

ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION
SUBMISSION TO THE AUSTRALIAN GOVERNMENT OPTIONS TO STRENGTHEN THE
MISUSE OF MARKET POWER LAW CONSULTATION

1 Introduction and Purpose of submission

1.1 Introduction

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at <http://ibanet.org>.

1.2 Purpose of Submission

This submission to the Australian Government's Options to Strengthen the Misuse of Market Power Law consultation process (the **Review**) is intended to focus on only certain areas raised by the Review in its Issues Paper released on 11 December 2015 (the **Issues Paper**).

The Working Group is comprised of international antitrust practitioners from multiple jurisdictions around the world as well as practitioners from Australia. The Working Group is conscious of the range of issues raised in the Issues Paper and wishes to address only certain issues based on the Working Group's international and Australian experience in a manner that the Review will hopefully find constructive and helpful. The IBA has not commented on specific conduct (which it considers is better addressed by industry associations and Australian businesses) but has dealt with the specific elements of the proposed amendments from a comparative international perspective to assist the Review.

2 Key issues raised by the Review

2.1 Purpose versus effect

Summary: As currently drafted, s46 of the CCA prohibits persons with a substantial degree of market power from taking advantage of that market power for a prescribed anticompetitive purpose. If this prohibition is to be the subject of reform, the Working Group considers that prohibitions on misuse of market power should focus on conduct with a material anti-competitive effect which does or would adversely affect competition and the competitive process, rather than simply focusing on the purpose/aim or form of the conduct. The Working Group considers that conduct should only be prohibited if it is actually and objectively capable of appreciably affecting competition because this can normally be expected to harm consumer welfare. This means there needs to be some filter to separate aggressive procompetitive conduct from anti-competitive acts.

In different jurisdictions around the world, prohibitions against the 'misuse of market power' or the 'abuse of dominance' tend to focus on either the purpose or the effect of the impugned conduct. Australia and New Zealand focus on the purpose of the firm with market power in engaging in the relevant conduct whereas the EU and US have a slightly different approach, analysing whether or not the relevant conduct in question had or may have had an anti-competitive effect. However, while this broad distinction is helpful it is also an oversimplification of the process undertaken by antitrust agencies and the courts in those jurisdictions which adopt such an approach, because often an analysis of both effect and purpose/intent is undertaken, with purpose/intent often informing the effect analysis. In addition, in the EU, for example, certain types of conduct are presumed to infringe, without proof of anti-competitive effects (notably exclusivity clauses, rebates conditional on exclusivity, and so-called 'naked restraints').

The Working Group commented on the overseas position in response to the Harper Review. The position is set out again here in the context of the Government's Review.

(a) United States

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization. Under current law both offences require proof that the monopolist's acts had an anticompetitive effect sufficient either to obtain or maintain monopoly power. A finding of monopolization thus requires both the possession of monopoly power and the wilful acquisition or maintenance of that power through improper means, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.¹ The mere 'exploitation' of lawfully obtained monopoly power -- such as by charging high prices -- is not a violation absent predatory or exclusionary conduct that harms the competitive process.

In the United States 'unlawful monopolisation' cannot be established without an analysis of both the effect and the proposed justification for the impugned conduct. Under US law it is well established that the offence of unlawful monopolisation requires something more than mere proof of monopoly power. General intent to harm a competitor or obtain a dominant position is not enough to satisfy the wilfulness element absent predatory or anticompetitive conduct. Where a firm has a legitimate business purpose, wilfulness cannot be established. For example, conduct where a defendant merely desires to increase its profits or market share can be distinguished from conduct where the defendant is willing to absorb losses to drive its competitors from the market. In *U.S. v Microsoft Corp*² the court identified the following principles for analysing a monopolist's conduct:

- to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect'. That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice;
- the plaintiff must demonstrate that the monopolist's conduct has that alleged anticompetitive effect;
- if a plaintiff establishes a prima facie case of an anticompetitive effect, then the monopolist may proffer a 'pro-competitive justification' for its conduct. If the monopolist asserts a pro-competitive justification then the burden shifts back to the plaintiff to rebut this claim;
- if the monopolist's pro-competitive justification is un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the pro-competitive effect;
- in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary, the court's focus is upon the effect of that conduct,

¹ United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

² 253 F.3d 34 (D.C. Cir. 2001).

not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent that it helps the court understand the likely effect of the monopolist's conduct.

