competitive, instead of pro-competitive!

3. As a broad comment, law that outlaws any conduct that “substantially lessens competition” has the difficulty that the very purpose of competition is to do that, to put your competitors out of business or lessen or eliminate their ability to compete with you. Such law might ban conduct that most people would regard as unacceptable (e.g. price fixing, or market-sharing); but it can also ban conduct that most people would regard as quite reasonable, productive, and beneficial to consumers and the economy, and therefore a good thing – for example, action to improve your efficiency and achieve cost savings and therefore prices; innovation that results in a much better product; taking advantage of improved technology to reduce costs and/or produce a better product; etc.. Such conduct might well have the effect of ‘substantially lessening competition’ – but be illegal!

4. And if the law doesn't specify the sorts of conduct that would be illegal, suppliers simply don't know what they can and cannot do. In effect, the law would be saying “We want you to compete; but if you're too successful, we might prosecute you” . Obviously, that's a disincentive for suppliers to compete, a strange provision in law that's supposed to protect and promote the competitive process. Moreover, the uncertainty brings with it the danger of businesses not engaging in desirable competitive conduct, for fear of being prosecuted.

5. In my view, section 46 should be drastically re-drafted, to outlaw only specifically defined conduct that most people would regard as unacceptable or ‘unfair’ – just as section 45 outlaws price-fixing and market-sharing, section 7 exclusive dealing, and section 48 resale price maintenance. And even then, such conduct should be capable of authorisation if the authorising authority judges it to be of ongoing benefit to consumers and/or the economy, that outweighs any lessening of competition.

6. Indeed, there is also a broader, 'social' reason for defining unacceptable conduct in section 46. If legislation is too broad and vague (and s.46 couldn't be more vague than it presently as to what constitutes illegal conduct), it is left to the Courts to decide that, rather than our elected representatives – the Parliament. Surely in a democracy it's the role of Parliament to decide and legislate as to what conduct is not acceptable in the community, and the Court's role to simply decide whether or not that conduct has occurred.

7. Defining unacceptable conduct is the approach taken in Canadian competition law, a copy of which (taken from page 67 of the 1993 Hilmer Report) is attached to this submission. Note that it defines 9 kinds of conduct that are regarded as "anti-competitive acts", and goes on to state that engaging in any of them that "has the effect of preventing or lessening competition substantially" can be prohibited. (The law allows other kinds of conduct to also be deemed an "anti-competitive act"; but, in the interests of clarity and certainty, I would not advocate that in a revised section 46 - instead of the 'including' provision, any additional kinds of conduct could be added by amending the Act if experience showed that to be necessary).

8. The Canadian law is also interesting, in that, although it has an "effects" test, the section defines these 9 kinds of conduct as "anti-competitive acts" only if they have the "PURPOSE" of harming competitors or potential competitors. Thus the overall effect of this section is to outlaw specifically defined kinds of conduct only if it demonstrated that such conduct has

BOTH THE PURPOSE AND THE EFFECT of substantially lessening competition. INDEED, SERIOUS CONSIDERATION SHOULD BE GIVEN TO ADOPTING THIS APPROACH WITH S.46 OF OUR ACT (purpose AND effect, instead of purpose OR effect); IT COULD WELL BE A COMPROMISE THAT MIGHT SATISFY (even though reluctantly) BOTH THOSE WHO FAVOUR AN 'EFFECTS' TEST, AND THOSE WHO FAVOUR ONLY THE EXISTING 'PURPOSE' TEST.

OTHER HARPER S.46 RECOMMENDATIONS

9. As for the Harper recommendations concerning s.46 apart from the 'effects' recommendation, I agree that

(a) the test of illegality, a 'substantial lessening of competition', should replace the present 'harm to a competitor' test – which is quite ridiculous in law that's supposed to protect the competitive process, not particular competitors;

(b) the "take advantage of" provision could be deleted, as Harper recommends;

(c) the Harper recommendation that "Authorisation should be available in relation to section 46" be adopted. **I REGARD THIS AS THE MOST IMPORTANT OF THE**

HARPER RECOMMENDATIONS, PARTICULARLY IF AN 'EFFECT' TEST IS INCLUDED IN SECTION 46, but even if it is not..

AUTHORISATION

10. In relation to (c) above, competition itself is not the Holy Grail; and suppliers should have the opportunity to show, outside (and before any possible) Court action, which risks payment of heavy fines if they lose, that what they have done is of 'public benefit' that outweighs any lessening of competition, the normal test for authorisation of other conduct. Authorisation is available for all other kinds of conduct that, under sections 45, 47,

48 and 50, would otherwise be unlawful; and it is quite illogical that it isn't available for section 46 conduct as well.

LEGISLATIVE GUIDANCE

11. As for Harper's recommendation that the Court be given "legislative guidance" about section 46, this is an admission that Harper realises that the "effect" recommendation could have the undesirable effect of having the Court outlaw quite acceptable and desirable competitive activity – which itself is a reason for **NOT** adopting the "effect" recommendation. Moreover, if section 46 were amended along the lines I have suggested in paras. 5 to 8 above, and if authorisation for section 46 conduct is made available, 'legislative guidance' to the Court would not be necessary.

12. And in any case, the guidance that Harper recommends, that the Court consider whether the conduct lessens or increases competition, is superfluous, repetitious (because of the proposed 'substantial lessening of competition' test), and probably offensive to the Court – which knows that the effect on competition is what it has to decide in the case before it anyway! It is also deficient, in that it doesn't ask the Court to consider whether the conduct 'enhances efficiency, innovation, product quality or price competitiveness', but reduces or does **NOT** increase competition.

THE 1993 HILMER REPORT

13. It is important to recall that the question of introducing an 'effect' test in s.46 has been considered in many past reviews of the Competition Act, and never recommended. The most significant past review was by Prof. Hilmer, whose 1993 Report has come to be regarded as virtually the 'Bible' on competition. And Hilmer said, about an 'effect' test, that "it would not ...constitute an improvement on the current test. It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct". (Note that what I have suggested in paras. 5 to 8 above, that s.46 be amended broadly along the lines of the Canadian legislation on misuse of market power, does address the latter difficulty). Hilmer also stated that it would "create additional uncertainty and thus potentially deter vigorous competitive activity". Hilmer's recommendation was that the current s.46 provisions continue.

14. With due respect, I do not regard the Harper Report as superior to the Hilmer Report.

CONCLUSION

15. Turning to the Options at the conclusion of Treasury's Discussion Paper (which, I might say as a personal side comment, is of the Treasury's usual high standard), given what I have said in this submission, in response to the Discussion Papers final question ("Are there any other options?"), I say 'YES'. Please consider what I have suggested in paras. 5 to 8 above, i.e. amend s.46 broadly along the lines of the Canadian approach to misuse of market power, by

(a) defining anti-competitive conduct in the way that Canada has done, thus making a start on fixing the basic problem of (as the Hilmer Report put it) "distinguishing between

socially detrimental and socially beneficial conduct”, and thus eliminating the uncertainty in the business community as to what they can and cannot do; and (b) create a ‘purpose AND effect’ as the Canadian legislation does (i.e., by having an ‘effect’ test, BUT also having a ‘purpose’ test by including it in the definitions of anti-competitive conduct).

16. Of the Options set out in the Treasury Paper, I would advocate Option C – which could be applied in conjunction with the Option I have advocated above. If my Option is not adopted, I would advocate Option C.

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