



**Australian Government**

# **Options to strengthen the misuse of market power law**

---

Discussion Paper  
December 2015

© Commonwealth of Australia 2015

ISBN 978-1-925220-77-3

This publication is available for your use under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a Creative Commons Attribution 3.0 Australia licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

### **Treasury material used 'as supplied'**

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics – then Treasury prefers the following attribution:

*Source: The Australian Government the Treasury*

### **Derivative material**

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

*Based on The Australian Government the Treasury data*

### **Use of the Coat of Arms**

The terms under which the Coat of Arms can be used are set out on the It's an Honour website (see [www.itsanhonour.gov.au](http://www.itsanhonour.gov.au))

### **Other uses**

Enquiries regarding this licence and any other use of this document are welcome at:

Manager  
Communications  
The Treasury  
Langton Crescent  
Parkes ACT 2600  
Email: [medialiaison@treasury.gov.au](mailto:medialiaison@treasury.gov.au)

## CONSULTATION PROCESS



The Final Report of the Competition Policy Review (the Harper Review) made 56 recommendations on Australia's competition framework spanning most sectors of the economy and with implications for all levels of government.

On 24 November 2015 I released the Australian Government response to all recommendations, which noted the recommendation on misuse of market power and that the Government will consult further on options to strengthen the misuse of market power provision.

The purpose of this discussion paper is to reinvigorate the debate on the Harper Review's proposal with a view to bringing parties closer together on the misuse of market power provision (section 46) of the *Competition and Consumer Act 2010* (CCA). Given the importance of the provision to the Australian economy and the level of contention surrounding the proposed amendment, the Government is seeking a way forward on options to ensure section 46 offers a commercially and legally robust, yet practical, approach to preventing the misuse of market power.

The Government will consider the outcome of this consultation in reaching a decision on the Harper Review's recommendation to strengthen the misuse of market power provision. I will submit a proposal for Cabinet consideration by the end of March 2016, at which time the Government will announce a final position.

*Treasurer, the Hon Scott Morrison MP*

### Request for feedback and comments

There are two ways that you can get involved. You can provide a formal submission in response to this consultation paper by email or provide brief comments on key issues via the Treasury website.

Submissions emailed electronically are preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

**Treasury will publish formal submissions on the Treasury website, unless the submission itself is marked as confidential.** Automatically generated confidentiality statements in emails will not suffice for this purpose. Respondents who would like part of their submission to remain confidential should mark this information as such and provide it in a separate document. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

### **Closing date for submissions: no later than Friday, 12 February 2016**

Email: [competition@treasury.gov.au](mailto:competition@treasury.gov.au)

Online: [www.treasury.gov.au/ConsultationsandReviews/Consultations](http://www.treasury.gov.au/ConsultationsandReviews/Consultations)

Enquiries: Enquiries can be initially directed to Scott Rogers, Manager, Competition Policy Unit

Phone: 02 6263 3076

# CONTENTS

<b>Options to strengthen the misuse of market power law</b> .....	<b>2</b>
Introduction.....	2
The Harper Review’s findings.....	3
Remove the ‘take advantage’ test .....	4
Move from a ‘purpose’ to ‘purpose, effect or likely effect’ test .....	5
Move from a focus on ‘damage to a competitor’ to a focus on damage to the competitive process (‘substantially lessening competition’).....	6
Introduce mandatory factors that courts must take into account .....	6
Additional measures to reduce uncertainty .....	6
Issues for discussion .....	7
Take advantage .....	7
Purpose or effect (or likely effect) .....	7
Substantially lessening competition .....	8
Mandatory factors.....	8
Authorisations .....	8
Other issues.....	8
Specific options .....	9
<b>Attachment A: Competition Policy Review Final Report</b> .....	<b>12</b>
Misuse of market power .....	12
Difficulties with the current form of section 46.....	14
Re-framing section 46 .....	17
Divestiture remedy to address market power concerns .....	22

## OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW

The independent Competition Policy Review was commissioned by the Government on 24 March 2014 and undertaken by a panel chaired by Professor Ian Harper.<sup>1</sup> The Harper Panel received almost 350 submissions in response to its Issues Paper and around 600 submissions in response to its Draft Report. Reflecting on the views put by all stakeholders, the Harper Panel recommended amendments to strengthen the misuse of market power provision so that it better restricts egregious anti-competitive conduct.

Following the release of the Final Report on 31 March 2015, the Government conducted a broad consultation process where a further 140 submissions were received. Throughout all the consultation processes, the misuse of market power provision and proposed amendments was the most common topic of submissions.

During consultation, stakeholder opinions were divided on whether the current misuse of market power provision is framed in a manner that is effective in deterring anti-competitive behaviour by firms with substantial market power. Many stakeholders supported the recommended amendments and many other stakeholders opposed any change in the provision. In this situation the debate has stalled.

The amendments to section 46 proposed by the Harper Panel contain a number of elements. This paper summarises the position reached in the Harper Review and sets out each of the elements with how they differ from the current position. The paper also canvasses a range of specific options to amend the misuse of market power provision, in addition to the Harper Panel's proposal. The intent is to encourage discussion about the merits of each element of the Harper Panel's proposal and of potential alternative options, without limiting discussion to the options presented.

### INTRODUCTION

Competition is a process of rivalry between businesses seeking to out-do each other for their individual commercial gain. This process drives businesses to increase sales and service offerings by bringing new products to market, and find new ways to deliver lower prices and meet customer expectations to increase market share and return on capital invested. Competition and the threat of competition (contestability) promote efficient production which, over time, also drives innovation and investment in new technologies, and the development of new products and business models that meet consumers' needs.

The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection. It provides competition laws that apply across the economy to encourage and maintain the competitive processes in Australia's markets. In particular, Part IV of the CCA seeks to proscribe particular types of conduct which would be anti-competitive in the sense of harming competition in a market, or preventing or deterring the entry of new firms.

The misuse of market power provision (section 46) regulates unilateral anti-competitive conduct. Subsection 46(1) prohibits a corporation with a substantial degree of market power from misusing that power. Subsection 46(1AA) more specifically prohibits predatory pricing by a corporation with a substantial share of the market. In both sections, behaviour is prohibited where it has the purpose of

---

1 The Panel consisted of Professor Ian Harper (Chair), Mr Peter Anderson, Ms Su McCluskey and Mr Michael O'Bryan QC.

eliminating or substantially damaging a competitor, preventing the entry of competitors or deterring or preventing competitive conduct.

Neither of these provisions prohibits a large market share or a high degree of market power on their own, or even a monopoly. Rather they are designed to protect the competitive process in markets.

This is described by the High Court in an oft-cited passage:

The object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort ... and these injuries are the inevitable consequence of the competition section 46 is designed to foster.<sup>2</sup>

That is, firms are entitled, and indeed encouraged, to succeed through competition, even if they put competitors out of business and achieve a position of market dominance through their success. This 'Darwinian' process of aggressive rivalry is what drives efficient outcomes and benefits to consumers. The law should keep markets contestable so that innovative Australian businesses or new entrants from overseas have the opportunity to compete on their merits.

