



9 January 2017

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Fitt

Senate Inquiry into the Misuse of Market Power Bill 2016

Thank you for the opportunity to comment on the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016, which reframes section 46 of the Competition and Consumer Act 2010. This Office previously contributed to related consultation in September and October 2016 on the exposure draft of competition law amendments and the ACCC's draft framework for misuse of power guidelines.

Freedom to compete on merit

As the Australian Small Business and Family Enterprise Ombudsman, I strongly support a business environment that allows small businesses to participate in markets and compete on their merits alongside larger businesses. This freedom depends on the existence of a level playing field where those with substantial market power are effectively prevented from using that power to lessen competition. The point is not that small businesses, individually or as a class, should be protected from the rigours of healthy competition – rather, that the competitive process itself should not be distorted.

Misuse of market power from a small business perspective

Small businesses may be adversely affected by the unchecked use of market power:

- as purchasers (often comparable in vulnerability to individual consumers) of essential inputs and services needed to make products and transact business;
- as innovators seeking to deliver the economic and social benefits of a better idea or new technology, which may be resisted by powerful incumbents as a threat to the status quo;

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- as subjects of potentially burdensome regulatory interventions designed to restore health to markets damaged by the misuse of market power; and
- as entrepreneurs willing to ‘have a go’ to start and grow businesses that generate more, cheaper or better offerings and provide employment to themselves and others. In the absence of a level playing field, taking such risks may appear more foolhardy than courageous.

As the ACCC noted in consultation on its draft guidelines, the purpose of competition law is to protect competition, not competitors. The existence of a range of viable competitors in a market is necessary in order to maintain healthy competition. Harm caused to small businesses by misuse of market power adversely affects their ability to contribute to competition overall, with associated loss of benefits to consumers and the economy as a whole.

Proposed changes to section 46

Section 46 has a long history in Australia’s competition law and its effectiveness in preventing the misuse of market power has frequently been questioned, with various amendments introduced over time to address issues of scope and interpretation. The final report of the Harper Review¹ lists numerous previous reviews that considered but declined to recommend an ‘effects’ test such as that contained in the current proposed amendment out of concern that such a provision might capture pro-competitive conduct. Since the publication of the Harper Review its recommendation to introduce the proposed amendment has itself generated considerable controversy.

In our view, this controversy as well as the likely impact of the proposed amendment should be kept in perspective. We believe the proposed reframing of section 46, together with ACCC guidelines articulating how the regulator will interpret the law if enacted, will be beneficial as one element of a broader effort to improve the clarity, simplicity and certainty of Australia’s competition law.

Importance of clarity and simplicity

From a small business perspective, these qualities are of critical importance because legal complexity itself generates systemic inequity. When the law is complex and uncertain, those who can afford expert advice are able to access a range of competitive strategies, while those who cannot – including most small businesses – risk non-compliance if they venture outside relatively narrow constraints.

We believe the proposed amendment is sufficiently clear to be reliably and consistently applied by business, the ACCC and the courts and to distinguish between pro-competitive and anti-competitive conduct. The introduction of an effects-based test that lowers the threshold for establishing misuse of market power is fairer

¹ Harper, I. *et al.* 2015. *Competition Policy Review: Final Report*. Canberra: Commonwealth of Australia, p. 336.

and more practical than the current provision. We therefore welcome the proposed amendment and support its implementation in law.

Yours sincerely

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman