



Australian
Competition &
Consumer
Commission

Options to strengthen the misuse of market power law

Australian Competition and
Consumer Commission

Submission to the Treasury

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Executive Summary

Competition law recognises that the conduct of firms with substantial market power can, in some circumstances, damage the competitive process.

It is a natural consequence of robust competition that more efficient firms damage less efficient firms by attracting customers and increasing their market share. This is a reality for small, medium and large businesses. Striving to grow, succeed and acquire market share and potentially market power is what encourages innovation, and firms should not be punished when they achieve it. Nor, having acquired market power, should they be prevented or discouraged from innovating further.

Section 46 of the *Competition and Consumer Act 2010* (CCA) seeks to prevent firms with substantial market power from engaging in conduct that prevents other firms from competing on their merits, while ensuring that large or powerful firms are not prevented or discouraged from engaging in fierce competition themselves.

The current section 46 is not fit for this purpose. This is the case for two reasons:

- i. The current section 46 fails to capture a range of anti-competitive conduct by firms with substantial market power. Courts have found that conduct by a firm with a substantial degree of market power does not involve a taking advantage of that power if a firm without substantial market power could engage in the same conduct. This ignores the very different consequences that can flow from the same conduct undertaken by a large firm versus a small firm in same the market.¹
- ii. The current purpose test is focussed on the impact of the conduct on individual competitors, not on the impact to the competitive process generally. This is inconsistent with the other sections in Part IV of the CCA and the rationale for having competition laws, which is to protect the competitive process, not individual competitors.

As a consequence, there are important types of anti-competitive conduct by businesses with substantial market power which are not prevented by the current section 46. Specific instances of these gaps are described in the ACCC response to question 1 and in more detail in attachment 1. Examples include most forms of strategic land banking, many instances of deep discounting, many retaliatory threats, capacity dumping and using regulatory and legal mechanisms to increase barriers to entry.

Other examples can be drawn from cases that have been successfully dealt with by misuse of market power provisions in other jurisdictions but would be unlikely to be caught by the current section 46 due to the 'taking advantage' requirement. These include the US case against Microsoft to prevent it from forcing Windows users to install other Microsoft products and excluding alternative software, and the European Commission ongoing case against Google which alleges that Google systematically favoured its own comparison shopping product in its search results, thereby preventing other comparison shopping products from entering or participating effectively in the market.

¹ Stuck, Cross, Douglas Richards, Weber Waller, *Use of Dominance, Unlawful Conduct, and Causation Under Section 36 of the New Zealand Commerce Act: A U.S. Perspective*, (2012) 18NZBLQ, 'whether firms with or without market power would have engaged in that conduct does not necessarily preclude anticompetitive purpose or effect', noting the court in *Berkey Photo, Inc. v. Eastman Kodak Co* (603 F.2d 263, 275 (2nd Cir. 1979)), 'Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even "honestly industrial".'

Such behaviour reduces the competitiveness of the Australian economy. Reform of section 46 is a necessary step to address the failings in the current provision and to ensure that the CCA is 'fit for purpose.'

The ACCC is of the view that reform of section 46 is a necessary part of a policy agenda to promote competition and innovation. However, without addressing both of the flaws in section 46, reform will be counterproductive. Indeed, without the removal of 'take advantage' all other changes to the section would be unhelpful or would make the current situation worse.

It is necessary therefore to replace the failed take advantage test with a 'substantial lessening of competition' (SLC) test. This would shift the critical inquiry away from 'taking advantage' to whether the conduct of the firm with substantial market power had the purpose, effect or likely effect of SLC. The substantial market power requirement will confine this section to a small number of corporations, and the SLC test will ensure it only applies to anti-competitive conduct. If powerful corporations are competing on their merits, and allowing other firms to compete on their merits, then the SLC test will not cause them any concern. Uncertainty and increased costs will be minimal as the SLC test is already used in the CCA, in sections 45 and 47. Corporations already make decisions based on this test every time they enter into a contract or engage in exclusive dealing.

The Harper Panel recommended that mandatory factors be adopted that the Court would be required to consider when adjudicating an alleged breach of section 46. As explained in detail below, the ACCC considers that these mandatory factors are unnecessary and unworkable.

For these reasons, the ACCC supports Option E.

