The government's announcement that it will support in full the recommendations of the Harper Review on misuse of market power, is a victory for good competition law.

Ultimately it is a win for competition and consumers (as distinct from small businesses, contrary to some of the spin accompanying the announcement); and for principle over politics, although some may suspect a behind-the-scenes deal done with stakeholders who actively opposed the reform, particularly representatives of the big business community.

In what came as a surprise to some, after protracted debate and political manoeuvring, the government announced it would repeal the current section 46 of the Competition and Consumer Act. In its place there will be a prohibition on businesses with substantial market power engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition.

The government cannot be criticised for not consulting extensively or for failing to consider alternatives (so-called "part-Harper" approaches).

This has not stopped reform opponents from responding to the announcement by warning of chilling effects, including dampening of innovation and investment .

However, this is a cry routinely heard when competition law reforms likely to affect big business are advocated. Such claims may generate noise but evidence supporting them is thin on the ground.

Those with a more pragmatic (or perhaps opportunistic) mind-set will be starting work on what the reform means for advising on and enforcing the law. However it will be some time before the announcement translates into legislation. An exposure draft bill will be released and consulted on, and then there is (again) a political process, not least involving a difficult Senate and a possible election, to be navigated.

Time to address sanctions and compensation

During this pause then, the issue of penalties and remedies should be considered. Getting the law right is essential. But so is ensuring that law-breakers are deterred and punished, and that victims are compensated. Our system is wanting in these respects.

Financial penalties fall way below the statutory maximum – the greater of $10 million, three times the gain from the breach, or 10% of 12 months of corporate turnover, and are woefully out of step with international benchmarks.

Our highest penalty for misuse of market power to date is $14 million (against Cabcharge). The highest imposed by the European Commission is €1.06 billion (against Intel). Even accounting for the disparity in market size, the comparison is stark.

Part of the reason for this is that our judges are reticent to penalise close to the maximum – a worse case is always imaginable. Part of the reason is that the Australian Competition and Consumer Commission settles a large proportion of these cases, following an arduous negotiation in which there is often considerable asymmetry in resources and hence bargaining power between the enforcement agency and its generally more richly endowed “opponent”.

In this negotiating environment, compromises are inevitably struck – not only on the extent of liability admitted, but also the size of penalties recommended for judicial endorsement. What is more, the question of compensation rarely rates a mention.

What should be done?

A useful start would be the approach taken to calculating penalties - a legislated base fine that is an eye-opening percentage (say, up to 30%) of the revenue derived from the sales affected by the anti-competitive conduct, would be a useful start.

The base fine could then be adjusted to accommodate either aggravating (recividism) or mitigating (cooperation) factors. The European Commission applies this method and imposes fines in the hundreds of millions.

While on the question of penalties, urgent attention also needs to be given to the maximum for unconscionable B2B conduct – a figure of $1.1million, which is really no more than a slap on the corporate wrist.

We know from the ACCC's recent action against Coles that small businesses are damaged not just by anti-competitive behaviour, but also by commercial schemes and tactics that offend any basic measure of business conscience.

The Food and Grocery Code of Conduct introduced last year is intended to address much of this behaviour, at least in the grocery sector. The ACCC has signalled that it will closely monitor compliance and will not hesitate to take action against breaches of the code. But such breaches do not attract penalties. Yet another opportunity for reform!

ACCC resources

The enforcement budget of the ACCC could also do with an uplift. The ALP's recently released small business policy proposed measures designed to facilitate more private litigation by the victims of anti-competitive behaviour.

The policy proposes allowing the Federal Court to exempt small businesses from adverse costs orders, and providing resources for the Small Business and Family Enterprise Ombudsman to advise on the merits of litigation.

Labor is right - the financial risk of an adverse costs order is a major disincentive for small businesses. However, removing this risk and funding the Small Business Ombudsman to advise on legal proceedings are unlikely to help overcome fears of commercial retribution (including the spectre of refusal to stock or supply).

The idea of the Ombudsman advising on success prospects in any such venture is similarly questionable. Even the best legal minds, commanding premium-end fees, frequently diverge on the tricky technical issues that beset this area of the law.

What is needed is a potent sanctions regime and a well-funded enforcement agency on stand-by to apply it. That will do more to deter powerful companies from misusing their market muscle in the first place. Prevention is always better than cure.

Greater funding for the ACCC could be sourced through increased revenues from higher penalties. This would shore up the watchdog's negotiating position, not just on penalties but also on compensation, and ultimately its capacity to bring more cases against big businesses.

ACCC chairman Rod Sims has shown he has the appetite for this. Soon he will have a coherent law. Now all he needs is the arsenal to enforce it.

Caron Beaton-Wells receives funding from the Australian Research Council.

Read more http://theconversation.com/the-government-goes-the-full-harper-on-competition-now-for-sanctions-56277