Business Council of Australia

SUBMISSION

Submission on Options to Strengthen the Misuse of Market Power Law

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Working to achieve economic, social and environmental goals that will benefit Australians now and into the future

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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

OVERVIEW

This is the Business Council's submission to the Treasury on "options to strengthen the misuse of market power law" ('section 46' of the *Competition and Consumer Act 2010*). It responds to a discussion paper released in December 2015 which includes six options: retaining the current section; implementing the recommendation in the Competition Policy Review (the 'Harper' Review), and four options based on the Harper Review.

Key points

- Competition is good for consumers and economic growth. The misuse of market power provision is an important tool for preventing anti-competitive behaviour. It must also provide clear guidance to businesses so they are not deterred from normal risk taking and can vigorously compete on price and product offerings to the benefit of consumers.
- The Business Council considers that the current section 46 works as intended, provides clear guidance to business and should not be amended. No evidence has been provided of an economy-wide problem with anti-competitive behaviour that justifies changing section 46.
- The options for changing section 46 would introduce major regulatory uncertainty and risk and misalign Australia with international law. They are inferior to the current law.
- While much of the popular debate regarding section 46 has related to the supermarket sector and food and grocery supply chains, the proposed changes would apply right across the economy, including banking, telecommunications, aviation, technology, tourism, mining and steel production sectors. They would increase risk for large and small businesses, including in regional areas. As such, the proposed changes risk stifling investment and innovation right across the economy, with adverse effects on consumers, jobs and economic growth.
- This debate also fails to recognise the increased levels of competition in the Australian economy. In particular, the supermarket sector has seen major international chains entering the market and new online offers providing greater consumer choice. This competition has seen real consumer prices for food and non-alcoholic beverages fall over recent years. The lower Australian dollar and recent free trade agreements are also opening up new markets for Australian agricultural produce.
- The government has also taken a number of recent actions to address the concerns of small business and the farming sector and plans to take more. Actions include: the small business tax cut package; agriculture white paper; industry codes of conduct (e.g. the Food and Grocery Code, the Horticulture Code, Franchisee Code, etc.); the extension of the unfair contract terms provisions to small businesses; streamlining and promoting collective bargaining permissions; the Small Business and Family Enterprise Ombudsman; and the appointment of agriculture and small business commissioners at the Australian Competition and Consumer Commission (ACCC). These policies need to be given time to demonstrate their effectiveness.
- The Treasury and Attorney-General's Department (in consultation with the new Ombudsman and the ACCC) should continue to monitor and collect evidence about legitimate competition problems and assess the adequacy of the competition policy framework, in its entirety, for dealing with anti-competitive conduct.

Recommendations

In the absence of a clearly defined economy-wide problem and with clear risks and costs from changing section 46, but unidentified benefits, the Business Council recommends:

- Section 46 should not be amended (Option ‘A’).
- The Government should give its recent and forthcoming actions to address concerns of small business and the farming sector time to work.
- The Treasury and Attorney-General's Department should continue to monitor and collect evidence about legitimate competition problems and assess the adequacy of the competition policy framework, in its entirety, for dealing with any anti-competitive conduct.

SUMMARY

Test for this review

The Business Council considers that this review of the misuse of market power law should be used by the government to satisfy itself whether:

- there are clear, serious and systemic instances of market power being misused which cannot be appropriately addressed under the current law and which justify substantive legislative change
- any solutions under consideration directly solve for those problems
- unintended consequences will be avoided that are harmful to jobs, investment, national income growth and consumer welfare, including regional consumers
- clear benefits from change are identified that outweigh the likely substantial costs and risks.

In considering these matters the government should take into account that:

- Section 46 has a specific role within the broader competition policy framework. Its role is to regulate misuse of market power through exclusionary conduct, not to serve as a 'catch all' for every allegation of anti-competitive conduct that might be raised, and which are best addressed under other sections of the Competition and Consumer Act.
- The government has initiated a number of policy actions to address allegations of anti-competitive or unfair business conduct, including:
  - industry codes of conduct (e.g. the Food and Grocery Code, the Horticulture Code, Franchisee Code, etc.)
  - the extension of the unfair contract terms provisions to small businesses
  - streamlining and promoting collective bargaining permissions
  - the Small Business and Family Enterprise Ombudsman
  - the appointment of agriculture and small business commissioners at the Australian Competition and Consumer Commission (ACCC).
- The government has initiated a small business tax cut package and agriculture white paper to help lift competitiveness in the farming and small business sectors.
- These measures should be given time to demonstrate their effectiveness before considering further regulatory change by amending section 46. Many of these initiatives post-date the commencement of the Harper Review in early 2014.
- Competition is increasing across the economy as a result of more open foreign trade and investment policies and digital disruption driven by new technologies.

The Business Council's view is that the current section works as intended and is far superior to the alternative legislative options when assessed against best practice principles. No clear and serious situations of market power being misused have been identified during the Competition Policy Review or at the stakeholder roundtables in January that justify change. Our considered analysis of the options proposed in the discussion paper and their associated risks leads to our firm conclusion that change to the provision is not warranted.

A detailed assessment of Treasury's six options for section 46 is in **Attachment C** and a full response to the 17 questions in the Treasury discussion paper is in **Attachment D**.

Problem definition

The problem to be solved remains unclear

The Business Council acknowledges there are a range of views on the effectiveness of the current section.

It should be incumbent on the supporters of change to identify allegations of misuse which have not been brought successfully to court because of the current law. This is a necessary first step so that consideration can be given to whether the activity is genuinely anti-competitive and whether any proposed change will address the example.

Neither the Competition Policy Review nor the Treasury discussion paper provided such examples. Stakeholder roundtables in January also failed to identify clear and valid examples.

Examples raised by the former Minister for Small Business, Bruce Billson MP, and the ACCC can already be addressed under section 46 or other parts of the law (see pp14-16).

Concerns raised by stakeholders in relation to the supermarket sector and food and grocery supply chains should be able to be dealt with under current laws, industry codes of conduct and collective bargaining permissions.

The Harper Review asserted that the problems with section 46 lie in the interpretation of 'take advantage' and the application of 'purpose'. The Business Council does not agree with the review's assessment.

The courts have had little difficulty interpreting the 'take advantage' element. Furthermore, amendments were made in 2008, on the ACCC's advice, to address concerns about the effect on the jurisprudence around 'take advantage' arising from the *Rural Press* decision. The effectiveness of the amendments was not assessed by the Harper Review.

The problems claimed with 'purpose' are not a sufficient reason to change the section. The ACCC has never lost a case for failing to prove purpose. The Act and its interpretation by the courts confirm that purpose can be inferred from all the circumstances, including the effect of the conduct – no 'smoking gun' is needed.

The ACCC has had considerable success with the provision, demonstrating that the provision works. Since the *Queensland Wire* case in 1987 it has brought 20 cases, winning 12 cases on the section 46 elements and an additional five cases on other parts of the Act. In the same period, the US Department of Justice has only brought ten cases – in a much larger economy.

No pro-competitive or pro-consumer benefits from change have been identified to date in the Harper Review, in Treasury's discussion paper or by other stakeholders.

Principles for designing a misuse of market power law

There are two key principles this review must keep sight of and which are at risk from change – that the provision addresses 'misuses of market power', and that consumers' interests are the primary concern.

Losing sight of these principles could lead to changes to section 46 – such as those proposed in the Harper Review – that will greatly expand the reach of the law and create significant regulatory uncertainty that will harm consumer welfare.

'Misuse of market power'

First, 'misuse of market power', through exclusionary conduct, is the specific behaviour that should be prohibited in section 46. This is consistent with the approach taken in other jurisdictions internationally.

This review should not be concerned with issues raised that are best addressed under other sections of the Act or other laws and policies.

'Misuse of market power' may be found in cases of predatory pricing, bundling, refusal to deal or price discrimination, depending on the circumstances. All of these examples can be dealt with now under the current section.

The current words 'take advantage' are particularly important to defining 'misuse' and for aligning the provision with comparable law internationally. The proposed removal of 'take advantage' in five of Treasury's options would mean that any conduct by a firm with market power could be caught, whether it constitutes a 'misuse' or not. Arguably this would transform the provision from a 'misuse of market power' provision to an 'anti-market power' provision. This will create major uncertainty and deter pro-competitive behaviour and is a step too far.

Consumer interest

Second, consumer interest must continue to be the primary concern of competition policy.

Competition is increasing across the economy as a result of more open foreign trade and investment policies and digital disruption driven by new technologies.

Consumers benefit from vigorous competition through product innovation, lower prices and greater choice. Vigorous competition has led to innovations that consumers have quickly developed a preference for, like the smartphone and disruptive new services like Uber and Airbnb. Australian consumers benefit from the expansion of major domestic and foreign retail chains, even though this may cause disruption in local markets.

For consumers to benefit, vigorously competing businesses need to know clearly where the law draws the line between anti-competitive and pro-competitive behaviour.

Shackling businesses with uncertain or excessive regulation due to their market power could substantially harm innovation and deprive consumers of cheaper, better products.

In prioritising consumers, the review should not be concerned with the effects on competitors or industry structure that are the consequences of normal competitive behaviour. If governments want to provide support to certain businesses or industries then that is the function of industry or social policy, it is not a matter for competition law.

Risks, costs and unintended consequences

Because it applies to everyday decisions by businesses to innovate and compete, it is widely acknowledged that the misuse of market power law can damage the competitive process and consumer welfare, if it is uncertain or overreaches.[1]

With our economy experiencing below-trend economic growth, we must avoid harming business confidence by introducing regulatory uncertainty around section 46.

Companies should not be at risk of breaking the law if they are legitimately competing by innovating, expanding their product offer or lowering prices to consumers, even if in doing so they harm competitors.

An uncertain or expanded provision will cause businesses to pull back from undertaking legitimate pro-competitive activity due to the risk of regulatory investigation or litigation. This could arise from effects on the market that cannot be predicted with any certainty.

Under a new provision, new jurisprudence and case law will take many years and cases to develop, adding to the uncertainty. ACCC guidance materials would also take a considerable amount of time to be developed and will be of limited use.

Increased costs to business will include the cost of sourcing economic and legal advice and the longer time frames that will need to be built into business decision making.

Many businesses, large and small, regional and metropolitan, would be affected, and across all sectors of the economy. A list of businesses previously involved in section 46 cases reveals the extent of the provision: Rural Press and Bridge Printing; Pfizer; Melway; Cement Australia; Baxter Healthcare; Eurong Beach Resort; Darwin and Garden City Cabs; Ticketek; the Bureau of Meteorology; Boral, and Visa.

Innovative global businesses like Tesla, Uber and Airbnb, could find themselves at risk of contravening the section if they are deemed to have market power. Domestic and foreign companies might prefer to trade in overseas markets than expose themselves to the risks of an uncertain market power provision in Australia.

The risk of a poorly designed section 46 is that Australian consumers pay more or miss out on new products. Low income and regional consumers would be disproportionately affected. Small business consumers wanting to purchase competitive business inputs will be disadvantaged.

Assessment of Treasury's six options

When considering the purpose of the misuse of market power law (as discussed earlier), and best-practice approaches internationally (as set out in Attachments B and C), the key elements that a provision must contain are:

- a threshold requirement of market power
- a focus on exclusionary conduct

[1] See, for example, Professor Gary Banks, *The good, the bad and the ugly: economic perspectives on regulation in Australia*, speech by Gary Banks, Canberra, 2 October 2003.

- an examination of purpose
- a causal connection between the market power and the conduct
- protection for conduct that has an efficiency or legitimate business justification.

In addition:

- The law should provide a clear guide to business.
- There should be low costs of application.

We have conducted a detailed assessment of Treasury's six options for changing section 46 against these key elements (see Figure 1 below and Attachment C). We find the current section 46, 'Option A', includes most of the key elements of misuse of market power laws in the major antitrust jurisdictions and is appropriately constructed.

Figure 1: Evaluating the six options for section 46 in the Treasury discussion paper

	Threshold	Conduct	Purpose	Market power link	Protection for efficiency	Cost to apply
Option A – 'no-Harper'	**Yes**: Substantial market power	**Yes**: Exclusionary	**Yes**	**Yes**: Conduct must use market power ('take advantage')	**Good**: Go to purpose or use of market power	**Low**
Option B – 'part-Harper'	**Yes**: Substantial market power	**Yes**: Exclusionary	**Yes**	**No** 'take advantage' removed	**Poor**: Go to purpose (but conduct can have multiple purposes)	**High**
Option C – 'part-Harper'	**Yes**: Substantial market power	**No**: Only guidelines	**Yes**	**No** 'take advantage' removed	**Poor**	**High**
Option D – 'part-Harper'	**Yes**: Substantial market power	**No**: Only guidelines and factors	**Yes**	**No** 'take advantage' removed	**Poor**	**High**
Option E – 'part-Harper'	**Yes**: Substantial market power	**No**: Only guidelines	**No**: No purpose required	**No** 'take advantage' removed	**Poor**	**High**
Option F – 'full-Harper' (see also fig. 2)	**Yes**: Substantial market power	**No**: Only guidelines and factors	**No**: No purpose required	**No** 'take advantage' removed	**Poor**	**High**

We have significant and specific concerns with Treasury's options in three key areas.

Removal of 'take advantage'

The BCA is deeply concerned about the removal of the essential element 'take advantage' in all of the alternative options put forward by Treasury.

The removal of ‘take advantage’ is based on a flawed view that the current interpretation by the courts is too narrow and may be permitting egregious behaviour by some businesses. This is not supported by evidence or recent case law. The Act was already amended in 2008 to address the ACCC’s concerns with interpretation.

The proposal to remove it altogether in the full-Harper and part-Harper options would put any conduct by a firm with market power at risk of regulatory intervention, even conduct that has no connection with market power and would be expected in a competitive environment. Removing ‘take advantage’ will set Australia far apart from other advanced economies.

The Substantial Lessening of Competition Test

The SLC test, included in several Treasury options, will be difficult, time-consuming and expensive to apply to unilateral behaviour under section 46.

It will not provide a clear guide to business about the likely effects of its actions. The SLC test is not limited to any particular form of conduct and can apply whenever the competitive process is affected – including by the exit of a competitor. Any conduct can be caught. There is no case law to rely on that says otherwise.

By comparison, the current section provides a clear guide to business about prohibited exclusionary conduct – for example, where it refers to ‘preventing the entry of a person’ or ‘deterring or preventing a person from engaging in competitive conduct’ in a market.

Purpose or Effect

The ‘purpose or effect’ approach, included in several Treasury options, is at odds with many overseas jurisdictions where ‘purpose’ is treated as an essential element and ‘effect’ is used as an additional test, not an alternative. This was acknowledged by the Harper Review.

Prohibiting conduct on the basis of effect alone would punish inadvertent and unforeseeable consequences, and put legitimate competitive conduct at risk.

Conclusion

The review process to date has provided no evidence of a clear and serious problem requiring legislative change. Furthermore, most of the issues raised by stakeholders are confined to the supermarket sector or food and grocery supply chains, thereby questioning the need for high risk economy-wide reform to competition law.

The absence of a clear problem, the substantial likely costs associated with change, and the lack of any identified pro-competitive or pro-consumer benefits all point to a clear preference to leave the provision in its current form.

The assessment against best practice finds the current ‘misuse of market power’ section remains the preferred option. The Harper Review proposal would be highly damaging and the part-Harper options offer no significant improvement. As review Chair, Professor Ian

Harper, reportedly said recently: ‘going half Harper might actually be worse than going full-Harper or no Harper.’[2]

Instead of changing section 46 the Government should give its recent and forthcoming actions to address concerns of small business and the farming sector time to work.

The Treasury and Attorney-General's Department (in consultation with the new Ombudsman and the ACCC) should continue to monitor and collect evidence about legitimate competition problems and assess the adequacy of the competition policy framework, in its entirety, for dealing with anti-competitive conduct.

2. Australian Financial Review, 12 January.

Figure 2 Section 46 Comparison – Current and Harper Review Proposal

Current section 46

A corporation that has a substantial degree of power in a market shall not **take advantage** of that power in that or any other market for the purpose of:
- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

1

What the proposal does: Removes the words "take advantage"

What are the consequences: A fundamental and high-risk change. There will no longer be a link between having market power and using it for anti-competitive reasons (which gives the provision its meaning). Any activity by a business with SMP can be caught. Amendments in 2008 already dealt with concerns with interpretation.

Proposed section 46

(1) A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the **purpose, or would have or be likely to have the effect,** of **substantially lessening competition** in that or any other market.

(2) Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, **the court must have regard to**:

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

(b) the extent to which the conduct has the purpose, or would have or be likely to have the 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.

2

What the proposal does: Expands test from just "purpose" to "purpose **or** effect or likely effect"

What are the consequences: A business can know the 'purpose' of its actions, but it cannot foresee the 'effect' of its actions on the market. The 'effect test' introduces major uncertainty. It risks significant overcapture, including pro-competitive behaviour good for consumers.

3

What the proposal does: Replaces three specific examples of anti-competitive behaviour with the "substantial lessening of competition" test

What are the consequences: The courts already interpret the current law as protecting competition not competitors. Introduces unnecessary uncertainty over the application of SLC test to unilateral decision making and does not identify conduct of concern or protect legitimate business conduct.

4

What the proposal does: Provides legislative guidance to direct courts' interpretation, to mitigate against the deficiencies in the core provision

What are the consequences: Businesses with market power need to consider these aspects before making any unilateral decision. This will be difficult, costly and time-consuming and will add little to certainty.

BCA RESPONSE

Context for the review

What is the review about?

The government has commenced a consultation process to assess options for 'strengthening' a core element of competition policy the 'misuse of market power' provision in section 46 in the *Competition and Consumer Act 1974* (CCA).

Australia's 'misuse of market power' provision has existed in its current form, more or less, since 1974, a period of over forty years. It prohibits a company with substantial market power from using that power for the purpose of eliminating its competitors or preventing competitors from entering or competing in a market.

Section 46 of the CCA prohibiting 'misuse of market power'

"A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:

- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market."

Although misuse of market power legislation varies considerably throughout the world (see Attachment B), in its application section 46 closely mirrors the application of similar laws in other countries against exclusionary conduct by firms with substantial market power. In part, this is due to jurisprudence that has been developed over forty years.

The review needs to identify the best way forward

The Business Council considers that this review of 'options to strengthen the misuse of market power law' should be used by the government to satisfy itself whether:

- there are clear and serious situations of market power being misused which have not been appropriately addressed under the current law
- any solutions under consideration directly solve for those problems
- unintended consequences will be avoided that are harmful to jobs, investment, national income growth and consumer welfare, including regional consumers
- clear benefits from change are identified that outweigh the likely substantial costs.

The discussion paper asks stakeholders to consider whether the Harper proposal, the current section, or a number of alternative 'part-Harper' options for stakeholders are the best ways forward. It does so without first identifying a clear and serious problem to be addressed.

The Business Council welcomed the opportunity to engage constructively with governments and other key stakeholders in roundtables held in January where problem identification was discussed. We sought in those meetings to develop a shared understanding of any valid problems with section 46 and what that means for identifying the best way forward for the provision in the interests of consumers, innovation and global competitiveness.