Introduction

This submission responds to the issues raised in the Section 46 Options Paper released by the Treasurer on 11 December 2015. The submission is divided into two parts. Part 1 sets out the ACCC's preferred reform option for section 46. Part 2 sets out the ACCC's responses to the questions asked in the Section 46 Options Paper.

Part 1—the ACCC’s recommended amendment to Section 46

The ACCC supports the proposal set out in Option E of the Section 46 Options Paper.

The current misuse of market power provision – Section 46

Section 46 of the CCA prohibits misuse of substantial market power. It is a crucial component of Australia’s competition law.

New entrants or ‘challenger firms’ and the prospect of new entry are critically important characteristics of most well-functioning markets. U.S. economist and judge Richard Posner has written that most truly exclusionary conduct is engaged in by what he termed the ‘fragile monopolist’ where substantial market power is under threat from actual or potential competition.² That has been the experience of the ACCC in many investigations it has conducted into the conduct of firms with substantial market power. Pertinent examples include the behaviour by Universal Music, Sony Music and Warner Music in the lead up to parallel importation of compact discs; the conduct of Baxter Healthcare in response to the threat of greater competition as a result of state government tender processes; the conduct of BHP in response to the attempted market entry of Queensland Wire; and the behaviour of Rural Press when its regional newspaper monopoly was threatened in rural South Australia.

Firms with substantial market power can damage the competitive process by engaging in a range of conduct including refusals to supply other market participants, price-based exclusionary conduct (predatory pricing, loyalty rebates, bundling and price squeezes), conduct which raises the costs of rivals, vertical restraints and leveraging of market power across markets. This conduct is only prohibited by the current section 46 if the firm possesses a substantial degree of market power and has taken advantage of that power for the purpose of:

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

There are two issues that limit the efficacy of section 46 and mean that anti-competitive conduct by a firm with market power may not be caught:

- First, the interpretation of the ‘take advantage’ element adopted by the Court. There has been an increased reliance in recent years by Courts on this element, by limiting it to actions that only businesses with that substantial market power could take.
- Second, the structure of section 46 is materially different to, and inconsistent with, the other competition provisions of the CCA that utilise an SLC test. Section 46 focusses on particular proscribed purposes which relate to harming individual competitors, rather than harming competition. This is at odds with usual competition principles because competition often involves harm to competitors. A move to an SLC test would provide more certainty and clarity, as well as harmonisation with other provisions in the CCA and increased consistency with most comparable overseas jurisdictions.

² Richard A. Posner, ‘Keynote Address: Vertical Restrictions and “Fragile” Monopoly’ (2005) 50(3) *The Antitrust Bulletin* 499.

Take Advantage

Section 46 prohibits a firm with substantial market power 'taking advantage' of that power for the purpose of harming actual or potential rivals or otherwise limiting competitive conduct. However, this is what occurs in well-functioning competitive markets. Firms engage in rivalrous conduct (such as price discounting, innovation, enhanced service delivery) with the purpose of winning customers at the expense of their rivals. Given this it has been necessary for 'take advantage' to do the 'heavy-lifting' in filtering pro-competitive / benign conduct from anti-competitive conduct.

However, the Courts have adopted an approach to the interpretation of 'take advantage' of market power that has resulted in section 46 having limited capacity to address serious anti-competitive conduct. The ACCC considers that the interpretation of the section has moved away from the original intent that section 46 be construed in the final analysis as a single provision,³ with the elements of substantial market power, 'take advantage' and purpose being dealt with in a holistic way, as the High Court did in the early case of *Queensland Wire*⁴.

Later decisions have adopted a more fragmented approach to assessing the elements of section 46. In seeking to identify anti-competitive conduct, the Courts have undertaken complex and hypothetical counterfactual analyses of whether a corporation without substantial market power could engage in the conduct in question without sufficiently coupling the use of the market power with the purpose sought to be achieved.

