

SUBMISSION

Options to Strengthen the Misuse of Market Power Law

THE EFFECTS TEST

Section 46 of the Competition & Consumer Act 2010

Keeping Australian Business Competitive

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Executive Summary

Competition policy in Australia is at a crossroads. An effective competitive process should be underpinned by unilateral conduct laws that safeguard the competitive process, not individual competitors. Yet in the wake of the most significant review of competition law and policy in this country in 20 years, Australia risks being saddled with a framework that hampers innovation, fails to deliver benefits to consumers, and shuts out small, innovative businesses.

The Competition Policy Review, led by Professor Ian Harper, proposes amending Section 46 of the Competition & Consumer Act, to introduce a simple Effects Test. Most international jurisdictions have an Effects Test in some shape or form.

The proposed Effects Test is pro-competitive, making it easier for smaller players to compete. Misuse of market power is a very serious allegation and difficult to prove. The evidentiary thresholds are very high, causing many cases to fail, especially given the resource disadvantage suffered by smaller businesses.

Poor or unsatisfactory outcomes do not just arise from intent but also from the unintended effects of activities. This is why we need an effects test that takes into account not just behaviour and intent, which are notoriously difficult to prove, but also the impact on structure — regardless of intent.

The big players are essentially putting forward an anti-competitive argument, and manufacturing uncertainty in order to derail the push to strengthen S 46.

The Business Council of Australia's private lobbying of the Prime Minister and Cabinet against adopting the Harper Review Committee's recommendations on S 46 has not been helpful. The Council has become captive to the interests of Coles, Woolworths and Telstra, rather than the long-term interests of all Australians.

The claim that big business can do a better job on innovation, growth and productivity, does not match the reality of what can be generated by small businesses: the new entrants, the innovators, the disruptors.

It would be consistent with the leadership taken by the Prime Minister, Malcolm Turnbull, on innovation and former Small Business Minister, Bruce Billson, on tax, to send a signal to small business that it believes Harper's Section 46 is pro-competitive. Amendment will not damage the paramountcy of consumer interest. On the contrary, a strengthened S 46 is good public policy.

Big business is accustomed to dealing with uncertainty and complexity in a host of areas, such as the environment and health and safety. If this amendment is truly to their detriment, I have no doubt that its vast resources and information, relative to small business, will enable it to cope without adverse impacts on competition, the community or themselves. If big business cannot innovate with a new Section 46, perhaps it does not deserve the market power it currently enjoys. It is good for the big companies to be challenged in this way.

Introduction

The most contentious element of our existing competition law framework is Section 46 of the Competition and Consumer Act (CCA). Section 46 prohibits big business from acting unilaterally to misuse its market power. As Merritt (2015) explains, there are currently three elements to S 46: a company must be found to have substantial market power, that it has “taken advantage” of that market power and that the purpose for this was anti-competitive.

Ian Harper’s Competition Policy Review Panel, which reported in 2015, recommended an Effects Test be incorporated into S 46. The Committee recommends retaining the first element — establishing substantial market power — and dispenses with the second and third. Thus, the focus moves away from purpose and intention, to simply outcome.

The Federal Government’s response will have a decisive effect on both the structure of competition and the ability of small business to grow. Both sides agree, theoretically at least, this debate is not necessarily about small and big business. Small business is a misleading label: it is much wider, and includes innovators, disruptors and start-ups that one day, may well become big business.

It is important in dealing with competition to understand the structure of the Australian economy. It is a relatively small economy with a number of very strong players in retailing, media, banking and telecommunications. Using international benchmarks, these companies are excellent performers. Their market shares are by world levels, high.

It is easy to see why some of these companies are frustrated; they desire to grow and are pushed to the limits in their competitive actions to grow and to gain market share. This causes damage to others which might not otherwise happen in larger economies where there is more scope to grow and take market share from others.

“By world standards, Australia already has too many oligopolies ... the highest concentration of any market in the world. We cannot allow this to worsen. We want start-ups and new entrants for innovation and change”

The idea of a fair go and level playing field is ingrained in Australian culture. Yet by world standards, Australia already has too many oligopolies. Of the 10 ASX listed companies representing 52% of the ASX 100 index, 48% of the 200 index and 46% of the 300 index, 9 are oligopolies. If BHP and RIO shares had not been hammered with the commodities and share market downturn, the percentage would be much higher. This would be the highest concentration of any market in the world. We cannot allow this to worsen. We want start-ups and new entrants for innovation and change. We need less concentration and more players.

Big business, given the huge competitive economic and strategic advantages it enjoys, it has a responsibility to consider the effects of its actions. These include the dangers of monopoly and oligopoly power, both for the market and individual players.

It is a slippery slope to monopoly and oligopoly: care is required, as they do not necessarily announce themselves: they are a matter of degree, and hard to regulate and undo.

Monopoly or oligopoly power is not necessary to be profitable and to deliver benefits for stakeholders, particularly mutual benefits for customers. We need to nurture competition.

There is nothing sacrosanct about competition or the competition process. There is no God-given concept or definition of what it should or should not be. We should not be overly influenced by lawyers and their view of ideal competition law, but by wider issues. Government should not, in the national interest, be frightened, intimidated or bullied out of placing some restraints on competition to create a genuinely even playing field.

The Existing S 46: Effects vs Purpose

Under the existing Section 46, one needs to prove the corporation:

- (i) has a substantial degree of market power;
- (ii) the corporation had the purpose of lessening competition in a market, and;
- (iii) takes advantage of that market power.

These separate steps require considerable research and evidence, putting those who are alleging anti-competitive conduct at a severe disadvantage in the courts. It is a test of behaviour. Notwithstanding the clarifying provision of the Trade Practices Act, how does one amass the evidence required to establish corporate motives? In short, the threshold of substantial market power is very high — more than half the cases fail on this point.

It is also extremely difficult to prove “taking advantage” of market power. This involves the challenge of delving into corporate motives, that is, the state of mind of corporations.

The ACCC also argues there is a loophole. If the conduct was undertaken by someone without market power, then those with market power are not stopped.

“Taking advantage” is where a firm possesses market power because of a weak competitive environment. Taking this advantage is easy compared to an environment where there are many competitors, market equilibrium or market contest. In any event, where does one draw the line?

The current conduct test is not appropriate, because the activity can theoretically be undertaken by any firm, large or small. The law is blind to the competition implications of this. But as a public policy first principle, we must ensure our legal framework stops exclusionary conduct; it is critical that small businesses and new entrants are not excluded.

The Debate

There is much that is wrong with the present Section 46. Unsurprisingly, coalitions are forming to attempt to influence the Government's response to the Harper Review.

In one camp, the interests of the oligopolists, who seek the status quo to protect their oligopolies, are taking precedence for reasons that are not immediately intelligible if one takes the long term, common good or net benefit as a starting point.

The other camp, with expectations of impartiality, believes strongly that Harper Section 46 is pro-competitive and is simply navigating its way through a thicket of interests. Neither camp is taking as its first principle what is right for Australia.

Broadly speaking, there are two camps debating the Effects Test:

Retain Section 46 (SK)	Position	What it is calling for
<ul style="list-style-type: none"> • The Business Council of Australia (BCA) • Professors Graeme Samuel and Stephen King (Monash University) • Woolworths • Wesfarmers • Telstra 	<p>The SK camp questions why an efficient, profitable and successful business outperforming its competitors should be stopped from offering better product at lower prices</p>	<ul style="list-style-type: none"> • Despite the independent Harper Review, the BCA wants an independent assessment of the risks and a full appraisal of economic cost and benefits of the proposal. The Government has responded by setting up roundtables to resolve the situation. • Maintain behavioural tests in the current Act
Amend Section 46 (HR)		
<ul style="list-style-type: none"> • The Harper Review Committee (HRC) • Rod Sims (ACCC Chairman) • Allan Fels (former ACCC Chairman) • Aust Chamber of Commerce & Industry 	<ul style="list-style-type: none"> • The HR group is trying to deal with competing views, free of any political or sector interest. It is almost as if they are mediators trying to find a way through the minefield without self-interest and trying to focus on what is objectively good for the competitive process. • Not driven by legal, economic or regulatory bias. 	<ul style="list-style-type: none"> • Strengthen section 46 • Amended Act to maintain or conduct behavioural test <i>and</i> introduce structural test.
<ul style="list-style-type: none"> • Aust Booksellers Association • Council of Small Business Australia • Aust. Dairy Farmers Federation • Aust. Hotels Association • Assoc. Newsagents Association • Aust. Retailers Assoc • MGA Independent Retailers • Natbuild • National Farmers Federation • Pharmacy Guild of Australia 	<ul style="list-style-type: none"> • Believe HR Section 46 recommendations are a material compromise on their position. • Do not see the need or fairness of further compromise: it would be "compromise on compromise". 	

The Roundtables: Running the Gamut of Competition from A-F

The Minister for Small Business has issued a discussion paper for discussion at two roundtables. The second, held at Tamworth on 29 January 2016, was chaired by Assistant Treasurer Kelly O'Dwyer, and facilitated by ANU academic and former chairman of Minter Ellison, Russell Miller. It was attended by corporate affairs staff, lawyers, the ACCC, Treasury & ministers. No media representatives were invited, and recording and publication of others' comments was prohibited.

Curiously, the Discussion Paper is titled, 'Options to Strengthen the Misuse of Market Power'. The title belies the contents, in the manner of Henry Ford's famous dictum, "You can have any colour, as long as it's black".

As Dorothy Parker observed of Katharine Hepburn, that she ran the gamut of human emotion from A to B, this paper does something similar. Of the six options, numbered A-F, on which the Government seeks input, five in fact weaken the section and the definition of market power, and only one endorses the Harper Review recommendation. Not one of the options *strengthens* S 46.

Moreover, these roundtables are closed sessions of handpicked protagonists, many of whom do not support a strengthened S 46. The Government does not want this to be an open process where anyone can attend because of the risk of it getting out of hand. The Government is desperate for a compromise, but the reality is that consensus is highly unlikely.

The domination by lawyers is such that important policy considerations risk being sidelined, and transformed into a lawyers' picnic.

It is clear from the behaviour at the roundtable that the BCA and the big players are going to fight this issue to the end and have mentioned the legislative process itself where we have seen mistakes made in the past like the 2007 Birdsville Amendment to Section 46 (which captured predatory pricing). Pressure will be brought to bear on the legislators and on the exact words and reasons. This should not frighten the legislators but simply make them more careful.

