



SUBMISSION

Submission to Treasury on the  
Exposure Draft of the Competition  
and Consumer Amendment  
(Competition Policy Review) Bill  
2016; and

Submission to the ACCC on  
Guidelines for the 'Misuse of Market  
Power' and 'Concerted Practices'

SEPTEMBER 2016

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

## About this submission

This is the Business Council's combined submission to:

- the Treasury on the exposure draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016, and
- the Australian Competition & Consumer Commission (ACCC) on its draft *Framework for misuse of market power guidelines* and draft *Framework for concerted practices guidelines*.

The submission attaches an independent opinion of the draft changes to section 46, the misuse of market power provision, by Neil J Young QC.

The Business Council has opposed the proposed changes to section 46 on the grounds they would introduce major regulatory uncertainty and risk, misalign Australia with international law and would be inferior to the current law. However, the government has made its decision to change the provision and it is now important to get the wording right to avoid unintended consequences.

To that end we asked Neil Young QC, one of Australia's most respected competition law barristers and a former judge on the Federal Court, to provide an independent assessment of the new provision. Mr Young finds that the new provision, as drafted, will be an 'outlier' when compared to similar provisions in other countries and that 'the risk of over-capture is real and imminent'. He argues that the provision must be amended to address these problems.

Drawing upon Mr Young's opinion, this submission recommends that, at a minimum, the government should amend the draft provision so that it reflects the ACCC's Draft Framework and the public statements of the ACCC and its Chairman, Rod Sims. That is, the law should specifically prohibit 'exclusionary conduct', and not be applicable to 'any conduct' by a firm with market power including conduct that has a legitimate business reason, which is a serious risk under the current drafting. The submission also recommends clarification of the ACCC's guidelines and makes comments on some other aspects of the exposure draft legislation.

## Summary of recommendations

### ***Recommendations to the Treasury on the draft legislation for section 46***

- The Business Council recommends that the draft section 46 be made clearer by focusing the section more clearly on 'exclusionary conduct' and by providing meaningful protection for conduct engaged in for legitimate business reasons, consistent with the government's policy objective and the ACCC's draft guidance materials.
- The Business Council recommends a number of options that could achieve that objective using the concepts and language used by the Harper Panel and the ACCC.
- These changes should also be reflected in the explanatory memorandum.

### ***Recommendations to the ACCC on its misuse of market power guidelines***

- The 'key concepts' section of the guidelines, in Section 4.1, should include the key concept of 'misuse of market power' and provide a detailed explanation of how the new law connects a firm's market power with its conduct.
- The guidelines should specify how the key elements of the conduct to be targeted (on page 4) – interfering with the competitive process, doing so by affecting rivals or competitors, preventing or deterring those rivals from competing on their merits – are addressed in the legal framework that would apply to the proposed law.
- The guidelines should provide more detail about how the ACCC would take a legitimate business reason into account in its assessment of an effect (or likely effect) of substantially lessening competition.
- The ACCC's treatment of predatory pricing, and its related example in the guidelines, requires clearer explanation of the concepts around national pricing, the relevant cost of supply, the prospect of recouping losses and determining a firm's 'aim'.
- The ACCC's examples of behaviour in Table 1 that are 'likely to raise concerns' under the proposed section, and in Table 2 that 'would not breach' the proposed section, need to be more vigorously tested against the likely interpretation of the new provision by the court with reference to previous cases and relevant statements from the courts. In Table 2, where the ACCC considers conduct *would* not breach section 46, clarification is needed that this is the ACCC's view about how the court will interpret the new section 46 in each case, and if so, to refer to precedent.
- The guidance should advise on whether it is a legitimate business decision to refuse to supply in the scenario that a producer is operating at full capacity (see the example of the cement works on page 10 of the guidelines).
- The guidelines should make it clear that section 46 does not apply to purely vertical relationships such as low prices paid to suppliers, where a business with market power is not in competition with its suppliers.
- The authorisation process should include a fast-track process for conduct that, based on the ACCC guidelines, is not conduct that the legislation is intended to capture.

### ***Recommendations to the Treasury on the draft legislation for section 45***

- The Business Council considers that a more considered legislative definition of 'concerted practice' should be developed and should make it clear that:
  - only concerted practices engaged in by *competitors or potential competitors* are to be covered; and
  - there must be a *knowing* substitution of coordination for competition.
- It should be an essential element of proving a contravention that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

### ***Recommendations to the ACCC on its concerted practices guidelines***

- The guidelines should provide more high-level principles that would help businesses identify and avoid concerted practices, and provide examples that explicitly illustrate these principles.
- Definition of 'concerted practice' should include an element of knowledge or intention.

***Recommendations to the government on the implementation process***

- The government should prepare a separate Regulatory Impact Statement (RIS) for the section 46 changes, with an independent assessment of all costs and benefits.
- The changes to section 46 and section 45 should be reviewed within two years from the date they take effect to assess whether they are meeting their objectives and providing a net benefit or net cost to the economy. The reviews should identify whether amendments to the laws will be needed to support a competitive economy.

**1. Introduction**

The government is seeking comment on draft changes to the *Competition and Consumer Act 2010* (CCA) that implement recommendations from the National Competition Policy review ('Harper Review').

The ACCC has also released for comment its guidance materials for two of the changes: the strengthening of the misuse of market power provision (section 46) and the new prohibition on concerted practices that substantially lessen competition (section 45).

This submission responds to both the draft legislation and the ACCC's guidance materials. It is mostly focused on the proposed section 46, as this is the most far-reaching change and will have the most serious consequences for competition and innovation if it is not approached carefully.

The Business Council supports the majority of the recommendations from the Harper Review and regards the government's legislative program as an opportunity to bring Australia's competition laws into line with the needs of a modern, dynamic economy. Sound competition laws that provide businesses with clarity and certainty are important for growing jobs and enhancing consumer welfare from innovation and price competition.

**2. Misuse of Market Power (section 46)****2.1 Assessment of the amendments to section 46*****The changes to the law must be well drafted***

The Business Council continues to recommend that the current section 46 be retained for the reasons detailed in its past submissions but acknowledges that the Commonwealth Government has committed to implement the recommendation from the Harper Review. This submission makes recommendations on the implementation of the new provision.

The government's proposed changes will replace the current section 46 with a test that adds an 'effects' alternative, remove the 'take advantage' element and refer to a 'substantial lessening of competition' rather than to individual competitors.

It will be critical to get the words right in the new misuse of market power provision if it is to operate as intended and not discourage the competition it is proposed to protect.

The government has said it is 'committed to ensuring Australia's competition law provides the best foundation for an innovative, competitive and agile economy.'<sup>1</sup> Healthy competition requires that businesses of all sizes are able to compete vigorously on merit in the interests of consumers.

To achieve this, the law must prevent companies with market power from abusing their power to harm the competitive process, while also making it clear that legitimate competitive behaviour will not transgress the law.

Changes will need to be made to the new provision (and the explanatory memorandum) if it is to meet this objective, provide the necessary clarity and avoid unintended consequences due to regulatory uncertainty or overreach.

***In its current form, the draft provision overreaches and creates regulatory uncertainty***

The Business Council considers that the new provision, in its current form, is poorly drafted as it will extend to conduct beyond its role as a misuse of market power provision and creates unnecessary regulatory uncertainty for business and the court.

While we do not consider this to be the government's intention, the new law will not be targeted at the deliberate abuse of market power, but will extend to *any* conduct by a corporation with market power that has the purpose or effect of substantially lessening competition in any market. This makes its potential application extremely broad.

The ACCC has identified that only 'exclusionary conduct' should be prohibited by the section, but the legislative drafting does not provide the same level of clarity. The breadth and uncertainty of the law as drafted will potentially deter or capture pro-competitive behaviour. These concerns are widely shared among the business and legal community and are supported by an independent opinion provided by Neil J Young QC, which is attached to this submission.

Mr Young's opinion is that if the legislation is implemented as drafted 'the risk of over-capture is real and imminent' and it will be an 'extreme outlier' when compared to similar provisions in other economies.

The conceptual problems with the proposed amendments as drafted have been raised previously by former ACCC Chairs and Commissioners Graeme Samuel, Stephen King and Bob Baxt; senior competition law barristers and academics; the Law Council of Australia; and the Business Council of Australia. More recently the Productivity Commission has cast doubt on the need for the changes.<sup>2</sup>

***Consequences of the proposed legislation***

The new law would apply to a very large number of companies engaged in ordinary competitive behaviour, particularly in smaller or regional markets which are often more narrowly defined.

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1. The Hon Scott Morrison MP, Treasurer of the Commonwealth of Australia, Release of Exposure Draft for Consultation: Strengthening Australia's Competition Law, Media Release, 5 September, 2016.

2. Productivity Commission, *Regulation of Australian Agriculture*, Draft Report, 2016, p. 29.

In our previous submissions to the Harper Review and to the government the Business Council has provided a set of examples of pro-competitive conduct that could be at risk, and several of these are referenced in Neil Young's opinion.

For example, Mr Young's opinion is that the application of the revised section 46 to the opening of new supermarket or hardware stores in smaller markets is 'unclear'. He says 'if the market is narrowly defined, as the ACCC is prone to do, then the loss of small competitors on the major's entry could easily be treated as a substantial lessening of competition.'

In general, a business whose only purpose is to increase efficiencies and deliver benefits to consumers could breach the new law where that conduct may result in less efficient competitors leaving the market and concentration increasing, particularly in markets characterised by significant barriers to entry.

There is a real risk that less efficient competitors will be protected from the full force of competition. Regulatory uncertainty and overreach are likely to deter the very competition that the law is supposed to encourage. Any dampening of competition will be to the detriment of consumers and the price they pay for goods and services.

***Uncertainty can be reduced by aligning and capturing the principles in the ACCC's guidelines within the law***

The uncertainty in the new provision may be reduced and clarity added by ensuring it properly aligns with and captures the key principles contained in the ACCC's guidelines, limiting its application to 'exclusionary conduct' and not *any* form of conduct by a firm with market power.

The ACCC's guidance materials state that the objective of the misuse of market provision is to prevent 'exclusionary conduct':

The objective of a misuse of market power provision is to prohibit unilateral conduct by a corporation with substantial market power **that interferes with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits.**

Sometimes this is broadly referred to as '**exclusionary conduct**'. (ACCC, page 4)

[emphasis added]

ACCC Chairman Rod Sims has in public interviews said that 'section 46 is about **excluding your competitors**' and 'obviously the law is meant to stop very large companies **excluding their competitors**.'<sup>3</sup> [emphasis added]

The ACCC Chairman has again publicly stated during this consultation period that the proposed provision 'is about firms with substantial market power, which is a key hurdle, who **interfere with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits**.'<sup>4</sup> [emphasis added]

3. *Effects test: ACCC's Rod Sims slams mistruths from big corporates*, by The Business presenter Ticky Fullerton, transcript of interview on ABC online, 29 March 2016.

4. R Sims, *Enhancing Competition in Retail*, Speech to the AFR Retail Summit, Melbourne, 28 September 2016.

On its face, the proposed new provision and the explanatory memorandum do not sufficiently reflect these core principles as set out by the ACCC Chairman and in the ACCC's guidance on the interpretation of the law.

Another key principle identified by the ACCC in its guidelines but not reflected in the new provision is protection for conduct engaged in for 'legitimate business reasons'.

The insertion of references to 'exclusionary conduct' and 'legitimate business reasons' into the provision itself are simple changes that would align the new law with the ACCC's guidance and provide the clarity that is needed.

Suggested alternative approaches to drafting the legislation are set out from page 10 below. The suggested alternatives are consistent with the intent of the Harper Review and retain all of the core elements of the government's policy to strengthen the misuse of market power provision. They would more closely align the new provision with similar laws in other developed economies including the USA, Canada and the United Kingdom.

