



The Institute of Public Accountants

Submission to the Treasury on *Options to strengthen the misuse of market power law*

February 2016



IPA INSTITUTE OF PUBLIC
ACCOUNTANTS

Partnership beyond numbers

General Manager
Market and Competition Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

11 February 2016

Dear Sir

Proposed changes to the misuse of market power provisions

This submission is made on behalf of the Institute of Public Accountants (IPA), one of Australia's oldest professional bodies with over 35,000 members in Australia and in over 65 other countries. It responds to the Government's discussion paper on *Options to strengthen the misuse of market power law*, of 11 December 2015.

We gratefully acknowledge that the submission was prepared by Associate Professor Julie Clarke, Deakin University, as part of the IPA Deakin University SME Research Partnership.

The submission that follows arises out of the IPA's concern that the existing misuse of market power provision does not adequately protect small business, and by extension consumers, from the predatory actions of companies with substantial market power.

The IPA accepts that the best form of protection against anti-competitive conduct is for small and medium businesses to face competitive markets when they enter into acquisition or supply transactions, or for them to seek to establish countervailing market power through authorised collective bargaining. The IPA does not seek special protection for them from the ordinary rigours of competition. However, Australia's concentrated market structure means that many markets are not competitive and, where collective bargaining is not possible or sufficiently expeditious, small or medium size businesses are especially vulnerable to exploitation or exclusion by firms with substantial market power.

The current prohibition on misuse of market power, embodied in section 46 of the *Competition and Consumer Act 2010* (CCA), continues to be deficient in addressing exploitative and exclusionary anti-competitive conduct by dominant firms.

Implementation of the Harper Report¹ recommendation in relation to misuse of market power would correct the two key deficiencies in the existing legislation:

- The 'take advantage' element, which has been interpreted in such a way as to excuse conduct even where its purpose is to deliberately harm a competitor or the competitive process; and
- The focus on 'purpose' alone, which fails to capture conduct having the effect of substantially lessening competition.

¹ Competition Policy Review, Final Report, March 2015 (Harper Report).

The IPA supports the full set of changes recommended in the Harper Report (Option F) designed to address these key deficiencies.

If you have any queries or require further information, then please don't hesitate to contact Vicki Stylianou, IPA Executive General Manager, Advocacy & Technical, on either vicki.stylianou@publicaccountants.org.au or mob. 0419 942 733.

Yours faithfully



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Questions raised in the discussion paper

1. What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provisions?

There have been several litigated examples of anti-competitive conduct failing to be caught by the existing provision. The two most prominent examples are the cases of *Rural Press* and *Cement Australia*.

In *Rural Press Limited v ACCC* (2003) 216 CLR 53, Rural Press engaged in conduct designed to remove a rival newspaper from its primary circulation area in Mannum. Despite the existence of an exclusionary purpose, the majority of the High Court found that there was no contravention of section 46. This was based on the majority's finding that the tactics of Rural Press were effective, not because of the market power it held, but because of their substantial 'material and organisational assets'. The decision has been rightly criticised as highlighting the deficiencies in the existing legislation stemming from the narrow interpretation of the 'take advantage' requirement.

More recently, in *ACCC v Cement Australia* [2013] FCA 909, conduct which substantially lessened competition was held not to have contravened the existing misuse of market power provisions. In this case Cement Australia entered into exclusive contracts with power stations to purchase flyash which exceeded its actual and forecasted demand. This conduct 'had the effect ... and would be likely to have the effect of discouraging, hindering or preventing a third party from seeking to establish processing facilities'.²

Justice Greenwood held that, despite holding substantial market power and engaging in conduct having both the purpose and effect of substantially lessening competition, *Cement Australia's* conduct did not constitute a 'taking advantage' of market power because the conduct *could* have been engaged in profitably by a firm lacking market power.

