



Law Council
OF AUSTRALIA

Business Law Section

General Manager
Market and Competition Policy
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: competition@treasury.gov.au

12 February 2016

Dear Sir or Madam,

Options to Strengthen the Misuse of Market Power Law

I have pleasure in enclosing two submissions prepared by the Competition and Consumer Committee and the SME Business Law Committee respectively of the Business Law Section of the Law Council of Australia. The submissions have been prepared in response to further consultation undertaken by the Federal Government prior to its responding to the recommendation of the Final Report of the Competition Policy Review in relation to the misuse of market provision.

The Committees are two of 15 specialist Committees established within the Business Law Section to offer technical advice on different areas of law affecting business. Each of these Committees approaches issues of law reform and practice from a different perspective, which reflects the primary focus of their respective Committees.

In this instance, the Competition and Consumer Committee supports the retention of s.46 of the Competition and Consumer Act in its current form whilst the SME Business Law Committee maintains that s.46 should be amended to afford greater protection for small business. The Business Law Section has concluded that both views should be submitted to Treasury for its consideration at this point in the policy-development process. Each separate Committee presents well considered views from experts with different focus areas and each submission can usefully inform a broader consideration of the issue from those different perspectives, in the context of the overall policy development.

If you have any questions in relation to the Competition and Consumer Committee's submission, in the first instance please contact the Committee Chair, Caroline Coops, on 03 9643 4097 or via email: caroline.coops@au.kwm.com. Any questions in relation to the SME Business Law Committee's submission, should be directed in the first instance the Committee Chair, Coralie Kenny, on 0409 919 082 or via email: coralie.kenny@gmail.com.

Yours sincerely,

Teresa Dyson, Chair
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Law Council
OF AUSTRALIA

Business Law Section

Response to Discussion Paper “Options to Strengthen the Misuse of Market Power Law”

Submission by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia

12 February 2016

1. INTRODUCTION

1.1 Introduction

The Competition and Consumer Committee of the Business Law Section of the Committee of Australia (the "*Committee*") welcomes the opportunity to provide submissions to the Commonwealth Government on Australia's law on unilateral anticompetitive conduct in the Australian economy, in response to the "Options to strengthen the misuse of market power law" Discussion Paper of December 2015 (the **Discussion Paper**).

This is a controversial area. Views across the Committee membership vary. In framing these submissions, the Committee has endeavoured to set out a balanced, consensus view and an informative set of observations on these issues, which might assist the Government in assessing its preferred approach.

1.2 Summary of submissions

The Committee supports the retention of s 46(1) in its current form. The section works effectively and is increasingly clear in its application, with the benefit of many cases explaining the application of the provision.

In the Committee's view, amending s 46 will have a significant and practical impact on the regulation of the conduct of firms with substantial market power in Australian markets. The Committee does not consider there to be a compelling case for change, and believes that the benefits of changing to a new form of prohibition are unclear.

To date, under the current form of s 46, a firm with substantial market power is prohibited from engaging in conduct which is rational or available to it only by virtue of the substantial market power it holds – this is the "taking advantage" of market power required by s 46. Put another way, a firm with market power is not prevented from conducting itself (no matter how vigorously) in the same way as any firm without market power might, in the relevant market context.

Each of options B to F in the Discussion Paper removes the "take advantage" element. Removing this element raises concerns that the conduct of firms with market power will be much more broadly regulated than is appropriate. The Committee considers this to be a significant issue.

Options C to F in the Discussion Paper adopt various forms of a substantially lessening of competition test as well as removing the "take advantage" element. Such a shift in the scope of s 46 will, in the Committee's view, have consequences such as the following:

- (a) Although the concept of "substantially lessening competition" is already contained within the Act, its application is uncertain in the particular context of regulating unilateral, dominant-firm conduct in Australia.
- (b) It will take years for useful guidance to emerge from the Courts in relation to a significantly revised provision. Indicative of this are the time frames for significant ACCC prosecutions to be determined (with appeals exhausted) in the past; commonly more than 5 years.
- (c) The adoption of an "effects" test may make it more burdensome to prove a contravention of s 46. Proof of a substantially anti-competitive effect in a relevant market involves a broad enquiry – arguably well beyond the more focussed elements of whether the defendant has market power and has taken advantage of it.

2. SUBMISSIONS

2.1 Outline

These submissions are structured as follows:

- (a) We set out several **observations on the current law** in relation to ss46(1). These are intended to provide a useful contextual background to the various proposals to be considered.
- (b) We explain briefly why many members of the Committee would prefer to **retain the current form of ss46(1)**, notwithstanding the views expressed by the Competition Policy Review Panel (the **Panel**) in its report of 31 March 2015 (the **Panel Report**).
- (c) We address some of the **Issues for Discussion** raised by the Government in the Discussion Paper.
- (d) We respond to the various **Options** outlined by the Government in the Discussion Paper.
- (e) If the Government is persuaded that there is a compelling case for change, we propose **two alternative forms of the proposed ss46(1)** put forward by the Panel, and set out the reasons for them.

2.2 Observations on the current law

The primary prohibition, set out in ss46(1), has been largely unchanged since 1986.¹ After around 30 years of judicial examination, the meaning of the provision and its application is reasonably clear.

However, the Committee broadly accepts that the proper meaning and application of ss46(1) is not intuitive, nor readily accessible to the lay reader. Indeed, in developing the law on s46, the courts have struggled with some of the more difficult cases – with appeals allowed on many occasions.²

By way of background to the submissions which follow, the Committee sets out the following observations on the construction and application of the current law:

- (a) Subsection 46(1) contains three elements:³
 - (i) whether the impugned firm has "a substantial degree of power in a market";
 - (ii) if so, whether the firm has "taken advantage" of that power in a market; and

¹ Amendments in 2007/8 (post the High Court's decision in *Rural Press v ACCC* (2003) 216 CLR 53 (**Rural Press**)) introduced the words "or any other market" into the provision in several places, but did not change the fundamental elements of the provision.

² See for example: In *Boral Besser Masonry v ACCC* (2003) 215 CLR 374 (**Boral**), the ACCC lost at trial, prevailed on appeal to the Full Federal Court and then lost on appeal to the High Court. In *Melway Publishing v Robert Hicks Pty Ltd* (2001) 205 CLR 1 (**Melway**), the plaintiff succeeded at trial and on appeal (2:1 in the Full Federal Court), but lost on subsequent appeal to the High Court. In *Melway*, the High Court also cast doubt on the approach taken by the Court in *Queensland Wire Industries v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 (**Qld Wire**). In *Rural Press*, at trial the court found against Rural Press in relation to s46, but this was reversed on appeals to the Full Federal Court and High Court. In *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 (**Universal Music**), the Full Federal Court allowed an appeal on the s46 issues.

³ These are to be analysed sequentially. This is particularly important where there is strong evidence of a proscribed purpose which might colour consideration of the previous elements – see *Boral* and *Melway*.