An application of the above factors means that unlawful monopolisation cannot be established without an analysis of both the effect and the proposed justification for the impugned conduct, having regard to the 'wilfulness' of the defendant's conduct in each case. Further, requiring plaintiffs to make an initial showing of harm helps to screen out non-meritorious cases, while requiring defendants to provide a non-pretexual justification enables a court to condemn patently anticompetitive conduct without having to engage in a complex balancing exercise.

The US antitrust authorities and courts have also considered a variety of other legal tests to help differentiate between economically efficient conduct and anticompetitive conduct, including the 'no economic sense' test,³ 'profit sacrifice' test⁴ and 'less efficient competitor' test,⁵ each of which has strengths and weaknesses. However, the Working Group notes that none of these have been approved by the US Supreme Court or accepted in full by the US antitrust authorities.⁶

(b) European Union

In Europe, there has been significant debate as to how the EU law on the misuse of market power – prohibition on abuse of dominance – contained within Article 102 of the Treaty on the Functioning of the European Union (**TFEU**) should be dealt with and this issue remains controversial.

Historically, there was concern that the Article was applied in an overly formalistic manner which could end up protecting particular (possibly inefficient) competitors rather than the competitive process. However, in recent years, the approach of the European Commission (**EC**) and European courts has moved towards focusing on whether conduct of a dominant business has (or would have) adverse effects on competition, with a particular focus on exclusionary conduct that forecloses equally efficient competitors.

This approach is reflected in the publication by the EC of guidance on enforcement priorities when selecting cases to investigate under Article 102 TFEU.⁷ When publishing its guidance the EC made it clear that its intention was to adopt 'an economic and effects-based approach to exclusionary conduct under Article 102 TFEU', that it is 'protecting competition and consumer welfare, not (individual) competitors who do not deliver to consumers' and that 'dominant companies should be free to compete aggressively as long as this competition is ultimately for the benefit of consumers'.⁸

³ The US Department of Justice (**DOJ**) has advocated the use of a no economic sense test, which asks 'whether, on the basis of information available to a firm at the time of the challenged conduct, the challenged conduct would have made economic sense even if it did not reduce or eliminate competition. The test condemns conduct only when its anti-competitive objective is unambiguous because the conduct would not have been undertaken 'but for' the prospect of obtaining or maintaining monopoly power'. Although the DOJ has advanced this test in a number of cases, no court has yet adopted it.

⁴ The profit sacrifice test is closely related to the 'no economic sense' test. One variant asks whether the defendant has sacrificed immediate profits as part of a strategy whose profitability depends on the recoupment of those profits through the exclusion of rivals.⁴ Although it has not specifically adopted this test, the Supreme Court has raised this question in refusal to deal cases. Another variant asks 'whether the allegedly anti-competitive conduct would be profitable for the defendant and would make good business sense even if it did not exclude rivals and thereby create or preserve market power for the defendant'.

⁵ Judge Richard A. Posner has proposed that an unreasonably exclusionary practice is one that is 'likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor'. Commentators and courts in the United States have found this test useful in evaluating bundled discounts or rebates.

⁶ Antitrust Modernization Commission, Report and Recommendations, April 2007, p.93.

⁷ Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

⁸ Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

The European courts have, over time, also started to adopt a similar approach to that outlined in the EC's guidance, with a focus on the effect of the conduct in question and whether it produces any actual or likely exclusionary effect. This is particularly the case when it comes to price-based exclusionary abuses such as predatory or discriminatory pricing, where the impact and effect of the conduct is more easily established than the infringing firm's intent or purpose. However, the courts retain a more or less per se approach for certain types of conduct, notably exclusivity clauses, rebates conditional on exclusivity, and so-called 'naked restraints'.

There are distinct merits to an approach that considers the effect of anticompetitive conduct rather than just its purpose:

- it targets conduct which is likely to have a detrimental effect on consumer welfare;
- allows anticompetitive and pro-competitive conduct to be distinguished on the basis of specific facts; and
- reduces the risk of chilling otherwise pro-competitive behaviour.