The roundtables did not, in our view, result in the identification of clear and serious economy-wide misuse of market power that warrants the changes to section 46 proposed in the discussion paper. Instead, they revealed fundamental disagreements about the role of section 46 and the purpose of any amendments even among proponents of change.

The Business Council has concluded in all of its submissions to date that the current section is well tested, is appropriately interpreted by the courts and works as intended. We have rigorously assessed the six options in the discussion paper against international practice and continue to hold that view.

A number of independent and respected experts and stakeholders also regard the current provision as fit for purpose and argue against change.

The majority of public reviews into section 46 before the Harper Review rejected the need to fundamentally change section 46, and specifically rejected the 'purpose, effect or likely effect of substantially lessening competition' test. The Harper Review broke with these past reviews to propose a fundamental re-drafting of the section that is potentially highly damaging and affects the whole of the economy.

Section 46 is one part of a broader competition policy framework

Australia has a number of competition policies and laws that regulate business conduct to protect competition and the competitive process. It is imperative that this process does not confuse all alleged anti-competitive behaviour with section 46. Many issues raised by stakeholders fall more appropriately under other provisions. Other key provisions include:

- ACL Sections 20 to 22A – Unconscionable conduct (relevant to supplier relationships).
- Enforceable industry codes of conduct, for example, the food and grocery code (relevant to supplier relationships).
- Section 45 – Contracts, arrangements or understandings that restrict dealings or affect competition.
- Section 47 – Exclusive dealing (always prohibits 'third line forcing', where suppliers mandate purchasing from a third party, and sometimes prohibits 'full line forcing', where suppliers require a purchaser not to purchase from a competitor).
- Section 48 – Resale price maintenance (which prevents suppliers prohibiting or placing restrictions on discounting by retailers).
- ACL Sections 23 to 27 – Unfair contract terms protections for business to business transactions (currently being implemented for businesses up to 20 employees).
- Small business collective bargaining permissions (particularly in the context of supplier relationships).
- National Access Regime in Part IIIA (regulation of natural monopolies) together with access regimes in state legislation and codes of conduct.

The government has recently implemented a number of new policy initiatives to address allegations of anti-competitive or unfair business conduct. These initiatives include the Food and Grocery Code, the Unfair Contract Terms legislation and the appointment of a Small Business and Family Enterprise Ombudsman. They also include the streamlining and promotion of the collective bargaining process under the Harper recommendations supported by the government. These measures should be given time to demonstrate their effectiveness before considering whether changes to the competition policy framework are needed, including to section 46.

Given the current absence of a clear and serious problem to be solved, the government should ensure that the Treasury and Attorney-General's Department, in consultation with the new Small Business and Family Enterprise Ombudsman and the ACCC, should continue to monitor and collect evidence of anti-competitive conduct that cannot be addressed under the current policy framework. This can inform an evidence-based approach to policy evaluation in future.

The need for clarity about the problem

The Business Council acknowledges there are different views among policy-makers, industry representatives and the wider community regarding the effectiveness of the current provision and whether it is working as well as it should.

Any consideration of changing the provision must be underpinned by clear and specific evidence of business conduct that is economically damaging and cannot be addressed under the section or the wider competition law and policy framework. It is pleasing to see the discussion paper seeks this evidence.

To date, the majority of competition concerns raised by stakeholders relate to the supermarket sector and food and grocery supply chains. No evidence has been provided of an economy-wide problem with anti-competitive behaviour that justifies changing section 46.

No specific problems have been identified that cannot already be addressed

We are aware of no specific examples being provided that cannot already be dealt with under the current Act or the broader competition policy framework.

Examples cited by the former Minister for Small Business, Bruce Billson MP, in his speech to CEDA on 1 July 2015, as well as other examples provided by the ACCC, can be addressed by the current competition framework (see table below).

Example cited	Coverage under the law
'Land banking' (buying up all available land)	**Already covered under the Act (section 50).** Acquisitions of land that have the effect or likely effect of substantially lessening competition are prohibited under section 50. The ACCC already prevents such acquisitions, or requires divestment of existing holdings before approving acquisitions, and has done so on a number of occasions in the retail sector (e.g. Woolworths in Glenmore Ridge NSW (2013), Coles in Singleton/Lakelands WA (2015).
Locking up limited supplies of key inputs	**Already covered under the Act (sections 46 as well as sections 45 and 47), where it is anti-competitive.** This behaviour, where it is anti-competitive (e.g. where supplies substantially in excess of reasonable requirements and contingencies are locked up), is already addressable under the current section 46, particularly after changes to the law made at the ACCC's request. Where there is a contract, arrangement or understanding (e.g. for exclusive supply or supply of a high and fixed proportion of output), this will be caught by sections 45 and 47 where there is an SLC purpose or effect. It is important to be careful with how this behaviour is addressed as, in many circumstances, securing supply is an ordinary and legitimate commercial behaviour that is overall pro-competitive.
Retaliatory threats in one market to block a new entrant in another	**Already covered under the Act (section 46 as well as section 45 and the cartel provisions)**. Using this behaviour as an example is a reference to courts' interpretation of section 46 in the *Rural Press* case. While many commentators disagree with the result in this case, it turns on a very particular set of facts and does not indicate a broader deficiency in the current section. The expansion of 'take advantage' in 2008 would make it more likely that similar conduct would be covered by the current law. This conduct would also be examined as an attempt to induce a market-sharing arrangement, which in many cases would attract *per se* liability under section 4D and the cartel provisions and would otherwise be caught by section 45 where it had an SLC purpose or effect. The ACCC was ultimately successful in *Rural Press* on this basis.
Retailers insisting on joint marketing fees	**Already covered under the Act (ACL Part 2-2)**. This behaviour is addressable under the unconscionable conduct provisions in the Australian Consumer Law (Part 2-2). As even Rod Sims has acknowledged, it is unlikely that vertical relationships with suppliers would be affected under the proposed new section 46. If a vertically-integrated retailer were to selectively insist on joint marketing fees to disadvantage suppliers who competed with its own home brand products, the existing section 46 would apply where appropriate. Although any retailer could ask for joint marketing fees, it is likely that a retailer's ability to insist on those fees would be materially increased by its market power.

Example cited	Coverage under the law
Freezing out competing suppliers from retail display and demonstration opportunities	**Already covered under the Act (section 46), or governed by the Food and Grocery Code, where it is anti-competitive**. This behaviour, where it is anti-competitive, is already addressable under the current section 46. It is important to be careful with how this behaviour is addressed as, in some circumstances, preferential display and demonstration arrangements are ordinary and legitimate commercial behaviours that are overall pro-competitive. The ACCC's 2008 Grocery Inquiry found that private labels and supermarket buyer power had little or no impact on competition and consumers, and tended to benefit consumers through lower prices.
Targeted geographic price discounting strategies by an incumbent, designed to dissuade new entrants into a region.	**Already covered under the Act (section 46), where it is anti-competitive.** This behaviour, also called 'predatory pricing', is already addressable under the current section 46, where it is anti-competitive. The ACCC has been successful in predatory pricing actions, most recently *Cabcharge* (2008). Following one unsuccessful ACCC case (*Boral*), section 46 was amended in relation to both market power and predatory pricing. These amendments have not yet been tested. It is important to be careful with how this behaviour is addressed, as price discounting strategies are an ordinary and legitimate commercial behaviour and consumers benefit from lower prices. Predatory pricing is rarely successful and in most cases customers usually benefit from low prices with no long-term detriments.

As well as some of these examples, the ACCC has previously and recently raised:

Example cited	Coverage under the law
Bundling	**Already covered under the Act (section 46 and also section 47), where it is anti-competitive.** Bundling of goods and services is prevented under section 47 where it prevents a customer from acquiring goods or services from a competitor of the supplier and has an SLC purpose or effect. Bundling has also been found to breach section 46, as in *ACCC v Baxter Healthcare* (2008) – even before the 2008 changes to 'take advantage'. The question is not whether small companies can bundle; it is whether it would make commercial sense for a company to bundle the particular products at the particular prices in question if it did not have market power.

Example cited	Coverage under the law
Loss-leading	**Already covered under the Act (section 46) where it is anti-competitive** **Loss-leading is the practice of reducing the price of one product in order to encourage (but not require) customers to purchase other products. It is ordinarily considered a legitimate commercial practice even if the loss-leading product is sold below cost – unless it is predatory pricing.** The question is not whether small companies can loss-lead; it is whether it would make commercial sense for a company to sell the particular products at the particular prices in question if it did not have market power.
Tying up customers in long term contracts with anti-competitive rebates	**Already covered under the Act (section 46 and also section 47), where it is anti-competitive.** Where a particular price or rebate is conditional on the customer taking exclusive supply or a supply of a high and fixed proportion of their requirements, this conduct will be caught by section 47 where there is an SLC purpose or effect. **Rebates were found to take advantage of market power in *ACCC v Pfizer* (2015) following the 2008 amendments. The court explained that although rebates were common in the industry, the particular rebates relied on Pfizer's market power.** It is important to be careful with how this behaviour is addressed, as rebates for quantity and loyalty are an ordinary and legitimate commercial behaviour and consumers benefit from lower prices.
Restricting supplies of essential materials	**Already covered under the Act (section 46), where it is anti-competitive.** This broadly describes the facts in cases such as *Queensland Wire*, a misuse of market power was made out; *Melway*, where it was not; and *Safeway*, where certain instances of conduct were held to breach section 46 while others were not. These cases suggest that the current section 46 is operating as intended in making the often borderline distinction between vigorous competition and the misuse of market power.

Evaluating the Harper Review's concerns with 'take advantage' and 'purpose'

The Business Council does not agree with the Harper Review conclusions that the 'take advantage' and 'purpose' elements are problematic and justify a complete overhaul of the provision.

The Business Council regards the 'take advantage' and 'purpose' elements as essential to section 46 and fundamentally disagrees with the Harper proposal to remove them.

We have consistently argued that the courts have had no difficulty interpreting 'take advantage'.

On the advice of the ACCC, amendments were made in 2008 to address concerns about the interpretation of the 'take advantage' element in previous cases (particularly *Rural Press*). The Harper Review failed to properly assess the effectiveness of those changes, it simply dismissed them with the comment that 'it is doubtful that the amendments assisted'.

This is not a sound basis on which to remove the 'take advantage' element. Our assessment is the amendments have sufficiently dealt with any need to clarify the meaning of 'take advantage' and have been used in recent judicial decisions.

The problems claimed with 'purpose' are not a sufficient reason to change the section. The ACCC has never lost a case for failing to prove purpose. It proved an anti-competitive purpose in every case it has brought under section 46 until the *Pfizer* case in 2015, which failed on other grounds. Claims that the 'purpose' test requires evidence of 'smoking gun' documents or statements are not supportable in light of section 46(7) and court decisions confirming that purpose may be inferred entirely from conduct or any other relevant circumstances – including the effect or likely effect of the conduct.

Many competition issues raised do not relate to section 46

A number of competition-related concerns have been raised by stakeholders that are best dealt with by other parts of the regulatory framework or are not valid reasons for regulation.

For instance, section 46 is not the appropriate provision in the first instance for dealing with problems with supply chains and the purchaser–supplier relationship. Those issues are best dealt with through the industry codes, unconscionable conduct laws or through collective bargaining. The ACCC has said that it agrees with this distinction, but other proponents of the change do not. This fundamental disagreement could have a profound impact on the framing and application of any change to the law.

General dislike about the growth in large firms, due to economies of scale or successful pro-competitive activities, should be disregarded. It is the impact of firm behaviour on consumers, productivity and economic growth that matters, not their size or even their market power.

Section 46 has been used successfully, and often, by international standards

Arguments that Australia's misuse of market power law is weaker than those of other jurisdictions are not supported by the facts. The data shows that the ACCC has had considerable success in pursuing action under section 46 and has taken a high number of cases by international standards. Since the *Queensland Wire* case in 1990:

- the TPC/ACCC has brought 20 cases involving a section 46 claim
- in 17 of those cases the section 46 claim was decided (in the other 3 cases it was withdrawn)
- in 14 of those 17 cases (82%), the ACCC was able to prove that the respondent had a substantial degree of market power
- in 12 of those 14 cases (85%), the ACCC was able to prove that the respondent had 'taken advantage' of that market power
- in all of those 12 cases, the ACCC was able to prove an anti-competitive purpose
- the two cases in which the respondent had substantial market power, but did not take advantage of it, were *Rural Press* and *Cement Australia*. Both cases concerned facts prior to amendments made to clarify the 'take advantage' interpretation in 2008.
- overall, the ACCC won 12 of its cases on the section 46 element and an additional 5 cases on other parts of the Act.

- there have also been at least 16 private actions under section 46. In 2014 alone, there were two private section 46 cases *(Apple v Samsung, ANSTO)* that settled.

In the same period, the US Department of Justice has only brought ten cases under the corresponding law, section 2 of the Sherman Act – in a much larger economy.

Conclusion

The problem with section 46 remains unclear. A key objective for the review should be to provide stakeholders with a clear and valid problem to be solved, before change is considered.

Key principles

The 'misuse of market power' provision must be focused on its primary purpose, which is to regulate the 'misuse' of market power through exclusionary conduct, and not be confused with the role of other laws. It must also protect competition and consumers, not competitors.

Purpose of the misuse of market power provision

The purpose of the 'misuse of market power' provision is to protect the process of competition in markets, because effective competition is in the best long-term interests of consumers and economic growth.

It is ultimately concerned with stopping firms with substantial power in a market from using that conduct to engage in exclusionary conduct which damages the process of competition. 'Misuse of market power' may be found in cases of predatory pricing, bundling, refusal to deal or price discrimination, depending on the circumstances.

The review needs to establish the appropriate test for determining whether a company has engaged in egregious behaviour of this type, and whether the current section or the Competition and Consumer Act in its totality is adequate.

'Misuse' and 'take advantage'

The current words 'take advantage' are particularly important to defining 'misuse' and align the provision with comparable law internationally. 'Take advantage' allows a business to know where the line is drawn between anti-competitive and pro-competitive conduct.

While only Australia, New Zealand and Indonesia use the term 'take advantage', competition laws throughout the world require a similar causal connection between the market power and the conduct or its effects.

The proposed removal of 'take advantage' in five of Treasury's options would mean that any conduct by a firm with market power could be caught, whether it constitutes a 'misuse' or not. This will create major uncertainty and deter pro-competitive behaviour and is a step too far.

The proposal to remove 'take advantage' is an excessive reaction to unsubstantiated concerns about interpretation by the courts. It risks punishing competing businesses for

simply having ‘market power’ and turning section 46 in to an anti-market power provision. Australia’s laws would be out of step with international law.

Competition law should not be concerned with the effects on competitors or industry structure that are the consequences of normal competitive behaviour. If governments want to provide support to certain businesses or industries then that is the function of industry or social policy, it is not a not a matter for competition policy. It is not a reason for introducing changes to competition law that will hold back vigorous competition and have a chilling effect on investment decisions.

Consumer interest is paramount

Consumer interest should be the ultimate goal of competition policy.

Vigorous and robust competition provides a strong incentive for businesses to improve quality, reduce costs and innovate to meet the needs of consumers. Vigorous competition has led to innovations that consumers have quickly developed a preference for, like the smartphone and disruptive new services like Uber and Airbnb. Australian consumers benefit from the expansion of major domestic and foreign retail chains, even though this may cause disruption in local markets.

The process of competition lifts business competitiveness and efficiency, leading to better use of our limited physical, human and capital resources, the creation of high-value jobs and a growing national income.

The framing of the ‘misuse of market power provision’ must be considered through the following lenses. The provision should protect competition by enhancing consumer interest, encouraging innovation and lifting global competitiveness.

- The ‘Consumer’ lens – how can the misuse of market power law be framed to ensure firms are unconstrained to compete vigorously in the interest of enhancing the welfare of consumers?
- The ‘Innovation’ lens – how can the misuse of market power law be framed so that new and existing firms of all sizes are not discouraged from innovating, lifting productivity and lifting the quality of goods and service provision to consumers?
- The ‘Competitiveness and scale’ lens – how can the misuse of market power law be framed in a way that will enable efficient firms to grow and legitimately take advantage of increasing scale to compete successfully in domestic and global markets, while maintaining competitive domestic markets?

The current misuse of market power provision scores well when viewed through these lenses.

Any change to the misuse of market power provision that:

- broadens the scope of the law to the point where legitimate business conduct is at risk of being captured
- creates uncertainty for business or
- creates excessive administration and compliance costs

will fail on these criteria. The cost of this failure will be borne by consumers and the wider community.

Changing the misuse of market power law from a law that works well to an as yet unknown alternative would be a risky venture with unknown consequences for consumers and innovation. As a bottom line, any changes to a law must follow the identification of a clear problem with the law and be shown to deliver benefits that exceed the costs – in accordance with the government's guidelines for best practice regulation.

A well-designed provision is essential for business certainty

The Business Council recognises the important role that an effective misuse of market power provision must play in protecting competition in the interests of consumers.

Companies with substantial market power should engage in competition on its merits, not seek to use that power to undermine the competitive process by excluding competitors from markets.

Equally, great care must be taken to ensure the provision does not prevent firms with market power from competing vigorously and on merit, such as through expansion into new markets, product enhancement or price discounting, innovating and increasing efficiency in production and distribution.

Simply having market power is not illegal, nor is it undesirable. Firms with substantial market power frequently innovate, including by drawing upon economies of scale, to provide consumers with better products at lower prices.

Data from the Australian Bureau of Statistics shows the larger the business, the more likely that it has introduced or implemented innovation in the previous year (74.3% of businesses with 200 or more persons; 63.4% of those with 20–199 persons; 51.0% of those with 5–19 persons; 34.7% of those with 0–4 persons).[3]

The OECD's *2015 Science, Technology and Industry Scoreboard* found that the top 250 corporate R&D investors account for 70 per cent of global business R&D and patents, and 44 per cent of trademarks.

Shackling businesses with excessive regulation due to their market power could substantially harm innovation, consumers and economic growth. Many firms with substantial market power are global champions at the forefront of Australia's exporting efforts.

Firms with substantial market power need to know precisely where the law draws the line between pro-competitive behaviour and anti-competitive behaviour.

This is especially important for unilateral or single-firm behaviour, which section 46 exclusively regulates. In regulating a firm's unilateral conduct directed at outperforming its rivals, which is the essence of competition, there can be little room for ambiguity. Under a poorly framed, unstable or uncertain provision businesses will need to regularly commission expert advice to assess the legality of their actions. This will be expensive and time consuming – and any advice will need to be heavily qualified.

3. Australian Bureau of Statistics, 8158.0 Innovation in Australian Business, 2012–13, ABS, Canberra, updated 21 December 2015.

Under such a provision, businesses will not be assured that they can engage in vigorous competition on its merits without the risk of investigation or litigation by the ACCC and third parties. The ACCC's powers to extract undertakings, require disruptive document production and attendance, and intervene in commercial conduct would greatly expand.

The net effect of heightened uncertainty and regulatory risk will be to deter competitive business behaviour. Firms will pull back from innovating and investing, rather than risk reputational damage or legal costs and penalties arising from litigation. This will harm consumers, prevent innovation and constrain the ability of Australian firms to compete in global markets.

