

# Options to Strengthen the Law Prohibiting Misuse of Market Power

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## 1 Introduction

The aim of this submission is to contribute to the Commonwealth Treasurer's consultation on s46 of the *Competition and Consumer Act 2010* ("the Act"), relating to recommendation 30 of the Harper review—which in turn aims to strengthen the law prohibiting misuse of market power, making it more effective in meeting the object of the Act in s2.

This submission argues that changes should be made to s46, but the specific changes proposed by the Harper Panel (hereafter "HP") are inappropriate. The HP proposal would likely lead to overreach in the application of s46. The comprehensiveness of the HP redrafting of the provision has an attendant risk of unexpected consequences. The approach taken in this submission is to identify more precisely the shortcomings of s46 and make only those amendments needed to remedy them.

The HP recommendation that subsections (1AAA) and (1AA) of s46 be repealed is not raised in the discussion paper as a matter for consultation, and it is assumed the Government accepts that aspect of recommendation 30. This submission supports the repeal of subsections (1AAA) and (1AA), which are poorly motivated and inconsistent with established competition law standards. The amended s46 should be appropriately designed to cover predatory pricing in addition to other forms of unilateral anticompetitive conduct that involve misuse of market power.

## 2 Rationale of the Harper Panel's proposal

In its initial submission to the Harper review, the Australian Competition and Consumer Commission (ACCC) argued that s46 is ineffective in its current form, partly because the courts have interpreted it more narrowly than it would have

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liked.<sup>2</sup> S46(1) has three main tests—all necessary conditions—to determine whether the conduct of a corporation is prohibited under that subsection. The corporation must have:

- a substantial degree of market power in a market
- engaged in conduct with one of the three proscribed purposes, and
- taken advantage of its market power when doing so.

The ACCC was primarily concerned about the ‘purpose test’ and the ‘take advantage’ test. Firstly, the requirement to prove a proscribed purpose is regarded by the ACCC as too onerous, and possibly not covering some forms of conduct likely to substantially lessen competition, since “economic harm can arise from unilateral conduct which has the effect of substantially lessening competition but is not engaged in for an anti-competitive purpose”.<sup>3</sup> It also suggested that lack of an effects test is “inconsistent with trends internationally” and is not internally consistent with related provisions in the CCA. These seem to be the main grounds for its proposal to include an ‘effects test’, which means a prohibition of conduct by a corporation with a substantial degree of market power that is likely to have the effect of substantially lessening competition.

The ACCC’s second main issue relates to the ‘take advantage’ test, which as it rightly points out, has become “the key filter to distinguish conduct that is pro-competitive (or benign) from anti-competitive conduct”.<sup>4</sup> The deficiency which the ACCC sees in this test is that “[i]n seeking to distinguish between conduct driven by pro-competitive economic efficiency, and that which is proscribed, the courts have been drawn into complex ‘counterfactual’ analyses ...”.<sup>5</sup> As a result, it has been excessively difficult to successfully prosecute conduct under s46, even where the ACCC feels that substantial market power and anti-competitive purpose were proved.

The main aspects of the HP recommendation in relation to s46 are:

- in subsection (1), to remove the ‘take advantage test’, and the specific proscribed purposes in paragraphs (a) to (c), and replace them with a broad test of whether the conduct of a corporation that has a substantial degree of

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<sup>2</sup> ACCC, ‘Reinvigorating Australia’s Competition Policy: Australian Competition & Consumer Commission Submission to the Competition Policy Review’ (25 June 2014).

<sup>3</sup> Ibid p.77.

<sup>4</sup> Ibid p.78.

<sup>5</sup> Ibid p.79.

market power has either the purpose or the likely effect of substantially lessening competition in any market; and

- to introduce a new subsection (2) that obligates the courts, when applying the proposed ‘purpose or effect test’ in s46(1), to balance pro-competitive factors such as “enhancing efficiency, innovation, product quality or price competitiveness in the market”; against anti-competitive factors such as “preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market”.

### **3 Discussion of the HP proposal**

This section firstly looks at whether the tests of substantially lessening competition (“SLC tests”) that apply in sections 45 and 47 of the Act are a useful guide for s46. Secondly, it examines whether the HP proposal is more consistent with the U.S. law against monopolisation than the existing s46. Thirdly, a hypothetical example is developed in an attempt to show that the proposal may lead to overreach.

#### **3.1 Nearby sections in the Act**

The ACCC has noted that s45 (anti-competitive arrangements) and s47 (exclusive dealing) use a test of whether the challenged conduct has the purpose, effect or likely effect of substantially lessening competition, and greater internal consistency would be achieved if a similar SLC test were used in s46.<sup>6</sup> However, this comparison with the test in s46 is not necessarily pertinent. Sections 45 and 47 mostly involve agreements between firms. S45 addresses horizontal agreements to exclude certain firms by preventing or inhibiting the supply of certain goods to them, or purchases of certain goods from them by the parties to the agreement. S47 applies to certain vertical restraints, commonly (but not always) involving exclusive dealing arrangements between producers and wholesalers or wholesalers and retailers.<sup>7</sup> Because these provisions usually involve agreements between firms that restrict competition, they are unlike s46, which applies to the unilateral conduct of firms with substantial market power.

As Hovenkamp has observed:

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<sup>6</sup> Ibid p.78.

<sup>7</sup> Alex Bruce, *Restrictive Trade Practices Law in Australia* (LexisNexis Butterworths, 2010), p.133.

Antitrust is more hospitable to unilateral conduct than to conduct that results from an agreement between two or more firms. ... the difference in attitude is both clear and justified.<sup>8</sup>

The reason for the difference in attitude is that multilateral agreements between firms represent a much easier way for firms to achieve or maintain dominance and are therefore the greater threat to competition than is unilateral anticompetitive conduct. For this reason, the argument that the test in s46 should be amended to be more similar to the test applied in nearby provisions is not persuasive.

### **3.2 Prohibition of monopolisation in the USA**

Section 2 of the Sherman Act in the USA is a useful example against which s46 and the HP proposal can be compared. Although many have argued that it is far from ideal, it is an important comparator because the USA is a common law system like Australia, and interpretation of the Sherman Act has developed in over a century of case law.

Sherman Act s2 prohibits monopolising conduct, and does not prohibit monopoly that arises from other causes, such as superior efficiency or acumen, a superior product, mismanagement by competitors, or chance outcomes of risk-taking. Nor does it prohibit "monopoly pricing" by a firm with a substantial degree of market power.

Monopoly profits will result even if the firm's monopoly power is innocently acquired or maintained. However, the Sherman Act does not condemn the mere status of monopoly—more is required.<sup>9</sup>

And:

we do not condemn monopolists for the simple act of reducing output and raising price. Rather, we insist on a showing of unreasonable "exclusionary" conduct.<sup>10</sup>

This submission attempts to show, in section 3.3, that the HP proposal for s46(1) would in some (many?) cases prohibit a firm that innocently possesses market power from earning monopoly profits, which is very different to the current s46 and to the corresponding prohibition in the Sherman Act.

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<sup>8</sup> Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, 2008), p.108.

<sup>9</sup> M.A. Lemley & C. Leslie, *Antitrust*, (Thomson BarBri, 10th edn, 2004), p.37.

