Australian Competition & Consumer Commission

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22 August 2014

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c:/ Competition Policy Review Secretariat
The Treasury
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Sent via email to: contact@competitionpolicyreview.gov.au

Dear Ian,

You will have noticed the recent debate concerning Section 46. Graham Samuel and Stephen King had an Op Ed in the AFR, Richard Goyder made some comments at the Press Club and former Treasurer Peter Costello has also entered the debate.

Common to all three interventions has been the view that competition policy should not seek to protect inefficient companies to the detriment of consumers. This is self-evidently true, indeed in competition circles it amounts to citing a belief in motherhood, but it is of no relevance to the debate the ACCC is seeking to generate in relation to Section 46.

The article by Samuel and King, which is attached, among other things asserts that "…if a big business undertakes R & D, leading to better products but harming less innovative competitors, that could be prohibited by the ACCC amendment."

This, of course, cannot be so under the Substantial Lessening Competition (SLC) test we propose: out-competing your rivals by competing on your merits cannot amount to conduct which has the effect of SLC. The SLC test has long been in the statute books in Part IV with no such interpretation.

These points were made clearly in an Op Ed by two ACCC Commissioners with career-long economic and legal competition experience, Jill Walker and Roger Featherston, which is also attached.

The ACCC's proposals for the reform of Section 46 of the Competition and Consumer Act are directed at making that section work more effectively to promote and protect the competitive process, and not to protect individual competitors.

As the High Court clearly articulated in Queensland Wire Industries (QWI), competition is by its very nature a ruthless process that damages individual market participants. There are winners and losers from the competitive process, with the winners being those that supply the goods and services consumers want at the lowest price. Section 46 should protect and promote this competitive process, not by protecting the 'losers', but by preventing conduct by

firms in a position of substantial market power that excludes efficient and innovative competition which would otherwise benefit consumers.

To reiterate the views detailed in the ACCC's initial submission, the current test in Section 46 and the way it has been interpreted has two problems. First, the purpose/competition limb of the test is directed at the impact of the conduct on individual competitors, rather than the impact of the conduct on the competitive process in the market. This means that the words "taking advantage" have had to do the heavy lifting in Section 46, distinguishing what is anti-competitive from what is pro-competitive.

This has led on to the second problem with Section 46. Rather than the words "…take advantage of that power for the purpose of..." being applied in a holistic way as a single provision, as was emphasised in the Explanatory Memorandum in 1986 (para.36) and by the High Court in QWI, over time the application of the words "take advantage" has become disembodied from the rest of the section and from analysis of the competitive impact of the actual conduct. Rather than asking whether the conduct enables the firm with substantial market power to achieve an exclusionary purpose, thereby damaging the competitive process, courts have been distracted into deliberations about what a hypothetical firm in a counterfactual world lacking substantial market power might do (for some other purpose).

The ACCC's proposal for the reform of Section 46 is to bring it back into focus as a holistic provision which works effectively to prohibit exclusionary conduct by a firm with substantial market power. The proposal does this by adopting the same test that is utilised elsewhere in Part IV, namely "purpose or effect of substantially lessening competition in a market".

I am sorry to burden you with more reading but I feel we must respond to this recent debate.

Kind Regards

Rod Sims
Chairman

Australian Financial Review, Australia
12 Aug 2014, by Graeme Samuel And Stephen King

General News, page 47 - 367.00 cm²
National - circulation 62,455 (MTWTFS)

ID 297025194 BRIEF #ACCC INDEX 2.1

The effect of the ACCC's ambitions is dangerous

Competition policy
Introducing a broad effects test for business behaviour would damage competition and hurt the economy.

Graeme Samuel and Stephen King

The Australian Competition and Consumer Commission has proposed that section 46 of the Competition and Consumer Act, which prohibits the misuse of market power by big business for an anti-competitive purpose, be replaced with the provision: "A corporation that has a substantial degree of market power in a market shall not engage in conduct that has the purpose or has, or is likely to have, the effect of substantially lessening competition in that or any other market."

This is unlike our other law prohibiting anti-competitive conduct.

