



Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.independentcontractors.net.au
PO Box 13103 Law Courts 8010 Vic

Misuse of market power the effects test Submission and Position January 2016

1. General proposition and position

Independent Contractors Australia advocates for the right of people to be self-employed. For that right to be 'real' in a practical sense, self-employed people must have secured for them the capacity to participate in a competitive open economy on equal terms with other economic players small and large.

** Within this general proposition ICA strongly supports and urges the government and parliament to fully implement the 'effects' test as recommended by the Harper Review.

The current law allows large dominant businesses to manipulate markets to effectively deny self-employed people the capacity to be genuine economic players. The law needs to be changed.

2. Background principles; It's about protecting competition. Big v Small

It's about balance

The assurance of a competitive, open economy requires good quality, well-targeted regulation. A competitive economy does not function under a 'wild west,' 'anything goes' situation. In this context the broad principle for competition assurance means allowing people/businesses to aspire to create monopoly for themselves but to always frustrate monopoly achievement. It's a regulatory balancing act!

Big business

It is a natural and expected function of human behaviour that when a business becomes big and achieves a measure of market power that the decision makers in the business will focus exclusively on the continuing enlargement of the business.

The employee decision makers careers are built open the businesses continuing expansion. Within the context of the internal business dynamics the decision makers do not have a brief, requirement or motivation to care for the broader community and social need of sustaining an open competitive economy. If the business decision makers' behaviours result in the destruction of external competition and this benefits the business, the decision makers are rewarded.

This is not to necessarily criticize or make accusations of immorality against big business decision makers. Rather it is simply a recognition of the dynamic of human behaviour demanded inside the employment structure of large firms. In understanding the regulation needed to protect competition this human behaviour reality needs to be understood and accepted but also constrained. The firm will not voluntarily constrain such behaviour. That is not a function of firms. Targeted regulation must impose the constraint.

The individual

In a truly competitive market every individual must have the right and effective capacity to be in business and to compete. Where such capacity is effective this becomes a core, major driver of innovation and entrepreneurship in society. This is self-employment. This is small business. This is the major driver of entrepreneurship because the numbers are so large. Small businesses (up to 50 employees) constitute more than 60 percent of the Australian workforce and some 75 percent of the Australian private sector workforce. The capacity of the individual business people in this sector of the workforce to compete, must be assured and protected by quality regulation. If they can compete they will innovate!

ICA's strong support for the effects test is not motivated to give small business people a competitive advantage. The motivation is to ensure small business people have competitive capacity.

3. Why the effects test is needed.

The need for the effects test can best be understood by comparing to the legal and moral principles comparing murder to manslaughter.

Murder requires intent to kill someone. Manslaughter occurs when someone has been killed but the 'killer' hadn't intended to kill the person. A reckless, dangerous driver can cause the death of a person in a car crash and end up being convicted of manslaughter. The driver ought to have known that their driving was dangerous and could lead to death.

Under current competition law if a big business misuses their market power and they 'kill' competitors it must be proven that the big business intended to kill (murder) competition.

This is extraordinarily difficult, almost impossible to prove. It requires inside knowledge and evidence of the behaviour and motivations of decisions makers inside large businesses. And if the managers are competition 'murderers' their behaviour will include mafia like codes of silence where they conspire to protect one another. Again, this is not to criticize or chastise large firms but rather to recognize the reality of the behavioural dynamic in large firms. It's what people do!

The effects test is a 'manslaughter' test. If the decision makers in a large business 'drive' the business in such a way that they have the 'effect' of killing competition and competitors they will be guilty. It's still a high test. It's necessary to prove that the big business managers' behaviour was reckless, grossly negligent and dangerous to competition for example.

What the effects does is refocus the mind of decision makers in market dominant big businesses. They know that if they 'kill' competitors or competition that they run the risk of being investigated and potentially prosecuted (for competition 'manslaughter'!). The signal this sends is that not only must the decision makers be mindful of the needs of the car/business they drive but they must be equally mindful of the needs to not cause a car crash! This doesn't stop them driving their business but it does mean they must drive their business in a responsible manner.

4. Recent initiatives: Unfair contract laws comparison

The effects test initiative should also be seen as being consistent with the recent passing by Federal Parliament of unfair contract laws for small business people. These laws, like the effects test, are highly targeted.

The unfair contract laws only apply to standard form contracts. The standard of what is 'unfair' is essentially a codification of the legal principles upon which a commercial contract is found to exist.

For example one party cannot change the terms of the contract without the other party's consent. This is not only 'fair' but it is a primary element embedded in common law of what constitutes a commercial contract.

In passing the small business unfair contract laws parliament recognized that large firms that use standard form contract are in a position of dominance in the commercial relationship. The unfair contract laws do not stop the use of such contracts but put a reasonable break on the ability of large firm to abuse their dominance. And the 'break' occurs entirely by reinforcing compliance with common law.

Likewise the effects test would also be a break on large firm market dominance. It would not stop market dominance but it would ensure that the dominance is constrained within the established principles of and the community need for effective competition.

5. Big business objection

We note that big business representatives and some big businesses themselves have been vocal and lobbying hard against the effects test. We do not criticize them for this. It is to be expected as (again) their business mission and brief is to seek monopoly. That is to be expected and understood. It is human behaviour.

However the bigger issue for society is the protection of effective competition itself. We ask the government and parliament to implement the effects test.

The effects test will not a stop big businesses driving their businesses. But it will send a powerful signal about the need to drive their businesses in a responsible way that is mindful of protecting competition.

6. Summary

The effects test is needed to protect competition.

- Big business will seek monopoly. That is human behavior.
- Monopoly achievement must be thwarted.

The effects test will not;

- advantage small business. It will protect their capacity to compete.
- stop big business operating. It will require them to operate responsibly such to protect competition.

Independent Contractors Australia asks the government and parliament to implement the effects test.