

EFFECTS TEST SUBMISSION

The Retail Guild represents the 1,200 IGA store owners in Australia (the Guild).

This paper is the Guild's response to the Government's discussion paper "Options to strengthen the misuse of market power law".

The Guild supports Option F in the discussion paper. Option F is to adopt the Harper Report's recommendation to change section 46 in the Competition and Consumer Act (the Act).

Rather than address specifically each point raised in the discussion paper, this response will address the core issues raised, which arise from adopting Option F.

TAKE ADVANTAGE

Public attention on the Harper Report has been focussed its recommendation to add an "Effects Test" to Section 46. The Harper recommendations are much broader than simply adding an effects test and it is the suit of changes proposed in Section 46 that need to be considered.

Firstly, the Harper Report recommends the deletion of the "Take Advantage" test in Section 46. The Harper Report found that the test is insufficiently clear and unpredictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct.

The Harper report also found that the "Take Advantage" test is based on a false economic premise. The economic premise of the test is that a company with substantial market power should be able to do what a smaller company can do. Harper correctly points out that there are circumstances where the fact that a smaller company can do something is benign in the competitive process, does not mean it remains benign a company with substantial market power does it.

The US and Canadian competition laws do not have an equivalent to the "Take Advantage" test. The EU competition laws use the broad phrase "any abuse" of market power, which avoids the problems encountered by the more prescriptive phrase "Take Advantage".

The Harper Report also correctly details the difficulty Australian Courts have had interpreting the phrase "Take Advantage". This uncertainty has led to inconsistent and variable outcomes, which has in the Guild's opinion, resulted in defeating the aims of Section 46 more broadly.

The Harper Reports refocusing of Section 46 on the competitive process necessarily requires the removal of the "Takes Advantage" test and the Guild supports this part of the recommendation. The Guild foresees no unintended consequences that would require the retention of the Take Advantage test.

EFFECTS TEST

The Harper Report recommends the addition of what is called the "Effects Test" to Section 46. An "Effects Test" means a corporation's intentions are irrelevant to determining if their actions have been a misuse of market power. The main point of an "Effects Test" is to focus the law on the competitive process, not what a corporation intended.

As outlined in the Harper Report, the Canadian, US and EU competition laws all adopt an "Effects Test" approach when determining misuse of market power matters.

The key arguments of those that oppose an “Effects Test” are, that it will lead to unintended consequences and it will cruel business decision making process. If either of those arguments had a wafer of substance to them, the opponents of the Effects Test would be able to point to examples of these unintended consequences and/or business decisions being cruelled in Canada, the US or the EU. This has not happened. Notably the home of market capitalism, the US, has the world’s most dynamic business environment. This has been the case for over a hundred years notwithstanding competition laws in the US have had an effects test and divestiture as a remedy for over 100 years.

What the opponents of the “Effects Test” are really seeking are competition laws that don’t work, because what they really want is to dominate markets without restraint.

In Australia the failure of Section 46 to protect the competitive process has been glaring exposed by the recent fining of Coles for unconscionable conduct in its treatment of suppliers. The fine Cole’s agreed to pay was \$10 million. It is the Guild’s contention that a fine of \$10 million dollars would have no real impact on the behaviour of Coles, because it is so small in the overall context of that company’s turnover. Had this action been taken using Section 46 damages are potentially up to 10% of annual turnover of the business. The much higher regime for damages in Section 46 reflects the importance of stopping companies with market power from abusing it. The reason the action against Coles was not taken under Section 46 is the current law is extremely difficult to apply.

If the Harper recommendations were adopted actions like the Coles action above could proceed under Section 46 where penalties are levied at a much more appropriate level.

SUBSTANTIALLY LESSENS COMPETITION (SLC Test)

The Harper Reports reframing of Section 46 away from the impact on competitors to the SLC Test is supported by the Guild, subject to the following caution;

Since the introduction of the SLC Test in Section 50 in 1993 (the merger provisions of the ACT), the ACCC has never successfully blocked a merger in a contested matter. In 1996, the ACCC resolved a matter by consent (*Pioneer Concrete*), resulting in the only penalty to have been ordered pursuant to section 50.

The ACCC has filed four Section 50/SLC cases – Pioneer Concrete (as above), Toll/Patrick (proceedings withdrawn following settlement via undertakings); Adelaide/Brighton (proceedings withdrawn when the parties abandoned the merger), and Metcash (where the ACCC lost at both first instance and on appeal). The only other case to proceed to court (*AGL*, which the ACCC joined and lost) was instigated by the merger parties, not the ACCC.

Overseas jurisdictions have an SLC Test, but it is not applied like that proposed by the Harper Report. For instance in the US, the Court’s analysis looks like the SLC Test, but it doesn’t operate in the same way. In the US efficiencies that accrue to the benefit of the merger parties can be taken into account. This is called the efficiencies defence which has been recently shown to be quite broad in the decision of *St Alphonsus v St Luke’s*.

The Harper Report’s recommended gloss to the SLC Test is a recognition that the SLC Test has some difficulties in its application.

The Courts in the opinion of the Guild may not feel bound by a gloss.

A gloss to the SLC Test should allow a full consideration of the impacts on the competitive process that flow from an action. The gloss if it is necessary should also be embodied as part of the Act.

SUMMARY

The Guild supports the Harper recommendation to change Section 46. The deletion of the “Take Advantage” test and inclusion of the “Effects Test” are required to make the law fit for purpose. The addition of the SLC Test whilst correctly focussing Section 46 on the competitive process, has some practical problems in its applications based on past caselaw. The gloss to the SLC test should be embodied in the Act and made as broad and non-prescriptive as possible.

The enemies of good competition are opposed to strengthening the law because they benefit from trading in an environment in which their conduct goes unchecked.

Australia decided with the gazettal of the Trade Practices Act in 1974, that good competition laws were a necessary part of an advanced market economy. The Guild believes competition laws which are fit for purpose are a key foundation of a modern market economy. Good competition laws encourage innovation and entrepreneurship, which are the foundation stones to increased economic productivity. If the Government is serious about increasing productivity, an effects test needs to be included in Section 46.