In short, the outcomes of a poorly designed law will be more regulatory activity, less investment, less employment, less income, higher prices and less consumer choice.

Strengthening the law

Following advice from the Harper Review, the government has set up this review to ask stakeholders for their views on the need to 'strengthen' the section.

All laws should be reviewed regularly and assessed for whether they are fit for purpose in the increasingly dynamic and global markets of the future economy.

In reviewing section 46 as part of a broader Competition Policy Review, the Harper Review proposed a substantial change to the law, which would have been highly damaging to the economy. The Harper proposal is revisited in the section below.

The law will only be strengthened if any changes are linked to a clear and valid problem and the benefits of change clearly exceed the costs and risks of change, in accordance with the *Australian Government Guide to Regulation*. A stronger law would not necessarily lead to more cases – it may lead to fewer cases.

In the absence of any specific evidence of gaps in the law, a stronger law should not mean an expanded law. The ACCC has said the section is difficult to apply, but no evidence has been provided to date of any specific anti-competitive behaviour that cannot be prosecuted under section 46 or other parts of the competition law and policy framework.

A stronger law will certainly not be the outcome if any changes to section 46 create uncertainty, add to the regulatory burden or unduly expand the regulator's powers, leading to reduced competitive conduct by firms and harm to consumers.

Revisiting the full-Harper option

The final report of the Competition Policy Review put forward a substantive micro-economic reform agenda that in the main would set Australia up for a more prosperous future. The majority of the 56 recommendations in the report will make a positive difference to economic growth.

The exception was the recommendation to amend the misuse of market power provision.

Harper Review proposed re-drafting of section 46

A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the **purpose, or would have or be likely to have the effect**, of **substantially lessening competition** in that or any other market.

Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, **the court must have regard to**:

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

b. the extent to which the conduct has the purpose, or would have or be likely to have the 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.

Harper's proposal is problematic in a number of ways.

- By removing the 'take advantage' element, the Harper proposal would remove the causal link between the market power and the conduct in question, fundamentally stripping the 'misuse of market power' provision of its essential meaning.
- It would also shift the compliance obligation on companies from purpose or intent, which are known to those engaging in the conduct, to 'effects', which are unknown. It is a major expansion in the law that would create significant uncertainty and should be rejected.
- The replacement of the 'purpose' requirement and the 'take advantage' element with a 'substantial lessening of competition' test would greatly extend the time and cost of regulatory intervention by the ACCC.

The Harper panel itself acknowledged the recommended changes run the risk of capturing pro-competitive conduct and sought to mitigate that risk through the addition of factors for the court to take into account. However, the further addition of mandatory court factors would not solve the problems introduced by the changes to the law.

While the panel concedes there would be costs and risks associated with the proposal, it failed to identify any pro-competitive or pro-consumer benefits.

The Harper Review proposed a fundamental re-write of the law with wide-ranging impacts across the economy, without putting forward any practical examples of problematic business behaviour.

The recommended changes would introduce regulatory cost and uncertainty at a time when the forward investment intentions of Australian businesses are already weak. They would risk harming price competition, new product development and business expansion for no clear identified benefits for consumers, employees, or businesses, large or small.

Key elements of section 46

What should the section do?

There are three overarching principles that laws on the misuse of market power should observe:

- They should capture anti-competitive conduct or abuses of market power.
- They should permit vigorous competition on the merits.
- They should provide a meaningful guide to conduct (i.e. be applicable).

The legal test must be able to be reliably and efficiently applied by businesses that will be subject to the law, so that they can ensure that their competitive conduct falls within that law.

A law that is uncertain and difficult to apply will itself deter competitive conduct as businesses seek to minimise the risk of investigation or legal action. It will also add compliance and uncertainty costs that will tend to raise prices if a business decides to accept the increased risk of the law.

Treasury's discussion paper separates out for discussion the key elements of the misuse of market power provision. The discussion paper invites stakeholders to comment on different variants of Harper's proposal. The options for discussion are:

- retaining the current section 46 (referred to as the 'no-Harper' option)
- the Harper Review proposal (the 'full-Harper' option)
- four new options put forward by Treasury that are different formulations of the Harper proposal (the 'part-Harper' options). See **Attachment C** for the full description of each option.

Treasury is asking stakeholders to comment on these aspects of the Harper Review's recommendation:

- Removal of the 'take advantage' limb.
- The shift from a 'purpose' requirement to 'purpose or effect, or likely effect'.
- The introduction of a 'substantial lessening of competition test' to replace the specific behaviours.
- The Harper proposal to include 'mandatory factors' for courts to consider.
- The proposal to allow authorisation.

What should be the essential elements of an effective 'misuse of market power' provision?

Looking at international practice, the relevant provisions in most countries have most or all of the following features. These features are designed to target anti-competitive behaviour and protect vigorous competitive conduct while providing reasonable guidance and certainty to courts, regulators and businesses:

- a threshold requirement of market power
- a focus on exclusionary conduct
- an examination of purpose

- a causal connection between the market power and the conduct
- protection for conduct that has an efficiency or legitimate business justification.

In addition:

- The law should provide a clear guide to business.
- There should be low costs of application.

Assessing Treasury's six options

The current section is greatly preferred to the full-Harper and part-Harper proposals

The Business Council has assessed the current section, the full-Harper proposal and Treasury's four 'part-Harper' options against the essential elements. A detailed assessment is provided in **Attachment C**.

The current section 46 ('no-Harper') includes most of the key elements of misuse of market power laws in the major antitrust jurisdictions, and its retention remains the preferred option, given the uncertainty of any change and the lack of practical evidence of any need for change.

The 'full-Harper' proposal is not acceptable for the reasons the Business Council and others have demonstrated earlier. It would over-capture, constrain competitive behaviour, greatly expand the powers of the regulator and create excessive regulatory risk.

None of the 'part-Harper' options for change set out in the discussion paper represent a significant improvement over the Harper proposal, and are greatly inferior to the current section. The reasons for this are:

- all of the options for change remove the 'take advantage' element without replacing it with any requirement for a connection with market power or any clear protection for efficiency-enhancing conduct or competition on price and innovation
- the options that include a 'purpose, effect *or* likely effect' test would risk significant over-capture
- the options that remove the three exclusionary purposes provide no guidance to the kind of conduct that is to be examined under the provision
- where factors for the court to take into account are included, they give no certainty of outcome and are significantly less certain than a defence, an exception or a necessary element of the prohibition.

The complete removal of the 'take advantage' element from the part-Harper options alone makes all the part-Harper options unacceptable. This is an essential element for a misuse of market power provision, as demonstrated by the Business Council's analysis. The 'part-Harper' alternatives suffer from many of the same problems as the Harper proposal, and may even have worse outcomes.

Risks of changes to section 46

The lesson from the history of competition policy reform in Australia is that we need to put the consumer first.

Risks for innovation and consumers

If we get the provision wrong, there will be major unintended consequences for consumers who could pay more, or miss out on product innovation. Low-income consumers will be disproportionately affected. Business innovation, including by small business, will be adversely affected.

There are costs and risks from changing any law, but particularly in this case, given the section applies to the unilateral conduct that is essential to competition, and is likely to take many years for courts to re-interpret.

The risk of removing or broadening the 'take advantage' element.

The ACCC has explicitly targeted 'take advantage' as a barrier to enforcement.

The arguments against removing the 'taking advantage' element have been debated extensively in submissions to the review by the Business Council and many others.

The Business Council strongly disagrees that 'take advantage' is problematic. BCA members have nominated 'take advantage' as a critical element in the current section as it ensures a causal link between market power and any conduct under investigation.

Removing the 'take advantage' element would:

- put at risk any conduct engaged in by a business with market power, even conduct that has no connection with market power and would be expected in a perfectly competitive environment
- remove an essential guide for businesses with market power to assess their conduct against, substantially increasing uncertainty and deterring vigorous competition
- remove protection of conduct that has a legitimate business purpose
- amount to punishment for the mere possession of market power, contrary to all international competition policy
- be out of step with international jurisprudence.

Section 46 was amended in 2008 on the recommendation of the ACCC to address concerns with 'take advantage' arising from the High Court's *Rural Press* decision. Even before those changes took effect, the courts applied a broader test on a number of occasions and found the 'take advantage' element satisfied in many cases. The expanded test should remove any concern about the effect of the *Rural Press* case and has been applied without apparent difficulty.

The 'take advantage' test should not cause any concerns, as long as it is applied with adequate precision, and there is no evidence of widespread misapplication of the test.

The risks of a purpose or effect test

The proposal for a test of 'purpose, effect or likely effect' is not supported by analysis of the relevant provisions overseas, many of which treat purpose as an essential element and use effect as an additional test, not an alternative. That is, 'purpose *and* effect'.

Prohibiting conduct on the basis of effect alone would punish inadvertent and unforeseeable consequences, and would put at risk legitimate competitive conduct that happened to increase concentration or discourage entry.

Conversely, prohibiting conduct on the basis of purpose alone would punish a range of harmless and beneficial conduct. It would punish guilty intentions and careless internal communications of competitive vigour. The current section 46 prevents this over-capture through the 'take advantage' element, but the Harper proposal and all of the 'part-Harper' options presented would remove this critical element.

Risks of using the Substantial Lessening of Competition Test

The Business Council has argued against applying the SLC test to unilateral behaviour in section 46. The SLC test is difficult and expensive to apply and does not provide a clear guide to business about the likely effects of its actions.

Market definition, in particular, is frequently contested, and there is concern about the tendency of the ACCC to define markets narrowly and in some cases artificially, which risks capturing more, rather than less, business conduct.

The risks, time and costs associated with the ACCC's application of the SLC test, which can take many months, many experts and millions of dollars to contest, is itself a significant deterrent to competitive behaviour.

In addition, to manage regulatory compliance and risk management, firms will need to start conducting their own internal SLC tests when innovating. These will need to be consistent with court interpretations of what constitutes a substantial lessening of competition.

Costs and effects on business decision making

Businesses typically implement sophisticated and robust regulatory compliance systems to ensure they are operating within the law. Regulatory investigation and litigation not only potentially expose businesses to substantial legal costs and penalties, it can also damage a business's reputation and brand.

An uncertain or expanded provision will cause businesses to pull back from undertaking legitimate pro-competitive activity where there is regulatory risk due to effects on the market that are hard to predict.

Under a new provision, new jurisprudence and case law will take many years and cases to develop, adding to uncertainty. ACCC guidance materials would take a considerable amount of time to be developed.

Some of the direct costs to business will include:

- the increased cost of sourcing economic and legal advice before undertaking pro-competitive activity
- the longer time frames that will need to be built into business decision-making process to manage regulatory compliance
- the costs and time of running internal SLC tests for each pro-competitive action.

The additional regulatory uncertainty, risks and costs from changing section 46 run counter to the need to create a regulatory environment that promotes innovation and pro-competitive conduct within dynamic markets.

Many businesses will face increased regulatory risk

This does not only affect the largest businesses in Australia. Many businesses, large or small, regional or metropolitan, would be affected, and across all sectors of the economy.

A list of businesses previously involved in section 46 cases reveals the extent of the provision: Rural Press and Bridge Printing; Pfizer; Melway; Cement Australia; Baxter Healthcare; Eurong Beach Resort; Darwin and Garden City Cabs; Ticketek; the Bureau of Meteorology; Boral, and Visa.

Examples of small and medium sized businesses involved in section 46 cases

- Eurong Beach Resort on Fraser Island in Queensland was a small business built from nothing by the owner Sid Melksham over 40 years. It was reported to have been sold in 2002 for about $20 million. The resort was found to have substantial power in the market for barge services from Inskip Point on the Queensland mainland to Hook Point on Fraser Island, and Mr Melksham was personally fined for breaching section 46.
- In Rural Press, the Bridge Printing Office was found to have substantial power in the market for local newspapers in the Murray Bridge area in South Australia. Its newspaper, the Murray Valley Standard, had a circulation of around 4,500 copies twice weekly. Although it had recently been purchased by the much larger Rural Press, it would have had that market power regardless.
- Garden City Cabs was a taxi cooperative in Toowoomba, Queensland. The case was brought under section 46 and 45 but the section 46 claim was withdrawn. The ACCC also took similar action against the Darwin Radio Taxi Cooperative and won on both section 45 and 46.
- A third-party private action under section 46 was brought against Hamilton Island Enterprises in Queensland, on the basis that it had substantial power in the market for ‘access to marina services adjacent to a commercial airport in the Whitsundays’ – arguably a very narrow market.

Innovative global businesses like Tesla, Uber and Airbnb, could find themselves at risk of contravening the section if they are deemed to have market power. Domestic and foreign

companies might prefer to trade in overseas markets than expose themselves to the risks of an uncertain market power provision in Australia.

Examples of competitive behaviour at risk from a poorly designed provision

A full set of examples is provided in **Attachment A**.

Threat to state-based pricing would mean higher prices in regional Australia. Under a policy called 'state-based pricing', the major supermarkets offer the same, low prices on goods like milk, meat, bread and other groceries to regional consumers as they offer to consumers in the city. Under proposed changes to section 46, local grocers unable to match the low prices on those products could argue the effect is a 'substantial lessening of competition' (i.e. from grocers closing down, or choosing not to enter the market, because they cannot compete). To avoid this risk, the major supermarkets would have to consider abandoning state-based pricing and charge regional consumers higher prices for milk, meat, bread and groceries.

Small businesses in narrowly defined markets are at risk. The proposed change to section 46 will capture small businesses with market power operating in narrowly defined markets based on geography or the definition of the product on offer. A rural car dealer and mechanic with multiple locations in far western New South Wales and strong community relationships may be deemed to have market power because it has a number of stores in a concentrated market. If a new car dealer opens up in one town, offering low introductory prices, and the existing car dealer agrees to match all of the new car dealer's introductory prices, the existing business is suddenly at risk of prosecution under a changed section 46.

Companies could be hindered from expanding in order to export into China. An agribusiness that may have market power, foresees rapid growth in demand for dairy products in coming years, particularly in China. It needs to secure more milk to supply this demand, especially to take advantage of the China–Australia Free Trade Agreement. Company A might seek to secure supply for milk within certain agricultural areas, including through entering into contracts with farmers that currently supply a competitor. As a result, competitors may suffer a loss in their own milk supply or have to pay higher prices to farmers than they otherwise would have, to maintain their own supply. If competitors can no longer maintain their supply and are no longer profitable, the agribusiness may be at risk under a changed section 46.

Legislative risks

Once commenced, the legislative process can lead to changes that appear initially as being innocuous becoming very high risk. An even more extreme and damaging law might emerge, particularly where even the proponents of the change disagree fundamentally about the scope and purpose of the change they are proposing.

Are there alternatives to substantive legislative change?

Given the strong case against changing section 46 itself, the government might consider alternative non-legislative approaches to addressing stakeholders concerns.

Options to consider might include:

- monitoring the effectiveness of its other policy initiatives designed to address allegations of anti-competitive or unfair behaviour, including the Food and Grocery Code, collective bargaining permissions, the Unfair Contract Terms legislation, the streamlining and promotion of the collective bargaining process and the appointment of a Small Business and Family Enterprise Ombudsman
- undertaking a proper and ongoing assessment of the clarification of the characterisation of the 'take advantage' test in subsection 46(6A), introduced in 2008
- improving access to justice
- education and information initiatives.

Conclusion

The absence of a clear problem, the substantial likely costs associated with change and the lack of any identified pro-competitive or pro-consumer benefits all point to a clear preference to leave the provision in its current form.

The assessment against best practice finds the current misuse of market power section clearly remains the preferred option.

The Harper Review proposal would be highly damaging and the part-Harper options offer no significant improvement. As review Chair, Professor Ian Harper, reportedly said recently: 'going half Harper might actually be worse than going full Harper or no Harper.'

The government should give its recent actions to address concerns of small business and the farming sector time to work. These include: the government's small business tax cut package; the agriculture white paper; industry codes of conduct (e.g. the Food and Grocery Code, the Horticulture Code, Franchisee Code, etc.); the extension of the unfair contract terms provisions; the streamlining and promotion of collective bargaining permissions; the Small Business and Family Enterprise Ombudsman; and the appointment of agriculture and small business commissioners at the Australian Competition and Consumer Commission (ACCC).

The government should ensure the Treasury and Attorney-General's Department (in consultation with the new Ombudsman and the ACCC) continue to monitor and collect evidence about legitimate competition problems and assess the adequacy of the competition policy framework, in its entirety, for dealing with any anti-competitive problems.

Attachment A – Examples of pro-competitive behaviour at risk

The Business Council has identified a number of examples of ordinary behaviour by a business with market power that might be abandoned or deterred, with real negative effects on productivity and consumer interests.

Threat to state-based pricing would mean higher prices in regional Australia

Under a policy called 'state-based pricing', the major supermarkets offer the same, low prices on goods like milk, meat, bread and other groceries to regional consumers as they offer to consumers in the city.

Almost all stores within a state set the same price, even in regional areas where it costs more to transport and supply the goods. The policy helps to ease cost-of-living pressures in parts of the country where disposable incomes may, on average, be lower than in the cities.

Under the proposed section 46, local grocers unable to match the low prices on those products could argue the effect is a 'substantial lessening of competition' (i.e. from grocers closing down, or choosing not to enter the market, because they cannot compete).

To avoid this risk, the major supermarkets would have to consider abandoning state-based pricing and charge regional consumers higher prices for milk, meat, bread and groceries.

How much higher could prices rise in regional areas?

In 2008, the ACCC's grocery inquiry found that prices charged by independent retailers in regional areas were 17 per cent higher than major retail chain stores.

Since then, prices offered by the major supermarkets have only fallen further. Coles' food and liquor prices have fallen 1.5 per cent a year over the past five years, while food prices across the economy have risen by 1.5 per cent per year.

Application of the SLC test will delay and deter product innovation

The experience of BCA member companies is that the ACCC's application of the 'Substantial Lessening of Competition' (SLC) test under other sections of the Act can take many months and define markets very narrowly. If the ACCC takes this same approach to unilateral conduct under section 46, which is more frequent and requires faster decision making, it will raise regulatory risk and slow businesses' ability to compete.

In the case of BlueScope, the ACCC's application of the SLC test in several recent merger applications took between 10 and 34 weeks. In one case, there was a lengthy investigation into defining a market narrowly on the provision of only 230 tonnes of steel (BlueScope's national production is 2.6 million tonnes). In another case, much time and effort was spent analysing the impacts of a national arrangement in the Tasmanian market.

We raise these examples of the application of the SLC test to highlight two major problems with the section 46 proposal:

- The narrow and unpredictable approach to defining markets at the very local level means a broad range of current and prospective business activities, including small businesses operating in smaller markets, risk investigation and prosecution.
- The time (up to six months) and substantial cost to business will slow down decision making, put companies at a commercial disadvantage and deter pro-competitive activity. This would come on top of the time and costs associated with businesses managing these regulatory risks internally as a part of their decision-making processes, for example, running internal test cases of possible ACCC action.

