Business Council of Australia

Supplementary Submission to the Competition Policy Review

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About this submission

This is the Business Council of Australia (BCA) supplementary submission to the Competition Policy Review that comments on proposals for changes to the Competition and Consumer Act 2010 and its application that have been raised in the media and in other submissions.

The BCA is concerned in particular by the following proposals:

- proposed changes to section 46
- calls for the ACCC power to initiate its own market studies
- the extension of the price signalling provisions.

Key points

- An efficient and effective competition policy regime is important for setting and administering rules for market conduct that are beneficial to business innovation and the welfare of consumers. However some proposals to the competition policy review risk harming the competitive process and consumer welfare through poor or excessive regulation.

Effects test

- The proposal to add an effects test to section 46 and to remove the "taking advantage" element should be rejected on the grounds that:
  - there is no obvious deficiency with the current law and no evidence showing any inappropriate gap in the law
  - there is a risk that legitimate pro-competitive conduct could be prohibited under these changes
  - regulatory uncertainty could lead to business curtailing innovation and price competition, with the effect of harming the competitive process and consumer welfare.

Market studies

- While market studies can be a useful tool for assessing the competitiveness of markets, they can also be misdirected, costly and intrusive. As a law enforcement agency, the ACCC should not have the power to self-initiate an inquiry for policy reform purposes. Further, the conferral of a general power on a law enforcement agency to conduct an inquiry into an industry runs counter to well-established principles and protections against such open-ended investigations. The government should determine when it is appropriate to refer a matter to the ACCC for inquiry.

Price signalling

- The price signalling provisions in the Act are poorly conceived and should be repealed. They should certainly not be extended across the economy. The Act already sufficiently captures anti-competitive price signalling behaviour obviating the need for this additional layer of confusing and costly regulation.

Introduction

The BCA provides this supplementary submission in response to a number of issues relating to the Competition and Consumer Act 2010 (CCA) and its administration that have recently been raised in the media and in other submissions to the review panel.

These issues are:

- proposed changes to section 46
- calls for the ACCC power to initiate its own market inquiries
- the extension of the price signalling provisions.

The BCA's original submission to the review panel made the following arguments:

- Introducing an "effects" test into section 46 and removing the "take advantage" principle risk harming vigorous competition and it has not been demonstrated that there is a clear net public benefit in these changes.
- It is not appropriate for a competition enforcement agency to have the general power to initiate its own market inquiries.
- The current price signalling provisions are unnecessary, are unfit to be extended across and economy, and should be repealed.

The BCA welcomes the opportunity to supplement its original submission with a more focused treatment of these important issues.

Proposed changes to section 46

The BCA is concerned by calls in the ACCC's submission to the Competition Policy Review for changes to section 46 of the CCA that would:

(a) add an "effects" test to section 46, requiring businesses that may have market power to predict the possible consequences of their actions and decisions on their competitors; and

(b) remove the "taking advantage" element, which is an essential tool for distinguishing ordinary competitive conduct from anti-competitive behaviour.

"Effects" test

Section 46(1) currently provides that:

> A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

To find a breach of section 46, a court must find three essential limbs or elements: a corporation must have a substantial degree of market power; it must take advantage of that market power; and it must do so for one of the three proscribed purposes.

Critics of the section 46 test, including the ACCC and its predecessor, have argued that the test is too difficult to prove and may result in some anti-competitive behaviour going unpunished. Historically, these claims have focused on the perceived difficulty in proving one of the proscribed purposes, leading to suggestions that the effect rather than the purpose of the conduct should be examined. More recently, claims have identified the courts' interpretation of the "take advantage" requirement as perhaps a greater difficulty.

The ACCC's submission to the review panel, and a number of other submissions, have proposed various formulations of an "effects" test for section 46. The ACCC's submission in particular suggests that the current prohibition be supplemented or replaced with a new prohibition that provides that:

> A corporation that has a substantial degree of 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 to be distinguished from the test suggested in the ACCC's submission to the Dawson review in 2003, and similar tests proposed by other parties to the current review, which simply add an alternative "effect" limb to the current section 46. Under those suggestions, section 46(1) would read:

> A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose, or with the effect or likely effect, of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

In response to recent criticism of its proposal, the ACCC has suggested that its critics have misunderstood the ACCC's position and failed to distinguish between:[1]

(a) a "silly" version of the effects test that simply adds "effect or likely effect" to the current section 46(1), as was proposed by the ACCC to the Dawson review

(b) a "sensible" version that replaces or supplements section 46(1) with a new provision that would prohibit a corporation with substantial market power from engaging in conduct that substantially lessens competition, as proposed by the ACCC to the present Competition Policy Review.