However, there are also potential downsides, particularly in that an effects-based approach can reduce certainty for businesses as it generates a need for self-assessment of the relevant conduct.

(c) Canada

In Canada, the relevant antitrust provision prohibits companies which 'substantially or completely control, throughout Canada or any area thereof, a class or species of business'⁹ from undertaking an 'anti-competitive act'¹⁰ where the effect of their conduct is to prevent or substantially lessen competition.¹¹ Section 79 of the Canadian Competition Act states:

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.

The inclusion of a requirement for an 'anti-competitive act' helps to provide a filter on the type of conduct that can be found to be a misuse of market power. This operates in a similar way to the 'take advantage' limb in the Australian legislation. The Canadian legislation specifically outlines in a non-exhaustive manner what is meant by an 'anti-competitive act'.¹²

⁹ Section 79(1)(a) of the Canadian Competition Act.

¹⁰ Section 79(1)(b) of the Canadian Competition Act. Section 78 of the same Act lists a number of examples of 'anti-competitive act'.

¹¹ Section 79(1)(c) of the Canadian Competition Act.

¹² Anti-competitive acts are set out in s78 of the Canadian Competition Act and relevantly include:

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

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

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

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

Further, when considering whether conduct is anticompetitive, the courts in Canada also must consider whether it was done in furtherance of a legitimate business objective. This business justification is seen not as a defence but as part of assessing the overriding purpose of the conduct. The Federal Court of Appeal has said that 'a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts.'¹³

(d) Singapore

In a similar fashion to Canada, the Singapore prohibition on abuse of a dominant position requires consideration of whether a dominant firm has used its dominant position in a way that amounts to an abuse.¹⁴ The Singapore Competition Act outlines a range of conduct that may constitute an abuse of dominance.¹⁵ In determining whether a firm has abused a dominant position, the Competition Commission Singapore (**CCS**) considers whether the dominant firm has used its dominant position in a way that amounts to an abuse.¹⁶ In this regard, there must be a nexus between the market power considered and the conduct reviewed in order for the CCS to find an infringement under the Competition Act for an abuse of dominance.

(e) South Africa

In South Africa, the 'abuse of dominance' provisions of the Competition Act, 89 of 1998 comprise a list of specific conduct that fall to be proscribed as 'exclusionary acts'. However, the mere existence of an 'exclusionary act' does not mean that anti-competitive consequences are assumed to flow from that act. A showing of net harm to competition is still required.

In the *Competition Commission v South African Airways (Pty) Ltd*,¹⁷ the Competition Tribunal clarified the approach to measuring 'anti-competitive effect' holding that that the anti-competitive effect of exclusionary conduct may be proven by evidence of 'actual competitive harm' but also:

If there is evidence that the exclusionary practices, substantial or significant or expressed differently, have the potential to foreclose the market to competition. If it is substantial or

(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.

¹³ *Canada (Commissioner of Competition) v Canada Pipe Co.* 2006 FCA 233 at [73].

¹⁴ Section 47 of the Singapore Competition Act states:

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

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

(a) predatory behaviour towards competitors;

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

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

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

¹⁵ Section 47(2) of the Singapore Competition Act.

¹⁶ Publication of the Competition Commission Singapore, *CCS Guidelines on the Section 47 Prohibition*, June 2007.

¹⁷ (18/CR/Mar01).

*significant, it may be inferred that it creates, enhances or preserves the market power of the dominant firm.*¹⁸

In rejecting the approach that the mere conduct should be deemed to have an anti-competitive effect, the Tribunal noted that 'the problem with this approach is that it can lead to the outlawing of conduct that has no anti-competitive effect'.

Although the South African assessment is clearly concerned ultimately with anti-competitive effects, the subjective purpose of the conduct can be brought to bear – both as evidence for and against a likely anti-competitive effect. In the *Bulb Man (SA) Pty Ltd v Hadeco (Pty) Ltd*¹⁹ the Tribunal indicated that:

We can look at the anti-competitive effect from another perspective. Why is the dominant firm refusing to deal? As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacked a proper explanation for its conduct, this might shift the probabilities in favour of the applicant.