It is noteworthy that a Wesfarmers representative claimed that Section 46 was put in the final Harper report under persuasion of the then Minister, Bruce Billson. This is an incredible assertion, given the integrity of people like Ian Harper. To suggest that the Harper Committee produced a report that was biased in this way, is defamatory. It is also noteworthy that Bruce Billson has been replaced as Small Business Minister and it is understood that this was at the request of the BCA, which claimed that there was an inherent conflict in the Minister for Small Business also dealing with Competition Policy.

This situation is difficult for the Government. The BCA has a close working relationship with Government and has done excellent public policy work in driving for greater

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innovation and productivity. Small business agrees with the importance of this. However, on this issue, the BCA has displayed implacable opposition to any change and has not suggested any compromise or alternatives, whereas the raison d'être of the roundtables seems to be an attempt at compromise.

The Roundtables raise some important questions about process:

- Are the deliberations and the input from Treasury any better than in the Harper Review?
- Has this all been designed and choreographed so Government are seen to be listening to small business because of the successful direct approach by big business to Cabinet;
- Where is the information and expertise coming from? Treasury as such was not available to the HR Committee.
- If the two Roundtables and the subsequent submissions add no new insight to the issues, what will happen?
- If there are new insights, will these be reviewed by Harper and the ACCC?

Public Policy Issues and Questions

The roundtables for discussion of Options A to F are a great forum for the lawyers to take over the debate. My objective is to steer the debate from semantics towards some wider and deeper public policy issues and questions, which I have set out below.

The Macro Environment	The oligopolistic structure of our economy
	The importance of driving innovation and productivity in the economy by small business being start-ups, disruptors, innovators and new entrants
	Economic observers going back to Adam Smith, 'the father of the free market' and some current economists views;
	Is Treasury the right place for the Business Portfolio to exist
Competition and Consumer Act (CCA)	Unacceptable conduct, its limitations and opportunities;
	Certain uncertainty or uncertain certainty
	It is important to consider the structure or conduct as well as the behavioural aspects of Section 46
	The relevance of what is happening in other international jurisdictions, particularly the US
	The acceptance of the status quo might have political consequences

Stakeholders & Interests	The disbursed and fragmented nature of the small business market means that its views are less focused and resourced than the BCA
	The possibility of the Government being seen to be captive to big business and the associated vested interests and lobbying power. The influence by the BCA and the manner in which its influence is exercised
	The scale and the advantages of big business and whether this imposes on them any moral responsibility
	The role of the ACCC and the strategic issue of evidentiary burdens
	The problem with the argument that consumers are voting with their wallet and their feet when it is clear that consumers seek instant gratification and do not and are unable to consider long-term considerations because of lack of information
	The High Court's recognition of the brutality of competition (Rural Pres Ltd vs ACCC) is a statement of fact that does not help the cause of small business
	Does big business understand sufficiently the disruptive effect of some its actions and its consequent destruction of people
	The loss of Bruce Billson as federal Small Business Minister
Recommendations	The deep and well researched consulted and independent report by the Harper Committee, should be accepted

The Competition Process

Both camps agree that the use of market power should be subject to some legal constraints. They agree with the formulation of competition that has the effect of Substantially Lessening Competition (SLC) in a market, but with SK this is qualified and with HR it is unqualified. The BCA complains that the definition of the market is too narrow and that decision making on SLC is too slow.

This test of SLC is the same as found in Section 45 (anti-competitive arrangements), Section 47 (exclusive dealing) and Section 50 (mergers).

The case law is well developed on this formulation, so to the extent that these words are used, there is certainty for the players. Both parties agree that unilateral conduct is the concern — not the damage that might be inflicted by one competitor upon another. Rather, it is about the state of competition or the process of competition; and not damage, or potential damage, to a competitor. This is a very important distinction.

Both parties agree that an Effects Test is appropriate, but the issue is: what else should drive or qualify the effects test?

The SK Position: Against Change

SK believes that S46 should be driven by:

- (i) any conduct causing the misuse or abuse of market power and,
- (ii) the 'taking advantage' of that power, which in effect substantially lessens competition in a market, should not be applied to any possible conduct engaged by business. SK argues this is far too wide and open,
- (iii) SK states that the amended Section 46 is inconsistent with overseas legislation and case law. That is not the conclusion I have reached, as I explain in the next section on US law.

In terms of the corporate support for this position, the Business Council and the big three (Woolworths, Telstra, Coles) argue that there are many other ways of helping the small business sector, beyond section 46. Their view is, "Don't mess with this Act; it is well settled, S46 is part of an interrelated package. There is a small business ombudsman, unfair contract, provisions and unconscionable behaviour rights. Isn't this toolkit enough for the regulators and the private litigants?"

It should be noted that all three are in serious disputes with the Regulator. They do not want to see any increase in regulator power. They maintain there have been plenty of cases in which the ACCC has had a number of victories and no serious losses. The consequence is that S46 case law is well settled and understood. Case law takes a long time to develop.

The BCA and the big three differentiate between intended and unintended consequences. There is a risk with the Harper recommendation that there will be unintended consequences. They want certainty and they gain more certainty by the regulator having to prove 'purpose' or 'taking advantage of'. This is very difficult which of course causes uncertainty on the application of the Section.

The BCA, Wesfarmers, Woolworths and Telstra, claim that to change Section 46 would be to the detriment of consumers, who would lose choice and benefits, and that is not in the National interest. The converse view is that the existing S46 is not working and in the words of the Master Grocers Association's (now MGA Independent Retailers) Jos de Bruin, 'not fit for purpose'.

Woolworths argues about the high cost of getting it wrong (cites NZ). There is no consensus as to what the problem is. There is a nexus between purpose and taking advantage, you cannot have one without the other. Telstra argues that for instance, national pricing, which involves some regional areas being serviced at a loss, and bundling, where some products are costed at less than cost, might offend HR S46. This is incorrect. And remember, Telstra does have special legislation.

They simply want consumer choice to override everything else and they are absolutely insensitive to the consequences of some of their actions in terms of hurting and disrupting companies, people and communities. They argue that in the interests of competition and the many quoted benefits they have delivered to consumers, there should be no limits. In particular they argue that the behavioural aspects being eliminated from Section 46 can be coped with by the concept of 'unconscionable conduct' which is only partly right.

In the Tamworth roundtable, Wesfarmers referred to the massive consumer benefits Bunnings is delivering across Australia. Should Bunnings be allowed to power on even if it finishes with virtually no competition in its core market? It was once a small business starting with 6 people in 1994.

Woolworths was not arrogant enough to refer to the equally successful Dan Murphy, which also started as a small business like Bunnings.

The HR Position: For Change

HR asks why it should matter if an activity has the effect of Substantially Lessening Competition in a market, even if there was no intended abuse or taking advantage of that market power. Does it matter whether it was intended or unintended?

Similarly, does it matter whether it is a small or large player that SLC, or whether the conduct engaged in is substantial or small as long as it has a substantial effect?

How, according to HR, can SK argue that the effects test is anti-competitive when it is in fact promoting and keeping the competitive process healthy?

The HR proposition is much simpler and easier to establish, because we are dealing with well accepted and known economic criteria. While one can have anti-competitive conduct, this is not confined to conduct per se, but to conduct that embraces impact or effect. It is just not any conduct. There are two branches to the analysis: conduct that has the effect (behaviour) or structure of the conduct that has the effect.

In essence, the BCA and SK want the behavioural tests maintained and HR both the conduct / structural and behavioural tests. The BCA / SK want the conduct to have purpose or intent and the taking advantage of market power. This is an important distinction when considering the options put forth by the Government.

Section 46 as recommended by Harper will also have an effect through conduct, structure and outcomes not behaviours alone which the big three do not like.

More on Structure

In Australia we face a unique situation. Our economy by international standards is quite small and we have many oligopolies, in media, banking, retailing, telecommunications and other areas. Oligopolists spend time protecting their oligopolies as that is their strategic advantage. Because the market is small there is sometimes, intensive competition, which creates behavioural challenges involving unacceptable or unconscionable conduct of an extreme nature. Many of the problems could be solved if our markets were larger. (See Appendix 1, letter to the Prime Minister). These behavioural problems in competition should not be confused with the competition process itself.

"It is curious that the BCA wants to make it more difficult for small players. Surely a pro-competitive role should be seen by large companies as a means to keeping their own organisations competitive."

Oligopolies or market power presuppose a lack of market equilibrium (economists may have a different definition) — in other words, a lack of countervailing market power.

Market equilibrium, or a healthy market, is very important for innovation and growing the economy to meet the changing world. We need to focus on the structural aspects of conduct as well as the behavioural aspects. We should not solely depend upon the subjective or behavioural tests, although this can provide evidence of structural problems.

A healthy market implies a number of players that can enter or exit the market. The existence of small companies, new entrants, innovators, disrupters and start-ups helps market equilibrium, is pro-competitive and should be nurtured.

It is curious that the BCA wants to make it more difficult for small players. Surely a pro-competitive role should be seen by large companies as a means to keeping their own organisations competitive.

Small Business: The Evidentiary and Resource Disadvantage

While I noted in the Introduction that 'small business' is a misnomer for the firms that may one day well be our innovators, disruptors and leading companies, this view needs to be qualified by practical realities.

Small business is more likely (but not necessarily) to be affected by anti-competitive effect. The evidentiary burden of proof under the existing test is so huge that it puts a smaller player and the ACCC at a significant tactical litigation disadvantage.

Because of the subjectivity and difficulty in proving conduct that amounts to the misuse or taking advantage of market power, the larger player has a considerable evidentiary and resource advantages. This makes it difficult for the smaller player litigant or the ACCC to succeed.

Those trying to help small business and give it a greater chance in the competition game with bigger players wa
Conversely, the status quo suits the bigger players, but they have greater capacity to adapt to change, and greater responsibility. Inevitably, large companies with huge resources and emerge the winners.

Those trying to help small business and give it a greater chance in the competition game with bigger players want Section 46 changed... the status quo suits the bigger players, who have greater capacity to adapt to change, and greater responsibility"

Comments on Market Power

Market power implies advantages of scale — whether market coverage, buying power, ability to fractionalise fixed costs, or the availability of specialised labour.

Market power can be one step from monopolisation, and assumes there is a lack of sufficient countervailing power in the market — that is, the existence of other players with competitive power.

Those with market power and all its manifold advantages and opportunities and privileges should accept some responsibility for curbing excess behaviour or anti-competitive conduct.