The BCA understands both formulations, and notes that the Dawson review considered and rejected tests that were effectively identical to each of the versions identified by the ACCC.

The Dawson review first considered the ACCC's then preferred test – that is, adding "effect or likely effect" to the existing purpose test – and dismissed it on the basis that it would affect legitimate business conduct and discourage competition:

> Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour...
>
> The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency ...
>
> An effects test would apply and capture behaviour with an adverse impact on competitors, but not necessarily on competition. The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.

Having dismissed that test, the Dawson review went on to consider:

> An alternative to the effects test proposed by the ACCC is to be found in some of the submissions. It is the amendment of section 46 to prohibit a corporation that has a substantial degree of market power from taking advantage of that power with the effect or likely effect of substantially lessening competition in a market.
>
> However, such an amendment would only serve to exacerbate the difficulties identified above in relation to the ACCC's proposed amendment. It would change the focus of section 46 from that of conduct with a proscribed purpose to that of conduct with a proscribed effect, the effect being the substantial lessening of competition in a market. Since the effect of legitimate competitive activities may result in the lessening of competition in a market,

1. See Rod Sims interview on ABC TV's *The Business*, 6 August 2014m, viewed 25 August 2014, <http://www.abc.net.au/news/2014-08-06/extended-interview-with-rod-sims/5653796>.

> the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct. Competitive behaviour would be discouraged by the prospect of proceedings under section 46.

That is, the Dawson review would assess the ACCC's current proposal for section 46 as no better, and perhaps worse, than its former proposal.

The BCA submits that all forms of the "effects" test are objectionable for the same reason: they require a business, and every person acting on behalf of a business, to predict the consequences of the actions or decisions they may take in the course of everyday legitimate business conduct.

Unlike mergers or acquisitions and contracts, arrangements or understandings, unilateral commercial actions and decisions are taken very frequently in the ordinary course of business, and since no other party is involved they may be made quickly, dynamically, and responsively.

Unilateral actions and decisions directed towards increasing efficiency, reducing prices and improving services to win customers are the essence of competition and the best guarantee of public benefit. An "effects" test would require decision-makers to turn from these goals and consider the possible consequences of each of their actions and decisions on the level of competition in a market. That would saddle a business that may have market power with the burden of being both a commercial operation and an assessor of the effects of its actions.

The ACCC has argued that its proposed test does not refer to competitors but to competition. However, competition is a process that is enacted by competitors, and an action that affects a competitor will often have a corresponding effect on competition, particularly if markets are defined narrowly with few competitors. Accordingly, a business considering its actions under the proposed test would in practice need to assess the effects of its actions on competitors: to protect its competitors, in effect, from the full force of competition. That would be the antithesis of the competitive process and would deprive the public of its benefits.

The consequences of an action or decision on either competitors or competition may be difficult or impossible to predict, with the result that a business concerned that it may have market power may compete less vigorously in order to reduce the risk of being accused of breaking the law and the damage to its reputation that would follow.

It is often suggested that Australia is alone in relying on a purpose test, but this claim was also dismissed by the Dawson review. Purpose, intent or business justification – whether subjective or inferred from conduct and circumstances, as in Australia – are used throughout the world to distinguish vigorous, legitimate competition from an anti-competitive misuse or abuse of market or monopoly power, and it would be dangerous and damaging for Australia to abandon this essential tool.

In its submission to the review panel, the American Bar Association further notes that Australian treatment of purpose or intent is consistent with United States law and practice:

> The requirement to prove intent has not proved to be a particular obstacle in U.S. enforcement in an otherwise sound case of exclusionary anticompetitive conduct with clear consumer harm. Modern U.S. decisions hold that it is not subjective intent but objective intent that is relevant, and that intent can be inferred from conduct and effect. The focus of the U.S. courts is on evidence of monopoly power and proof of exclusionary conduct.
>
> Similarly, in Australia it appears that "purpose" is considered broadly under an objective-not a subjective-standard. Section 46(7) of the Act makes the objective standard explicit by providing that that a proscribed purpose may be "ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances."
>
> Section 4F of the Act also provides that the anticompetitive purpose need not be the only purpose or dominant purpose, as long as it is a substantial one. As such, it seems clear that Australian courts can and do consider the totality of the circumstances in determining whether a corporation possesses the requisite anticompetitive purpose, including analysing the nature of the conduct and its likely effect.[2]

The Business Council's original submission to the Competition Policy Review cited other examples of jurisdictions that rely on purpose for the same reasons as Australia does, e.g. Canada, New Zealand and the European Union.[3] Any proposition that Australia needs to amend section 46 to align more closely with international jurisprudence is misleading and provides no basis for the extensive changes proposed.