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.

Few cases are brought under the current misuse of market power provision. In the past 15 years, only seven cases have been considered by the full Federal Court or the High Court.

Section 46 has been the subject of a large number of previous independent reviews and parliamentary inquiries. Other than the Harper Review, there have been 11 reviews of the misuse of market power provision since 1976, only one of which recommended substantial changes. Past reviews have mostly looked at different alternatives to the one proposed by the Harper Panel and their conclusions were generally reached prior to the judgements in recent cases such as *Rural Press* and *Cement Australia*.

## THE HARPER REVIEW'S FINDINGS

The current misuse of market power provision prohibits:

- corporations that have a substantial degree of power in a market;
- from taking advantage of that power;
- for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

Following extensive public consultation, the Harper Panel considered that section 46 is deficient in its current form, both holistically and with respect to the 'take advantage' and 'purpose' limbs

---

<sup>2</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Limited* (1989) ATPR 40-925 at 50,010.

individually. The Panel was of the view that the current misuse of market power provision is not reliably enforceable and permits conduct that undermines the competitive process. This led the Panel to make the following recommendation.

### Recommendation 30 — Misuse of market power

The primary prohibition in section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- 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
- 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.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of ‘take advantage’ and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

The main elements of the recommendation are:

1. remove the ‘take advantage’ test;
2. move from a ‘purpose’ to ‘purpose, effect or likely effect’ test;
3. move from a focus on ‘damage to a competitor’ to a focus on the competitive process (‘substantially lessening competition’);
4. introduce mandatory factors that courts must take into account; and
5. additional measures to reduce uncertainty.

This section summarises the Panel’s considerations (reproduced in full at Attachment A).

### Remove the ‘take advantage’ test

The Harper Panel considered the ‘take advantage’ limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct.

The Panel noted that the meaning of the expression ‘take advantage’ that has emerged from case law is subtle and difficult to apply in practice. The Panel outlined several cases where the courts encountered difficulties with meaning of the term, including:

- In *Rural Press*, trial and appellate courts differed on whether a threat by one regional newspaper publisher to begin distributing its newspaper in a neighbouring region, in order to deter the neighbour from distributing its newspaper in the first publisher’s region, involved taking advantage of market power — the High Court ultimately concluded that it did not. Following *Rural Press*, Parliament amended section 46 in 2008 to explain the meaning of ‘take advantage’.
- Recently, in *Cement Australia*, the meaning of the expression ‘take advantage’ was again a central matter of dispute in determining whether conduct, involving the acquisition of fly ash (a by-product of coal-fired electricity generation, that can be used as a cementitious material in concrete), amounted to a misuse of market power. The Federal Court concluded that the conduct did not amount to a misuse of market power in contravention of section 46 but did have the likely effect of substantially lessening competition in contravention of section 45.

Further, the Harper Panel noted that the ‘take advantage’ test is not best adapted to identifying misuse of market power. The ‘take advantage’ test allows firms with substantial market power to engage in particular business conduct if firms without market power can also commercially engage in that conduct. The Panel considered that business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation might be competitively benign when undertaken by a firm without market power, but competitively harmful where a firm has market power.

The Harper Panel noted that it is unclear whether the 2008 amendments to the provision will, over time, address the fundamental concerns with the ‘take advantage’ limb. In 2008 subsection 46(6A) was inserted into the CCA to provide legislative guidance on the term ‘take advantage’. It clarifies that the court may have regard to whether the conduct was materially facilitated by the corporation’s market power, whether it engaged in the conduct relying on its market power, whether it is likely that the corporation would have engaged in the conduct if it did not have market power, or whether the conduct was otherwise related to the corporation’s market power. However, these changes largely codified jurisprudence and may or may not alter the courts’ interpretation over time.

### Move from a ‘purpose’ to ‘purpose, effect or likely effect’ test

The ‘purpose’ test and whether it should be amended to include an ‘effects’ test has been the primary focus of debate concerning the provision. Submissions to the Harper Review advanced two main arguments for the inclusion of an effects test:

- As a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect of conduct that harms consumer welfare.
- As a matter of practicality, proving the purpose of commercial conduct is difficult because it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

On the other hand, those opposing reform are concerned that introducing an effects test would create uncertainty and so ‘chill’ competitive behaviour by firms in the market, which would be harmful to consumer welfare.



The Harper Panel considered the ‘purpose’ limb, which prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches. The Harper Panel found that international competition laws in the EU, US, UK and Canada have been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct. In Australia, section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition. Australia is almost unique (save for New Zealand, whose analogous law substantially follows the approach in section 46) in adopting both the ‘take advantage’ limb and a test based only on anti-competitive purpose.

### **Move from a focus on ‘damage to a competitor’ to a focus on damage to the competitive process (‘substantially lessening competition’)**

The Harper Panel also considered whether the law should be drafted to protect competitors or the competitive process. Generally speaking, the CCA is an economic-based law, concerned with the state of competition in markets, rather than with issues of fairness or equity on market participants. Indeed, harming the businesses of competitors is an expected outcome of vigorous competition and it would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors. For this reason, the Panel recommended reframing the provision to focus on whether behaviour ‘substantially lessens competition’ to enable the courts to assess whether conduct is harmful to the competitive process, rather than individual competitors.

The proposed test of ‘substantially lessening competition’ is the same as that found in sections 45 (contracts, arrangements or understandings that restrict dealings or affect competition), 47 (exclusive dealing), and 50 (mergers) of the CCA.

### **Introduce mandatory factors that courts must take into account**

The Harper Panel considered the provision should also include legislative guidance directing courts and firms to weigh the pro-competitive and anti-competitive impact of conduct. These could take the form of mandatory factors that courts must consider, but may go beyond, when determining whether there has been a substantial lessening of competition. The Panel stated that these factors would assist with the court’s analysis and businesses’ understanding of how the proposed prohibition should be applied.

### **Additional measures to reduce uncertainty**

The Harper Panel acknowledged that, as with any change to the law, amending section 46 will involve some uncertainty. At least part of the jurisprudence to date would be lost and it would take time before a new body of case law to develop. This would be mitigated by adopting the long-standing expressions ‘substantial degree of power in a market’ and ‘substantial lessening of competition’. Further, there is clearly uncertainty with elements of the current provision, particularly the ‘take advantage’ component of the provision. On balance, the Panel considered that any uncertainty would be outweighed by the benefit of a more effective prohibition on unilateral anti-competitive conduct.

The Panel considered that supplementary measures could help to address industry concerns about uncertainty arising from amending section 46, including:

- allowing ACCC authorisation where the conduct generates a net public benefit;
- asking the ACCC to issue guidance material on its approach to enforcement of an amended section 46; and
- thorough consultation on the form and wording of draft legislation.