- (iii) if so, whether the "purpose" of the firm in doing so falls within the terms of any of paragraphs (a), (b) or (c) of ss46(1).
- (b) First, discerning whether a corporation has a "substantial degree of power in a market" is reasonably settled. It is clear that two or more firms may have such power in a market,⁴ and that the degree of constraint on the powerful firm by rivals and other firms, such as suppliers and customers, as well as the existence of barriers to entry, are critical considerations.⁵
- (c) Secondly, whether the firm with substantial market power has "take[n] advantage of that power" is the heart of the prohibition. This element of the current test determines whether the firm's conduct is, broadly speaking, anticompetitive. Only where the firm has taken advantage of (that is, used) its market power to engage in impugned conduct, will it contravene s46(1).⁶ Subsection 46(6A) (introduced in 2008) usefully expands on this element.⁷
- (d) It is by reference to this "take advantage" element that the current form of ss46(1) identifies anticompetitive conduct by a firm with substantial market power. Conceptually, a firm "taking advantage" of, or using, its substantial market power, is doing something antithetical to normal competition in a market.
- (e) The Committee broadly accepts that the meaning of the expression "take advantage" in this context can be "subtle" and that it may be "difficult to apply" in practice in some cases. However, in the Committee's view, this element, as construed and developed by the courts over the last 30 years, now serves as a reasonably clear basis on which to make the fundamental distinction between legitimate competitive conduct, on the one hand, and anti-competitive conduct, on the other, engaged in by a firm with substantial market power.⁸
- (f) Thirdly, the "purpose" element serves to ensure that a contravention occurs only where an undesirable anti-competitive objective to the conduct, which has taken advantage of substantial market power, is involved. Put another way, the

⁴ See especially ss46(3D).

⁵ See Gleeson CJ and Callinan J in *Boral*, "The essence of power is absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers. ... Matters of degree are involved, but when the question of the degree of market power enjoyed by a supplier arises, the statute directs attention to the extent to which the conduct of the firm is constrained by the conduct of its competitors or customers." In relation to barriers to entry, see *Qld Wire* at page 201.

⁶ In *Boral*, the High Court adopted the observation from Heerey J at trial that: "If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power." Previously, in *Melway*, the High Court had observed that, "to ask how a firm would behave if it lacked a substantial degree of power in a market, for the purpose of making a judgement as to whether it is taking advantage of its market power, involves a process of economic analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of s46."

⁷ Ss46(6A) makes it clear that the firm will have taken advantage of its substantial market power where:

- its conduct is "materially facilitated" by that market power;
- the firm relied on that market power;
- it is unlikely that the firm would have engaged in the conduct if it did not have that market power; and
- the conduct is "otherwise related to" that market power of the firm.

⁸ This distinction is at the heart of monopolisation regulation everywhere and is universally difficult. As Dawson J observed in *Qld Wire* at p202: "The difficulty in determining what conduct constitutes taking advantage of market power and what does not, stems inevitably from the need to distinguish between monopolistic practices, which are prohibited, and vigorous competition, which is not. Both here and in the United States the search continues for a satisfactory basis upon which to make the distinction. For the most part, all that emerges are synonyms which are not particularly helpful. Words such as "normal methods of industrial development", "honestly industrial", "anticompetitive", "predatory", or "exclusionary conduct" merely beg the question."

"purpose" element serves to ensure that a contravention does **not** occur in cases where a firm might properly take advantage of substantial market power. This may occur in at least two important contexts; that is, where a firm with substantial market power takes advantage of its market power:

- (i) simply to charge high prices – it is clear that a firm with substantial market power in Australia may charge high prices⁹ – section 46 is not a price control provision; or
 - (ii) to engage in conduct which has a benign purpose – this is less common, but there may be "benign" conduct which nevertheless involves a taking advantage of substantial market power.¹⁰ The "purpose" element of ss46(1) serves not to prohibit such conduct.
- (g) Importantly, in the Committee's view, the "purpose" element of the current form of s46(1) has very rarely determined the outcome of a prosecution or other litigation in relation to ss46(1).¹¹ It is **not** the primary test by which essentially pro- or anti-competitive conduct by a firm with substantial market power, is identified. The "take advantage" element does this work.

2.3 Retaining ss46(1)

The reasons for which members of the Committee support retention of ss46(1) in its current form are briefly stated below:¹²

- (a) First, after years of litigation since the High Court's decision in *Qld Wire* in 1989, the meaning and application of the current form of s46 is now workably clear and consistent. This was not the case around the turn of the century – as several cases such as *Melway*, *Rural Press*, *Universal Music* and *Boral* were determined/appealed. However, that flurry of cases, together with several explanatory amendments to s 46,¹³ has meant that the law is now clearer.
- (b) Secondly, it is inherent in the nature of a provision which prohibits anticompetitive, or exclusionary, dominant firm conduct, that there is a difficult distinction to be drawn between permissible, pro-competitive conduct by a firm with market power, and unacceptable, anticompetitive (or "exclusionary" or "abusive") conduct by such a firm. As made clear by Dawson J in *Qld Wire* (see footnote 8 above), simply to change the words in the Australian provision is unlikely to make this inherent distinction any easier to draw in any case.
- (c) Thirdly, a significant change to the wording of ss46(1) will introduce considerable uncertainty as to quite how it is to be applied, and will render much of the judicial explanation and application of the current provision over the last 30 years far less useful.

⁹ When a firm, even one with substantial market power, raises its prices, it is very unlikely to damage a competitor, prevent entry or deter competitive conduct – to the contrary, entry becomes more likely and existing competitors have greater scope to win sales against that firm.

¹⁰ A clear, but hypothetical, example would be where a large pharmaceutical firm, with substantial market power, distributes an important drug to impoverished patients in Australia, at very low cost. Such conduct might be considered "predatory" by a rival firm, but it will not contravene ss46(1) if the **purpose** of the conduct is clearly charitable, rather than to prevent competition or to exclude or damage rivals.

¹¹ There has been only one significant case over the last few decades in which a corporation was found not to be acting for a proscribed anti-competitive purpose: *ACCC v Pfizer Australia Pty Ltd* (2015) FCA 113.

¹² It should be noted that this position is not unanimous.

¹³ See particularly subsections 46(3), (3A), (3C), (3D) and (6A).

- (d) Fourthly, with its principal focus on whether the firm has "taken advantage" of, or "used" its substantial market power, ss46(1) is broadly consistent with the NZ, US and EU approach to regulating dominant firm conduct, such that the Australian courts can continue to draw usefully from their thinking and jurisprudence on the issues.

More broadly, it is not clear that the current form of ss46(1) is significantly under-inclusive of potentially harmful anticompetitive behaviour by powerful firms. Further notes on this issue are set out below.

2.4 Proposal for reform: The Panel's proposal

The Panel has proposed that s46(1) be amended (with consequential amendments to the remainder of s46) to read along the following lines:

"A corporation that has a substantial degree of power in a market shall not engage in conduct which has the purpose, or has the effect or is likely to have the effect, of substantially lessening competition in that or any other market."

The Panel has also suggested that amended legislation also direct the court to have regard to factors such as the extent to which the conduct:

- is efficiency enhancing; or
- may prevent, restrict or deter the potential for competitive conduct or new entry.

The Panel supports permitting authorisation for conduct which might otherwise contravene s46 as reframed.

2.5 The Government's Discussion Paper – "Issues for Discussion"

The Government has identified several "Issues for Discussion" in its Discussion Paper. The following table addresses many of these issues (whereas we have addressed particularly the issues in relation to the potential regulatory impact of the proposed provision, and the proposed "purpose" element included within it, more fully below).