As always, the difficulty is where to draw the line. The High Court has acknowledged the brutality of competition, but because of the jurisprudential challenges in drawing the line, the easiest course is to do nothing, with Section 46 being left as an ineffective Section and misuse and abuse continuing.

Small business is often geographically dispersed operating in many different shapes, sizes, models where competitive conditions are quite different. Small business cannot marshal its resources to deal with market power as can big business.

The balance needs to be tilted in terms of the evidentiary burden in favour of a small business (private litigant and the regulator).

In the US, where there is a monopoly, the monopoly has to disprove the abuse of market power. With the current Section 46, if 'taking advantage' is not removed, then someone with market power should prove they are not taking advantage.

Trade-offs Between Short and Long-Term Uncertainty

The fundamental question, then, is: how should we balance the evidentiary burden and resource issue?

Defenders of the status quo (SK) maintain it is critical in competition law for there to be certainty. In fact, the existing Section 46 in its application is very uncertain, because of the need to prove conduct amounting to an abuse of market power and taking advantage of. The emphasis is on behavioural or subjective issues, not the structural ones sought by HR.

Death is death, whether caused by murder or manslaughter. One is intended and the other is not. The only difference is the penalty.

One way of expressing this is to say that under the current Section 46, there is certain short-term and long-term uncertainty. With the amendment to Section 46 there is short-term uncertainty as firms adapt, but the gain is mid to long-term certainty.

If players are in any doubt, they can approach the ACCC and obtain authorisation for their actions, which obviates the BCA fear-mongering about uncertainty. An Effects Test with the possibility of authorisation is preferable to a situation where anti-competitive behaviour against small players is difficult to challenge, even if the strategies of the big players are laid bare in an authorisation process but this material can be made private. The ACCC can also establish guidelines and be consulted. It is accepted that guidelines will not have the force of the law but no doubt The ACCC would be very careful in this area.

Comparison with US Law

Monopolies are notoriously difficult to unravel. Yet in US, breaking up the oil and telecommunication monopolies led to a great deal of economic innovation. The comparison between Australian and US law is not straightforward, but on balance supports the HR position in favour of change.

In the US, the first step is to establish whether a company has monopoly power in a properly defined market. It must be demonstrated that the company has wilfully acquired or maintained this power by means of anti-competitive conduct.... While the monopolist behaviour must have anti-competitive effect, there is no need to demonstrate an actual or likely substantial lessening or prevention of competition. It is sufficient to establish some harm to the competitive process.

It appears to be accepted in the US as of 2006 (American Bar Association) that intent is only relevant to the extent that it assist the Court in assessing the likely effect of the challenged conduct.

It is clear that the US test of monopolisation is more stringent than the Australian test of abuse of market power.

SK could argue that because the Australian threshold is lower, any conduct should be qualified to where there is intent to misuse or abuse power by taking advantage of. But this is not where HR recommendations sit.

In the US, the focus is on objective intent, which is inferred from the conduct, and its effect in respect to the competitive process, not the effect on the competitors themselves. It does not matter if the competitors are being damaged, it is the damage by conduct to the competitive process that is subjective behavioural intent and difficult to prove.

Monopolies, or any attempts to create them, are treated as having an anticompetitive effect. The US prohibits predatory or exclusionary conduct in an attempt to enhance a monopoly.

Where it is established that an activity affects a substantial lessening of competition, monopolists can defend themselves by successfully arguing that the activity in question enhances community value or generates aggregate cost savings in the interest of the community, not the end consumers alone. Unlike in Australia, the monopolist has to prove his or her position – not the other way around.

	Australia	US
Legislative focus	<ul style="list-style-type: none"> • Behavioural, subjective 	<ul style="list-style-type: none"> • objective intent, inferred from conduct
What is the test?	<ul style="list-style-type: none"> • Abuse of market power • "Taking advantage of" 	<ul style="list-style-type: none"> • Monopolisation
What is prohibited?		<ul style="list-style-type: none"> • predatory or exclusionary conduct in an attempt to enhance a monopoly
Evidentiary burden		<ul style="list-style-type: none"> • no need to demonstrate an actual or likely substantial lessening or prevention of competition. • It is sufficient to establish some harm to the competitive process.

The Business Council of Australia: Certainty at the Cost of Competition?

BCA's quest for certainty is concerning. The BCA is ostensibly concerned about unintended consequences of the need to establish conduct that is deliberately a misapproaching the environment, of and taking advantage of, market power. OH&S and workplace relations, with

Given the issues are not black and white, it is puzzling BCA has such a determined and single-minded position. This awareness seems to be without any apparent receptivity to other views or putting missing from the BCA's stance on any alternative or compromise. competition policy"

To argue that business should understand consequences of its actions is not to argue for protecting any inefficient or failing company. It is, however, a suggestion that more sensitivity is needed. Businesses are now accustomed to approaching the environment, OH&S and workplace relations with great sensitivity and attention to detail. This awareness seems to be missing from the BCA's stance on competition policy.

At the heart of the push for retention, there seem to be two fundamental questions:

- (i) Is the roadblock simply about the short-term uncertainty adapting to the change?
- (ii) Is there enough economic information available to enable firms to have certainty about the effects of their actions?

It is not difficult for big business with its vast resources to understand the effects of its activities or conduct. Many consultants are available to help. I believe the BCA is exaggerating the scenario of firms requiring lawyers, accountant and consultants to hold their hands in perpetuity, and the lawyers in particular, seem to be looking for problems that are relatively easy to solve, remote or do not exist.

"Big business, with all its massive, locked-in resources ... wants a safe, risk-free way forward.

This does not lead to innovation, flexibility or disruption: there is too much to lose by disrupting yourself and it takes a bold company to go down that path"

Most of us, but not all, want certainty, a predictable future without risk. This makes decision-making easier with less need for entrepreneurship. Others thrive on uncertainty and see it as an opportunity.

Big business, with all its massive, locked-in resources (sunk costs of tangible and intangibles), wants to protect that and wants a safe, risk-free way forward. This does not lead to innovation, flexibility or disruption: there is too much to lose by disrupting yourself and it takes a bold company to go down that path. This is particularly so where there is not market equilibrium

and monopolies. Monopolies want to protect the status quo.

To argue that we will need lawyers, economists and consultants at the decision-making table is a nonsense. Any CEO, GM, Executive or Non-executive Director should have a good working knowledge of competition policy as it affects their sector.

None of these people, including non-executive directors, should be in their positions without a good working knowledge of Competition policy, Discrimination, OHS or IR.

Without that knowledge they cannot carry out their duties professionally.

Scope for a Co-operative Approach

Big business in the various sectors can develop policy guidelines in conjunction with the ACCC. Revised ACCC compliance manuals or training models would emphasise that the only activities to be mindful of are those that substantially lessen competition in the market. The ACCC can also issue guidelines generally and for particular sectors after consultation with industry. It is understood that this material does not have the force of law. This is a healthy process that would avoid unnecessary cases and cost down the track.

The effects test will make business more careful. We should be on guard about any advance in monopoly power in our already concentrated oligopolistic markets.

Big Business: Reputation, Brand and Position in Society

The High Court has accepted the brutality of unbridled competition, ruling that it is not in itself anti-competitive. However, this is no excuse to disregard the adverse effects of this conduct on competitors and society. Nor is it pandering to inefficient or failing business.

The BCA's arguments are being driven by economic purists and lawyers pushing the boundaries. No one denies the right of the BCA to do this, or questions the BCA's right to lobby or whether *all* BCA members agree. However, there must be more counterbalancing forces and argument, given the societal effect of disruption on so many, mainly small, enterprises.

It does not help when the BCA in a private communication with Cabinet Ministers misleads. This letter included 10 teasers trying to create the impression of complexity, uncertainty and difficulty. A more definitive statement of facts would have made solutions self-evident even for non-jurists. We all know the fewer the words, the bigger the tease and more difficult the puzzle.

The very fact that the BCA lobbied Cabinet members and the PM, in particular in private and the corridors of Parliament, to reject the Harper Committee recommendations, worries small business about who has the best access and influence in Canberra.

Even though unfettered competition may have short-term benefit for the consumer, we need an advocate to articulate the excesses of competition. Neither the economists, nor regulators or lawyers have a case that is self-evidentially right. Considering the fairness question and reasonableness of one's actions is not a barrier to growth and profitability.

"75% of Australians support strengthening competition laws by adding an effects test. Only 9% opposed... Some big players were once small and undoubtedly would not approve of the BCA's current assault on small players"

Vast numbers of Australians, in large organisations and at the coal face, are concerned about the actions of the big players. Research proves this: a national survey commissioned by MGA in 2015 found 75% of Australians support strengthening competition laws by adding an effects test. Only 9% opposed. Big

business should turn this around and adopt appropriate actions that might enhance their own brand — for instance by applauding small players that are efficient and successful in their own markets — after all, they are pushing big business to become more efficient and competitive.

Some big players were once small and undoubtedly would not approve of the BCA's current assault on small players.

It is accepted that it is difficult to draw a line between the big and small player. But there is an Australian tradition of fair play and justice in not disadvantaging a small player with evidentiary barriers that have nothing to do with the effect of substantially lessening competition in the marketplace.

Looking Beyond Immediate Consumer Impact

It has been suggested there should be guidelines to enable the court to look beyond the narrow confines of competition to the effect on the end consumer. The end consumer is not making decisions with all the information that might prompt concern about the moral issue of whether their purchases will, in the long run, disrupt the market or damage a competitor.

"Consumers vote with their wallet and feet, not with their minds and hearts. Few consumers are aware of the effect of their purchases on competitors"

Consumers vote with their wallet and feet, not with their minds and hearts. Few consumers are aware of the effect of their purchases on competitors.

There is no suggestion that legislative guidelines should go this far. It would be interesting to know what the views of consumers would be if they were so informed of the effect of their actions to disrupt or damage. However, this might not translate into changed purchasing behaviour.

My view however, is that most on the street would want to impose some moral restraints on the behaviour of corporations.

Where, for instance, there is a huge imbalance of power, information, knowledge, resources, geography and skill, it has been established in some codes, where the consumer is so disadvantaged, that there need to be mechanisms for redress. At the moment this is limited to the relationship between the corporation and individual consumers and very small business. Some would argue that some of these notions should be built in to defining what is fair and reasonable in the competition process on other words on a bigger scale.

While it is easy to state some general principles in this area, it is extraordinarily difficult to put these concepts into legislation in a way that would influence the competition process.

What is Unacceptable Conduct and How Do We Legislate?