## ISSUES FOR DISCUSSION

The Harper Panel formed the view that the current provision is not fit for purpose, as it is not reliably enforceable and permits conduct that undermines the competitive process.

The Government would like to hear the full range of views on options available to strengthen the misuse of market power provision and the costs and benefits of amending certain elements of the provision.

1. What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provision?
2. What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?

The Government recognises that decisions on individual elements of an alternative provision (to the existing provision and the Harper Panel's proposal) are interrelated. Hence, it is willing to receive submissions on integrated approaches to amending the existing provision. Questions below aim to seek views on specific elements.

### Take advantage

Removing the take advantage limb would remove the requirement for a causal connection between the market power of a firm and the exclusionary conduct. Firms would still be required both to have market power and engage in the conduct, but would no longer be protected by the defence that a firm without market power could commercially engage in the same behaviour.

3. Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?
4. Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed to certain 'exclusionary' conduct if the 'take advantage' limb is removed?
5. Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?

### Purpose or effect (or likely effect)

The purpose of a firm's actions can be difficult to infer. The current provision (subsection 46(7)) directs that courts may infer purpose from the conduct of the corporation or of any other person, or from other relevant circumstances. A focus on purpose can increase the importance of documentary evidence and reduce the emphasis on demonstrating detrimental economic effects and consumer disadvantage created by the conduct. The proposed move to include an effects test has been the most contentious aspect of the changes to section 46 proposed in the Harper Review.

6. Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?
7. Alternatively could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?

## Substantially lessening competition

The current provision outlines specific examples of conduct that are prohibited, including ‘eliminating or substantially damaging a competitor’. However, in practice courts have interpreted the provision to protect the process of competition, and not individual competitors (for example, see the High Court passage quoted in the Introduction above). In other provisions of Part IV, including sections 45, 47 and 50, a more general framing that focuses on substantially lessening competition is used.

8. Given the understanding of the term ‘substantially lessening competition’ that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?
9. Should specific examples of prohibited behaviours or conduct be retained or included?

The effect or likely effect of substantially lessening competition currently applies to most key provisions of the competition law. Despite this, some concerns have been expressed about applying it to section 46.

10. An alternative to applying a ‘purpose, effect or likely effect’ test could be to limit the test to ‘purpose of substantial lessening competition’. What would be the advantages and disadvantages of such an approach?

## Mandatory factors

The inclusion of factors which courts must consider, but are not limited to, would provide guidance to the courts on the interpretation of the provision. On the other hand, they may distinguish the concept of substantially lessening competition in section 46 from its application in other sections.

11. Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?
12. If mandatory factors were adopted, what should those factors be?

## Authorisations

Part VII of the CCA provides for a range of exceptions to the operation of certain provisions (via notification, authorisation or clearance). This allows firms to engage in particular types of prohibited conduct if that conduct is considered to be unlikely to substantially lessen competition, or the conduct would be likely to have a net public benefit (the benefit of the conduct would outweigh any detriments).

13. Should authorisation be available for conduct that might otherwise be captured by section 46?

## Other issues

In responding to these questions, the Government is also interested to understand:

14. If quantitative data on the regulatory impact of alternative options on stakeholders (including the methodologies used) can be provided.
15. Are there any other alternative amendments to the Harper Panel’s proposed provision that would be more effective than those canvassed in the Panel’s proposal?

## Specific options

Taking into account the elements of the Harper Panel's recommendation discussed above, a range of specific options to amend the misuse of market power provision are presented below.

### Option A – Making no amendment to the current provision

This option involves maintaining the status quo, as discussed above (see Introduction).

### Option B – Amend the existing provision by removing the words 'take advantage'

The new provision would prohibit corporations that have a substantial degree of power in a market from engaging in conduct for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

Removing 'take advantage' from the existing provision would, in effect, remove the defence that a firm with substantial market power may engage in particular business conduct if it can demonstrate that firms without market power can also commercially engage in that conduct. It would also allow the provision to be simplified, as amendments introduced to explain the meaning of take advantage could be removed.

The option retains the 'purpose-only' test (does not involve extending the provision to also include an 'effects test'). Those opposing a move to an 'effects test' are concerned that such a move would 'chill' competitive behaviour by firms in the market, which would be harmful to consumer welfare. However, not extending the existing provision to capture the anti-competitive effects of conduct may risk not capturing conduct that has damaging economic effects on markets.

### Option C – Amend the existing provision by removing the words 'take advantage', including a 'purpose of substantially lessening competition' test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision

The new provision would prohibit corporations that have a substantial degree of power in a market from engaging in conduct for the purpose of substantially lessening competition in that or any other market. It would also include making authorisation available, and the ACCC issuing guidelines regarding its approach to the provision.

This option would remove 'take advantage', but would also address concerns about the focus of the provision by changing that focus from harm to competitors to harm to the competitive process (substantially lessening competition). Extending the existing provision to capture conduct that 'substantially lessens competition' would enable the courts to assess whether conduct is harmful to the competitive process, rather than individual competitors, by adopting a term used elsewhere in the competition provisions of the law. This would be a significant change relative to the existing provision and would necessarily involve some uncertainty.

Also, as with option B, this option involves retaining the 'purpose-only' test and not extending the provision to also include an 'effects test', which may risk not capturing conduct with damaging economic effects on markets.

The adoption of supplementary measures - making authorisation available and the ACCC issuing guidelines regarding its approach to the provision - should help to address concerns about uncertainty arising from amending section 46.

**Option D – Amend the existing provision by removing the words ‘take advantage’, including a ‘purpose of substantially lessening competition’ test, including mandatory factors for the courts’ consideration, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision**

The new provision would prohibit corporations that have a substantial degree of power in a market from engaging in conduct for the purpose of substantially lessening competition in that or any other market. It would also include establishing mandatory factors for the courts’ consideration, making authorisation available, and the ACCC issuing guidelines regarding its approach to the provision.

This option would remove ‘take advantage’ and address concerns about the focus of the provision by changing that focus from harm to competitors to harm to the competitive process.

As with option C, this option involves retaining the ‘purpose-only’ test and not extending the provision to also include an ‘effects test’.

This option would incorporate mandatory factors for courts to consider. The Harper Panel stated that the mandatory factors would assist with courts’ analysis and businesses’ understanding of how the proposed prohibition should be applied. The factors may also be a useful tool for the courts to filter competitive and anti-competitive conduct. However, some stakeholders considered the factors may add costs, as businesses will need to consider the factors prior to undertaking a decision. In some other provisions using ‘substantial lessening of competition’ in the CCA, there are no such factors employed. Guidelines issued by the ACCC regarding its approach to the provision would instead be used to provide assistance to businesses.