"Issues for discussion"	Committee Responses
<p>1. <i>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 provision?</i></p>	<p>There are two fields in which the current provision may be under-inclusive of "detrimental and economically damaging" conduct:</p> <ul style="list-style-type: none"> • Prospective market power: The Australian law (both currently and as proposed by the Panel) does not prohibit an "attempt to monopolise" in the same way as the US legislation does.¹⁴ In Australia, it is necessary to prove that the defendant has "a substantial degree of power in a market" in every case, whereas in the US, a conviction may be secured upon proof that anticompetitive conduct has a specific intent and a dangerous probability of achieving that position. This is however, not a serious gap in the Australian law, in the view of the Committee.

¹⁴ The US law, set out in section 2 of the *Sherman Act*, extends to prohibit a firm from engaging in "predatory or anticompetitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power", *Spectrum Sports v McQuillan* 506 US 447 (1993).

"Issues for discussion"	Committee Responses
	<ul style="list-style-type: none"> • Potentially "anti-competitive" conduct which does not "take advantage" of substantial market power: Some commentators have suggested that, under the current law, Australian firms with substantial market power may be improperly permitted to engage in some potentially "anti-competitive" conduct (such as exclusive dealing), in circumstances where firms without substantial market power do or would engage in such conduct, and that this is a weakness or gap in our law. However, the case law tends to suggest that remedies are available for such conduct, even where a breach of s46 has not been established.¹⁵
<p>2. <i>What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?</i></p>	<p>The uncertainty of a new test (although cast in familiar terms, involving the phrase "substantial lessening of competition"), does involve some risk that the proposed provision may be applied in cases involving (vigorously) pro-competitive conduct, such as:</p> <ul style="list-style-type: none"> • a firm with market power selling products at low prices (but above its cost), at which incumbent suppliers cannot compete; and • a firm with market power refusing to sell its product to current or potential rivals (such that its conduct "prevents" or "hinders" potential competition¹⁶), notwithstanding that it is an efficient distribution structure that would be adopted by a firm without market power. <p>If the proposed form of ss46(1) is adopted exactly as proposed by the Panel, removing the "take advantage" test and including reference to the "purpose" of the corporation/conduct, the provision is much more likely to capture pro-competitive conduct (such as conduct which has been described in internal correspondence within the corporation in a robustly anti-competitive way). This issue is expanded upon in paragraph 2.6 below.</p> <p>There may also be conduct that is caught by the Harper Panel's proposed provision that should not be unlawful, or in respect of which it is difficult to determine where the line between lawful and unlawful conduct should be drawn. For example:</p> <ul style="list-style-type: none"> • A firm with market power operates the only retail store of a certain kind in a country town, or region, and vigorously engages in planning or licensing objections over a period of two to three years in respect of the lodgement of development plans by a potential new entrant who would compete against the incumbent in that area. How will an effects test apply to competitors using legitimate litigation or objections processes? • In anticipation of rumours that a new competitor will otherwise establish new competing outlets in a location, a firm with market power

¹⁵ See for example *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 and *ACCC v Baxter Healthcare Pty Ltd* [2008] FCAFC 141.

¹⁶ See s4G of the CCA.

"Issues for discussion"	Committee Responses
	<p>purchases the only one or two available development sites in that location at market or above market rates. Does it matter under an effects test whether the purchase is above market rates, or whether the incumbent has a bona fide intended use for the site or not, as in either case, the effect will be to deny the new entrant the opportunity to enter that local market?</p> <ul style="list-style-type: none"> • A firm with market power poaches key personnel with hard to replace skills from a new entrant which weakens its capacity to compete? How will legitimate resourcing decisions be treated under an effects test? • A firm with market power commences litigation alleging that a generics manufacturer is breaching its IP? How will legitimate IP challenges be distinguished from litigation designed to delay new entry under an effects test?
Take advantage	
<p>3. <i>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?</i></p>	<p>There is no evidence that there would be any such improvement, in the Committee's view.</p> <p>At the heart of the issue, is whether the Australian law has a clear basis on which to prohibit anticompetitive conduct by a powerful firm, but permit (even vigorous and aggressive) pro-competitive conduct by such a firm. The "take advantage" element (as now construed and applied by the Australian courts after years of litigation), does this tolerably well.</p> <p>Removing this element is in fact more likely to restrict behaviour that is economically beneficial, as it risks capturing conduct by firms with market power that is efficiency enhancing.</p>
<p>4. <i>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?</i></p>	<p>See the response to Issue 2 above.</p> <p>The Committee does not support the introduction of a new test cast in terms as to whether conduct is "exclusionary" (or other similar expressions), in lieu of the "take advantage" element, for the reasons set out in paragraph 2.3(b) above.</p>
<p>5. <i>Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?</i></p>	<p>There are potential alternative formulations of the legal test by which anticompetitive conduct (ie "economically damaging behaviour") by a powerful firm is distinguished from pro-competitive conduct by such a firm (ie "economically beneficial behaviour") which could be adopted into the Australian law in the place of the "take advantage" element.</p> <p>These include the US approach of requiring that the conduct of a firm with substantial market power be either "exclusionary" or "predatory" (both terms pregnant with the judicial challenge of applying them correctly in individual cases)¹⁷, and the European approach of looking</p>

¹⁷ See for eg *United States v Microsoft Corp* 253 F.3d 34 at 58 (2001): "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."

"Issues for discussion"	Committee Responses
	<p>to whether there has been an "abuse" of a dominant position.¹⁸</p> <p>However, in the Committee's view, adopting any such alternative would:</p> <ul style="list-style-type: none"> • not resolve the inherent difficulty in any "anti-monopolisation" provision, of distinguishing anticompetitive conduct from procompetitive conduct by a firm with substantial market power – see paragraph 2.3(b) above; and • introduce significant uncertainty as to the proper construction and application of the "new" test adopted, at least over the medium term (of a decade or more), as the new test is judicially applied.
Purpose or effect (or likely effect)	
<p>6. <i>Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?</i></p>	<p>No.</p> <p>The current test of "purpose" in ss46(1) explicitly involves the court having regard to the likely effect of a corporation's conduct, in determining its "purpose".¹⁹</p> <p>More importantly, if the form of ss46(1) is amended as suggested by the Panel (see paragraph 2.4 above), the Committee is concerned that "purpose," should not be included in the amended provision, for the reasons set out in paragraph 2.6 below.</p>
<p>7. <i>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?</i></p>	<p>This approach is opposed by the Committee, for the reasons set out in paragraph 2.6 below.</p>
Substantially lessening competition	
<p>8. <i>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?</i></p>	<p>Refer to the response to Issue 2 above.</p>
<p>9. <i>Should specific examples of prohibited behaviours or conduct be retained or included?</i></p>	<p>In the Committee's view, setting out "specific examples of prohibited behaviour or conduct" is potentially dangerous and unlikely to be helpful, for the following reasons:</p> <ul style="list-style-type: none"> • it is very difficult to describe definitively particular conduct which must not be engaged in by a firm with substantial market power: for example, exclusive dealing arrangements, and selling at loss-leading prices, may both be pro-competitive conduct by a firm with substantial

¹⁸ Article 102 provides that: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

See European Commission commentary (at http://ec.europa.eu/competition/antitrust/procedures_102_en.html) which states that: "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." In the Committee's view, the word "abuse" in Article 102 is similarly *descriptive* of differentiating between anticompetitive and procompetitive conduct by a dominant firm, rather than *determinative*, as the "take advantage" element in ss46(1).