<sup>10</sup> Hovenkamp, above n 8, p.112.

The two main elements of the monopolisation offence in the Sherman Act are:

- possession of monopoly power in a relevant market
- purposeful and intentional action to acquire or maintain that power.<sup>11</sup>

"Monopoly power" in this context has a similar meaning to "a substantial degree of market power" in Australian competition law.<sup>12</sup> Thus the Sherman Act s2 has broadly similar elements to the current CCA s46(1). However, there are several important differences.

Firstly, there is no equivalent to the 'take advantage' test. There is a necessary connection between the two elements of Sherman Act monopolisation, so that the monopolist is shown to have exercised its market power to acquire or maintain the market power. However, *exercising* market power for an anticompetitive purpose is a less stringent test than the 'take advantage' test under s46—which usually requires that the corporation could or would not have engaged in the conduct absent its substantial market power.

Secondly, in the Sherman Act, the 'purpose' element requires that the monopolist "*deliberately and purposefully*" used its market power, precluding "inadvertent or accidental conduct", but "*a specific intent to monopolize is not required*".<sup>13</sup> This may be contrasted with Australian competition case law, where 'purpose' refers to "a substantial subjective purpose informing the minds of the decision-makers" of the relevant business.<sup>14</sup> A motive to exclude potential competitors, alone, is insufficient. The exclusionary purpose is the specific "end sought to be accomplished" by the conduct.<sup>15</sup> That is, a specific intent to accomplish one of the three proscribed purposes is required.

Thirdly, s2 of the Sherman Act also prohibits *attempts* to monopolise, which "permits some degree of control over exclusionary single-firm conduct in cases where the offending firm does not possess clear monopoly power".<sup>16</sup> In these cases it is necessary to prove the defendant had a specific intent to monopolise and "a

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<sup>11</sup> Lemley & Leslie, above n 9.

<sup>12</sup> George Hay & Rhonda Smith, 'Why Can't a Woman be More Like a Man?' - American and Australian Approaches to Exclusionary Conduct' (2007) 31(3) *Melbourne University Law Review* 1099.

<sup>13</sup> Lemley & Leslie, above n 9, p. 46.

<sup>14</sup> *ACCC v Cement Australia Pty Ltd* [2013] FCA 909, at [2997].

<sup>15</sup> *Ibid* at [3005].

<sup>16</sup> Lemley & Leslie, above n 9, pp. 52, 54.

dangerous probability of achieving monopoly power".<sup>17</sup> Neither the current, nor the HP proposed s46(1), has an equivalent prohibition.

Fourth, the kinds of conduct that would satisfy the second element of the Sherman Act monopolisation test—i.e. the kinds of business behaviour characterised as anticompetitive conduct—are not specified, unlike s46(1), which sets out three general proscribed purposes. In the USA, the anticompetitive nature of the conduct needs to be argued on a case-by-case basis—a process commonly referred to as the “rule of reason”. As part of this inquiry, it is necessary to prove harm to competition resulting or likely to result from the defendant’s conduct. Harm to competitors is not the same thing. Harm to competition is generally regarded as equivalent to harm to consumers.<sup>18</sup>

To prove conduct is anticompetitive, it is necessary to differentiate anticompetitive conduct from competition on the merits. The principle that harm to competition matters, not harm to competitors, is well established in Australian case law. However, there is no specific element in s46 under which this inquiry would naturally be undertaken. The proscribed purposes do not differentiate between harm to competitors and harm to competition. The special meaning of “take advantage” has in part developed to assist the courts to differentiate between anticompetitive conduct and competition on the merits.

The HP proposal has some similarities to U.S. practice, with regard to its emphasis on case-by-case assessment of whether there is likely to be a substantial lessening of competition. But an important difference is that it would prohibit conduct by a firm with market power if *either* it has an anticompetitive purpose, *or* it would substantially lessen competition. By contrast, s2 of the Sherman Act, as given effect by the courts, usually requires *both* a purpose (although not necessarily a specific intent to monopolize) *and* an anticompetitive effect, with the latter given particular emphasis (see section 4). Furthermore, the Harper proposal has no requirement that the defendant’s market power be used in carrying out the anticompetitive conduct, unlike the USA. For these reasons, there remains a substantial difference between and the HP proposal for s46 and relevant international practice as exemplified by U.S. antitrust law.

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<sup>17</sup> Ibid p. 54.

<sup>18</sup> J.D. Wright, 'Dissenting Statement of Commissioner Joshua D. Wright in the Matter of McWane Inc. et. al.; Docket No. 9351' (Federal Trade Commission, 2014).

The following table sets out the elements the HP proposal against the current s46 and against s2 of the Sherman Act.

**Table: Elements of s46 (actual & proposed) compared with Sherman Act s2**

<i>Elements</i>	<i>Current s46(1)</i>	<i>Sherman s2</i>	<i>Harper's s46(1)</i>
Market power test:			
• possesses 'monopoly power' or a 'substantial degree of power' in a market	Yes	Yes	Yes
• <i>or</i> , a dangerous probability of achieving monopoly power (attempting)	No	Yes	No
Use or "take advantage" of market power:			
• use	Yes	Yes	No
• "take advantage"	Yes	No	No
Purpose Test:			
• conduct is anticompetitive	Yes* (3 statutory purposes)	Yes (Rule of reason)	Yes** (SLC test)
• purpose or intent	Yes (specific purpose)	Yes (general purpose)	Yes**

\* The three proscribed purposes in the current s46(1) do not differentiate between conduct that harms competition and conduct that harms competitors, but relevant precedent focuses only on the former;

\*\* In the HP proposal only one of the two elements listed here under heading Purpose Test is required. That is, either the conduct is anticompetitive or there is purpose or intent.

### 3.3 An example of possible overreach

This section is relevant especially to question 2: *What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?*

As previously observed, a business that acquires market power through legitimate 'competition on the merits' and engages in monopoly pricing (i.e. sets prices significantly above the competitive level) is not condemned in U.S. antitrust law. In the EC, monopoly pricing can, in principle, represent an abuse of dominance, however, Gal argues that the "rule against excessive pricing ... has very little practical value in Community institutions."<sup>19</sup>

<sup>19</sup> Michal Gal, 'Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?' (2004) *Antitrust Bulletin*, pp. 20-21.

Competition law recognises that the pursuit of high returns through the attainment of market power is a legitimate goal of firms competing on the merits and a key driver of competitive activity which competition law seeks to foster.

Monopoly pricing creates incentives for firms to compete and invest in cost-reducing or welfare-enhancing products, services or processes that might enable them to gain a comparative advantage and achieve a monopoly position to enjoy its fruits. Limiting the profitability of monopolists that achieved their position solely by fair competition distorts the incentives of firms to become more efficient. The effect might be impaired innovative performances, low levels of research and development, and productive inefficiency. The question is, of course, how significant this disincentive effect is likely to be.<sup>20</sup>

It is also recognised that antitrust law is not intended to place courts in the role of regulatory agencies with respect to the prices of firms with market power, as Hovenkamp has emphasised:

A government agency regulating a public utility, such as an electric power company, might supervise the firm's prices or its decisions to enter into new markets or develop new technologies. But antitrust views firms as "regulated" mainly by the market. Failure to preserve this distinction between regulation and competition has explained many of the failures of §2 policy.<sup>21</sup>

Inconsistently with this established competition law policy, under the HP proposal, monopoly pricing would appear to be prohibited if it substantially lessens competition in a related market.