**Option E – Amend the existing provision by removing the words ‘take advantage’, including a ‘purpose, effect or likely effect of substantially lessening competition’ test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision**

The new provision would prohibit corporations that have a substantial degree of power in a market from engaging in conduct that has the purpose, or would have the effect, or likely effect, of substantially lessening competition in that or any other market. It would also include making authorisation available, and the ACCC issuing guidelines regarding its approach to the provision.

As with options C and D, this option would both remove ‘take advantage’ and move the focus of the provision to the impact of conduct on the competitive process. In addition, by moving from a ‘purpose’ to ‘purpose, effect or likely effect’ test, this option would capture conduct with damaging economic effects. Where firms are concerned that their conduct could have detrimental effects on the competitive process, authorisation would be made available provided they could demonstrate the anticipated benefits to consumers would be expected to outweigh the costs.

As with option C, this option would not incorporate mandatory factors for courts to consider.

**Option F – Amend the existing provision by adopting the full set of changes recommended by the Harper Panel**

This option involves adopting all changes recommended by the Harper Panel, the elements of which are discussed above (see The Harper Panel's Findings).

16. Which of options A through F above is preferred? What are the relative strengths and weaknesses of each option? What information can you provide regarding the regulatory impact of each option on businesses?
17. Are there any other options (not outlined above) that should be considered?

# ATTACHMENT A: COMPETITION POLICY REVIEW FINAL REPORT

## PART 4 — COMPETITION LAWS

### 19.1 MISUSE OF MARKET POWER

Section 46 of the *Competition and Consumer Act 2010* (CCA) prohibits corporations that have a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.<sup>3</sup>

Many submissions comment on section 46. As reflected in those submissions, opinions are divided on whether section 46 is framed in a manner that is effective in deterring anti-competitive behaviour by firms with substantial market power.

Those seeking reform of the law most commonly propose that the prohibition should be revised or expanded to include an ‘effects’ test — that is, a firm with substantial market power would be prohibited from taking advantage of that power if the effect is to cause anti-competitive harm. Two main arguments are advanced for the inclusion of an effects test:

- As a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect of conduct that harms consumer welfare.
- As a matter of practicality, proving the purpose of commercial conduct is difficult because it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

Those opposing reform are concerned that introducing an effects test would ‘chill’ competitive behaviour by firms in the market, which would be harmful to consumer welfare.

The debate whether section 46 should be based solely on a ‘purpose’ test or should also (or alternatively) have an ‘effects’ test is one of the enduring controversies of competition policy in Australia. Section 46 has been the subject of a large number of independent reviews and parliamentary inquiries (see Box 19.2).

#### Box 19.2: History of proposals for an effects test<sup>4</sup>

Year	Review	Recommend effects test?	Reasons
1976	Trade Practices Act Review Committee (Swanson Committee)	No	The section should only prohibit abuses by a monopolist that involve a proscribed purpose.
1979	Trade Practices Consultative Committee (Blunt Review)	No	Would give the section too wide an application, bringing within its ambit much legitimate business conduct.
1984	Green Paper, The Trade Practices Act Proposals for Change	Yes	Difficulty in proving purpose.

<sup>3</sup> Part IV is mirrored in the Competition Code in Schedule 1 of the CCA, which applies the anti-competitive conduct laws through application legislation in the States and Territories.

<sup>4</sup> Adapted from Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), Canprint Communications, Canberra, Box 3.2 History of the effects test, page 83.

Year	Review	Recommend effects test?	Reasons
1989	House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee)	No	Insufficient evidence to justify the introduction of an effects test into section 46.
1991	Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee)	No	Might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.
1993	Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Committee)	No	It would not adequately distinguish between socially detrimental and socially beneficial conduct.
1999	Joint Select Committee on the Retailing Sector (Baird Committee)	No	Such a far-reaching change to the law may create much uncertainty in issues dealing with misuse of market power.
2001	House of Representatives Standing Committee on Economics, Finance and Public Administration (Hawker Committee)	No	Await the outcome of further cases on section 46 before considering any change to the law.
2002	Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the <i>Trade Practices Act 1974</i> .	No	Referred consideration of section 46 to the Dawson Review.
2003	Trade Practices Act Review Committee (Dawson Review)	No	The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive.
2004	Senate Economics References Committee Inquiry into the Effectiveness of the <i>Trade Practices Act 1974</i> in protecting Small Business	No	While sympathetic to some of the arguments for an effects test, the difficulties with introducing it meant that the Committee did not recommend the inclusion of an effects test.

The Panel considers that the long-running debate concerning ‘purpose’ and ‘effect’ in the context of section 46 has been somewhat unproductive. In one sense the concerns raised by both sides of the debate are correct.

Internationally, competition laws have been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct (see [Appendix B](#)). In Australia, section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition.

Equally, competition laws have been framed (and interpreted) in a manner that is designed to minimise the risk that the law might chill competitive behaviour.

The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct.



## Difficulties with the current form of section 46

Section 46 only applies to firms that have a substantial degree of power in a market. The threshold test of substantial market power enjoys broad support, and the Panel did not receive any submissions making a case for change.

Section 46 defines conduct as a misuse of market power if it satisfies two legal tests:

- First, the conduct must have involved taking advantage of the firm's market power.
- Second, the conduct must have been undertaken for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

### Take advantage

Both the courts and the legislature have wrestled with the meaning of the expression 'take advantage' over many years. Its meaning is subtle and difficult to apply in practice. The ordinary meaning of the words 'take advantage' is to use to one's advantage. But when the words are coupled with market power, it is necessary to understand how a firm might use market power to its advantage and what constitutes a use of market power.

The difficulty with the expression lies in the fact that market power is not a physical asset (such as an airport) or a commercial instrument (such as a lease), the use of which can be observed. Market power is an economic concept, describing the state or condition of a market. A firm possesses market power when it has a degree of freedom from competitive constraint. Recognising that, the High Court concluded in *Queensland Wire*<sup>5</sup> that taking advantage of market power means engaging in conduct that would not be undertaken in a competitive market (because the firm would be constrained by competition).

In the years since the decision in *Queensland Wire*, the difficulties in interpreting and applying the 'take advantage' test and determining whether specific business conduct does or does not involve taking advantage of market power have become apparent. The following cases illustrate some of the difficulties.

- In *Melway*,<sup>6</sup> trial and appellate courts differed on whether refusing to supply Melway street directories to a particular retailer involved taking advantage of market power — the High Court ultimately concluded that it did not.
- In *Boral*,<sup>7</sup> trial and appellate courts differed on the circumstances required to show that selling products at low prices involved taking advantage of market power (and constituted predatory pricing). Following *Boral*, the Parliament amended section 46 in an attempt to capture predatory pricing conduct.<sup>8</sup> However, the amendments themselves are cast in language that is difficult to interpret and apply in practice (while the amendments seek to prohibit pricing below cost, the expression 'cost' is not defined and there are circumstances in which pricing below certain measures of cost might be an ordinary business strategy in a competitive market).
- In *Rural Press*,<sup>9</sup> trial and appellate courts differed on whether a threat by one regional newspaper publisher to begin distributing its newspaper in a neighbouring region, in order to deter the neighbour from distributing its newspaper in the first publisher's region, involved taking advantage of market power — the High Court ultimately concluded that it did not. Following *Rural Press*,

<sup>5</sup> *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

<sup>6</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

<sup>7</sup> *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374.