2.2 The take advantage limb

Summary: If amendments to s46 are proposed it is important that some filter, such as the 'take advantage' limb, is included. While different jurisdictions adopt different formulations, such as listing proscribed anticompetitive conduct or adopting a 'wilfulness' concept, it is important that such a filter exist so as to differentiate between conduct of a firm with substantial market power that is pro-competitive and conduct that is anticompetitive

The Review raises the issue of whether the take advantage limb of the prohibition in s46 should be repealed. While removing the 'take advantage' limb might appear to be effective in restricting behaviour by firms that would be economically damaging to other competitors, the Working Group considers that it would do so at too high a cost to the overall competitive process, possibly having a 'chilling' effect on competition. Further, the Working Group does not think that removing the take advantage limb would necessarily add any clarity to the current state of the law.

An assessment of whether the conduct in question is linked to the firm's market power is an essential part of considering whether or not there has been an 'abuse' of dominance (or 'taking advantage' of market power). The current 'take advantage' limb plays an important filtering role to exclude otherwise pro-competitive conduct from the prohibition. If this limb was removed the amended section could 'over-capture' conduct that is otherwise pro-competitive and could prohibit economically beneficial behaviour.

As outlined above, in the United States, the offence of unlawful monopolisation requires something more than mere proof of monopoly power. General intent to harm a competitor or obtain a dominant position is not enough to satisfy the 'wilfulness' element absent predatory or anticompetitive conduct. This 'wilfulness' element provides the relevant connection or nexus between the firm's monopoly power and the relevant anticompetitive conduct in question. Courts and commentators in the US have also considered a range of possible alternative tests designed to help differentiate efficient conduct from anticompetitive conduct, including the 'no economic sense' test, 'profit sacrifice' test

¹⁸ *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01)..

¹⁹ (81/IR/APR06).

and 'equally efficient competitor' test, each of which has strengths and weaknesses and none of which have been imposed by the Supreme Court or accepted in total by the US antitrust agencies.

In Europe, while there is no explicit 'taking advantage' requirement in Article 102 of the TFEU, in practice most types of abuse are only possible for a dominant company (i.e. in the absence of dominance, below cost pricing or refusal to supply will not normally make sense commercially) so in this sense companies abusing a dominant position are generally using their 'dominance' to do so.²⁰ The position in Europe has been further clarified by case law which sees Article 102 imposing 'special responsibility' on dominant companies, so that, for example, exclusivity may be possible for both dominant and non-dominant firms, but dominant companies have to be more cautious in pursuing such an objective as their conduct may have anticompetitive effects that would not arise in relation to the same conduct on the part of a non-dominant company.

In other jurisdictions, such as Canada and Singapore, there are provisions which work in a similar way to the 'take advantage' limb by outlining the relevant anticompetitive conduct in broad terms and ensuring that there is a link between the market power and the conduct in question.

In South Africa, the courts adopt the notion of 'leverage', which is akin to a requirement that the dominant firm be found to be taking advantage of its dominance in order to protect or enhance its market power, whether in that primary market or some related (vertical, or collateral) market. Once again, the effects are key, but subjective purpose may provide an indication of a likely motivation based on a position of dominance rather than competition on the merits.

2.3 Substantial degree of market power

The Working Group considers that the issues outlined above in relation to the removal of the take advantage limb are exacerbated by the lower market power test currently adopted in the Australian legislation (which refers to a 'substantial degree of market power') rather than the higher 'market dominance' standard under EU law or the possession of 'monopoly power' under US law.

In this respect, amending the provision to refer to a corporation with 'market dominance' rather than a corporation with 'substantial market power' may warrant further consideration. Such an amendment would provide businesses with greater clarity regarding the applicability of the provisions and would ensure that only those businesses that have a very strong position in a particular market are subject to the prohibition. This reform would also bring Australia into line with other major antitrust jurisdictions such as the EU, US and UK.

