CBH Group

Submission in relation to Australian Government Discussion Paper - December 2015

Options to strengthen the misuse of market power law

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1. Introduction

The CBH Group is Australia's largest co-operative and is a leader in the Australian grain industry, with operations extending along the value chain from grain storage, handling, transport, marketing and processing.

Owned and controlled by around 4,200 Western Australian grain growers, the core purpose of the CBH Group is to create and return value to growers.

Since being established in Western Australia in 1933, CBH has continuously evolved, innovated and grown.

Its storage and handling system currently receives and exports a significant proportion of the Western Australian grain harvest and CBH is regarded as one of the best and most efficient grain exporters in the world. At the same time in Australia we face competition from some of the world's largest grain companies in Cargill, ADM, Bunge, Louis Dreyfus and Glencore. We are therefore conscious we must continuously strive to innovate, be competitive and deliver value to our grower members.

The CBH Group owns a state-of-the-art rail fleet dedicated to seeking the most efficient transfer of grain from country receival points to its four port terminals. We acquired the train fleet and work with a rail operator in order to achieve the best competitive outcome for WA farmers.

The co-operative's marketing and trading arm is the leading grain acquirer in Western Australia and has operations in eastern Australia, as well as offices in Hong Kong, Tokyo and Portland. It also owns a 50% stake in Interflour which operates 7 flour mills in Indonesia, Vietnam, Malaysia and Turkey, including a grain port terminal in Vietnam.

The CBH Group has total assets of more than A$2 billion and employs approximately 1,100 permanent employees and up to 1,800 casual employees during the harvest period from October through to January. We seek to make a significant contribution to the Australian, Western Australian and regional communities in which we operate.

Competition law is important to CBH and we seek to comply with competition laws as well as all laws relevant to our operations. We also operate in a global environment where Australian grain exporters compete in a global market and CBH competes with global competitors many times our size. However, we believe in competition as competition from grain marketers is in the best interests of our grain grower members as it increases competition for their grain. It is in these circumstances important in seeking to ensure that in the complex nature of the grain export task that we seek to manage on behalf of our members,

that competition laws be clear that allow parties to be highly competitive and seek efficiencies for their customers.

2. The Policy Basis for a Change to Section 46 has not been made out

CBH is not able to support the proposals for changes to section 46 of the Competition & Consumer Act 2010 (Cth) ("**CCA**") set out in the Discussion Paper, as it does not believe that there are sufficient benefits arising from the changes to outweigh the potential uncertainties created by amending the section. CBH therefore favours Option A, making no change to the current provision at this time.

Section 46 is intended, consistent with the name of the section in the CCA, to deal with "misuse" of market power, just as the United States equivalent deals with monopolisation and the European law deals with abuse of dominant position. It is therefore important that the Australian equivalent provision captures unilateral anti-competitive conduct of a similar nature – and it should not capture conduct that is already prohibited by other provisions of the CCA.

At the moment, the Discussion Paper does not set out the precise nature of the conduct sought to be captured by the changes to section 46, nor does it distinguish how that conduct is not already caught by other provisions of the CCA. That is, there is no clear establishment of the scope of the provision other than by what it should not capture – for example, the football analogy on page 3[1] or the oft cited passage from the High Court decision in Queensland Wire (1989) as to the object of section 46 ("to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to an end").

At this time CBH acknowledges the desire from some parts of the rural community to address concerns as to imbalances in bargaining power in the agricultural sector in relation to the retail sector. However CBH remains concerned that the proposed changes to section 46 will have unintended consequences and are not from a policy perspective the first best means to address such concerns.

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[1] Australian Government, Options to strengthen the misuse of market power law, Discussion Paper, December 2015

> "The role of section 46 is to distinguish vigorous competitive activity, which is desirable, from economically inefficient, monopolistic practices that may exclude rivals and harm the competitive process. To use a sporting analogy, section 46 should not seek to prevent a team from winning a grand final by training harder, having better skills or using better strategies, but it should prevent teams from refusing to allow their opponents access to the field."

3. The Discussion Paper Options

Options C, D, E and F each involve the removal of the "taking advantage" element and also the change to a "substantial lessening of competition" test. Option B involves the removal of "take advantage" but retains the same competition language.

CBH as a cooperative has a focus on decreasing costs in the export supply chain to the benefit of its grower members and growers in general by operating in a cost effective and efficient manner. As one of Australia's largest grain marketers and as a cooperative with a large grower base, we are conscious of our market position, although we believe that we operate subject to significant constraints from our Australian and much larger international competitors, as well as the fact that we seek to act in the best interests of our grower members by facilitating competition.

In these circumstances, CBH is concerned that by seeking to act in the best interests of its grower members and farmers in reducing costs in the export supply chain (even if supplying goods or services at above cost), it may make it difficult for other competing suppliers to compete because we seek to operate on low margins and return value to growers. As such the "taking advantage" element of section 46 provides some comfort for CBH that in efficiently exporting at a lower cost for farmers it is complying with the law, as other cooperatives would also seek to act in a similar manner.