This case provides a good example of the inadequacy of the current provision in distinguishing harmful from benign single firm conduct. In particular, by using what *could* be done by a firm lacking market power as a threshold for distinguishing anti-competitive conduct, the current interpretations of 'take advantage' fail to recognise that conduct capable of being engaged in by firms without market power has a greater propensity to foreclose the market and produce economic harm when engaged in by firms with market power.³

Another example of conduct which may not be caught by the provision involves rebate or loyalty schemes by dominant firms. Loyalty discounts and rebates are common and normally pro-competitive or, at least, benign. However, they can produce anti-competitive effects and/or be used for an anti-competitive purpose when they foreclose a significant portion of the market to rivals. As this is likely to be possible only where a firm has substantial market power, it is clear that this type of conduct will produce different economic effects when engaged in by a firm with market power than when engaged in by a firm lacking such power. As a result of the current interpretation of 'take

² *ACCC v Cement Australia* [2014] FCA 148 (para 3162) (Justice Greenwood)

³ See, for example, Stephen Corones, Submission in response to the Competition Policy Review Committee Draft Report (8 October 2014). See also RBB Economics, Submission in response to the Competition Policy Review Committee Draft Report and Kathrine Kemp, Submission in response to the Competition Policy Review Committee Draft Report, pages 9-12.

advantage' in section 46, it is unlikely such schemes would be caught because it would be both possible and commercially rational by a firm without market power to engage in them.

The Harper Report also provides a number of examples of conduct which, while capable of being undertaken by firms without market power, is only likely to raise competition concerns when undertaken by firms with substantial market power; for example, exclusive dealing, loss-leader pricing and cross-subsidisation.⁴

2. What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?

Conduct producing a pro-competitive effect is not (by definition) capable of being captured under the Harper Panel's proposed provision.

Opponents of the introduction of an effects test have typically argued that the removal of the 'take advantage' element would mean that firms engaged in normal competition would risk contravening the provision if their competitive conduct was successful in improving their market share and deterring, eliminating or diminishing rivals. For example, it may be argued that successful new innovation may be interpreted as having the effect of substantially lessening competition if it leads to the exit or reduced share of existing firms or makes new entry more difficult.

The IPA agrees that it is necessary to distinguish pro-competitive conduct, such as successful product innovation, and anti-competitive conduct made possible only by virtue of a party's power in the market. However, the concern that the Harper Review's proposal could stifle innovation and deter other pro-competitive activity is significantly overstated. For example, RBB Economics submitted, in response to these concerns, that:

Pro-competitive conduct that harms competitors through the superior efficiency of the firm with market power should not ... be categorised as creating a [substantial lessening of competition] in the first place.⁵

Successful innovation which may temporarily enhance market power should not be viewed as anti-competitive, notwithstanding the effect it may have on other individual market participants. Although successful rigorous *competition* may reduce the number of competitors or deter entry, that is not the same as substantially lessening competition *in the market*.

The Harper Report recognised the concerns that the provision may be interpreted broadly by the courts (a risk not justified by the court's interpretation of anti-competitive effects elsewhere in the Act) and have proposed including guidance requiring the court to have regard to the extent to which conduct may enhance efficiency, innovation, product quality or price competitiveness.

The IPA considers that the Harper Panel's proposal, including direction to the court and development of ACCC guidance, will address concerns that pro-competitive conduct would be caught by the Harper Panel's proposed provision.

⁴ Harper Report, page 61.

⁵ RBB Economics, Submission in response to the Competition Policy Review Committee Draft Report, page 5

Take advantage

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 competition?

We have interpreted this question as involving the retention of the *existing* test, modified only by the removal of the ‘take advantage’ limb.

