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ashurst

Dear Sir or Madam

Response to Discussion Paper – Options to strengthen the misuse of market power law

Thank you for the opportunity to respond to the Commonwealth Government's Discussion Paper on "Options to strengthen the misuse of market power law" (**Discussion Paper**).

Ashurst's competition practice has extensive experience advising clients on the application of the prohibition on the misuse of substantial market power in section 46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and representing clients during investigations and litigation relating to that prohibition.

In this submission we offer observations on the key issues raised in the Discussion Paper, based on our experience.

Yours sincerely

Bill Reid
Practice Head

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SUBMISSION IN RESPONSE TO THE DISCUSSION PAPER

1. SUMMARY

(a) Competition law is vitally concerned with the competitive process. An effective competition law should protect the competitive process in a way that allows it to flourish. The importance of protecting the competitive process is reflected in the very serious penalties (the greater of $10 million or 10% of Australian turnover for each contravention) which can be imposed for contraventions of the competition law. A corollary of such substantial penalties is that the scope of the prohibitions should be very clear so that firms can be confident that their conduct is lawful. The serious risk that arises when considering reform to competition law is that the wrong reform may be "over" protective, and may result in uncertainty as to the scope of the prohibition and, in both ways, may chill the competitive rivalry that leads to innovation and efficiency, and promotes the welfare of all Australians.[1]

(b) The meaning of the essential elements of the current prohibition on misuse of market power in section 46 is reasonably clear, and has been illuminated by case law. This means that a consequence of materially amending section 46 would be to unsettle the prevailing certainty about the effect of the prohibition, and the consequent confidence businesses have in their ability to know, in advance, whether particular conduct will contravene the section.

(c) The critical threshold questions to ask in relation to any reform of section 46 are: Is reform required? What evidence is there to support the case for reform? The Discussion Paper proceeds on the basis that there is some problem with the current prohibition, such that it is desirable to "strengthen" it. However, neither the Discussion Paper nor advocates of reform of section 46 have identified any concrete examples of conduct that should be but is not captured by the current prohibition.

(d) *If* these threshold questions identify that there is an evidence-based need for reform (and in our opinion they do not, as noted above and addressed in part 3), any proposed reform of section 46 should then be assessed against the following questions:

  (i) Would the proposed reform prohibit or discourage businesses in Australia from engaging in legitimate, robust, procompetitive conduct? (Would it "overprotect", or create uncertainty about what conduct was prohibited, and thereby chill or deter legitimate competition?)

  (ii) If so, can that outcome be justified on the basis that the proposed reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit? (Is the net effect of the change to facilitate rather than deter legitimate competition?)

(e) In our view, none of the Discussion Paper's proposed reforms to section 46 can be justified under this analysis, and all of the proposed reforms would be detrimental compared to the current position. As set out in Part 4:

  (i) Currently, the "take advantage" element in section 46 plays a critical role in distinguishing anticompetitive conduct from procompetitive conduct, and assisting firms to compete vigorously, by providing clarity as to the type of conduct that will and will not breach the prohibition. Except for the option of retaining the current section without amendment (Option A), all of the options propose removing this "take advantage" element, and none of them propose a satisfactory replacement. Without the "take advantage" element, a firm with substantial market power would face substantial uncertainty

[1] *Competition and Consumer Act 2010* (Cth), s 2: "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

about whether their conduct would breach any of the "options" identified in the discussion paper – even if it was conduct they would readily have engaged in before they obtained market power. They would face two choices: compete as they always did and risk breaching the law, or compete less vigorously to be certain they would not breach the law. The first option would impose unacceptable uncertainty on businesses about the legality of their conduct; the second option puts at risk the very economic efficiencies our competition laws are supposed to protect, and should be anathema to responsible policy makers.

(ii) The introduction of a test based on a firm having the purpose, or its conduct having the effect or likely effect, of substantially lessening competition would not materially change the scope of the current prohibition *if* the "take advantage" element was retained. However if the "take advantage" element was removed, introducing such a test would raise serious concerns.

(A) A "purpose" based prohibition[2] that did not involve the "take advantage" element would seriously risk over-reaching, creating significant uncertainty, and thereby chilling legitimate competitive conduct, as outlined above. Further, it would seriously risk capturing "false positives" – in particular, prohibiting conduct that might have been expressed in terms suggesting an anticompetitive purpose, but which in substance posed no risk of competitive harm. This risk could be expected to dampen further the extent of legitimate and vigorous rivalry between competing firms. Section 46 should concern itself with the question whether *conduct* is anticompetitive; a test based on purpose without "taking advantage" seriously risks prohibiting conduct that is competitively benign in substance, regardless of how it might be described.