While the taking advantage element has been criticised by some as being an ineffective filter as the same conduct by larger corporations may have a greater impact on competition than if done by a smaller competitor, section 46 was amended by section 46(6A) to provide guidance on "taking advantage". Further, there are real questions as to how the substantial lessening of competition test will be applied in a unilateral conduct context in relation to the impact on competition in Australia by the Courts or the Australian Competition & Consumer Commission ("**ACCC**").

First, section 46(6A) provides greater interpretative assistance than simply whether a smaller corporation would have engaged in similar conduct. Section 46(6A) provides as follows:

> *"(**6A**) [**Whether corporation took advantage of market power**] In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:*
>
> *(a) Whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;*
>
> *(b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;*

(c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;

(d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

This subsection does not limit the matters to which the court may have regard.

[Subs 6A) insert Act 116 of 2008, s 3 and Sch 1 item 5]"

These changes were heavily promoted by the ACCC under its previous Chairman and the Courts interpretation of this element of this section is developing. This element of "taking advantage" also maintains the section's relationship with "misuse" of market power.

It may also be important to note the comments of Justice Middleton in "The Trade Practices Legislation Amendment Act 2008 (Cth) and s46 of the Trace Practices Act 1974 (Cth) will anything really change?" (FCA [2009] FedJSchol 11 where his Honour thought that cases such as Rural Press (2003) in the High Court would have been decided differently with the section 46(6A) amendment.

http://www.austlii.edu.au/au/journals/FedJSchol/2009/11.html

Further, the change to a substantial lessening of competition test (SLC Test) is a different competition test to the current test of whether the conduct is for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into the market, or deterring or preventing a person from engaging in competitive conduct. The criticism of this element of the test that it is focussed on competitors, not competition, is somewhat of a red herring as the courts ever since the Queensland Wire Case in 1989 have focussed on harm to the competitive process.

The SLC test is untested in Australia in relation to unilateral conduct, although has been considered in relation to section 45 and 47 and section 50 (mergers) of the CCA. However, the SLC test as used by the ACCC in sections 45 and 47 has not considered in any detail the issues of pro-competitive efficiency enhancing behavior as may occur with unilateral conduct. Further, no case has been made why existing sections 45 and 47 used by the ACCC would not capture the conduct sought to be captured by the proposed amended language.

For example, in relation to section 50, the ACCC has only accepted in the consideration of the SLC test efficiencies which make the merger parties more effective competitors and relies upon the authorization test and public benefits for parties to prove efficiencies. In this situation, while the authorisation process is useful in certain circumstances, it would create increased red tape and regulatory burden to require parties to seek authorization for section 46 conduct on the basis it involves efficiencies. While a useful option – the misuse

of market power law should clearly take efficiencies into account rather than requiring parties to seek statutory exemptions and the time and costs involved in an authorization process.

Accordingly, CBH believes that there is a significant risk that removing the "take advantage" element would over capture conduct that is competitively beneficial to society as the amended section could capture pro-competitive conduct by large organizations. In particular, the SLC test is as yet untested in whether such conduct could be said to lessen competition substantially even if it is clearly based on efficient conduct. CBH anticipates that the ACCC might well say that such conduct does not harm competition and therefore is likely to be lawful, but at the same time it is quite likely that such conduct by large organisations would be heavily investigated by the ACCC. The time and cost of investigations as well as their nature may see boards of companies hesitant to pursue vigorous competitive conduct that could invite ACCC investigation and the possibility of litigation.

4. Purpose element and safeguards

CBH notes the retention of "purpose" in some of the alternative formulations of section 46 (although the take advantage element has been removed). As others have noted, as "purpose" can be said to be inferred from documents or communications, purpose does not always provide an adequate filter for conduct, as there may be emails or documents that could be taken out of context or are an overzealous reflection of an individual's views of competing aggressively, and may not be truly reflective of the purpose of the overall entity. Accordingly, the retention of the purpose element is not a panacea for the uncertainties created by the proposed changes.

Given changes to the competition test that is proposed in the section it is also noted that the purpose element applies to a new competition test and that test may not be entirely appropriate for unilateral conduct in that it may not fully take into account efficiencies arising from the particular conduct.

While CBH does not believe that the alternative options in the Discussion Paper establish a clear way forward, if it is proposed to proceed with an alternative formulation for section 46, CBH requests that there be safeguards that it does not apply to conduct by cooperatives for the benefit of their members and for conduct associated with efficiency enhancing conduct relating to Australia's agricultural export sector.

5. Conclusion

Finally, CBH as a cooperative working for the benefit of its grower members, believes that it is important that the law in this area be clear so that CBH and other corporates are able to conduct their operations within the

law. There is a significant compliance cost and regulatory burden imposed by laws that are imprecise and unclear in application, both in compliance costs and also in costs of regulatory interaction and responses to questions and investigations by the ACCC. The Cement Australia decision in 2014 involved a 940 page decision at first instance. Such a lengthy decision in part highlights the complex factual and legal issues involved in misuse of market power cases. CBH is keen to ensure that it complies with the law and requests that as far as possible the Government and legislature seek to provide clear lines and drafting in legislation so that businesses may know where they stand in order to comply with the law.

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