They would create an effective provision while also addressing legitimate concerns that the proposed draft legislation overreaches, creates uncertainty and risks deterring competitive conduct that is in the interests of consumers.

***The Substantial Lessening of Competition concept, mandatory factors and ACCC guidelines do not provide sufficient clarity***

The Business Council understands that there are different views about whether the proposed law needs to be clarified or whether the existing case law with respect to the substantial lessening of competition test, the proposed mandatory factors and the ACCC guidelines together provide sufficient clarity to limit its focus to certain forms of conduct.

The Harper Review argued the principle that any new law must be clear and easily applied:

Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct.<sup>5</sup>

Business needs certainty that the law is one that *will* be focused on exclusionary conduct that may result in a substantial lessening of competition, not one that merely *should* be so focused.

***Substantial lessening of competition concept***

The ACCC contends that the courts' interpretation of the 'substantial lessening of competition' test limits the test to exclusionary conduct and that no further legislative clarification is required.

When announcing the changes in March 2016, the government also considered that the substantial lessening of competition concept reduces uncertainty:

Conscious of the needs of business, the change is deliberately designed to reduce the uncertainty associated with amending a law. It uses existing legal concepts from within the

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5. Harper, I. et al, Final Report of the National Competition Policy Review, Canberra, p. 336.



competition law – such as ‘substantially lessening competition’ – and ensures the focus of the provision remains only on those firms that have substantial market power.<sup>6</sup>

Many competition law experts have expressed the contrary view: that the courts’ interpretation of the ‘substantial lessening of competition’ test does not suggest any of the limitations argued by the ACCC.<sup>7</sup>

Neil Young says in his opinion that case law does not limit the application of the substantial lessening of competition test to exclusionary conduct:

There is no suggestion in the case law applying to the substantial lessening of competition test that it only applies to particular forms of conduct such as exclusionary conduct. To that extent, the arguments advanced by the ACCC are not consistent with the language of the proposed s46 or the case law that has expounded on the substantial lessening of competition test.

The Business Council considers that the substantial lessening of competition test, on its own, does not provide sufficient clarity that the law will be applied in the way that the ACCC considers that it should.

### *Mandatory factors*

The Harper Review grappled with the risk of inadvertently capturing pro-competitive conduct under its recommended formulation for section 46, proposing first a defence, and then mandatory factors for the court to consider.

The mandatory factors however are unlikely to reduce uncertainty to a significant extent. Mr Young’s opinion finds the proposed mandatory factors to be an ‘empty vessel’ that provide no additional clarity around how the test should be applied.

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

### *ACCC guidance*

The ACCC’s guidance is helpful but it will not bind the court so it does not obviate the need for a clearer law. The ACCC’s draft guidance sets out the ACCC’s approach to interpretation and enforcement of the new law and the types of conduct that will cause it concern (and not cause it concern). The ACCC acknowledges its guidance materials will not bind the court:

The guidelines will set out the views of the ACCC. Ultimately it will be a matter for the court to determine if particular conduct has breached the misuse of market power prohibition. (ACCC draft *Framework for misuse of market power guidelines*, page 2)

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6. The Hon Scott Morrison MP, Treasurer of the Commonwealth of Australia, *Fixing competition policy to drive economic growth and jobs*, joint media release with The Hon. Malcolm Turnbull MP, Prime Minister and The Hon. Kelly O’Dwyer MP, Minister for Small Business, 16 March 2016.

7. Including the Competition and Consumer Committee of the Law Council of Australia, academics such as Alexandra Merrett, Rhonda Smith and Rachel Trindade, and competition partners from many of Australia’s leading law firms.

Furthermore, the ACCC's guidelines will have no effect where business is the subject of litigation by private parties. The ACCC guidelines are therefore not sufficient on their own to provide the certainty to business and the courts about how the new law should be applied. This can only properly be achieved through the legislative drafting.

Greater clarity in the law ought to be of benefit to the ACCC as it will reduce unnecessary and costly disputes, investigations and litigation by the ACCC. It will also reduce the need for business to seek authorisation from the ACCC, which will result in lower administration costs for both business and the ACCC.

### **Conclusion**

Given the fundamental disagreement about the application of the provision as drafted and its likely interpretation by the court, additional legislative language is required to remove ambiguity and make clear that the new law will apply only to 'exclusionary conduct', and will not apply where there are 'legitimate business reasons'.

A clearer law and explanatory memorandum are both necessary to provide greater certainty to the courts and to businesses assessing conduct under the new section 46. A well drafted law is essential for Australia's businesses to fully engage in competitive activity that improves consumer welfare and creates jobs.

If there is a concern that clarifying the provision would alienate proponents of the amendment who expect it to apply more broadly, this inconsistency should be aired and addressed now rather than through the courts over the coming decades. Legislating an inherently ambiguous provision will ultimately cost consumers in the form of higher prices and more cautious competitive responses from larger – and often more efficient and innovative – businesses in markets across the economy.

### **Summary of opinion by Neil J Young QC**

The case for amending the drafting of the new law is detailed in the attached legal opinion by Neil J Young QC.

In June 2016, the Business Council engaged Neil J Young QC to provide an independent opinion on the courts' likely assessment of the potential application of section 46(1) proposed by the Harper Review, whether the mandatory court factors in proposed section 46(2) would clarify that application, and whether and how the proposal might be improved.

Mr Young is one of Australia's most respected competition law barristers and has served as a judge on the Federal Court. Among many other cases he appeared as senior counsel for the ACCC in the *Rural Press* and *Boral* hearings in the High Court. His opinion is attached to this submission and concludes that:

- the draft provision risks overreaching its proper role as a 'misuse of market power provision'

There is some justification for the elimination of the "taking advantage" test ... but, there are shortcomings in the way in which the Harper Committee seeks to substitute a so-called effects test for the current provision, which mean that the recommended section overreaches its proper role (at paragraph [15])

The foregoing analysis demonstrates, in my view, that the risk of over-capture is real and imminent. It is unclear how those risks will be resolved (at paragraph [73])

Contrary to the view expressed by the Harper Committee the existing s46 is very much a mainstream provision when compared to its international analogues. It is the form of s46 proposed by the Harper Committee which is the outlier ... (at paragraph [16])

- the 'substantial lessening of competition' test is not sufficient to limit the application of the proposed section 46 and would result in a section of broad application.

There is no suggestion in the case law applying to the substantial lessening of competition test that it only applies to particular forms of conduct such as exclusionary conduct. To that extent, the arguments advanced by the ACCC are not consistent with the language of the proposed s46 or the case law that has expounded on the substantial lessening of competition test.

As a result, if the substantially lessening competition test were to become the only operative element of section 46, aside from the threshold requirement of substantial market power, a business would need to consider the effect of all of its conduct on competition in its immediate market or any related market. (paragraphs [71]-[72])

- The proposed section could apply where otherwise competitive conduct resulted in the exit of one or more competitors from the market:

Practitioners commonly experience situations where the ACCC expresses the view in the course of its merger clearance process that a reduction in the number of corporations from say, four to three, is highly likely to have the effect of substantially lessening competition.

If the market is defined very narrowly, as the ACCC is prone to do, then the loss of small competitors on the major's entry could easily be treated as a substantial lessening of competition. (paragraph [71])

- The mandatory factors in the proposed section 46(2) would not give clarity to these issues:

In my view, the recommended s46(2) is an empty vessel. It does no more than require the Court to have regard to two considerations which are in any event embraced within the concept of conduct that has an effect or likely effect of substantially lessening competition.

Nor does it contain anything that would limit the application of the new s46 to conduct that both 'substantially harms competition and that has no economic justification', contrary to the observation by the Harper Committee. (paragraphs [65] and [64])

- Many companies in Australia would be considered to have a substantial degree of market power and be caught by the proposed section:

A very large number of companies in Australia will fall within the reach of the new s46. This is so because, in the Australian economy, the class of corporations that have a substantial degree of power in the market or markets in which they operate is a very wide one. In fact, many Australian markets are so concentrated that all of the major players (which will often amount to less than, say, six or so) will have a degree of market power that qualifies as substantial. The consequence is that, for the first time, many ordinary business decisions by those corporations will potentially fall within the reach of the new s46. (at paragraph [38])

Mr Young's opinion proposes 'minimum' changes to the provision necessary to address the problems he has identified. These changes would include that:

- a meaningful safeguard should confine the principal provision to anti-competitive or exclusionary conduct
- purpose and effect should be cumulative requirements, and

- the provision should be limited to any other market in which the corporation supplies or acquires goods and services.

The principles Mr Young identifies are consistent with the objectives of a misuse of market power law as identified by the Harper Review and by the ACCC's draft guidelines.

However, Mr Young's advice unequivocally concludes that the Harper section 46 requires additional refinement to meet these objectives rather than relying solely on the 'substantial lessening of competition' test alone.

## 2.2 Alternative formulations of section 46

This section of the Business Council's submission considers several options for amending the draft provision in order to address the identified problems and to insert the clarity that is needed.

### *Reflecting the ACCC guidelines in the law*

As discussed above, the additional clarity could be provided by aligning the proposed section 46 with the language of the ACCC's guidelines. Based on the current draft guidelines, this could provide that:

- (1) A corporation that has a substantial degree of power in a market must not engage in exclusionary conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.
- (2) For the purposes of subsection (1), "exclusionary conduct" means unilateral conduct that interferes with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits.
- (3) For the purposes of subsection (1), conduct will not be considered to have the purpose, or to have or be likely to have the effect, of substantially lessening competition in any market where:
  - (a) the corporation has or had a legitimate commercial or business reason for engaging in the conduct; and
  - (b) the conduct was not unreasonable or disproportionate to the achievement of that legitimate commercial or business reason.

This would clearly limit the application of the section to exclusionary conduct as defined by the ACCC, and would provide protection for conduct that has a legitimate business reason – provided the conduct is not disproportionate to the achievement of that reason. This degree of protection mirrors the burden-shifting approach developed in the United States, as acknowledged by the Harper Review's final report.

### *Neil J Young QC's proposed improvement*

Mr Young proposes the following amendment to the Harper proposal, drawing most directly on the Canadian legislation and the language of the Harper Review's draft report and final report and of the current Act:

- (1) A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has an exclusionary purpose, and has, or would have or be likely to have the effect of substantially lessening competition in that market or in any other market in which the corporation supplies or acquires goods or services.

- (2) For the purposes of sub-section, (1) conduct will have an exclusionary purpose if it:
  - (a) has the purpose of preventing, restricting or deterring anyone from engaging in competitive conduct in the market or in any other market in which the corporation supplies or acquires goods or services;
  - (b) has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons generally or from particular persons or classes of persons in particular circumstances or on particular conditions; or
  - (c) has the purpose of eliminating or substantially damaging a competitor; or
  - (d) has the purpose of preventing, restricting or deterring new entry into the market.
- (3) In determining whether conduct has an exclusionary purpose, and has, or would have, or be likely to have the effect of substantially lessening competition in a market, the court must have regard to whether the conduct, or its effect or likely effect on competition:
  - (a) was a result of superior competitive performance;
  - (b) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; or
  - (c) would be likely to have the effect of advancing the long-term interests of consumers.

While this is perhaps a more substantial change to the Harper Review's recommendation than the government is currently considering, the Business Council supports this proposal as an example of adherence to principle and of the clarity that should be brought to a misuse of market power provision.

#### *Increasing the certainty of the Harper mandatory court factors*

The Business Council considers that the mandatory factors to be considered by the court under the Harper recommendation provide a reasonable description of exclusionary conduct on the one hand, and efficient conduct on the other. However, by limiting the impact of these concepts to factors for the court to weigh, the proposal provides little certainty and little protection for legitimate competitive conduct.