¹⁹ See for example, *Dowling v Dalgety Australia* (1992) 34 FCR 109.

"Issues for discussion"	Committee Responses
	<p>market power in some circumstances, and hence any general "guidance" that such conduct by a powerful firm tends to be, or should be construed as, anticompetitive would be misleading; and</p> <ul style="list-style-type: none"> broader guidance which requires the court to have regard to whether conduct is pro-competitive or not, really goes no further than the current provision. <p>One possibility for consideration is whether a list of factors which should be taken into account by the Court (such as is set out in ss50(3) of the CCA) would assist business and the courts in anticipating the way in which a new ss46(1) would/should be applied, beyond the already accepted principles and factors to be taken into account in assessing whether a corporation has substantial power in a market.</p>
<p>10. <i>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?</i></p>	<p>The Committee opposes this approach, for the reasons set out in paragraph 2.6 below.</p>
<p>Mandatory factors</p>	
<p>11. <i>Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?</i></p>	<p>Such "mandatory factors" to be considered by the court, as suggested in the Panel Report may reduce uncertainty for business.</p> <p>An alternative approach would be to provide guidance on the appropriate considerations or factors to be taken into account in the Explanatory Materials to any amending legislation.</p>
<p>12. <i>If mandatory factors were adopted, what should those factors be</i></p>	<p>The Government may wish to consider whether factors such as those set out in ss50(3) (which apply to ss50(1)) would assist. It is already the case that the Courts have regard to factors such as barriers to entry, market concentration and the degree of constraint from customers and suppliers (among other factors) in determining whether a corporation has "substantial power in a market". However, other factors may assist in the application of whether conduct by a firm with substantial market power has the effect or likely effect of substantially lessening competition.</p> <p>The factors might also include the purpose of the relevant conduct, and the extent to which the conduct gives rise to efficiencies or other consumer benefits.</p>
<p>Authorisations</p>	
<p>13. <i>Should authorisation be available for conduct that might otherwise be captured by section 46?</i></p>	<p>Yes – the Committee supports this proposal.</p>
<p>Other issues</p>	
<p>15. <i>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?</i></p>	<p>Yes. If the Government is persuaded that there is a compelling case for change and decides that an alternative to the current form of ss46(1) is to be implemented, there are two alternate formulations of the Panel's proposed provision that could usefully be considered (marked up against the Panel's proposed provision, set out in paragraph 2.4 above). See paragraph 2.8 below.</p>

"Issues for discussion"	Committee Responses

2.6 The Panel's proposal for reform should not be accepted

The Panel's proposal for reform – as set out in paragraph 2.4 above – involves several significant changes.

(a) *Removal of "take advantage"*

Critically, the Panel's proposal removes the "take advantage" element from ss46(1). This profound change to the provision breaks the currently required causal nexus between the impugned firm's substantial market power and any anti-competitive effect of its conduct. Without this important element, the Committee considers that ss46(1) will be more likely to prohibit efficiency enhancing, legitimate competitive conduct.

(b) *Without "take advantage", "purpose" is not an adequate filter*

The "purpose" element in the Panel's proposed provision set out in paragraph 2.4 above should be amended to remove any reference to "purpose".

As noted above (see paragraph 2.2), the principal basis on which the current form of ss46(1) determines whether the conduct of a corporation with substantial market power is anticompetitive is to ask whether the corporation has "taken advantage" of that substantial market power. The "purpose" element in the current provision does **not** serve this principal role (rather, it has a clearly secondary role, as explained in paragraph 2.2).

A "purpose" element is **not** an appropriate basis on which to assess whether a powerful firm has engaged in anticompetitive conduct, if the "take advantage" element is removed from ss46(1). Statements of an aggressive intent by a powerful firm (by which its "purpose" will be evidenced) may be equally robustly competitive or made with an anticompetitive or exclusionary outcome in mind - it is very hard to tell the difference. Thus, "purpose" should not be part of the basis on which the new provision discriminates between pro- and anti-competitive conduct by a powerful firm.

Instead, if the Panel's proposed new provision (which removes the "take advantage" element – as is the case in each of Options B to F in the Discussion Paper) is to be considered, it must be altered, in the Committee's view, to focus only on the **effect** (or **likely effect**) of the conduct of the corporation with substantial market power.

This is for the following reasons:

- (i) *Inconsistent with international practice:* In this context, focussing upon the **effect or likely effect** of conduct (rather than its purpose) is clearly preferable and is consistent with international practice, including in the US, the EU and in Canada.²⁰ As the Chairman of the ACCC stated in a 2015

²⁰ Section 79 of the Canadian *Competition Act*, which has been in force since 1986, prohibits abuse of a dominant position in the following terms:

"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,*

speech, under a heading "*Re-focusing on effects on competition: the better lens*":²¹

"Delving deeper, it is widely recognised internationally that best practice should prohibit unilateral conduct by a dominant firm that has a deleterious effect on competition."

- (ii) "*Purpose*" does not reliably distinguish between pro- and anti-competitive conduct: Removing the references to the "purpose" of the conduct will avoid the pitfall that "purpose" is not a reliable basis on which to tell pro-competitive conduct from anti-competitive conduct. Particularly, in the US, it has long been recognised that a firm's "intent" should not be determinative of liability. See for example, Professor Areeda's warnings on this point:²²

"Although excesses in the use of "intent" have been most apparent in the law of predatory pricing, our qualification on the usefulness of intent as a determinant of liability is not limited to that area. The problem, quite simply, is that the aggressive firm always "intends" to harm rivals if injury to rivals is a consequence of one's own increase in market share. To be sure, sometimes this intent seems directed to a specific firm rather than to competitors in general. But the point is that the same manifestations of intent show up both in robustly competitive markets and in markets that are vulnerable to monopolization. As a result, bad intent is easily proven but seldom serves to distinguish situations where monopolization is possible from those where it is unlikely or even impossible. Indeed, only in the perfectly competitive model do firms have no intent whatsoever respecting competitors. In any oligopolistic market – that is, in virtually every market where monopoly is plausible – firms necessarily observe the decisions of their rivals and respond accordingly. In such circumstances one generally cannot distinguish appropriate and inappropriate "intent to harm rivals" apart from the conduct itself, thus making the separate intent inquiry moot."

This warning is particularly to the point in a smaller economy such as Australia's, where "oligopolistic markets" tend to be more prevalent.

With the form of ss46(1) proposed by the Panel (with no reference to the "take advantage" element), the Committee is very concerned that a corporation with substantial market power may contravene the proposed provision simply where its internal documentary record reveals statements of hostile intent.²³

In the Committee's view, a corporation with substantial market power should not contravene a new form of ss46(1) by reference only to aggressive, "locker-room" talk set out in casual internal emails which might be said to go to the corporation's purpose, and which are likely to be

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- (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."
(emphasis added)

²¹ See "*Section 46: The great divide*", Rod Sims, Chairman of the ACCC, 30 May 2015

²² Areeda and Hovenkamp, *Antitrust Law*, ¶601.