The difficulties associated with the ‘take advantage’ limb have long been recognised, as highlighted by Alan Griffiths MP during the course of the Griffiths Review:⁶

‘It puts a great limitation on the operation of section 46 by insisting that the proscribed purpose alone is not sufficient; the nature of the activity also has to fall within the terms of section 46 ... a corporation which has a statutory monopoly, such as Telecom ... would all be capable of characterising activities as the exercise of a right given to it by statute, rather than taking advantage of the market power which it has by virtue of its position ... [130] ... The real problem with the drafting ... is that it enables a corporation to engage in anti-competitive conduct which breaches the proscribed purposes provision of section 46 but the conduct itself does not fall within the narrow definition of taking advantage of the market power’.⁷

These comments were made prior to the decision of the High Court *Qld Wire*⁸ which rejected the attempt to introduce a pejorative element into the ‘take advantage’ requirement and found that BHP had misused its market power in refusing to supply Y-Bar to Qld Wire. The Griffith Committee considered that that decision had resolved the ‘debate about the interpretation of the take advantage provision’ and that it should ‘make it easier for aggrieved parties to establish a breach of section 46.’⁹ Unfortunately, the Committee’s predictions about the future of the provision proved too optimistic. Subsequent decisions, particularly those in *Rural Press*¹⁰ and *Cement Australia*, have abandoned the neutral and holistic approach to section 46 and the ‘take advantage’ element which were exemplified in *Qld Wire*. Instead, the courts in these cases have engaged in a ‘complex, disaggregated form of analysis’ which has rendered the provision of ‘limited utility’.¹¹ Legislative intervention is needed to resolve the problem caused by the ‘take advantage’ requirement.

Removing the ‘take advantage’ limb would improve the ability of the law to restrict economically damaging behaviour by firms with substantial market power. Both *Rural Press* and *Cement Australia* represent examples of economically damaging behaviours that would have been caught by section 46 had the ‘take advantage’ limb been removed.

⁶ ‘Mergers, Takeovers and Monopolies: Profiting from Competition?’ (Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs) 1989

⁷ Hansard Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (Reference: Mergers, takeovers and monopolies) Canberra 25 October 1988, page 129-130.

⁸ *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

⁹ ‘Mergers, Takeovers and Monopolies: Profiting from Competition?’ (Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs) 1989 paragraph 4.6.26

¹⁰ *Rural Press Ltd v ACCC* [2003] HCA 75

¹¹ ACCC Submission to the Competition Policy Review (Issues Paper), pages 79-80.

The IPA is of the view that conduct by corporations with substantial market power which has the purpose of:

- eliminating or substantially damages a competitor;
- preventing entry of a person into a market; or
- deterring or preventing a person engaging in competitive conduct

should be unlawful, regardless of whether it involves a ‘taking advantage of market power.’ Such conduct should be prohibited, not to protect small business per se, but because it is appropriate for a law aimed at the protection of competition and promotion of fair dealing to prohibit conduct which has as its object the elimination of rivals and, by extension, harm to the competitive process.

However, the IPA does not believe that this change is sufficient *in itself*, and supports the proposed new provision recommended by the Harper Panel (Option F).

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 to certain ‘exclusionary’ conduct if the ‘take advantage’ limb is removed?

Despite some concerns expressed to the contrary, the IPA does not consider that removing the ‘take advantage’ element will unduly broaden the scope of the provision. We accept that competition is often ‘deliberate and ruthless’ and that successful competitors will necessarily injure those who are less successful.¹² However, removing the ‘take advantage’ element from the existing prohibition would not capture *competitive* conduct, such as development of more efficient processes or improvements to products through innovation and investment in research and development, which may have the effect of eliminating less efficient or innovative competitors.

Narrowing the prohibition to certain defined forms of exclusionary conduct is likely to require complex drafting and (as various previous examples attest) will inevitably fail to capture some forms of economically harmful conduct. **The IPA does not support limiting the prohibition in this way.**

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

The IPA supports the Harper Report’s recommendation, which goes beyond merely removing the ‘take advantage’ element from the existing provision.

Absent the introduction of an effects test, the IPA does not consider that there are better alternatives than the removal of the ‘take advantage’ limb.