Two judicial decisions that illustrate the difficulty with the 'take advantage' element of section 46, as interpreted by the Courts, are:

- **Rural Press Limited v ACCC** [2003] HCA 75: Rural Press had substantial market power in a regional newspaper market. When a smaller newspaper from a neighbouring market sought to enter the Rural Press region, Rural Press threatened retaliation which caused the withdrawal of the potential new competitor. The majority of judges in the High Court held that Rural Press did not 'take advantage' of its market power because the action was taken to protect its market power and that the conduct could be undertaken by a firm without substantial market power. Although no breach of section 46 was found, the High Court held that the same conduct had the purpose and effect of substantially lessening competition.
- **ACCC v Cement Australia** [2013] FCA 909: a firm with substantial market power in the South East Queensland cement market contracted all the available supply of a cement ingredient with the purpose of excluding and/or increasing costs of rivals. The Court held that the firm with substantial market power had not 'taken advantage' of market power because a small firm could have done the same. As in *Rural Press*, the Court found the contracts (that is, the same conduct) had the purpose and effect of substantially lessening competition.

In both of these cases, the firms involved had substantial market power and both were held to have engaged in the conduct that was found to have had the effect of substantially lessening competition. However, in neither case was there found to be a breach of section 46 because the Court held the firms did not 'take advantage' of their substantial market power to carry out the conduct.

³ Explanatory Memorandum, *Trade Practices Revision Bill 1986* (Cth) at [36]. The Explanatory Memorandum also emphasised that the provisions of section 46 enable the court to consider whether the corporations *would* have been likely to engage in the conduct in a competitive market, not just whether they *could* have done so.

⁴ (1989) 167 CLR 177. See further information on our views of the relevance of *Queensland Wire* on page 78 of Australian Competition and Consumer Commission submission to the Competition Policy Review, *Reinvigorating Australia's Competition Policy*, 25 June 2014.

Justice Kirby's dissenting judgment in *Rural Press* was critical of the majority judgment's approach to 'take advantage'. His comments continue to ring true today:

*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 section 46 of the Act. It undermines the Court's earlier and more realistic decision in *Queensland Wire*. The victims are Australian consumers and the competitors who seek to engage in competitive conduct in a naïve 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.*⁵

Since *Rural Press*, the 'take advantage' test has effectively operated as a stand-alone element that must be proved separately to establish a breach of section 46. The decision in *Rural Press* has meant that to defeat an allegation of misuse of market power, a business with substantial market power need only show that the anti-competitive conduct it has engaged in is something a small firm could also engage in, despite the very different harm it may cause to the economy, other competitors and consumers.

This results in consideration of whether a hypothetical firm facing hypothetical competition could engage in similar conduct, rather than an analysis of whether the actual conduct engaged in by the actual firm with substantial market power, in the actual market, was for an anti-competitive purpose or had or was likely to have an anti-competitive effect.

While the below quote relates to New Zealand's similar counterfactual test, the ACCC considers that it applies equally to Australia:

*The counterfactual test is unlikely to provide an effective means to differentiate competitively harmful conduct from beneficial conduct in many cases. To the contrary, it is very likely to lead to a significant incidence of erroneous conclusions, especially false negatives, and likely under deterrence. It will tend to insulate incumbent firms with substantial market power in highly concentrated industries from competitive challenges, perpetuate the current, concentrated market structure that is prevalent in a number of industries in New Zealand, and diminish, not promote, the long term dynamism of the economy.*⁶

As a result, there are a number of cases that have been successfully dealt with by misuse of market power provisions in other jurisdictions that would not be caught by the current section 46:

- In the US, Microsoft was prevented from forcing Windows users to install other Microsoft products, and excluding alternative software. Lifting these restrictions has led to the development of many diverse software offerings. In Australia, the 'take advantage' test would very likely not have been satisfied because firms without market power can bundle products in the way Microsoft did.
- In Europe, the European Commission alleges that Google systematically favoured its own comparison shopping product in its search results, thereby preventing other comparison shopping products from entering or participating effectively in the market. In Australia, the 'take advantage' test would very likely not have been satisfied because firms without market power can favour their own products.

⁵ *Rural Press Limited v ACCC* [2003] HCA 75.

⁶ Andrew I. Gavil, *Imagining a counterfactual section 36: rebalancing New Zealand's competition law framework*, (2015) 46 VUWLR 1043 at 1047.

Further, as noted in Attachment 1, there are a number of categories of conduct which are not likely to be within the ambit of the current section 46 because of the ‘taking advantage’ element, but which - if engaged in by a firm with substantial market power—would appropriately be assessed under an SLC test.