Decisions by local steel manufacturers to invest in product innovation and compete with low-priced imports requires a stable and efficient regulatory framework. If the ACCC takes this same approach to unilateral decision making by businesses, it will add significantly to the risk and cost of competing and hamper downstream product innovation and manufacturing in the steel industry. It will put at risk local investment and jobs, particularly in regional parts of New South Wales and Victoria.

Investment in regional Australia at risk

A meat processor wants to expand its operations in regional Australia with a new hi-tech processing plant. It is seeking support for an investment that would allow it to double its production capacity, double its workforce, and increase its exports into the growth markets of East Asia.

Coles offers the support of a long-term supply contract. The meat processor would use this contract to help secure finance, and the economies of scale of the new plant would deliver Coles high-quality cuts of meat in large volumes at lower cost. The savings would be reinvested in cheaper prices for meat at the checkout.

Would a retail competitor to Coles complain that this commercial arrangement was in breach of the new section 46, because that retailer was unable to access meat at the same cost? Would a smaller meat processor in that same region seek to take action under the new section 46 because it could not compete on price or volumes with the output from the state-of-the-art facility built by its rival?

Would the 10-year supply contract or the investment in new plant and jobs proceed if either Coles or the meat processor were advised of there being significant risk of being prosecuted for contravention of the new section 46?

Small businesses in narrowly defined markets are at risk

The proposed change to section 46 will capture small businesses with market power operating in narrowly defined markets based on geography or the definition of the product on offer.

Consider a rural car dealer and mechanic with multiple locations in far western New South Wales and strong connections to the community.

A new car dealer opens up in one town, offering low introductory prices. The existing car dealer agrees to match all of the new car dealer’s introductory prices. In addition, the existing car dealer refuses to trade with the new car dealer, due to concerns about

creditworthiness. The existing business is suddenly at risk of prosecution under the proposed section 46.

The existing car dealer may be deemed to have market power because it has a number of stores in a concentrated market, which are used to build community relationships. The effect of price-matching or refusing to supply could be deemed to be a lessening of competition in the market if the competitor cannot continue. This might be because they are not able to build up enough relationships in the community.

Price competition could be constrained for popular products like children's trainers

A new discounter in the footwear retail market seeks to gain market share and generate greater business through its stores by promoting reduced prices for a key item, kids' trainers.

The market-leading sports shoe retailer seeks to match the discounter on price, rather than concede price leadership on a popular product line. Competition is intense and a price war ensues, with both retailers selling at, and sometimes below, their costs. Families benefit from low prices for children's footwear.

Under the proposed amendments to section 46, would a smaller footwear retailer competing in the same market be tempted to take action to prevent vigorous price competition on kids' trainers? Could it mount an argument that it did not have the economies of scale and supply chain volumes to buy the trainers from its wholesale supplier at a price that would allow it to compete for sales? Would potential loss of sales, customers and profitability expose its business model to distress, and potential closure?

If so, would the new section 46 support ongoing price competition to the benefit of consumers – or would the courts rule that the impact, real or potential, of vigorous price discounting on children's shoes was having the effect or likely effect of substantially lessening competition in the market?

Consumers could be denied lower prices and choice from hardware stores

Former Woolworths Chairman, Mr John Dahlsen, has reportedly called for changes to the section 46 laws because hardware stores such as those owned by his company JC Dahlsen are finding it difficult to compete with new Bunnings stores ('Former Woolworths Chairman John Dahlsen attacks Bunnings', SMH, 12 August 2015).

Dahlsen cites the case of three stores where his company 'had to sell those stores because Bunnings informed us they were entering those three markets'. Dahlsen also says, 'Bunnings is now entering very small markets which five years ago it wouldn't have contemplated, and it's having a dramatic effect on the small retailer – many small independent hardware merchants are failing'. ACCC Chair Rod Sims is quoted as saying that: 'Yes, there are some concerns with Bunnings's share and it's an area of interest but so are many other areas'.

Bunnings succeeds when consumers choose to switch from existing retailers to take advantage of the low prices and extensive range that a new Bunnings store offers. This is the nature of competition and is good for the consumer.

If, as is suggested by the article, the proposed changes to section 46 are to be used by existing retailers to stymie competition from new entrants (i.e. to prevent new Bunnings stores), it will deprive consumers in those areas of the benefits that are available to consumers in other parts of Australia where Bunnings already operates.

Major new innovations like the iPhone would be at risk

When Apple released the iPhone in 2007, it may well have been deemed to have 'substantial market power' because of its share of the laptop, personal computer and mp3 music player markets.

The iPhone grew popular very quickly because it was an exciting new product that integrated well with Apple's established products. As a result, some competitors had to exit the market – for example, Nokia, BlackBerry and Palm – and the market became more concentrated.

Under the revised section 46 proposal, these competitors would have been able to take their own action or ask the ACCC to take Apple to court.

Apple may have been found to have market power due to its large market share in related markets, and unique integration capability in the emerging smartphone market. It might be found that there is an effect of substantial lessening of competition in the hardware and operating system markets.

Apple would have had to weigh this up when designing and launching the iPhone and decide whether the regulatory risk was worth taking.

Established companies could be prevented from innovating in response to new entrants

Company A offers subscriber television service and is considered to have market power. It launches a new online video streaming on-demand service, partly in response to the entry into the Australian market of an international competitor.

Company A's existing program licences mean it can offer a high-quality and popular product. At the time it launches the new service, it would have had to weigh up the risk of the international entrant failing, blaming its lack of success on Company A's actions, and taking action under the proposed section 46.

The international competitor or the ACCC could take this action if Company A is deemed to have market power; and the effect of the launch of the new service is a lessening of competition in the market due to the international competitor choosing not to enter the Australian market, or exiting the market.

Companies could be hindered from expanding in order to export into China

Company A is an agribusiness that may have market power and foresees rapid growth in demand for dairy products in coming years, particularly in China. It needs to secure more milk to supply this demand, especially to take advantage of the China–Australia Free Trade Agreement.

Company A might seek to secure supply for milk within certain agricultural areas, including through entering into contracts with farmers that currently supply a competitor.

As a result, competitors may suffer a loss in their own milk supply or have to pay higher prices to farmers than they otherwise would have, to maintain their own supply.

If competitors can no longer maintain their supply and are no longer profitable, and/or unrelated businesses in dependent sectors (like food manufacturers) are no longer profitable and they exit the industry, Company A may be at risk under the proposed section 46.

Company A will have to weigh up the risk that expanding its business, with the intent of growing exports to China, will be prosecuted under the new section 46.

The growth in cheaper groceries under home brands could be stopped

Home brands are good for consumers: they lower prices and introduce more competition with the brands on supermarket shelves – as found by the ACCC in its 2008 Food and Grocery Inquiry and by the Senate Economics Reference Committee in its 2011 report *The impacts of supermarket price decisions on the dairy industry*.

Major supermarkets have recently expanded their home brand range, to appeal to price-sensitive customers and respond to competition from new entrants. If they expand the offer of home brands further, the effects on suppliers of branded products may put the supermarkets at risk of prosecution under the proposed section 46.

The supermarkets may be deemed to have market power due to their market share and access to customers and supplies that its competitors do not have. There may be an effect of lessening of competition in the retail markets due to potential competitors not entering the market; or existing competitors potentially exiting the market.

Passengers on airline routes could experience less choice

Airline A may have market power and is seeking to commence services on a new route, currently serviced by Airline B. Airline A has assessed various options and the most profit-maximising use of its available aircraft, crew and ground staff to service anticipated demand would be five daily services.

However, there is a risk that Airline B may not be able to sustain its existing services if Airline A introduces five daily services. This may or may not mean that Airline B exits the market over time. Given uncertainty over whether Airline A's expansion would have the effect of substantially lessening competition, Airline A modifies its proposed schedule and decides to operate only three daily services.

This reduces choice and flexibility for the customer, is less likely to stimulate additional demand and reduces the incentive for Airline B to engage in innovative and pro-competitive responses to the new entry. Airline B has been 'accommodated'. This approach sacrifices efficiencies and cost savings for Airline A and ultimately makes the new services less sustainable.

Attachment B – Equivalent laws in other jurisdictions

United States

Section 2 of the *Sherman Act* prohibits a firm that possesses, or has a dangerous likelihood of obtaining, **monopoly power** from engaging in **exclusionary conduct** that either **uses or contributes to that power** and has an objectively anti-competitive **purpose and effect**. If a firm raises a prima facie **legitimate business purpose**, the **plaintiff** must show that the **anti-competitive harm outweighs any pro-competitive benefit** of the conduct.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Europe

Article 102 of the *TFEU* prohibits a firm in a **dominant position** from **abusing that position** with an **exclusionary or exploitative effect** which may be determined by reference to **purpose.** There must be a **connection** between the dominant position and the **conduct or its effects**. If a firm has an **objective justification** including **protecting commercial interests or efficiencies**, the **defendant** must show that these **benefits outweigh any anti-competitive effects**.

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Canada

Section 79 (**Abuse of Dominant Position**) of the *Competition Act 1985* prohibits a firm that may **substantially or completely control a market** from engaging in **an anti-competitive practice with a predatory, exclusionary or disciplinary purpose** against a competitor **and the effect of preventing or lessening competition substantially** in a market. It does not require an explicit connection between market power and the conduct or effect, but requires the Tribunal to consider whether the practice is a result of superior competitive performance and allows a defendant to advance a business justification against any evidence of an anti-competitive purpose.

78. (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice …

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Hong Kong

Section 21 of the *Competition Ordinance* prohibits an undertaking with a **substantial degree of market power** from **abusing that power** with the **object or effect** of **preventing, restricting or distorting competition.** The main categories of abusive conduct are listed.

21. (1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

(2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—

(a) predatory behaviour towards competitors; or

(b) limiting production, markets or technical development to the prejudice of consumers.

Indonesia

Section 25 of the *Law Concerning the Ban on Monopolistic Practices and Unfair Business Competition* prohibits entrepreneurs from **taking advantage of a dominant position** for a number of **exclusionary purposes**.

25. (1) Entrepreneurs are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:

a impose trade terms with the intention to prevent and/or hamper the consumers to acquire competitive goods and/or services, both in prices or quality; or

b. restrict the market and technology development; or

c. hamper other entrepreneurs having the potential to become their competitors to enter the relevant market.

China

Article 17 of the *Anti-Monopoly Law* prohibits a business in a **dominant market position** from **abusing that position** to conduct a range of **exclusionary and exploitative acts,** but may allow these acts where they have **justifiable cause**:

A business operator with a dominant market position shall not abuse its dominant market position to conduct following acts:

(1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;

(2) selling products at prices below cost without any justifiable cause;

(3) refusing to trade with a trading party without any justifiable cause;

(4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;

(5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;

(6) applying dissimilar prices or other transaction terms to counterparties with equal standing;

(7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council

Japan

The *Anti-Monopoly Act 1947* prohibits an enterprise from **excluding or controlling the activities of other enterprises** so as to cause a **substantial restraint of competition** contrary to the public interest – that is, private monopolization.

2(5) The term "private monopolization" as used in this Act means such business activities, by which any enterprise, individually or by combination or conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

3 A enterprise must not effect private monopolization or unreasonable restraint of trade.

Singapore

Section 47 of the *Competition Act 2004* prohibits an undertaking from **abusing a dominant position** which may be constituted by a range of **exclusionary conduct**:

(1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —

(a) predatory behaviour towards competitors;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Malaysia

Section 10 of *the Competition Act 2010* prohibits an enterprise from **abusing a dominant position** which may include a range of **exclusionary and exploitative conduct**, but does not prevent any conduct that has **reasonable commercial justification** or represents a **reasonable commercial response** to the market entry or market conduct of a competitor.

(1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

(2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—

(a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;

(b) limiting or controlling—

(i) production;

(ii) market outlets or market access;

(iii) technical or technological development; or

(iv) investment,

to the prejudice of consumers;

(c) refusing to supply to a particular enterprise or group or category of enterprises;

(d) applying different conditions to equivalent transactions with other trading parties to an extent that may—

(i) discourage new market entry or expansion or investment by an existing competitor;

(ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or

(iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;

(e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;

(f) any predatory behaviour towards competitors; or

(g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

(3) This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.

South Korea

Article 3-2 of the *Monopoly Regulation and Fair Trade Act* prohibits a **market dominant undertaking** from engaging in **abusive conduct** which includes a range of **exclusionary and exploitative conduct** and includes reference to **purpose**:

Any market dominant undertaking shall not engage in any of the following conducts (hereinafter abusive conducts):

1. Unjustly determining, maintaining, or changing the price of goods or services (hereinafter price).
2. Unjustly controlling the sales of goods or the supply of services.
3. Unjustly hindering the business activity of other undertaking.
4. Unjustly impeding new competitors market entry.
5. Transacting with the purpose of unjustly excluding competitors or unjustly and substantially impairing consumers interest.

India

Section 4 of the *Competition Act 2002* prohibits the **abuse of a dominaint position,** which includes a range of **exclusionary and exploitative conduct** which includes reference to **purpose** and excludes **meeting competition** in some circumstances.

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market there for or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

South Africa

Section 8 (**Abuse of dominance prohibited**) of the *Competition Act 1998* prohibits a **dominant** firm from engaging in a range of **exclusionary and exploitative conduct.** Exclusionary acts are permitted where **technological, efficiency or other pro-competitive gains** outweigh anti-competitive effects, with the burden on the defendant in the case of listed exclusionary acts and on the prosecution for other exclusionary acts.

It is prohibited for a dominant firm to –

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

  (i) requiring or inducing a supplier or customer to not deal with a competitor;

  (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

  (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

  (iv) selling goods or services below their marginal or average variable cost; or

  (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

Attachment C – Detailed analysis of Treasury's six options against best practice

What elements must be included?

An essential set of elements can be drawn from Australian experience and international best practice. Australia's misuse of market power law should have the key elements that make up best practice internationally.

The relevant provisions in most countries have most or all of the following features, which are designed to target anti-competitive behaviour and protect vigorous competitive conduct while providing reasonable guidance and certainty to courts, regulators and businesses:

- A threshold requirement of market power.
- A focus on exclusionary conduct (as it applies to competition, not competitors).
- An examination of purpose.
- A causal connection between the market power and the conduct.
- Protection for conduct that has an efficiency or legitimate business justification.

In addition, the provisions strive to avoid both under-capture and over-capture according to the conditions of their particular jurisdiction and recognising the costs of applying, and complying with, the tests set out in these laws.

These features are used to test the options in the discussion paper later in this attachment.

1. A threshold requirement of market power

When originally enacted, section 46 applied to 'a corporation that is in a position substantially to control a market'. It was amended in 1986 to the current threshold of 'a substantial degree of power in a market'. This was intended to be a lowering of the threshold to apply not only to monopolists but to 'major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market'.[4]

Internationally, the relevant legislation appears to refer to a higher standard:

- The US Sherman Act continues to refer to monopolize and intent to monopolize.
- The Treaty for the Functioning of the European Union refers to a *dominant position.*
- The Canadian *Competition Act* applies where one or more persons *substantially or completely control* a market.

The current Australian standard has not been widely questioned, but in comparing Australia against other jurisdictions, it is worth considering that the relevant threshold may be higher in other jurisdictions and the Australian provision may accordingly apply to a wider range of economic activity.

[4] *Trade Practices Revision Act 1986*, Second Reading Speech, 19 March 1986.

2. A focus on exclusionary conduct (as it applies to competition, not competitors)

Misuse of market power laws internationally tend to focus on *exclusionary* conduct – that is, conduct aimed at excluding or preventing competitors from competing – though Europe and jurisdictions with laws based on the European model may also prohibit *exploitative* conduct such as inflated prices to consumers or unreasonably low prices paid to suppliers.

Categories of exclusionary conduct may be set out in legislation, as it is in Australia and Canada, or developed through the case law, as in the United States and Europe. It may be defined by reference to an exclusionary purpose, as again it is in Australia and Canada, by the form or effect of the conduct, or using a combination of these factors.

The ACCC has said that section 46 should apply only to exclusionary conduct:

> The ACCC wants to ensure competition is on its merits by dealing with exclusionary behaviour, when a business takes steps to prevent competitors entering a market … [5]
>
> As we have said, the ACCC sees anti-competitive behaviour as essentially exclusionary: it must affect the process of competition itself.[6]

However, while the current section 46 identifies specific categories of exclusionary conduct, the Harper proposal relies on the assumption that the 'substantial lessening of competition test only applies to exclusionary conduct. This assumption does not seem to be supported by the case law or by the ACCC's enforcement activity. For example, the substantial lessening of competition test applies to mergers, which are not obviously exclusionary in nature.

Exclusionary conduct, by its nature, applies to actual or potential competitors, but it is prohibited in order to protect the competitive process. Although the current section 46 refers to individual competitors and entrants, it is widely recognised that it is only concerned with them to the extent that damage to or exclusion of individual competitors affects the competitive process. The Full Federal Court said in *Eastern Express* that:

> "Part IV of the Act is designed to promote competition, and the role of Section 46 is to maintain competitive markets by restraining misuses of market power that will produce a non-competitive market."[7]

3. An examination of 'purpose'

The Harper Report recognises that misuse of market power laws internationally require examination of both purpose *and* effect:

> 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.[8]

Analysis of the relevant laws in major antitrust jurisdictions confirms that these laws tend to require proof of both an exclusionary purpose – whether objective or subjective – and a detrimental effect on competition or consumer welfare. This is most clearly seen in the

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5 Rod Sims, 'Our economy needs more competition on its merits', 13 September 2014.

6 Rod Sims, 'Bringing more economic perspectives to competition policy & law', 7 November 2014.

7 Eastern Express Pty Limited v General Newspapers Pty Limited (1992) ATPR ¶41-167

8 p. 336.

Canadian *Competition Act*, which prohibits anti-competitive acts that have the effect or likely effect of substantially preventing or lessening competition in a market[9] and, according to the legislation and the courts:

> First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor.[10]

This is explicitly a purpose *and* effect test, and similar combinations have been developed in the US and European jurisprudence including through the concepts of legitimate business purpose and objective justification.

By contrast, including 'purpose, effect or likely effect' would prohibit conduct on the basis of purpose without more, and would also prohibit conduct on the basis of effect or likely effect without more – punishing both inadvertent and harmless conduct.

4. A causal connection between the market power and the conduct

While only Australia, New Zealand and Indonesia use the term 'take advantage', competition laws throughout the world require a similar causal connection between the market power and the conduct or its effects. This connection is inherent in the European concept of an *abuse* of a dominant position, though in Europe the connection may be satisfied where the market power contributes to the impact of the conduct. It is also essential in the United States, where it will be satisfied if the conduct increases or maintains the market power.

Competition law authorities and frameworks around the world recognise that the acquisition of market power is the natural ambition of any competitor and should not be discouraged, as long as it is achieved through legitimate competitive means; that is, acquiring or maintaining market power should not be illegal: only the *misuse* of that market power should be prevented. As the European Commission notes:

> A dominant position is not in itself anti-competitive, but if the company exploits this position to eliminate competition, it is considered to have abused it.[11]

The 'take advantage' element implements this principle by providing that the business with market power must *use* that market power for an exclusionary purpose in order to contravene the law. The idea of 'use' may be evidenced in different ways, such as whether the conduct was 'materially facilitated' by the market power, or whether the business could or would have engaged in the conduct if it did not have market power.