The objectives identified by the Harper Review and committed to by the government could more effectively be achieved by promoting the court factors to essential elements of the prohibition, as follows:

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.
- (2) Subsection (1) shall only apply in respect of exclusionary conduct, that is, conduct that:
  - (a) has the purpose, or would have or be likely to have the effect, of preventing, restricting or deterring the potential for competitive conduct in a market, or new entry into a market, in competition with the corporation; and
  - (b) does not have the purpose, and would not have or be likely to have the effect, of enhancing efficiency, innovation, product quality or price competitiveness in a market.

This change would ensure that the provision only targeted exclusionary conduct and protected efficiency-enhancing conduct.

*Returning to the defence proposed in the Harper Review's draft report*

Recognising the potential for the proposal to overreach, the Harper Review's draft report proposed a defence with two limbs. The most common criticism of the proposed defence was that satisfying both limbs was unreasonable and unworkable. It was proposed that, at a minimum, each of the limbs should be a separate and sufficient defence, as follows:

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.
- (2) Subsection (1) does not apply to any conduct to the extent that it:
  - (a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; or
  - (b) would be likely to have the effect of advancing the long-term interests of consumers.

Mr Young's advice echoes this concern, and the Business Council considers that the modified Harper defence would better protect pro-competitive conduct and promote the objectives of the Harper Review than the mandatory court factors.

*A new defence*

The wording of the defence could be more closely adapted to the objectives identified by the Harper Review and the ACCC, for example, by providing:<sup>8</sup>

- (1) A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.
- (2) For the purposes of subsection (1), conduct does not have the purpose, and would not have or be likely to have the effect, of substantially lessening competition in a market to the extent that the conduct:
  - (a) has the purpose, or would have or be likely to have the effect, of enhancing efficiency, innovation, product quality or price competitiveness in the market;
  - (b) is competitive conduct based on:
    - (i) the merits of goods or services; or
    - (ii) the price of goods or services, except where the corporation supplies, or offers to supply, the goods or services for a sustained period at a price that is less than the cost to the corporation of supplying those goods or services; or
  - (c) is a refusal to supply goods or services for legitimate business reasons.

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8. This example has been prepared by Arnold Bloch Leibler.

The Business Council would be happy to discuss any of these alternatives with the Treasury, but strongly considers that each of these alternatives would provide a more effective implementation of the objectives of the Harper Review than the current proposal.

### **2.3 ACCC draft guidelines on the Misuse of Market Power**

This section comments on the ACCC's draft *Framework for misuse of market power guidelines*.

The ACCC's draft guidelines emphasise the disparity between its intentions for the section and the language in which it is expressed, and the lack of clarity around some of the key concepts in any misuse of market power law.

#### *Exclusionary conduct*

As mentioned earlier, the draft guidelines begin with a summary of the objective of a misuse of market power law that is consistent with its statements on the Harper Review proposal:

The objective of a misuse of market power provision is to prohibit unilateral conduct by a corporation with substantial market power that interferes with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits. Sometimes this is broadly referred to as 'exclusionary conduct'. (at page 4)

It is striking that, of the many concepts that contribute to this objective, only the requirement that a corporation has a substantial degree of market power is reflected in the language of the proposed new section 46. The elements relevant to the conduct to be targeted – interfering with the competitive process, doing so by affecting rivals or competitors, preventing or deterring those rivals from competing on their merits – are nowhere to be found in the proposed section 46.

Many of these elements are referred to in the draft guidelines, particularly in the examples of conduct given, but the draft guidelines do not specify how they are addressed in the legal framework that would apply to the proposed law, even when the draft guidelines discuss the application of the 'substantial lessening of competition' test.

#### *Legitimate business reasons*

However, the discussion of the 'substantial lessening of competition' test does provide that the ACCC will take into account all of the factors the courts have recognised as relevant to the test, and that:

This would include whether there are legitimate business reasons for engaging in the conduct.

This echoes the apparent intention of the Harper Review that the proposed section 46 should apply to conduct that 'substantially harms competition and that has no economic justification' as identified by Neil J Young QC.

The difficulty is that, while legitimate business reasons or economic justifications are often taken into account in deciding whether a corporation has taken advantage of its market power under the existing section 46, the draft guidelines do not refer to any cases that examine these concepts through the 'substantial lessening of competition' test that would

help business understand how these factors would affect the ACCC or the court's application of the proposed section.

In some cases, the guidelines appears to treat the lack of a legitimate business reason as a necessary element of a finding of misuse of market power separate from the 'substantial lessening of competition' test, for example, in describing a refusal to deal:

For instance, where a firm that has a substantial degree of market power in the supply of a key input ... refuses to supply that input to its competitors in a downstream market, without any legitimate commercial reason for the refusal (e.g. credit risk, product shortages, etc.), and the purpose, effect or likely effect of the conduct is to substantially lessen competition in the downstream market ...

In other cases, the guidelines appear to discount legitimate business reasons altogether, again in relation to a refusal to deal:

While one of the firm's motivations is to protect the employment of its workers, the end result it is seeking to achieve is that the rival firm is not able to enter the market and compete away business which could ultimately cause the incumbent to lay off workers. Further, a purpose of substantially lessening competition only needs to be a substantial purpose for the conduct and does not need to be the only purpose.

More detail about the ACCC's treatment of legitimate business or commercial reasons and economic justifications would be useful. Since reasons and justifications are closely related to purposes, it would be particularly valuable to understand how a legitimate business reason might be taken into account in the assessment of an effect (or likely effect) of substantially lessening competition.

### *Refusal to deal*

The section in the guidelines on 'refusal to deal' contains a statement to the effect that businesses are generally entitled to choose whether or not they will supply or deal with another firm, including a competitor. The subsequent discussion significantly undermines that proposition and has the flavour of an "essential facilities" approach.

The problem may result from some confusion between substantial market power and natural monopoly. A firm, which does not enjoy a natural monopoly, may have substantial market power. This is made clear in sub-sections 46(5) and (7) in the amended prohibition which provide, respectively, that a firm may have substantial power in a market even though it does not substantially control that market and more than one firm may have substantial power in a market.

The ACCC's example of a refusal to supply cement is predicated on the fact that cement is an essential input for ready-mix concrete but does not make it clear, even as an assumption, that it is critical to the analysis that it would not be economic to build another cement plant. Unless that assumption is made, it suggests that a firm could avoid making investment in a cement works and use the prohibition on misuse of market power to compel its vertically integrated competitor to supply cement to it and (see the discussion concerning margin squeeze below) to do so at a price which would allow the firm a sufficient margin to enable it to cherry pick ready-mix concrete customers.



### *Predatory pricing*

The ACCC's treatment of predatory pricing and related example raise a number of questions that could be further explored to increase certainty in this complex area:

- What is the relevant measure of a firm's own cost of supply? Average avoidable cost and average variable cost are often used as the relevant cost of supply. What if a firm has very high fixed costs and low variable costs?
- Does the ACCC consider that there needs to be a reasonable prospect of recouping the losses incurred during the predatory period?
- The guidelines suggest that low pricing will be predatory only if it has an 'aim' of causing competitors to exit the market, disciplining or damaging competitors for competing aggressively or discouraging potential competitors from entering the market. Is an 'aim' different from a purpose? How will the ACCC determine what a firm's aim is?
- The 'national pricing' example suggests that if an individual store is operating profitably overall then below-cost prices on individual lines or products will not be predatory. The corollary would appear to be that every store in a chain needs to be operated on a profitable basis. It would be useful for the guidelines to confirm these conclusions.
- How are free services offered in one market, by a firm which has substantial power in another market, to be analysed? A free service is clearly being supplied below various measures of cost but this business model delivers considerable benefits to consumers but may be disruptive to the business models of other firms, which rely on charging for equivalent services.

It would also be useful for the guidelines to provide more detail on the circumstances in which damage to an individual competitor or competitors may have the effect or likely effect of substantially lessening competition.

The guidelines should make it clear that section 46 does not apply to purely vertical relationships such as low prices paid to suppliers, where a business with market power is not in competition with its suppliers.

### *Margin/price squeeze*

The discussion of 'margin/price squeeze' contains a statement to the effect that businesses are generally entitled to charge different prices to different buyers. Implicit in the statement is that, in some circumstances, price discrimination may contravene the misuse of market power prohibition.

The only type of price discrimination addressed in the guidelines is a margin/price squeeze, but not all price discrimination involves a margin squeeze. If the ACCC considers that price discrimination, which does not involve a margin squeeze, could contravene the amended section 46, it is important that the guidelines provide some guidance on the ACCC's approach to assessing such price discrimination.

The discussion of 'margin/price squeeze', like the discussion of refusals to deal, also has the flavour of an "essential facilities" approach. It would be useful for the guidelines to provide guidance on:

- how the ACCC will determine that an input is essential; and

- how it will assess pricing. For example, will it use some form of imputation testing and, if not, how is a supplier to determine a price which is not likely to contravene the prohibition?

#### *General comment*

Finally, the Business Council considers that the guidelines face a fundamental obstacle in that the ACCC's view of the objective of the law is not supported by the language of the legislation, and – unlike the position of the European Commission when it came to develop its influential guidelines on Article 86/102 of the Treaty of the Functioning of the European Union (TFEU) – it has no judicial interpretation of that language to support its position. The Business Council would encourage the ACCC to support the clarification of the legislation and explanatory materials to better reflect the ACCC's own guidelines.

### **3. Concerted practices (section 45)**

#### **3.1 Assessment of the amendments to section 45**

This section of the submission comments on the proposed amendments to section 45 in the draft legislation, notably the introduction of a law to govern 'concerted practices'.

As set out in its submissions to the Harper Review and the Treasury consultation process, the Business Council supports the repeal of the current price signalling provisions, which are complex, arbitrarily limited to a single sector, and risk capturing information disclosures of the kind that are necessary for the efficient operation of the market.

However, as also set out in our previous submissions, the Business Council has ongoing concerns about the proposal to extend the competition law with a prohibition against concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

As with the changes to section 46, this submission acknowledges the government has decided to proceed with the introduction of the new 'concerted practices' law in section 45 and makes recommendations that are intended to address our concerns.

#### *Greater clarity is needed*

The proposed new subsection 45(1)(c) provides that a corporation must not engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

The final report of the Harper Review noted that Article 101 of the TFEU includes the concept of 'concerted practice', but the report did not explore the legal treatment or definition of that concept, or indicate whether the concept recommended by the review was intended to adopt any of the European jurisprudence.

The draft Explanatory Materials provide a degree of clarity on these issues:

As is the case for other forms of coordination dealt with by section 45, concerted practices are not defined in the Act. The interpretation of a "concerted practice" should be informed by international approaches to the same concept, where appropriate. Broadly, international jurisprudence suggests that coordination between competitors, where cooperation between

firms is substituted for the uncertainties and risks of independent competition, is potentially a concerted practice. (At paragraph 3.18)

However, this explanation is incomplete in a number of respects and cannot substitute for a more useful definition of the concept of ‘concerted practices’ in the legislation itself.

It is true that the terms ‘contract’, ‘arrangement’ and ‘understanding’ are not defined in the Act, but those are terms with more transparent ordinary meanings than ‘concerted practice’. While the concept of a ‘concerted practice’ is often referred to in European antitrust jurisprudence, it is not a concept whose meaning and limits have been established with precision.

The explanation suggested by the Explanatory Materials draws on but does not adequately capture the European cases such as *Suiker Unie*, which provides that:

The concept of a “concerted practice” refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market.<sup>9</sup>

The European concept requires an element of knowledge or intention that is missing from the summary in the Explanatory Memorandum. This could prove to be a significant omission and should be corrected.

Some recognition of the additional nuance set out in *Suiker Unie* would also be useful:

Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market ...

The fact that a vendor aligns his price on the highest price charged by a competitor is not necessarily evidence of a concerted practice but may be explained by an attempt to obtain the maximum profit.

It should also be noted that Article 101 contains no separate concept of ‘arrangement’ or ‘understanding’ as included in section 45 of the CCA. As a result, the concept of a ‘concerted practice’ extends to all relevant arrangements that fall short of an agreement between the parties.