²³ This concern is further exacerbated by the degree to which a corporation's "purpose" may be drawn from the evidentiary record with the assistance of s4F of the CCA, which permits a "purpose" of a corporation to be simply only one of several "substantial" purposes of the corporation, discernible from the evidence.

ambiguous, at best, as to whether the firm's conduct is genuinely anti-competitive.

To be sure, where liability may be determined under other provisions of the CCA by reference to either of "purpose" or "effect", there are already examples of firms being found to have contravened the CCA by reference only to the "purpose" of the firm – even where the statement of purportedly anticompetitive intent/purpose is clearly an empty one. Particularly, in *Universal Music*, the Full Federal Court (in considering the application of s47 of the CCA to conduct) found that the respondents' conduct had the purpose based on "a body of evidence, including internal memoranda" of the respondents²⁴, but was not satisfied that the facts supporting a finding by the trial judge that the relevant conduct had the effect or likely effect, of substantially lessening competition in the relevant market.²⁵

Such an outcome should not be permitted. It is likely to result in cases where ultimately pro-competitive conduct (nevertheless described by executives within a corporation in a robustly aggressive and predatory way, in their internal correspondence) is prohibited by the proposed provision.

A rule which "over-deters" potentially anticompetitive behaviour in this way may dull the incentive for powerful firms to engage in aggressively competitive conduct and would sacrifice the efficiency benefits associated with such robustly competitive behaviour.

Rather, as is widely recognised, the principal concern of ss46(1) should be the competitive **effect** of the powerful firm's conduct.

(iii) *Practical considerations:* Several important practical considerations are better served by omitting express reference to "purpose" in the Panel's proposed form of ss46(1). They are:

(A) *Evidence of purpose still relevant, but not determinative:* A court may still have regard to a corporation's *purpose* in assessing the likely effect of that corporation's conduct. The forensic exercise of determining the likely *effect* of conduct may still properly include evidence of what the powerful firm thought it was doing, or intended as the outcome of its conduct. Thus, by deleting express reference to "purpose" from the proposed ss46(1), it is not the case that powerful evidence of an anticompetitive purpose is not admissible or properly to be considered by the Court.²⁶ However, that potentially ambiguous evidence alone will not be potentially determinative.

(B) *Reduces the costs of litigation:* By deleting express reference to "purpose" in the Panel's proposed form of ss46(1), applicants to litigation under the new provision (such as the ACCC or rivals of the respondent to the litigation) will be less incentivised to demand comprehensive discovery by the respondent across its entire email records etc, in search of a "smoking gun" email, disclosing an

²⁴ *Universal Music* at paragraph 259.

²⁵ *Universal Music* at paragraph 274: "... s 47(10) was satisfied in each case and ... there was thus a contravention by each corporate appellant of s 47(1) of the Act; however, only by reference to the purpose of that appellant, not the effect or likely effect of its conduct."

²⁶ See *Rural Press* per Gummow, Hayne and Heydon JJ, "The views and practices of those within an industry can often be most instructive ... on the question of assessing the quality of particular competitive conduct in relation to the level of competition and the impact of its cessation."

(arguably) anti-competitive intent. This issue has been expressly recognised as a benefit of having regard only to the effect of conduct by firms with substantial market power in the US²⁷ – but the issue is equally important here in Australia, where the costs of litigation are much commented upon.

- (iv) *Consistent with the other "unilateral conduct" provisions in Part IV of the CCA:* The removal of the "purpose" element from the Panel's proposed provision would be consistent with the provisions of s50, which prohibits (the largely unilateral conduct of) a firm acquiring shares or assets, which has the effect or likely effect (but not the "purpose") of substantially lessening competition in a relevant market.

2.7 Regulatory impact of the Panel's proposed form of s 46

The Committee has the following views on the likely regulatory impact of the proposed form of ss46(1), put forward by the Panel.

- (a) *Proof of a contravention potentially more difficult:* In the Committee's view, a contravention of the proposed provision may be more difficult and more expensive to prove than is the case under the current form of ss46(1)²⁸. This is because establishing that conduct has the likely effect of "substantially lessening competition in a market":
 - (i) is potentially a more wide-ranging inquiry which must traverse how a market functions as a whole and the effect of the conduct within it, rather than to examine whether a particular firm's conduct took advantage of its substantial market power – this may broaden the extent of document discovery, testimony and the potential issues involved in cases litigated under the provision; and
 - (ii) as an extension of the point above, requires the application of a counterfactual analysis, in circumstances where the assumptions behind, and the identification and proof of, what is an appropriate counterfactual context(s) can be contentious and difficult.²⁹

These factors may point away from the proposed provision being appreciably less "difficult to apply" than the current form of s46(1).

- (b) *Some conduct may avoid contravention:* It is possible that conduct by a corporation which takes advantage of its substantial market power, but which has as its purpose harming only a very small market rival, may not be prohibited from doing so by the proposed provision (whereas it would be under the current form of

²⁷ Easterbrook J in *AA Poultry Farms v Rose Acre Farms* 881 F.2d 1396, 1402 (7th Cir. 1989) observed:

"Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. ... Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation."

²⁸ This conclusion assumes the absence of "smoking gun" purpose documents in the respondent's record, which may readily establish that it had the purpose of substantially lessening competition in the relevant market.

²⁹ A "counterfactual" assessment of what might have occurred in the relevant market, if the impugned conduct had not been engaged in, will be necessary to establish whether there has been a "lessening" (or prevention or hindering – see s 4G) of competition in that market. This "counterfactual" assessment is clearly established as an integral part of assessing whether conduct has the purpose or likely effect of substantially lessening competition under s45 and s47, and whether it has such a likely effect under s50 of the CCA. See *ACCC v Metcash Trading* (2011) 198 FCR 297, *AGL v ACCC (No 3)* (2003) 137 FCR 317 and *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38.

s46(1)), as the conduct may have neither the purpose nor the likely effect of *substantially* lessening competition in the market.

2.8 Specific Options

Option A is recommended

The Committee supports Option A set out in the Discussion Paper – that there be no change to the form of ss46(1).

Beyond that position, however, the Committee **strongly contends** that the Government should **not** adopt a form of ss46(1) as proposed in any of Options B, C, D, E or F set out in the Discussion Paper.

This is because, in each case, the proposed option removes the “take advantage” element and includes explicit reference to the “purpose” of the conduct of the firm with substantial market power, as the sole, or one of several alternative, element(s) by which pro-competitive conduct is to be distinguished from anticompetitive conduct by the firm with substantial market power.

As explained above, in paragraph 2.6, this approach is inconsistent with international practice (which focuses on the “effect” of the conduct of a powerful firm) and does not provide a reliable test for determining whether conduct by a powerful firm is genuinely anticompetitive.

Instead, if the Government is persuaded that a compelling case for change has been made, the Committee considers that the following two alternative formulations are worthy of consideration.

Alternative Formulation A

The Committee suggests an alternative formulation of ss46(1) along the following lines (marked up against the Panel's proposed provision):

"A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market ~~engage in conduct which has the purpose, or has~~ with the effect, or is likely effect, of substantially lessening competition in that or any other market."

Formulation A retains the “take advantage” element and thereby greatly reduces the risk that the proposed provision will capture vigorous pro-competitive conduct. Examples of such conduct are contained in the response to Issue 2 in paragraph 2.5 above.