In addition, certain jurisdictions, notably Germany, use market shares as a basis for establishing a presumption of dominance. Under German antitrust law there is a presumption that a single firm is dominant if it has a market share of 40% or more. Further assumptions apply for collective market dominance. Such market share thresholds are also used by the EC at the European-wide level, with the EC relevantly commenting:

Market shares are a useful first indication of the importance of each firm on the market in comparison to the others. The Commission's view is that the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary

²⁰ It is also worth noting that there are subtle nuances in the different national translations of Article 102 of the TFEU, some of which explicitly suggest that there needs to be 'exploitation' of the dominant position by the dominant firm. The Spanish version of Article 102 refers to 'abusive exploitation...of a dominant position'. The French version translates as 'to exploit, in an abusive way, a dominant position', and the Portuguese and Italian versions also have similar drafting. However, the European courts have generally found that 'exploitation' is not a necessary element with the focus being on an 'abuse' of a dominant position.

*indication of dominance. If a company has a market share of less than 40%, it is unlikely to be dominant.*²¹

Businesses often find such guidance helpful from a compliance perspective.

2.4 Specific examples of proscribed conduct, mandatory factors and guidance

(a) Specific examples of proscribed conduct

The Working Group considers that including specific examples of proscribed conduct in the legislation itself has the potential to be useful as a guide to business and to aid in predictability, depending of course on how those examples are drafted and how the provision is intended to operate. As outlined above, certain jurisdictions such as the EU,²² Canada and Singapore adopt this approach in their legislation in order to foreshadow the type of anticompetitive conduct the subject of the provision and to ensure that there is an appropriate filter. This is similar to the current role played by the 'take advantage' limb in Australia.

However, if examples of proscribed conduct are used, it is important that it is expressed in a way which does not become overly prescriptive and limit the flexibility of the courts to find new types of conduct as being in breach if it has a detrimental effect on competition and consumer welfare. In this respect, the take advantage limb, which permits judicial flexibility, may be a more desirable option particularly for industry sectors that are rapidly changing such as e-commerce.

(b) Mandatory factors

Similarly, the Working Group considers that if mandatory factors were to be included in s46, this could reduce uncertainty for business and assist in compliance. However, this is dependent on the wording of the mandatory factors that would be included. As noted above, overly proscriptive legislation can limit the flexibility of the provision, particularly when dealing with new products or innovative industry sectors.

(c) ACCC Guidance

While guidance doesn't have the force of law, the Working Group considers that guidance from the ACCC on their interpretation of s46 for enforcement purposes could be useful for business. A number of other antitrust enforcement agencies have published guidance such as the EC's guidance on its Article 102 TFEU enforcement priorities and the UK Competition and Market Authority's guidance on the equivalent abuse of dominance provision in the Competition Act 1998 (UK).

2.5 Alternative formulations proposed

(a) Proposal to incorporate the 'substantial lessening of competition' test

The Review proposes incorporating the substantial lessening of competition test into s46 as a means of determining conduct that should be prohibited by the provision. The Working Group thinks that the

²¹ http://ec.europa.eu/competition/antitrust/procedures_102_en.html

²² Article 102 of the TFEU does include a non-exhaustive list of specific examples of anticompetitive conduct that infringe the prohibition. This non-exhaustive list has been expanded through case law. Non-exhaustive examples of abusive conduct have also proven to be helpful under German law since they help to rationalize the case law, while also allowing for flexibility in that the courts can expand the 'list' of proscribed conduct having regard to the facts of the particular case.

use of the term 'substantial lessening of competition' is well known in Australia and the Australian courts have developed some jurisprudence on the correct interpretation of the term.

However, the Working Group reiterates that a revised s46 which includes the phrase 'substantial lessening of competition' needs to be appropriately adapted so that not all conduct that may be found to have a 'purpose' of substantially lessening competition or have that effect is captured.²³ Particularly in circumstances where unilateral conduct is sought to be modified, it is important that there is a distinction drawn between conduct which is exclusionary that will damage the competitive process and, on the other hand, aggressive competition on the merits. Conduct with commercially sound rational and legitimate business purposes should not be caught by the prohibition. For example, under the proposed test the following types of conduct may be argued to substantially lessen competition even though they may have a legitimate commercial purpose and be beneficial to consumers:

- launching a new and innovative product that is patent protected;
- aggressive (but non-predatory) discounting by a large firm at a rate that other competitors cannot meet; or
- refusal to supply where there are genuine commercial concerns about the acquirer's credit worthiness.