The "take advantage" element

The ACCC further proposes to remove the "take advantage" element of section 46, which currently requires a connection between a corporation's market power and its actions. Without this nexus, a corporation with market power could be prevented from engaging in conduct that has a perfectly legitimate business justification, would be expected in a perfectly competitive market and would remain available to its competitors.

Since even businesses with relatively low market shares may be found to have market power, and markets can be defined very narrowly, the removal of this element is likely to affect a significant number of businesses engaging in legitimate competitive behaviour that may, as the Dawson review recognised, have the unintended effect of lessening competition in a market. That would further discourage competition to the detriment of consumers.

Removing both the requirement for an anti-competitive purpose and the requirement that a corporation take advantage of its market power would leave section 46 with no means to distinguish between legitimate competition and anti-competitive conduct.

2. American Bar Association Submission to the Competition Policy Review Issues Paper p. 8.
3. BCA, *Submission to the Competition Policy Review* , pp. 117–118.

The ACCC submission argues that the "substantial lessening of competition" test is itself a "key filter" to avoid capturing pro-competitive conduct, but there is little evidence of the test being used in that way. In light of the weight that the ACCC has given to market structure in applying the competition test in mergers and other contexts, it is easy to imagine that conduct resulting in a competitor leaving the market may be viewed as a substantial lessening of competition.

A new body of jurisprudence would need to be developed before the substantial lessening of competition test could be relied on to prevent the ACCC's amendment from prohibiting vigorous competition through efficiency improvements, product and service innovation and responsiveness to customers that may make it substantially more difficult for other players to compete.

That jurisprudence will be slow and expensive to develop and the ACCC's amendment would stifle a great deal of genuine competition in the meantime.

The "take advantage" element has been subject to recent law reform suggested by the ACCC and adopted using the ACCC's language to address concerns with the "take advantage" test, and the new guidance set out in section 46(6A) has not had a chance to be tested in court.

The ACCC submission argues that: "it is not clear that [recent] cases would have been decided differently if section 46(6A) had applied". Section 46(6A) reflects the approaches found in various cases on section 46, and makes clear that the court does not need to choose between those tests but may have regard to any or all of them. This is a useful and significant development and should not be dismissed before it has been tested.

The need for change

It has not been demonstrated that there is any form of predatory or exclusionary conduct that cannot be dealt with by the existing section 46 or by other sections of the CCA. The BCA is only aware of two cases in which the ACCC has failed to obtain a remedy in a case involving section 46: in the CSBP & Farmers Ltd case of 1980[4] and in the Boral case of 2003.[5] In every other case the ACCC has been successful in proving either a misuse of market power under section 46 or a purpose or effect of substantially lessening competition under section 45 or section 47.

The ACCC's submission argues that in certain cases the ACCC has decided not to take enforcement action because it considered it would be unable to establish a proscribed purpose. The submission reaches the conclusion that:

> This experience also suggests that, as currently drafted, Part IV of the CCA does not effectively capture all forms of anti-competitive unilateral conduct and fails to recognise that economic harm can arise from unilateral conduct which has the effect of substantially lessening competition but is not engaged in for an anti-competitive purpose.

4. Trade Practices Commission v CSBP & Farmers Limited (1980) ATPR ¶40-151.
5. Boral Besser Masonry Limited v ACCC [2003] HCA 5.

It would be useful to know more about these cases, including the nature of the anti-competitive effect, the evidence used to establish it, and the reasons that a proscribed purpose could not in those cases be inferred from the circumstances. Without further information it is difficult to discern which forms of anti-competitive unilateral conduct would not be captured by the existing provisions.

In this regard the BCA notes the recent example given by the ACCC of conduct that would be captured by a new section 46:

> If you went out and bought up all the land near you so that nobody else could compete with you, that would have the effect of substantially lessening competition. We think that should be caught; you really shouldn't have to show purpose there.[6]

The BCA submits that these circumstances would be appropriately assessed by the current law. If a business bought up such a large proportion of nearby land as to exclude all competition, and had no legitimate business reason to do so, an exclusionary purpose under section 46 could well be inferred from those circumstances.

In addition, such an acquisition of land may also be subject to a substantial lessening of competition test under section 50. This was the basis on which the ACCC recently intervened in the Woolworths acquisition of undeveloped land at Glenmore Ridge.[7]

Although this is only one example, as far as the BCA is aware it is the only example that has been publicly advanced to suggest a gap in the law that needs to be addressed. Further, the BCA is not aware of any evidence of widespread conduct of this kind that would suggest the need for additional scrutiny or action.