The High Court acknowledges the reality that competition is brutal and is often disruptive of business and destructive of people. This does not sit well with those attempting to argue for checks and balances in the competitive process.

The Court does not make any moral comment on the nature of competition, nor should it. But this impartiality gives rise to a very legalistic and narrow view of competition, which has little regard to the destructive and disruptive outcomes.

It is not difficult to see the attractiveness of the concept of abuse of market power and taking advantage of a market position to lessen competition. Implicit is a moral judgement about intent of competition.

A test of substantially lessening competition in a market is that it is dealt with in economic terms alone; it is not necessary to consider intention and behaviour.

It is easy for economic purists to argue for minimal interference in the competitive process, a line consistent with the Harvard, Chicago or the post-Chicago Economic Schools. The view is that the market will always sort things out, as market power will always be curbed by countervailing power, thus preventing monopolies and oligopolies. Anti-competitive behaviour is an inherent property of monopolies, especially in the absence of any competitive counter activities.

Competition case law tries to focus on net consumer benefit, yet this has not been very well articulated by the courts. In particular, it is accepted that the US has been unable to satisfactorily define and decide which is better — the aggregate economic welfare (efficiency surplus) standard or the true consumer welfare standard (or consumer surplus). Put simply, if all of us benefit from efficiencies, then a lessening of competition is acceptable, but if only the consumer benefits, then it is not. The balance of argument seems to follow aggregate benefit.

In Australia, that neat distinction and tension between the collective and the individual consumer does not seem to be recognised.

It cannot be assumed that all cost savings will lead to consumer benefit. Only if the cost savings are significant enough to be passed through to the consumer is this lessening of competition deemed acceptable.

"It cannot be assumed that all cost savings will lead to consumer benefit. Only if the cost savings are significant enough to be passed through to the consumer is this lessening of competition deemed acceptable"

The problem with the concept of unacceptable conduct is that there is no universal conduct that applies to all sectors. Legislation enshrining unacceptable conduct principles via the ACCC has occurred in some sectors such as telecommunications, banking and retailing. It is proposed for small business, measured by sales by individuals, because this affects the competition process in the long term.

Unacceptable conduct provisions regulate conduct between parties, usually between one with superior information, resources and power and one without. These provisions are tailored to the unique instances or existing tensions. They essentially restore some sort of parity to an unequal relationship. But this is essentially what is wrong with the competition process: the need for such recalibration.

To argue that this rebalancing protects the inefficient or failing rent or entitlement seekers or anti-capitalists is inappropriate. Rather, it highlights the weaker negotiating position of small business, even while the sector delivers broad benefit to the community, societal and economic wellbeing.

It is the balancing of power that we need to address. Irrespective of whether the exercise of power is intended or unintended, we should be concerned at the effect on the competition process.

For a healthy competitive process we need to encourage small players, because that is where they are more likely to get new entrants, innovation, change, new ideas and disruption.

The more we can rebalance the health of the competitive process, the more benefits there will be for the consumer in the long term. The huge difficulty, of course, is where and how to legislate.

Lessons of Behavioural Economics

Recent Nobel Prize Winner Robert C Merton, of MIT, says it is wrong for economists to try to predict or forecast the future. Economists interpret historical data and explain why certain things happen, but the past is only one ingredient in predicting the future. Merton supports this view by highlighting how often economists are wrong in their predictions.

It is into this void that behavioural economics has moved. Most behaviours are highly resistant to change, but recognising this can, paradoxically, illustrate patterns of consistent outcomes.

People's behaviour is an economic force, as is evident in the Global Financial Crisis and the behaviour of monopolies and oligopolies. Behavioural economists are less concerned about structures and more about people and how they actually behave: is the conduct acceptable or unacceptable? The difficulty of behavioural economics is its lack of scientific backing and acceptance among economists in general.

The idea of information asymmetry or what I call, 'information balance', is a central tenet of economics. In the consumer market, people vote with their wallet and feet and this seems to be the end of the matter. This view assumes that consumers understand the consequences of their actions and have all the information available to do that. Yet very often, purchase decisions are made by reference to limited data such as the specifications, price, convenience, look and feel, but not the effect the purchase will have on the long term state of competition.

Lessons of Classical Economics for Competition

While Adam Smith was one of the early proponents of the free market and its advantages, he acknowledged its limitations and market failures. Some economists use Smith to justify a position of not interfering in the market at all. This is not correct, Smith in fact was a moral philosopher and had views beyond pure economics. He

"Adam Smith distinguished between self-interest and selfishness. An individual could be self-interested and still beneficent... no doubt he would describe the behaviour of Australian retailers towards their suppliers, and banks towards their customers, as morally wrong"

could be described as an early exponent of behavioural economics, a sub-discipline that is getting some attention today, and as a moral philosopher, he would have endorsed the rise of behavioural economics. Smith believed there were moral constraints on the exercise of market power. He endorsed the need for a legal system to protect liberty and property rights, national defence, public works; as well as regulations that the community accepts as necessary for its own protection without abandoning free market philosophy.

In all likelihood, Smith would describe the behaviour of Australian retailers towards their suppliers, and banks towards their customers, as morally wrong. He would

not like the BCA's push, which has no beneficence or compassion, because of their massive advantage: he would see it not as self-interest, but selfishness.

Smith identified prudence and justice as critical to the civil functioning of a free market. He commended the virtue of beneficence and concern and compassion *for others*. He distinguished between self-interest and selfishness. An individual could be self-interested and still beneficent. Moreover, the self-interest of one person could be in accord with that of another — for example, in the case of a bargain or a mutually beneficial transaction. Self-interest is acceptable when it suits both parties, but it does not necessarily lead to the right outcomes.

In banking and retailing, we have significant individual and organisational behaviours which, taken together, are unfair. The result is one side capturing too much of the rent to the disadvantage of the other.

Akerlof & Shiller's 2015 book, *Phishing for Phools: The Economics of Manipulation and Deception*, decries people who behave in a purely self-serving way by taking advantage of our free market by deception and manipulation. Akerlof & Shiller (both Nobel Prize winners) make a plea for:

- The manipulated consumer;
- Business people frustrated and depressed by the cynicism of colleagues trapped into following suit;
- Frustrated regulators and government officials;
- The volunteers, philosophers and opinion leaders on the side of integrity;
- Young people seeking meaning.

The economic forces that take advantage of the imbalance of information power resources in the economic equilibrium of the free market to deceive and manipulate are damaging the free market systems.

Journalist John Kehoe (AFR, 2015) draws attention to this issue, calling it ‘the business oligopolies protecting their oligopolies’. He calls it crony capitalism, designed to protect the incumbent models, not support competition. Kehoe argues that the situation is much more extreme in the US than in Australia, but there are dangerous signs emerging in Australia.

In an excellent recent book, Charles G Koch, whose Koch Industries is the largest private company in the US, discussed the principles by which people live and work together and flourish. A great admirer of Adam Smith, Koch expands on Smith’s distinction between self-interest and selfishness, noting that throughout history, many people have tried to protect their business through political means, but always to the detriment of society as a whole.

“The issue is, how do you channel self-interest for the general good? Whether it’s in society or business, mutual benefit is achieved only when rules are in place to make some people not being so aggressive in pursuit of their own self-interest.”

Regulation in a Free Market: A Parallel Issue

Smith’s schema highlights the problem with the Global Financial Crisis. Self-interested bankers and bank executives were selfish in that they undertook transactions to benefit themselves but to the material disadvantage of others. This has necessitated greater regulation.

Indeed, Smith also had strong views on regulation:

The Man of System.... is apt to be very wise in his own conceit; and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely, and in all its parts, without any regard either to the great interests, or to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that in the great chess-board of human society, every single piece has a principle of its own, altogether different from that which the legitimate might choose to impress upon it.

There are problems with excessive regulation. In its excellent 2013 Report, *Regulatory Engagement with Small Business*, the Productivity Commission highlighted some instances. For example, it is almost the impossible for builders to comply with all the regulations from multiple regulators without some corner cutting.

Even with political will, it is not easy to assist small business other than with tax measures, an ombudsman, unfair contract provisions and competition policy. Red tape and regulation are costly to small business because the burden is different in each sector and difficult to tackle.

This is another reason why the HR Section 46 will help small business with good public policy as a pro-competition measure.

Robert Menzies — Principles, Not Politics

Menzies remained relatively aloof from the media and big business. He wanted to pursue principle, not politics, and did not want to be too close for fear of being bound or compromised (IPA, 2015).

For instance Menzies passed a series of Acts designed to stop the growth and reach of The Herald and Weekly Times (HWT) in all forms of media. HWT was an oligopoly with massive media influence.

This situation here is nowhere near as draconian and directed as above, but HWT had to accept this. The Harper Section 46 influence is minimal, but at the same time, it is giving encouragement to a great deal of pro-competitive actions.

It would not be difficult for the Government to articulate to the public the reasons why it has adopted the Harper Section 46 recommendation.

Relevance of Power

The competition process and more generally the free market and capitalism are being widely challenged and losing respect. It is in the Nation's interest to have a competitive process that is broadly acceptable to all parties and the community at large. Big business has a responsibility to play its part in ensuring a healthy, competitive process rather than its own selfishness and a 'free for all' that damages the process of competition and small players.

The proposed Effects Test is pro-competitive in that it makes it easier for smaller players to compete. Misuse of market power is a very serious allegation and difficult to prove. The evidentiary thresholds are very high, causing many cases to fail. It is also strange that the big players are essentially putting forward an anti-competitive argument.

Poor or unsatisfactory outcomes do not just arise from intent but also from the unintended effects of activities.

No one likes economic brutality — it is not at such a far remove from personal brutality. An economy and society are made up of people, not brutal operators.

Markets exist to satisfy unique needs and wants of individual human beings. Free-for-all competition causes societal damage, which is poorly, if at all, measured. An economy is not something in isolation but is made up of people and should as a consequence be more concerned of the effect on people, and this should take precedence in the competition process. Companies could improve their brand value and reputations by recognising this and taking unilateral steps. Their employees and other stakeholders would likely applaud any moves to self-regulate and engage in fair and ethical conduct.

"Free-for-all competition causes societal damage, which is poorly, if at all, measured. An economy is not something in isolation but is made up of people and should as a consequence be more concerned of the effect on people, and this should take precedence in the competition process"

The Effects Test is a tiny step down the path of trying to rebalance the power and resources of the big players, who, unlike small players, can cope with and use evidentiary barriers and cost to their advantage. The Effects Test is a tiny step because many want it to extend to predatory behaviour, capacity and pricing, and to reverse the onus of proof.