The deletion of the reference to “purpose” is for the reasons set out in paragraph 2.6 above.

This formulation would have the following advantages over the form proposed by the Panel:

- it would require a causal nexus between a firm’s market power and any anti-competitive effect and would be less likely to capture efficiency enhancing, legitimate competitive conduct;
- it is focused on the competitive **effect** of the conduct of the powerful firm, which is at the heart of the policy objective of any prohibition against anticompetitive dominant firm conduct;
- it does not invite an inquiry into the “purpose” of the conduct in circumstances where:

- a vigorously pro-competitive "purpose" of a firm often looks very similar to an anti-competitive "purpose" – in both cases, the firm's purpose is likely to be expressed in exclusionary terms (eg to "drive out" rivals etc), and hence an analysis of a firm's purpose in this context is unlikely to assist in discriminating between properly pro-competitive and anti-competitive conduct; and
- having regard to a firm's "purpose" will invite an investigative or court discovery process which turns over a firm's entire business records in search of evidence of an improper purpose, which will add great costs to those processes (for no regulatory gain, given the factors set out in the bullet point immediately above).

Further, this alternative form of ss46(1) to the Panel's proposal would be consistent with the "competition rule" contained in s151AJ(2) of Part XIB of the CCA which has applied for many years to firms with a substantial degree of market power in a telecommunications market.

Alternative Formulation B

A further alternative formulation of ss46(1), which makes no reference to the current "take advantage" element, is as follows (marked up against the Panel's proposed provision):

"A corporation that has a substantial degree of power in a market shall not engage in conduct which has the ~~purpose, or has the effect~~ or is likely to have the effect, of substantially lessening competition in that or any other market."

By not including the "take advantage" element, this alternative thereby addresses the concern expressed by the Panel that the proper meaning and application of the "take advantage" element in the current form of ss46(1) is "subtle" and "difficult to apply".

However, as marked up, this alternative does not include reference to "purpose" in the context of the provision no longer including a "take advantage" element. This addresses the fundamental concerns that the Committee has in relation to the Panel's proposed provision, as explained in paragraphs 2.6 and 2.7 above.

Conclusion

These two alternatives have the following attributes:

- (a) They retain the current, settled element of requiring a "substantial degree of power in a market" and also adopt the benchmark of a "substantial lessening of competition", used elsewhere in Part IV of the CCA.
- (b) They do not include reference to whether the firm has the "purpose" of substantially lessening competition, for the reasons set out in paragraph 2.6 above. This is a critical defect in each of Options B-F of the Discussion Paper, in the Committee's view.
- (c) They are consistent with a policy objective of focusing on the competitive effect of dominant firm conduct. They are also consistent with the settled approach taken in s50 of the CCA (in relation to assessing the "effect or likely effect" of proposed mergers/acquisitions against a benchmark of a substantial lessening of competition).

Whilst views within the Committee differ, Formulation A is likely to carry less risk of inadvertently capturing conduct that is pro-competitive or efficiency enhancing than Formulation B, whilst still directing the focus on the provision to the competitive effects of the conduct of a firm with market power.

For this reason, Formulation A is preferred.

2.9 **Need for clarification - interpretation of "likely effect"**

If the Government proposes to adopt a formulation which involves a determination of whether the conduct in question is "likely to have the effect of substantially lessening competition", the Committee submits that there should be an appropriate clarification of how "likely to have the effect of" is to be interpreted in this context.

While there is some doubt about what that phrase means in the context of s50 of the Act, it appears that the prevailing view is that likely means "real chance" rather than more probable than not: *Australian Gas Light Co v ACCC (No 3)* [2003] FCA 1525; *ACCC v Metcash Trading Ltd* [2011] FCA 967; [2011] FCAFC 151.

While a "real chance" test might, arguably, be apt in the merger provision context, the Committee considers that it is an inappropriate test for determining whether unilateral conduct has contravened the Act and is liable to be subject to substantial penalties.

In the Committee's view, such a test imposes an unreasonable burden, and risk, on business decision-makers in that those decision-makers must judge whether there is a mere possibility that action taken by the company might result in a substantial lessening of competition.



Law Council
OF AUSTRALIA

Business Law Section

Response to Discussion Paper “Options to Strengthen the Misuse of Market Power Law”

Submission by the SME Business Law Committee of the Business Law Section of the Law Council of Australia

12 February 2016

SME Committee Position on the Discussion Paper

The SME Committee would first like to repeat a number of comments which it made in its earlier submissions to the Harper Review.

Policy Objectives of the Competition and Consumer Act 2010 (CCA)

The SME Committee expressed a concern in its earlier submissions that the Harper Review appeared to have accepted the claim that the sole policy objective of the CCA is to “protect competition and not competitors”. However, in the SME Committee’s view, when one more carefully considers this question it becomes apparent that the policy objectives of the CCA are much broader and more multifaceted.

Section 2 of the CCA states:

The object of this Act is to enhance the welfare of Australian through the promotion of competition and fair trading and the provision of consumer protection.

The CCA is aimed at the promotion of both competition and fair trading. In the SME Committee’s view it is implicit in the term “fair trading” that the CCA is aimed at preventing companies from engaging in unfair trading practices towards both consumers and their competitors.

The Second Reading Speech for the *Trade Practices Act* also makes it clear that the policy objective of the CCA involves a wider range of considerations than suggested in the Draft Report. As stated by the Hon. Senator Murphy on 30 July 1974:

The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices. The Bill will replace the existing Restrictive Trade Practices Act, which has proved to be one of the most ineffectual pieces of legislation ever passed by this Parliament. The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices. Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and featherbedding of industries.

In the view of the SME Committee, the policy objectives of the TPA/CCA are much broader than the promotion of competition, but rather extend to the removal of unfair practices including the prevention of discriminatory and exclusionary action against small businesses.

Similarly, Senator Murphy noted the policy objectives behind section 46 in his Second Reading speech:

The clause [46] covers various forms of conduct by a monopolist against his competitors or would-be competitors. A monopolist for this purpose is a person who substantially controls a market. The application of this provision will be a matter for the Court. An arithmetical test such as one third of the market- as in the existing legislation- is unsatisfactory. The certainty which it appears to give is illusory.

Clause 46 as now drafted makes it clear that it does not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.

The provision will not apply merely because a person who is in a position to control a market engages in conduct within one of the classes set out in the clause. It will be necessary for the application of the clause that, in engaging in such conduct, the person concerned is taking advantage of the power that he has by virtue of being in a position to control the market. For example, a person in a position to control a market might use his power as a dominant purchaser of goods to cause a supplier of those goods to refuse to supply them to a competitor of the first mentioned person- thereby excluding him from competing effectively. In such circumstances the dominant person has improperly taken advantage of his power.

Again, the policy objective behind section 46 was and is to prevent firms with market power from engaging in conduct which will eliminate or injure their competitors. Implicit in Senator Murphy's speech is a recognition that competition does not occur in a vacuum, but rather manifests itself in a practical sense through rivalrous behaviour between competing firms or potentially competing firms.

In the SME Committee's view, there is a need for better recognition and acknowledgement of the multifaceted policy objectives behind the CCA. Of particular importance is recognition and acknowledgement of the clear policy objective of providing competitors, particularly small businesses, with protections from unfair trading and abuses of market power. In the Committee's view, such recognition and acknowledgement is essential in considering the various proposals for amending section 46.