Consider the following example of a firm that establishes a new product in a market, and ultimately gains a substantial degree of market power through superior product or acumen, that is, it acquires market power legitimately. Consider a corporation that establishes a new private hospital in a region previously without a local hospital, where residents previously travelled a long distance for hospital services. The new product is unambiguously welfare enhancing, because consumers can still make their previous choices, so none are worse off, but some are better off because they prefer to use the local hospital. At some stage, *several years later*, demand conditions are such that the hospital corporation finds it has market power and can raise price above its minimum supply price (i.e., the price it would charge if the local market were effectively competitive). Although some customers may switch to using the

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<sup>20</sup> Ibid p.13.

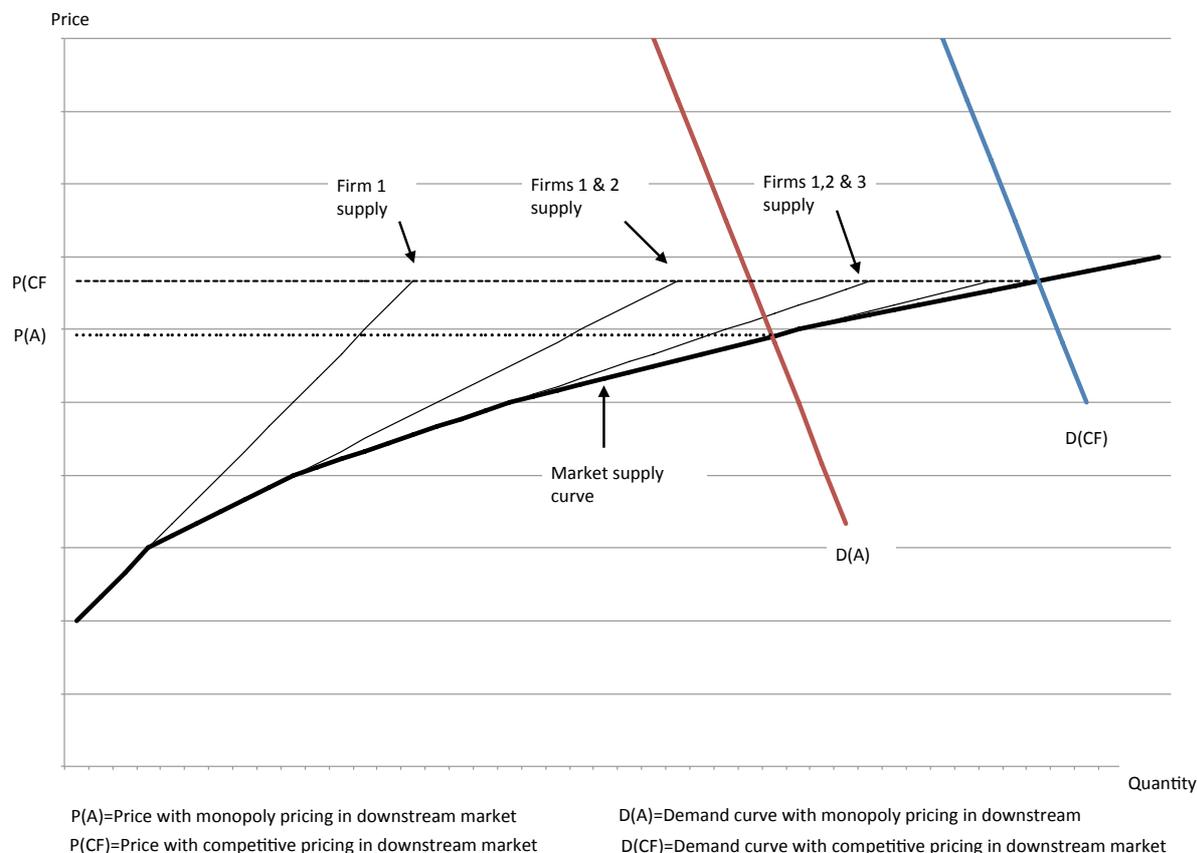
<sup>21</sup> Hovenkamp, above n 8, p. 151.

services of more distant hospitals, demand is sufficiently inelastic that the local hospital prices can be profitably increased above the competitive level.

For the purposes of this example, there is a local industry that supplies inputs to the hospital, for example, industrial scale laundry services, and these input suppliers have no other significant local customers. When the hospital raises its prices to maximise its profits, and the demand for its services reduces, this decreases the demand for the input.

The market for the upstream input is shown in the following diagram, under certain assumptions. The suppliers of bulk laundry services are assumed to have differing degrees of efficiency—a common assumption in empirical analysis.<sup>22</sup> Here the differences in efficiency are shown as differences in the intercepts of their individual supply curves. Otherwise, the supply functions are assumed to be linear with equal slope. The diagram shows the aggregation over individual suppliers to derive the aggregate supply function for the input.

**Figure: Effect of Monopoly Pricing on Concentration in Input Market**



<sup>22</sup> Peter Davis & Eliana Garces, *Quantitative Techniques for Competition and Antitrust Analysis* (Princeton University Press, 2010), pp. 19-21.

The diagram shows the demand function for the input when the hospital set the price of its services above the competitive price,  $D(A)$ , and in the counterfactual case where the hospital charges the competitive price,  $D(CF)$ . In the “actual” scenario, with downstream monopolistic pricing, there is a higher degree of concentration in the input market, partly because there are fewer suppliers than in the counterfactual case, and partly because, when demand contracts the less efficient suppliers incur a greater proportion of the contraction, and the most efficient supplier is relatively less affected, causing more disparity in market shares. In this hypothetical example, when the hospital engages in monopoly pricing, it results in greater concentration and arguably a lessening of competition in the upstream bulk laundry services market.

This example shows that even though the hospital corporation’s market power was legitimately acquired, the exercise of its market power to charge a higher price than it would under effective competition may have the effect of substantially lessening competition in a related market. It would seem to be in breach of the HP’s proposed s46, because it has a substantial degree of market power, and it has engaged in conduct that substantially lessens competition in a market, compared to the counterfactual case of competitive pricing. However, as previously shown, it would not have liability under U.S. law because it has not engaged in monopolisation. Nor would it have liability under the current s46 because it has not acted with a proscribed purpose.

This example seeks to show that the HP proposal for s46 is likely to be broader in its application than the comparable U.S. law, and this aspect of the proposal would have the potential to stifle competitive and innovative activity.

#### **4 Discussion of the elements of s46**

This section discusses the elements of s46 and identifies specific shortcomings and amendments to remedy them. Since the HP and the ACCC did not propose any change to the requirement that a corporation must have a substantial degree of market power in a market before it comes within the scope of s46, this aspect isn’t in contention and therefore not discussed. This section discusses the following topics:

- (1) Section 4.1 considers whether an SLC test is needed in s46. It also considers whether some form of effects test is needed, without addressing the specific form of the effects test.