(B) An "effects" based prohibition[3] that did not involve the "take advantage" element would risk doing serious harm to the competitive process it purports to protect. In particular, such a prohibition would risk retrospectively proscribing legitimate procompetitive conduct through which a firm with market power succeeded at the expense of its competitors. That is, it would risk proscribing the precise rivalry that Australian competition law ought to encourage. Further, it is illusory to think that a test based on the effect or likely effect of substantially lessening competition would make it easier to establish that particular conduct contravened section 46. In fact, it is notoriously difficult to prove an effect/likely effect of substantially lessening competition, as is borne out by experience with other provisions of the CCA that use this formulation.

(iii) The options of relying on "mandatory factors" that a court must consider in applying section 46, providing for ACCC authorisation of conduct that might otherwise breach section 46, and the publishing of guidelines by the ACCC in relation to section 46 are no answer to our concerns with the proposed reform options identified in the Discussion Paper.

(f) Question 15 of the Discussion Paper asks whether there are any amendments to section 46 that would be more effective than those recommended in the Harper Review's proposal. Our answer is "yes": the best option would be for section 46 not to be amended except to repeal subsections (1AA), (1AB) and (1A). This option would remove subsections that do nothing but introduce material uncertainty for business; they have not been illuminated by case law, and their repeal would

[2] Whether included on a standalone basis or in a "purpose or effect/likely effect" formulation.

[3] Whether included on a standalone basis or in a "purpose or effect/likely effect" formulation.

materially reduce the compliance burden on and risk faced by businesses seeking to ensure that legitimate, procompetitive conduct does not breach section 46.

(g) For ease of reference, Annexure 1 to this submission summarises our analysis in response to each of the specific reform options identified in the Discussion Paper; Annexure 2 summarises our responses to the specific questions identified in the Discussion Paper.

2. ANALYTICAL FRAMEWORK

2.1 Competition law is vitally concerned with the competitive process. An effective competition law should protect the competitive process in a way that allows it to flourish.

2.2 The CCA does not protect competition at all costs, and nor should it. The serious risk that arises when considering reform to competition law is that the wrong reform may be "over" protective, and may chill the precise competitive rivalry that leads to innovation and efficiency, and promotes the welfare of all Australians.[4]

2.3 In this respect, the "sporting analogy" on page 3 of the Discussion Paper is spot on: "section 46 should not seek to prevent a team from winning a grand final by training harder, having better skills or using better strategies". Any proposed reform which would prohibit or discourage a firm from "winning" in this legitimate, procompetitive way should be discarded.

2.4 In this context, we submit that the critical threshold questions to ask in relation to any reform are: Is reform required? What evidence is there to support the case for reform? We address these questions in part 3 below.

2.5 If these questions identify that there is an evidence-based need for reform (and in our opinion they do not, as we outline in part 3), any proposed reform of section 46 should then be assessed against the following questions:

(a) Would the proposed reform prohibit or discourage Australian businesses from engaging in legitimate, procompetitive conduct? (Would it "overprotect", or create uncertainty about what conduct was prohibited, and thereby chill or deter legitimate competition?)

(b) If so, can that outcome be justified on the basis that the proposed reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit? (Is the net effect of the change to facilitate rather than deter legitimate competition?)

2.6 Part 4 of this submission outlines our views on the key elements of the reform proposals identified in the Discussion Paper, which form the basis for our answers to these two critical questions, as summarised in Annexure 1.

3. IS REFORM REQUIRED? WHAT EVIDENCE SUPPORTS THE CASE FOR REFORM?

3.1 When considering whether reform is required, and the consequences of any reform, it is important to appreciate that the meaning of the essential elements of the current misuse of market power prohibition in section 46 is reasonably clear, and has been illuminated by case law.