Having said that, the SME Committee also noted that too much focus had been placed on amending section 46 as a means of addressing small business concerns about the market conduct of larger corporations in markets. In this regard, the SME stated:

In the SME Committee's view, the debate concerning how to provide small businesses with a greater level of protection should focus less on ways of trying to "fix" section 46 of the CCA. In the Committee's view, section 46 at its best will only ever be a blunt instrument in terms of protecting small businesses from the abusive practices of larger firms.

The SME Committee believes that other proposed changes to the CCA and ACL are likely to provide small businesses with a much greater degree protection than continual tinkering with section 46.

For example, the recent cases taken by the ACCC against a supermarket chain for alleged unconscionable conduct show the ways in which these provisions may be used to provide protections to small and medium sized businesses. In the past, the ACCC was likely to have looked at the conduct described in these cases under section 46, rather than appreciating the potential of using the unconscionable conduct provisions to challenge such conduct.

The proposed extension of the Unfair Contract Terms legislation to business standard form contracts will also provide small businesses with greater protection in their dealings with larger businesses. Indeed, in the SME Committee's view, this particular legislative change is likely to have a profound effect in terms of improving the fairness of contractual relations between large and small businesses in Australia.

Finally, in the SME Committee's view, the introduction of a mandatory Grocery Code, along the lines of the UK Groceries Code, would also have a significant impact in terms of leveling the playing field between small/medium suppliers and the major grocery retailers.

SME Committee submission to Harper Review re Final Report, dated 29 May 2015

The SME Committee reiterated its view that section 46 is simply one element of a suite of small business protections provided in the CCA. The unconscionable conduct provisions and the unfair contracts legislation in relation to small business standard form contracts, which will commence on 12 November 2016, will supplement section 46 in terms of providing important small business protections.

The SME Committee believed that the proposed section 46 should be amended, in the following manner, so that it provides greater protections for small businesses:

A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose or would have or be likely to

have the effect, of substantially lessening competition in that market or in any other market including by preventing, restricting or deterring the potential for competitive conduct in a market or new entry to a market.

The SME Committee also supported the idea of having guidance factors included in the legislation, as follows:

- (a) conduct by a vertically integrated supplier in reducing or squeezing the margin available to an unintegrated customer which is in competition with the supplier;
- (b) acquisition by a supplier of the business of a customer which would otherwise be available to a competitor of the supplier, or the acquisition by a customer of the business of a supplier which would otherwise be available to a competitor of the customer;
- (d) the selective and/or temporary introduction of loss leader brands to the market;
- (e) entering into agreements for the acquisition of scarce facilities or resources which are required by a competitor for the operation of their business, with the object of withholding the facilities or resources from the market;
- (f) purchasing products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by a competitor;
- (h) requiring or inducing a supplier to sell primarily or exclusively to certain customers, or to refrain from selling to a particular competitor;
- (i) selling goods at a price lower than the acquisition price on a sustained basis; and
- (j) the introduction of additional capacity to a market without a legitimate business rationale or justification.

Authorisation would be available in relation to section 46 where the conduct can be shown to have countervailing public benefit.

ACCC Enforcement of section 46

Prior to outlining the SME Committee's position in relation to the Discussion Paper, the Committee believes that it is important to review the ACCC's enforcement of section 46 since the enactment of the provision in 1974.

The following table lists all of the ACCC section 46 litigation in the period from 1974 to 2016:

Table: ACCC and TPC Section 46 cases – 1974 to 2016¹

	Case	Year	Sections	Result
1.	CSBP Farmers Limited	1980	ss. 45, 46	Lost
2.	Carlton United Breweries Limited	1990	s.46	Won - consent
3.	CSR Limited	1991	ss.45, 46	Won - consent
4.	Commonwealth Bureau of Meteorology	1997	s.46	Won - consent
5.	Darwin Radio Taxi Cooperative Limited	1997	s.46	Won - consent
6.	Garden City Cabs	1997	s.45, 46	Won - consent
7.	Safeway Limited	2003	ss.45, 46	Won - contested
8.	Rural Press Limited	2003	s.45, 46	Lost s46 case but won s45 case
9.	Boral Limited	2003	s.46	Lost - High Court
10.	Qantas Limited	2003	s.46	No result – case settled with each party bearing their own costs
11.	Universal Music and Warner Music (CD's case)	2003	s.45, 46, 47	Lost ss45 and 46 cases but won s47 case
12.	FILA Pty Ltd	2004	ss.46, 47	Won - uncontested
13.	Eurong Beach Resort	2005	s.45, 46, 47	Won - consent
14.	Cardiothoracic surgeons	2007	ss.45, 46	No result – s46 claim dropped as part of the settlement
15.	Baxter Limited	2008	ss.46, 47	Won - contested
16.	Cabcharge Limited	2010	ss.46, 47	Won - consent
17.	Ticketek Pty Ltd	2011	s.46	Won – consent
18.	Cement Australia Pty Ltd	2014	ss.45, 46	Lost s.46 case, won s45 case.
19.	Pfizer	2016	ss.46, 47	Lost – contested
20.	Visa International	2015	ss.46, 47	Won s47 case, dropped s46 case

The above table discloses the following facts about the ACCC's enforcement of Section 46:

1. over the last 43 years the ACCC has commenced 20 actions which raised an allegation of a contravention of section 46 which equates to less than one section 46 case every two years;
2. the ACCC has been successful in 11 of its 20 section 46 actions, giving it an overall success rate of 55%;
3. eight of the 11 cases which the ACCC was successful in were settled by consent;

¹ Michael Terceiro, "Mythbusting: Bridging the Great Section 46 Divide", *Competition and Consumer Protection Law blog* at <http://competitionandconsumerprotectionlaw.blogspot.com.au/2015/11/mythbusting-bridging-great-section-46.html>

4. the ACCC dropped its section 46 allegations in two cases; and
5. the ACCC failed to establish its section 46 allegations in court in six of its 20 cases which equates to a failure rate of 30%.

The other important facts not disclosed in the above table are the grounds on which the ACCC failed to establish its section 46 case in Court. With the exception of the Pfizer case, the ACCC has been successful in establishing a proscribed purpose in each of its contested cases.

In the five other section 46 defeats for the ACCC, it failed to establish taking advantage in three cases (ie CSBP Farmers, Rural Press, and Cement Australia) and failed to establish a substantial degree of market power in two cases (ie Boral and Universal).

Harper Recommendation

As you are aware, the SME Committee's Deputy Chair, Michael Terceiro attended the Section 46 Roundtable held in Melbourne on 27 January 2016. The following is a summary of the SME Committee's position in relation to the Harper Section 46 Recommendation, as outlined by Mr Terceiro at the Roundtable.

The SME Committee sees two main problems with the existing section 46.

The first is the "taking advantage" test. In our view, prior to *Melway* and *Rural Press*, the taking advantage test simply required a causal connection between a firm's market power and their proscribed conduct.

Unfortunately, the High Court in *Melway* and *Rural Press* introduced a new and problematic interpretation of the taking advantage test. As explained in the Discussion paper, this test allows firms with market power to engage in particular business conduct if the court forms the view that firms without market power could also commercially engage in that conduct; in effect a "safe harbour".