Having regard to this concern, the retention of the 'take advantage limb' (or some other substitute for this) in any revised formulation of s46 that includes the 'substantial lessening of competition' test would be useful as it would act as an appropriate filter to remove from the prohibition conduct which is pro-competitive and beneficial to consumers.

(b) Proposal to change to 'Purpose, effect or likely effect'

The Working Group considers that moving to 'purpose, effect or likely effect' in s46 is too broad a formulation of the prohibition and will over capture conduct that may otherwise be procompetitive.

By leaving 'purpose' in the provision and adding 'substantially lessening competition' it potentially captures conduct that has the purpose of substantially lessening competition regardless of whether or not it is likely to have an anticompetitive effect. The breadth of this provision is too wide and is a significant departure from the current position where purpose is tied to a limited number of outcomes, namely, (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; or (c) deterring or preventing a person from engaging in competitive conduct. This wide formulation would also make compliance training significantly more difficult.

²³ In South Africa, for example, there is presumptive 'dominance' over a certain market share threshold. Participants above a certain market share threshold can thus more easily be 'put on notice' to consider whether their conduct is potentially anticompetitive. Nevertheless, having a market share over the threshold should only be a jurisdictional question, a showing of anti-competitive effect is still required for prosecution.

3 Responses to specific questions

The Working Group sets out below its responses to the questions that are relevant to the key issues outlined above in the submission. We note that not all of the questions have been answered.

Question 3 - 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 the competition?

As stated in Section 2 above, the Working Group considers that removing the 'take advantage' limb from s46 would not improve the ability of the law to restrict behaviour of firms that would be economically damaging to competition. Indeed, doing so would be detrimental as the take advantage limb fulfils an important filtering role by effectively prohibiting anticompetitive conduct by a powerful firm, while permitting (even vigorous and aggressive) pro-competitive conduct by such a firm in relevant circumstances. As outlined above in section 2, other jurisdictions such as the US, the EU, Canada and Singapore have a similar filtering provision, even though they are expressed differently to the 'take advantage' limb used in Australia.

Question 4 - Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed down to certain 'exclusionary' conduct if the 'take advantage' limb is removed?

As outlined in 2 above, the Working Group considers that if the take advantage limb is removed from s46, the revised provision would 'over-capture' conduct that is otherwise pro-competitive and this could have the effect of prohibiting economically beneficial behaviour. Each of the jurisdictions described in section 2 has a filtering provision to differentiate between conduct that is procompetitive and conduct that is anticompetitive on the part of firms with substantial market power (or 'dominance'). Whether this filtering is done by a proscribed list of exclusionary conduct or by a take advantage test will depend on the particular circumstances in each jurisdiction. The key point is that such a 'filter' generally exists.

Accordingly, in jurisdictions such as the EU, Canada and Singapore, there are provisions which work in a similar way to the 'take advantage' limb by outlining the relevant anticompetitive conduct (at least in general terms) and ensuring that there is a link between the market power and the conduct in question.

In the United States, there is a requirement that the offence of unlawful monopolisation requires something more than mere proof of monopoly power. General intent to harm a competitor or obtain a dominant position is not enough to satisfy the 'wilfulness' element absent predatory or anticompetitive conduct. This 'wilfulness' elements provides the relevant connection or nexus between the firm's monopoly power and the relevant anticompetitive conduct in question. In *United States v Microsoft Corp*, the court stated the following:

Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.

Similarly, in Europe, the EC and European courts look at whether there has been an 'abuse' of a dominant position. The key analysis therefore centres on the term 'abuse'. EC guidance relevantly states:

To be in a dominant position is not in itself illegal. A dominant company is entitled to compete on the merits as any other company. However, a dominant company has a special responsibility to ensure that its conduct does not distort competition.

The inclusion of the term 'abuse' is therefore similarly useful as a mechanism to differentiate between anticompetitive and procompetitive conduct by a dominant firm, in a similar manner to the take advantage limb in Australia.

The Working Group notes that the 'take advantage' limb is currently well understood in Australian jurisprudence. Accordingly, swapping this filtering mechanism for a different one may not be desirable in practice as it may unnecessarily increase the burden of compliance which often arises when legislation is changed.

