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Submission on options to strengthen the misuse of market power law

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Australian
Chamber of Commerce
and Industry

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The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad. We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

The Australian Chamber supports the full adoption of the Harper Review's recommended changes (Option F).

There is nothing wrong with firms obtaining market power by competing on merit through better products, production that is more efficient and distribution or marketing that is more effective. However, for market-based economies to function effectively, dominant firms must be at risk of losing their market share if a more efficient competitor emerges. New entrants must have the opportunity to enter a market without handicaps other than those arising from the fact that existing competitors have first mover advantages, such as well-established ties with consumers and skilled employees.

The fact that small, remote countries like Australia tend towards high levels of market dominance mean that it is particularly important for Australia's competition laws to be robust. The threat of competition is vital in markets with natural monopoly characteristics, as the only means of encouraging firms to continue innovating and limit their ability to increase profits at the expense of consumers using their market power.

The Australian Chamber contends

- The concept of 'a substantial lessening of competition' is sufficient to distinguish anticompetitive and procompetitive conduct, although the additional elements proposed by Harper serve to emphasise the importance of protecting behaviour that results in better outcomes for consumers.
- The take advantage test is peculiar to Australia. With no basis in economics it serves only to protect conduct that should be judged anticompetitive.
- The purpose test is similarly problematic. At best it can be contorted to match some but not all of the tests typically used to determine whether conduct is anticompetitive in other jurisdictions.

Substantial lessening of competition is a sufficient test

The concept of 'a substantial lessening of competition' is sufficient to distinguish anticompetitive and procompetitive conduct. The United States and Europe, along with most other jurisdictions, use similar general tests with no evidence of a chilling effect on competition or significantly higher legal costs.

Firms are unequivocally safe if they compete on merit through the development of better products, processes that are more efficient, or even marketing that is more effective.

Problems only arise if conduct would tend to exclude an equally efficient competitor (the 'as efficient competitor' test) or would not be profitable, or a reasonable business decision, absent the exclusionary consequences (the 'profit sacrifice' and 'no economic sense' tests).

While it is possible for conduct to have procompetitive and anticompetitive effects, the risk of over-capture is low as courts overseas have erred on the side of protecting any behaviour that could be characterised as offering better outcomes to consumers. The additional elements in the Harper

recommendation, such as the need to consider the effect on innovation, merely emphasise this presumption.

Ironically, one of the areas where it is most difficult to make the distinction between competitive and anticompetitive conduct is exclusive dealing.¹ Yet despite the fact that section 47 subjects exclusive dealing to a substantial lessening of competition test absent any take advantage or purpose elements, there is no evidence that exclusive dealing rules have resulted in noticeable adverse effects on legal costs or on competition.

The take advantage test is inherently protective of anticompetitive conduct

The 'take advantage test' is inherently protective of conduct that should be considered anticompetitive. US courts clearly recognise that the same behaviour can be benign for a firm in a competitive market, but anticompetitive for a firm with market power.²

The need to show that the conduct in question could not have been undertaken by a firm without market power is peculiar to Australia,³ and has no basis in economics.

For example, a vertically integrated firm in competitive markets may refuse to deal with its competitors without affecting competition. However, if that same firm were to acquire market power in one market and refused to supply competitors in key linked markets then there is a serious risk of that conduct substantially lessening competition (absent some other concern such as credit worthiness).

At best, the relevant nexus between market power and whether conduct is anticompetitive should relate to the anticompetitive effect of the conduct is the result of a firm's market power, not whether market power is what enabled the firm to undertake the conduct in the first place.

US law goes even further, recognising that even conduct by firms without market power can be anticompetitive by prohibiting attempted monopolisation as well as monopolisation under section 2 of the Sherman Act.⁴

The purpose test is not fit for purpose

Supporters of the 'purpose test' argue, contradictorily, that it is crucial to identifying anticompetitive conduct, and that removing it would make little difference to the operation of section 46.⁵

¹ Exclusive dealing arrangements can intensify competition where retailers act as agents of their consumers in driving down wholesale costs. See Murphy, K. and Klein, B., 2008, 'Exclusive Dealing Intensifies Competition for Distribution', *Antitrust Law Journal*, Vol. 75, No. 2. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656635

² In finding Dentsply International Inc guilty of using exclusive dealing to maintain its market power in the market for artificial teeth, the Court of Appeals for the Third Circuit noted that "Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." See Sher, S A and Russell, 2005, Adding Bite to Exclusive Dealing?: An Analysis of the Third Circuit's Dentsply Decision, *theantitrustsource*, May 2005. https://www.wsgr.com/PDFSearch/AntitrustSource_may05_sher.pdf

³ Crampton, P. 2006, "Abuse" of "dominance" in Canada: building on the international experience', *Antitrust Law Journal*, Vol. 73, No. 3, pp. 803-867, p. 829.

⁴ U.S. Code: Title 15 - Commerce and Trade, Section 2: <https://www.law.cornell.edu/uscode/text/15/2>

⁵ Compare page 15 of the BCA submission on the draft Harper Report with the same page of the BCA submission on the final Harper report. BCA, 2014, *Submission on the Competition Policy Review Draft Report*, <http://competitionpolicyreview.gov.au/files/2014/12/BCA.pdf>; BCA, 2015, *Submission on the Competition Policy Review Draft*

The telecommunications industry clearly shows the benefits of introducing an effects test, with the government noting that the changes were effective in curbing anticompetitive practices such as internet peering and commercial churn.⁶

If purpose is defined subjectively then it encourages a laborious search for a smoking gun that is only probative in whether conduct is really anticompetitive.

If purpose is defined objectively, then it could deliver similar results to the 'profit sacrifice' and 'no economic sense' test. However, there are forms of anticompetitive conduct that may pass the 'profit sacrifice' and 'no economic sense' tests but would still tend to foreclose an equally efficient competitor. Examples of such conduct include:

- a firm using its dominant position in part of the upstream supply chain to increase prices, which raises its own profits, but also tends to exclude equally efficient competitors in the downstream market; or
- a dominant retailer using favourable shelf position to promote its own brand products over those of independent suppliers that may have products that are equally attractive to consumers.

Report, http://www.bca.com.au/docs/4c945237-4f4f-4014-8baa-faa69423d6d3/BCA_Submission_on_the_Final_Report_of_the_Competition_Policy_Review_FINAL.pdf.

⁶ See Supplementary Explanatory Memorandum to the *Telecommunications Legislation Amendment Bill 1998*. <https://www.comlaw.gov.au/Details/C2004B00254/Supplementary%20Explanatory%20Memorandum/Text> The Internet peering issue involved Telstra charging to carry competitors' Internet traffic on its network while refusing to pay its competitors for their carriage of its traffic. Commercial churn is the transfer of customers from one carrier or carriage service provider to another.

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