Purpose or effect (or likely effect) of substantially lessening competition

The current section 46 does not address unilateral conduct by a firm with substantial market power when that firm has the purpose, or the conduct has the effect or likely effect of substantially lessening competition. It only addresses conduct that has one or more proscribed purposes.

The proscribed purpose requirement has a material impact on the ACCC’s ability to deal with anti-competitive unilateral conduct, especially at the investigative stage. The ACCC has discontinued a number of investigations into serious allegations of conduct that was likely to have had an anti-competitive effect because it was unlikely the ACCC would have been able to establish that the conduct had been engaged in for a proscribed purpose.

Adopting a purpose or effect or likely effect of SLC test’ (SLC test) for section 46 and removing the specific proscribed purposes that focus on harm to competitors and potential competitors rather than the process of competition would bring section 46 into line with the other competition provisions of the CCA. Sections 45 (anti-competitive contracts) and 47 (exclusive dealing) both impose a test that involves considering whether the impugned conduct has the purpose or effect, or is likely to have the effect, of substantially lessening competition. Section 50 (mergers) also looks at acquisitions which have the effect or likely effect of substantially lessening competition.

The use of the SLC test in section 46, therefore, would not require a significant change in the way in which businesses assess whether their conduct is likely to breach our competition law. It is also a test that is familiar to businesses operating in international markets.

Vocal critics of the reframing of section 46 to include an SLC test argue that doing so would constrain big business from legitimate competition, reduce productivity, chill investment and lead to higher prices. This is not true. An SLC test would protect legitimate competition and only target anti-competitive conduct. Conduct that enhances competition, by definition, will not substantially lessen competition and will not be captured.

The application of the SLC test allows firms to gain market share by being more innovative and efficient than their rivals, since this benefits consumers and raises productivity. Innovation is at the heart of competitive conduct. Even where innovation and strategic investments lead to market dominance, neither the courts nor the ACCC would regard that as a substantial lessening of competition.

Suggestions that an SLC test in section 46 would lead to regulation of a large number of players or prevent widespread conduct that is procompetitive demonstrate a fundamental misunderstanding of the substantial market power element and misconstrue the operation of an SLC test. Section 46 currently applies, and would continue to apply, only to those firms that possess substantial market power within a market. This is a filter which of itself restricts the current test, as it would an amended section 46 with an SLC test, to a very small number of businesses. The provision would not apply to conduct that is merely fierce competition; under an SLC test, to damage competitors, even to the extent of competitors being forced out of business, is not in itself a basis to establish a ‘lessening of competition’. The SLC element seeks to protect the competitive process. The SLC test targets conduct that prevents or impedes firms from competing on their merits.

Australian businesses are already accustomed to considering the SLC test in relation to most other aspects of their commercial dealings as a result of sections 45 and 47.

If section 46 were to be amended to remove the 'take advantage' limb and include a purpose or effect SLC test, a breach of the revised section 46 will continue to require a significant evidentiary burden. The court would need to be satisfied that a corporation that has a substantial degree of power in a market had engaged in conduct that had the purpose or effect or was likely to have the effect of substantially lessening competition in that or any other market.

Mandatory factors

The ACCC considers that the best course of action is to amend section 46 to bring it into line with sections 45 and 47, as recommended by the Harper Review. This would allow an amended section 46 to draw on established jurisprudence and competition policy. Australian businesses are already accustomed to considering the SLC test in relation to most other aspects of their commercial dealings as a result of sections 45 and 47. The use of this test in section 46, therefore, would not require a significant change in the way in which businesses assess whether their conduct is likely to breach the competition law. As noted, it is also a test that is familiar to businesses operating in international markets.

However, the ACCC considers that the proposed mandatory factors are unnecessary and unworkable as:

- sections 45 and 47 currently function effectively without the need for consideration of mandatory factors, yet each has the same SLC test
- the inclusion of the proposed mandatory factors would significantly increase the complexity of section 46, contrary to the simplification recommendation of the Harper Review
- inserting mandatory factors in section 46 will lead to legal arguments that the test is to be construed differently to the SLC test in sections 45 and 47
- the mandatory factors would impose a heavy and unrealistic evidentiary burden upon an applicant to disprove matters which will often be within the respondent's knowledge (such as any efficiency enhancements or changes in product quality)
- the mandatory factors could require some quantification of anti-competitive purposes or effects as well as efficiencies and innovation, and a balancing exercise to determine whether there is a substantial lessening of competition, which in many cases will simply not be possible.