In these circumstances, the BCA submits that no compelling case for change to section 46 has been made.

The great risk is that such a change would be likely to have unintended consequences due to the uncertainty it would introduce for businesses trying to predict the competitive consequences of their unilateral actions, the legal position of legitimate business behaviour and the different standards applying to the same conduct by businesses that may or may not have market power.

Today a business knows when its conduct is likely to be at risk of breaching section 46: that is, when it is engaged in for a specified exclusionary purpose.

With the introduction of an "effects" test and the removal of the "take advantage" requirement, a business must assess not only its commercial motivations, but also the effects of its competitive conduct on competitors and the market generally.

This means that ordinary competitive actions that consumers value, such as lowering prices, offering incentive deals, and delivering innovative and attractive

6. See Rod Sims interview on ABC TV's *The Business*, 6 August 2014, viewed 25 August 2014, <http://www.abc.net.au/news/2014-08-06/extended-interview-with-rod-sims/5653796>.
7. See <http://registers.accc.gov.au/content/index.phtml/itemId/1116726/>, viewed 25 August 2014.

product bundles and features, will now be at risk – particularly if competitors claim they cannot compete with such product offerings. Even a price-match or a price-beat guarantee could be at risk.

This uncertainly will necessarily raise the risks for larger firms engaging in vigorous competition, and could have substantial impacts on consumer welfare. Accordingly, the BCA submits that no change should be made.

Market studies

The ACCC has submitted that it should be given a broad power to initiate and conduct formal market studies. It acknowledges that it already has functions in relation to the dissemination of information, law reform and research, and that this offers "some scope to conduct market studies", though these functions do not enliven its information-gathering powers. Both these functions and this limitation are entirely appropriate.

The ACCC submission also acknowledges that under Part VIIA of the CCA the ACCC may be required by the minister to hold a price inquiry, as was the case with the 2008 Grocery Prices Inquiry, or may hold such an inquiry with the Minister's approval, as it did with the 2007 Petrol Prices Inquiry.

The BCA supports the power of the executive government to refer a study to the ACCC or the Productivity Commission, including on the suggestion of the ACCC. However, it is not appropriate for a regulator to have the general power to initiate its own formal market studies. Detailed market studies or reviews should be initiated by the government where it has identified problems or public concerns that need to be addressed, and has chosen an investigative body appropriate to the kind of outcome sought.

In many cases the appropriate body will be the Productivity Commission, which as Australia's peak microeconomic research and advisory body has a proven track record in conducting sectoral inquiries referred to it by the government as well as some self-initiated research. In other cases the ACCC may well be the appropriate body to undertake a particular study in the nature of the Grocery and Petrol inquiries referred to above.

Generally, the Productivity Commission is responsible for analysing sectors from a range of perspectives and recommending improvements to market structures that will maximise their efficiency, while the ACCC is responsible for enforcing the competition laws within that sector or market. This is broadly the difference between market design and enforcement, and these roles are appropriately undertaken by separate bodies in order to avoid any conflicts between their different purposes.

The ACCC's submission, expanded by its second supplementary submission, suggests that the ACCC would use a market study power:

- as a lead-in to competition or consumer protection enforcement action when anti-competitive behaviour is suspected in a sector but the exact nature and source of the problem is unknown

- to identify a systemic market failure (instead of ad hoc compliance action against individual firms) and to better target a response (whether, for example, through enforcement action or compliance education)
- to identify market problems where affected parties are disadvantaged and either have difficulty making a complaint to the ACCC or accessing the legal system to take private action
- to address public interest or concern about markets not functioning in a competitive way; the market study could either confirm such concerns, and propose some solutions, or reveal them to be unfounded, or
- to fact-find to enhance the ACCC's knowledge of a specific market or sector, particularly where a market is rapidly changing, and raises issues across the ACCC's functions.

There is significant confusion in these roles between enforcement-related objectives and policy-related objectives. Further, the conferral of a self-initiated investigatory or inquiry power on the ACCC, which is a law enforcement agency, in pursuit of any of these objectives is troubling.

The proposal that a law enforcement agency should have the power to initiate an inquiry with compulsory investigation powers at large, as a lead-in to enforcement action, is a departure from the accepted investigatory framework in Australia, which generally requires the reasonable suspicion of a specific contravention before formal investigatory powers are enlivened.

Conferring on a law enforcement agency the ability to initiate an inquiry for a self-determined policy reason would also be unusual, removing critical balances on the exercise of power and risk giving the agency power beyond its proper expertise.