3.2 This means that a consequence of materially amending section 46 would be to unsettle the prevailing certainty about the effect of the prohibition, and the consequent confidence businesses have in their ability to know, in advance, whether particular conduct will

[4] *Competition and Consumer Act 2010* (Cth), s 2: The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

contravene it. If section 46 is amended, key learning from important cases such as *Boral*,[5] *Melway*,[6] *Safeway*,[7] *Rural Press*,[8] *Baxter Healthcare*[9] and *Universal Music*[10] may well be redundant. Faced with this uncertainty in the future, businesses could either compete less vigorously (so as not to breach the prohibition), or compete as they would now, and risk substantial sanctions if their conduct was subsequently determined to be illegal. It is no answer to this concern to suggest that businesses can seek advice: legal advisors will face the same uncertainty as their clients until a body of case law develops. This will take significant time.[11]

Is there a need for reform, or evidence to support it?

3.3 We have considered the question whether there is conduct that should be but is not prohibited by the current section 46. We cannot identify any examples of unilateral anticompetitive conduct by a firm with market power that should be but is not prohibited by the current prohibition.

3.4 However, the Discussion Paper proceeds on the basis that there *is* a problem with the current prohibition. This is reflected in the title of the Discussion Paper ("Options to strengthen the misuse of market power law"), and in the description of options "...for strengthening misuse of market power laws...".[12]

3.5 The clear implication from the Discussion Paper is that the current prohibition in section 46 is "weak". The weakness is, apparently, that there is conduct of powerful firms, which is harmful to competition, but which is not caught by section 46 in its current form. If that were the case, there should be clear examples of such conduct, so that any proposed reforms could be sensibly assessed against the question whether they would enable section 46 to address that conduct, without unjustifiably chilling or deterring legitimate competitive conduct (see paragraph 2.5 above).

3.6 There are, however, no concrete examples in the Discussion Paper of any conduct which ought to be but is not caught by section 46.

3.7 The Discussion Paper does include some general references to conduct that it appears to suggest should be but is not prohibited by section 46; however those references do not advance any case for reform.

(a) The Discussion Paper refers to the *Rural Press* case,[13] and notes that the High Court concluded that a threat by one regional newspaper publisher to begin distributing its newspaper in a neighbouring region in order to deter a neighbouring newspaper publisher from distributing its newspaper in the first publisher's region did not involve taking advantage of substantial market power.[14] Quite clearly, the threat to begin distribution in another region would involve the use of a printing press and

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[5] *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374.

[6] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

[7] ACCC v Australian Safeway Stores Pty Limited [2003] FCAFC 149.

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

[9] *ACCC v Baxter Healthcare Pty Ltd* [2008] FCAFC 141.

[10] Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193.

[11] Even a single case can take several years to resolve – for example, the ACCC's proceedings against Pfizer for misuse of market power relate to conduct in the period from late 2010, and are not yet resolved (pending the Full Court's decision on the appeal from Flick J's decision at first instance). This is not a particularly exceptional case in terms of the time taken for the case to proceed to court. Given that it can take at least 5 to 6 years for contested cases on misuse of market power to be investigated by the ACCC and determined by the courts, it is highly likely that there will be a material, not merely transitory, delay between the introduction of an amended section 46 and the development of a body of case law that provides certainty on its application.

[12] Discussion Paper, p 7.

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

[14] Discussion Paper, p 5.

various organisational assets. The use of those modest assets in the circumstances, did not of itself involve any use of substantial market power. The High Court's decision is hardly a surprising result, and it does not illustrate any uncertainty or difficulty in applying the current prohibition. Acts of competitive retaliation, explicit and implicit threats of competitive retaliation and assessing the risk of competitive retaliation by competitors to particular conduct are all part and parcel of vigorously competitive markets. The fact that the Full Federal Court and the High Court both concluded that making a threat of entry was not a misuse of substantial market power does not support the proposition that the current prohibition is weak and in need of strengthening.

(b) The Discussion Paper also refers to the *Cement Australia*[15] decision in the Federal Court.[16] The brief reference suggests that the decision illustrates something unsatisfactory about the current prohibition. It notes that the Federal Court concluded that certain conduct in connection with the acquisition of the fly ash did not, in the circumstances considered by the Court, involve a misuse of market power in contravention of section 46, but did involve making and giving effect to particular contracts that would have the likely effect of substantially lessening competition in a market. This case was enormously complex. The judgment comprises 3,277 paragraphs. Much of the judgment concerns a very detailed consideration of evidence regarding contractual negotiations, the business rationale for particular contractual terms and the state of competition in the supply of fly ash. To imply, on the basis of this very complex case, that there are types of conduct which ought to be but are not caught by a prohibition on misuse of market power, without identifying what that conduct is, is not a sufficient or proper basis for law reform. Any such types of conduct should at the very least be described and clearly identified before being enlisted as support for the case to "strengthen" the current prohibition, so that the options for reform can be tested against them.