One alternative, proffered by Prof Stephen King and Graeme Samuel, would in our view fail to better restrict economically damaging behaviour. King and Samuel argue that the ‘take advantage’ limb should be retained, but suggest that if it is removed it should be replaced with the phrase ‘shall not

¹² *Queensland Wire Industries v BHP* (1989) 167 CLR 177 (per Chief Justice Mason and Justice Wilson at para 24)

misuse that power'.¹³ A firm would be deemed to have misused power if 'the conduct alleged to constitute the misuse of its power in that market would be inconsistent with conduct that would be engaged in by a corporation that does not have a substantial degree of power in that market'.¹⁴

The problem with this alternative proposal is that it perpetuates the deficiency with the current 'take advantage' element. It effectively defines the proposed new term (misuse that power) in the same way that the courts have defined 'take advantage'. This fails to acknowledge the link between substantial market power and the propensity for unilateral conduct to produce economic harm through market foreclosure or exploitation. The *existence of substantial market power* increases the propensity for unilateral conduct to produce this harm with the result that the economic effect of conduct cannot, and should not, be compared with the outcome that would prevail if a firm lacking market power engaged in the same conduct.

Rebate and discount schemes offer a good example of conduct which may be competitive or anti-competitive, depending on the power held by the firm engaging in the conduct. When rebate schemes are employed in competitive markets by firms lacking market power, they generally enhance competition by providing a further price-based mechanism through which firms can compete. However, when offered by firms with substantial market power, particularly where those firms have an assured (non-contestable) customer base (for example, because they sell a 'must stock' product or their scale is such that rivals are not able to meet customers' full demand), rebates can foreclose the market to competitors, harming competition. This is because a firm with market power can leverage their non-contestable share of demand by targeting rebates at the contestable share of demand, with the result that even *more efficient rivals* will not be able to match prices for the contestable demand. This can foreclose a significant portion of the market to both existing and potential competitors; the same rebate schemes by a firm lacking market power would not have this effect.¹⁵

Similarly, loyalty and fidelity discounts may be either pro-competitive or anti-competitive, depending on their form and the market structure in which they are applied. It is well recognised that the potential anti-competitive impact of fidelity discount schemes will depend, to a significant degree, on the 'market power of the discounter and the discounter's relative position *vis-à-vis* competitors'.¹⁶

¹³ Stephen King and Graeme Samuel, 'Why section 46 is the best for competition' (*Australian Financial Review*, 13 January 2016)

¹⁴ Stephen King and Graeme Samuel, 'Why section 46 is the best for competition' (*Australian Financial Review*, 13 January 2016)

¹⁵ See generally, International Competition Network, *Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws* (June 2009) and Maier-Rigaud, F.P. and Schwalbe, U., 'Do retroactive rebates imply lower prices for consumers?' (8 June 2013) (<http://ssrn.com/abstract=2276396>)

¹⁶ OECD, *Loyalty and Fidelity Discounts and Rebates* (Policy Roundtable, 2002: DAF/COMP(2002)21) page 9.

Purpose or effect (or likely effect)

6. Would including ‘purpose, effect or likely effect’ in the provision better target behaviour that causes significant consumer detriment?

We have interpreted this question as retaining the *existing* test (including the ‘take advantage’ limb and the three prescribed purposes in (a)-(c)) while replacing the words ‘purpose’ with ‘purpose or effect (or likely effect)’.

The IPA supports the effects test as proposed by the Harper Report. It does not, however, support incorporating an effects test into the existing provision. This would capture, for example, any conduct having the *effect* of substantially damaging a competitor, significantly and inappropriately expanding the scope of the provision. Successful rigorous *competition* may have the effect of reducing the number of competitors or diminishing their market share, without having a detrimental effect on competition *in the market* and without having the purpose of causing targeted harm to competitors. While it is appropriate to capture conduct by a firm with substantial market power which has the *purpose* of harming a competitor or competitors (for reasons explained in response to question 5, above, and question 17, below), it is not appropriate to capture conduct which has this more limited effect.

7. Alternatively 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?

We do not believe that retaining ‘purpose’, while amending other elements (*even removing the ‘take advantage’ element*) would be sufficient to achieve the policy objectives of reform outlined by the Harper Panel. Any such change would fail to direct attention to the core policy concern: unilateral conduct by firms with market power having the *effect of substantially lessening competition in the market*.