- (2) Section 4.2 discusses the ‘take advantage’ element.
- (3) Section 4.3 addresses the ‘purpose’ element, including whether it should be broadened to more clearly encompass objective purpose as well as subjective purpose.
- (4) Section 4.4 discusses the HP proposal to remove the proscribed purposes in paragraphs (a), (b) and (c) of s46(1).
- (5) Section 4.5 considers the alternative ways in which an effects test could be introduced, including: whether the purpose element should be retained on its own (more clearly encompassing objective purpose); whether the purpose and effect elements should both be necessary elements for the misuse of market power; or whether, as the HP proposes, they should be alternatives.
- (6) Section 4.6 addresses the HP’s proposed s46(2).
- (7) Section 4.7 discusses whether any amendment to s46 is needed to address “attempting” to monopolise—i.e., anticompetitive conduct by firms that have not yet obtained a substantial degree of market power, but have a dangerous likelihood of attaining it as a result of the anticompetitive conduct.

#### **4.1 Is “substantially lessening of competition” needed?**

This section is relevant to question 8: *Given the understanding of the term ‘substantially lessening competition’ that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?*

The Harper Panel’s proposal to include the terms “substantially lessening competition” in s46 applies to both the purpose or effects elements, and as such it can be considered independently of the proposal to include an effects test as an alternative to the purpose element. This section considers whether a “substantially lessening competition” requirement should be introduced into s46(1), and whether in principle there should be some form of effects test. However, the options for introducing an effects test are considered in a later section.

According to Stewart, the issues that have primarily “vexed legislators, courts and commentators” about s46 are the complexity of the economic concepts and the “difficulty in distinguishing anticompetitive conduct from competitive conduct”.<sup>23</sup> Bruce observes that “it is not an easy task to distinguish between aggressive but legal

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<sup>23</sup> Ian B. Stewart, *The Misuse of Market Power in Australia* (Kindle, 2013), preface.

conduct that has the effect of damaging or even eliminating a competitor, and illegal anti-competitive uses of market power to achieve the same goal.”<sup>24</sup>

The elements of s46 only make this distinction in part. The prohibition only applies to conduct with one of the proscribed purposes carried out by a firm with a substantial degree of market power that relies on its market power when engaging in the conduct. This set of requirements reflects the premise that conduct with such a purpose carried out by a firm without market power, or without using market power, is unlikely to be detrimental to competition. Only if a firm uses market power could the impugned conduct have the effect of harming competition. Otherwise the conduct would be categorized as ordinary competition, which is by nature ruthless. The Act aims to protect such competition as being in the interests of consumers.<sup>25</sup>

However, this leaves a question regarding whether all conduct with a proscribed purpose, engaged in by a firm with a substantial degree of market power, and using that power, is necessarily anticompetitive. This is not entirely clear. For instance, Salop has criticized the use of market power proxies as indicators of the likelihood of anticompetitive effects.<sup>26</sup> He argues:

In a first principles economic analysis of exclusionary conduct, proof of anticompetitive effect generally involves proof of *both* injury to competitors (“power to exclude competitors” or “raising rivals’ costs”) and injury to consumers (“power over price”).<sup>27</sup>

Both questions relate to market power. The first question requires proof that the defendant “had the power to exclude competitors” and used that power to do so, and the second question requires proof that consumers were injured.<sup>28</sup> S46 appears to involve only the first of these two inquiries. The second inquiry, namely whether consumers were injured (which is generally taken to be synonymous with whether competition has been harmed), is lacking, at least in a formal sense.

Australian courts have not always found the elements of s46 to be fully sufficient to separate anticompetitive conduct from legitimate competition.<sup>29</sup> For example in

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<sup>24</sup> Bruce, above n 7, p.105.

<sup>25</sup> Stewart, above n 23.

<sup>26</sup> Stephen Salop, 'The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium' (2000) 68(1) *Antitrust Law Journal* 187, p.192.

<sup>27</sup> *Ibid* p.192 (italics added).

<sup>28</sup> *Ibid* pp. 187-202.

<sup>29</sup> In this submission the terms “legitimate competition” and “competition on the merits” are used interchangeably.

relation to predatory pricing, McHugh J asked in *Boral Besser Masonry Ltd v ACCC* (hereafter “*Boral*”):

Does s46 of the Act distinguish between vigorous competition through pricing and anti-competitive pricing? If so, on what basis does s46 distinguish between the two types of conduct?<sup>30</sup>

In *ACCC v Pfizer Australia Pty Ltd*, the court noted:

One of the central difficulties inherent in s 46 is well recognised, namely the tension between pursuing conduct for the legitimate commercial objective of being competitive as opposed to the proscribed objectives.<sup>31</sup>

It is well established, from the overall object of the Act, that s46 has the purpose of protecting competition and not competitors. However, the proscribed purposes in paragraphs (a) to (c), while assisting to delineate the types of conduct that are prohibited, do not appear to be sufficient to distinguish between anticompetitive conduct and competition on the merits, in part because they are limited to addressing the effects on competitors, without also addressing the effects on competition. Consequently, the courts have needed to over-rely on the ‘take advantage’ element, which does not appear to be well designed to distinguish between legitimate forms of competition and anticompetitive practices. This last point is developed further in the next section.

S46 is essentially a *per se* prohibition,<sup>32</sup> i.e. based on the form of the conduct without necessary regard to the effects on competition. As we have seen, this is inconsistent with the USA practice. The OECD has noted in relation to the enforcement of competition laws against the abuse of dominance, that international experience suggests form-based and effects-based approaches each have strengths and weaknesses, however, the OECD argues that it is better to avoid pure form-based or pure effects-based approaches because “[e]ither approach, driven to excess, produces unattractive results”.<sup>33</sup> It would be better to combine elements of the two approaches.

If s46 is to adequately distinguish between anticompetitive conduct and competition on the merits it needs to be supplemented with a requirement for the courts to

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<sup>30</sup> *Boral Besser Masonry Ltd v ACCC* [2003] HCA 5; 195 ALR 609, at [204].

<sup>31</sup> *ACCC v Pfizer Australia Pty Ltd* [2015] FCA 113, at [57].

<sup>32</sup> Bruce, above n 7, p.106.

<sup>33</sup> OECD, 'Competition on the Merits' (Policy Roundtables, DAF/COMP(2005)27, 2005), p.10. The “form-based” approach here essentially means that certain forms of conduct are prohibited, whereas an effects-based approach relies on a case-by-case assessment of the effects of the conduct to determine its illegality.

evaluate whether the conduct in question is likely to harm competition. That is, it should be supplemented with the criterion of substantially lessening competition. It also suggests that the effects of conduct on competition are relevant considerations, in addition to purposes.

### *Conclusion*

The terms “substantially lessening competition” *should* be incorporated into s46(1) to effectively require that conduct with a proscribed purpose must also be anti-competitive conduct—i.e. it harms consumers in the long run. This would assist the courts to ensure that only anticompetitive conduct is captured and not legitimate competition. Furthermore, some test of whether the effects of the conduct are likely to be anticompetitive should also be included, to ensure that a combination of form-based and effects-based considerations are adequately taken into account.

## **4.2 Take advantage**

This section addresses questions 3, 5 and 12: *Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition? Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour? If mandatory factors were adopted, what should those factors be?*

A key concern of the ACCC is with the take advantage element. However, this element can assist the courts to differentiate between legitimate competitive conduct, which may be aggressive, but is in the wider interest of consumers, from conduct that inhibits or weakens competition. Nevertheless, the interpretation of ‘take advantage’ by the courts, and related to this, the interpretive subsection (6A), have shortcomings at present.