Conclusion

The ACCC considers that the existing provision is flawed because it focusses on harm to competitors rather than to competition, and the 'take advantage' limb is an inappropriate and illogical filter to distinguish between pro and anti-competitive conduct. The 'take advantage' limb ignores the very different consequences of conduct by a firm with market power and similar conduct by a firm without market power.

The ACCC suggests the deletion of the 'take advantage' and current purpose elements, and the substitution of the SLC test. The ACCC does not support the inclusion of the suggested mandatory factors, nor any other mandatory factors.

The ACCC therefore supports the amendment of section 46 in accordance with Option E.

Part 2—the ACCC’s responses to the questions

Question 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 provision?

As currently interpreted, section 46 does not effectively address a range of anti-competitive conduct including:

- **Strategic land banking**, for example, where a retailer already operates other sites in a market, is unlikely to satisfy the ‘take advantage’ requirement as small firms can buy land too.
- Firms using **retaliatory threats** to deter new entry are unlikely to satisfy the ‘take advantage’ requirement if, for example, the action was taken to *protect* market power instead.
- **Capacity dumping**, for example, an airline increasing its seating capacity significantly above forecast growth in market demand to deter new entry or eliminate a competitor is unlikely to be considered to ‘take advantage’ of market power because smaller firms could engage in this conduct.
- **Regulatory / legal**, the use of legal or regulatory mechanisms to anti-competitively increase barriers to entry to a market, such as lodging objections to planning applications or appealing the grant of planning approvals or licences.

Further examples of conduct that is problematic to address under the current section 46, and how amending the section to include an SLC test would better address the conduct, are set out at Attachment 1.

Indeed, there are many ways companies can seek to prevent their competitors competing on their merits. In this context, the ACCC notes the US Microsoft and EC Google cases, discussed above, as further examples of conduct that is unlikely to be caught by the current section 46.

While sections 45, 47 and 50 do capture some forms of conduct that may be engaged in by a firm with substantial market power that have the effect of SLC, the other requirements of these provisions mean that they do not adequately cover the gap in the law which exists due to the current drafting of section 46. For example, a refusal to deal with a potential competitor (such as was the case in *Queensland Wire*) would fall outside of section 45 (as there would be no contract, arrangement or understanding), section 47 (as there would be no refusal to supply for one of the reasons set out in section 47(3)) and section 50 (as there is not an acquisition of shares or assets).

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

There are no examples of pro-competitive conduct that could be captured by the Harper Panel’s proposed provision or by the ACCC’s preferred Option E. If conduct is pro-competitive it does not substantially lessen competition and would not be captured.

The ACCC recognises that amendments to section 46 to remove the ‘take advantage’ and purpose and insert an SLC test might expose the conduct of businesses with substantial market power to more scrutiny. Opponents to amending section 46 argue that this increased scrutiny would constrain big business from legitimate competition. The ACCC considers that many of the concerns expressed by opponents to change are based upon a fundamental misunderstanding or misconstruction of the effect of the proposed amendments.

Competition, by its very nature, is deliberate and ruthless. Advantages gained through research and development, innovation or economies of scale do not lessen competition, even if the conduct causes competitors harm or forces them to exit a market.

- Investing in improved technology and lowering prices is a normal part of the competitive process that increases efficiency and will increase rather than lessen competition.
- Passing on lower prices to consumers that a firm is able to offer as a result of increased efficiency is a normal part of the competitive process and will increase rather than lessen competition. This is the case even where the prices are at a level that competitors find hard to sustainably match. Retailers adopt pricing strategies to promote their competitive position and increase their share of the contestable market; such strategies can include loss leading and national pricing where a chain retailer may offer a form of price guarantee. This conduct can be undertaken by firms with market power and those seeking to gain market share. In the majority of cases such pricing strategies stimulate competition and are pro-competitive. Section 46 acts as a filter; it will only capture pricing strategies undertaken by a firm with substantial market power where that strategy has damaged the competitive process by substantially lessening competition.
- Expansion by a firm into a new geographic area or into a complementary market that, because of the efficiency or technical expertise of the entering firm, causes others to exit or decide not to enter, is a normal part of the competitive process and will increase, not lessen competition.