This is not to ignore the fact that conduct engaged in by a business with market power may have a greater impact than similar conduct engaged in by a smaller business. As the US Supreme Court has said:

> Where a defendant maintains substantial market power, his activities are examined through a special lens: Behaviour that might otherwise not be of concern to the antitrust laws or that

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9 *Competition Act 1985*, ss 78 and 79.

10 *Canada (Commissioner of Competition) v. Canada Pipe Co* (2006) FCA 233.

11 EC Website at < http://ec.europa.eu/competition/consumers/abuse_en.html>

> might even be viewed as procompetitive can take on exclusionary connotations when practised by a monopolist.[12]

This statement was approved by the majority of the High Court in the *Melway* case, who nevertheless insisted that the conduct must be materially facilitated by market power. Interpreted correctly, the 'take advantage' test does not exempt conduct on the basis that the same physical steps could be undertaken by a business without market power; but where conduct has an exclusionary purpose, the market power must materially facilitate the achievement of that purpose.

The ACCC has said that the 'take advantage' element has been interpreted too narrowly in decisions such as *Rural Press* and *Cement Australia.*[13] However, section 46 was amended in 2008 to address these concerns, and it is appears likely that the prevailing interpretation of section 46 remains much broader than the *Rural Press* decision was feared to dictate.

5. Protection for conduct that has an efficiency or legitimate business justification

The ACCC has said that competition on the merits should never be prohibited, even where it results in many competitors leaving the market and increasing concentration:

> New innovation, aggressive discounting (provided it is not below cost for a sustained period), and new market entry, are all pro-competitive and, in our view, cannot have the effect of SLC… To repeat, to SLC there must first be behaviour that could be seen as anti-competitive. There cannot be an SLC through competition on its merits.[14]

The current section 46 relies on both the purpose and 'take advantage' elements to protect competition on the merits. A business without market power has little choice but to compete on the merits, as any exclusionary strategy is bound to fail. As a result, any conduct that does not take advantage of market power is also likely to constitute competition on the merits.

Other jurisdictions protect conduct that has an efficiency or legitimate business justification more explicitly. For example, in the United States if the defendant raises a prima facie business justification, the plaintiff needs to prove that the anti-competitive harm of the conduct outweighs any pro-competitive benefit.[15] In Europe, a defendant is entitled to claim an objective justification such as the protection of its commercial interests[16] or efficiency advantages that outweigh any harm.[17]

6. Costs of application

Misuse of market power provisions worldwide recognise that there are costs associated with both over-capture and under-capture, and additional costs associated with applying and complying with the law. These costs may differ in their relative significance depending on the history and structure of the economy. Where the economy is sluggish and still

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12 *Eastman Kodak v Image Technical Services* 504 US 451 (1992).

13 Rod Sims, 'Section 46: The Great Divide', 30 May 2015.

14 Rod Sims, 'Bringing more economic perspectives to competition policy & law', 7 November 2014.

15 *US v Microsoft* (2001) 253 F.3d 34.

16 Case 27/76, *United Brands v Commission.*

17 Case C-05/05, *British Airways v Commission.*

emerging from historical state control and monopoly, under-capture may be more damaging than over-capture; where the economy is more dynamic, over-capture and the costs of applying the law may be more significant.

In the Business Council's view, after more than 40 years of modern competition law and more than 20 years since the Hilmer reforms, Australia's economy is best characterised as dynamic and competitive, and the competition law should be calibrated accordingly.

Through judicial interpretation, the current section 46 has kept pace with the evolving and expanding economy and remains an appropriate provision to regulate the misuse of market power – though opportunities for some improvements may well be available.

Assessing the Options against the elements

Table 1: Option A – Assessment of current section 46 against key elements

Wording	Factor	Fit with factor?
A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of: a. eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; b. preventing the entry of a person into that or any other market; or c. deterring or preventing a person from engaging in competitive conduct in that or any other market.	*Threshold*	Yes: Substantial market power
	Conduct	Yes: Exclusionary
	Purpose	Yes: Purpose is an essential element
	Market power link	Yes: Conduct must use market power ("take advantage")
	Protections for efficiencies	Good: Go to purpose or use of market power
	Costs of application	Low: purpose and take advantage tests are easy for businesses to understand and apply.

Table 2: Option B – Assessment against key elements

Wording	Factor	Fit with factor?
The new provision would prohibit corporations that have a substantial degree of power in a market from engaging in conduct for the purpose of: a. eliminating or substantially damaging a competitor, b. preventing the entry of a person into a market, or c. deterring or preventing a person from engaging in competitive conduct.	*Threshold*	Yes: Substantial market power
	Conduct	Yes: Exclusionary
	Purpose	Yes: Purpose is an essential element (though it may be inferred from effect)
	Market power link	No
	Protections for efficiencies	Poor: Go to purpose (but conduct can have multiple purposes)
	Costs of application	High: purpose test without take advantage makes it difficult for a business to distinguish competitive from anti-competitive conduct.

Table 3: Option C – Assessment against key elements

Wording	Factor	Fit with factor?
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.	*Threshold*	Yes: Substantial market power
	Conduct	No: Only guidelines (not binding on court, private actions, or even ACCC).
	Purpose	Yes: Purpose is an essential element (though it may be inferred from effect)
	Market power link	No
	Protections for efficiencies	Poor: go to purpose (but conduct can have multiple purposes), SLC test (but limited support for efficiencies) or authorisation (but lengthy process).
	Costs of application	High: purpose of SLC is more difficult to test than a purpose directed at other market players; authorisation expensive and time-consuming.

Table 4: Option D – Assessment against key elements

Wording	Factor	Fit with factor?
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.	*Threshold*	Yes: Substantial market power
	Conduct	No: Only guidelines (not binding on court, private actions, or even ACCC).
	Purpose	Yes: Purpose is an essential element (though it may be inferred from effect)
	Market power link	No
	Protections for efficiencies	Poor: go to purpose (but conduct can have multiple purposes), SLC test (but limited support for efficiencies, even with court factors) or authorisation (but lengthy process).
	Costs of application	High: purpose of SLC is more difficult to test than a purpose directed at other market players; authorisation expensive and time-consuming.

Table 5: Option E – Assessment against key elements

Wording	Factor	Fit with factor?
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.	*Threshold*	Yes: Substantial market power
	Conduct	No: Only guidelines (not binding on court, private actions, or even ACCC).
	Purpose	No: Purpose *or* effect test means no need to show purpose.
	Market power link	No
	Protections for efficiencies	Poor: go to purpose (but conduct can have multiple purposes), SLC test (but limited support for efficiencies) or authorisation (but lengthy process).
	Costs of application	High: purpose of SLC is more difficult to test than a purpose directed at other market players; likely effect of SLC very difficult to predict; authorisation expensive and time-consuming.

Table 6: Option F ('Full-Harper') – Assessment against key elements

Wording	Factor	Fit with factor?
A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to: • the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and • the extent to which the conduct has the purpose, or would have or be likely to have the 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.	*Threshold*	Yes: Substantial market power
	Conduct	No: Only guidelines (not binding on court, private actions, or even ACCC).
	Purpose	No: Purpose *or* effect test means no need to show purpose.
	Market power link	No
	Protections for efficiencies	Poor: go to purpose (but conduct can have multiple purposes), SLC test (but limited support for efficiencies, even with court factors) or authorisation (but lengthy process).
	Costs of application	High: purpose of SLC is more difficult to test than a purpose directed at other market players; likely effect of SLC very difficult to predict; authorisation expensive and time-consuming.

Conclusion

The current section 46 includes most of the key elements of misuse of market power laws in the major antitrust jurisdictions, and its retention remains the preferred option given the uncertainty of any change and the lack of practical evidence of any need for change.

Attachment D – Detailed responses to Treasury's 17 questions

Business conduct

Question one

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?

Summary response:

We have not seen any examples of egregious business conduct that suggest that section 46 needs to be amended. No examples were provided in the Competition Policy Review, the discussion paper or the stakeholder roundtables. All examples raised in the public debate so far (e.g. land banking, buying up all the inputs, threats of retaliatory action, bundling, etc.) are likely to be covered by the existing section 46 or other parts of the competition law framework where they damage competition.

Detailed response:

This question is framed unfortunately. Section 46 is not designed to capture every example of business conduct that may be detrimental to competition. It is designed to capture *abuses of market power* that are detrimental to competition. Other examples of business conduct such as anti-competitive agreements, exclusive dealings and acquisitions are addressed by other sections of the *Competition and Consumer Act 2010* (CCA), and the fact that section 46 does not also capture this behaviour is no criticism of that section.

In fact, a misuse of market power provision broad enough to capture *any* form of business conduct that might be detrimental to competition would itself be economically damaging and detrimental to the competitive process. Competition law frameworks throughout the world treat misuse of market power laws separately and differently from other competition laws, in recognition of the fact that:

- while multilateral conduct such as collusion between competitors or the acquisition of competitors may be inherently antithetical to competition, single-firm conduct that aims to win customers away from competitors and drive less efficient competitors from the market is the very essence of competition
- because competition requires that firms make unilateral business decisions every day in response to rapidly changing market conditions, there is a significant economic cost in adding complexity, uncertainty and delay to those decisions by subjecting them to regulations that are difficult, time-consuming and expensive to comply with
- the acquisition of market power is the natural ambition of any competitor and should not be discouraged, as long as it is achieved through legitimate competitive means; that is, acquiring or maintaining market power should not be illegal: only the *misuse* of that market power should be prevented.

There is no gap in the law according to examples cited to date

A number of examples of damaging conduct that may not be captured by the current section 46 have been advanced without acknowledging that the conduct is clearly captured by other sections of the competition law.

In July 2015 former Small Business Minister Bruce Billson identified six categories of behaviour that he argued would be difficult or impossible to bring action against under the current section 46. The table below examines all of these examples and concludes that the existing competition framework would effectively deal with all of them.

Example cited	Coverage under the law
'Land banking' (buying up all available land)	**Already covered under the Act (section 50).** Acquisitions of land that have the effect or likely effect of substantially lessening competition are prohibited under section 50. The ACCC already prevents such acquisitions, or requires divestment of existing holdings before approving acquisitions, and has done so on a number of occasions in the retail sector (e.g. Woolworths in Glenmore Ridge NSW (2013), Coles in Singleton/Lakelands WA (2015).
Locking up limited supplies of key inputs	**Already covered under the Act (sections 46 as well as sections 45 and 47), where it is anti-competitive.** This behaviour, where it is anti-competitive (e.g. where supplies substantially in excess of reasonable requirements and contingencies are locked up), is already addressable under the current section 46, particularly after changes to the law made at the ACCC's request. Where there is a contract, arrangement or understanding (e.g. for exclusive supply or supply of a high and fixed proportion of output), this will be caught by sections 45 and 47 where there is an SLC purpose or effect. It is important to be careful with how this behaviour is addressed as, in many circumstances, securing supply is an ordinary and legitimate commercial behaviour that is overall pro-competitive.
Retaliatory threats in one market to block a new entrant in another	**Already covered under the Act (section 46 as well as section 45 and the cartel provisions)**. Using this behaviour as an example is a reference to courts' interpretation of section 46 in the *Rural Press* case. While many commentators disagree with the result in this case, it turns on a very particular set of facts and does not indicate a broader deficiency in the current section. The expansion of 'take advantage' in 2008 would make it more likely that similar conduct would be covered by the current law. This conduct would also be examined as an attempt to induce a market-sharing arrangement, which in many cases would attract *per se* liability under section 4D and the cartel provisions and would otherwise be caught by section 45 where it had an SLC purpose or effect. The ACCC was ultimately successful in *Rural Press* on this basis.

Example cited	Coverage under the law
Retailers insisting on joint marketing fees	**Already covered under the Act (ACL Part 2-2)**. This behaviour is addressable under the unconscionable conduct provisions in the Australian Consumer Law (Part 2-2). As even Rod Sims has acknowledged, it is unlikely that vertical relationships with suppliers would be affected by the proposed new section 46. If a vertically-integrated retailer were to selectively insist on joint marketing fees to disadvantage suppliers who competed with its own home brand products, the existing section 46 would apply where appropriate. Although any retailer could ask for joint marketing fees, it is likely that a retailer's ability to insist on those fees would be materially increased by its market power.
Freezing out competing suppliers from retail display and demonstration opportunities	**Already covered under the Act (section 46), or governed by the Food and Grocery Code, where it is anti-competitive**. This behaviour, where it is anti-competitive, is already addressable under the current section 46. It is important to be careful with how this behaviour is addressed as, in some circumstances, preferential display and demonstration arrangements are ordinary and legitimate commercial behaviours that are overall pro-competitive. The ACCC's 2008 Grocery Price Inquiry found that private labels and supermarket buyer power had little or no impact on competition and consumers, and tended to benefit consumers through lower prices.
Targeted geographic price discounting strategies by an incumbent, designed to dissuade new entrants into a region.	**Already covered under the Act (section 46), where it is anti-competitive.** This behaviour, also called 'predatory pricing', is already addressable under the current section 46, where it is anti-competitive. The ACCC has been successful in predatory pricing actions, most recently *Cabcharge* (2008). Following one unsuccessful ACCC case (*Boral*), section 46 was amended in relation to both market power and predatory pricing. These amendments have not yet been tested. It is important to be careful with how this behaviour is addressed, as price discounting strategies are an ordinary and legitimate commercial behaviour and consumers benefit from lower prices. Predatory pricing is rarely successful and in most cases customers usually benefit from low prices with no long-term detriments.

As well as some of the above examples, the ACCC has previously and recently raised:

Example cited	Coverage under the law
Bundling	**Already covered under the Act (section 46 and also section 47), where it is anti-competitive.** Bundling of goods and services is prevented under section 47 where it prevents a customer from acquiring goods or services from a competitor of the supplier and has an SLC purpose or effect. Bundling has also been found to breach section 46, as in *ACCC v Baxter Healthcare* (2008) – even before the 2008 changes to 'take advantage'. The question is not whether small companies can bundle; it is whether it would make commercial sense for a company to bundle the particular products at the particular prices in question if it did not have market power.
Loss-leading	**Already covered under the Act (section 46) where it is anti-competitive** **Loss-leading is the practice of reducing the price of one product in order to encourage (but not require) customers to purchase other products. It is ordinarily considered a legitimate commercial practice even if the loss-leading product is sold below cost – unless it is predatory pricing.** The question is not whether small companies can loss-lead; it is whether it would make commercial sense for a company to sell the particular products at the particular prices in question if it did not have market power.
Tying up customers in long term contracts with anti-competitive rebates	**Already covered under the Act (section 46 and also section 47), where it is anti-competitive.** Where a particular price or rebate is conditional on the customer taking exclusive supply or a supply of a high and fixed proportion of their requirements, this conduct will be caught by section 47 where there is an SLC purpose or effect. **Rebates were found to take advantage of market power in *ACCC v Pfizer* (2015) following the 2008 amendments. The court explained that although rebates were common in the industry, the particular rebates relied on Pfizer's market power.** It is important to be careful with how this behaviour is addressed, as rebates for quantity and loyalty are an ordinary and legitimate commercial behaviour and consumers benefit from lower prices.
Restricting supplies of essential materials	**Already covered under the Act (section 46), where it is anti-competitive.** This broadly describes the facts in cases such as *Queensland Wire*, a misuse of market power was made out; *Melway*, where it was not; and *Safeway*, where certain instances of conduct were held to breach section 46 while others were not. These cases suggest that the current section 46 is operating as intended in making the often borderline distinction between vigorous competition and the misuse of market power.

As former ACCC Chair Graeme Samuel and former ACCC Commissioner Stephen King have summarised:

> Proponents of the reform argue that some reduction of competition is simply a cost we need to bear to prevent real anti-competitive abuse. But the cited examples often have nothing to

> do with section 46 and are covered by other parts of our competition laws. If a business has concerns about a rival's anti-competitive bundling, then that can already be prosecuted directly under section 47 of the laws.
>
> Concerns about supplier relations? These are dealt with through the unconscionable conduct provisions of the laws. Concerns about threats from a supplier to cut off supply if you discount? That is section 48. What about an anti-competitive contract? Section 45![18]

This is reflected in the ACCC's high degree of success in addressing anti-competitive conduct in the courts, using all of the tools provided by the law.

Of the 20 section 46 cases the ACCC has commenced following the landmark *Queensland Wire* case in 1989, the ACCC succeeded on the section 46 claim in 12 cases (60%) and succeeded on other provisions of the CCA in a further five cases, bringing its success rate to 85%.

This is not a low number of misuse of market power cases by international standards – the US Department of Justice has only brought half as many in the same period – and there is little support for the position in the discussion paper that:

> 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.[19]

The fact that only seven cases have been considered by appellate courts suggests that the jurisprudence in this area is slow to develop – an important consideration when weighing the impact of a substantial change to the law, as it will take many years for the higher courts to develop a clear understanding of the new law – but it severely understates the number of cases that are brought. In fact, in the last 15 years, 21 cases have been brought under section 46, including 14 by the ACCC and seven private actions. Again, this is not low by international standards.

Question two

What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?

Summary response:

The 'full-Harper' and 'part-Harper' proposals risk capturing or deterring any conduct by a business that may have market power, including ordinary competitive conduct that may damage less efficient or less innovative businesses. They would punish conduct for its unintended and unforeseeable effects, as well as for carelessly described purposes. They would require a business to engage in expensive and time-consuming legal and economic analysis before making decisions that need to be made every day and as responsively as possible.

Detailed response:

A wide range of conduct that may be pro-competitive risks being captured under the Harper Panel's proposed provision. Some of this conduct has been raised by the

[18] 'Why section 46 is best for competition', *Australian Financial Review*, 13 January 2016.

[19] p. 3.

Business Council and others previously, and additional examples are set out in this submission.

The Harper recommendation would make a number of fundamental changes to section 46:

- It would remove the three categories of exclusionary conduct set out in section 46 and would place any conduct by a business with market power under scrutiny.
- It would remove the requirement that a business 'take advantage' of its market power, and would extend to conduct that would be expected under competitive conditions.
- It would remove the requirement to prove an anti-competitive purpose, and would capture conduct purely on the basis of its effect or likely effect.
- It would rely solely on the substantially lessening competition (SLC) test to distinguish between vigorous competition and anti-competitive conduct.

As discussed in this submission, these are far-reaching changes that would greatly expand the scope of the section while making the precise limits of that scope more uncertain and difficult to predict. Accordingly, the economically beneficial behaviour that would be restricted, as a result of the change, falls into two categories:

- Conduct that would be found to be illegal under the new law.
- Conduct that would be deterred or delayed due to the difficulty and expense of complying with the new law.