Evidence Gathering and the Corporate Mind

Corporate behaviour as opposed to individual behaviours raise difficult issues of the complexity of the corporate mind. The Act recognises this and provides guidance on evidence gathering. Yet the Act is only minimally helpful.

Many cases fail because the lack of satisfactory evidence even though there is a high probability of intent. The dis-prover has an easy role in creating uncertainty. The regulator and the private litigator face massive problems in taking on cases, and this explains why case law has been so slow to develop.

Competition Law cases have become very costly and time consuming.

Many corporations have, in case of litigation, become very astute with formal records, retaining lawyers whose main task is to supervise all of the formal records by settling minutes and deleting material. This is particularly so in tax and competition law. In competition law, those words in documents can give the game away, but strict evidentiary rules still apply. This is not so with structural issues. The role of expert witnesses in dealing with structure is more settled: the court makes use of economic concepts.

Although some structures do require interpretation, this is only on the edge of behavioural economics.

BCA appears to be driven by the lawyers who are aware of these issues and are focusing on the legal niceties but are avoiding the key public policy issues.

The options prepared by Treasury are exacerbating the issue by focusing on the options rather than alternative public policy approaches. This is surprising, because the Options Paper, facing page, refers to strengthening the misuse of market power provision. These words assume or imply some existing sin, wrongdoing or adverse position, yet all the options, bar two (Option E & F) are weaker than the HR Recommendations.

The BCA has been trapped by the Coles / Woolworths push, not broad economic issues. BCA says it is ok if there is no proven behavioural abuse, and holds that structural abuse is ok. Section 46 should have both behavioural abuse and structural abuse.

Section 46 — Galvanising Small Business

It is surprising that the Government did not accept the Harper Review recommendations on Section 46. Currently, the Section fails in terms of good competition policy, suitability for small business and litigation effectiveness. Litigation

has been hugely expensive and consumed a great deal of court time). This is acknowledged by most players.

Big business and the BCA are the beneficiaries of the failed Section 46. The BCA elected to lobby and canvas a few Ministers in the Cabinet privately and directly over the proposed changes. Its requests were not and have never been made public. Small business, suffering relative lack of power, influence and ability to marshal its resources, does not appreciate the lack of openness and the appearance of privileged access. This frightens small business, in particular how Section 46 amendments were scuttled by the BCA in its private unpublished communication with Government Ministers and the Head of the Liberal Party. This document has still not been disclosed for discussion and analysis.

While the BCA refuses to accept the umpire's decision, the associations acting for small business have been prepared to compromise and accepted the recommendations, notwithstanding that they wanted a stronger and more effective Section 46 than that recommended by the Harper Review.

"No doubt the Cabinet and the previous prime minister, in canning the Harper Recommendations, feared retaliation in the form of a massive advertising campaign, similar to the Minerals Council's devastatingly effective stand against Labor's mining tax... Nonetheless, they should take note of how quickly small business associations have rallied as a counterpoint to the BCA."

Politicians from all parties in regional Australia are subject to a litany of complaints from small business. They all want Section 46 strengthened, yet the BCA has been able to lobby, if not to stop the change, at least to defer it. This is not helped by the lawyers, who are manufacturing uncertainty and an illusion of anti-competitiveness.

Failure to adopt Harper's Section 46 recommendations could have adverse consequences electorally. No doubt the Cabinet and the previous prime minister, in canning the Harper Recommendations, feared retaliation in the form of a massive advertising campaign, similar in impact to the Minerals Council's devastatingly

effective stand against Labor mining tax.

Whether or not any such campaign is implied or feared, we should not underestimate the position and power of the consensus of the industry associations, which have come together under the leadership of the MGA's Jos de Bruin.

It would be folly for the Government to disappoint the associations. With two million or more members, covering a diverse range of activities and geography, it is potentially a very powerful political force and could, despite the good work of Bruce Billson, especially on tax concessions, be marshalled to the disadvantage of the Government, for example, in backing Senate candidates. Given the somewhat bizarre policies of the cross benchers, a small business ticket is surely feasible.

Small business was more relaxed when Bruce Billson was in Cabinet, as his commitment to small business was beyond doubt. This may have bred some complacency. Nonetheless, the Government should take note of how quickly a number of small business associations rallied behind the MGA and its leader, Jos de Bruin, to put together a combined representation as a counterpoint to the BCA.

The associations already have common interests on several issues, such as workplace relations, international tax abuse (technology companies disrupting the tax

system), regulation and red tape, tax and compliance. There are many issues facing small business not just competition policy that require co-operation by Governments of all persuasions. It would not be difficult to gather these issues and put them into an excellent policy framework that had wider appeal to the community than just small business owners.

If the Government sees the possibility of a political force emerging it will seek to divide and conquer. It is thus very important in the process of dealing with Section 46 for there to be agreement by the associations on all aspects of the approach to adopt the Harper recommendations.

The Government should not be distracted by the BCA's gambits, but rather, should embrace an amended Section 46 change as pro-competitive and a wonderful initiative for small business.

Cabinet should dismiss the private communication from the BCA; it was plainly inaccurate and designed to mislead.

Small Business: Barnacle on the Good Ship Treasury

Small business is a highly fragmented sector. It is geographically dispersed with business of different sizes activate and different models in many different sectors and segments. Australia has 2 million active businesses, of which 250,000 employ five-20 people and 800,000 with sales of less than \$200,000.

Small business is very important to the vibrancy, employment and success of our economy. Small business has a big effect on growth and innovation. From a policy point of view, it is very important for government to encourage, to monitor and understand and stay in contact with small business.

The former minister, Bruce Billson, was passionate and understood the sector, and achieved a significant amount of traction. Some are cynical enough to believe that big business lobbied Government not to reappoint Bruce Billson to the Small Business Portfolio.

Billson inspired a high degree of trust that there was someone in Cabinet working in the interests of small business, and the confidence that the best option was to work through rather than around him.

Kelly O'Dwyer is a very good replacement. However, given her huge role in relation to tax and financial reform as Assistant Treasurer, it is difficult to see how she could service the sector as well as Billson has.

The Treasurer, Scott Morrison, maintains small business sits well within Treasury. I disagree: Treasury is not the natural home for small business.

Looking after small business is not consistent with the culture, values and skills of Treasury, which is not necessarily be concerned about the brutality of competition. Small business issues arise in many portfolios and in many policy considerations, and should not be subsumed by Treasury, which deals

"Treasury is not the natural home for small business. Looking after small business is not consistent with the culture, values and skills of Treasury, which is not necessarily be concerned about the brutality of competition... Small business should be a standalone portfolio"

with quite different policy considerations in other portfolios. Treasury deals with big and complex macroeconomic issues both within Australia and internationally — remote from small business issues. It appears that small business is the barnacle on the ship.

At this stage, O'Dwyer has not shown her hand, except to push for the reopening of Section 46, although it is understood this was a condition of the Coalition agreement between the Nationals and the Liberals.

Small business should be a standalone portfolio so it can monitor all portfolios and Government activities to ensure all policy is compatible with the interests of small business. Small business needs an advocate, protector or someone passionate about and totally informed about all issues, not someone part-time.

SUMMARY

The Effects Test – Section 46

Harper Review Recommendations (HRR)

There are two deeply entrenched, vigorous and irreconcilable positions being taken on the Harper Review's recommendation to amend Section 46 to incorporate a simple Effects Test. This detracts from the Report, which has 56 excellent recommendations that should enhance Australia's innovation, productivity and in turn growth.

The Harper Review advocates a simple and direct Effects Test: any conduct that has the effect of substantially lessens competition in a market. It is a structured test. The HR recommendations are backed by the ACCC, former ACCC Commissioner Allan Fels and many industry associations representing small business from booksellers, grocers, farmers, newsagents, hoteliers, pharmacists, retailers, convenience stores, independent hardware and timber, petrol, independent supermarkets, optometrists, grain growers, master builders, hairdressers, to motor traders.

The BCA want the status quo, with the retention of all the behavioural tests and the associated evidentiary difficulties in proving the misuse of, and taking advantage of, market power.

The debate is clouded by recent history, which saw the ACCC devote huge resources to tackle the supermarket chains on their relationships with suppliers. Although not directly relevant to this discussion, it is certainly colouring people's arguments about how power is exercised and misused in some sectors.

Although Section 46 does not deal directly with the tension between big and small businesses, this is nevertheless the section's practical import. This is not about protecting failing or less successful businesses, but rather, it is a realistic understanding of the relatively weak position of small business.

It is surprising that the BCA is not supporting a procompetitive change to Section 46, which would give greater opportunity for small business to compete and improve the competition process for start-ups, innovators, disruptors and new entrants. The BCA also wants certainty and clarity. That is understandable because Section 46 causes certain uncertainty.

Big business can be sensitive and cope with difficulty, uncertainty and detail. It already does so with environment, OH&S, tax and employee issues, so why not on this subject? In any event, positions can be negotiated with conduct authorised by the ACCC.

Small business, unlike the BCA, is compromising its position because small business wants to include predatory pricing behaviour and capacity, the onus proof reversed and a universal code of conduct.

"Perhaps a subsidised newspaper death notice column of failed small businesses (with the damage caused particularly in regional Australia) might lead some to think more about the long-term effect of the existing Section 46.

Some banks may not look pretty."

The BCA shows no compromise or mercy in its objectives and means to achieve its ends. Do all members of the BCA accept this position? Perhaps a subsidised newspaper death notice column of failed small businesses (with the damage caused

particularly in regional Australia) might lead some to think more about the long-term effect of the existing Section 46. Some banks may not look pretty.

The BCA's members have massive scale, information, knowledge and resources to pursue their cause, while small business does not. There is no comparable organisation to the BCA with similar resources or influence. However, it is heart-warming that with the current debate that many of the associations representing small business have for the first time informally come together to present their views. Together, they represent a huge number of Australian small businesses.

Professors Samuel and King support the BCA claim that the Effects Test is inconsistent with US law. In examining the US law, I have reached the opposite conclusion. Nearly all countries have an Effects Test.

The High Court acknowledges that competition is brutal. This does not help those who argue for checks and balances in the competition process, particularly as the effect of brutal competition is often disruptive and destructive of people.

The High Court should not and does not make any moral comment on the nature of competition however one consequence is that it leads to a legalistic and narrow view of competition and does not consider disruptive and destructive outcomes on people and small business.