Question 3—Would removing the ‘take advantage’ limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?

Yes, but the ‘take advantage’ limb cannot be removed without also amending the balance of the existing prohibition. For the reasons set out in Part 1, an SLC test should also be adopted.

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

The ACCC considers that Option B (proposal to remove the ‘take advantage’ limb without also adopting an SLC test) risks capturing pro-competitive conduct. This is because the proscribed purpose limb is directed to conduct that affects particular competitors rather than the competitive process. However, the ACCC considers that adopting an SLC test will remove this risk.

Adding the adjective ‘exclusionary’ to conduct that may have the purpose or effect of substantially lessening competition would be extremely detrimental for the following reasons:

- ‘exclusionary’ does not have an ordinary meaning which is clear or precise
- even if a definition were sought to be added into the section, it would be very difficult to draft a helpful and clear definition
- it would not add anything to the SLC test, if that test is applied in accordance with current jurisprudence
- most important, it would lead to legal arguments that it makes the SLC test in s46 different to the SLC test in ss45 and 47, undermining the benefits of consistency and uniformity, and causing extreme confusion in its interpretation
- it would be contrary to the principle of simplicity endorsed by Harper in recommendation 23.

The 'take advantage' limb was intended to distinguish pro-competitive or benign conduct from that which is anti-competitive. As has been put throughout the Harper Review process, 'take advantage' has failed to do this and has greatly weakened the effectiveness of section 46. We have strong concerns that the introduction of 'exclusionary' as another divining instrument, takes away the focus on whether competition has been harmed substantially, and would be a source of endless legal debate and uncertainty.

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

The ACCC considers that the removal of the 'take advantage' limb is the essential step to improving the efficacy of section 46. Without the removal of the 'take advantage' limb all other changes would be unhelpful, or could even make the current situation worse. As discussed below, in response to questions 6 -10, an SLC test is the most appropriate filter for separating pro and anti-competitive conduct.

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

The ACCC considers that including 'purpose, effect or likely effect' will better target anti-competitive conduct that causes significant consumer detriment. For example, it is likely that an amended section 46 would have resulted in Rural Press Limited and Cement Australia Pty Ltd being found to have breached section 46. In both of these cases, the firms involved had substantial market power, both were held to have engaged in the conduct for a substantial anti-competitive purpose and the conduct was found to have a substantial anti-competitive effect.

Question 7—Alternatively could retaining 'purpose' alone while amending other elements of the provision be sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?

The ACCC considers that the best course of action is to amend section 46 to bring it into line with sections 45 and 47 which have a test that involves considering whether the impugned conduct has the purpose or effect, or is likely to have the effect, of substantially lessening competition. This would allow an amended section 46 to draw on established jurisprudence and competition policy.

Question 8—Given the understanding of the term 'substantially lessening competition' that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?

Yes. Amending section 46 to include an SLC test would draw on established jurisprudence and competition policy. It would avoid restricting genuinely pro-competitive conduct. Australian jurisprudence has confirmed consistently that the SLC test is concerned with the process of competition and not the effect on individual competitors. Conduct that enhances competition, by definition, will not substantially lessen competition and will therefore not breach an amended section 46.

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

No. One of the benefits of the SLC test is that it is a flexible test that already effectively targets anti-competitive conduct only. Therefore, including specific examples of prohibited conduct is unnecessary and may limit the ability of the section to flexibly deal with a range of conduct.

Adding categories of conduct to section 46 would also not be beneficial for the following reasons:

- if the categories are only illustrative, then they would not assist in narrowing any inquiry or application of the section
- most categories (such as pricing below cost and bundling) will not always substantially lessen competition –specific conduct falling within the category would still need to be assessed on its facts to determine if it would substantially lessen competition

If the categories are mandatory and exclusive, then:

- that would add another layer of complication and argument as to whether the conduct fitted the description of a category of conduct
- the scope of s46 would be limited to those categories, which would potentially seriously under-capture anti-competitive conduct
- adding the categories would be contrary to the drafting principles of simplicity, and the use of broad, flexible prohibitions which can adapt to different businesses and business practices as they evolve.

Question 10—An alternative to applying a ‘purpose, effect or likely effect’ test could be to limit the test to ‘purpose of substantial lessening competition’. What would be the advantages and disadvantages of such an approach?