In addition, while establishing purpose has not proven a significant hurdle in the limited number of section 46 cases that have been litigated, difficulties in obtaining evidence of purpose has hindered the capacity of the ACCC to bring some matters to court¹⁷ and this is likely to be even more difficult where the focus is a purpose of ‘substantially lessening competition’ as opposed to a purpose of harming an individual competitor (or competitors), for which documentary or testimonial evidence may be more readily available.

Substantial lessening of competition

Before addressing the questions relating to substantial lessening of competition, it is important to clarify the following two claims made in the discussion paper:

- a) that the current provision outlines specific examples of conduct that are ‘prohibited’; and
- b) that in practice courts have interpreted the provision to protect the process of competition, and not individual competitors

¹⁷ See, for example, ACCC Submission to Competition Policy Review (Issues Paper), page 76.

We do not believe either is accurate. The current provision sets out three forms of conduct that *are* prohibited (they are not simply examples of prohibited conduct). In addition, it is not the case that the courts have interpreted the *purpose* element of section 46 as protecting the process of competition rather than individual competitors. The paper cites the High Court in *Queensland Wire* as evidence of the this, but the Court in that passage was discussing its view on purpose of the provision rather than applying the specific purpose elements in section 46. The specific purpose element in section 46(1)(a) refers explicitly to the purpose of ‘eliminating or substantially damaging a competitor’. This is clearly directed toward harm caused to an ‘individual competitor’ and not the competitive process, and there is no evidence that the courts have interpreted this prohibited purpose in any other way.

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 IPA believes the term ‘substantially lessening of competition’, which is adopted elsewhere in the Act, is an appropriate focus for legislation concerned with the prohibition of anti-competitive conduct.

However, for reasons discussed in response to question 17, the IPA also believes that it is appropriate to prohibit firms with substantial market power from engaging in conduct having certain defined anti-competitive purposes.

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

As noted in response to question 7, above, the current Act does not include *examples* of prohibited behaviour, but rather defines three prohibited ‘purposes’, one of which must be established before a contravention will occur. For reasons discussed in response to question 17, the IPA believes that it is appropriate to prohibit conduct having one of the three prohibited purposes currently contained in section 46, *in addition to* the new prohibition proposed in the Harper Report.

In relation to the proposed new effects based test, the IPA fully supports the Harper Report’s recommendation, which does not include specific examples of prohibited behaviour.

Some other jurisdictions have attempted to define (either inclusively or exclusively) conduct which might constitute an abuse of power. In Europe, for example, four non-exhaustive forms of abuse are listed as examples of conduct which may constitute an abuse of dominant position.¹⁸ In Canada, where the misuse of market power laws focus on anti-competitive conduct which substantially lessens competition, legislation includes a non-exhaustive list of conduct which constitute an anti-competitive act. This conduct will meet the threshold requirement of an anti-competitive act, but will not be prohibited unless they have the effect of substantially lessening competition in the

¹⁸ Article 102, Treaty on the Functioning of the European Union

market.¹⁹ No such list appears in the United States, which prohibits monopolisation and attempted monopolisation, the meaning of which has evolved through case law over several decades.

Although there is no obvious need to include specific examples of prohibited behaviour, provided any such examples were illustrative only (such as in the EU), so that their inclusion/exclusion did not automatically render conduct unlawful/lawful, the IPA would not object to the inclusion of such a list.

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?

The IPA can identify no advantage to such an approach. The Act currently allows purpose to be ascertained by inference from the conduct of the corporation, with the result that *in some cases* it is likely that a purpose of substantially lessening competition could be inferred by establishing effect or likely effect of the conduct substantially lessening competition.

The key disadvantage with such an approach is that it fails to focus attention on the key concern – the economic damage caused by certain conduct. It would also be inconsistent with the approach taken in other provisions of the Act dealing with anti-competitive conduct, which all either include a *purpose or effect test* (sections 45 and 47) or an *effect test* (section 50).