To deal with this there are, however, unacceptable conduct provisions that have been endorsed by the ACCC that apply to some sectors but these provisions are not universal but tailored to the tensions in certain sectors. The more tailored, the more effective.

Notwithstanding drafting difficulties, some general code of behaviour could be designed which could be modified for sectors. These would attempt to recalibrate the imbalance of economic and strategic power, information and resources between the parties and so make the competition process fairer and more open to the smaller players and with less disruption.

Some well-known economists are beginning to express concern, as indeed did Adam Smith, the Father of the free market. Some argue that Smith favoured free unbridled and unfettered competition. Indeed, as a moral philosopher rather than an economist, he believed there should be limits on competition.

The difficulty is, where does one draw the line? Yet this dilemma should not deter attempts to develop a code which might recalibrate the process of competition.

While the removal of the behavioural tests in Section 46 does strengthen the regulator's position, the regulators are answerable to the courts and in turn to the community. There is no way the judicial system would allow them to abuse Section 46. In addition to community attitudes of not just thousands of small business, but politicians of all persuasions, particularly in regional areas would be troubled to hear the roundtable resistance to HR recommendations and the reasons therefore. So it is almost the big 3 against the rest of Australia. As for the BCA, its views may not be the view of all of its members.

Finally, it must be remembered that markets are there to serve the unique needs and wants of individual human beings. Competition should be oriented to this principle, not to the unbridled, unfettered activities of some who damage the competition process.

Comments On Round Table Options

<p>Option A Making no amendment to the current provision</p>	<ul style="list-style-type: none"> • The current Section 46 is a dud and is not effectively dealing with the misuse or abuse of market power; • The status quo benefits big business and the oligopolies to the detriment of small business and there is a lack of balance; • The status quo is <u>not acceptable</u>.
<p>Option B Amend the existing provision by removing the words 'take advantage'</p>	<ul style="list-style-type: none"> • "Take Advantage of" should be removed; • The test should focus on structural, not behavioural, aspects; • It should not matter whether there was or was not an attempt to take advantage; • "Take advantage" imposes another level of evidence and is extremely difficult to prove; • Is not acceptable.
<p>Option C Amend the existing provision by removing the words 'take advantage', including a 'purpose of substantially lessening competition' test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision</p>	<ul style="list-style-type: none"> • Purpose should be irrelevant. It should not matter whether it was intended or unintended; • Purpose as with 'taking advantage' creates another evidentiary challenge; • Substantially lessening competition should not depend upon purpose or intent; • Effect is what matters, not purpose; • This enables the focus on structural rather than behavioural issues; • Is not acceptable.
<p>Option D Amend the existing provision by removing the words 'take advantage', including a 'purpose of substantially lessening competition' test, including mandatory factors for the courts' consideration, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision</p>	<ul style="list-style-type: none"> • Substantial lessening of competition is qualified by the need for conduct or purpose. This focuses on behaviour not structure; • The provers has great disadvantages over the dis-prover not dissimilar to the crime of murder or manslaughter; • Is not acceptable.

<p>Option E</p> <p>Amend the existing provision by removing the words ‘take advantage’, including a ‘purpose, effect or likely effect of substantially lessening competition’ test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision</p>	<ul style="list-style-type: none"> • If the Harper Recommendations are not mandatory factors but ACCC guidelines then this is preferred over F; • Is <u>acceptable</u> and superior to F.
<p>Option F</p> <p>Amend the existing provision by adopting the full set of changes recommended by the Harper Panel</p>	<ul style="list-style-type: none"> • Guideline 1 but not 2 is of concern. In Guideline 1, the Court is being asked to consider (and this is not exhaustive) whether the conduct is enhancing: <ul style="list-style-type: none"> - Efficiency, - Innovation - Product quality or, - Price competition; • This opens up a new area of jurisprudence as to what the words mean and will create uncertainty. The ACCC would be asked to interpret this issue which would require a lengthy economic interpretation and explanations. This could be a Pandora’s Box; • Guideline 2 is clear and no interpretation required; • Overall it is better to keep the Section simple as in Option E leaving the Court to determine what is in effect pro-competition; • <u>Agree</u> as the second choice to E.

Samuel / King Option

(as articulated in AFR, 14.1.16, pg 39)

Model suggested by S/K:

“The corporation that has substantial degree of market power in a market should not misuse that power in that or any other market if so to do would have or likely have the effect of substantially lessening competition in that market or the other market”.

If I read the proposal correctly, the overriding position is that the Company shall not misuse its power. What does “misuse” mean? In my view, it is mischievous and opens up a Pandora’s box as to what constitutes market abuse. A whole new field of jurisprudence will be required. Samuel and King evidently believe there is nothing wrong with market power per se, but that the sin or fault is in how it is exercised. In other words, it is a fault and behaviourally based approach, not an economic one. It does not take into account macroeconomic environment or business structure, or the power of small business to innovate, disrupt and change.

Other Options

If the government is serious about strengthening Section 46, then it could change substantially lessening of competition to materially lessening competition and after the words, ‘substantially less competition’ add or excluding a competitor in the market. This may conflict with Section 47.

Senator Xenophon’s suggestion, removing the words, ‘lessening’, this would be too extreme.

If the government is absolutely insistent on retaining the words ‘take advantage’ or ‘purpose’, then it could reverse the onus of proof so that a company has to prove to the satisfaction of the ACCC or the Court that it is not doing so. This would be similar to the US position, where Monopolies have to defend themselves from break up.

Example

See the following example that applies to the existing and proposed HR recommended Section 46 to a situation that often happens.

A	B	
Facts	Measures / Comments	
Market leader enters a new market with: - Oversized format	Measured in: - Sales per square metre	
- Over ranged stock	Measured in: - Stock turn - Days / Weeks / Months of stock	
- Excess labour	Measured in: - Labour / Sales % - Sales to FTE - FTE / Sales per sq mt	
- Excess advertising and promotion budget	- Advertising to sales %	
- Beat by 10%	- Unlike the small player, beat on comparable product	
Next Step		
After B has captured sufficient market share: - Stock reduces - Advertising reduces - Labour cost reduces	Local independent competing in core categories or the primary market either: - Fails - Sells - Contracts - Exits market when able to do so, or - Exits market before leader arrives anticipating result	
The continued excess space cost is minimal compared to the reduction in: - Stockholding cost - Labour cost - Advertising cost	- In the secondary market, eg. carpet, plumbing, paint, electrical, outdoors etc, all operators contract and reduce space and staff - No labour market effect as the new employees of the leader are replacing the exiting employees from those whose market share has contracted	
Legislative Effect	What has to be proved:	
	Under existing S46	HR S46
Market Definition	Same	Same
Market Power	Same	Same
Substantially lessening of competition	Same	Same
Has the purpose	Very difficult to prove	Not exclusively required but established by the conduct
Taking advantage of	Same	Not relevant

The Harper Review (p 417) talks about predatory capacity not being affected by HR S46. The above is different because once the market is captured, over capacity is reduced. In other words, it does not continue, but the temporary over capacity has the effect of excluding a competitor.

General

In the above example, the ACCC would, at present, fail, but in the HR Section 46, there could be a breach.

By eliminating 'purpose' and 'take advantage of', the ACCC can look simply at the conduct or structure and not worry about having to prove the behavioural aspects. The above measures are all clinical, easily measured and relevant to the Effects Test.

About The Author – John Dahlsen

I am passionate about small business and regional Australia and have been helping fight their cause for some time. I have advised a number of fellow travellers, but always on a pro bono basis. My CV is attached.

I have been fortunate to be involved at a senior level in banking, retail, media & the law and at the same time, very closely involved with a small business as a principal in regional Victoria. I was co-founder of Southern Cross Broadcasting, which grew from a small company in the media space with equity of \$3M which was sold to Fairfax for \$1.4B.

I am now Chairman and owner of JC Dahlsen Pty Ltd. The company was founded about 137 years ago in one site in Bairnsdale. It competes with Bunnings in respect to only a very small part of its business — JC Dahlsen Pty Ltd business is 95% trade and 5% DIY or retail. Bunnings is the reverse.

When Bunnings announced its intention of entering into three of our trade / retail market segments — Sale, Traralgon & Horsham — we elected to sell to Bunnings rather than cope with unprofitable stores. These stores were more than 50% DIY or retail. Our dealings with John Gilham and the Bunnings executive team were first class and we have no complaints about the way the transactions were handled. With the imminent expiry of a three-year restraint on sale, we are about to re-enter two of three markets with trade-only stores, in Warragul & Sale.

There is no market contest in the DIY market in Australia, which is dominated by Bunnings, but there is in trade, where Bunnings faces a number of competent, independent operators. Bunnings, with the failure of Masters would have a 60 per cent plus market share and a dangerous position, which is far more than oligopoly — but not an oligopoly in trade.

My attendance at the Tamworth conference as a guest of Peter Strong, of the Small Business Association (Peter Strong). I am not being paid by them, and my views do not represent theirs, or vice versa. My electorate is Higgins, held by Kelly O'Dwyer, but my heart and soul are in East Gippsland. The member there is Darren Chester, who supports my activities.

APPENDIX – 1

An Open Letter to the Prime Minister

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Monday 14th September 2015

Open Letter to the Prime Minister

The Hon. Tony Abbott, MP Prime Minister of Australia
A Plea for Efficient and Successful Smaller Business

Dear Prime Minister,

There are two major policy issues now before the Government which have the same underlying issues, the balance between big and smaller business.

The first issue is media reform.

Media reform

Media is one of the most disrupted sectors in our economy. It is heavily regulated by archaic restrictions designed decades ago that have passed their use by date. The sector badly needs legislative change so that it can innovate, change and meet these new disruptive technologies without materially disadvantaging existing players.

Minister Turnbull has gone to great lengths to achieve consensus among the media players, but has failed, despite his strong commercial background and negotiating skills.

In my view, a consensus can never be achieved. Any reform will have an uneven impact on the players. Reform might suit one player at some time and not at another. The sector is forever changing and being disrupted. Stalling on reform because of a lack of consensus is not in the overall interest of the sector or the economy.

Background to media reform — Independence

Media reform has always been difficult. In the 1950s under the Menzies Government, legislation was passed to specifically limit the growth of The Herald and Weekly Times Ltd (Herald).

