

SUBMISSION IN RESPONSE TO THE DISCUSSION PAPER CONCERNING OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW

GENERAL SUBMISSION

Thank you for the opportunity to make a submission in response to the Discussion Paper concerning “Options to strengthen the misuse of market power law”. This submission supports the adoption of the form of section 46 of the CCA proposed by the Harper Panel with some qualifications.

There are two principal reasons why the Government should accept the Harper Panel’s recommendation.

Principle

First, as a matter of principle. The objective of section 46 should be to prohibit a corporation with a substantial degree of power in a market from undertaking conduct that damages the competitive process so as to maintain its power, or expand its power in the same or a related market. Substantial market power enables a corporation to charge supra-competitive prices. If the competitive process is damaged then that will ordinarily have the effect of cementing the ability of the corporation with market power to charge higher prices to consumers, or enable another entity to charge higher prices.

The revised version of section 46 proposed by the Harper Panel will directly achieve the objective identified above. The Harper Panel’s proposal is reasonably consistent with prohibitions in the United States and the European Union.

The current form of section 46 does not directly achieve the objective identified above. Rather, the current section uses the “take advantage” element to attempt to define the conduct of a monopolist that should be prohibited. However, the “take advantage” element tests whether (or to what extent) it would be commercially possible for a corporation without substantial market power to undertake the same conduct.

Under the current law, even if a corporation has a monopoly, has an intent to maintain its monopoly, engages in conduct that maintains its monopoly by damaging the competitive process and cannot show that its conduct is efficient or would have a public benefit, that will still not be enough to make out a contravention of the existing section 46. There will be no contravention unless the ACCC (or another applicant alleging a contravention) satisfies the

Court that a corporation without substantial market power could not rationally engage in the conduct or that the substantial market power “materially facilitated” the conduct.

Practicality

Second, the Harper Panel’s proposal should be preferred as a matter of practicality. It will impose a standard that can be more consistently applied and understood.

The “take advantage” test is difficult to apply because it necessitates a broad hypothetical inquiry which is then evaluated against an indefinite standard. As the jurisprudence over the last twenty-five years has demonstrated, articulating the standard to be applied for “take advantage” is difficult. But even the best articulations of the standard are necessarily imprecise. What does it mean to say that conduct has been “materially facilitated” by something? At what point is conduct profitable in a commercial sense? Does that require an accountant to identify hypothetical income and expenses or does it require an intuitive judgment about whether a hypothetical reasonable businessperson (or an unreasonable businessperson) might think that the conduct was a good idea?

Courts should, quite properly, err against guessing that a corporation has engaged in a contravention that exposes the corporation to a civil penalty.

Of course, many aspects of the law, both civil and criminal, call for a hypothetical inquiry as part of testing whether one thing has caused another thing. This is sometimes referred to as using a “counterfactual”. For example:

- (a) Would the accident have occurred even if the defendant had not driven through the red light?
- (b) Would the deceased still be alive even if the accused had not fired the gun?

The “substantially lessening competition” test employs this type of hypothetical inquiry. In the case of section 45, it asks whether the state of the competitive process would have been the same even if the respondent corporation had not made or arrived at the contract, arrangement or understanding. The form of section 46 proposed by the Harper Panel would ask whether the state of the competitive process would have been the same even if the respondent corporation had not engaged in the conduct.

The “take advantage” test employs a different type of hypothetical inquiry. It asks whether the corporation would have engaged in the conduct if the commercial world in which the

corporation operated was different. It does not look at the effect of conduct on the world. It looks at the effect of the world on conduct. It asks, if the world was different (so that the corporation lacked substantial market power), would (or could) the corporation nevertheless have engaged in the conduct (or would it have been as easy to engage in the conduct)?

The “take advantage” test reverses the question posed by the “substantially lessening competition” test. The “substantially lessening competition” test compares the effect of changes in the conduct on the market. The “take advantage” test compares the effect of changes in the market on the conduct. Posing a change in conduct and then asking how that is likely to affect an outcome in the world in the future is a more practical task than posing a change in the world in the past and then asking how that might have affected conduct. The difficulty of applying the “take advantage” test is further exacerbated by the imprecision in identifying what change in the world is sufficient to convert “substantial market power” to merely “market power”. The “substantially lessening competition” test is binary: with or without the conduct.