Mandatory factors

11. 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 Report recommends a list of factors to which the court must have regard when assessing whether conduct would have the effect of substantially lessening competition in a market. The IPA supports the inclusion of these factors and believes it may assist in reducing uncertainty for business. However, the IPA also holds the view that, as firms with substantial market power already must consider a competition based effects test under several other provisions in the Act, there is little reason to believe that they would not be capable of making that assessment in relation to unilateral conduct under section 46.

The IPA does not believe that there is merit in the concern, raised in the Discussion Paper, that such a list (provided sensibly drafted) may distinguish the concept of substantially lessening competition in section 46 from its application in other sections. Section 50 is illustrative. A mandatory list of factors is included in section 50 for the assessment of mergers. These factors were derived from earlier case law applying the substantial lessening of competition test²⁰ and, while many of these factors are referred to when applying a substantial lessening of competition test in other provisions

¹⁹ Sections 78-79 *Competition Act* (Canada)

²⁰ Most notably, the Tribunal’s decision in *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (QCMA) (1976) ATPR 40–012 at 17,246.

of the CCA, there is no evidence that the test in s 50 has been applied differently than in sections 45 or 47 where a substantial lessening of competition test also applies.

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

The IPA supports the mandatory factors recommended by the Harper Panel. The model provision contained in the Harper Report includes a broad and sensible list of factors that may be regarded as increasing competition; efficiency, innovation, quality and price competitiveness. In addition, it makes general reference to conduct that may lessen competition; that is, conduct which prevents, restricts or deters the potential for competitive conduct or new entry into the market.

These broad references to pro and anti-competitive effects are appropriate and avoid the risk of focussing attention too narrowly on specific forms of conduct which may or may not cause economic harm depending on the particular market structure. As discussed in response to Question 2, pro-competitive conduct which incidentally harms competitors should not be categorised as substantially lessening competition and the mandatory factors drafted by the Harper Panel appropriately reinforce this view without attempting to be too prescriptive.

Authorisations

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

The IPA supports the Harper Report's recommendation that authorisation should be available for conduct that might otherwise be captured by section 46.

Authorisation was not appropriate when the only conduct prohibited was that having the purpose of harming competitors or deterring competitive conduct. However, where the prohibition captures conduct producing anti-competitive effects, irrespective of purpose, an authorisation mechanism is appropriate, facilitating conduct which may produce public benefits that outweigh its potential anti-competitive consequences.

Other issues

14. If quantitative data on the regulatory impact of alternative options on stakeholders (including the methodologies used) can be provided.

We are not in a position to provide quantitative data.

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?

The IPA supports the full Harper Report recommendations in relation to misuse of market power.

The IPA does, however, propose that *an additional purpose-based prohibition* be retained. This is discussed further in response to question 17, below.

Specific options

16. Which of options A through F [set out below] 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?

The IPA recommends implementation of Option F (the full introduction of the Harper Report recommendation on misuse of market power).

Both options E and F would improve the focus of the provision to capture anti-competitive effects; none of recommendations A – D would achieve this objective. All recommendations discussed below have been ranked in order of preference.

Option F – Amend the existing provision by adopting the full set of changes recommended by the Harper Panel

The IPA supports this option.

The Harper Report recommendation corrects the two key deficiencies in the existing legislation by:

- removing the ‘take advantage’ element; and
- expanding the focus of the provision to capture conduct having the *effect* of substantially lessening competition in a market.

These deficiencies have been discussed in detail, above.

In addition, Option F includes some guidance designed to assist the courts in distinguishing pro-competitive from anti-competitive activity and recommends further guidance from the ACCC; detailed agency guidance on abuse of power provisions is common in other jurisdictions to assist firms to understand agency priorities and provide further guidance – both to firms with substantial market power and the firms with whom they deal - about conduct likely to raise competition concerns.