In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (hereafter “QWI”) the High Court said the “phrase ‘take advantage’ in s.46(1) does not require a hostile intent inquiry” and does not mean that the use of the market power must be “morally or socially undesirable”.<sup>34</sup> In *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (hereafter “Melway”) the Court said s46 “requires, not merely the co-existence of market power, conduct and proscribed purpose, but a connection such that the firm

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<sup>34</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1989] HCA 6; (1989) 83 ALR 577; ALR pp. 584 & 587.

whose conduct in question can be said to be taking advantage of its market power.”<sup>35</sup> There must be a “sufficiency of the connection between the market power and the conduct complained of” and usually “a causal connection is required”.<sup>36</sup> In *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* the court observed that “[t]here must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power”.<sup>37</sup>

Within these interpretations there has been a tension in relation to the required nexus between market power and the impugned conduct. In *QWI* the High Court effectively introduced a ‘counterfactual approach’, which involves testing whether the defendant *could* have engaged in the alleged anticompetitive conduct without its substantial market power. And similarly, in *Rural Press Ltd v ACCC* (2003) ATPR 41-965; [2003] HCA 75 the High Court adopted the same test.<sup>38</sup> Here ‘take advantage’ is interpreted to mean that a substantial degree of market power is a necessary condition for the conduct even to take place. On the other hand, in *Melway* the Court suggested a less demanding test could be employed:

in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. ... S 46 would be contravened if the market power which a corporation had made it easier for the corporation to act for the proscribed purpose than otherwise would have been the case.<sup>39</sup>

Various interpretations of ‘take advantage’ are reflected in subsection (6A), enacted in 2008. This subsection states that it “does not limit the matters to which the court may have regard” but indicates that:

... the court may have regard to any or all of the following:

- (a) whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;

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<sup>35</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) ATPR 41-805; [2001] HCA 13; 178 ALR 253; at [44].

<sup>36</sup> Bruce, above n 7, p.119, quoting Jacobsen J in *Pacific National (ACT) Ltd v Queensland Rail* (2006) ATPR (Digest) 46-268; [2006] FCA 91 at [1024].

<sup>37</sup> *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) ATPR 41-196; 111 ALR 631; ALR p.631.

<sup>38</sup> *Rural Press Ltd v ACCC* [2003] HCA 75; (2003) ATPR 41-965. Stewart observes, in this context, that the “courts have used either could or would, without distinction in meaning”; Stewart, above n 23, ch.17.

<sup>39</sup> *Melway*, above n 35, at [53].

- (b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
- (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;
- (d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

Paragraph (c) reflects the 'counterfactual approach'; items (a) and (b) codify the other tests of 'take advantage' previously suggested by the courts; while item (d) was entirely new and quite vague. Bruce has commented that the 'counterfactual approach' in item (c) imposes "a very high threshold" to establish that conduct takes advantage of market power.<sup>40</sup>

The enactment of (6A) did nothing to reconcile the different, and potentially inconsistent, principles or settle on a preferred approach to testing whether conduct takes advantage of market power. Perhaps for this reason the enactment of s46(6A) seems to have had little influence on the interpretation of 'take advantage' by the courts. For example, although the interpretation of 'take advantage' was considered in detail in *ACCC v Cement Australia Pty Ltd*, there is no reference at all to subsection (6A) in that judgment. The court adopted the 'counterfactual test' based on previous High Court cases:

In examining the evidence, I ask whether a profit maximising firm operating in a workably competitive market could in a commercial sense profitably engage in the conduct in question having regard to the business reasons ...<sup>41</sup>

In *ACCC v Pfizer Australia Pty Ltd* [2015] FCA 113, the court adopted the same principle, namely "whether the corporation would have engaged in the conduct under scrutiny if it did not have that power",<sup>42</sup> which is consistent with paragraph (c) of subsection (6A).

S46(6A) has several important shortcomings. Firstly, in regard to the 'counterfactual test' in paragraph (c), Bruce has observed:

This version of the counterfactual test involves a *very high threshold*. It effectively means finding that the conduct alleged to breach the Act is *only possible* because of a corporation's substantial degree of market power.<sup>43</sup>

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<sup>40</sup> Bruce, above n 7, pp. 111-112.

<sup>41</sup> *ACCC v Cement Australia Pty Ltd*, above n 14, at [1899].

<sup>42</sup> *ACCC v Pfizer Australia Pty Ltd*, above n 31, at [315].

<sup>43</sup> Bruce, above n 7, p.113.

It may be added that an inquiry into whether it is *possible* for a corporation without a substantial degree of market power to engage in the same conduct is not necessarily equivalent to an inquiry as to whether the conduct is anticompetitive or represents genuine competition.

A second shortcoming is the inclusion of paragraph (d), which as Stewart observes, is an “anomalous and intermediate test of whether conduct is related to market power, without specifying whether a causal connection between the two is necessary”.<sup>44</sup> A third shortcoming is that the function and status of section (6A) is unclear because a court can have regard to any or all of its elements, or none of them, and is not limited in adopting different considerations.

### *Conclusion*

The ‘take advantage’ test should be retained, as it assists the courts with the difficult task of distinguishing between anticompetitive conduct and genuine competition. It is also consistent with the U.S. practice that, for conduct to be proscribed, the firm must be exercising market power when it engages in the anticompetitive conduct. However, the ‘take advantage’ element should not be relied on as the only, or primary, means of distinguishing between anticompetitive conduct and legitimate competition. As concluded in the previous section, an amendment to s46 is warranted to clarify that conduct with a proscribed purpose should be of a nature that substantially lessens competition.

Given such a change, a less stringent standard should be used for the take advantage test. To implement the change to the take advantage test, subsection (6A) should be amended to:

- remove paragraph (c), because it reflects a very high threshold, and instead rely on paragraphs (a) and (b)
- remove the anomalous paragraph (d), and
- clarify the status of the criteria in paragraphs (a) and (b). Rather than being matters that the court can, if it chooses, have regard to, it should be necessary that at least one of the criteria is met.

### **4.3 Purpose**

This section addresses question 6 in part: *Would including ‘purpose, effect or likely effect’ in the provision better target behaviour that causes significant consumer detriment?*

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<sup>44</sup> Stewart, above n 23, Preface.

The ACCC argued that ‘purpose’ is difficult to prove, although Stewart observes that: “[t]he purpose element usually involves little difficulty in s 46, compared to the vexing issues of market power and taking advantage.”<sup>45</sup> In the HP proposal, proving anticompetitive ‘purpose’ would remain as an alternative to proving anticompetitive effects. This section examines whether the purpose element should be retained in s46, as an essential or optional element, and whether the ‘purpose’ should refer primarily to subjective purpose or also explicitly encompass objective purpose. Again, U.S. antitrust law is used as a guide.

