

**Misuse of Market Power -A Proposed Revision to Section 46 and the “Effects” Test -
Options to Strengthen the Misuse of Market Power Law Discussion Paper Submission
12 February 2016**

1. This is a brief submission as the debate has been in gestation for several decades.
2. I have practised in competition law in Ireland and the European Union. My practice particularly focused on abuse of dominance issues. The prohibition on abuse of dominance in Ireland and European Union is based on an effects test, which the Harper Review now recommends.
3. Despite what Australian competition lawyers may say, the effects based test in assessing abuse of dominance never had a chilling effect on competition. The evolution of many key markets in most European Union Member States from being monopolistic, duopolistic or oligopolistic in nature to being truly competitive (and so enhancing consumer welfare and maximising efficiencies) owed much to the effects based abuse of dominance prohibition. In my own practice in Ireland, for example, I successfully pursued abuse of dominance claims to achieve market access for new entrants.
4. The introduction of an effects test for abuse of market power does not prohibit a company or enterprise accruing or maintain having a position of market power.
5. Introducing an effects based test will bring Australia into line with its principal trading partners. It will facilitate enhanced opportunity for market entry by local start ups and international business.
6. The real chilling effect is in the current regime in that it deters international business from committing to Australia in sectors where there are entrenched market positions, but where those incumbent positions are concreted in owing to the difficulty of prosecuting an abuse of market power claim in Australia which could be prosecuted successfully elsewhere. International business is bamboozled by the Australian regime as it cannot understand why a legalistic approach to abuse of market power has been elevated over economics and the factual evidence of what the effects of behaviour has been. The current regime seems almost predicated on the basis that whilst something may be apparent in fact and practice (the effect), it is ignored if it does not fit the legal theory in the statute (section 46 disavowing effects as being real). Thus, the current regime allows incumbents in sectors such as supermarket retail effectively to use the current laws as a form of regulatory arbitrage in their favour; they spend as much time on seeking advice to avoid falling foul of the laws now as they would in the future.
7. Further, as the current regime does not encourage efficiencies and because its effect is to bolster positions of market power, it distorts competition. This means that competition is not allowed to iron out inefficiencies and to pass on cost savings to consumers. Incumbents with market power who do not have to monitor their behaviour have no fear of retaliation and so act in an unimpeded manner.
8. The telecoms regime in Australia has long had an effects based test for abuse of market power and no one has suggested that that has not worked. If it works in telecoms, it works in every other sector. That is my experience in Ireland and the European Union.

9. Finally, having an effects based test as proposed by the Harper Review would mean that there would be less reason for the ACCC to have recourse to prosecuting for improper and unconscionable conduct. These claims are effectively substitutes for the inability to bring an abuse of market power claim having regard to the current constraints of the legislation. Introducing the reforms would therefore allow the ACCC to be more earnest and transparent in identifying culpable conduct; this provides certainty for all.

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