The Herald, under the leadership of Sir John Williams (Jack), had acquired a huge number of newspapers plus television and radio stations throughout Australia. Herald acquired some of these outright. In others, Jack used HWT's huge cash flow to acquire minority and blocking interests — only some of these deals were known to the public. Jack, a great journalist and editorial leader with considerable business acumen dominated the market. He was the greatest builder of The Herald (like no other), with

media interests in all States other than NSW, which he left the market to the Packer and Fairfax Families. Jack has only been eclipsed by Rupert Murdoch.

In the breakup of The Herald Group these interests proved extraordinarily valuable leading to a huge return for shareholders. The breakup did enable some of these assets to be more intensively managed. Had Jack not been restrained he would have achieved a monopoly. Incidentally, Jack Williams instilled in all his senior executives and journalists the need to keep their distance from the politicians, so that in perception and reality they were free and independent, and this would be reflected in the journalism. How things have changed.

On the other side, Prime Minister Menzies was relatively aloof from business and the media. He kept his powder dry. He was his own man, captive to no one and impervious to criticism which he sometimes enjoyed and engaged.

Prime Minister Menzies was acting in the public interest in curbing the growth of The Herald. While the Herald unsuccessfully challenged the constitutionality of the changes in the High Court, it ultimately accepted the limitations. There is no evidence the Group used its editorial power to vent its disappointment. Its own commercial objectives did not intrude on its journalism.

Today the media sector has two very large, successful and powerful players who do not want the reform to take place. Both are successful internationally. These two proprietors have great access to you as Prime Minister and do not hesitate to use, or suitably threaten to use, their editorial powers to achieve their own commercial ends. Power has only to be exercised occasionally to remind you of its existence. This is in stark contrast to The Herald, the Fairfax and Age publications of old where independent journalism was at the forefront, aided by the "rivers of gold" — classified advertising.

There is nothing wrong with a proprietor having views and slanting the journalism and opinions fixing the content mix — as long as the facts are correct and there is fairness and balance and no intent to mislead.

The online environment has shortened news cycles and raised consumer expectations for instantaneous news, and the "clickbait" phenomenon has also affected story selection and style. As a result, newspapers have become more aggressive in their news gathering. These days, most newspapers start by allocating the advertising space then filling gaps with content (with override for some pages like the front and back pages). Given the changing nature of newspapers and the proliferation of channels, the Government should be less concerned about offending the bigger proprietors. Multiple channels mean that there are multiple and alternative sources for the public.

The genius and uniqueness of Murdoch lies in how he manipulates and hides his use of newspapers for his own commercial gain and political power. No one so far, or in the future, including his sons, is likely to be as devastatingly effective. The issue is one of disclosure.

Regional markets

The day of the universal newspaper is over, but may last longer in small regional markets.

A newspaper can no longer appeal to everyone of all ages on all issues all the time.

It must appeal to a particular demographic and adopt an agenda, make decisions about space, content allocation or mix and employ journalists who are in tune with that demographic.

It is better to have specialised content in multiple channels with similar demographics than general material in one channel with a wide and diverse demographic. There is nothing inherently wrong in adopting a demographic reach that is likely to attract advertising. This is the genesis of many specialist publications.

We have two proprietors who have, in perception and reality, a dominant position in the audience market including advertising revenue and so have powerful voices that a prime minister must listen to.

It is extraordinary that these two players should be seeking to restrict competition when they are so powerful. Note the implications of the successful bid of the AFL Rights by the dominant newspapers, television proprietors, telco and pay TV.

We must consider the smaller, regional players. Regional operators need to be strengthened so that they are required and able to, provide local news and content. All TV particularly regional free-to-air TV is suffering long-term pressure on its advertising revenue and its costs. Operating profits will slowly decline and the failure to the reform will help accelerate this. This can be achieved by eliminating huge amounts of duplication and cost, reducing the 75% reach rule and the two of three rule. This would allow local news and content to blossom. The two as a market test is way too general: each market is different and this, and the reach limit should be left to the ACCC to supervise.

Given the changing nature of newspapers and the proliferation of channels, we should be less concerned about offending the big players. Their influence is less than in the past because of the proliferation of channels and the public's access to alternative information and content. The big proprietors' impunity when it comes to criticising political leaders is far less than during the Menzies era, the '50s and '60s. Radio and TV are the same.

Against a background of proliferating alternative channels, the 2 to 3 market limit makes it more difficult for existing channels. Is it fair to restrict or freeze existing channels while the new channels are free to pursue the market without restriction?

Minister Turnbull has gone to extraordinary lengths to get consensus though admirable, in reality, can never be achieved. Lack of consensus should not be a reason for delay.

Prime Minister, you should act in the interests of the sector as a whole, and put through the reforms to encourage competition, innovation, new players and help the existing small players. Some anti-siphoning concessions for sports on Foxtel may be appropriate particularly in the light of Netflix and Stan entering the market. Second tier sports should have a chance of being on TV.

The second issue is the effects test.

Effects Test

Similar games are being played with the Effects Test.

You had an inquiry comprising a competent and well balanced group led by Professor Ian Harper. The Competition and Consumer Review Panel spent much consultation

time, effort and consideration in making conclusions about Section 46 of the Competition and Consumer Act (CCA), and the need for reform, which consequently recommended changes to Section 46 to an "effects test". Incidentally, Section 46 is the only section which regulates unilateral conduct and misuse of market power. It focuses on outcomes not the rationales, not conduct itself but its effect on competition.

There must be some limits to competition. Adam Smith, the intellectual father of free market, was also a moral philosopher. In today's terms, he was a behavioural economist; not an economic purist. He acknowledged that there should be some limits to the prospects of monopoly power. We all know that monopolies are insidious and ultimately work to the long term detriment of the consumer.

In conceding there should be some limits to free and open competition, it is acknowledged that it is very difficult to determine where the line should be drawn. This is a major issue for our time and needs much debate. We need Adam Smith to return. Capitalism is being criticized as too crude and in need of refinement. Most businesspeople would like to have a monopoly, and this applies both to big business and small business — this desire is an inherent centrifugal force in business.

In its current form, Section 46 has failed to restrain the possibility of monopolies emerging.

One problem is the evidentiary disadvantage in that there must be purpose, and the player must be seen to take advantage of the situation. By contrast, an effects test is simpler, clearer and more likely to be interpreted by the Courts in a way that will give the players certainty. If in doubt you can be authorized. With the existing two barriers, the large players have a significant evidentiary advantage in that the subjective nature of the two issues makes it easier to fight these issues in the courts. The cost of research and evidence gathering is proving unsatisfactory for the ACCC. The evidentiary issue balance favours big business and constitutes a field day for their lawyers, accountants and consultants and economists.

This incremental expenditure on gaining 1% or 2% market share gain against revenue earned makes it a great challenge. So you can understand why big business is using the BCA and the legal attack dogs to fight the issue at all levels, including in the corridors of parliament.

If your incremental revenue exceeds your incremental costs, leaving an incremental margin, that incremental margin (if it exceeds the cost of capital), means you have a lot of firepower. For instance, 10% of a chain with 300 stores means that 30 more stores can be established each year initially with low-ish incremental returns, and gain an economic advantage not enjoyed by independents.

Put another way, large chains have many economic and strategic advantages, not the least of which is that each new store enables the fractionalisation of fixed costs, something that the independent cannot do. So in public policy terms, one must be more sympathetic with the struggle of the independent.

Where the amount of fractionalization cost exceeds the increase in absolute cost, then this drives growth in footprint but possibly at the expense of profit ROI. Most businesses don't grow along a smooth trajectory but in a series of steps. Large businesses can fractionalize their steps to achieve an almost smooth trajectory. On the other hand, small businesses face much larger steps entailing far greater risk. For very many small businesses, their steps are sometimes insurmountable.

Section 46 – Anti-Competitive Conduct

The public should not be disadvantaged by a weak Section 46, in relation to anti-competitive conduct effecting competition.

Small business has nowhere near the resources or the ability to combine together to present and lobby its point of view. It is left to people like minister Billson to act on their behalf, but he has a huge disadvantage in meeting the thrust and power of big business. Notwithstanding, we have already seen his great work in achieving tax concessions for small business. But here, the challenges are much greater.

We have a problem with a small economy. In the media, banking and retail sectors we have a few very large, world-class players, who are frustrated because the size of the market means makes it a great challenge to gain or hold market share. The market size limits them. Huge amounts are invested to gain a hold on to say one or two percent of market share. This would be not so prevalent in, say, the US, where the overall market is so large. You can thus understand why our players are resisting this, because the effects test is at the cutting edge of where they can grow. This is not a reason to reject the effects test, because the most important benefit is that it will give the small players a chance and in the long term interest of consumers. The effects test is more clinical, less uncertain and will be capable of certain interpretation by the courts, because it involves fairly elementary economic criteria.

Professors Samuel and King from Monash University, both outstanding academics with great industry and regulatory experience push very strongly the argument, that in the interest of the consumer, efficient businesses delivering consumer value should not be limited in any way. The High Court has noted

“Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to ‘injure’ each other in this way..... and these injuries are the inevitable consequence of the competition S46 is designed to foster.”

That proposition is accepted but for larger players that position can be abused.

It is not about protecting the inefficient, or pandering to small business but the effect of the behaviours on competition.

Take for example the current Bunnings model for new market entry where it over resources a store out of all proportion to the size of the market. By raising the intensity of competition to a level out of proportion with market size, the smaller simply cannot afford to compete. It doesn't have a nature network to fractionalise the extra costs. The consequence is that the independent fails. Is that efficient competition or a system offering no protection to smaller business ultimately reducing competition; so it is not the conduct per se but the effect on competition.

Small players can in the absence of Bunnings conduct be efficient with reduced market share and compete and survive notwithstanding inherent scale and economic advantages of the large-scale players. These stores invariably have a large component of trade where Bunnings is not as effective.

The oversizing tactic is not procompetitive. It is an abuse of its market power and in the long run reduces competition because the consumer choice will become less. The concern is not the damage to competitor because of the competition conduct this is wrong; it should be the effect on competition.

This is not a fundamental contradiction to the economic philosophy underpinning competition law and policy. In the long-term it is pro-consumer and will help small players and competition in some markets. Let me assure the Professors that if Bunnings over resourced a store, in a smaller market, the independent no matter how good, has little chance. I don't think Adam Smith would like this.

Have some heart, compassion and sensitivity for the smaller players not with unfettered, unlimited, 'free for all' competition which causes so much damage to the state of competition. Would a reasonable man in the street agree with that proposition? Perhaps subsidised death notices of failed small business might cause people to think a little more about the long term effect on competition.