Every other section prohibits business from engaging in a specific form of conduct if it is likely to substantially lessen competition. Conduct such as price fixing is automatically illegal.

In contrast, the proposed ACCC amendment focuses on conduct by a specific class of businesses. It would remove the "misuse of market power" test in the current law and introduce an "effects" test. If you are a big business (having a substantial degree of power in a market) you are to be prohibited from engaging in any conduct that has the purpose or has or is likely to have the effect of substantially lessening competition.

But as the High Court has pointed out, the essence of a market economy and of competition is that competitive businesses always have the purpose and effect of harming their competitors by stealing their customers – through better products, lower prices, better service, greater choice, and so on. This benefits consumers.

"[T]he object of s46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to injure each other in this way ... These injuries are the inevitable consequences of the competition s46 is designed to foster."

In other words:

"The purpose of the statute is to promote competition; and successful competition is bound to cause damage to some competitors."

This is consistent with best practice from overseas jurisdictions, including the United States and Europe.

Australia is a small country with small markets, many of which are characterised by relatively concentrated market structures. It might be argued that such markets need "special" protection through the competition laws. But as the Dawson Committee review into the Competition Provisions of the Trade Practices Act (2002) noted:

"Concentrated markets can be highly competitive ...

"Of course, concentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the act is to promote and protect the competitive process rather than to protect individual competitors.

"The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition ...

"Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons. Those are matters which may legitimately be the subject of an industry policy, but that is not a policy which is to be found in the competition provisions in part IV of the act."

Put simply, using competition laws to protect particular competitors or sectors of the economy undermines the objective of the law and harms consumers. The ACCC amendment is a piece of industry policy aimed at constraining big business from legitimate competition.

So if a big business undertakes R&D, leading to better products but harming less-innovative competitors, that could be prohibited by the ACCC amendment.

A big business may have economies of scale that lower production costs. But under the ACCC amendment, these savings may not be permitted to be passed on to consumers, if they might have the effect of substantially lessening competition.

When a business opens a new outlet, that can harm its local competitors. Under the ACCC amendment, such actions could be legal for a small or medium-sized business but illegal for big business.

Or if a big business decided to branch out into new complementary businesses,

Australian Financial Review, Australia
12 Aug 2014, by Graeme Samuel And Stephen King

General News, page 47 - 367.00 cm²
National - circulation 62,455 (MTWTFS)

ID 297025194 BRIEF #ACCC INDEX 2.1

giving it significant competitive advantages over its rivals, the ACCC amendment could apply.

Other jurisdictions do have a form of effects test, but having run into the kinds of problems that we note here, their courts have sought to limit its application by, for example, the "rule of reason" adopted by the courts in the US.

Grist for the mill for the lawyers. But this would have a chilling effect on business growth, competitiveness and the welfare of consumers – all anathema to the competition policy successfully implemented in Australia under the Keating and Howard governments.

In 2005 the Organisation for Economic Co-operation and Development observed that Australia had become a model for other OECD countries, in particular because of "the tenacity and thoroughness with which deep structural reforms were proposed, discussed, legislated, implemented and followed-up in virtually all markets, creating a deep-seated 'competition culture'".

The ACCC seems to have forgotten this "competition culture" and its role as the competition watchdog.

Wesfarmers chief Richard Goyder was wrong to describe the ACCC proposals for section 46 as "ludicrous". They are economically dangerous.

Graeme Samuel AC and Stephen King are co-directors of the Monash Business Policy Forum. Both are former commissioners of the ACCC.

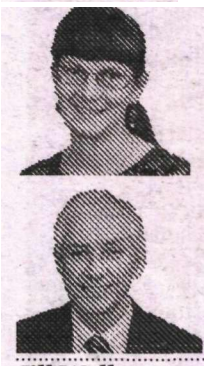
Australian Financial Review, Australia
14 Aug 2014, by Jill Walker And Roger Featherston

General News, page 55 - 330.00 cm²
National - circulation 62,455 (MTWTFS)

ID 298097183 BRIEF #ACCC INDEX 1.1 PAGE 1 of 1

ACCC suggestion is far from novel and not anti-competitive

Competition
The changes sought by the regulator to section 46 have been effectively tested in some sectors without the sky falling.