Economically beneficial conduct that would be illegal under the new law would include:

- Conduct that has the immediate purpose and effect of pursuing efficiencies and satisfying customer needs, but may also have the longer-term effect of increasing concentration in the market and making new entry less likely. For example, a national chain achieves operational efficiencies by adopting a policy of uniform pricing, which makes it difficult for independent retailers to compete, particularly in regional areas. The national chain becomes the only competitor in a number of regional markets.
- Conduct that manifests vigorous competition in one market but may have an impact on other markets. For example, fierce competition between retailers drives them to reduce their costs and rationalise the number of suppliers they deal with. This increases concentration in the upstream market and makes new entry into that market more difficult.
- Conduct whose primary purpose and effect is to innovate and deliver greater value to consumers but which may be carelessly described in internal documents to have the additional purpose of making it more difficult for rivals to compete. For example, a market leader under threat from a new entrant may sacrifice some of its margins by offering an enhanced product at a lower price. Early drafts of internal presentations refer to 'wiping out the competition', which is corrected by higher management but is revealed in compulsory document production.
- Conduct that has an anti-competitive purpose but in fact benefits consumers. For example, a market leader reduces its prices to deter a new entrant but the strategy in fact fails. Both the incumbent and the new entrant are forced to become more efficient and consumers benefit from a period of very low prices with no ongoing detriments.

It should be noted that key proponents of the Harper recommendation within government intend and anticipate that this conduct will be illegal under the new provision. Although the

ACCC has said that, for example, supplier relationships and vigorous competition that damages competitors will not be captured by the SLC test:

- the ACCC's position is clearly not shared by key proponents of the reform, who are backing the Harper proposal on the basis that it will assist suppliers and independent retailers against the major supermarket chains[20]
- the ACCC has in the past taken action against conduct that has an immediate benefit to consumers (such as fuel discount shopper dockets) on the basis of damage to independent competitors, without showing that the conduct would damage the competitive process (for example, by below-cost pricing)
- even if the ACCC were to refrain from taking action legal on this basis, private and class actions would be much more likely under the new provision.

The economically beneficial conduct that would be deterred or delayed due to the difficulty and expense of complying with the new law extends to every form of competitive conduct by a business that may have a substantial degree of market power.

This is because every competitive response by such a business will have an effect on competition in at least the immediate market, and perhaps in related markets, and predicting that effect will be difficult, time-consuming and expensive.

The Harper proposal would prohibit conduct on the basis of these effects (or likely effects) alone, even where a business has only legitimate purposes and takes no advantage of its market power. A business that may have substantial market power will have to predict these effects, even where it is acting innocently and consistently with competitive market conditions.

The costs and consequences of applying a broad effects standard, such as an effect on competition or on consumer welfare, are widely acknowledged by competition agencies internationally, including those who consider an effects test to be appropriate in theory. As the International Competition Network notes:

> The effects-based approach tends to lead to a more accurate assessment of a particular case. However, because this approach generates fact-driven outcomes, it tends to lead to greater delays and costs for the agency and those under investigation. The approach also makes it more difficult for business planners and counsel to predict whether specific conduct is likely to result in an infringement decision. This uncertainty may result in a chilling effect, as firms avoid conduct that may in fact be procompetitive and lawful.[21]

Further:

> [S]ound unilateral conduct rules and enforcement norms should strive to minimize error costs, both from over-deterrence as well as under-deterrence, as well as the costs of compliance and enforcement. Agencies should thus be concerned not only about correct outcomes that are consistent with applicable policy goals, but also, and even equally, by rules that are transparent and outcomes that are predictable.[22]

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[20] See for example Senator Matt Canavan, '"Effect test" needed for supermarket competition', 11 December 2015.

[21] International Competition Network, *Unilateral Conduct Workbook*, April 2012.

[22] International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies,* May 2007.

The ICN does not determine when any theoretical increase in accuracy is worth the additional costs of applying a particular standard, while recognising that these costs are real and that this is a balance to be determined according to the priorities of a jurisdiction.

However, the ICN has identified that over-enforcement tends to be more costly in dynamic markets, while under-enforcement is more costly in sluggish markets:

> in **dynamic markets** characterised by good capital markets, active consumers and strong entrepreneurship, over-enforcement has a high error cost as it may punish efficient leaders and reward inefficient firms, while under-enforcement has a low error cost as dynamic markets will address most problems
>
> in **sluggish markets** characterised by heavy regulation of entry, a history of state monopoly and weak consumers, over-enforcement has a lower error cost as it can stimulate the competitive process, while under-enforcement has a high error cost as it can lead to the persistence of monopoly profits.[23]

The BCA considers that, after 40 years of competition law, extensive micro-economic reform and strong enforcement by the ACCC, Australia's markets are better characterised as dynamic rather than sluggish, with the result that over-capture presents significantly greater risks than under-capture and can substantially deter competitive conduct.

In this context, it is not clear that the benefit of capturing any additional conduct that is not theoretically captured by the current section is worth the real costs of significantly increasing the regulation of competitive conduct.

The US Department of Justice's 2008 guidelines on section 2 of the Sherman Act sets out the ways in which these costs may arise:

> Firms with substantial market power typically attempt to structure their affairs so as to avoid either section 2 liability or even having to litigate a section 2 case because the costs associated with antitrust litigation can be extraordinarily large. These firms must base their business decisions on their understanding of the legal standards governing section 2, determining in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.[24]

The Issues Paper for New Zealand's *Targeted Review of the Commerce Act 1986* also recognises the balance that needs to be found and the risks involved in a test that may be more accurate *ex post* but is difficult to apply and predict:

> A system that perfectly assured the long-term benefit of consumers – even if possible – would likely be highly complex, bringing with it:
>
> - undesirable expense and delays; and
> - difficulty for firms to know in advance whether their proposed course of action is likely to be punishable.

[23] International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007.

[24] Department of Justice, Antitrust Division, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, September 2008.

> In this context, the complexity (and with it, potentially, the effectiveness) of the system we design may need to be reduced in order to allow the system to be cost-efficient, timely, and predictable.[25]

These costs and risks have also been recognised by every previous review of Australia's competition law that has included a proposal to broaden section 46 by introducing an 'effects' test. Many of these reviews, including the Hilmer Review and the Dawson Review, examined proposals that are essentially identical to the main Harper proposal. The Hilmer Review assessed the Trade Practices Commission's proposal as follows:

> The TPC proposed that unilateral conduct should be prohibited if it has the effect of substantially lessening competition. Such a test would not, in the Committee's view, constitute an improvement on the current test. It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct.
>
> As the High Court has observed, the very essence of the competitive process is conduct which is aimed at injuring competitors... Firms should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation. There is a serious risk of deterring such conduct by too broad a prohibition of unilateral conduct. The Committee takes the view that an effects test is too broad in this regard...
>
> The current provision has the advantages over an effects test of an appropriate interpretation and a greater level of certainty for businesses.[26]

Similarly, the Dawson Review examined a range of effects tests, including an effect of substantially lessening competition test, and decided:

> Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour...
>
> The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency...
>
> The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.[27]

Supporters of the Harper proposal argue that the substantial lessening of competition (SLC) effects test does not give rise to these concerns as it is well-understood, simple to apply and frequently used by businesses assessing their conduct under other sections of the CCA. These claims are not supported by the application or legal interpretation of the SLC test in other contexts, as discussed in the response to question 8 below.

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[25] New Zealand Ministry of Business, Innovation and Employment, *Targeted Review of the Commerce Act: Issues Paper*, November 2015 at p 26.

[26] p. 70.

[27] p. 70.

Take advantage

Question three

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?

Summary response:

Removing the 'take advantage' limb would prevent the law from distinguishing between behaviour that would damage competition and behaviour that embodies competition. There is little evidence of any issue with the 'take advantage' element, no evidence that it requires further alteration following the 2008 amendments proposed by the ACCC, and certainly no argument for removing the element altogether (as proposed in the 'full-Harper' and 'part-Harper' options). Its removal would put Australia out of step with misuse of market power laws in other developed economies which demand a causal connection between a business's market power and its conduct.

Detailed response:

As discussed in question one above, there is no evidence that the law is deficient in restricting behaviour that would be economically damaging to competition. The ACCC has a high success rate in section 46 cases and a very high success rate if other sections of the CCA are taken into account, and it takes more cases than other enforcement agencies internationally.

In particular, there is no evidence of any ongoing problem with the 'take advantage' limb.

There is no evidence of an ongoing problem with the case law

It is true that the courts have sought to explain the 'take advantage' element in a number of ways. Some of these expressions appear to impose a higher or lower threshold, variously requiring an applicant to show that:

- the conduct was materially facilitated by the respondent's market power
- the respondent *would* not have engaged in the conduct if it did not have substantial market power
- the respondent *could* not have engaged in the conduct if it did not have substantial market power.

The cases that have been advanced to argue a deficiency in the 'take advantage' element are *ACCC v Rural Press* and *ACCC v Cement Australia.*

The Rural Press case (2003)

The High Court's decision, in *Rural Press* in particular, has been interpreted to apply the higher threshold in deciding that Rural Press did not take advantage of its market power in forcing its rival Waikerie out of its local market with the threat that it would enter Waikerie's home market with its own newspaper. In fact, the High Court's majority judgment applied a range of tests including a relatively low 'materially facilitated' threshold, and found that the conduct in question did not satisfy that arguably lower threshold:

> The Commission failed to show that the conduct of Rural Press and Bridge was materially facilitated by the market power in giving the threats a significance they would not have had without it. What gave those threats significance was something distinct from market power, namely their material and organisational assets.[28]

ACCC Chair Rod Sims has argued that this finding was incorrect because:

> The threat was credible, and hence the effect on competition in the Murray Bridge market substantial, because it was made by the monopoly provider in that market.[29]

The Business Council is inclined to agree that Rural Press's market power contributed to the credibility and significance of its threats, and thereby materially facilitated the conduct. But this is entirely a question of fact and not of the interpretation of the 'take advantage' element.

The Law Council of Australia made a similar suggestion to the Senate inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business in 2003:

> The Trade Practices Committee submits that the factors that led the High Court to overturn findings as to 'taking advantage' of market power in the *Melway*, *Boral* and *Rural Press* cases are not based on any deficiency in the form of section 46, or difficulty with the test for taking advantage of market power. The High Court simply found that the facts as established at trial did not justify a finding at law that there had been any taking advantage of market power.[30]

It has been argued that the *Rural Press* case so narrowed the 'take advantage' element that section 46 was rendered unworkable. However, even after *Rural Press*, the courts continued to find that the 'take advantage' element had been made out in section 46 cases, using a range of tests including the lower 'would' threshold. For example:

- In *NT Power v PAWA*, the High Court found that the Power and Water Authority had taken advantage of its market power in refusing to grant NT Power access to its electricity transmission and distribution infrastructure, since:

  > [I]f PAWA had been operating in a competitive market for the supply of access services, it would be very unlikely that it would have been able to stand by and allow a competitor to supply access services.[31]

- Similarly, in *RP Data v State of Queensland* the Federal Court found that the State of Queensland had taken advantage of its market power in ceasing to supply real estate data to RP Data, by asking the question:

  > [W]as the conduct of the respondent taking advantage of its market power in withdrawing the supply of the Excluded Data, such that an entity with no substantial degree of market power in the Wholesale Market would not, as a matter of commercial judgment, engage in that conduct?[32]

- Even applying a higher 'could' threshold, in *ACCC v Baxter Healthcare* the Full Federal Court found that Baxter had taken advantage of its market power in the sterile fluids

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28 at [53]

29 Rod Sims, 'Section 46: the Great Divide', 30 May 2015.

30 LCA Trade Practices Committee Second Submission, 14 January 2004, p. 8.

31 *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 at [124].

32 *RP Data Limited v State of Queensland* [2007] FCA 1639 at [113].

market by bundling those sterile fluids with the peritoneal dialysis (PD) fluids it supplied in competition with other providers:

> Baxter was taking advantage of its market power. Had there been any serious competitor in the sterile fluids market, Baxter could not rationally have made what appears to have been an unrealistically high item-by-item price for sterile fluids. It would have been constrained from doing so by the competition in the market.[33]

The Cement Australia case (2013)

In *Cement Australia* the Federal Court confirmed that the question is not whether a firm without market power could physically engage in the same conduct, or the same kind or category of conduct. Instead, the question is whether, in a workably competitive market, it would be *profitable* for a firm to engage in the *very particular conduct* engaged in, taking into account the firm's legitimate business reasons for engaging in the conduct:

> The question, put simply, is whether a firm profitably could have engaged in the conduct in question in the absence of a substantial degree of power in the relevant market. Because that question involves a hypothetical construct it must be answered by applying an objective test but one which takes into account the legitimate business reasons identified by the firm for engaging in the conduct.
>
> However, that question is not to be *disengaged* from the conduct to the extent of asking a slightly *abstracted* and less relevant question of whether, for example, a firm confronting uncertainty about the continuity of its sources of a critical input would bid and contract for, in a workably competitive market, an additional source of flyash should it become available, rather than a more focused question of whether such a profit maximising firm functioning in a workably competitive market would bid and ultimately contract for the acquisition of such an input *on the terms* upon which it actually contracted. Would it have been profitable for such a firm, so constrained, to engage in the *very particular* conduct under challenge?

The court also acknowledged that a company would be considered to 'take advantage' of its market power if that market power 'made it easier for the corporation to act for the proscribed purpose than otherwise would be the case', as raised in *Melway*.

However, it found that Cement Australia's subsidiaries had not taken advantage of their market power because they had legitimate business reasons – including ensuring ongoing supply – for bidding for the relevant contracts as they did, and a firm without market power could profitably have bid for the same contracts for the same legitimate business reasons.

In its submission to the Competition Policy Review, the Law Council considers that the courts have continued to enhance and clarify section 46 since *Rural Press*:

> [I]n the ten years since the last review of this issue, the Federal Court and High Court have clarified the meaning of section 46 significantly, with economically sound analysis of the "take advantage" test...[34]
>
> [T]he Committee submits that the "take advantage" element of s46(1) is far less likely to be "difficult to apply" in Australia prospectively, in light of the extent and emerging consistency of the jurisprudence to date on the issue.[35]

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[33] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 at [150].

[34] Law Council Competition and Consumer Committee, Submission on Issues Paper, p. 6.

[35] Law Council Competition and Consumer Committee, Submission on Draft Report, p. 13.

The law has been changed to address perceived problems

Further, section 46 was amended in 2008 on the advice of the ACCC to specifically address concerns about the narrow interpretation of the 'take advantage' test.

Following the High Court's decision in *Rural Press,* the ACCC submitted to the Senate Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business that:

> The High Court's acceptance of the Full Court's "taking advantage" test of inquiring whether Rural Press and Bridge Printing *could* engage in the same conduct in the absence of market power has further narrowed the application of section 46. What this test means is that so long as it *could* physically be possible for a firm to engage in the conduct in the absence of its having market power, it will be held not to have taken advantage of its market power, even though it *would not on any rational commercial basis* have engaged in the conduct in the absence of market power.[36]

As discussed above, this characterisation of the Rural Press decision is questionable and is not reflected in subsequent decisions. The question is not whether a firm without market power could *physically* engage in the conduct, it is whether the firm could *profitably* engage in the conduct. If a firm would have no rational commercial basis for engaging in conduct in the absence of market power, all of the case law suggests that it would be found to have taken advantage of that market power.

However, the High Court's decision reinforced the ACCC's view that the 'take advantage' element of section 46 should be clarified by adding the criteria of whether:

- the conduct of the corporation is materially facilitated by its substantial degree of market power
- the corporation engages in the conduct in reliance on its substantial degree of market power
- the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power
- the conduct of the corporation is otherwise related to its substantial degree of market power.

The Senate Committee noted concerns expressed by the Law Council that the ACCC's amendments would threaten to remove the crucial link between the conduct and the firm's market power, but agreed with the ACCC's proposal:

> The Committee concurs with the views of the ACCC, and considers that the recommended amendments would make the Act more clear and remove current uncertainty with regard to the meaning of 'take advantage.' The Committee considers that the ACCC's proposals, despite the views expressed by the Law Council, would make clear and explicit the requirement that a link be established between proscribed conduct and the possession of substantial market power.[37]

Section 46 was amended in 2008 to add a new subsection 6A in effectively identical terms to the ACCC's proposal. That is, the ACCC, the Senate Committee and the parliament all

[36] ACCC Third Submission, 14 January 2004 at p. 4.

[37] at [2.31]

agreed that the amendment would remove any uncertainty about the 'take advantage' element following the *Rural Press* decision.

Effectiveness of the 2008 amendments

In its submission to Harper Review, the ACCC argued that:

> While the conduct in Rural Press and Cement Australia pre-dated the introduction of section 46(6A) (and so the Court was not required to consider the possible application of the section to the facts), it is not clear that these cases would have been decided differently if section 46(6A) had applied.[38]

The Harper Report went further, finding summarily that 'it is doubtful that the amendments assisted',[39] and the discussion paper now appears to consider that the 'changes largely codified jurisprudence and may or may not alter courts' interpretation over time'.[40]

Since the arguments for changing section 46 appear to rest largely or entirely on the assumption that the 2008 amendments were ineffective, it is necessary to examine these claims in more detail. However, in the Business Council's view, there is no reason to dismiss the 2008 amendments or assume that they have not achieved what they were proposed by the ACCC to achieve.

Whether the amendments 'largely codified existing jurisprudence'

It is true that most of the formulations introduced in the 2008 amendments have been found in legal decisions. However, all of these formulations pre-date the *Rural Press* case, and all of them suggest a significantly lower threshold for the 'take advantage' test than the ACCC's interpretation of *Rural Press*.

If the concern is that the *Rural Press* narrowed the 'take advantage' test, the changes explicitly revive a number of previous tests and clearly expand the range of conduct that may be considered to take advantage of market power.

In addition, the 'otherwise related to market power' test appears to be broader than any previous test suggested by the case law. In fact, the Law Council has submitted that this test be removed from section 46(6A) since it requires an insufficiently clear connection between and market power and may be 'a clear departure from the previous case law.'[41]

On the other hand, if the amendments in fact 'codified existing jurisprudence', then it must be accepted that *Rural Press* did not in fact materially change the law and that there was never any problem with the 'take advantage' element to begin with.

Whether the amendments 'may or may not alter courts' interpretation over time'

To date there have only been two section 46 decisions to which the 2008 amendments applied. Both of those decisions referred to the amendments and considered that the test

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38 ACCC First Submission on Issues Paper, p. 80.

39 Final Report, p. 338.

40 Discussion Paper, p. 5.

41 Law Council of Australia, Competition and Consumer Committee, Submission on Issues Paper, p. 35.

to be applied is broader than the narrow test that *Rural Press* has been thought to establish:

In *ACCC v Pfizer*, Flick J found that Pfizer had taken advantage of its market power in operating a rebate scheme:

> It may be accepted at the outset that in determining whether a corporation has taken advantage of a substantial degree of market power it is relevant to have regard to whether the corporation would have engaged in the conduct under scrutiny if it did not have that power: *Competition and Consumer Act* s 46(6A).

In granting an interlocutory injunction in *Ocean Dynamics v Hamilton Island Enterprises,* Edelman J found there was a *prima facie* case that Hamilton Island had taken advantage of its market power in withdrawing access to its marina facilities:

> I accept that there is a prima facie case that this conduct by Hamilton Island Enterprises involved the taking advantage of its power in the market submitted by counsel for Ocean Dynamics. In particular, it is arguable that it was unlikely that Hamilton Island Enterprises would have refused the access if Ocean Dynamics could easily have procured other marina access elsewhere that would have been as satisfactory for commercial purposes in the market. It is also arguable that it was unlikely that Hamilton Island Enterprises would have refused access if it did not have a substantial degree of power in the market for marina services and that the refusal of access to Ocean Dynamics was otherwise related to the corporation's substantial degree of power in the market.