<sup>8</sup> *Competition and Consumer Act 2010*, subsections 46(1AAA) and (1AA).

<sup>9</sup> *Rural Press Limited v ACCC* [2003] HCA 75.

Parliament amended section 46 in an attempt to explain the meaning of ‘take advantage’.<sup>10</sup> It is doubtful that the amendments assisted.

- Recently, in *Cement Australia*,<sup>11</sup> the meaning of the expression ‘take advantage’ was again a central matter of dispute in determining whether conduct, involving the acquisition of flyash (a by-product of coal-fired electricity generation, that can be used as a cementitious material in concrete), amounted to a misuse of market power. The Federal Court concluded that the conduct did not amount to a misuse of market power in contravention of section 46 but did have the likely effect of substantially lessening competition in contravention of section 45.

The important point is not whether the outcomes of those cases, on the facts before the court, were correct or incorrect from a competition policy perspective. The issue is whether the ‘take advantage’ limb of section 46 is sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct.

A number of submissions also draw attention to an economic problem in using the ‘take advantage’ test to distinguish between lawful and unlawful business conduct. The economic premise of the test is that a firm with substantial market power should be permitted to engage in particular business conduct if firms without market power also engage in that conduct. However, as observed by Katharine Kemp, US jurisprudence recognises that particular conduct might be competitively benign when undertaken by a firm without market power but competitively harmful where a firm has market power.<sup>12</sup> Similarly, Professor Stephen Corones submits:

... conduct engaged in by a firm with substantial market power will have a much greater propensity to have market-distorting foreclosure effect, than the same conduct engaged in by a firm without substantial market power. The need to examine the conduct of major business[es] more closely than those without market power has been recognised in both the United States and the EU. (DR sub, page 11)

RBB Economics submits:

Since the same conduct can have different economic effects in different circumstances, it follows that conduct can be anti-competitive when it is pursued by a firm with market power even if it is unproblematic in situations where such power is absent. If one considers most of the categories of conduct that can give rise to anti-competitive outcomes — price discrimination, exclusive dealing, loyalty rebates, bundling, refusal to deal, etc. — it is evident that these are also commonly observed phenomena in many well-functioning competitive markets. (DR sub, page 4)

In the Panel’s view, the ‘take advantage’ limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The test has given rise to substantial difficulties of interpretation, revealed in the decided cases, undermining confidence in the effectiveness of the law.

Further, and perhaps more significantly, the test is not best adapted to identifying misuse of market power. Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

---

<sup>10</sup> *Competition and Consumer Act 2010*, subsection 46(6A).

<sup>11</sup> *ACCC v Cement Australia* [2013] FCA 909.

<sup>12</sup> See also Katharine Kemp, DR sub, pages 9-12.

## Purpose

The second legal test in section 46 is the ‘purpose’ test. As noted earlier, the purpose test has been the primary focus of debate concerning section 46. Compared to the ‘take advantage’ test, the meaning of the ‘purpose’ test in section 46 is at least clear and capable of reliable application by the courts.

The debate over whether section 46 should include a subjective purpose test or an objective effects test tends to obscure a more significant issue. Presently, the purpose test in section 46 focuses on harm to individual competitors — conduct will be prohibited if it has the purpose of eliminating or substantially damaging a **competitor**, preventing the entry of a **person** into a market, or deterring or preventing a **person** from engaging in competitive conduct.

Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself — that is, the competitive process.

Given the existing focus of the purpose test in section 46, resistance to changing the word ‘purpose’ to ‘effect’ is understandable. It would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors. However, an important question arises whether section 46 ought to be directed at conduct that has the purpose of harming individual competitors (under the existing purpose test) or whether it ought to be directed at conduct that has the purpose or effect of harming the competitive process (consistent with the other main prohibitions in sections 45, 47 and 50 of the CCA).

Many submissions to the Draft Report express both strong support for<sup>13</sup> and strong opposition to<sup>14</sup> changes to the existing focus of section 46, viz, on ‘purpose’. Other submissions canvass other options, including retaining the existing proscribed purposes in addition to introducing a reference to ‘effect’,<sup>15</sup> duplicating existing provisions regarding the misuse of market power in the telecommunications industry<sup>16</sup> and re-framing the test in terms of the ‘rule of reason’ approach adopted in the US.<sup>17</sup>

---

13 See, for example: Alinta Energy, DR sub, page 2; George Altman, DR sub, page 2; Australian Automotive Aftermarket Association, DR sub, pages 10-11; Australian Chamber of Commerce and Industry, DR sub, page 16; Australian Competition and Consumer Commission, DR sub, pages 48-54; Australian Dairy Farmers, DR sub, pages 5-7; Australian Food and Grocery Council, DR sub, pages 7-8; Australian Motor Industry Federation, DR sub, pages 9-10; Australian Retailers Association, DR sub, pages 5-6; AURL FoodWorks, DR sub, pages 9-11; Business SA, DR sub, page 11; Chamber of Commerce and Industry Queensland, DR sub, pages 4-5; CHOICE, DR sub, pages 26-27; Consumer Action Law Centre, DR sub, pages 15-17; Professor Stephen Corones, DR sub, pages 1-12; Growcom, DR sub, page 2; iiNet, DR sub, page 4; Minter Ellison, DR sub, page 5; National Farmers Federation, DR sub, pages 10-12; New Zealand Commerce Commission, DR sub, pages 1-9; Queensland Law Society, DR sub, pages 3-4; RBB Economics, DR sub, pages 1-5; Retail Guild, DR sub, page 19; Rykris Pty Ltd, DR sub, page 2; Santos Retail, DR sub, page 1; Small Business Development Corporation (WA), DR sub, pages 7-9; The Australian Chamber of Fruit and Vegetable Industries, DR sub, pages 3-5; and WA Independent Grocers, DR sub, page 2.

14 See, for example: AGL Energy Limited, DR sub, pages 3-4; Arnold Bloch Leibler, DR sub, pages 4-7; ASTRA Subscription Media Australia, DR sub, pages 6-7; Australian Industry Group, DR sub, pages 20-21; Australian Institute of Company Directors, DR sub, pages 1-6; Australian National Retailers Association, DR sub, pages 29-35; Baker & McKenzie, DR sub, pages 3-5; Boral Limited, DR sub, pages 3-9; Business Council of Australia, DR sub, pages 13-20; Cement Industry Federation, DR sub, page 5; Coles Group Limited, DR sub, pages 8-10; Energy Supply Association of Australia, DR sub, pages 5-6; Foxtel, DR sub, pages 9-10; Housing Industry Association, DR sub, page 2; Insurance Australia Group, DR sub, pages 1-2; Insurance Council of Australia, DR sub, pages 3-4; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 12-19; Law Council of Australia — SME Committee, DR sub, pages 14-15; MasterCard, DR sub, pages 2-4; National Seniors Australia, DR sub, page 14; Origin Energy, DR sub, page 2; QBE Insurance Australia, DR sub, pages 3-4; Spier Consulting Legal, DR sub, pages 10-15; Ian Stewart, DR sub, pages 4-8; Telstra Corporation Limited, DR sub, pages 13-16; and Wesfarmers Limited, DR sub, page 3.