(c) The Discussion Paper mentions, in passing, that conduct, such as exclusive dealing, loss leader pricing and cross subsidisation might be competitively harmful where a firm has market power.[17] This may be the case in particular circumstances, but such practices are very commonly adopted in highly competitive contexts by many firms, large and small. Indeed, the Discussion Paper does not contain a single concrete example of exclusive dealing, loss leader pricing or cross-subsidisation which ought to be caught by a prohibition on misuse of substantial market power but which is not caught by section 46. The possibility of such uncaught conduct is, at best, mere speculation.

(d) The Discussion Paper's misdescriptions of the positive statutory element of "taking advantage" of market power as a "defence",[18] or of it having the effect that conduct is "immunised,"[19] should not distract attention from the fact that the Discussion Paper has fundamentally failed to identify conduct which should be caught but is not.

3.8 If there is unilateral conduct which should be caught by a prohibition on misuse of substantial market power, that conduct should be clearly identified so that proposed amendments to section 46 can be assessed to determine whether they would cover that conduct. Critics of section 46 in its current form have had the best part of two years[20] to identify such unilateral conduct which should be caught but is not, and have been unable to do so. This failure to identify any such specific conduct highlights a serious problem with

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[15] *ACCC v Cement Australia* [2013] FCA 909 .

[16] Discussion Paper, p 5.

[17] Discussion Paper, p 5.

[18] Discussion Paper, pp 7, 9.

[19] Discussion Paper, pp 5, 15.

[20] Since the Terms of Reference for the Harper Review were released in March 2015.

the various options for reform: it is impossible to determine whether any of those options would be any more effective than the current prohibition in proscribing such conduct.

4. KEY ELEMENTS OF THE REFORM PROPOSALS IDENTIFIED IN THE DISCUSSION PAPER

The "take advantage" element

4.1 Under section 46 as it currently exists, conduct is not prohibited unless it involves (among other factors) a "use" of market power – ie, unless there is a causal link between the existence of market power and the relevant conduct. This is the work of the "take advantage" element. Its effect is that, even if all other elements of section 46 are satisfied, conduct is not prohibited if it is conduct that a firm without market power could have engaged in.

4.2 This aspect of the "take advantage" element is much criticised, but wrongly: in playing this essential role, it ensures that only conduct that is antithetical to competition is prohibited. Simply having market power, or engaging in conduct that has an anticompetitive purpose, is not of itself antithetical to competition. What is antithetical to normal competition is *using* market power for an anticompetitive purpose – ie engaging in conduct that is caused or made possible by substantial market power.

4.3 The "take advantage" element is therefore critical for two reasons:

(a) as a matter of principle, because it distinguishes proscribed anticompetitive conduct from legitimate, vigorous competition; and

(b) as a matter of practice, because it assists successful firms to continue to compete vigorously, by providing reasonable clarity as to the types of conduct that will and will not breach the prohibition.

4.4 Without the "take advantage" element, potentially any conduct by a firm with substantial market power will be at risk of breaching the prohibition. This alone will impose a significant burden on many firms and deter them, to varying degrees, from engaging in vigorously competitive conduct. Indeed, without the "take advantage" element, section 46 would have no connection with the use or misuse of market power. Merely to have substantial market power and engage in conduct with a purpose or likely effect of substantially lessening competition, says nothing about whether market power has in fact been used. The removal of "take advantage" would mean that the section would become a law simply prohibiting unilateral conduct by businesses with an anticompetitive purpose or effect, simply because they are large and/or successful, without any inquiry as to whether their market power had any connection with the conduct. To illustrate:

(a) The Discussion Paper's sporting analogy makes clear that there is nothing anticompetitive in competing by training harder, having better skills or using better strategies – even if a team's purpose is to be fitter, more skilful and more strategic than every other team in the league, even if their motto is "Not happy until our rivals are crushed", and even if they are successful in achieving their purpose and their rivals chose to switch codes rather than face regular humiliating defeat, there is nothing anticompetitive in their conduct.