Regional Markets

The elimination of independent businesses has an additional impact in regional markets. The large monopoly businesses are invariably based in a capital city where many central activities are conducted. Every time a National businesses squeezes out a small regional operator jobs are transferred from that market into the city. This affects not only roles within that sector but also external services such as accounting and legal.

The International situation

Australian laws on anti-competitive conduct are confined to conduct with anti-competitive *purpose*. This is not the way US and European law is defined. There is a great deal of discussion about this in the Harper Report.

US antitrust laws contain much stronger provisions on misuse of market-power than in our existing Section 46. Past US governments have had to intervene to break up companies that achieved monopoly power, for instance in oil and telecommunications.

We do not want to be faced with this prospect of breaking up Australian companies. It is far better to design a provision now to induce or increase competition, not reduce it. The proposed 'effects' clause would help to achieve this.

It is important to regulate anticompetitive effect because, unfettered, it leads to the prospect of monopolies, when indeed we should be encouraging new entrants, innovation and new business models. In the long run, some regulation makes the economy much more dynamic and more efficient. We have seen this in Australia before: busting protection letting the \$ float led to serious economic growth.

It is natural for firms that have prospered under the existing Section 46 to want to cling to it. We see this phenomenon in banking, where APRA's regulatory oversight does little to mitigate the effects of cartel like behaviour. APRA helps to define and limit competition and cause a sameness with our big 4 banks unlike in any other country. The Big Four banks like APRA and are public in their praise of its approach. The Murray recommendations on competition with APRA are grossly inadequate. New capital was a 'claytons' argument and in most other respects, the banks like the Murray recommendations.

The question is, should we be protecting big business? We cannot have a totally free for all market; there must be some limits to monopoly power and anti-competitive behaviour.

The Australian panorama is further complicated by the fact that a firm has to take advantage of its market power. If undertaken by a smaller firm, this conduct would not

be illegal.

Business Council of Australia (BCA)

The BCA wants, in effect, to limit competition and create certainty. That is, certainty about a provision that has little bite, and effect on the marketplace.

The BCA's preferred modus operandi runs the risk of nurturing monopolies. One needs to ask whether the views being put forward by the BCA reflect those of all of its members. I would be surprised. I wonder whether its members have been properly briefed about the current arguments, because they are not natural or reasonable. Has the BCA been hijacked by Coles and Woolworths?

This is inconsistent and damaging for the BCA, which has published excellent reports promoting productivity, tax reform and competitiveness. To now take an anti-competitive approach with little justification is damaging the BCA brand and might cast doubt over some of their other reports. Of particular concern is the BCA's inference that the recent judgement against Visa (over international payment card transactions at Point of Sale and ATMs in Australia), vindicates the existing Section 46 (The Federal Court found Visa was in breach of Section 47, but the Section 46 claims were ultimately not pursued).

The Effects Test in Retail – The Hardware Market

We should be realistic about the effects test. Take, for instance, Bunnings, which has a market share of at least a 40% in its core activities (in some core categories, more) and in peripheral categories useful but not dominating shares.

The pro-competitive part of Section 46 should encourage Bunnings and Masters to go into smaller markets to meet the needs of customers who invariably vote with their feet.

However, if Bunnings goes into a relatively small market with:

- an oversized footprint (measured as a percentage of rent to sales or sales per sq/mt),
- an oversized labour force (measured as a percentage of sales or sale per head),
- an oversized local advertising and market spend (as a percentage of sales) which goes beyond the need to reasonably inform the market of its arrival,
- high stocks resulting in uneconomic stock turn;

All this, combined with the 'beat by 10% strategy', will make it impossible for a local independent to survive the onslaught, particularly when Bunnings can sustain that position for as long as it takes for the independent to fail. Under that scenario, all independents will fail and Bunnings will finish up subject to Masters' destiny, a monopoly in its core markets. This has implications for consumers but suppliers. Incidentally Masters has been very good in pushing Bunnings to a new level of excellence.

Bunnings has massive market power, as profit to sale and ROI are probably the highest % in the world. Consequently, it can easily sacrifice profit on new stores. A handful of "dogs" (to use the BCA terminology) out of 285 stores, means little. Conversely, the personal cost of an independent failing is huge and extremely

inefficient. Closure costs are always substantial and include redundancies, stock clearance, sale of assets and vacant property. After satisfying the demands of the bank, there is little, if any, "superannuation" remaining. Invariably it is a family tragedy needing compassion, particularly where the independent:

- was established in the market before Bunnings,
- was a key employer in the market, or
- is an important cog in the local economy.

No doubt many regional politicians have heard the tales of woe. How small will the markets get? The same is happening in some extent in supermarkets. But at least in supermarkets there are three vigorous national competitors whereas here, there is one failing one.

It does not matter what Bunnings' purpose was in resourcing or specialist new stores and establishing stores that are oversized for the market. If the independent closes, that is a loss of competition. The difficulty with the purpose test is that in most markets, the independent may have failed anyway. The issue is, would the independent have failed had Bunnings not over-resourced its own store?

Small markets will be too small for Masters to enter. If Masters withdraws, then Bunnings will achieve a monopoly position. The Bunnings operation team is very strong and effective, if not brutal, in driving performance, down to store level, maintaining competitiveness on price and marketing, in local and small markets; there are no exceptions. Store staff will tell you that. The independent and the specialist store is treated no differently than Masters. Some specialists are being targeted for attacks.

Conclusion

The issue that underlies both media reform and the effects test is the disproportionate influence, resources and access large players have in comparison to small players. There is a great deal of resentment in the community over this, and the small players do not have the same clout, money, access to power, or ability to influence and persuade.

Prime Minister, do you want "short term certain uncertainty" as the law now stands, or do you want "long term uncertain certainty" until the courts determine the criteria and boundaries?

Where do you want the chill factor to reside — with the small player or with the big player?

Minister Billson has done a great job by the small business sector. He has helped the Government in a material way in his relationship with the sector.

The BCA has done a lot of excellent work in some of its papers and recommendations to government. Regrettably, its advocacy on the effects test, where it takes up the cause of the large players, is not doing its reputation any good. It casts into question the extent to which its other reports are independent and in the interests of the wider community.

If the Harper recommendations are not substantially accepted by Government, that will be a waste of valuable intellectual contribution and time. If the Government or Opposition has a point of view in respect to the Inquiry or an Issues Report, then those

views should be put to the inquiry as soon as possible, to minimise the potential for government to decisions contrary to the recommendations.

As Melbourne Law School competition lawyer Alexandra Merrett noted in a recent article, "There are numerous laws affecting arrangements between two or more parties, but only Section 46 - which prohibits the misuse of market power - focuses on big business acting alone." For the sake of small business, regional communities, the health of our industry sectors, and the wider Australian community, it is crucial that we get this right.

To argue the Government should be focusing on more important issues such as productivity, efficiency, tax reform and jobs is to let the Government off the hook for failing to face up to a central issue. Delay is disadvantaging the economy. Every store closure undermines further confidence in the ideal that success comes with hard work. These are the people who are willing to take the responsibility and risk running their own businesses.

They are critical to Australia's future and the tools to provide that opportunity must be in place.

If the Government institutes the media reform and adopts the effects test as requested by Ministers Turnbull and Billson, the Government stocks will rise and your political capital will be in no way diminished. Menzies, in my view, would have had no difficulty in adopting both of these measures. They are in the true sense the kind of reforms that he as a Liberal would have adopted. The positions can easily be explained in the Australian public, who deserve respect for their good sense and intelligence regarding the underlying reality. Both reforms have on balance a much better result for Regional Australia than in the cities.

You think that the arguments about Section 46 are theological. I ask that you think about the reasonable man in the street; what would he think? The Effects Test is just one small step in balancing the interest of the small and big players.

The community now accepts much more than it might have 12 months ago: that reform and change are inevitable. You now have a situation where it is easier to proceed with these initiatives in the current climate.

Please exercise leadership and accept the recommendations of the Harper review and ministers Turnbull and Billson in relation to media reform and the effects test. In both cases, it is the Captain's pick. I am sure your backbench would support you.

Finally, Australians are not witless. They can see through things and make their own interpretations. The more respect you give them, the more esteem you will be held in.

Yours faithfully,

John Dahlsen LLB MBA.

APPENDIX – 2

Curriculum Vitae of the author John Dahlsen

John Christian Dahlsen

Company Director and Solicitor

Qualifications

Bachelor of Laws, University of Melbourne (1958)
Master of Business Administration, University of Melbourne (1969)
(John Clemenger Prize Winner as top student)

Career Summary

Current Directorships

Private or Non-listed Companies	JC Dahlsen Pty Ltd Group (Chairman and Sole Owner)
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Current Charitable Activities	Melbourne Business School Ltd (Director) Centre for Journalism University of Melbourne
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Former Charitable Activities	The Smith Family National Drugs Partnership Non Profit Australia Institute of Public Affairs Ltd (Councillor) Little St Margaret Limited (Chairman)
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Some Former Directorships	Mining Project Investors Pty Ltd Woolworths Limited (Chairman) Melbourne Business School Limited (Chairman) Myer Emporium Limited (Deputy Chairman) Myer Family Investment Companies WJM Pty Ltd LEK (Member Advisory Group) ANZ Banking Group Limited Herald and Weekly Times Limited (Chairman) and Director of Associated Companies: - Advertiser Newspaper Limited - Herald Sun TV Pty Limited - Television Broadcasters Pty Limited - Queensland Press Limited OVS Investment Corporation Limited John Holland Group Pty Ltd Sandridge City Development Co Pty Ltd Penrice Ltd G S Private Equity Pty Ltd Byvest Management Buyout Group
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Nature of Legal Practice

Commercial Solicitor for over 45 years having practiced in all aspects of commercial law including takeovers, reconstructions, tax and trade practices related issues.

Preparing extensive submissions to Tribunals.

For a number of years operated a large practice in Public Company Takeovers.

Advising Boards on strategic issues and as to the duties of directors and on relationships with shareholders and shareholder interest.
Advising in relation to directors duties generally.

Member of the three man Panel that reviewed The Audit Act 1994 in Victoria.

Completed a study for the Prime Minister's Community Business Partnership on the desirability or otherwise of establishing a Not-for-Profit Council of Australia.

Marital Status

Married to Gillian Hamilton York Syme on 21/09/1962

Children

Sarah, Geoffrey and Mary

Terminology

HR	Harper Review
SK	Professors Samuel and King
SLC	Substantially Lessening Competition

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