Jill Walker and Roger Featherston

Contrary to the assertion by Graeme Samuel and Stephen King that the ACCC is aiming "at constraining big business from legitimate competition" (*The Australian Financial Review*, August 12), the amendments to section 46 suggested by the ACCC would protect such competition and only target conduct that is anti-competitive. Conduct that enhances competition, by definition, will not substantially lessen competition.

A prohibition on corporations with substantial market power engaging in conduct with the purpose or effect of substantially lessening competition would draw on established jurisprudence and competition policy. Indeed, it has effectively been trialled in telecommunications markets since 1997 without the sky having fallen in.

Recent contributions to the public debate on whether to amend the misuse of market power provision (section 46) of the Competition and Consumer Act 2010, have suggested a competition test would be novel, would chill pro-competitive conduct by big business, and would protect individual competitors instead of the competitive process. These suggestions are incorrect.

Jurisprudence in Australia has confirmed consistently the substantial lessening of competition test is concerned with the process of competition and not with the effect on individual competitors. As Samuel and King pointed out, the courts have recognised competition, by its very nature, is deliberate and ruthless, and so their examples of conduct (such as a corporation gaining an advantage through R&D and innovation, or as a result of economies of scale) would not be regarded by the ACCC or the courts as a lessening of competition, even if the conduct caused competitors harm or forced them to exit the market.

This issue highlights an inconsistency in the current section 46 which has long been recognised. Unlike the competition tests in other sections, section 46 focuses on conduct that has the purpose of damaging a competitor or deterring a competitor from engaging in competitive conduct, rather than focusing on the process of competition or competition more generally in the market. Ironically, Samuel and King appear to wish to retain this inconsistency instead of considering an alternative more consistent with their stated concern of focusing on the competitive process and not on individual competitors.

International comparisons are fraught with difficulty, but it is worth noting the US Federal Trade Commission, in its submission to the Harper review, describes the US monopolisation test as a combination of substantial market power and substantial lessening of competition. Europe has abuse of dominance provisions which focus on the anti-competitive effect of conduct by firms in a position of dominance. These are more similar to the amendments the ACCC is suggesting than to the existing prohibition in section 46.

In addition, the ACCC is seeking to address the difficulties inherent in the current requirement a corporation must "take advantage" of its substantial market power.

With the focus of the current test on individual competitors, these words have been required to do the "heavy lifting" in section 46, attempting to distinguish what is anti-competitive from what is pro-competitive. Interpretation of these words has been tortuous, involving convoluted counterfactual worlds lacking substantial market power, disembodied from a proper consideration of the competitive impact of the conduct. The ACCC is suggesting (as in Europe) if a corporation with substantial market power acts anti-competitively, that should be enough, provided it constitutes a "substantial lessening of competition". With this as the threshold competition test, the words "taking advantage" become redundant.

This would simplify the act and focus the analysis of the purpose or effect of the conduct on the process of competition in the market.

The substantial lessening of competition test is an established test in the act and, contrary to the claim by Samuel and King, is applied to general forms of conduct. Samuel and King claimed every other section of the act prohibits a specific form of conduct if it is likely to substantially lessen competition, but that overlooks section 45, which prohibits any contract, arrangement or understanding, and section 50, which prohibits any acquisition of shares or assets, where the agreement or acquisition substantially lessens competition in a market. Corporations have coped with those general prohibitions for decades, and so they will cope with a similar test in section 46. Indeed, it is instructive to note in both Rural Press and Cement Australia, while the courts struggled with the interpretation and application of section 46, the conduct was found to substantially lessen competition in breach of section 45.

Let's have a debate, but let the debate be based on our current act and how it might sensibly be improved, and any examples should be appropriate to illustrate issues rather than simply as scare mongering.

Jill Walker and Roger Featherston are current Commissioners of the Australian Competition and Consumer Commission

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Europe has rules on the anti-competitive effect of conduct by firms in a position of dominance.