(b) It is equally clear that there is nothing anticompetitive in a small new entrant or disruptor competing by preparing well, being more skilful or having better strategies – for example, by knowing their market, developing a valuable product, and adopting a particular distribution, pricing or product bundling strategy for that product. The Melway street directory business may have fit this description when it was starting out;[21] who knows how many ambitious and not yet widely known start-ups might fit it today. Even if the small new entrant's purpose is to be better than

[21] See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 for the relevance of this example.

every competitor in the market, even if their motto is "Not happy until our rivals are crushed", and even if it seems their strategy will be successful, there is nothing anticompetitive in their conduct. The small new entrant does not need to worry about section 46 – they hope one day to be the most successful firm in their market, but they are not there yet, and in the meantime, they need not worry about misuse of market power: they know they have none to misuse.

(c) After years of hard work, the small new entrant's preparation, skills and strategies pay off: it still has the same strategy, purpose and motto, but now it also has a market leading product, and substantial market power. How does this business know whether their conduct now breaches section 46?

(i) With the "take advantage" element, the business can ask: could we have sensibly done what we're doing now, before we had market power? This provides certainty that conduct which is clearly legitimate, procompetitive rivalry when engaged in by a smaller firm is similarly viewed by the law as legitimate, procompetitive rivalry by a firm with market power. This certainty is crucial, as illustrated by the *Melway* case, the effect of which was that Melway was not found to have breached section 46 by implementing, during a period in which it had market power, the same distribution system it had used to compete legitimately and in a procompetitive way when it did not have market power.[22]

(ii) Without the "take advantage" element, a successful firm would be left with the uncertainty of trying to identify whether at some point their legitimate competitive strategy transforms into prohibited conduct, simply on account of their success. Take the hypothetical new entrant who succeeds, develops a market leading product, and attains substantial market power. Suppose they stick by their original strategies, and their original motto. Without the "take advantage" element, how can they know what section 46 will and will not let them do? Should they change their motto, lest it be seen to suggest an anticompetitive purpose? Should they worry that their outcompeting of competitors who have now exited the market will be used to suggest an anticompetitive purpose or effect to their conduct? How do they know at what point the strategies they deployed as a start-up become prohibited on account of their market power? They face two choices: compete as they always did and risk breaching the law, or compete less vigorously to be certain they do not breach the law. The first option imposes unacceptable uncertainty on businesses about the legality of their conduct; the second option should be anathema to responsible policy makers, as it puts at risk the very economic efficiencies our competition laws are supposed to foster and protect.

4.5 It should not be an outcome of competition law that successful firms are discouraged from competing equally as vigorously as they did to establish their success, or equally as vigorously as the new entrants and disruptors that seek to dethrone them. This is especially the case with a firm that has successfully disrupted a market through its innovation. Competition law should not require such a firm to consider, at the point at which it may be regarded as possessing substantial market power, whether it can continue to engage in the conduct (or aspects of it) which made it successful. The High Court's decision in *Melway*[23] makes this abundantly clear.

4.6 In the absence of any specific examples of conduct that should be but is not prohibited by s 46, removing the "take advantage" limb would not improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition. However, it would undoubtedly restrict economically beneficial conduct, as the examples above illustrate.

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[22] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

[23] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

Introducing a test based on purpose or effect

Purpose

4.7 The role of "purpose" in the current section 46 is to ensure that the prohibition does not apply to conduct involving a competitively benign taking advantage of market power. Where a firm uses its market power for a purpose that is not anticompetitive – for example, by using its network for a community or charitable purpose – that conduct may be a "use" (a taking advantage) of that market power, but it is not anticompetitive, and so should not be prohibited. Accordingly, purpose serves a useful, although often not a determinative, role in the current form of section 46.

4.8 However, we have serious concerns about, and consider there is no justification for, adopting a misuse of market power prohibition which includes a "purpose" test (whether on a standalone basis or as part of a combined "purpose or effect" test) if the "take advantage" element is removed from the prohibition. A "purpose" based prohibition that did not involve the "take advantage" element would seriously risk overreaching and would create considerable uncertainty, thereby chilling legitimate competitive conduct.

4.9 An inquiry based on purpose without also testing for the "take advantage" element would create a serious risk of capturing false positives – ie prohibiting procompetitive conduct that might have been expressed in terms suggesting an anticompetitive purpose, but which in substance posed no risk of competitive harm. Take the motto of the small new entrant hypothesised above: "Not happy until our rivals are crushed". Suppose they used it to motivate and focus their commercial strategy. Suppose they continued to use it after a point at which they had substantial market power. How would they defend themselves against an allegation that particular conduct motivated by this motto, even if it simply involved training harder, developing better skills or having better strategies, constituted a misuse of market power? Suppose the firm's procompetitive conduct was described in the following robust, "locker room" terms in internal board papers, strategy documents or emails, or by employees responsible for implementing it: "We'll dominate with this one"; "Our competitors will take their toys and go home"; "Here's our chance to own our space"; "Do this right and the market will be ours". How would the business defend itself against an allegation of misuse of market power in this situation?