15 See, for example: Australian Newsagents’ Federation, DR sub, page 13.

16 Vodafone Hutchison Australia, DR sub, page 14.

17 American Bar Association, DR sub, pages 3-6.

The current purpose test in section 46 is inconsistent with the focus of equivalent prohibitions in overseas jurisdictions:

- In respect of section 2 of the US Sherman Act, which prohibits monopolisation or attempts to monopolise in trade or commerce, the American Bar Association states that ‘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’. (American Bar Association, sub, page 7)
- In Canada, section 79 of the Competition Act prohibits anti-competitive conduct by a dominant firm that has the effect or likely effect of substantially lessening competition.
- In respect of Article 102 of the TFEU which prohibits abuse of a dominant position, the International Bar Association states ‘... in recent years the approach of both the EU Commission and the European courts (together with many Member State authorities) to Article 102 TFEU has moved towards an approach which focuses more on whether the conduct of dominant businesses has (or would have) adverse effects on competition (in particular focussing in principle, on exclusionary conduct which forecloses equally efficient competitors)’. (International Bar Association, sub, page 17)

The Panel considers that the current form of section 46, prohibiting conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

## Re-framing section 46

An effective provision to deal with unilateral anti-competitive conduct is a necessary part of competition law. This is particularly the case in Australia where the small size of the Australian economy frequently leads to concentrated markets. The Panel considers that section 46 can be re-framed in a manner that will improve its effectiveness in targeting anti-competitive unilateral conduct.

Accordingly, the Panel proposes that the primary prohibition in section 46 be re-framed to prohibit a corporation with a substantial degree of market power from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in that or any other market.

The prohibition would make two significant amendments to the current law. First, it would remove the ‘take advantage’ element from the prohibition. Second, it would alter the ‘purpose’ test to the standard test in Australia’s competition law: purpose, effect or likely effect of substantially lessening competition. The test of ‘substantially lessening competition’ would enable the courts to assess whether the conduct is harmful to the competitive process.

The proposed test of ‘substantial lessening of competition’ is the same as that found in section 45 (anti-competitive arrangements), section 47 (exclusive dealing) and section 50 (mergers) of the CCA, and the test is well accepted within those sections. As explained by the former Trade Practices Tribunal in *QCMA*, competition ‘expresses itself as rivalrous market behaviour’ and ‘is a process rather than a situation’.<sup>18</sup>

Section 4G of the CCA defines ‘lessening of competition’ to include ‘preventing or hindering competition’. The proper application of the ‘substantial lessening of competition’ test is to consider how the conduct in question affects the competitive process — in other words, whether the conduct prevents or hinders the process of rivalry between businesses seeking to satisfy consumer requirements.

---

18 *Re Queensland Cooperative Milling Association* (1976) 8 ALR 481 at 515 and 516.

The Panel's proposed changes to section 46 in the Draft Report drew both support and opposition in subsequent submissions. Much of the opposition focuses on the defence proposed in the Draft Report, which is discussed below.

A number of submissions express concern about introducing the 'substantial lessening of competition' test into section 46. They suggest the change would increase business cost and uncertainty because a business has relatively more information about the purposes for which it engages in conduct compared to the effect of its conduct on competitors (see for example, Business Council of Australia, DR sub, page 16).

The Panel's proposed reform to section 46 is an important change, which will (like all regulatory change) involve some transitional costs, as firms become familiar with the prohibition and as the courts develop jurisprudence on its application. In the Panel's view, the change is justified as transitional costs should not be excessive and will be outweighed by the benefits.

The Panel agrees with the Australian Competition and Consumer Commission (ACCC) that the uncertainty 'should not be unduly significant as the change is to an existing test with which businesses are already familiar' (DR sub, page 53) — that is, the substantial lessening of competition test used in other provisions of the CCA. This incorporates 'standards and concepts ... at least well enough known as to be susceptible to practically workable *ex ante* analysis' (Minter Ellison, DR sub, page 5).

Indeed, framing the offence by reference to the impact on competition in a market enables major businesses to advance pro-competitive justifications for their conduct (Professor Stephen Corones, DR sub, page 3), in the absence of an anti-competitive purpose.

The Law Council of Australia — Competition and Consumer Committee supports retaining section 46 in its existing form. However, it also submits that, if the law were to be amended to a 'substantial lessening of competition' test, the purpose element should be deleted; in other words, conduct by a firm with substantial market power would be unlawful if it would have or be likely to have the effect of substantially lessening competition. This is the 'substantial lessening of competition' test used in section 50 of the CCA (mergers) and in the equivalent Canadian prohibition (referred to above). The Competition and Consumer Committee submits that a prohibition based on the competitive purpose of business conduct runs the risk of 'prohibiting statements of hostile (but aggressively competitive) intent rather than only anticompetitive conduct, by firms with substantial market power' (DR sub, page 15).

The Panel acknowledges the force of this submission but considers that the Committee's concern is mitigated by altering the focus of the prohibition from a purpose of harming a competitor to a purpose of substantially lessening competition.

In recommending reform of section 46, the Panel wishes to minimise the risk of inadvertently capturing pro-competitive conduct, thereby damaging the interests of consumers. To neutralise concerns about over-capture, the Panel proposed a defence in the Draft Report. The defence provided that the prohibition would not apply if the conduct in question would be both:

- a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- likely to have the effect of advancing the long-term interests of consumers.

The onus of proving that the defence applied would have fallen on the corporation engaging in the conduct.