In Australia, it is not clear how a ‘concerted practice’ concept would affect or be affected by the adjacent definitions of arrangement and understanding in our law. In fact, the *Suiker Unie* definition proposed by the Explanatory Materials appears to apply equally to the concept of an ‘arrangement’ or ‘understanding’ as to the concept of a ‘concerted practice’, making it unclear how any of these concepts would be interpreted by the courts in the future.

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<sup>9</sup> C-40/73 *Suiker Unie and Others v Commission* [1975] ECR 1663.

### *Need for an efficiency defence*

Further, Article 101(3) of the TFEU provides a defence to an otherwise anti-competitive agreement or concerted practice on the basis that it ‘contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit’. This is essentially an efficiency defence and is critical in helping to ensure that Article 101 does not prevent information disclosures that provide overriding consumer benefits.

While the proposed section 45(1)(c) only applies to concerted practices that have the purpose, effect or likely effect of substantially lessening competition, it is not at all clear that this would provide the same level of protection for information exchanges or other concerted practices that promote efficiency and consumer welfare as the European efficiency defence does.

The uncertainty and potential breadth of the concerted practices concept makes an additional test or defence, such as the Article 101(3) efficiency defence, critical. Authorisation and notification would not provide a meaningful exemption in the context of information exchanges. Indeed, to ensure that information exchanges that promote competition, inform consumers or are otherwise essential to business are not prevented or chilled, the ACCC should bear the onus of proving that there is no legitimate business justification for the disclosure or that it was not in the ordinary course of business.

In these circumstances there is a serious risk that spontaneous and pro-competitive conduct would be penalised if the changes proposed by the Exposure Draft were adopted without significant additional thought.

### *Recommended changes*

The Business Council considers that, at a minimum:

- a more considered legislative definition of ‘concerted practice’ should be developed and should make it clear that:
  - only concerted practices engaged in by competitors or potential competitors are to be covered; and
  - there must be a *knowing* substitution of coordination for competition; and
- it should be an essential element of proving a contravention that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

For example, section 45 could provide that:

- (1) A corporation must not: [...]
  - (c) engage with one or more of the corporation’s competitors or potential competitors in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition. [...]
- (3A) For the purposes of this section, a **concerted practice**:
  - (a) is a form of coordination between competitors that does not constitute a contract, arrangement or understanding but knowingly substitutes the risks of competition with practical cooperation that leads to conditions of competition that do not correspond to the normal conditions of the market; but

- (b) does not include disclosures of information that have a legitimate business justification or are in the ordinary course of business.

Although the section should be limited to concerted practices between competitors, the Business Council strongly supports the Harper Review's recommendation that the section remain in section 45 as a civil provision subject to the 'substantial lessening of competition' test rather than a potentially criminal or *per se* provision.

### 3.2 ACCC draft guidelines on concerted practices

This section comments on the ACCC's draft *Framework for concerted practices guidelines*.

The Business Council welcomes the guidelines developed by the ACCC to set out its approach to what is to be considered a 'concerted practice', but is concerned that the draft guidelines circulated by the ACCC, which set out a range of examples but few underlying or unifying concepts or principles, demonstrate that consideration of the detail and application of the concerted practices recommendation has not been sufficient, given the far-reaching impact of the change.

The Business Council notes that the ACCC guidelines provide a more accurate summary of the European concept by referring to the requirement that the parties *knowingly* substitute cooperation for the risks of competition. However, this element of knowledge or intention is absent from the ACCC's definition of a concerted practice:

A concerted practice is a form of coordination between competing businesses by which, without them having entered a contract, arrangement or understanding, practical cooperation between them is substituted for the risks of competition.

The Business Council strongly recommends that this omission be corrected in the guidelines and that the ACCC will support the inclusion of an element of knowledge or intention in the explanatory materials if not in section 45 itself.

The guidelines could also provide more high-level principles that would help businesses identify and avoid concerted practices. For example, it should be made clear that:

- firms are permitted to adapt themselves intelligently to the existing and anticipated conduct of their competitors
- this includes independently raising prices to meet the prices of a competitor in order to maximise profits.

Other questions that could usefully be clarified in the guidelines include:

- Does a concerted practice require a repeated course of conduct or would a single disclosure of information be at risk?
- What does the recipient of unsolicited pricing information have to do in order to avoid being involved in a concerted practice?
- Under what circumstances would a public disclosure of pricing information risk being characterised as a concerted practice?
- What kinds of information disclosures are more or less likely to be characterised as a concerted practice? For example, what kinds of data are commercially sensitive, when is

data public, when is an information exchange public, historic v future data, frequency of exchange?

- How efficiency gains, including increasing transparency and reducing information asymmetries, are to be taken into account?

#### **4. Other changes in the Bill**

The draft legislation implements many other competition law changes recommended in the Harper Review in these areas:

- definition of competition
- cartel conduct
- exclusionary provisions
- covenants affecting competition
- secondary boycotts
- third line forcing
- resale price maintenance
- authorisations, notifications and class exemptions
- power to obtain information, documents and evidence
- access to services.

The Business Council agrees with the majority of these changes, with some exceptions as set out below. A detailed explanation for the Business Council's position on each of the Harper Review's competition law recommendations was provided in our earlier submissions to the Competition Policy Review and to the government.

##### *Admissions of fact*

The Business Council does not support enabling proceedings to be brought against persons making admissions of fact under section 83.

Agreed admissions or statements of fact are presented to the court by parties wishing to reduce the costs and uncertainties of litigation. They have been used in the majority of ACCC legal actions and have accounted for the majority of ACCC penalties awarded. However, agreed admissions will be substantially less appealing to respondents if they are used to facilitate private litigation, including class actions, by constituting prima facie evidence in these subsequent actions. The additional advantage that might be provided by the recommendation is not worth overturning the principles identified by the courts or the clear benefits of effective settlement to the enforcement process.

##### *National Access Regime*

The draft legislation adopts the Productivity Commission's recommendation to amend declaration criterion b). The Business Council instead supports the Harper Review's recommendation to amend declaration criterion b) to 'require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service'.

Further, we recommend the government pursue more substantive reform of the National Access Regime so that declaration under Part IIIA is confined to airports and any other former publicly owned multi-user facilities that do not have an access regime.

#### *Resale Price Maintenance*

The draft legislation permits notification for resale price maintenance. The Business Council supports this change but also recommends replacing the *per se* prohibition in the Act with a 'substantial lessening of competition' test.

#### *Trading restrictions in industrial agreements*

The Business Council supports the Harper Review recommendation to amend sections 45E and 45EA of the CCA so that 'they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.' These changes were not included in the draft legislation.

## **5. Best Practice Regulation**

#### *Regulation Impact Statement*

The Business Council recommends that a separate RIS be prepared for the changes to section 46 given they are expected to have the greatest impact on the economy, but also are the highest risk. In assessing the costs and benefits of the changes the RIS should include these costs, where applicable:

- The cost of sourcing additional economic and legal advice, including the costs and time of running internal tests to determine whether there is a substantial lessening of competition for each pro-competitive action.
- The longer time frames that will need to be built into business decision making and the effect on the flexibility of businesses to respond quickly to changes in the market and consumer demand.
- Costs to the ACCC and to business from increased investigations or litigation attributable to uncertainty in the law.
- Costs to business and the ACCC associated with the ACCC's new s46 authorisation process.
- Costs of competitive activity foregone where business perceives it faces an unacceptable risk of breaking the law even if, by legitimately competing by innovating, expanding their product offer or lowering prices to consumers, in doing so they anticipate they will harm competitors or have effects on the market that cannot be predicted with any certainty.

#### *Post-implementation review*

The changes to sections 46 and 45 should be reviewed within two years from the date they take effect. The reviews should assess whether the new provisions are meeting their objectives and delivering a net benefit or a net cost to the economy. Information should be collected over the first two years of the provision on the costs and benefits of the reforms and the impact of the provisions on business decision making, the ACCC and on the courts. The review should make recommendations on whether further amendments need to be made to the provisions to improve their effectiveness or to reduce costs.

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**IN THE MATTER OF THE FINAL REPORT OF THE COMPETITION  
POLICY REVIEW (HARPER REVIEW) AND THE RECOMMENDED  
FORM OF AN AMENDED S 46**

**OPINION**

1. Recommendation 30 of the final report of the Competition Policy Review (**Harper Review**) published in March 2015 states:

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

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

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

2. The Harper Review recommended that sub-sections (1) and (2) as set out below should be substituted for the existing s 46(1) of the *Competition and Consumer Act* 2010 (Cth) (**CCA**):

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

- (2) Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to:
    - (a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and
    - (b) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.
3. The Harper Review also recommended the retention of existing sub-sections (3), (3)(A), (3)(B), (3)(C), (3)(D) and (4) which expand on the concept of market power. Those provisions remain relevant, but they are to be re-numbered as sub-sections (3)-(8) of the recommended form of s 46.
4. The other sub-sections of the existing s 46(1) are to be deleted as they relate to abandoned aspects of the former sub-section (1), such as the concept of “taking advantage”.
5. The Federal Government has announced that it proposes to implement recommendation 30. There is, however, a prospect that the Government may entertain submissions concerning the wording of the new section, and perhaps particularly the wording of sub-section (2) as recommended by the Harper Review.
6. On the assumption that the existing s 46 will be replaced by an “effects test” substantially in the form of sub-section (1) as recommended by the Harper Review, I have been asked to provide an opinion examining the strengths, weaknesses and problems of the proposed drafting of sub-sections (1) and (2) and canvassing ways of improving the draft.

### **Purpose of the recommended amendments**

7. A useful starting point is to identify the purposes of the recommended amendments, as explained by the Harper Committee.
8. The Harper Committee cited three main reasons for substituting a so-called “effects test” for the current provision that focuses on a misuse of market power for anti-competitive purposes. Those reasons were:
  - (a) the sole focus on purpose in the existing s 46 does not usefully distinguish pro-competitive from anti-competitive conduct, and it is inconsistent with the overriding policy objective of the CCA to protect competition, and not individual competitors;<sup>1</sup>
  - (b) the sole focus on purpose in the existing s 46 is out of step with international approaches;<sup>2</sup> and
  - (c) in contrast, a test that is expressed in terms of the purpose, or effect or likely effect, of substantially lessening competition is consistent with other prohibitions in the CCA and it would have the advantage of allowing the Court to weigh the pro-competitive and anti-competitive impact of the conduct in question.<sup>3</sup>
9. The Harper Committee expanded on the dichotomy it perceived between an approach that focused on purpose and one that focused on effects by describing the rival arguments in the following terms:<sup>4</sup>

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

- As a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the

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<sup>1</sup> Harper Review at 9, 61 and 339.

<sup>2</sup> Harper Review at 9, 340 and Appendix B.

<sup>3</sup> Harper Review at 9, 61 and 340-341.

<sup>4</sup> Harper Review at 335.

conduct, because it is the anti-competitive effect of conduct that harms consumer welfare.

- As a matter of practicality, proving the purpose of commercial conduct is difficult because it involves a subjective enquiry, whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

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

The debate around whether section 46 should be based solely on a ‘purpose’ test or should also (or alternatively) have an ‘effects’ test is one of the enduring controversies of competition policy in Australia.

10. It is worth pausing to consider the reasons advanced by the Harper Committee for their recommended changes to s 46, and the weak points of that reasoning. That discussion will be assisted if I discuss the elimination of the “take advantage” requirement from s 46(1), and then turn to the Harper Committee’s reasons for substituting an effects test (starting with the second reason advanced by the Harper Committee – the international comparators).