4.10 Such language could and would be used by any football team which was serious about winning. It could and would be used by any start-up, new entrant or disruptor serious about competing with utmost vigour. At present, it can and does land firms with substantial market power in extensive ACCC investigations and discovery processes when faced with a section 46 allegation. But at present, it is seldom determinative of liability under section 46, because of the critical role of the "take advantage" element. Specifically, the "take advantage" element sees through such overblown language, and ensures that only genuinely anticompetitive use of market power, but not ordinary rivalry dressed up in aspirational language, falls within the prohibition. If the "take advantage" element was removed, and a "purpose" or "purpose or effect" test was adopted, there is a material risk that liability could be determined by such evidence, regardless of the fact that a small new entrant would engage in exactly the same conduct, and describe it in exactly the same terms. Faced with this risk, a responsible business may well counsel its staff to describe their commercial strategy with modesty and conservatism, rather than abundant and procompetitive zeal. Such strategies may well live up to their tempered down ambition. Over time, this would damage Australia's economy, as otherwise fiercely competitive firms choose to drive with the handbrake on.

4.11 Section 46 should concern itself with the question whether *conduct* is anticompetitive. A provision which prohibits conduct by a firm with substantial market power based on purpose alone (or as an alternative to effect) seriously risks prohibiting conduct that is competitively benign in substance, notwithstanding the commercial fantasies of its authors. Australian competition law should play no part in such a hosing down of competitive ambition, but it would if section 46 deployed a "purpose" element without "take advantage".

Effect

4.12 We have serious concerns about, and consider there is no justification for, adopting a misuse of market power prohibition that uses an "effects" test (whether on a standalone basis or as part of a combined "purpose or effect" test) if the "take advantage" element is removed from the prohibition. Such a tool is blunt and naively overzealous, and risks doing serious harm to the competitive process it purports to protect.

4.13 To illustrate, suppose the once small new entrant start-up referred to above is now a national business with substantial market power. Suppose it is a consumer-facing retail business and opens a store in a small town where it has not previously operated, uses its economies of scale and scope to offer materially lower (but above cost) prices than the small businesses it competes with can offer, and adopts its standard opening hours, which are 20% longer than those offered by its small business competitors. Suppose its competitors close in the face of competition they cannot match. It is uncontroversial that such an outcome should not be prohibited: such conduct and outcomes are evidence of the competitive process at work. But what, in an effect based prohibition that omits a "take advantage" element, gives the business comfort that they will not be challenged for having misused their substantial market power? They cannot deny their market power. They cannot deny that they are now a monopolist in a town previously served by competing businesses. What comfort does the law give them that they could defeat an allegation that the effect of their conduct has been to substantially lessen competition?

4.14 A prohibition which provides for liability under section 46 to be established based solely on the existence of market power and an effect or likely effect of substantially lessening competition provides no satisfactory answer to this challenge. There is no element of 'use' or 'misuse' of market power in such a prohibition. Nor do the "mandatory factors" identified by the Harper Review satisfactorily address this problem. These "factors" would require a court to consider whether the purpose or effect of the conduct was to increase competition by enhancing efficiency, innovation, product quality or price competitiveness. It would be reasonable, having considered those factors, to conclude that the conduct did not have a purpose or effect of substantially lessening competition. It is uncontroversial that this is the right *outcome* – ie that the national competitor's conduct should not be prohibited. However, the Harper Review's "mandatory factors" would also require the court to consider whether the conduct has had the effect of lessening competition by deterring the potential for competitive conduct (among other things). In the scenario described, this would invite the now-departed competitors to scrutinise and seek to impugn their rival's conduct under section 46, and argue that it deterred them and all other potential competitors in the town from engaging in competitive conduct. The mandatory factors would require the court to take this into account; they should, but do not, provide a clear basis on which the court could find that despite the lack of competition where previously competition existed, vigorously competitive conduct by the one remaining firm had not had the effect of substantially lessening competition.