The practical difficulty of applying the type of hypothetical inquiry required by the “take advantage” test can be illustrated by adapting the two examples given above and considering the inherent difficulty with answering these questions:

- (a) Would the defendant have driven through the red light if traffic design had been better in the area?
- (b) Would the accused have fired the gun if there was stronger firearm regulation?

It is immensely difficult to evaluate whether specific conduct that occurred in the actual world would have occurred, or been likely to occur, if broad hypothetical changes had been made to the world. It invites intuitive judgments that may be idiosyncratic and dependent upon the perceptions of the particular person making the evaluation. For these reasons, it is very difficult to understand how it could be claimed that there is certainty or predictability as to how the “take advantage” test (and therefore the current section 46) will be applied in particular cases.

RESPONSE TO ISSUES RAISED FOR DISCUSSION

This section addresses some of the specific issues for discussion raised by the Discussion Paper.

1. What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provision?

As noted above, it will not be a contravention of the current section 46 for a corporation with substantial market power to engage in conduct that substantially damages the competitive process, and thereby protects the corporation's substantial market power, if it cannot be established that the conduct was commercially possible, or likely to be commercially possible, because of the substantial market power.

2 What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?

Pro-competitive conduct will not be captured by the Harper Panel's proposed provision because by definition pro-competitive conduct will not substantially lessen competition. Pro-competitive conduct may damage competitors but it should not damage the competitive process.

For example, undercutting a competitor's price is the essence of competition. It may damage a competitor. Indeed, it is usually intended to damage a competitor. But it will not damage the competitive process unless it transforms into predatory pricing and erects barriers to entry that will allow the corporation engaging in the conduct to later charge monopoly prices after driving competitors from the market and preventing re-entry by the same or different competitors. If the corporation is able to charge a lower price because it has a more efficient means of production, and in charging a lower price it drives all of its competitors from the market, that will not damage the competitive process. The corporation has not prevented equally-efficient competitors from entering the market. The corporation will be restrained from raising its prices by the threat that competitors will enter or re-enter the market with less efficient means of production.

The *Melway* decision is an important litmus test. In *Melway*, the High Court found that the refusal of a publisher to supply to a former distributor did not contravene section 46 because the conduct did not take advantage of the publisher's substantial market power. The refusal to supply was part of maintaining a distributorship system that had existed before and after the publisher had substantial market power. If it was thought that the Harper Panel's

proposal would alter the outcome of *Melway* then that would be a reason to not implement such an amendment. But that would not be the effect of the amendment. There was no allegation in *Melway* that the publisher's refusal to supply substantially lessened competition. It is not apparent how *Melway*'s distributorship system could have substantially lessened competition. But if a corporation with substantial market power did create some form of "distributorship system" that damaged the competitive process in a market in which it participated, why should that conduct not be prohibited? It is necessarily conduct that will have a negative impact on consumers (unless there is a countervailing public benefit, in which case authorisation would be available). Indeed, if the implementation of this anti-competitive "distributorship system" requires one or more contracts, arrangements or understandings, it is likely already prohibited by section 45.

Claims that the Harper Panel's proposed revision will result in a prohibition on pro-competitive conduct should be judged against the fact that the substantial lessening of competition test has been applied as part of sections 45, 47 and 50 for many years without an example of pro-competitive conduct having been found to substantially lessen competition. In any event, the proposal by the Harper Panel also allows for authorisation on public benefit grounds of conduct that would otherwise contravene the proposed section. Any further concern could be addressed by including a defence that would excuse a corporation if the substantial lessening of competition brought about by the conduct would be outweighed by the public benefit.

3 Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?

Removing the take advantage limb would improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition. This for the two reasons explained above. Removal of the take advantage limb would better direct the section as a matter of principle and improve the practical operation of the section.

4 Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed to certain 'exclusionary' conduct if the 'take advantage' limb is removed?

Economically beneficial behaviour would not be restricted as a result of this change for the reasons explained in response to Issue 2.