*Eliminating the “take advantage” requirement*

11. The central purpose of the recommended amendments is to address difficulties that have attended the current form of s 46. Those difficulties arise from the requirement that conduct falling within s 46 must “take advantage” of the corporation’s substantial market power.
12. In the opinion of the Harper Committee, the words “take advantage” pose a test that is not sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct. Further, the Harper Committee considered that the test had given rise to substantial difficulties of interpretation, as revealed in decided cases such as *Queensland Wire Industries v BHP* (1989) 167 CLR 177, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, and *Rural Press Limited v ACCC* (2003) 216

CLR 53; and that those cases have had the effect of undermining confidence in the effectiveness of the law.<sup>5</sup> The Harper Committee also noted that these problems have not been overcome by the introduction of sub-section (6A) in 2008.<sup>6</sup>

13. It is correct, but perhaps surprising, that Australian courts have struggled with the proper interpretation and application of s 46. In other jurisdictions, courts have not experienced any particular difficulties in applying provisions that are couched in language such as “abuse ... of a dominant position” and “abusing” a position of substantial market power or a dominant position. The root of the problem in Australia may lie in the fact that the courts have departed from the ordinary meaning of the words “take advantage”. As the Harper Committee pointed out, the ordinary meaning of those words is simply to use to one’s advantage. On their face, the words would seem to mandate a factual inquiry into the genesis, circumstances, purpose and effects of the conduct in question. Instead of taking this course, the courts have been influenced by unhelpful economic notions, particularly what the Harper Committee describes as the supposed “economic premise” of the test that a firm with substantial market power should be permitted to engage in particular business conduct if firms without market power could also engage in that conduct.<sup>7</sup> The Harper Committee goes on to point out that this is a dubious premise because particular conduct might be competitively benign when undertaken by a firm without market power but competitively harmful when a firm has market power.
14. In my view, the supposed economic premise of the expression “take advantage” has led the courts to embark on a difficult and often arid inquiry into whether the same conduct could have been undertaken by a corporation that lacked substantial market power. Such an inquiry is unlikely to produce any useful answers. The perceived difficulties of the provision would surely have been less if Australian courts had applied the provision in accordance

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<sup>5</sup> Harper Review at 337-338.

<sup>6</sup> Harper Review, at 338.

<sup>7</sup> Harper Review at 338.

with the ordinary meaning of the language it used, so as to mandate an inquiry into the origins and circumstances of the conduct, and the effects that the corporation with substantial market power sought to achieve, or in fact achieved, by engaging in that conduct.

15. For the foregoing reasons, there is some justification for the elimination of the “taking advantage” test, as recommended by the Harper Committee, and the insertion of an effects test into s 46, so long as the new provision links purpose and effects in a way that has the practical result that the section is confined to conduct that amounts to an abuse of substantial market power. But, as discussed below, there are shortcomings in the way in which the Harper Committee seeks to substitute a so-called effects test for the current provision, which mean that the recommended section overreaches its proper role.

#### *Overseas comparisons*

16. Contrary to the view expressed by the Harper Committee,<sup>8</sup> the existing s 46 is very much a mainstream provision when compared to its international analogues. It is the form of s 46 proposed by the Harper Committee which is the outlier. Let me give a few examples.
17. In relation to Canada, the Harper Committee argues that the existing s 46 is inconsistent with s 79 of the Canadian Competition Act which it says “prohibits anti-competitive conduct by a dominant firm that has the effect or likely effect of substantially lessening competition”.<sup>9</sup> This description of the Canadian Act is incomplete because it omits to mention that s 78(1) describes an anti-competitive act in purposive terms. It provides:

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

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

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<sup>8</sup> Harper Review at 9 and 340.

<sup>9</sup> Harper Review at 340.

- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

18. Building upon s 78(1), s 79(1) provides:

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

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

- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
  - (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
- the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

19. Additionally, s 79(4) provides:

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

20. The Enforcement Guidelines published by the Canada Competition Bureau state:<sup>10</sup>

Section 78 of the Act enumerates a non-exhaustive list of acts that are deemed to be anti-competitive in applying section 79. The Federal Court of Appeal has stated that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.<sup>11</sup> However, the Federal Court of Appeal and Tribunal have acknowledged that paragraph 78(1)(f) is an exception to this standard in that it does not contain a reference to a purpose vis-à-vis a competitor. In any event, while many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose.

When assessing whether an act is anti-competitive, the purpose of an act may be proven directly by evidence of subjective intent, or inferred from the reasonably foreseeable consequences of the conduct. Although verbal or written statements of a firm's personnel may assist in

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<sup>10</sup> At 10. Where the Guidelines describe s 78(1)(f) as not referring to a purpose vis a vis a competitor the emphasis is on the last words describing the target. The provision is still purposive in the wider sense that it describes a purpose of maintaining prices above a competitive level

<sup>11</sup> *Canada (Commissioner of Competition) v Canada Pipe Co* 2006 FCA 233 at para. 66.



establishing subjective intent, evidence of subjective intent is neither strictly necessary nor completely determinative.<sup>12</sup> In most cases, the purpose of the act can be inferred from the circumstances, and persons are assumed to intend the reasonably foreseeable consequences of their acts.<sup>13</sup>

An additional factor in the determination of whether an act is anti-competitive is whether it was in furtherance of a legitimate business objective. A business justification is not a defence to an allegation that a firm has engaged in anti-competitive conduct, but rather an alternative explanation for the overriding purpose of that conduct, if and as required, that a firm can put forward where the Bureau believes that purpose to be anti-competitive.

21. The Guidelines go on to observe that s 78 describes various means by which a firm may engage in exclusionary conduct which is designed to make current and/or potential rivals less effective at disciplining the exercise of a firm's market power, to prevent them from entering the market, or to eliminate them from the market entirely.
22. Further, it is noteworthy that s 79 requires both an anti-competitive act that is identifiable by its anti-competitive, exclusionary or predatory purpose, and a demonstrated effect on competition. It is not sufficient in Canada that a particular practice has, or is likely to have, an adverse effect on competition.
23. In relation to the U.S., the Harper Committee said<sup>14</sup> that the prohibition on monopolisation or attempted monopolisation in s 2 of the Sherman Act depends on objective, not subjective, intent, which can be inferred from conduct and effect. This marks only a marginal difference from the existing s 46. Its purposive requirement has been described as stipulating for an operative subjective purpose, but the existence of that purpose is commonly, indeed ordinarily, inferred from conduct and effect. Moreover, it is not

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<sup>12</sup> *Ibid.* at para. 72-73.

<sup>13</sup> *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), at 35.

<sup>14</sup> Harper Review at 340.

conclusively established simply because individuals give evidence of their subjective intentions.<sup>15</sup>

24. The more important difference is that the concepts of monopolisation and attempted monopolisation in s 2 of the Sherman Act require proof of conduct that amounts to a wilful acquisition or maintenance of such power so as to cause anti-trust injury. In effect, U.S. jurisprudence requires that monopoly power must be obtained or maintained by anti-competitive, exclusionary or predatory means, as distinct from its growth or development as a consequence of superior product, business acumen or historic accident.<sup>16</sup> This is a far cry from the form of s 46 proposed by the Harper Committee where a contravention can be established simply by pointing to an effect or likely effect of substantially lessening competition and without any need to prove a link between the possession of substantial market power and the assessed substantial lessening of competition.

25. In relation to the European Union, Article 102 of the TFEU states:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

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<sup>15</sup> *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 at [256]; and *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460 at 482-3.

<sup>16</sup> *National Ass'n of Pharmaceutical Mfrs., Inc. v Ayerst Laboratories, Div. of and American Home Products Corp.*, C.A.2 (N.Y.) 1988; *Shavrnock v Clark Oil and Refining Corp.*, C.A.6 (Mich.) 1984, 726 F.2d 291; *Hunt-Wesson Foods, Inc. v Ragu Foods, Inc.*, C.A.9 (Cal.) 198, 627 F.2d 919, certiorari denied 101 S.Ct. 1369, 450 U.S. 921, 67 L.Ed.2d 348.; *Commercial Data Servers, Inc. v International Business Machines Corp.*, S.D.N.Y. 2003, 262 F.Supp.2d 50; *Picker Intern., Inc. v Leavitt*, D.Mass. 1994, 865 F.Supp. 951; *Marnell v United Parcel Service of America, Inc.*, N.D.Cal. 1966, 260 F.Supp. 391.

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
26. In its Final Report,<sup>17</sup> the Harper Committee said that because Article 102 is framed in terms of an “abuse ... of a dominant position”, this allows regard to be had to matters such as the adverse effects of the conduct on competition. But neither the terms of Article 102, nor the European jurisprudence that applies it, can be assimilated to an effects test, contrary to what the Harper Committee asserts in Appendix B. Most importantly, the key feature of Article 102 is that the conduct in question must constitute an abuse of market power deriving from a dominant position. A substantially similar requirement lies at the core of the existing s 46 (albeit a lower threshold of substantial market power applies), but the Harper Committee’s proposed amendments would remove it.
27. In its submissions to the Commonwealth Department of Treasury in February 2016 in relation to the amendment of s 46, the Business Council of Australia (BCA) referred to equivalent laws in many other jurisdictions. From the BCA’s summary, it is plain that most countries have an abuse of market power provision that is broadly similar to the existing s 46. Countries in this category include Hong Kong, Singapore, Malaysia, Indonesia, China, South Korea, India and South Africa. The evidence seems to be overwhelming that the form of s 46 proposed by the Harper Committee is an extreme outlier.

### *Sole purpose*

28. The Harper Committee’s first reason for its recommendation depends on a flawed characterisation of s 46(1). While a proscribed purpose is one essential element of the provision, the other essential elements are equally important as

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<sup>17</sup> At 340 and in Appendix B.

they demand proof of a causal link between the possession of substantial market power and conduct or practices that use or rely upon that market power for a proscribed purpose. The Harper Committee is also mistaken in suggesting that the proscribed purposes in s 46(1) are confined to a purpose of inflicting damage on individual competitors. That describes s 46(1)(a) but sub-sections (1)(a) and (b) refer, respectively, to purposes of preventing market entry and deterring or preventing a person from engaging in competitive conduct. Given the range of purposes it proscribes and the other necessary elements it contains, the existing s 46 is squarely aimed at misuses of market power.

29. There is also a flavour to the Harper Committee's comments that objective circumstances and anti-competitive effects are irrelevant to the application of the current s 46. That is not the case. In s 46, "purpose" refers to an intention to achieve a particular end, result or market effect. The relevant purpose need not be the only purpose, provided it is a substantial purpose: s 4F. As to proof of that purpose, it can be established by direct evidence or inference from all the circumstances, including the effect of the conduct on competition. The latter situation tends to represent the norm; in other words purpose will usually be inferred by the courts from all the circumstances, including in particular the nature of the conduct, the circumstances in which it occurred, and its likely effect on competitors and competition. Statements from individuals in the witness box as to their intentions or purpose will be tested closely and are treated with the utmost caution.<sup>18</sup> This approach of inferring purpose from all the circumstances is virtually indistinguishable from that adopted in Canada, as summarised in the enforcement guidelines published by the Competition Bureau of Canada.

*The advantages of an effects test*

30. The Harper Committee placed great weight on the fact that the current s 46(1) does not explicitly refer to anti-competitive effects. Although, as discussed

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<sup>18</sup> *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460; *Taprobane Tours Pty Ltd v Singapore Airlines Ltd* (1990) 96 ALR 405.

above, the effects of the conduct on competition are relevant in applying the current s 46, there is no requirement in the provision, as there is in the corresponding Canadian provision, articulating a specific requirement that the conduct have, or be likely to have, the effect of substantially lessening competition. If there were such a requirement, it would ensure that the Court weighs the pro-competitive and anti-competitive effects of the conduct in determining whether there had been a misuse of market power. Accordingly, there is in my view merit in adding a requirement that there must be an effect or likely effect of substantially lessening competition.