4.15 In contrast, a "take advantage" element requires assessment of the qualitative nature of the conduct in issue. Importantly, it extinguishes arguments that "training harder, having better skills or using better strategies" could ever constitute a misuse of market power well before they make it to court. A test based on purpose or effect which omitted such a qualitative assessment would have no such unequivocal ability to reject arguments that procompetitive conduct is prohibited on the basis that it has had the effect of substantially lessening competition. There is simply no principled basis on which to justify the removal of the "take advantage" element from the current prohibition, especially if an effects based test is to be adopted.

4.16 We make one further observation on the introduction of an effects test. Although tests based on the effect or likely effect of substantially lessening competition are relatively well known, proof of an effect/likely effect of substantially lessening competition is complex. Proving a lessening of competition as a result of certain conduct requires a comparison between circumstances in which the conduct has occurred and hypothetical circumstances in which it has not occurred. For example, if the challenged conduct is a refusal to supply

a product, the impact of that refusal on competition must be established by comparing the state of competition "with" the refusal to the state of competition "without" the refusal. Determining what is likely to occur in the "without" circumstances is notoriously difficult. For example, what assumptions should be made as to the terms and price at which the product would have been supplied? These assumptions will be critical to comparing the impact on competition of a refusal to supply with supply on the assumed terms. These difficulties are illustrated in the ACCC's experiences in contested merger cases where a substantial lessening of competition is at issue. They are compounded by the fact that there have been few other decisions concerning the substantial lessening of competition test. Therefore, while we have no concern with this choice of words in principle if an effects test is to be adopted, policymakers and the public should be honest with themselves that such a test is not likely to result in an easier or more readily deployed avenue of demonstrating misuse of market power than that which exists at present.

Mandatory factors, authorisation and ACCC guidelines

4.17 It is no answer to the concerns we have expressed that any revised prohibition may include "mandatory factors" for a court to consider, be the subject of guidelines written by the ACCC or be able to be authorised by the ACCC. None of these options should be relied on to "rein in" a prohibition that prohibits or chills competitive conduct. The preferable course is to fine-tune the prohibition, not to shift that responsibility to judicial discretion, administrative guidelines or the need to participate in an often costly and time-consuming authorisation process.

5. OTHER AMENDMENTS

5.1 Question 15 asks whether there are any alternative amendments to the Harper Review's proposal that would be more effective than those canvassed in the Discussion Paper.

5.2 Our answer is "yes": the best option would be to adopt a modified version of Option A as outlined in the Discussion Paper ("making no amendment to the current provision"). Specifically, we propose that section 46 not be amended except to repeal subsections (1AA), (1AB) and (1A) of that provision. The subsections that would be repealed under that approach do nothing but introduce material uncertainty for business; they have not been illuminated by case law, and their repeal would materially reduce the compliance burden on, and risk faced by, businesses seeking to ensure that their conduct does not breach section 46.

ANNEXURE 1

OPTION	KEY QUESTIONS AND OTHER OBSERVATIONS (see paragraph 2.4)
Option A – Making no amendment to the current provision	***(a) Would this prohibit/discourage businesses from engaging in legitimate, procompetitive conduct?*** No. ***(b) If the answer to (a) is "yes", can that outcome be justified on the basis that the reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit?*** NA. ***Other observations*** There are no specific examples of conduct that should be but is not prohibited by the current section, and so no warrant to amend it.
Option B – Amend the existing provision by removing the words 'take advantage'	***(a) Would this prohibit/discourage businesses from engaging in legitimate, procompetitive conduct?*** Yes – see part 4. ***(b) If the answer to (a) is "yes", can that outcome be justified on the basis that the reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit?*** No – there are no specific examples of conduct that should be but is not prohibited by the current section, so there would be no "benefit" from an amendment that would outweigh the prohibition and chilling of procompetitive conduct that would arise from this option.
Option C – Amend the existing provision by removing the words 'take advantage', including a 'purpose of substantially lessening competition' test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision	***(a) Would this prohibit/discourage businesses from engaging in legitimate, procompetitive conduct?*** Yes – see paragraphs 4.1 - 4.6 on "taking advantage", paragraphs 4.7 to 4.11 on "purpose", and paragraph 4.17 on the possibility of ACCC guidelines. ***(b) If the answer to (a) is "yes", can that outcome be justified on the basis that the reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit?*** No – there are no specific examples of conduct that should be but is not prohibited by the current section, so there would be no "benefit" from an amendment that would outweigh the prohibition and chilling of procompetitive conduct that would arise from this option.