### *The USA’s Rule of Reason*

The USA’s “rule of reason” test has its classic statement in *Chicago Board of Trade* (1918):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences.<sup>46</sup>

However, the scope of rule of the reason investigation has been strongly criticised by Hovenkamp:

Justice Brandeis’s version of the rule of reason created one of the most costly procedures in antitrust practice. Under it courts have engaged in unfocused wide-ranging expeditions into practically everything about the business of large firms in order to determine whether a challenged practice is unlawful.<sup>47</sup>

Although there is a real risk of casting the net too wide in a rule-of-reason analysis, it is important for the present purpose that it encompasses an appraisal of *both* the effects and purposes of the conduct. The purpose of the conduct is not sufficient in itself to determine the legality or illegality of the conduct, but nor can an assessment of whether the conduct has an anticompetitive effect be entirely divorced from the

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<sup>45</sup> Stewart, above n 23, ch.21 para. 3.

<sup>46</sup> *Chicago Board of Trade v United States*, 246 U.S. 231 (1918), at 238.

<sup>47</sup> Hovenkamp, above n 8, p.105.

purpose of the conduct. It is necessary to understand both the effects of the conduct on competition and the intent of the corporation when determining whether the conduct is anticompetitive.

There is contrasting view that subjective intent evidence is irrelevant in competition law cases—a view especially associated with the Chicago School in the USA who regard intent evidence as virtually devoid of probative value in separating anticompetitive conduct from competition on the merits, and consider only effects evidence as relevant.<sup>48</sup> In a jury system for civil law disputes, such as the USA, subjective intent evidence can easily be misinterpreted or given undue weight. Notwithstanding this view, intent evidence remains legally relevant in U.S. antitrust cases, and properly evaluated can be useful for interpreting facts and predicting outcomes.<sup>49</sup>

The Chicago School view correctly identifies an inherent weakness of subjective intent evidence in competition law cases. As Hylton observed:

Under the subjective approach to specific intent, courts analyze the statements of corporate officers and internal corporate memoranda for evidence of a desire to suppress competition. This sort of evidence is unreliable.<sup>50</sup>

Although intent evidence only has a secondary role in s2 cases, which only require evidence of 'wilful' acquisition of power, and give primary attention to the likely anticompetitive effects of challenged conduct, the U.S. courts also tend to give weight to objective intent:

When the behavior is predictably anticompetitive, the courts typically infer improper intent from the conduct itself. ... the more blatantly anticompetitive the conduct, the more likely the court infers the requisite anticompetitive intent from the conduct itself.<sup>51</sup>

Hylton argues that *objective* evidence of intent to damage competition reduces the probability of false convictions for monopolisation.<sup>52</sup> Under this standard, a greater onus is placed on the defendant to demonstrate the economic efficiency of the

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<sup>48</sup> Maurice Stucke, 'Is Intent Relevant?' (2012) 8(4) *Journal of Law, Economics & Policy* 801, p. 807.

<sup>49</sup> Ibid pp. 815, 857.

<sup>50</sup> Keith Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, 2003), p.192.

<sup>51</sup> Stucke, above n 48, p. 856.

<sup>52</sup> Hylton, above n 50, p.192.

challenged conduct. The same author also argues that modern U.S. case law has moved towards requiring proof of specific objective intent to monopolise.<sup>53</sup>

#### *Subjective and objective purpose*

In s46, 'purpose' has been defined in *QWI* as "an intent to achieve the result spoken of in each of the paragraphs in s 46(1)."<sup>54</sup> Here intent refers to the subjective thinking or state of mind of a director, employee or agent of the corporation engaging in the conduct (s84(1) of the Act). That said, s46(7) permits the court to infer the purpose from other attendant circumstances and courts have sometimes found it more useful to analyse the relevant facts of the case and infer from them the likely purpose of the conduct.<sup>55</sup>

The courts have observed the serious limitations to the usefulness of subjective intent evidence when seeking to differentiate anticompetitive conduct from legitimate competition. For example, in *Boral* the Court approvingly noted the opinion of Judge Easterbrook in the USA that in predatory pricing cases under the Sherman Act:

... to fix upon intent does not assist in separating beneficial aggressive competition (where prices are set by reference to the market) from attempted monopolisation, that it invites juries to penalise hard competition, and that a "greed-driven desire to succeed" over rival firms is neither a basis of liability nor a ground for the inferring of the existence of such a basis.<sup>56</sup>

Since evidence of subjective purpose, alone, does not provide a reliable basis for concluding that conduct is anticompetitive, s46 cannot be fully effective without either modifying the purpose element to better identify anticompetitive purpose, or augmenting it with an assessment of effects, or both.

One way of approaching this problem is to give greater weight to the notion of objective purpose. Bruce has observed that:

while it is the corporation's subjective purpose to bring about one of the results in s 46(1) that must be established, that subjective purpose can be inferred from an *objective* examination of the conduct itself and the way in which it was implemented. ... It is rare that direct evidence in the form of internal corporate communications that directly disclose the subjective intent of that corporation is found. In most cases, the court is invited to infer the existence of the purpose

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<sup>53</sup> Ibid p.202

<sup>54</sup> *QWI*, above n 34, ALR p. 602.

<sup>55</sup> *ACCC v Australian Safeway Stores Pty Ltd* [2003] FCAFC 149; 198 ALR 657, at [341].

<sup>56</sup> *Boral*, above n 30, at [195] per Gaudron, Gummow & Hayne JJ.

from an objective consideration of the circumstances of the corporation's conduct.<sup>57</sup>

The notion of *objective purpose* is to focus, not on the state of mind or subjective intent of the party, but on what a reasonable person, given all of the circumstances, would think the intention of the party was. This approach to purpose could usefully be given a much greater role in s46.

### *Conclusion*

At present the purpose element of s46(1) means the subjective purpose of the parties, but the notion of objective purpose could usefully be given a much greater role in s46. This would involve directing the court to consider the effects of the conduct as part of the assessment of the objective purpose of the conduct. A greater focus in objective purpose rather than subjective purpose should ameliorate some of the ACCC's concerns relating to the 'purpose' element. It would be less reliant on assembling evidence of the state of mind of the defendant, and would permit a greater focus on the effects that would reasonably be anticipated from the conduct.

To give effect to this suggestion, it is proposed that s46(7) be retained and amended to allow the purpose of a corporation to be inferred from the consequences, including the effects or likely effects on competition, that would reasonably be anticipated from the conduct which is found to take advantage the corporation's substantial degree of market power. Other drafting amendments may be needed to simplify and clarify subsection (7) as detailed in section 5.

## **4.4 Specific proscribed purposes**

This section addresses question 9: *Should specific examples of prohibited behaviours or conduct be retained or included?*

As previously stressed (see section 3.3), in U.S. antitrust law, attaining a monopoly through superior acumen, efficiency, innovation, and so on, is not prohibited, and nor is monopoly pricing by a firm that acquires market power in such ways. In part this reflects the roots of the Sherman Act in the common law,<sup>58</sup> and it also reflects recognition that the attainment of market power is a legitimate goal of businesses that are competing on the merits. Another reason for this policy is the high cost and

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<sup>57</sup> Bruce, above n 7, pp. 120-1.