31. The Harper Committee's recommended provision does not secure such an outcome because it treats purpose and effect as alternative ways of establishing a contravention.
32. The fact that the recommended form of s 46 poses alternative requirements for purpose or effect, rather than cumulative requirements, is of particular significance, given the fact that the proposed s 46 contains no necessary link between the possession of substantial market power and the conduct that is alleged to have a purpose, effect or likely effect of substantially lessening competition in a market. This is brought home by the closing words of the proposed s 46(1). They have the effect that a corporation can contravene s 46(1) by engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a second market, even though its own substantial power resides in a first market; and there is no need to show that the conduct in the second market amounted to a use of the substantial market power held in the first market. In contrast, the concluding words of s 46(1) are apposite in the current provision because there is a requirement that the conduct affecting the second market must amount to a taking advantage of substantial market power in the first market.
33. As for the proposition that the substitution of the substantial lessening of competition test will bring s 46 into line with provisions such as ss 45, 47 and 50, there is an important difference between s 46 and these other provisions. Section 46 is aimed at unilateral conduct by corporations possessing

substantial market power, whereas the other provisions are triggered when two or more corporations enter into a contract, arrangement or understanding, or where the conduct relates to a supply relationship that attracts the exclusive dealing provision in s 47, or where two or more corporations come together and agree to acquire or dispose of shares or assets in a manner that is caught by s 50. Hitherto, the premise of the *Consumer and Competition Act* has been that there is no need, and there are dangers, in applying a substantial lessening of competition test to unilateral business decisions.

### **Retaining elements of s 46(1) – Substantial market power**

34. The recommended provision retains the threshold test of “a substantial degree of market power” because the Harper Committee regarded it as appropriate and well understood.<sup>19</sup> It therefore remains the gateway to s 46 in the sense that it defines the class of corporations to whom the provision applies, but the proposed section requires no other nexus between the possession of a substantial degree of market power and the remaining elements of s 46(1). Specifically, there is no requirement in the new section that such power must be used in a way that is intended to bring about, or which is likely to bring about, a substantial lessening of competition. Nor is there any requirement that the possession of a substantial degree of market power must be connected with the corporation engaging in conduct that has the purpose, or effect or likely effect of substantially lessening competition.
35. When s 46 was initially enacted, it contained a more stringent threshold requirement that meant it only applied to corporations that had a dominant position in a market. The provision was re-drafted in 1986 so that the threshold was reduced to a substantial degree of market power. This occurred because of a concern that s 46 might only apply to corporations that held monopoly power or something akin to monopoly power.<sup>20</sup> It was further relaxed in 2007 and 2008 when sub-sections (3), (3A), (3B), (3C) and (3D) were added or amended to ensure that the phrase “a substantial degree of

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<sup>19</sup> Harper Review at 61.

<sup>20</sup> *ACCC v Baxter Health Care Pty Ltd (No 2)* (2008) 170 FCR 16 at [378].

market power” was not construed too restrictively. For instance, subsection (3C) provides that a body corporate may have a substantial degree of power in a market even though it does not substantially control the market or does not have absolute freedom from constraint by the conduct of competitors, or potential competitors or its suppliers or acquirers. Similarly subsection (3D) provided that more than one corporation may have a substantial degree of power in a market.

36. The requirement for a substantial degree of market power is not an exacting one. The word “substantial” is a relative term and can have a range of meanings. In the context of s 46, it has been interpreted as referring to a degree of market power that is real, or of substance, or considerable, rather than trivial or minimal.<sup>21</sup> Thus, a substantial degree of market power is power that is, to an extent that warrants the description substantial, not constrained by competitors, potential competitors, suppliers or acquirers. Plainly, it can extend to companies whose degree of market power falls well short of monopoly power or a dominant level of market power.
37. What this background shows is that it was one thing to progressively relax the threshold of a substantial degree of market power in s 46 when the section was aimed at a taking advantage of market power for proscribed anti-competitive purposes. However, it is another thing to adopt the same threshold in a revised provision that is no longer aimed at the abuse of market power, and which will apply a substantial lessening of competition test to any conduct engaged by a corporation that happens to have a substantial degree of power in a market.
38. A very large number of companies in Australia will fall within the reach of the new s 46. This is so because, in the Australian economy, the class of corporations that have a substantial degree of power in the market or markets in which they operate is a very wide one. In fact, many Australian markets are so concentrated that all of the major players (which will often amount to less than, say, six or so) will have a degree of market power that qualifies as

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<sup>21</sup> *Dowling v Dalgetty Australia Limited* (1992) 34 FCR 109; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385; and *Mark Lyons Pty Ltd v Bursill Sports Gear Pty Ltd* (1987) 75 ALR 581.

substantial. The consequence is that, for the first time, many ordinary business decisions by those corporations will potentially fall within the reach of the new s 46.

### **Introducing a Test of Substantial lessening competition**

39. The Harper Committee considers that it is a significant advantage if the new s 46 adopts the same test of substantially lessening competition that is found in other provisions in Part IV of the Act. Accordingly the ingredients of that test warrant close examination.<sup>22</sup>

#### *Substantial*

40. It is fair to say that the judicial interpretation of the word “substantial” within the phrase “substantially lessening competition” has undergone an evolutionary process. The result of that process is that the meaning of the word substantial in the phrase “substantially lessening competition” differs significantly from the way in which the same phrase has been construed in the opening words of the existing s 46.
41. The earlier cases treated the word “substantial” as a primarily quantitative expression. Hence, substantial was construed as meaning “more than trivial or minimal”, perhaps “considerably”, and as importing “a greater rather than a lesser degree of lessening”.<sup>23</sup>
42. Later cases, however, have placed greater emphasis on a qualitative assessment of the state of competition, compared to the future state of the market with and without the impugned conduct. The formula that the courts now commonly use to capture the qualitative dimension of the test is that the impact of the conduct must be “meaningful or relevant to the competitive

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<sup>22</sup> Those ingredients have been examined, very helpfully, in a recent article by Peter Armitage, “The Evolution of the ‘Substantial lessening of competition’ test – a review of case law”, (2016) 44 ABLR 74.

<sup>23</sup> See, e.g., *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 260; *Singapore Airlines Pty Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158, 181; *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, [241]; and *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437, 445.



process” to qualify as a substantial lessening of competition.<sup>24</sup> This formula springs from the decision of French J in *Stirling Harbour* and it was applied by French J in the *Australian Gas Light Co* case.<sup>25</sup> It received qualified approval from the High Court in *Rural Press v ACCC*<sup>26</sup> where the High Court used the formula while observing that it was unnecessary to reach a view with respect to the inconclusive debate about the proper construction of substantial. The High Court clearly accepted the qualitative dimension of the test for substantially lessening competition because it went on to say that the authorities “do not support the proposition that it would be sufficient for liability if the relevant effect was quantitatively more than insignificant or not insubstantial”.<sup>27</sup>

43. The High Court’s decision in *Rural Press* effectively endorsed the Full Court’s view that a competitive impact may be substantial where it nips competition “in the bud”. The High Court also described the entrant who was deterred as “a small but potentially significant competitor” that would have diluted the impact of the existing monopoly.<sup>28</sup> Both these matters suggest a qualitative assessment that does not always require a large impact on competition.<sup>29</sup>
44. In *Australian Gas Light Co*,<sup>30</sup> French J applied the meaningful or relevant test and in doing so he endorsed the observation by the Full Federal Court in *Universal*<sup>31</sup> that the lessening must be sufficiently serious to adversely affect the process of competition and that this would exclude a short term effect which would be readily corrected by market processes.
45. It would be going too far, however, to conclude that the test is purely qualitative. My own assessment of these cases corresponds to that expressed

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<sup>24</sup> See *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-752 at [113]; *Australian Gas Light Co v ACCC (No 3)* (2003) 137 FCR 317 at [351]; and *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 41.

<sup>25</sup> *Supra*.

<sup>26</sup> (2003) 216 CLR 53 (*Rural Press*).

<sup>27</sup> *Rural Press* at [41].

<sup>28</sup> *Rural Press* at [46].

<sup>29</sup> *Rural Press Ltd v ACCC* (2002) 188 FCR 236 at [129]; and *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 46.

<sup>30</sup> (2003) 137 FCR 316.

<sup>31</sup> *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FC.R at [242].

by Allsop J in *ACCC v Liquorland (Aust) Pty Ltd*<sup>32</sup> where his Honour said that “there is a layer of meaning of “considerable” to be added to the notion of being meaningful or relevant to the competitive process”.

### *Likely*

46. In most legal context, the word “likely” connotes a factual outcome that the Court assesses to be more probable than not. But that is not the meaning that the word bears in the context of a likely substantial lessening of competition. Rather, the courts have construed the word “likely” in that context as requiring only that there must be “a real chance” that the conduct, practice or acquisition in question will result in a substantial lessening of competition.<sup>33</sup>
47. In *Australian Gas Light Co v ACCC*, French J expanded on the meaning of the word “likely” in s 50:

The meaning of “likely” reflecting a “real chance or possibility” does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition. By the language it adopts and the function thereby cast upon the Court and the regulator in their consideration of acquisitions s 50 gives effect to a kind of competition risk management policy. The application of that policy, reflected in judgments about the application of the section, must operate in the real world. The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the Howard Smith case, the Court is concerned with “commercial likelihoods relevant to the proposed

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<sup>32</sup> [2006] FCA 826 at [829]

<sup>33</sup> See, e.g., *ACCC v Metcash Trading Ltd* [2011] FCA 967 at [146]; and *Australian Gas Light Co v ACCC (No 3)* (2003) 137 FCR 317 at [320]-[348].

merger”. The word “likely” has to be at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration.<sup>34</sup>

His Honour also said that this approach applies across Part IV whenever there is a reference to a likely substantial lessening of competition.<sup>35</sup>

*Framework for assessing a substantial lessening of competition*

48. It is now well established by judicial decisions under Part IV that the question whether conduct has the effect or likely effect of substantially lessening competition must be assessed by considering the future state of the market with and without the impugned conduct.<sup>36</sup>
49. This counter factual analysis does not exclude reference to the present state of competition to illuminate the future state of the market, but it does mean that it would be an error to confine attention to the present state of the market. It is also clear that the future counter factual cannot be a purely hypothetical one. In *Metcash*, Emmett J held at trial that the ACCC must demonstrate that, absent the acquisition, it was more probable than not that the counter factual situation would occur.<sup>37</sup> On appeal, Buchanan J agreed with this aspect of the trial decision, but the other two appellate Judges (Yates and Finn JJ) treated the counter factual as merely an aid to detect the existence and extent of changes in the process of competition.<sup>38</sup>
50. Next, there is the question of what categories of evidence or market factors are likely to assume importance in applying the counter factual analysis. This is another area where the views of the courts and the Australian Competition Tribunal have undergone something of an evolution. The classical starting point has been the list of structural factors that Professor Maureen Brunt

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<sup>34</sup> *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 31 AAT [348]

<sup>35</sup> *Australian Gas Light Co v ACCC (No 3)* (2003) 137 FCR 317 at 347

<sup>36</sup> *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-752 at [113]; *Australian Gas Light Co v ACCC (No 3)* at [352]; and *ACCC v Metcash Trading Ltd* (2011) 198 FCR 297 at [148]; and *Re Chime Communications Pty Ltd (No 2)* (2009) 234 FLR 210 at [14] (a decision of the Australian Competition Tribunal).

<sup>37</sup> *ACCC v Metcash Trading Ltd* (2011) FCA 967 at [146].