The Harper Panel’s recommendations also appropriately call for the repeal of post-2007 amendments to section 46, which failed to address the key deficiencies in the Act and, in some cases, brought about further uncertainty. Finally, the Harper Panel’s recommendation allows for authorisation to be sought for misuse of market power, which is appropriate following the move to an effects-based test and ensures consistency with other effects-based prohibitions in the Act.

Option E – Amend the existing provision by removing the words ‘take advantage’, including a ‘purpose, effect or likely effect of substantially lessening competition’ test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision

The IPA would support this option *as an alternative* to the full Harper.

The key difference between Option E and F is that the former removes the Harper Panel’s recommended legislative guidance. The IPA believes inclusion of the mandatory factors may provide some useful guidance to the courts and to business. Nevertheless, the IPA does not believe that such guidance is essential to ensure the appropriate scope and operation of the provision and therefore would be prepared to support Option E as an alternative to Option F.

Option D - Amend the existing provision by removing the words ‘take advantage’, including a ‘purpose of substantially lessening competition’ test, including mandatory factors for the courts’ consideration, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision

The IPA does not support this option.

For reasons discussed in relation to question 10, the IPA can identify no advantage in limiting a substantial lessening of competition based prohibition to *purpose* alone. Where a substantial lessening of competition test is adopted a direct focus on conduct having an anti-competitive effect is more appropriate.

There are two key disadvantages to the purpose-only based approach:

- it fails to focus attention on the key issue – the economic damage caused by certain dominant firm conduct – and therefore risks failing to capture conduct which causes significant economic harm to the market;
- it would be inconsistent with the approach taken in other provisions of the legislation which address anti-competitive conduct, all of which either include a *purpose or effect test* (sections 45 and 47) or an *effect test* (s 50).

Option C - Amend the existing provision by removing the words ‘take advantage’, including a ‘purpose of substantially lessening competition’ test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision

The IPA does not support this option.

This recommendation differs from Option D only in that it excludes the mandatory list of factors proposed by the Harper Panel. For reasons discussed in relation to Option D, the IPA does not support this option.

Option B - Amend the existing provision by removing the words ‘take advantage’

The IPA does not support this option.

Option B would represent an improvement from the current position, but is insufficient *in itself* to address the concern that the current provision fails to capture conduct having an anti-competitive effect.

The IPA does, however, recommend that the modified provision proposed as Option B, should be included as an *additional prohibition* in the Act. The reasons for this are discussed in response to question 17, below.

Option A - Making no amendment to the current provision

The IPA does not support this option.

For reasons discussed at the beginning of our submission and in response to question 1, the current provision is deficient in several respects. Maintaining the status quo would, therefore, do nothing to improve market outcomes.

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

The IPA suggests that the government consider retaining a prohibition on firms with substantial market power engaging in conduct with the object of harming competitors or competition, *in addition to* the new provision proposed in the Harper Report. This reflects the IPA’s view that the object of the Act, and of the misuse of market power provision in particular, is not, and has never been, restricted to pure economic harm.

Object of the Act

The discussion paper states that the CCA is an economics based law, which is concerned with the state of competition in markets rather than fairness, and that the existing misuse of market power provision is designed to ‘protect the competitive process in markets’ rather than individuals. This is not, however, consistent with the history or drafting of the provision or with the express object of the Act.

The objects clause of the Act (section 2) refers to enhancing the welfare of Australians through the *promotion of competition and fair trading and provision for consumer protection*. The Australian Consumer Law, which comprises a significant portion of the Act, is clearly directed toward issues of fairness beyond pure economic considerations. However, even with respect to the competition provisions within the Act, the objects clause suggests they are intended to promote both ‘competition and fair trading’, clearly importing notions of fairness beyond pure economic concerns.

In relation to the misuse of market power provision itself, section 46 has never been, and should not now be, considered as limited to conduct which produces significant anti-competitive harm in an economic sense, although it should extend to such harm. That such a limitation was not the original object of the provision is apparent from its focus on the *purpose* of conduct and on harm to *specific* competitors or persons (in subsection (1)(a)), irrespective of the effect of the conduct on the broader competitive process.