Question 5 - Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?

See the comments in response to Question 4 above.

Question 6 - Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?

As set out above, the Working Group considers that moving to 'purpose, effect or likely effect' in s46 is too broad a formulation of the prohibition and will over capture conduct that may otherwise be procompetitive.

By leaving 'purpose' in the provision and adding 'substantially lessening competition' it potentially captures conduct that has the purpose of substantially lessening competition regardless of whether or not it is likely to have an anticompetitive effect. The breadth of this provision is too wide and is a significant departure from the current position where purpose is tied to a limited number of outcomes, namely, (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; or (c) deterring or preventing a person from engaging in competitive conduct. A broader formulation of the test would also make compliance training significantly more difficult.

Question 7 - Alternatively could retaining 'purpose' along with amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?

The effectiveness of this approach will of course depend on what specific amendments to the provision are proposed. In respect of retaining 'purpose', the Working Group considers that retaining purpose while amending other elements of the provision (such as adding 'substantial lessening of competition') will also result in the over-capture of pro-competitive conduct and such a reform may not be consistent with the approach adopted in other jurisdictions.

It is the Working Group's position that prohibitions on the misuse of market power should focus on conduct with a material anti-competitive effect, which does or would adversely affect competition and the competitive process, rather than on the purpose/aim or form of such conduct. In principle, conduct should only be prohibited if it is actually and objectively capable of appreciably affecting competition (in an Australian context, 'substantially lessening competition') and thus consumer welfare.

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?

As outlined in Section 2 above, the 'substantial lessening of competition' test is a sufficiently developed and well known term in Australia. However, the Working Group considers that a

'substantial lessening of competition' test, on its own, has the potential to overly restrict pro-competitive conduct. In light of this, the retention of the 'take advantage' limb (or some alternative formulation such as those adopted in Canada and Singapore) would assist as it would act as an appropriate filter to remove from the prohibition that conduct which is pro-competitive and ultimately beneficial to consumers.

Question 9 - Should specific examples of prohibited behaviours or conduct be retained or included?

Please refer to the Working Group's comments in section 2 above. The Working Group considers that including specific examples of proscribed conduct in the legislation itself has the potential to be useful, depending of course on how those examples are drafted and how the provision is intended to operate. As outlined above, certain jurisdictions such as Canada and Singapore adopt this approach in their legislation in order to foreshadow the type of anticompetitive conduct the subject of the provision and to ensure that there is an appropriate filter. This is similar to the current role played by the 'take advantage' limb in Australia.

However, if examples of proscribed conduct are used, it is important that they are expressed in a way which does not become overly prescriptive and limit the flexibility of the courts to find new types of conduct as being in breach if it has a detrimental effect on competition and consumer welfare.

Question 10 - 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?

As outlined in Section 2 above, the Working Group considers that prohibiting conduct engaged in 'for the purpose of substantially lessening competition' is too broad. Such a prohibition could result in certain forms of pro-competitive, efficiency enhancing conduct engaged in by a firm with substantial market power being prohibited (i.e. the release of an innovative and market-leading product by a firm that already has substantial market power causing lesser effective rivals to exit the market).

Question 11 - Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?

As outlined in Section 2 above, the Working Group considers that mandatory factors could reduce uncertainty for business and assist in overall compliance. However, this is dependent on the wording of the relevant mandatory factors that would be included.

Question 12 - If mandatory factors were adopted, what should those factors be?

Please see the response to Question 11.

Question 13 - Should authorisation be available for conduct that might otherwise be captured by section 46?

The Working Group does not see any harm in making authorisation available for section 46. However it does consider that such a process will be rarely used.

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?

Please see section 2 above where the Working Groups outlines its views in respect of the key issues identified.

Question 16 - Which of options A through F above is preferred? What are the relative strengths and weaknesses of each option? What information can you provide regarding the regulatory impact of each option on businesses?

For the reasons set out in section 2 above, the working group does not prefer any of the options outlined.

Question 17 - Are there any other options (not outlined above) that should be considered?

Please see section 2 above where the Working Groups outlines its views in respect of the key issues identified.