Australia has many concentrated markets, dominated by a few big businesses. Should these businesses be required to actively promote competition?

Australia's current competition law says that as long as a business doesn't use its market power in a way that is intended to harm competition and consumers, it has behaved legally.

But perhaps the law should go further, so a big business is required to actively "assist" competitors or to treat competitors on the same terms that it treats itself.

Arguably, this is the position in Europe, where Google is being prosecuted for not providing competitor advertisers with "equal access" to Google's own search engine. Similarly, Australia's infrastructure access laws place a competitive obligation on a business that controls an "essential facility".

Or does a business with market power owe a "duty of care"? This means it doesn't need to actively help competition. However, the business needs to ensure it doesn't harm competition, either intentionally or accidentally, through its conduct.

For example, a big business, like any other business, can negotiate with suppliers. But it needs to recognise that, because of its market power, such negotiations may have very different consequences.

For example, the suppliers may stop sales or raise prices to other businesses if these terms and conditions are used as comparatives by the business with market power. This was at the heart of the Safeway bread case , where the supermarket was penalised for fixing the price of bread and misusing its market power.

Australia's current system

Australia, like most developed countries, makes it illegal for a dominant business to abuse its

market power and reduce competition. But what does this mean?

It is clearly not about protecting competitors. As the final report of the Competition Policy Review (2015) notes, competition law:

“is not designed to support a particular number of participants in a market or to protect individual competitors; instead, it is designed to prevent competitors’ behaviour from damaging the competitive process to the detriment of consumers”.

Unfortunately, the “competitive process” is poorly defined. Does it mean that big business can compete on the merits? Or that the law is not broken so long as a business does not behave in a way that depends on its market power? Or that the aim is to protect an equally efficient competitor?

Neither economics nor the law provides a simple answer to these questions.

For example, if a big business drops its price, undercutting rivals so that they exit, and then raises its price above the original level, harming consumers, is this illegal?

According to legal precedent, both here and overseas, it depends. A business cannot price “too low” or it breaks the law. But undercutting competitors, even if this leads to higher prices later on, is not necessarily illegal.

Economics also provides little help. According to some economists , low pricing should be illegal if it harms consumers over the longer term. According to others, the short-term benefits to consumers of low prices should never be prevented.

So the problem of designing competition laws to “protect the competitive process” is that it is unclear what this means.

Changes to Australia's competition laws

In contrast, we can think of competition law as creating competitive obligations on big business. Different views of obligations will lead to very different laws. The changes to our competition laws proposed by the Competition Policy Review create positive obligations. That is why they are so controversial.

At a minimum, the proposed laws create a duty of care. So long as there is an anti-competitive effect, a business can break the law unintentionally. Intent or purpose is not required.

Arguably, this is not a major change. The courts assume big business knows what it is doing. Claims by big business that "we didn't expect that" are often treated with scepticism.

However, the proposed changes go further. A business with market power may breach the proposed law if it acts in a way that substantially lessens competition, even if its behaviour is not connected to its market power.

This goes beyond a duty of care. It creates a proactive obligation and may limit behaviour that would be considered pro-competitive for a business without market power.

This is a major change in how Australia governs competition. And it may not be desirable.

The changes may lead to excessive business caution. It may harm consumers, particularly if it results in large international players, like Google, Visa or Apple, bypassing our market or restricting new services for fear that they might break the law. Europe is too big for business to ignore. Australia is not.

The need for debate

Supporters of the proposed competition law changes would argue that I am too pessimistic. The courts, they would claim, will not put a positive obligation on big business. The courts will

understand what it means to “substantially lessen competition” and will stop short of such a requirement.

Perhaps. But what if they are wrong?

Before changing our competition laws we need to debate the objective of those laws. Debates about a poorly defined “competitive process” are unhelpful. Rather, what, if any, competitive obligations do we want to place on a business that has “substantial market power”? What are the costs and benefits of different obligations?

Maybe the status quo is best? Or possibly we want big business to bear a positive obligation to competition? I don’t know – because we have not had the discussion.

However, I do know that this debate is necessary. To change our laws without clearly stating the objective is a recipe for confusion and uncertainty.

Stephen King does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.

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