The Business Council submits that the power to conduct a particular market study should be a case-by-case decision made by the government so it can consider the body most appropriate to fulfil a particular purpose.

The Business Council has no objection to the government requesting the ACCC to undertake a market inquiry as it has done in the past, or the ACCC proposing to the government that it request it to do so.

However, a law enforcement agency should not be granted a broad power to initiate its own market studies for purposes it determines for itself, particularly when those purposes are so wide-ranging and potentially conflicting as those suggested by the ACCC.

Providing a law enforcement agency with such a power could risk undue interference in competitive markets in the absence of any clear problems, could impose unjustified costs on market participants, and would encourage "fishing expeditions" to circumvent appropriate limits on the regulator's investigative powers.

A number of competition agencies in other countries have broad market study powers, but there are important differences between Australia and international jurisdictions.

Internationally, agencies with market study powers are not typically traditional law enforcement agencies like the ACCC, enforcing criminal or quasi-criminal laws; they are typically operating under administrative competition law regimes. Many do not have compulsory information-gathering powers backed by penalties for non-compliance.

For example, in the United States the Antitrust Division of the Department of Justice is solely responsible for prosecuting criminal cases under the Sherman Act, and while it conducts its own informal research it does not have compulsory information-gathering powers. Conversely, the Fair Trade Commission has wide-ranging information-gathering powers but can only seek very limited civil penalties and no criminal penalties.

Similarly, the European Commission has broad information-gathering powers and can impose administrative fines but is explicitly denied the power to impose criminal sanctions.[8] In Canada, the Competition Bureau conducts market studies but does not have the power to compel the supply of information.

In the UK, until recently the Office of Fair Trading was responsible for initiating general market studies, but it could direct the Competition Commission to undertake a detailed market investigation and take any subsequent enforcement action. With the integration of these agencies into the Competition and Markets Authority, strict internal governance measures have been required to address concerns that a law enforcement agency could self-initiate a broad industry inquiry.

Further, the Productivity Commission does not have a close equivalent in any of the countries where competition agencies have similar market study powers, limiting the usefulness of comparisons with these countries. Comparisons may also ignore the extensive role the ACCC already plays in conducting market studies either informally or by government reference such as the Grocery and Petrol Inquiries.

Finally, Australian markets have had the benefit of 40 years of competition regulation and 20 years of microeconomic reform; they are not characterised by entrenched monopolies or cartels and their features are generally well known. As the OECD found in its often-cited 2004 report:

> In the last decade of the 20th century, Australia became a model for other OECD countries in ... 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’.

In these circumstances it is not clear that in these circumstances that there would be any net benefit in confusing and potentially compromising the ACCC’s enforcement role by allowing it to initiate its own investigations into market structures rather than simply applying the competition law.

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8 See Article 23(5) of Council Regulation (EC) No. 1/2003.

Market studies can be extremely costly and intrusive, particularly if they are accompanied by powers to compel the production of information and the provision of witness testimony. Allowing them to be initiated by the body who will also carry them out would risk conflating market design and enforcement, obscuring the purpose of the market study, and reducing its legitimacy.

Price signalling

The BCA strongly disagrees with any suggestion that the price signalling provisions, which are currently limited to the banking sector, should be extended across the economy in their current form.

Many submissions to the Competition Policy Review have called for these provisions to be either repealed or replaced with a more appropriate treatment of the conduct in question. Very few submissions apart from the ACCC's have recommended that the current provisions be extended to other sectors of the economy.

As set out in its submission, the BCA remains of the view that anti-competitive price signalling behaviour and similar facilitating practices are already sufficiently captured by the CCA as an attempt to enter into or induce an arrangement or understanding, or an actual arrangement or understanding that may be inferred from the circumstances. The ACCC has won a number of cases under the current law; the fact that it has not won every case does not mean that the law needs to be changed.

The current price signalling provisions show every sign of chaotic development through competing government and private member's bills and overlapping House and Senate inquiries, against a backdrop of concerns over petrol prices overtaken by suspicion towards the major banks.

The provisions combine considerable overreach only partly mitigated by a patchwork of exceptions in their attempt to distinguish between legitimate communications over price and the conduct of real concern. Their treatment of public and private disclosures is arbitrary and incoherent.

Although the provisions are expressed in general terms to apply to any industry prescribed by regulation, the provisions were clearly developed and finalised in the context of the banking sector and the exceptions, in particular, are tailored to banks and unsuitable for extension to other industries. Any such extension would impose significant compliance costs on business and risk stifling information that is essential to the working of the economy, for no demonstrated benefit.

Accordingly, the price signalling provisions should be repealed and certainly not extended across the economy.

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