Limiting the SLC test to ‘purpose’ only would fail to capture conduct that has the effect of SLC. Competition policy should be at least as concerned with conduct that substantially lessens competition as with conduct that is intended to, but may not achieve, that outcome.

The ACCC considers that the best course of action is to amend section 46 to bring it into line with sections 45 and 47 which have a test that involves considering whether the impugned conduct has the purpose or effect, or is likely to have the effect, of substantially lessening competition. This would allow an amended section 46 to draw on established jurisprudence and competition policy.

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

Question 12—If mandatory factors are adopted, what should these factors be?

The ACCC considers that mandatory factors are unnecessary and would be unworkable:

- sections 45 and 47 currently function effectively without the need for consideration of mandatory factors, yet each has the same SLC test
- the inclusion of the proposed mandatory factors would significantly increase the complexity of section 46, contrary to the simplification recommendation of the Harper Review
- inserting mandatory factors in section 46 will lead to legal arguments that the test is to be construed differently to the SLC test in sections 45 and 47
- the mandatory factors would impose a heavy and unrealistic evidentiary burden upon an applicant to disprove matters which will often be within the respondent’s knowledge (such as any efficiency enhancements or changes in product quality)
- the mandatory factors would require some quantification of anti-competitive purposes or effects as well as efficiencies and innovation, and a balancing exercise to determine whether there is a substantial lessening of competition.

Accordingly, the ACCC does not consider that any factors should be introduced into the broad misuse of market power prohibition.

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

Yes. While pro-competitive conduct is by definition not captured by the SLC test, the ability to provide authorisation would allow the ACCC and businesses to deal with some exceptional cases where there are offsetting effects and provide businesses with greater comfort in those cases.

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

Question 15—Are there any other alternative amendments to the Harper Panel’s proposed provision that would be more effective than those canvassed in the Panel’s proposal?

The ACCC strongly supports the removal of the ‘taking advantage’ element and the introduction of an SLC test, without the proposed mandatory factors. It considers that this amended form of section 46 would be practical, workable and effective to prevent misuse of market power by businesses with substantial market power.

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

The ACCC supports Option E.

As discussed in Part 1, there are two issues that need to be addressed to ensure that section 46 is effective:

- removing of the ‘take advantage’ limb
- replacing the proscribed purpose limb with an SLC test.

The ACCC considers that providing mandatory factors risks differentiating the SLC test in section 46 from the SLC test in other provisions and creating unnecessary difficulties and complexities.

Option E is the only option that gives effect to these three matters and therefore Option E is significantly better than the other options presented in the Section 46 Options Paper.

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

No comment.

Attachment 1

Conduct of concern		Why current law wouldn't apply	Why Harper proposal helps
A	<p>Land banking</p> <p>A retailer operates 6 out of 8 retail fuel sites in a major town. The local planning authority has designated 4 other sites in the town as suitable for the establishment of new retail fuel sites. A potential new entrant is considering purchasing one of these sites. The retailer buys the first option to purchase all of the 4 sites before this can occur.</p>	<p>Unlikely to be taking advantage of market power because a firm without substantial market power could also buy the option. In other words, conduct that is designed to protect market power but could be undertaken by a firm without substantial market power is unlikely to breach the current s.46 (<i>Rural Press</i>).</p> <p>There are likely to be legal difficulties with this conduct being an 'acquisition' for the purposes of the mergers provisions and with the acquisition having an SLC effect.</p>	<p>Allows an assessment of whether the conduct has an anticompetitive effect (or purpose) in the relevant market, including by way of the higher barriers to entry the conduct is likely to erect.</p> <p>Even if the conduct could be assessed using 'effect' of SLC in a merger, the revised section 46 would allow 'purpose' of SLC to also be assessed.</p>
B	<p>Locking up supplies</p> <p>A firm with 60% total sales in a market enters into long terms arrangements to lock up 90% of all supplies of an essential ingredient in its production process.</p>	<p>Unlikely to be taking advantage of market power as a firm without substantial market power could enter such agreements. (see <i>Cement Australia</i>) In other words, conduct that is designed to protect market power but could be undertaken by a firm without substantial market power is unlikely to breach the current s.46 (<i>Rural Press</i>).</p>	<p>Allows an assessment of whether the conduct has an anticompetitive effect (or purpose) in the relevant market, including by preventing competing producers from growing their production thereby competing with the firm. (<i>Cement Australia</i> involved a finding of SLC)</p>
C	<p>Restricting supplies of essential materials</p> <p>A vertically integrated firm with substantial market power refusing to supply downstream competitors.</p>	<p>Depends very much on details but likely to be caught by the current law, although there could be some difficulties in showing taking advantage and/or purpose. (see and compare <i>Queensland Wire</i> and <i>Melways</i>)</p>	<p>Allows an assessment of whether the conduct has an anticompetitive effect, without the complicated use of a counterfactual test to assess whether the conduct constituted taking advantage of the firm's market power.</p>