This proposed defence is generally not supported by submissions. Many feel that the first limb leaves a number of questions unanswered, and replicates the problems with the existing 'take advantage' test:

... does it have to be a profit maximising strategy, or could a strategy aimed at increasing market share that was not profit maximising qualify? If the respondent gives reasons for the conduct and the court accepts those reasons as genuine, is the court then required to go behind the reasons, and decide whether the explanations were objectively valid in terms of economic theory or best business practice? (Professor Stephen Corones, DR sub, page 3)

This is a reformulation of the 'take advantage' requirement that exists in the current section 46. It gives rise to the same problems that flow from the 'take advantage' test. It requires the application of a counterfactual test that inverts the traditional counterfactual test applied elsewhere in the Act ... (Queensland Law Society, DR sub, page 3)

Other submissions comment that the first limb would shift the onus of proof to the respondent:

Effectively moving a similar concept to the 'take advantage' element to a defence would also effectively shift the burden of proof from the ACCC to the respondent, imposing considerable costs on business. (Australian National Retailers Association, DR sub, page 33)

... it is inappropriate for the onus to be on the defendant to establish such a defence. Misuse of market power is a serious allegation and a person making such an allegation should, at minimum, have a proper factual and legal basis for that person's case in relation to the types of matters referred to in any such defence. (Arnold Bloch Leibler, DR sub, page 6)

This reverse onus of proof means that, to avoid inadvertently breaching the law in developing new products and competitive strategies, businesses will have to undertake assessments of their current and proposed practices to establish how a hypothetical rational business would behave and operate ... To do this effectively would require an extensive and high level undertaking that would be both time consuming and costly. (Insurance Australia Group, DR sub, page 2)

Concerns are also raised about the second limb of the defence:

If a corporation can prove that its conduct is in fact in the long-term interests of consumers, that ought to be a sufficient defence ... one way of satisfying such a defence would be to prove that the relevant conduct is efficient, and the Society recommends rephrasing the second limb of the defence to clarify that position. (Queensland Law Society, DR sub, page 4)

The added requirement of the second limb to prove conduct in the long-term interests of consumers is too vague to serve as a defence. (Coles Group Limited, DR sub, page 9)

... the '*long-term interests of consumers*' ... is a standard which isn't properly capable of practically workable *ex ante* application. Businesses are often not well equipped to assess the long term interests of consumers. They are usually more interested in more immediate buying preferences and buyer behaviour rather than considering how consumers' interests will be served over the long term. (Minter Ellison, DR sub, page 5)

Others argue that the proposed defence is unnecessary. They posit that a prohibition of misuse of market power based on the 'substantial lessening of competition' test is sufficiently certain given the jurisprudence developed under sections 45, 47 and 50 that use the same test. The ACCC submits:



The risk of overreach, as raised in submissions to the Review Panel and in the media, reflects a misconception of the SLC [substantial lessening of competition] test and there appears to be a significant degree of misunderstanding regarding the conduct that is likely to be prohibited by an SLC test.

Damage to competitors, even to the extent of competitors being forced out of business, is not necessarily evidence of a lessening of competition. ... businesses 'competing' through offering better products or services or by undertaking a successful promotional campaign, undertaking research and development which results in better products or more efficient processes, or passing savings through to consumers will be enhancing competition, not lessening it. (DR sub, page 52)

Similarly, Minter Ellison submits:

... the concepts of 'substantial degree of power', 'purpose', 'effect', and 'substantially lessening competition' are all well understood from past cases and therefore tractable for the purposes of allowing *ex ante* guidance for business conduct. (DR sub, page 5)

The New Zealand Commerce Commission notes:

We recognise the Panel's desire to avoid capturing pro-competitive conduct. However, we consider that a defence that the conduct was pro-competitive can, and should, be captured within the main test as to whether the conduct had the effect, or likely effect of substantially lessening competition. This can occur, for example, through the recognition of actual or potential efficiency gains. (DR sub, page 5)

RBB Economics submits:

Our query would be whether it is possible that the proposed prohibition itself, which confines itself to conduct that will or is likely to have the effect of substantially lessening competition, requires any additional defences. Pro-competitive conduct that harms competitors through the superior efficiency of the firm with market power should not in our view be categorised as creating an SLC [substantial lessening of competition] in the first place. Provided that was made clear in the framing and context of the law, the need for defences against false positives should not arise. (DR sub, page 5)

In light of arguments presented in submissions, the Panel accepts that the defence proposed in the Draft Report is not the best means of addressing potential concerns that the revised prohibition may inadvertently catch pro-competitive conduct.

As a number of submissions observe, conduct undertaken by a firm with substantial market power can have both pro-competitive and anti-competitive effects. For example, a firm with substantial market power may compete vigorously in a market through lower prices. If that is sustained through cross-subsidisation from another aspect of the firm's operation, it may limit the ability of other firms in that market to compete. The issue for the court, and for firms assessing their own conduct, is to weigh the pro-competitive and anti-competitive factors to decide if the cross-subsidisation involves a substantial lessening of competition.

Further, the inclusion of a defence to section 46 would be inconsistent with the approach taken in sections 45, 47 and 50 (where there is no express defence) and runs the risk of casting doubt on the established meaning of the 'substantial lessening of competition' test.

The approach adopted in comparable overseas jurisdictions is to empower the court to take into account the pro-competitive and anti-competitive aspects of business conduct. Professor Stephen Corones submits that 'under both EU competition law and US antitrust law, firms with substantial market power are

provided with the opportunity of demonstrating pro-competitive efficiency justifications for their conduct' (DR sub, pages 4-5).

In respect of section 2 of the Sherman Act, the American Bar Association observes:

In the U.S., a monopolist may rebut evidence of anticompetitive conduct by establishing that it had a valid justification for the conduct—that is, one related directly or indirectly to enhancing consumer welfare. For example, conduct may be important to preserve investment incentives or to generate cost savings that will be passed on to consumers. Or, the restraint may be necessary to bring a new product to the market. Assuming the monopolist shows it had a valid business justification, a plaintiff must then address whether the conduct is reasonably necessary to achieve those efficiencies and whether substantially the same efficiencies can be achieved by significantly less restrictive available alternatives. No legal distinction is typically made between short-term versus long-term effects. (DR sub, page 4)

The Law Council of Australia — Competition and Consumer Committee suggests that, instead of a defence, section 46 might require the court to have regard to whether the conduct is efficiency-enhancing or include a list of factors to be taken into account (such as those contained in subsection 50(3) in the context of mergers) (DR sub, pages 18 and 19).

The Panel considers that the preferable approach is to include in section 46 legislative guidance with respect to the section's intended operation. Specifically, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition in a market, to have regard to:

- 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
- 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.

These considerations would be mandatory, but non-exhaustive. The existing interpretative provisions in section 46, insofar as they are relevant to the proposed new test, would be retained (subsections 46(2) to 46(4)).

The legislative guidance would assist with the court's analysis and businesses' understanding of how the proposed prohibition should be applied. The proposed legislative factors would expressly direct the court to consider any pro-competitive aspects of the impugned conduct, in addition to the alleged anti-competitive aspects, in assessing whether the conduct has the overall purpose, effect or likely effect of substantially lessening competition.

The Panel considers that introducing this legislative guidance is preferable to the defence proposed in the Draft Report. It is consistent with the legislative approach adopted in other provisions of the CCA, notably subsection 50(3) (mergers) and Australian Consumer Law section 22 (unconscionable conduct). It also addresses concerns expressed about reversing the onus of proof in the proposed defence, while clarifying the object of the prohibition.

The proposed reform would allow section 46 to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing and amendments that attempt to explain the meaning of 'take advantage'.