It would not be sensible to introduce identification of certain 'exclusionary' conduct. It is not

practical to attempt to define particular kinds of 'exclusionary' conduct to be prohibited and, in any event, it is unnecessary. A provision that prohibits conduct with the purpose, effect or likely effect of substantially lessening competition will apply a standard that is consistent with existing sections in Part IV of the CCA.

6 Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?

Yes, for the reasons explained above, the inclusion of purpose, effect or likely effect would better target behaviour that causes significant consumer detriment. Consumer detriment, in a competition sense, is a result of damage to the competitive process not damage to competitors.

7 Alternatively could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?

It would be preferable to include effect and likely effect. This would be consistent with other international jurisdictions, as identified by the Harper Panel. In addition, the law should prohibit an effect or likely effect of substantially lessening competition, even if it is not proved that the corporation had the purpose of achieving this outcome because this will create the appropriate incentive for corporations that already have substantial market power: to consider the effect and likely effect of their conduct. This is consistent with section 45 of the Act.

8 Given the understanding of the term 'substantially lessening competition' that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?

For the reasons explained above, the focus on "substantially lessening competition", rather than specific behaviour, will better focus the provision on conduct that damages the competitive process rather than damaging competitors.

9 Should specific examples of prohibited behaviours or conduct be retained or included?

Specific examples should not be retained or included in section 46. Specific examples are likely to create confusion as to the type of conduct that is prohibited. It is impractical to draft specific examples that can provide useful guidance to the Courts or businesspeople because whether conduct substantially lessens competition must be assessed in all the circumstances and no example will adequately capture all of the relevant circumstances.

11 Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?

Mandatory factors should only be included in the CCA if they are applied generally across Part IV of the CCA and not limited to the interpretation of section 46. To include mandatory factors only in section 46 risks the possibility that “substantially lessening competition” will be interpreted differently when used in section 46 as compared with sections 45 or 47.

12 If mandatory factors were adopted, what should those factors be?

Mandatory factors such as those that currently exist in section 50 of the CCA and those included in the Harper Panel’s draft model for section 46 could be used. These factors reflect the considerations relevant to assessing whether there is, or is likely to be, a substantial lessening of competition.

13 Should authorisation be available for conduct that might otherwise be captured by section 46?

Authorisation should be available as proposed by the Harper Panel.

15 Are there any other alternative amendments to the Harper Panel’s proposed provision that would be more effective than those canvassed in the Panel’s proposal?

As an addition, rather than an alternative, to the Harper Panel’s proposal, consideration should be given to whether a defence should be available if the substantial lessening of competition brought about by the conduct would be outweighed by the public benefit. The respondent corporation would bear the onus of proof.

Consideration might also be given to whether the Harper Panel’s draft legislation should be narrowed so that the affected market is not simply any market. On the present drafting, if a corporation had substantial market power in one market, and engaged in conduct that had a purpose, effect or likely effect of substantially lessening competition in an entirely unrelated market in which neither the corporation nor any related entity participated, that would be caught by the provision. In practical operation, that situation is unlikely to arise. However, this theoretical breadth could be readily narrowed by adding the words “in which the corporation, or a related entity, supplies or acquires, or is likely to supply or acquire, goods or services” to the end of the Harper Panel’s draft section 46(1). “Related entity” is not a term used in the CCA but it is a term used in the *Corporations Act* 2001. If consideration was given to limiting the affected market, it would be appropriate to import the much wider expression used in the *Corporations Act* to avoid the possibility that corporate structuring

could avoid the reach of the prohibition.

16 Which of options A through F above is preferred? What are the relative strengths and weaknesses of each option? What information can you provide regarding the regulatory impact of each option on businesses?

For the reasons explained above, Option F is the best option subject to three qualifications:

- (a) the use of mandatory factors only if they have general application across Part IV of the CCA;
- (b) consideration of a defence upon which the respondent corporation would bear the onus;
- (c) consideration as to whether the phrase “any other market” should be limited to a market in which the corporation, or a related entity, supplies or acquires, or is likely to supply or acquire, goods or services.

17 Are there any other options (not outlined above) that should be considered?

The only other alternative that ought to be considered is amending the section to prohibit a corporation with substantial market power from engaging in conduct with the effect or likely effect (but not purpose) of substantially lessening competition.

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