Conduct of concern		Why current law wouldn't apply	Why Harper proposal helps
			Assessing whether the conduct has the purpose or effect of substantially lessening competition (compared to assessing whether the conduct involves a taking advantage of substantial market power) provides a clearer and more predictable test for assessing whether the refusal to deal is based on genuine business concerns (such as the credit worthiness of buyer) or is being engaged in to prevent rivalry.
D	<p>Retaliatory threats</p> <p>A firm is the only distributor of newspapers to newsagents and convenience stores in a town. A distributor of newspapers in a neighbouring town expands its distribution area to compete with the firm. The firm threatens to commence operating in the entrant's distribution area unless the entrant keeps to its own area.</p>	Unlikely to be taking advantage of market power as the firm is using its assets as a distributor to make the threat of retaliation credible, ie using its financial power rather than market power (see Rural Press). Further, if the entrant does not accede to the threat, then there would be no s.45 agreement to assess under the SLC test.	Allows an assessment of whether the conduct has an anticompetitive effect (or purpose) in the relevant market, including by eliminating the threat of entry from a neighbouring distributor. (In Rural Press – SLC was found but no breach of 46)
E	<p>Joint marketing fee</p> <p>A dominant retailer in a market (more than 60% of total sales) asks its suppliers to pay it 20% of sales price in a joint marketing fee. It doesn't impose this requirement on suppliers of products it sells under its home brand.</p>	Unlikely to be taking advantage of market power as a firm without substantial market power, indeed any retailer, could ask suppliers to contribute to marketing expenses.	Allows an assessment of whether the conduct has an anticompetitive effect (or purpose) in the relevant market, including by imposing considerable additional costs on suppliers that compete with home brand suppliers.

<p>F</p>	<p>Freezing out competing suppliers from retail display and demonstration opportunities</p> <p>A dominant retailer in a market (more than 60% of total sales) discriminates in favour of its own brand products in relation to in-store placement and promotions.</p>	<p>There may be difficulties with showing taking advantage and/or purpose. Alternatively, an unconscionable conduct case where the targets of the conduct are large suppliers of proprietary brands would be challenging (and not available at all where the suppliers are listed companies).</p>	<p>Allows an assessment of whether the conduct has an anticompetitive effect (or purpose) in the relevant market, including by making it more difficult for suppliers of proprietary brands to compete with the own brand products.</p>
<p>G</p>	<p>Targeted price discounting strategies by an incumbent, designed to dissuade new entrants into a region</p> <p>Possible predatory pricing by a dominant firm.</p>	<p>If truly predatory, i.e. below relevant costs of supply and targeted at potential competitors, this conduct would be picked up by the current law.</p>	<p>Allows an assessment of whether the conduct has an anticompetitive effect (and purpose), without the complexities of demonstrating below cost pricing. Assessing whether the conduct has the purpose or effect of substantial lessening competition (compared to assessing whether the conduct involves a taking advantage of substantial market power) provides a clearer and more predictable test for assessing whether the price discounting is a genuine competitive response or is being engaged in to prevent rivalry.</p>
<p>H</p>	<p>Tying up customers in long term contracts with anti- competitive rebates</p>	<p>Depending on the detail this could fall within the current law.</p>	<p>Allows an assessment of the conduct through the prism of the SLC test. Assessing whether the conduct has the purpose or effect of substantially lessening competition (compared to assessing whether the conduct involves a taking advantage of substantial market power) provides a clearer and more predictable test for assessing whether the use of the rebates is competitive conduct or is being engaged in to prevent rivalry.</p>