<sup>38</sup> *ACCC v Metcash Trading Ltd* [2011] 198 FCR 297 at [90] per Buchanan J and [228] and [230] per Yates and Finn JJ.

identified in *QCCA*. Those factors included the height of barriers to entry, the level of market concentration, the character of vertical relationships (which would capture any countervailing power held by customers and suppliers, and the nature and extent of vertical integration) and the dynamic characteristics of the market. A number of those factors are replicated in s 50(3). It follows that those factors are relevant throughout s 46 wherever the substantial lessening test is used.<sup>39</sup>

51. It has often been said that the most important of these factors is the height of barriers to entry.<sup>40</sup>
52. However, recent Tribunal cases have laid much greater emphasis on behavioural rather than structural factors when applying the substantial lessening of competition test.<sup>41</sup>
53. Although the courts have not gone as far as the Competition Tribunal, in *Boral Besser Masonry Ltd v ACCC* (2001) 106 FCR 328 at [225] and [341]-[342] both Merkel and Finkelstein JJ took strategic, and not just structural, barriers to entry into account. On appeal to the High Court, only McHugh J endorsed this approach.<sup>42</sup>
54. The shift towards behavioural factors may have particular bearing on the question whether a substantial lessening of competition can be discerned from the fact that the conduct has led, or is likely to lead, to the exit of one or more competitors. In *Chime*, the Tribunal said that the level of competition cannot be measured simply by the number of firms in the market, their market shares and the market concentration. In *Re Telstra Corporation (No 3)* the Tribunal said that it was important not to confuse the objective of promoting

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<sup>39</sup> Armitage, *supra*, at 92.

<sup>40</sup> See, e.g., *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177; and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at [67].

<sup>41</sup> See *Re Qantas Airways Ltd* [2004] AComp.T 9 at [304], [400], [420] and [438]; *Re Chime Communications Pty Ltd (No 2)* (2009) 234 FLR 210 at [29], [48] and [53]; *In the Matter of Fortescue Metals Group* [2010] AComp.T 2 at [1050] – [1051]; and *Re AGL Energy Ltd* [2014] AComp.T 1 at [369].

<sup>42</sup> *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR at [295] and [313]; see also Greenwood J in *ACCC v Cement Australia Pty Ltd* [2013] FCA 909 at [980].

competition with the outcome of ensuring the greatest number of competitors.<sup>43</sup>

55. In his text, Heydon observes that the exit of many small firms may not affect the quality of the competition process because it may leave the market as competitive as previously.<sup>44</sup>
56. Notwithstanding these authorities, there are cases where the impact of conduct on a particular competitor proved decisive in applying the substantial lessening test. *Rural Press* was one such case. Other cases of that kind include *Mark Lyons*, and *O'Brien Glass*. In *Boral*, McHugh J drew attention to the signaling effects of conduct on particular competitors or potential entrants into the market.<sup>45</sup> In a similar fashion, Hill J in *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 drew attention to the impact of exclusive dealing conduct on other retailers.<sup>46</sup>
57. Practitioners commonly experience situations where the ACCC expresses the view in the course of its merger clearance process that a reduction in the number of corporations from say, four to three, is highly likely to have the effect of substantially lessening competition. The explanation may be that the ACCC considers that the acquisition falls within the scope of s 50(3)(h) and would result in the removal of a vigorous and effective competitor.<sup>47</sup> But of course, even very small competitors might satisfy this description if the market is defined very narrowly in product and geographic terms.
58. One question that arises in the context of the proposed new s 46 is whether its incorporation of a substantial lessening of competition test creates uncertainty as to whether s 46 might apply to conduct by a corporation holding substantial market power where that conduct results in the exit of competitors from the market. It may be, for instance, that competitors in a narrowly defined regional market cannot match it with a more powerful corporation that enters

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<sup>43</sup> *Re Telstra Corporation (No 3)* [2007] AComp.T 3 at [98]-[99]; see also the explanatory memorandum relating to the introduction of s 50(3) at page 6 in 1992.

<sup>44</sup> Heydon, *Trade Practices Law*, at s 30.230.

<sup>45</sup> *Boral*, *supra*, 215 CLR 374 at [313].

<sup>46</sup> *ACCC v Universal Music Australia Pty Ltd* (2001) 115 FCR 442 at [464]-[465]; and in the Full Court, 131 FCR 529 at [243]-[244].

<sup>47</sup> See the ACCC Merger Guidelines at 49.

the regional market because of its size and economies of scale. It would be an odd result if those facts alone were enough to expose such a corporation to the risk of contravening s 46 in its revised form. Yet the ACCC's approach to merger cases affords little confidence that such situations will be treated as falling outside the reach of the proposed s 46.

59. In conclusion, the message that emerges from this brief review of the authorities is that many uncertainties attend the application of the substantial lessening of competition test. Moreover, its application is fact intensive and usually time consuming. This is evident in the fact that the ACCC analysis of the test in the context of merger cases normally takes many months to complete and may involve narrow market definitions which tend to magnify the consequences of the impugned conduct. The application of such a test to conduct engaged in by every corporation that falls within the wide reach of the new s 46 is likely to be very disruptive to business.
60. In its February 2016 submission to the Treasury in relation to the proposed revision of s 46, the BCA made the following submissions:

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

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

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

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

61. In my view, the uncertainties and vagueness of the substantial lessening of competition test, as explained in the authorities, lends support to the BCA's submissions.

### **Over-capture**

62. The Harper Committee acknowledged in its Final Report that its proposed s 46 posed a significant risk of over-capture.<sup>48</sup>
63. The Committee initially proposed a defence providing that the prohibition in s 46 would not apply if the conduct in question would be both a rational business decision by a corporation that did not have a substantial degree of power in the market, and likely to have the effect of advancing the long term interests of consumers. It is unclear why these conditions were expressed cumulatively rather than in the alternative.<sup>49</sup> Be that as it may, in its Final Report, the Harper Committee said that the risk of inadvertently capturing pro-competitive conduct in the re-drafting of the provision was better addressed by a further sub-section to the following effect:

46(2) Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to:

- (a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and
- (b) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

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<sup>48</sup> Harper Review at 61 and 342-345.

<sup>49</sup> Harper Review at 342.

64. Compared to the originally proposed defence, this safeguard does not contain any carve out for conduct that reflects a rational business decision by a corporation that did not have a substantial degree of power in the market. Nor does it contain anything that would limit the application of the new s 46 to conduct that both “substantially harms competition and that has no economic justification”, contrary to the observation by the Harper Committee at [61].
65. In my view, the recommended s 46(2) is an empty vessel. It does no more than require the Court to have regard to two considerations which are in any event embraced within the concept of conduct that has an effect or likely effect of substantially lessening competition. Take the first factor in sub-section (2)(a). It is obvious that the Court will necessarily have regard to the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market when it applies sub-section (1). The position is not altered by referring, non-exhaustively, to several ways in which that might be done, viz., enhancements to efficiency, innovation, product quality or price competitiveness. Similarly, paragraph (b) merely re-states the necessary effect of sub-section (1), and the non-exhaustive references to several ways in which competition might be lessened adds nothing by way of safeguard.
66. The risk of over-capture can be illustrated in various ways, as the Business Council of Australia did in its February 2016 submission to the Treasury. The BCA’s illustrations include the following:
  - (a) *Delays and narrow market definitions:* The experience of BCA member companies is that the ACCC’s application of the substantial lessening of competition test under other sections of the Act can take many months and regularly involves very narrow market definitions. Many examples can be given. For instance, Bluescope’s recent merger applications took between 10 and 34 weeks and one involved a lengthy investigation by the ACCC into a narrow market definition affecting the provision of only 230 tonnes of steel. The ACCC’s recent



investigations into the Asciano merger applications have taken many many months.

In merger clearance applications, the ACCC's application of the test has highlighted two major problems with the proposed new s 46. First, the narrow and unpredictable approach to defining markets at a very local level means a broad range of current and prospective business activities, including small businesses operating in smaller markets, fall within the scope of s 46 and their normal activities risk investigation and potential allegations of contravention. Secondly, the time and substantial cost to business involved in such inquiries or investigations will slow down decision making, put companies at a commercial disadvantage, and deter pro-competitive activity.

- (b) *Small businesses:* The proposed change to s 46 will capture small businesses with market power operating in narrowly defined markets based on geography or the definition of the product on offer. The risk can be illustrated by reference to the hardware segment of the market.

Former Woolworths Chairman, Mr John Dahlsen, has reportedly called for changes to the section 46 laws because hardware stores such as those owned by his company JC Dahlsen are finding it difficult to compete with new Bunnings stores ('Former Woolworths Chairman John Dahlsen attacks Bunnings', SMH, 12 August 2015). Dahlsen cites the case of three stores where his company 'had to sell those stores because Bunnings informed us they were entering those three markets'. Dahlsen also says, 'Bunnings is now entering very small markets which five years ago it wouldn't have contemplated, and it's having a dramatic effect on the small retailer – many small independent hardware merchants are failing'. ACCC Chair Rod Sims is quoted as saying that: 'Yes, there are some concerns with Bunning's share and it's an area of interest but so are many other areas'. Bunnings succeeds when consumers choose to switch from existing retailers to take advantage of the low prices and extensive range that a new Bunnings store offers. This is the nature of competition and is good

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

- (c) *Supermarket home brands:* The major supermarket operators have introduced home brands which have had the effect of lowering prices and introducing more competition with other brands on supermarket shelves as the ACCC found in its 2008 food and grocery inquiry.

Major supermarkets have recently expanded their home brand range, to appeal to price sensitive customers and respond to competition from new entrants. If they expand the offer of home brands further, the effects on suppliers of branded products may put the supermarkets at risk of prosecution under the proposed section 46. The supermarkets may be deemed to have market power due to their market share and access to customers and supplies that its competitors do not have. There may be an effect of lessening of competition in the retail markets due to potential competitors not entering the market; or existing competitors potentially exiting the market.

- (d) *State-based pricing:*

Under a policy called ‘state-based pricing’, the major supermarkets offer the same, low prices on goods like milk, meat, bread and other groceries to regional consumers as they offer to consumers in the city. Almost all stores within a state set the same price, even in regional areas where it costs more to transport and supply the goods. The policy helps to ease cost-of-living pressures in parts of the country where disposable incomes may on average be lower than in the cities. Under the proposed section 46, local grocers unable to match the low prices on those products could argue the effect is a ‘substantial lessening of competition’ (i.e. from grocers closing down, or choosing not to enter the market, because they cannot compete). To avoid this risk, the major supermarkets would

have to consider abandoning state-based pricing and charge regional consumers higher prices for milk, meat, bread and groceries.

67. The ACCC has argued in various places, both by submissions to the Harper Committee and in public statements, that the proposed effects test in s 46 poses no risk to legitimate business conduct. The following is a sample of statements made by the ACCC:

(a) *Competition on the merits will not be affected*

"Companies that want to compete on their merits have nothing to fear. Only those who wish to exclude their competitors and damage the competitive process will need to re-examine their conduct."<sup>50</sup>

"I have heard concerns from many leaders in the business community about an effect of SLC test. It seems to me those concerns are based on a misunderstanding.

Some business leaders have said that, for example, when they innovate, actively compete on price or enter a new geographic market, and the result is that they succeed and most others fail, they fear their outcomes will have the effect of SLC.

This confuses the outcome with how you get there. To be held to have substantially lessened competition you have to do something anti-competitive; pro-competitive behaviour, whatever the outcome, cannot be held to SLC.

As we have said, the ACCC sees anti-competitive behaviour as essentially exclusionary; it must affect the process of competition itself. New innovation, aggressive discounting (provided it is not below cost for a sustained period), and new market entry, are all pro-competitive and, in our view, cannot have the effect of SLC.

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<sup>50</sup> "ACCC Chairman Rod Simms: 'Nothing to fear' from effects test", *AFR*, 17 March 2016.