Any residual concerns about business uncertainty can be further mitigated in two ways:



- first, as recommended below, authorisation should be available to exempt conduct from the prohibition in section 46; and
- second, the ACCC should issue guidelines on its approach to enforcing section 46, prepared in consultation with business stakeholders, legal experts and consumer groups, and issued in advance of the commencement of the revised prohibition.

The proposed amendment to section 46 and the availability of authorisation would also obviate the need for the telecommunications industry-specific anti-competitive conduct provisions (Division 2 of Part XIB) and exemption order regime (Subdivision B, Division 3 of Part XIB) of the CCA. Division 2 currently provides for an effects-based test in relation to the conduct of carriers or carriage service providers (within the meaning of the *Telecommunications Act 1997*) with a substantial degree of power in a telecommunications market. Division 3 allows applications to the ACCC for an order exempting specific conduct from the scope of that effects test, where the public benefit outweighs the anti-competitive detriment. In this context, the Panel notes the Australian Government has announced a review of Part XIB of the CCA during the second part of 2015,<sup>19</sup> in response to Recommendation 2 of the Statutory Review under section 152EOA of the CCA<sup>20</sup> that Part XIB should be reviewed to assess its continued utility and effectiveness.

### Divestiture remedy to address market power concerns

A court may order a broad range of remedies following a finding that a firm has engaged in misuse of market power in contravention of section 46. These remedies include declarations, injunctions, damages and civil penalties.<sup>21</sup> However, neither the ACCC nor a private party is able to seek a divestiture order from the court to break up the firm found to have misused its market power.

The Panel notes that divestiture as a remedy is raised in submissions to the Agricultural Competitiveness Green Paper and in submissions to this Review. For example, Master Grocers Australia/Liquor Retailers Australia considers:

Whilst the inclusion of divestiture in a mandatory code would be a useful and powerful deterrent to misuse of market power, the additional inclusion of divestiture as a sanction in Section 46 of the CCA would be an appropriate powerful measure, including a deterrent, in overcoming conduct of the kind that is currently destroying healthy competition in the Australian supermarket industry. (DR sub, pages 20-21)

The Hilmer<sup>22</sup> and Dawson<sup>23</sup> reviews considered proposals for a specific divestiture remedy (to be used in circumstances other than mergers) to address competition concerns about businesses with significant market power. Those reviews did not recommend its adoption because of the potentially broad nature of such a remedy and difficulties in targeting the conduct of concern. The Dawson Review noted that divestiture as a remedy in the case of acquisitions leading to a substantial lessening of competition is different to divestiture as a remedy for misuse of market power. Divestiture in the context of mergers involves the court ‘unwinding’ a transaction rather than splitting a firm that has expanded through organic growth.<sup>24</sup>

---

19 Australian Government 2014, *Telecommunications Regulatory and Structural Reform*, Commonwealth of Australia, Canberra, page 14.

20 Cost-Benefit Analysis and Review of Regulation 2014, *The Statutory Review under section 152EOA of the Competition and Consumer Act 2010*, Canberra, page 24.

21 *Competition and Consumer Act 2010*, Part VI.

22 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 163.

23 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra, page 150.

24 *Ibid.*, page 162.

Providing a general divestiture provision within the CCA for Part IV offences could, if exercised, see matters of market conduct dealt with through a structural remedy. Although reducing the size of a firm may limit its ability to misuse its market power, divestiture is likely to have broader impacts on the firm's general efficiency. Such changes could also have negative flow-on effects to consumer welfare. It is also possible that divested parts of a business might be unviable.<sup>25</sup> Further, it would leave the redesign of a firm or industry in the hands of the court, which is generally not well positioned to make decisions about industry policy.

In the US, divestiture is available as a remedy for violations of section 2 of the Sherman Act (the anti-monopolisation provision). However, divestiture is ordered only rarely: the last major use of the divestiture remedy was the 1982 consent decree that broke the American Telephone and Telegraph Company into a number of smaller companies.<sup>26</sup>

Structural remedies present a number of difficulties and normally are reserved for cases in which a conduct remedy is insufficient ... The least common and most complex form of structural remedy is breaking the dominant firm into competing entities. This sort of remedy has not been used in the United States in recent decades but was applied in the landmark *American Tobacco* and *Standard Oil* cases nearly a century ago.<sup>27</sup>

In light of the above, the Panel considers the existing range of remedies is sufficient to deter a firm from misusing its market power and to protect and compensate parties that have been harmed by such unlawful conduct. Where section 46 is breached, the court already has available to it a wide range of sanctions, including: pecuniary penalties that can greatly exceed the benefit the firm has obtained from the conduct; a range of remedial orders, such as compensation payments to parties who have suffered loss or damage; and injunctive relief.<sup>28</sup>

Ultimately, if circumstances were to arise where the public interest would be served by breaking up a firm or redesigning an industry, for competition or other policy purposes, it is open to the Parliament to legislate to bring about such reform. Such action would be expected to be rare and exceptional. Nevertheless, the Panel considers it preferable for any such action to be implemented by the Parliament rather than by the court as a remedy for breaches of competition law.

---

25 See discussion in Senate Standing Committee on Legal and Constitutional Affairs 1991 (Cooney Committee) *Mergers Monopolies and Acquisitions — Adequacy of Existing Legislative Controls*, Canberra, pages 89-93.

26 Davey, A. 2012, *The introduction of a general divestiture provision under Australian competition law*, Sapare Research Group (Report prepared for Coles), Canberra, page 21. In June 2000, the United States District Court for the District of Columbia ordered a breakup of Microsoft, a decision later reversed on appeal by the D.C. Circuit Court of Appeals. The matter was ultimately settled in November 2001, imposing behavioural rather than structural sanctions.

27 OECD 2006, *Remedies and Sanctions in Abuse of Dominance Cases*, US contribution to OECD Policy Roundtables, Paris, pages 175-176.

28 *Competition and Consumer Act 2010*, sections 76, 87 and 80 respectively.

### The Panel's view

The Panel considers that section 46 is deficient in its current form. The 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The 'purpose' limb, that prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches.

The provision should be directed to conduct that has the purpose, or would have or be likely to have the effect, of substantially lessening competition, in a similar manner to the prohibitions in sections 45, 47 and 50. The provision should also include legislative guidance directing courts and firms to weigh the pro-competitive and anti-competitive impact of conduct.

As with any change to the law, amending section 46 will involve some uncertainty, but the proposal adopts the long standing expressions 'substantial degree of power in a market' and 'substantial lessening of competition'.

Although uncertainty may lead to some cost, the Panel considers this is outweighed by the benefit of a more effective prohibition on unilateral anti-competitive conduct.

### Recommendation 30 — Misuse of market power

The primary prohibition in section 46 of the CCA should be re framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- 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
- 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.

Such a framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

This recommendation is reflected in the model legislative provisions in Appendix A.