These decisions closely mirror the reasoning in *Queensland Wire v BHP*, where the High Court found that:

> In effectively refusing to supply Y-bar to the appellant, BHP is taking advantage of its substantial market power. It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power – in other words, if it were operating in a competitive market – it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.[42]

Rural Press has been seen as an unfortunate departure from, or misapplication of, the principles established in *Queensland Wire* – including by Justice Kirby in his dissenting judgment in *Rural Press* itself. However, **the case law following *Rural Press* appears to be consistent with *Queensland Wire*, and the 2008 amendments confirm that the language and approach of *Queensland Wire* are to apply**.

The *Pfizer* case has been appealed to the Full Federal Court and should provide additional clarification of the effect of the 2008 amendments. However, all indications so far suggest that they have corrected any effect on the jurisprudence that *Rural Press* may have had.

Shortly after the 2008 amendments were enacted, Federal Court Justice Middleton predicted that section 46(6A) had probably been helpful and may have led to a different outcome if *Rural Press* were decided again:

> It makes it clear that the 'higher' threshold connection is not required, and sets out a variety of factors which the court may consider, synthesising strands of analysis from the previous

[42] (1989) 167 CLR 177 at 192.

> case law… the factors set out in s 46(6A) provide some much needed clarification to this area of competition law.
>
> Would the list of factors in s 46(6A) have affected the outcome of *Rural Press?* Probably, yes. [43]

Former Federal Court Justice Heerey, who heard landmark section 46 cases such as *Melway* and *Boral*, is of the view that the amendments were unnecessary:

> While there may be subtle nuances in judicial discussions, and an unhelpful statement of the bleeding obvious in s 46(6A), the concept itself is simple and understandable. It embodies the notion that there is nothing wrong with having market power – what should be prohibited is the abuse of that power in a way which harms competition.
>
> The fact that at times it is difficult to ascertain whether there has been a "taking advantage" is not to the point. Very often clear and logical laws have to be applied in borderline fact situations where there is room for argument. That in itself is not a criticism of the law. Down the ages countless lawyers have infuriated clients by opining that the application of a law "depends on the facts and circumstances of each particular case".
>
> The present law has developed a useful rule of thumb: if particular conduct could be followed by a firm without any, or any substantial, market power it is a good indication that a firm with substantial market power engaging in such conduct is not "taking advantage" of that power.
>
> This has the great benefit that decision-makers can apply their practical knowledge of what goes on in their particular field of business: what is usual, what is done, or not done, by competitors. By contrast, requiring business decision-makers to speculate as to what economists and judges might think the "market" to be, or whether competition is "lessened", and if so "substantially", is to impose a new level of unpredictability in areas in which most decision-makers would have no particular expertise.[44]

In these circumstances there is no basis to assert that the High Court's decision in *Rural Press* has narrowed the law or that there is any ongoing difficulty with the current 'take advantage' test.

While those concerns were understandable in the immediate aftermath of *Rural Press*, subsequent cases have shown them to be unfounded, and the 2008 amendments should have put the matter beyond doubt.

The ACCC and others have claimed that categories of potentially exclusionary conduct, such as bundling, rebates, and predatory pricing, are immune from action under section 46 because a small business may also engage in that category of conduct. For example, Rod Sims recently said:

> If I'm a big company, I can use bundling of goods and I can use predatory pricing because a smaller company can do the same.[45]

This suggests a fundamental misunderstanding of the 'take advantage' test, which does not look at whether a smaller company could engage in the same broad category or kind

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[43] The Hon Justice John Middleton, 'The *Trade Practices Legislation Amendment Act 2008* (Cth) and s 46 of the *Trade Practices Act 1974* (Cth) – will anything really change?' Twentieth Annual Workshop of the Competition Law and Policy Institute of New Zealand, 8 August 2009.

[44] The Hon Peter Heerey AM QC, Submission to the Draft Report, p. 3.

[45] 'Rod Sims wants law change to combat anti-competitive behaviour by oligopolies', *Australian Financial Review*, 10 January 2016.

of conduct. At its very narrowest, the test may look at whether that company could profitably have engaged in that very particular conduct, in all the circumstances in which it occurred, if it did not have market power.

The particularity of the conduct to be examined is illustrated by the *Cement Australia* case. In that case, the question relevant to the 'take advantage' issue was not whether a smaller company could buy flyash. In fact, Justice Greenwood considered that the question was not even whether a company without market power, facing uncertainty about the continuity of an essential input, would bid and contract for an additional source of flyash – that was too general and abstract an inquiry. Instead, it was necessary to ask whether such a company facing those circumstances would bid and contract for an additional source *on the terms of the Cement Australia* contracts.

Since *Rural Press*, the ACCC has won section 46 cases involving bundling (*Baxter Healthcare*) and predatory pricing (*Cabcharge*), and in the *Pfizer* case the court found that Pfizer had taken advantage of its market power in tying up customers with rebates, even though rebates were widespread in the industry even among those without market power. It is not the case that the 'take advantage' element exempts certain categories of conduct, and demonstrably not the case that categories such as predatory pricing, bundling and rebates are exempted.

The 'take advantage' test is essential to Australia's law on the misuse of market power, and removing it would not improve the ability of the law to restrict economically damaging behaviour. Rather, it would significantly reduce the ability of the law to distinguish between vigorous competition and economically damaging behaviour, and would deprive consumers of the benefits of competition.

Question four

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?

Summary response:

Competition itself would be restricted as a result of removing the 'take advantage' element. The section should apply only to exclusionary conduct, but it is still necessary to show that the exclusionary conduct was a misuse of market power and not simply a competitive response. 'Take advantage' performs that role.

Detailed response:

Much of the restriction of economically beneficial behaviour identified in relation to question 2 above will occur due to the removal of the 'take advantage' element. The requirement to prove a connection between a company's market power and its conduct is central to the regulation of misuse of market power. Removing that requirement would potentially punish a company simply for possessing market power and would be inconsistent with modern competition law frameworks.

While only Australia, New Zealand and Indonesia use the term 'take advantage', competition laws throughout the world require a similar causal connection between the

market power and the conduct or its effects. This connection is inherent in the European concept of an *abuse* of a dominant position, though in Europe the connection may be satisfied by where the market power contributes to the impact of the conduct. It is also essential in the United States, where it will be satisfied if the conduct increases or maintains the market power.

The scope of the proscribed conduct should be limited to certain exclusionary conduct whether or not the 'take advantage' limb is retained. This is the approach of the current section 46 and is the approach taken by the legislation in Canada and the jurisprudence in the United States and Europe.

Limiting the proscribed conduct to certain exclusionary conduct would not itself be a substitute for requiring a connection with market power, as every form of exclusionary conduct can be a legitimate competitive response depending on the circumstances. The 'take advantage' element remains necessary to distinguish legitimate competition from anti-competitive conduct, and removing this element from the section without any satisfactory replacement – as proposed by the Harper report and all of the 'part-Harper' variants set out in the discussion paper – would be out of step with international approaches and leave the provision unworkable.

Question five

Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?

Summary response:

The 'take advantage' limb is fundamental to the provision. If there are demonstrated problems with the application of that element then further or refined guidance may be required. However, there is no evidence that the guidance added to the section in 2008 has failed to address concerns.

Detailed response:

If the further development of the case law suggests that change is necessary, the best alternative may be to further clarify the 'take advantage' element. Indeed, in its first submission on the Harper Review Issues Paper, the ACCC suggested such an option:

> For example, it may be desirable to define 'take advantage' in a more prescriptive manner to ensure that the counterfactual enquiry focusses on the question: 'what exclusionary advantage does a firm with substantial market power get from the conduct that a firm without such market power would not?' In essence, this is consistent with the approach in *Queensland Wire*.[46]

The Business Council considers that the 2008 amendments are already consistent with the approach in *Queensland Wire* and also with the inquiry suggested by the ACCC in that submission. However, further examination of the definition of 'take advantage', as

[46] ACCC First Submission on Issues Paper, 25 June 2014, p. 80.

expanded by subsection 46(6A) in 2008, seems an obvious avenue for any further reform – if future court decisions indicate that those amendments have not been effective.

When he became ACCC Chair in 2011, Rod Sims appeared to recognise the potential impact of those amendments:

> [T]he law has evolved in recent years, providing the ACCC with a clearer view of what is intended by section 46 and misuse of market power to gain advantage. Over 2007 and 2008, and in response to the 2003 *Boral* and *Rural Press* cases in particular, the section was amended and extended…
>
> These represent important changes. The ACCC still needs, however, to ask itself searching questions about whether there was an anti-competitive purpose in a firm's conduct. Indeed, even with these amendments, establishing a section 46 case will be difficult…
>
> A final point I would like to make is that, in my view, we need to resolve the questions around section 46 as it currently stands. I am not, therefore, making a case for further amendments or additions to section 46 at this stage.[47]

It is not clear what caused the ACCC to reverse this position long before any court decision governed by the amended section 46 had been delivered, but the concerns it now raises with the 'take advantage' limb are effectively identical to the concerns it raised following the *Rural Press* decision. For example, ACCC Chair Rod Sims has recently said:

> The courts have interpreted "take advantage" to mean that companies with substantial market power are allowed to engage in exclusionary conduct (that is, behaviour that excludes others from effectively competing) provided the actual steps taken, that make up the conduct, are steps that companies without substantial market power could have undertaken.[48]

As discussed above, this characterisation of the courts' interpretation is questionable at best; it is certainly not the only interpretation that the courts have propounded, whether in *Rural Press* itself or in the cases since. Nevertheless, substantial amendments were suggested by the ACCC itself and legislated to address this perceived problem, and the evidence available so far suggests that the amendments have neutralised any narrowing that may have resulted from the *Rural Press* decision.

While the ongoing effects of both *Rural Press* and the subsequent amendments will become clearer as the jurisprudence continues to develop, the Business Council considers that continuing to evaluate the effectiveness of the 'take advantage' element as it currently stands – and refining it where it proves to be necessary – is a far better alternative than removing this essential element altogether.

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47 Rod Sims, 'Some compliance and enforcement issues', 25 October 2011.

48 Rod Sims, 'Why the change to Harper Competition Review law will help boost competition', *AFR,* 4 August 2015.

Purpose or effect (or likely effect)

Question six

Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?

Summary response:

Including 'purpose, effect or likely effect' is out of step with the position internationally, which requires an examination of both purpose *and* (not *or*) effect. By punishing effects without more, it would require businesses to predict all the possible consequences of their actions, however distant and unintended, in order to avoid the risk of legal consequences. By punishing purposes without more, it would also allow regulators to pursue companies based only on careless expressions of competitive vigour. It would greatly broaden the application of the law and would in no sense 'target' any kind of behaviour.

Detailed response:

Including purpose, effect or likely effect as alternative limbs of liability would not better target behaviour that causes significant consumer detriment.

It would significantly expand the scope of the section to cover damaging and beneficial conduct alike, and would itself delay or restrict competitive conduct by requiring businesses to predict the effects of their actions before engaging in the competitive responses that are essential to consumer welfare.

The Harper Report recognises that misuse of market power laws internationally require examination of both purpose *and* effect:

> 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.[49]

Analysis of the relevant laws in major antitrust jurisdictions confirms that these laws tend to require proof of both an exclusionary purpose – whether objective or subjective – and a detrimental effect on competition or consumer welfare. This is most clearly seen in the Canadian *Competition Act*, which prohibits anti-competitive acts that have the effect or likely effect of substantially preventing or lessening competition in a market[50] and, according to the legislation and the courts:

> First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor.[51]

This is explicitly a purpose *and* effect test, and similar combinations have been developed in the US and European jurisprudence, including through the concepts of legitimate business purpose and objective justification.

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[49] p. 336.

[50] *Competition Act 1985*, sections 78 and 79.

[51] *Canada (Commissioner of Competition) v. Canada Pipe Co* (2006) FCA 233.

The requirement to establish both an exclusionary or predatory purpose and a consequential effect on competition or consumer welfare provides the easily applicable guide to business conduct necessary for vigorous competition and helps to ensure that only conduct that damages competition and not competitors is prohibited.

By contrast, including 'purpose, effect or likely effect' would prohibit conduct on the basis of purpose without more, and would also prohibit conduct on the basis of effect or likely effect without more – punishing both inadvertent and harmless conduct. This would be particularly significant since, under the current Australian law:

- A purpose does not need to be the only or even the primary purpose of the conduct, but merely one 'substantial' purpose among many; as a result, the provision could easily be breached by the overly exuberant communications of executives even where the main purpose *and only effect* of the conduct is to compete on the merits and benefit consumers.
- An effect does not need to be foreseeable and is not limited to any market in which the firm in question operates, leading to potential liability for remote and unpredictable consequences.
- A 'likely effect' simply requires a 'real chance or possibility'[52] or 'a real or not remote possibility'[53] of that effect; a likelihood of much less than 50% will be sufficient to breach the section; and given the unpredictable nature of market definition and the equally low threshold for establishing a *substantial* lessening of competition, it will be difficult for a business to be satisfied that there is not a real chance or possibility that a competitive response will contravene the SLC test.

Former Federal Court Justice Heerey argues that the courts' interpretation of 'likely' is too broad and that it should require more than a real chance. He concludes that this breadth contributes to the unsuitability of the SLC effects test proposed by the Harper Report:

> Successful business and economic prosperity requires positive decisions, usually involving risk. To add another layer of uncertainty, as to what some economists or judges might regard as "substantially lessening competition in (this) or any other market" makes it just that much more likely (in my preferred sense), that the decision-makers will think "It's just too risky".[54]

Including 'purpose, effect or likely effect' would result in an extraordinarily broad constraint on unilateral conduct and would go far beyond any comparable misuse of market power law.

Question seven

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?

Summary response:

Retaining 'purpose' while amending other elements of the provision – particularly the 'take advantage' element – would put businesses at particular risk for careless expressions of

[52] *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557.

[53] *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557.

[54] The Hon Peter Heerey AM QC, Submission on the Draft Report, p. 5.

competitive vigour that do not reflect either the primary purpose or the effect of the conduct, and would be unlikely to achieve the policy objectives of reform.

Detailed response:

The jurisprudence surrounding section 46 has developed to ensure an appropriate balance between preventing harmful exclusionary conduct and allowing vigorous competition. There is a high risk that amending and, particularly, removing the other elements of the provision would significantly disrupt that balance.

In particular, the current prohibition against conduct with an exclusionary purpose works closely with the 'take advantage' element to ensure that section 46 does not punish 'bad intentions'. This is critical in a context where the purposes of beating competitors and winning markets are central to the process of competition.

The 'take advantage' element ensures that these purposes will only be prohibited where they are achieved by methods that would not be profitable or effective under competitive conditions, but only when connected with a business's market power.

Removing or substantially weakening the 'take advantage' element would risk implicating competitive businesses on the basis of unwise expressions of competitive vigour by overly exuberant executives even where the dominant purpose – and only effect – of the conduct is to compete on the merits and benefit consumers.

The Law Council has argued strongly that the law should not prohibit purpose without more:

> The Committee is very concerned that a corporation with substantial market power may contravene the proposed provision simply where it is found to have the "purpose" of substantially lessening competition in a market. This risks prohibiting statements of hostile (but aggressively competitive) intent, rather than only anticompetitive conduct, by firms with substantial market power.
>
> In the Committee's view, the current form of s46(1) is clearly superior to the proposed alternative in this regard. The current form of s46 includes the requirement that the corporation with substantial market power must "take advantage" or "use" that market power to establish a contravention – this requirement clearly goes beyond the corporation's "purpose".[55]

The Harper Report '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.'[56]

The Law Council's submission had acknowledged the difference between a purpose of harming competitors and a purpose of substantially lessening competition, but argued that one may easily amount to the other, depending on the circumstances. The Law Council does not appear to agree that its concern is mitigated, as it continues to advocate that purpose be removed from the Harper recommendation if it is to be adopted.[57]

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[55] Law Council Competition and Consumer Committee, Submission on Draft Report, p. 15.

[56] Final Report, p. 341.

[57] Law Council Competition and Consumer Committee, Submission on Final Report, p. 14.

The ease with which a purpose of harming competitors may lead to a purpose of substantially lessening competition is illustrated by the *Universal Music* case.[58] In that case two record labels were found to have the purpose of substantially lessening competition by discouraging retailers from using parallel imports, even though there was no prospect of an effect or likely effect of substantially lessening competition and the conduct was directed at only a handful of retailers.

In these circumstances a test that relied on purpose alone – without a take advantage element – would be unlikely to meet the policy objectives of the Harper recommendation.

Substantially lessening competition

Question eight

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?

Summary response:

The application of the 'substantial lessening of competition' test to single-firm conduct under section 46 is not predictable, but its use in other areas suggests that it is not an appropriate test for this section. It may be triggered simply by the exit of a single significant competitor, and does not itself distinguish between pro-competitive and anti-competitive forms of conduct. The understanding of the test propounded by the ACCC appears to be based on a view of how the law *should* operate, but is not supported by the existing jurisprudence. The SLC test is one of many tests used in the competition law and there is no basis to assume it should apply to the particular demands of section 46.

Detailed response:

The understanding of the term 'substantially lessening competition' (SLC) is not particularly well developed, and the consultation process has exposed fundamental disagreements on the nature and operation of the test. In the Business Council's view, the case law that exists is not helpful to the context of unilateral conduct and does not support the ACCC's view of what should be captured by the misuse of market power laws.

The SLC test does not itself focus on any form of conduct

The case law on the SLC test as it has applied in other sections of the CCA suggests that the test involves a counterfactual 'with and without' analysis. That is, the test compares the likely future state of competition *with* the conduct in question against the likely future state of competition *without* that conduct, and considers whether there is substantially less competition in the former scenario than in the latter scenario.

[58] *Universal Music v ACCC* [2003] FCAFC 193.

The *QCMA* case establishes that the level of competition in a market is largely a function of the *structure* of the market, and that the essential elements of market structure are:

(1) the number and size distribution of independent sellers, especially the degree of market concentration

(2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market

(3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion

(4) the character of 'vertical relationships' with the customers and with suppliers and the extent of vertical integration

(5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

In *QCMA,* the court considered that the height of barriers to entry constituted the most important of these structural elements, but all of these elements are important – including market concentration and the number of independent sellers. A substantial change in any of these factors may substantially lessen competition.

Later cases have confirmed that, while eliminating a competitor will not necessarily result in a substantial lessening of competition, it is a relevant consideration. For example, in *ACCC v Baxter Healthcare* Dowsett J examined the authorities on the SLC test and noted that:

- whether changes in market concentration have the effect of lessening competition must be determined by reference to competitive characteristics in the market; and
- the effect of the elimination of a competitor must also be addressed by reference to such characteristics.