To repeat, to SLC there must first be behaviour that could be seen as anticompetitive. There cannot be an SLC through competition on its merits.”<sup>51</sup>

(b) *Vertical arrangements with suppliers will not be affected*

“The matter we have with Coles and the suppliers has got nothing to do with the misuse of market power, because they’re not competitors, so there’s just no issue there. The supplier case is not a competition case, it’s got nothing to do with misuse of market power, it would be completely unaffected by the change I’m proposing.”<sup>52</sup>

“Where the farmers are supplying a product and competing with the supermarkets who have a home brand in that product, that may be helpful... But if the issue is just a supplier relation, then it can’t help them with an effects test”.<sup>53</sup>

(c) *State-based pricing will probably not be affected*

“Craig Emerson has concerns that statewide uniform pricing could be subject to challenge under the Harper substantial lessening of competition test. The only circumstances where this could be the case is where the company is pricing all or most of its products below its own costs in a local market for a sustained period.”<sup>54</sup>

“If there was predatory pricing involved, such as for example pricing below cost, there’s laws there now to deal with that, 46 doesn’t change that. Most importantly, let’s say you price nappies at a low price. How is that going to substantially lessen competition in any market. How’s that going to have an effect on retailing in in country towns. I mean it’s just an extraordinarily strange proposition if I do say so myself... If

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<sup>51</sup> Rod Sims speech, “Bringing more economic perspectives to competition policy & law”, RBB Economics Conference, Sydney, 7 November 2014.

<sup>52</sup> Extended interview with Rod Sims, *The Business*, ABC TV, 6 April 2014.

<sup>53</sup> “Competition watchdog ACCC head Rod Sims denies claims an ‘effects test’ would be ‘economically dangerous’”, *ABC Rural*, 19 August 2014.

<sup>54</sup> Rod Sims, “Why the change to Harper Competition Review law will help boost competition”, *AFR*, 4 August 2015.

you out-compete your competition and put them out of business, that cannot possibly trigger section 46.”<sup>55</sup>

(d) *Opening a new retail store cannot breach the new section*

“I am often told that when a supermarket opens in a new geographic area, that the existing shops will be substantially damaged. I am then asked: what is the ACCC going to do about it? Of course, there is no SLC in this case, although there may be harm to individual competitors in the market.”<sup>56</sup>

“I find it very hard to see how the [Australian National Retail Association] could think that bringing a new store into a new market could have a purpose or effect of substantially lessening competition... Introducing a new business into a market doesn't substantially lessen competition, it adds to competition. I think the law on that is very clear.”<sup>57</sup>

(e) *The law will be limited to exclusionary conduct*

“The ACCC wants to ensure competition is on its merits by dealing with exclusionary behaviour, when a business takes steps to prevent competitors entering a market.”<sup>58</sup>

“Some argue that if a company outperforms its rivals and drives them out of business then this can lead to a substantial lessening of competition. This is not so. You cannot substantially lessen competition by outperforming your rivals, only by excluding them from competing on their own merits.”<sup>59</sup>

68. There is no suggestion in the case law applying the substantial lessening of competition test that it only applies to particular forms of conduct such as

<sup>55</sup> Extended interview with Rod Sims, *The Business*, ABC TV, 24 March 2016.

<sup>56</sup> Rod Sims speech, “Bringing more economic perspectives to competition policy & law”, RBB Economics Conference, Sydney, 7 November 2014.

<sup>57</sup> “ACCC boss Rod Sims rejects supermarket claims effects test will hurt shoppers”, *Sydney Morning Herald*, 27 April 2015.

<sup>58</sup> Rod Sims, “Enhancing Competition Policy”, Law Council of Australia, Competition & Consumer Committee AGM, 12 September 2014.

<sup>59</sup> Rod Sims, “Why the change to Harper Competition Review law will help boost competition”, *AFR*, 4 August 2015.

exclusionary conduct. To that extent, the arguments advanced by the ACCC are not consistent with the language of the proposed s 46 or the case law that has expounded on the substantial lessening of competition test.

69. Further, the arguments advanced by the ACCC are largely if not entirely question-begging for the reasons explained by Rachel Trindade, Alexandra Merrett and Rhonda Smith:

The ACCC Chairman captured a popular sentiment in his speech to the RBB Economics Conference in November this year when he dismissed criticism of the use of the SLC test in section 46, saying:

To be held to have substantially lessened competition you have to do something anti-competitive; pro-competitive behaviour, whatever the outcome, cannot be held to SLC ...

To repeat, to SLC there must first be behaviour that could be seen as anti-competitive. There cannot be an SLC through competition on its merits.

Many people appear to agree with this general approach, but it's actually putting the cart before the horse ...

One simply cannot determine whether something is anticompetitive (or conversely "competition on the merits") without doing a proper competition analysis. The result of the competition analysis is what allows you to attach the label "anti-competitive" – in other words, conduct that substantially lessens competition in a market is anti-competitive. You can't start by characterising conduct as anti-competitive and then work backwards – that's exactly the type of error of reasoning our High Court has warned against.<sup>60</sup>

As a result, if the substantially lessening competition test were to become the only operative element of section 46, aside from the threshold requirement of substantial market power, a business would need to consider the effect of all of its conduct on competition in its immediate market and any related market.

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<sup>60</sup> Rachel Trindade, Alexandra Merrett and Rhonda Smith, *The state of competition*, Issue 21, December 2014.

70. The logical flaws in the arguments advanced by the ACCC exposes a hole in the reasoning that underpins the Harper Committee’s recommendation. As Peter Armitage has pointed out in his article, “The evolution of the ‘substantial lessening of competition’ test – a review of case law”<sup>61</sup>:

The inclusion of the “substantial lessening of competition” standard in the prohibition on unilateral conduct of firms which possess substantial market power would require further development and articulation of it. Questions such as the following would need to be addressed by the courts:

- Would conduct which intentionally injures rivals but which results in increased efficiency contravene the standard?
- Would conduct which raised strategic barriers to entry contravene the standard?
- How enduring would the impact on competition need to be?

Answers to such questions will emerge in due course but the current case law provides no clear guidance. The inclusion of the “substantial lessening of competition” standard in the prohibition on misuse of substantial market power will inevitably create a period of considerable uncertainty for many firms and for the ACCC. If the evolution of the case law concerning the current prohibition is any guide, that period of uncertainty would be in the order of 20 years.

71. It is unclear how the revised s 46 would be applied to unilateral conduct by large corporations, such as the major supermarkets or hardware stores, which expand into smaller communities or markets in a way that is likely to lead smaller businesses to exit that market. If the market is defined very narrowly, as the ACCC is prone to do, then the loss of small competitors on the major’s entry could easily be treated as a substantial lessening of competition.
72. In this regard, I note that proponents of the effects test have argued that the section needs to be revised so as to protect small businesses from fierce competition from larger rivals. Likewise, they have argued that it is necessary

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<sup>61</sup> 2016 44 ABLR 74

to protect small suppliers from their powerful customers, particularly the major supermarkets. These objectives may be reflected in the extrinsic materials that support the enactment of the proposed s 46, and that would exacerbate the risk of over-capture. In those circumstances, there must be a real risk that the loss of small competitors consequent on a large corporation's entry into a local market will attract s 46. This may be the result despite the fact that there is something counter-intuitive in the proposition that conduct that makes it likely that certain competitors will leave the market can be treated as conduct that is likely to substantially lessen competition, given that competition is a ruthless process, and the exit of firms expresses the very nature of competition.

73. The foregoing analysis demonstrates, in my view, that the risk of over-capture is real and imminent. It is unclear how those risks will be resolved. Perhaps the most that can be said is that courts called upon to interpret and apply the proposed s 46 will have to grapple with issues such as:
- (a) to what extent does vigorous competitive conduct that results in a reduction in rivalry in a market, perhaps a very narrowly defined market, fall within the scope of the provision.
  - (b) whether the provision will extend to conduct in relation to suppliers or customers, such as conduct by a large corporation in demanding low prices from suppliers that has led, or is likely to lead, to increased concentration in the suppliers' segment of the market or under investment in that upstream segment of the market.
  - (c) whether the extrinsic materials and the objectives of the amending Act will allow the provision to be read down so that it only applies to certain forms of exclusionary conduct, and if so how that conduct might be described or defined.

#### **Potential improvements to the provision**

74. Working from the premise that s 46 is to be amended so as to include a prohibition on conduct that has the effect or likely effect of substantially



lessening competition, there are in my view a number of improvements that could be made to the provision.

75. In my opinion, the following changes warrant serious consideration:
  - (a) Purpose and effect: Consistently with the approach in Canada, purpose and effect should be cumulative requirements. It ought not be possible to breach s 46 simply by reason of the fact that conduct by a corporation which happens to have a substantial degree of power in a market has the effect or likely effect of substantially lessening competition in that market.
  - (b) Any other market: These words give the proposed provision too wide an operation. Without the words, the provision will apply to conduct in any market in which the corporation has a substantial degree of power and engages in conduct that falls within the provision. At the very least, the provision should be limited to any other market in which the corporation supplies or acquires goods or services.
  - (c) A safeguard provision: If there is to be a widely expressed prohibition on conduct that has the purpose and effect or likely effect of substantially lessening competition in a market, it should be accompanied by a meaningful safeguard that confines the principal provision to anti-competitive or exclusionary conduct. This is the approach adopted in Canada.
76. These changes could be implemented by revising the proposed s 46 so that it provides:
  - (1) *A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has an exclusionary purpose, and has, or would have or be likely to have the effect of substantially lessening competition in that market or in any other market in which the corporation supplies or acquires goods or services.*

- (2) *For the purposes of sub-section (1) conduct will have an exclusionary purpose if it:*
  - (a) *has the purpose of preventing, restricting or deterring anyone from engaging in competitive conduct in the market or in any other market in which the corporation supplies or acquires goods or services;*
  - (b) *has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from particular persons or classes of persons generally or from particular persons or classes of persons in particular circumstances or on particular conditions; or*
  - (c) *has the purpose of eliminating or substantially damaging a competitor; or*
  - (d) *has the purpose of preventing, restricting or deterring new entry into the market.*
- (3) *In determining whether conduct has an exclusionary purpose, and has, or would have, or be likely to have the effect of substantially lessening competition in a market, the court must have regard to whether the conduct, or its effect or likely effect on competition:*
  - (a) *was a result of superior competitive performance;*
  - (b) *would be a result of a rational business decision by a corporation that did not have a substantial degree of power in the market; or*
  - (c) *would be likely to have the effect of advancing the long-term interests of consumers.*

77. My sub-section (2) incorporates language that is currently used in s 46(1)(a), (b) and (c) and in s 4D. In my view, it is preferable to express the provision in this way rather than listing types of anti-competitive conduct as s 78(1) of the Canadian Act does.
78. The advantage of defining the requisite purpose as an exclusionary purpose in this way is that it ensures that the new provision targets misuses of market power much more directly and specifically than the provision formulated by the Harper Committee.
79. I have considered whether it would be possible to retain s 46(1) in the form recommended by the Harper Committee, while building all of the changes I consider necessary into sub-sections (2) and (3) of a new s 46. In my opinion, that course would be neither feasible nor desirable. First, it would result in two different purpose requirements – a purpose of substantially lessening competition in sub-section (1) which would need to be overridden by a more restrictive definition of purpose in sub-section (2). I doubt that any Parliamentary draftsman would entertain such a structure. Secondly, it would not address the fact that s 46(1) expresses purpose and effect as alternative bases for a contravention of s 46. Consequently, even if a new sub-section (2) narrowed the purpose requirement to an exclusionary purpose, it would not address the fact that conduct would contravene s 46(1) if there were a real chance that it would substantially lessen competition. Thirdly, it would not address the inappropriate width of the concluding words “any other market” in sub-section (1).
80. My revised sub-section (3) is based on s 79(4) of the Canadian Act and elements of the defence originally proposed by the Harper Committee when it recommended changes to s 46.
81. The changes I have proposed to s 46(1) are the minimum changes necessary to address the problems I have identified.
82. More broadly, my revised s 46 is consistent with the ACCC’s public assurances that the proposed s 46 is not aimed, and should not be aimed, at anything other than exclusionary or anti-competitive conduct.

83. Taken together, the changes I have put forward would, in my opinion, ensure that the new s 46 targets serious anti-competitive conduct while avoiding the problems, uncertainties and economic inefficiencies of a provision that overreaches its proper function within the Act of addressing the competitive harm that can be caused by misuses of market power.

10 June 2016



NEIL J YOUNG

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