The negative effect of this test on the enforcement of section 46 cannot be underestimated. In our view, Justice Kirby in his dissent in *Rural Press* clearly identifies the seriousness of the problems created by this new approach to taking advantage. In that case Kirby stated:²

"In my view, the approach taken by the majority is insufficiently attentive to the object of the Act to protect and uphold market competition. It is unduly protective of the depredations of the corporations concerned. It is unrealistic, bordering on ethereal, when the corporate conduct is viewed in its commercial and practical setting. The outcome cripples the effectiveness of s 46 of the Act. It undermines this Court's earlier and more realistic decision in Queensland Wire. The victims are Australian consumers and the competitors who seek to

² *Rural Press v ACCC* (2003) 216 CLR 53, para. 139.

engage in competitive conduct in a naive faith in the protection of the Act. Section 46 might just as well not have been enacted for cases like these where its operation is sorely needed to achieve the purposes of the Act. Judicial lightning strikes thrice. A novel doctrine of innocent coincidence prevails. Effective anti-competitive threats can be made without the redress which s 46 appears to promise. Once again I dissent."

In the Committee's view, the High Court's approach to taking advantage has crippled the effectiveness of section 46. As a result, there have only been 20 section 46 cases commenced by the ACCC in the last 43 years.

The SME Committee considers that the second significant problem in the section is that it looks solely at purpose rather than the effect or likely effect of conduct. It is more appropriate for a provision seeking to prevent the misuse of market power to look at the effects of particular conduct as well as the purpose of such conduct. This focus on purpose in section 46 puts Australia out of step with many other anti-trust and competition regimes around the world.

Claims by some groups that the inclusion of an effects test would threaten competitive conduct and innovation are not convincing given that purpose or effects tests exist almost everywhere else around the world. For example, purpose or effects tests exist in the monopolisation provisions in both the US and Europe. However, we have not seen any negative impacts on competitiveness or innovation in those places due to the inclusion of an effects test in their monopolisation provisions.

Some have also suggested that having a purpose and effects test would be novel in terms of the Competition and Consumer Act 2010. However, the purpose or effect or likely effect test is clearly the dominant test in Part 4 of the CCA – for example each of sections 45, 47 and 50 have a purpose or effect test. In our view, Australian businesses already have a great deal of exposure and understanding of a purpose or effects test.

Finally, the purpose or effects test already applies to unilateral conduct by a firm, so there is nothing novel about Harper's proposed inclusion of this test in section 46. Both sections 47 and 50 already apply to unilateral conduct by a firm.

The only aspect of the Harper Committee Recommendation we do not support are the mandatory factors. Therefore, the SME Committee supports Option E but does express a concern about difficulties in proving a "substantial lessening of competition "in a market.

Discussion Paper – "Issues for Discussion"

The Government has identified several "Issues for Discussion" in its Discussion Paper. In the following table, we have sought to address each of these issues:

"Issues for discussion"	Committee Responses
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"Issues for discussion"	Committee Responses
<p>1. <i>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 provision?</i></p>	<p>The complexities created by the High Court's treatment of "taking advantage" has made it difficult for the ACCC and private litigants to take action under the existing provision. Litigants are required to prove that a corporation without market power would not have been able to engage in the particular conduct before being able to establish their case.</p> <p>It is arguable that the current provision is inadequate to combat anti-competitive price discrimination. Whilst price discrimination is often pro-competitive, in some cases it can be used to damage competition.</p>
<p>2. <i>What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?</i></p>	<p>The SME Committee does not believe that the new provision will capture any pro-competitive conduct, given that the ACCC and private litigants will have to prove that the purpose or effect of the conduct was to substantially lessen competition.</p>
<p>Take advantage</p>	
<p>3. <i>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?</i></p>	<p>As stated above, the SME Committee agrees with Justice Kirby's comments in Rural Press, quoted above, that the current interpretation of taking advantage has limited the effectiveness of section 46.</p>
<p>4. <i>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?</i></p>	<p>The SME Committee does not believe that the new provision will restrict any economically beneficial behaviour, given that the ACCC and private litigants will have to prove that the purpose or effect of the conduct was to substantially lessen competition.</p> <p>The SME Committee also notes that Harper has proposed that Authorisation be available in relation to section 46. Therefore, businesses will be able to have economically beneficial behaviour approved by the ACCC or the Tribunal.</p>
<p>5. <i>Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?</i></p>	<p>A significant criticism of the removal of the taking advantage element is that there will no longer be any need to prove a causal connection between the corporation's substantial degree of market power and their conduct. While this is true, it should also be acknowledged that taking advantage has been interpreted by the High Court in such a way that it does much more than simply require a causal connection. Rather taking advantage has now become a significant defence which corporations can seek to rely on to defeat a section 46 action.</p>

"Issues for discussion"	Committee Responses
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?	Yes. The SME Committee believes that many ACCC investigations are not pursued to litigation because the ACCC believes that it is unable to establish a proscribed purpose. If the provision is enacted, the ACCC will be able to pursue cases where it is able to prove conduct has or is likely to have the effect of substantially lessening competition.
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?	The SME Committee believes that the inclusion of purpose and not effect or likely effect in a monopolisation statute is incongruous and out of step with major antitrust and competition law regimes.
Substantially lessening competition	
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?	Yes, although the SME Committee notes that it will be extremely difficult for private litigants to establish the substantial lessening of competition element of the new section 46. Even the ACCC has had great difficulties in proving an SLC in relation to unilateral action.
9. Should specific examples of prohibited behaviours or conduct be retained or included?	The SME Committee sees no need to include specific examples of prohibited behaviours in the provision, subject to the inclusion of guidance factors.
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 stated above, the SME Committee believes that the inclusion of purpose and not effect or likely effect in a monopolisation statute would be incongruous and out of step with major antitrust and competition law regimes.
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 SME Committee does not support mandatory factors, but rather guidance factors as currently existing in section 50 of the CCA.
12. If mandatory factors were adopted, what should those factors be	As stated above, the SME Committee does not support mandatory factors.
Authorisations	
13. Should authorisation be available for conduct that might otherwise be captured by section 46?	Yes – the Committee supports this proposal.

"Issues for discussion"	Committee Responses
Other issues	
<p>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?</p>	<p>Yes, the SME Committee supports the inclusion of guidance factors such as the following:</p> <ul style="list-style-type: none"> (a) conduct by a vertically integrated supplier in reducing or squeezing the margin available to an unintegrated customer which is in competition with the supplier; (b) acquisition by a supplier of the business of a customer which would otherwise be available to a competitor of the supplier, or the acquisition by a customer of the business of a supplier which would otherwise be available to a competitor of the customer; (d) the selective and/or temporary introduction of loss leader brands to the market; (e) entering into agreements for the acquisition of scarce facilities or resources which are required by a competitor for the operation of their business, with the object of withholding the facilities or resources from the market; (f) purchasing products to prevent the erosion of existing price levels; (g) adoption of product specifications that are incompatible with products produced by a competitor; (h) requiring or inducing a supplier to sell primarily or exclusively to certain customers, or to refrain from selling to a particular competitor; (i) selling goods at a price lower than the acquisition price on a sustained basis; and (j) the introduction of additional capacity to a market without a legitimate business rationale or justification.