There is no suggestion in the case law that the SLC test only applies to particular forms of conduct, such as exclusionary conduct. Under the CCA, the SLC test applies in a range of circumstances which are not limited to exclusionary conduct, and is most frequently applied to mergers under section 50. Mergers are rarely exclusionary but can lessen competition by increasing concentration, particularly where barriers to entry are high. The removal of a single competitively significant participant may substantially lessen competition under the merger test, and there appears to be nothing in the SLC element itself to distinguish one method of removal from any other.

Similarly, agreements under section 45 can substantially lessen competition either because they are exclusionary or because they are collusive, for example, when they reduce the incentives for competitors to compete: there is nothing in the SLC test itself to limit the examination to exclusionary conduct.

The concerted practice prohibition proposed by the Harper Report would also be assessed under an SLC standard, though the concerted practices of concern – information sharing that may coordinate prices – are not exclusionary.

For the same test to apply across very different categories of potentially anti-competitive behaviour, the conduct to which the test applies must be separately specified in the language of each section. Section 50 explicitly applies to mergers and acquisitions;

section 45 applies to contracts, arrangements and understandings, and section 47 applies to exclusive dealings.

If section 46 is to apply only to exclusionary conduct, and not to other kinds of conduct that have the effect of increasing concentration or otherwise altering the structure of the market – including vigorous competition – the section must be explicitly limited to exclusionary conduct on its terms. The SLC test cannot be relied on to narrow the scope of the section to particular forms of conduct.

Rachel Trindade, Alexandra Merrett and Rhonda Smith agree that the SLC test itself does not suggest any particular form of conduct:

> The ACCC Chairman captured a popular sentiment in his speech to the RBB Economics Conference in November this year when he dismissed criticism of the use of the SLC test in section 46, saying:
>
> To be held to have substantially lessened competition you have to do something anti-competitive; pro-competitive behaviour, whatever the outcome, cannot be held to SLC …
>
> To repeat, to SLC there must first be behaviour that could be seen as anti-competitive. There cannot be an SLC through competition on its merits.
>
> Many people appear to agree with this general approach, but it's actually putting the cart before the horse …
>
> One simply cannot determine whether something is anticompetitive (or conversely "competition on the merits") without doing a proper competition analysis. The result of the competition analysis is what allows you to attach the label "anti-competitive" – in other words, conduct that substantially lessens competition in a market is anti-competitive. You can't start by characterising conduct as anti-competitive and then work backwards – that's exactly the type of error of reasoning our High Court has warned against.[59]

As a result, if the SLC test were to become the only additional element of section 46 beyond the establishment of substantial market power, a business would need to consider the effect of all of its conduct on competition in its immediate market and any related market.

The SLC test is complex and expensive to apply

Trindade, Merrett and Smith also recognise the difficulties involved in conducting an SLC evaluation:

> Being heavily fact intensive, the SLC test requires significant resources to do it properly…
>
> On a ballpark basis, the cost of upfront legal advice on proposed conduct would have to start in the order of tens of thousands of dollars (and may cost hundreds of thousands for complex industries), while for litigation it would definitely be in the order of millions.[60]

In particular, market definition remains critical to any SLC assessment under Australian law, as the effect on competition in a market will vary considerably depending on the dimensions of that market. Market definition is frequently a contested issue and the views

[59] Rachel Trindade, Alexandra Merrett and Rhonda Smith, *The state of competition,* Issue 21, December 2014.

[60] p. 6.

of businesses and regulators diverge considerably. It is even more difficult to predict how a court will define a market, even on advice from economic experts.

The SLC test is not the appropriate primary test for misuse of market power

Trindade, Merrett and Smith acknowledge calls for consistency across Australia's competition laws, but recognise that misuse of market power is a special case:

> It is a laudable objective to have consistent laws – our competition laws started with one test for mergers, another for horizontal agreements and a seemingly unrelated test for misuse of market power (section 46). So the symmetry we have now is certainly welcome.
>
> But one of the reasons given for changing section 46 is to further this consistency – SLC is the "paradigmatic" test for our competition laws, so shouldn't it also provide the framework for section 46? But this reasoning is flawed. By definition, section 46 is a law of special application, relevant to very few businesses. If they are subject to the same test as everyone else, what's the point of a special law for those with market power? Why not just prohibit any unilateral conduct that SLCs?
>
> (That last question was rhetorical, in case you were wondering. But one reason NOT to do this would, of course, be the ambiguity of the SLC test!)

The New Zealand Issues Paper also questions the argument that different parts of the competition law should operate in the same way:

> [S]ome have queried the coherence of the competition regime where unilateral conduct that does not contravene the prohibition in section 36, if carried out by two or more parties in concert, would contravene the anticompetitive arrangements prohibition in section 27 of the Act. They query if the same standard for anticompetitive conduct should apply to unilateral conduct as for multiple party conduct. The substantial lessening of competition test is applied by businesses and their advisers in relation to mergers and arrangements, so some query why this is different in the case of unilateral exclusionary conduct. On the other hand, of course, most competition law regimes treat multilateral conduct more harshly than unilateral conduct – having different results under different provisions is thus not unusual worldwide.[61]

The claim that the 'purpose, effect or likely effect of substantially lessening competition' test is the 'standard test' of the competition section of the CCA is misleading and unhelpful.

Section 45 (contracts and understandings) and section 47 (exclusive dealing) apply that test, but section 50 (mergers) and section 151AJ (misuse of market power in telecommunications) require an effect or likely effect of SLC and will not be satisfied by a purpose. Section 44ZZX (public price signalling) requires an SLC purpose, and section 45DA (secondary boycotts) require an SLC purpose and effect.

Further, a number of sections prohibit conduct on the basis of a standard other than the SLC standard. The most serious conduct in the CCA – cartel conduct – requires proof of a purpose or effect of fixing prices, or a purpose of market-sharing, bid-rigging or restricting output. Section 45 also prohibits exclusionary provisions, which are provisions with the purpose of preventing, restricting or limiting supplies or acquisitions among competitors.

[61] p 30.

The secondary boycott and employment provisions prohibit conduct with the purpose and effect of causing substantial loss or damage to a business or preventing or hindering international trade or commerce; or with the purpose of preventing supply or acquisition.

Finally, section 47(6) and (7) (third-line forcing), section 48 (resale price maintenance) and section 44ZZW (private price signalling) do not require any purpose or effect but prohibit particular forms of conduct without more.

The changes recommended by the Harper Review would increase the prevalence of the 'purpose, effect or likely effect of substantially lessening competition' test, but there seems to be little basis to embrace this test over any other formulation, or to assume that there should be a standard test, rather than a range of tests each tailored to specific conduct.

Question nine

Should specific examples of prohibited behaviours or conduct be retained or included?

Summary response:

The law should identify the conduct to be prohibited with sufficient precision and clear enough language to guide business decision making. The current section 46 is expressed at an appropriate level of specificity and provides a high level of certainty. By comparison, proposals such as those put forward in the discussion paper, which capture any conduct that has the purpose, effect or likely effect of substantially lessening competition, do not provide sufficient guidance to business. Regulatory uncertainty deters innovation and investment.

Detailed response:

In general, prohibiting specific forms of conduct provides a guide for business to regulate its behaviour, increasing compliance with the competition law and reducing cost and uncertainty for businesses and enforcement agencies. Competition laws around the world either specify the specific forms of conduct to be prohibited in legislation or rely on decades – if not centuries – of accumulated jurisprudence to provide these guidelines.

Former ACCC Chair Allan Fels has often said that the Australian competition law should be replaced by a single provision that any conduct that has the purpose, effect or likely effect of substantially lessening competition is prohibited unless authorised.[62]

It is easy to see how a regulator or enforcement agency would prefer this kind of competition law, as it confers extremely broad discretion on that agency – particularly in the substantial proportion of regulatory activity that occurs before or outside of formal legal proceedings. However, modern competition law frameworks recognise that such a broad and discretionary approach provides insufficient certainty for industry participants and is likely to interfere with the competitive activity that the law is designed to promote and protect.

[62] See Allan Fels, 'The future of competition policy', National Press Club address, Canberra, 10 October 1991.

As a result, every prohibition in the CCA identifies specific kinds of conduct or behaviour. These may be relatively general, such as the contracts, arrangements or understandings assessed under section 45; or more specific, such as the exclusive dealings of section 47 or the categories of cartel conduct set out in Division 1. Some of these examples may be overly specified and difficult to navigate, and many could usefully be simplified. But the better solution is to refine them, rather than abandoning them and leaving business without any guidance.

Section 46 currently identifies the prohibited behaviour as conduct that:

- takes advantage of a substantial degree of market power; and
- does so for the purpose of:
  i. eliminating or substantially damaging a competitor in that or any other market
  ii. preventing the entry of a person into that or any other market
  iii. deterring or preventing a person from engaging in competitive conduct in that or any other market.

Despite concerns from the regulator that the 'take advantage' element is difficult to apply and predict, in practice it provides a useful and effective guide to business. A business can relatively easily determine whether it would be likely to engage in particular conduct in a workably competitive market or whether, to the contrary, it would only engage in that conduct because of its relative freedom from competitive constraint. This is a straightforward test to communicate to decision-makers throughout a business.

As the New Zealand Issues Paper notes in relation to their courts' interpretation of the 'take advantage' test, which is similar to, but arguably narrower than, the Australian interpretation:

> The courts have explained that their adoption of this rule is to provide businesses with certainty ex ante as to whether their conduct is lawful and to minimise the risk of a chilling effect on large businesses competing.[63]

The three exclusionary purposes set out in section 46 provide a further guide to business for conduct that should be avoided.

The purpose of 'eliminating or substantially damaging a competitor' is not well expressed and on its face risks capturing pro-competitive conduct, though the courts have clearly stated that only conduct that damages the competitive process will be caught.

The other purposes set out in section 46 closely match the definitions of exclusionary conduct that have been proposed by the ACCC, such as 'behaviour that excludes others from the market'[64] and 'when a business takes steps to prevent competitors from entering a market'.[65] The current section 46 might be improved by removing or clarifying the first exclusionary purpose and retaining the other two.

Alternatively, the description of exclusionary conduct proposed in the Harper proposal appears to be a reasonable definition. As discussed in relation to question 11 below, it is not particularly useful as a court factor, but could be used to specify the conduct to be

[63] At p. 22.

[64] Rod Sims, ABC The World Today program, 2 September 2014.

[65] ACCC, 'Our economy needs more competition on the merits', ACCC Media Release, 13 September 2014.

examined by reference to its purpose: for example, the purpose of preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

By contrast, the Harper proposal – and the 'part-Harper' variants raised in the discussion paper – come close to Professor Fels's one-line competition law. The only difference is that they would apply to a business with market power, but limiting a provision to certain businesses is not the same as identifying particular forms of behaviour. Instead, it would punish the mere possession – or possible possession – of market power, contrary to competition law principles.

Former Federal Court Justice Heerey argues that the current section 46 is to be preferred over the Harper proposal in this respect:

> Under the proposed section, a firm making a decision would have to agonise over the effects in the future on competition in a market. For a start, this would require working out just what was the market in which a substantial degree of power was held, and then what other possible markets might fall within the rubric of "any other market". This can lead to disagreement between learned economists and lawyers, and even judges…
>
> Then there is the predictive speculation as to whether behaviour as a result of the proposed decision would "lessen" the abstract concept of competition, and, if so, whether "substantially".
>
> While I agree with the principle of focussing on competition rather than competitors, the present section does have the practical advantage of specifying clearly identifiable conduct which is inherently likely to lessen competition.[66]

On this basis, it is certainly desirable for prohibited behaviour to be specified, and the current section 46 does so more clearly than the alternatives presented.

Question ten

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?

Summary response:

A prohibition of conduct that has the purpose of substantially lessening competition, without any further examination of whether the business had misused its market power, would risk significant over-capture. The case law shows that a purpose of substantially lessening competition can be found even where there is no likely effect of any consumer harm. This prohibition could deprive consumers of lower prices or improved product choice.

Detailed response:

A provision that prohibited a corporation with substantial market power from *taking advantage of that market power* for the purpose of substantially lessening competition

[66] The Hon Peter Heerey AM QC, Submission to the Draft Report, p. 2.

would have the advantage of clarifying that the section is intended to protect competition, not competitors.

However, as discussed in relation to question 7 above, a provision that prohibited any conduct that has a purpose of substantially lessening competition would risk capturing a wide range of conduct that would benefit consumers.

The case law suggests that a purpose of substantially lessening competition may be found even where there is manifestly no likely effect of substantially lessening competition – see for example *Universal Music.* It is also clear that it is the *subjective* purpose that is relevant – even though that purpose may be inferred from objective circumstances – and that a business need not have the sole or even the primary purpose of substantially lessening competition to be caught by such a law. As a result, conduct could easily be caught on the basis of an anti-competitive purpose expressed carelessly by an over-zealous executive, even though the primary purpose – and indeed the effect – of the conduct is pro-competitive.

It is not clear that the competition law should punish businesses simply for having the purpose of lessening competition without more. It should only punish businesses that seek to achieve anti-competitive purposes in particular ways – for example, by misusing their market power.

Mandatory factors

Question eleven

Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?

Summary response:

Mandatory court factors would reduce uncertainty only to a limited extent, even if the language of the Harper recommendation were improved. The essential elements of a misuse of market power law should require proof to the satisfaction of the court; it is not enough that the court 'have regard to' these elements.

Detailed response:

Court factors, whether mandatory or otherwise, can be useful in expanding the scope of the court's consideration or shifting it in a particular direction. However, they are less useful in providing certainty for business, and in the case of distinguishing vigorous competition from anti-competitive unilateral conduct, it is difficult to see how these factors could reduce uncertainty to a significant extent.

Unilateral conduct may have very different effects in the short term and the long term, or in the immediate market and related markets, and it is not easy for a business to predict how a court might weigh these effects against each other. If, as is proposed by the Harper Report, the court would also need to weigh purposes and effects against each other, these factors would be unlikely to reduce uncertainty at all.

The essential elements of a misuse of market power law should not be left to factors for a court to consider, but should make up the elements of a contravention or a defence, as they do in other jurisdictions.

For example, under the Harper proposal, the court would be directed 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
- 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.

This provides far less certainty than a provision that was explicitly limited to exclusionary conduct and provided a defence for, or did not apply to, efficiency-enhancing conduct.

Question twelve

If mandatory factors were adopted, what should those factors be?

Summary response:

Mandatory factors would need to be clear enough to significantly alter the scope of the 'substantial lessening of competition' test as it is currently interpreted by the courts and applied by the ACCC. It may be necessary to specify factors that the court is *not* permitted to take into account.

Detailed response:

The mandatory factors suggested by the Harper Report appear to be limited and may be ineffective. For example, the court should always take into account whether conduct has the purpose, effect or likely effect of enhancing efficiency, innovation, product quality or price competitiveness, but the wording of this direction suggests that it may only do so to the extent that these things increase competition.

There is considerable jurisprudence and commentary to suggest that, in Australia, efficiencies and other improvements will generally be public benefits for the purpose of an authorisation or notification, but that they will only be relevant to an SLC assessment in limited circumstances – for example, when they increase competition against a larger business.

It is not clear to what extent a market leader may be able to claim that efficiencies and improvements increase competition in a market – since they may increase its market power – and the language of the proposed direction is not clear enough to overcome this presumption.

Authorisations

Question thirteen

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

Summary response:

Authorisation should be available but is only likely to be helpful in a limited number of cases due to the time and expense of the process. A more useful approach would be an exception or defence for conduct that provides public benefits that outweigh any anti-competitive detriments.

Detailed response:

Authorisation of unilateral conduct is not likely to be helpful in many circumstances and should not be relied on to distinguish between competitive conduct and anti-competitive exclusionary behaviour.

Authorisation is appropriate for conduct that is infrequent and is not time-critical or commercially sensitive. It necessarily involves complex legal advice and is likely to require economic and other expert advice to weigh public benefits and detriments.

Authorisation is a public process and the current time frames for authorisation are up to 6 months. This is the antithesis of the agile and reflexive competitive conduct crucial to the promotion of consumer welfare in a market economy.

Instead of relying on lengthy administrative authorisation processes, it may be preferable to introduce a general 'public benefit' defence, which could apply the same balancing of public benefits against anti-competitive detriments as applies in an authorisation, but would be self-assessed by the business in the first instance. This would address the limits of the SLC test in recognising efficiencies or other public benefits while preserving vigorous competition, and would align more closely with efficiency or 'rule of reason' considerations found overseas.

Other issues

Question fourteen

If quantitative data on the regulatory impact of alternative options on stakeholders (including the methodologies used) can be provided.

Any quantitative data should reflect (including where it may be used in a Regulatory Impact Statement):

- economic activity foregone from an uncertain or expanded provision that causes businesses to pull back from innovation and investment due to the risk of regulatory investigation or litigation
- increased costs to business will include the cost of sourcing economic and legal advice and the longer timeframes that will need to be built into business decision making
- development of new jurisprudence and case law

- possible increased regulatory administration costs for the ACCC.

With our economy experiencing below trend-economic growth the economy-wide effects from harming business confidence and introducing regulatory uncertainty need to be quantified and taken into account.

Question fifteen

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?

Summary response:

A proper assessment of the interpretation of the 'take advantage' element in light of the case law and legislative amendments is strongly preferred to removing the element altogether. This assessment was not undertaken in the Competition Policy Review nor in the discussion paper.

Detailed response:

As set out in relation to question 5, the primary concern of the Harper Report and the ACCC now seems to be with the 'take advantage' element. This element has long been recognised as a critical element of the provision, and has been progressively refined by a number of court decisions and recent legislative amendments. Given this importance, it is surprising that the Harper Report gave so little consideration to refining this element and was so quick to recommend its complete removal.

The idea that the SLC test will substitute for this element in distinguishing vigorous competition from anti-competitive conduct for businesses, regulators and courts seems to be little more than wishful thinking. An amendment that addressed any demonstrated gaps in the 'take advantage' element, while preserving the 40 years of accumulated jurisprudence relating to the element, would be significantly more effective than the Harper approach.

Specific options

Question sixteen

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?

Summary response:

Option A is preferred. None of the other options offer significant improvements over the Harper proposal.

Detailed response:

The relative strengths and weaknesses of the options presented are set out in **Attachment A**. Taking into account these strengths and weaknesses and the

considerations discussed in this section, the Business Council can only conclude that Option A is preferred. In particular, since none of the 'part-Harper' variants retain the 'take advantage' element or make any attempt to improve on it, none of those options are open to consideration as they currently stand.

Question seventeen

Are there any other options (not outlined above) that should be considered?

Summary response:

Whatever options are considered should be assessed against the essential elements of a misuse of market power law, and should provide certainty to business and not only discretion to the regulator, in order to avoid undermining the competition it is intended to protect.

Detailed response:

As set out in the main section of this submission, in the Business Council's assessment there are a number of features common to a greater or lesser degree to misuse of market power laws in developed economies throughout the world, and the ideal section would incorporate as many of those elements as possible. Those elements are:

- a threshold requirement of market power
- a focus on exclusionary conduct
- an examination of purpose
- a causal connection between the market power and the conduct
- protection for conduct that has an efficiency or legitimate business justification.

The current section 46 has most of these elements; the Harper recommendation and the 'part-Harper' variants set out in the discussion paper have very few.

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