Submission in response to the Options to strengthen the misuse of market power law Discussion Paper

February 2016

INTRODUCTION

1. Optus welcomes the opportunity to comment on the Discussion paper on the *"Options to strengthen the misuse of market power law".*

2. Optus' perspective on this issue is informed through its experience competing in several communications markets that are highly concentrated, where an incumbent provider has a substantial degree of market power. The concentrated nature of the telecommunications market has resulted in the industry being subject to specific competition rules under Part XIB of the Competition and Consumer Act (CCA). Whilst the Part XIB provisions differ from section 46, they do provide useful insights on the key issues under consideration in the present consultation. The telecommunications market also provides useful insights into how misuse of market power can have adverse impacts for competition and consumer interests.

3. An effective and well-functioning misuse of market power law that acts to deter conduct that harms competition and consumer interests is a necessary component of an effective competition regime. It is not clear that section 46 in its current form meets this objective.

4. Optus believes there is a case for some reform of section 46. However, we recognise that there are as many opponents of reform as there are proponents. As a consequence, the task for Government in navigating these views will be challenging. In approaching this issue, Optus believes it is important to consider reform from the perspective of the consumer; what will deliver the best outcome for consumers? We believe that this will be achieved by enhancing the opportunities for competition to develop through measures designed to remove any temptation for firms with market power to misuse that power and harm competition.

5. Optus supports reforms aimed at improving the operation of section 46 so that its application is more certain and will actually discourage conduct that harms competition. This can best be achieved by adopting a test that assesses the "effects" of conduct rather than solely on the "purpose" of conduct and whether a firm has or has not been able to leverage its market power. Optus believes that the stripped back rule set out in option (e) will operate as the most effective deterrent to misuse of market power.

6. The test under option (e) is similar to that proposed by the Harper Review, with the exception that it does not include additional mandatory factors to be taken into account in determining whether conduct will lead to a significant lessening of competition. As will be discussed below, Optus considers that these mandatory factors may act to undermine the utility of the reformed rule proposed by the Harper Review.

7. Optus has set out below further details on the issues under consideration in the review that lead us to support reform option (e).

DETAILED CONSIDERATION OF THE ISSUES

Move from a "purpose" to a "purpose, effect or likely effect test"

8. Optus supports proposals to amend the existing misuse of market power test to extend the focus of the test beyond questions of whether conduct was undertaken with the express purpose of undermining competition to examine whether the conduct will or is likely to harm competition.

9. Under the proposed amended rule, conduct will be proscribed if it can be determined that it will or will likely lead to a substantial lessening of competition. It is appropriate that a law designed to

discourage the misuse of market power actually focuses on the outcomes of such conduct rather than just the purpose of such conduct. The proposed change will bring section 46 into alignment with other parts of the Competition Law, such as sections 45, 47 and 50. It will also better align section 46 with similar competition laws applied in other developed jurisdictions, such as the EU, US, UK and Canada.

10. Contrary to the repeated claims of some opponents of reform, the concept of "significant lessening of competition" is well understood by businesses, regulators and the courts. Such analysis is undertaken to apply other parts of the Competition Law. Further, telecommunications has operated under a similar effects test in Part XIB of the CCA since 1997. There is no evidence that the "effects test" under Part XIB has "chilled" competitive behaviour or caused an undue level of litigation.

"Take advantage of"

11. The problem with the "take advantage" limb of section 46 – which currently appears to focus on a hypothetical counter factual of whether a competitor without market power could or would have engaged in the alleged conduct – has been well documented in the Harper Inquiry. In a speech to the Competition Law Conference in Sydney in May 2015, the Chairman of the ACCC summarised the problem with the current approach:

    "Unilateral conduct by a firm with a substantial degree of market power is much more likely to distort the competitive process than the same conduct by a firm without market power".

12. Optus considers that the case to remove the "take advantage of" limb from the current misuse of market power test is well made. Firms with a substantial degree of market power can, by definition, operate independent of the market. These firms are not subject to the same disciplines as firms that operate in an effectively competitive market. Actions that take advantage of this market power will typically not see a response from other market participants to countervail their actions. Consumers often lose as a result of such conduct through higher prices or reduced supply. As such, it is appropriate that firms in the 'special' position of having substantial market power are subject to rules to which firms without market power are not subject.

13. Once this point is accepted then the question arises as to whether further guidance should be given to help the courts determine what should be deemed to constitute pro-competitive behaviour from anti-competitive behaviour of firms with substantial market power.

Mandatory factors or guidance

14. A concern canvassed in the Harper Review is whether the removal of the "take advantage" limb of the current test may open a risk that behaviour which ought to be considered normal commercial competitive behaviour will be inappropriately proscribed. To address this risk the Harper Review put forward a recommendation to provide additional guidance to the court by including mandatory factors that should be considered in determining whether there has or is likely to be a substantial lessening of competition. The proposed mandatory factors are;

    (a) the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and

    (b) the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

15. Optus does not believe such guidance is necessary. As indicated above, we believe that the concept of significant lessening of competition is well founded and understood since it has been a long-standing feature of other parts of the Competition Law. Further, there is a risk that inclusion of the mandatory factors recommended by the Harper Review could create a trip-wire to future actions under section 46.

16. Inclusion of these mandatory factors will place an onus on a court to specifically consider whether such factors exist, opening up the risk that it will give them greater weight than they are otherwise due. Further, the countervailing nature of the proposed mandatory factors implies that there ought to be a form of balancing to be undertaken by the court.

17. It is possible to foresee circumstances in which a firm can construct a defence to conduct undertaken that is identified to have clear anti-competitive effects on the basis that the conduct promotes innovation. An example from the telecommunications sector may help to illustrate the problem.

18. In 2001, Telstra launched an ADSL broadband service into the market but refused to offer a wholesale version of the service that allow its wholesale customers to compete with Telstra's retail service. In this instance the ACCC determined that Telstra's action was likely to lead to a significant lessening of competition and had breached the competition rule under Part XIB of the Competition Act. Telstra was required to open up wholesale access to the service and competition not only drove rapid take-up of broadband, it also enabled Telstra's competitors to lead the next phase of innovation with the upgrade to ADSL2+. However, under the proposed Harper construct it would have been open to Telstra to mount a defence on the basis that the ADSL service promoted innovation.

19. It is uncertain how a court would balance the mandatory factors to reach a judgement. It is not clear, therefore, that the guidance proposed by the Harper Review will assist in discouraging the misuse of market power because of this lingering uncertainty as to how the provisions will be applied.

20. Optus believes that the misuse of market power test should focus on the outcomes of conduct; that is, will particular conduct lead to a substantial lessening of competition or not. If it does, then such conduct should be proscribed. As indicated above, firms with market power ought to be subject to a higher threshold of conduct than firms without market power because their actions can have a significant impact on the market and consumers.

21. If a firm believes that particular conduct has pro-competitive benefits then it is open to it to seek authorisation. The authorisation process applies a clear and well defined balancing of pro and anti-competitive effects based on a net public benefit analysis. Ultimately, it is the public interest that determines whether conduct that lessens competition ought to be allowed.

22. Optus acknowledges that Government might remain concerned that reliance on an "effects test" may capture conduct by a firm with market power that ought to be deemed normal commercial behaviour. As alternative to Optus' preferred option (e), the Harper Review proposal could be amended to direct the court to effectively apply a net public benefit test in circumstances where conduct has identifiable pro and anti-competitive effects.