<sup>58</sup> Andreas Papandreou & John Wheeler, *Competition and its Regulation* (Prentice Hall, 1954).

impracticality of courts regulating monopoly prices in a way analogous to a public utility regulator.<sup>59</sup>

In section 3.3 it was argued that the Harper Panel's proposal has the potential to significantly broaden of the scope of the s46, because it would not contain any distinction between anticompetitive exclusionary conduct, and monopoly pricing by firms that have acquired market power legitimately. This potential for overreach is related to the proposed removal of subparagraphs (a), (b) and (c), which limit the types of conduct that may give rise to liability. The proposal to prohibit any conduct of a firm with market power that has the effect (or purpose) of substantially lessening competition is too generic, and carries with it the risk of encompassing conduct that should not be prohibited. Monopolisation is a more specific activity than lessening competition in a market. Genuine competitive activity can affect competition in other markets, and could even cause other markets to disappear. In short, the HP proposal lacks a focus on the kinds of conduct that are likely to be anticompetitive.

#### *Conclusion*

Paragraphs (a), (b) and (c) should be retained because:

- although insufficient in themselves to differentiate between anticompetitive conduct and competition on the merits, they assist to delineate the kinds of conduct that s46 seeks to prevent
- they provide greater certainty to businesses about the scope of the section, and
- may assist to better focus issues in litigation.

Unless subparagraphs (a), (b) and (c) are shown to be too narrow, they do not need to be amended.

#### **4.5 Options for taking effects into account**

This section addresses questions 10 and 7: *An alternative to applying a 'purpose, effect or likely effect' test could be to limit the test to 'purpose of substantial lessening competition'. What would be the advantages and disadvantages of such an approach? ... could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?*

Section 4.1 concluded that "substantially lessening competition" should be included in s46(1) as a qualification to subparagraphs (a), (b) and (c), and also that some form

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<sup>59</sup> Gal, above n 19, pp. 18-19.

of effects assessment is needed. This section considers three alternative formulations of the “effects test”:

- (a) As proposed by the HP, including terms such as: “has the purpose, or would have or be likely to have the effect, of substantially lessening competition”.<sup>60</sup>
- (b) To require both the purpose *and* effects elements to be proved. That is, to refer to “purpose, *and* ... effect”.
- (c) To rely on the purpose element alone, but to provide greater clarity that it can refer to the objective or subjective purpose of the conduct.

These alternatives need to be considered within the overall balance of the other changes proposed to s46.

Under the HP proposal, if the plaintiff’s case is based on proving anticompetitive effects, then evidence of anticompetitive purpose would be unnecessary, and defences based on lack of anticompetitive purpose would not be relevant. Although defences based on an alternative efficiency purpose may be weighed within the overall effects, the fact that an efficiency goal was being pursued rather than an anticompetitive purpose would only matter if those efficiencies outweighed any harm to competition and consumers. While in some respects this may seem desirable, there are important risks of:

- imposing liability for conduct that has an inadvertent or accidental anticompetitive effect, which could not reasonably have been foreseen
- errors due to excessively relying on effects assessments that may be subject to considerable estimation error, especially when those effects are in the future and need to be forecast.

The risk of litigation that is heavily focussed on effects assessments that are complex and subject to uncertainty and potential for error could conceivably give rise to a source of uncertainty for businesses, and might thereby deter vigorous competition on the merits. If so, this would not be consistent with the object of the legislation. On the other hand, the risks associated with excessive reliance on effects estimates alone may cause the courts to require very high levels of confidence for effects analysis, which may be difficult to meet, particularly when estimating future effects, and if so, little would be achieved by the amendment.

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<sup>60</sup> I. Harper, P. Anderson, S. McCluskey & M. O’Byrne ‘Competition Policy Review: Final Report’, (Australian Government, March 2015), p.513.

The second option, (b), would require both purpose and effect to be assessed, which would assist to deal with the first of the foregoing problems because, as previously observed, evidence of objective intent to damage competition tends to reduce the chance of false convictions. However, option (b) adds an additional mandatory element into s46(1), which may impose a greater burden on parties and the court in terms of the amount of evidence that needs to be submitted and evaluated in a typical s46 case. Since the relative amounts of evidence on intent and on the likely effects of conduct will vary from case to case, a requirement to prove both of those elements may significantly increase the difficulty of achieving convictions. It may also increase the cost and delays of litigation. Recall Hovenkamp's concerns, quoted earlier, about the costliness of "unfocused wide-ranging expeditions into practically everything" under the rule of reason. Although the costliness of trials should be balanced against the considerable potential costs of errors in judicial outcomes, this potential for greater cost and complexity is nevertheless an important issue for consideration.

Under option (c) the effects of the conduct on competition would need to be considered within the assessment of the purpose of the conduct. This option has some similarities to option (a), since in any specific case more or less attention may be given to intent or objective purpose (i.e. the effects reasonably anticipated), however both subjective and objective purpose elements would always remain relevant to discovering the 'purpose' of the challenged conduct. In this respect it is more like option (b), although with much more flexibility in terms of the importance that each of those two elements may take on in any given case.

Option (c) has the following advantages:

- By combining the assessment of purposes and effects, this approach also has the potential to reduce the risk of penalising conduct with anticompetitive effects that were not, and could not have reasonably been, anticipated—an advantage relative to option (a). This submission has quoted several opinions that suggest both effects and purpose are relevant considerations that should be taken into account in a unilateral monopolisation case. The HP proposal, option (a), may be lacking in this respect, since only one of these elements is required in any given dispute.
- It would not be as reliant on effects assessments as would litigation under option (a) in cases pleaded only on the effects or likely effects of the conduct. This may be an advantage when there is corroborative intent evidence. More generally, option (c) may reduce the burden of proof relative to option (a),

because under option (a) it would be necessary either to prove the purpose, or to prove the likely effect, since both are separate arms. Under option (c) the evidence of purpose and effect would be taken together to form an overall assessment of the objective purpose of the conduct.

- Option (c) represents a more incremental change to s46 compared to the other options. When policy options are complex and outcomes are uncertain with potentially large costs of errors, there is much to be said for making smaller changes and taking a stepwise approach to policy change.<sup>61</sup>

Although option (c) has several benefits relative to the other options, it does rely on the courts giving due attention to the effects of challenged conduct within an inquiry into the objective purpose of that conduct.

### *Conclusion*

How some kind of effects test should be implemented in s46 is a difficult question. Here an alternative to the HP proposal has been formulated which would rely on the purpose element alone, but would provide greater clarity that 'purpose' can refer to the objective purpose of the conduct. Under this alternative option, subsection (7) would be amended to include an explicit objective purpose test incorporating a consideration of the reasonably anticipated effects or likely effects of the conduct on competition. The courts would retain flexibility in evaluating the purpose of the conduct from subjective and objective evidence. In the remainder of this submission, this option for incorporating an effects test is put forward as the proposed option.

## **4.6 Proposed subsection 46(2)**

This section addresses question 12 in part: *Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?*

The Harper Panel's proposed s46(2) requires courts, when assessing whether specific conduct has the purpose or the effect or likely effect of substantially lessening competition (SLC) under s46 to have explicit regard to the balance of pro-competitive and anti-competitive effects. This proposed provision would be helpful to the courts and to litigants by elaborating on what is required as part of a 'substantially

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<sup>61</sup> See: Edward Woodhouse & David Collingridge, 'Incrementalism, Intelligent Trial-and-Error, and the Future of Political Decision Theory', in H. Redner (ed) *An Heretical Heir of the Enlightenment: Politics, Policy, and Science in the Work of Charles E. Lindblom* (Westview Pr, 1993).

lessening competition test'. It is also broadly consistent with the U.S. rule of reason test.