The second reading speech accompanying the introduction of the Act in 1974 made clear the provision was designed to capture *improper* use of market power;²¹ Senator Murphy’s Second Reading speech stated that:

Clause 46 ... will prohibit an enterprise which is in a position to a market from taking advantage of its market power **to eliminate or injure its competitors.**’ (emphasis added)²²

This broader objective for the provision was further highlighted in the second reading speech accompanying the 1986 amendments:²³

A competitive economy requires an appropriate mix of efficient businesses, both large and small. ... an effective provision controlling misuse of market power is most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors. ...
Section 46 in its proposed form ... is not aimed at size or at competitive behaviour as such of strong businesses. What is being aimed at is the misuse by a business of its market power.²⁴

²¹ Mr Enderby, House of Representatives, Hansard, 16 July 1974, page 229; Senator Lionel Murphy, Senate Hansard, 30 July 1974

²² Senator Lionel Murphy, Senate Hansard, 30 July 1974, page 544.

²³ The 1986 amendment reduced the threshold market power test from one of market control to the current ‘substantial market power’ test and made clear that a court could infer requisite purpose from surrounding circumstances (s 46(7))

²⁴ Attorney-General, Mr Lionel Bowen, House Hansard, 19 March 1986, page 1626

Should it be determined that the object of the Act generally, and the misuse of market power provision in particular, should be re-defined to focus exclusively on the *competitive process* and *economic harm*, the IPA recommends that the objects provision of the Act should be amended. This would avoid the existing disconnect between legislative intention as reflected in the current objects clause and the objectives sought to be attributed to the Act by recent reviews and some political commentary.

In the event that it was determined that issues of fairness should be removed from the object of the competition provisions, the effectiveness of the Australian Consumer Law in achieving fair outcomes when dealing with the predatory conduct of firms with substantial market power should also be reconsidered.

Retaining a targeted purpose prohibition

If the existing objects clause is retained and considerations of 'fair dealing' remain one of the objects of the misuse of market power prohibitions, the IPA is of the view that conduct by corporations with substantial market power which has the purpose of:

- eliminating or substantially damaging a competitor;
- preventing entry of a person into a market; or
- deterring or preventing a person engaging in competitive conduct

should be unlawful, regardless of whether it involves a 'taking advantage of market power.' The level of concentration in many of Australia's markets means that conduct of this kind will frequently fail to have the effect of 'substantially lessening competition' precisely *because* of the market power held by the firms engaging in the predatory conduct. Such conduct should be prohibited, not to protect small business *per se*, but because it is appropriate for a law aimed at the protection of competition and promotion of fair dealing to prohibit conduct which has as its object the elimination of rivals and, by extension, harm to the competitive process.

Retaining this modified provision, in addition to prohibition recommended by the Harper Panel, would protect against conduct which unfairly impedes normal competition; that is, conduct which has as its *object* the exclusion or deterrence of others from the market. In addition to harming competition, one competitor at a time, such conduct carries with it moral opprobrium for which purpose remains an appropriate and effective mechanism for distinguishing *predatory* conduct from normal and benign *competitive* behaviour.

If it is accepted that conduct having as its *object* the exclusion or elimination of competitors should be prohibited, the need for a 'take advantage' link to market power is negated. Neither the anti-competitive purpose nor effect are altered by the source of the power utilised to bring about the outcome. A firm with substantial market power may eliminate a competitor by burning down their shop or by refusing to supply them with essential materials; the former is clearly not referable to market power while the latter may be. There is no obvious reason for distinguishing between the two; the purpose and outcome remain the same.

The IPA therefore suggests the following prohibition, in addition to that proposed in the Harper Report.

A corporation that has a substantial degree of power in a market shall not engage in conduct for the purpose of:

- (i) 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;
- (ii) preventing the entry of a person into that or any other market; or
- (iii) deterring or preventing a person from engaging in competitive conduct in that or any other market.