That said, there remains ambiguity in the substantially lessening competition test. There are two different counterfactuals that could potentially be used in the test:

- the state of competition immediately before the conduct occurred, or
- the state of competition that would likely have prevailed in the absence of the conduct.

The first of these two counterfactuals would be inadequate in the context of a monopolisation provision, because conduct aimed at maintaining market power, for example by preventing competitive entry, would not lessen competition compared to the situation before the conduct occurred. The second counterfactual is the one that should be applied. However, this is not sufficiently clear in the HP proposal. If the courts were to adopt the first counterfactual, this would have the unintended consequence of greatly narrowing the application of s46. To avoid this risk, it may be preferable to clarify the counterfactual against which the substantial lessening of competition is to be assessed.

#### *Conclusion*

The proposed s46(2), which provides guidance in relation to carrying out SLC tests, is supported. However, it should be revised to clarify that a substantial lessening of competition is to be determined by comparing the likely state of competition following the conduct against the likely state of competition absent the conduct.

#### **4.7 Attempting to Monopolise**

Unlike its U.S. counterpart, s46 may not necessarily apply to anticompetitive conduct designed to confer market power, engaged in by a firm not initially possessing a substantial degree of market power—or at least no an ability to raise prices above the competitive level. In the U.S., such conduct is classed as attempting to monopolise, and is prohibited if there is a specific purpose to monopolise and a dangerous probability of acquiring substantial market power. It is at least conceivable that anticompetitive conduct could be carried out by a firm not initially possessing substantial market power—at least in terms of pricing—but gaining power as a result of the conduct.

It is uncertain whether s46 extends to such circumstances. For example, in *Boral*, McHugh J observed:

Conduct that is predatory in economic terms and anti-competitive may not be captured by s46 simply because the predator does not have substantial market power when it sets out on its course to deter or injure competitors.<sup>62</sup>

On the other hand, in *QWI* the High Court noted that an ability to anti-competitively exclude competitors might itself be indicative of market power:

The term 'market power' is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner ... But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal ... The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices ...<sup>63</sup>

In *Boral*, Gleeson CJ and Callinan J observed that the success of the anticompetitive conduct, in terms of attaining the ability to raise prices, can also be indicative of market power. Specifically, they observed, in the predatory pricing context, that the possibility of recoupment "may be of factual importance" to market power in a given case. For example:

A finding that [the defendant] expected to be in a position, at the end of the price war, to recoup its losses by charging prices above a competitive level may have assisted a conclusion that it had a substantial degree of market power, depending on the other evidence.<sup>64</sup>

The same principle may apply to other forms of exclusionary conduct that, once successful in removing rivals, enabled the corporation responsible for that conduct to engage in monopoly pricing. This raises the possibility that market power, for the purposes of s46, need not necessarily be confined to the power of the corporation prior to engaging in the conduct. The ability to undertake exclusionary conduct and its success or prospective success in reducing the firm's pricing constraints, may also be relevant to an assessment of market power.

### *Conclusion*

It is not certain at this stage that s46 would not apply to conduct with proscribed purposes that would give rise a dangerous likelihood that the party engaging in the conduct would acquire the ability to engage in monopoly pricing afterwards. In light

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<sup>62</sup> *Boral*, above n 30, at [269].

<sup>63</sup> *QWI*, above n 34, ALR p.591.

<sup>64</sup> *Boral*, above n 30, at [130].

of this uncertainty, there does not appear to be a compelling basis for making amendments to s46 to address the issue of “attempting” to monopolise.

## 5 Summary of Recommended Amendments

This section addresses question 15. *Are there any other alternative amendments to the Harper Panel’s proposed provision that would be more effective than those canvassed in the Panel’s proposal?*

This section summarises the conclusions of the previous sections in terms of specific drafting suggestions.

1. In relation to s46(1):

- the words “substantially lessening competition” should be inserted
- the term “take advantage” should be retained
- paragraphs (a), (b) and (c) should be retained.

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of substantially lessening competition by:

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

2. An implication of retaining paragraphs (a), (b) and (c) in subsection (1) is that subsection (1A) should also be retained, with needed amendments.

(1A) For the purposes of subsections (1) ~~and (1AA):~~

- (a) the reference in paragraphs (1)(a) ~~and (1AA)(a)~~ to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
- (b) the reference in paragraphs (1)(b) and (c) ~~and (1AA)(b) and (c)~~ to a person includes a reference to persons generally, or to a particular class or classes of persons.

3. Section (6A) should be retained and amended to remove the ‘counterfactual approach’ in paragraph (c) and the anomalous paragraph (d), and to clarify the status of the remaining criteria such that one of the criteria must be met.

(6A) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court ~~may~~ must be satisfied that ~~have regard to any or all of the following:~~

- (a) ~~whether~~ the conduct was materially facilitated by the corporation's substantial degree of power in the market; or
- (b) ~~whether~~ the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
- (c) ~~whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;~~
- ~~(d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.~~

4. Subsection (7) should be retained and amended to make it clearer that the term ‘purpose’ in subsection (1) may be the objective purpose of the conduct. The following amendments are suggested.

(7) Without ~~in any way~~ limiting the manner in which the purpose of a person may be established for the purposes of this or any other provision of this Act, the purpose of a corporation may be taken to have taken advantage of its power for a purpose referred to in subsections (1) and (2) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference may be inferred from:

- (a) the conduct of the corporation or of any other person or from other relevant circumstances; or
- (b) the consequences, including the effects or likely effects on competition, that would reasonably be anticipated to follow from the conduct which is found to take advantage of the corporation's substantial degree of market power.

5. The following HP recommendations are supported:
- Removing subsections (1AAA), (1AA) and (1AB)
  - Minor amendments to (3A) and (3C)
  - Removing subsections (3D), (4A), (5) and (6).

6. The HP's proposed s46(2) is supported subject to the following revisions:

(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; and

(c) in each case the state of competition, or likely state of competition, following the conduct is to be compared against the likely state of competition absent the conduct.

## 6 Conclusion

This submission has sought to formulate an alternative option for amending the law relating to misuse of market power, with the aim of better balancing the risks of overreach (i.e. too great a risk of “false positives”) against the possible shortcoming of ineffectiveness (i.e. too great a risk of “false negatives”).

The Harper review of Australia's competition policy sets out an important policy agenda, which includes the recommendations relating to Part IV of the CCA. The last major inquiry into Part IV was the Dawson Review in 2003. It is appropriate that the CCA should continue to be periodically reviewed, and indeed, clause 5(6) of the *Competition Principles Agreement* (1995) indicates that legislation that restricts competition should be systematically reviewed *at least once every ten years*.<sup>65</sup> Some legislation incorporates within itself a requirement for periodic review, which is something that could be considered for the CCA. In any case, a period of five years after implementation of the substantial amendments to Part IV following from the Harper review may be a suitable timeframe to review the effectiveness of those changes.

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<sup>65</sup> Although the Act has the objective of promoting competition, Part IV regulates competitive conduct by restricting certain behaviour that is harmful to competition.