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OPTION	KEY QUESTIONS AND OTHER OBSERVATIONS (see paragraph 2.4)
Option D – Amend the existing provision by removing the words 'take advantage', including a 'purpose of substantially lessening competition' test, including mandatory factors for the courts' consideration, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision	***(a) Would this prohibit/discourage businesses from engaging in legitimate, procompetitive conduct?*** Yes – see paragraphs 4.1 to 4.6 on "taking advantage", paragraphs 4.7 to 4.11 on "purpose", paragraph 4.17 on ACCC guidelines and authorisation and paragraphs 4.12 to 4.16 on "mandatory factors". ***(b) If the answer to (a) is "yes", can that outcome be justified on the basis that the reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit?*** No – there are no specific examples of conduct that should be but is not prohibited by the current section, so there would be no "benefit" from an amendment that would outweigh the prohibition and chilling of procompetitive conduct that would arise from this option.
Option E – Amend the existing provision by removing the words 'take advantage', including a 'purpose, effect or likely effect of substantially lessening competition' test, making authorisation available, and the ACCC issuing guidelines regarding its approach to the amended provision	***(a) Would this prohibit/discourage businesses from engaging in legitimate, procompetitive conduct?*** Yes – see paragraphs 4.1 - 4.6 on "taking advantage", paragraphs 4.7 to 4.11 on "purpose", paragraphs 4.12 to 4.16 on "effect" and paragraph 4.17 on ACCC guidelines and authorisation. ***(b) If the answer to (a) is "yes", can that outcome be justified on the basis that the reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit?*** No – there are no specific examples of conduct that should be but is not prohibited by the current section, so there would be no "benefit" from an amendment that would outweigh the prohibition and chilling of procompetitive conduct that would arise from this option.
Option F – Amend the existing provision by adopting the full set of changes recommended by the Harper Panel	***(a) Would this prohibit/discourage businesses from engaging in legitimate, procompetitive conduct?*** Yes – see paragraphs 4.1 - 4.6 on "taking advantage", paragraphs 4.7 to 4.11 on "purpose", paragraphs 4.12 to 4.16 on "effect", paragraph 4.17 on ACCC guidelines and authorisation, and paragraphs 4.12 to 4.17 on "mandatory factors". ***(b) If the answer to (a) is "yes", can that outcome be justified on the basis that the reform would extend section 46 to prohibit anticompetitive conduct that it does not currently prohibit?*** No – there are no specific examples of conduct that should be but is not prohibited by the current section, so there would be no "benefit" from an amendment that would outweigh the prohibition and chilling of procompetitive conduct that would arise from this option.

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ANNEXURE 2

"ISSUES FOR DISCUSSION"	RESPONSE
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?	There are none – see part 3.
2. What are examples of conduct that may be procompetitive that could be captured under the Harper Panel's proposed provision?	Legitimate, procompetitive conduct that a firm without market power could unquestionably engage in without breaching the law, but that may be alleged to have an anticompetitive purpose or effect – see paragraphs 4.4 to 4.15.
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?	No – see part 4 above.
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?	Yes: there is economically beneficial behaviour that would be restricted (see paragraphs 4.4 to 4.15). Retaining the "take advantage" element is preferable to introducing an "exclusionary" conduct element, since such an "exclusionary" element would merely raise new questions and hence create uncertainty about the effect of the prohibition.
5. Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?	No.
6. Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?	No.
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?	Not if the "take advantage" element is removed – see paragraph 4.8 and following.
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 anticompetitive rather than using specific behaviour, and therefore avoid restricting genuinely procompetitive conduct?	No.
9. Should specific examples of prohibited behaviours or conduct be retained or included?	It is most important to ensure that the substantive prohibition only proscribes anticompetitive conduct. "Specific examples" should not be relied on for this purpose, but may otherwise assist in the interpretation (as distinct from the basic delineation) of the section.
10. An alternative to applying a 'purpose, effect or likely effect' test could be to limit the test to 'purpose of substantially lessening competition'. What would be the advantages and disadvantages of such an approach?	No advantages if the "take advantage" element is retained. Material disadvantages if the "take advantage" element is removed. See paragraph 4.7 and following.

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"ISSUES FOR DISCUSSION"	RESPONSE
11. Would establishing mandatory factors the courts must consider (such as the pro- and anticompetitive effects of the conduct) reduce uncertainty for business?	No, not if the "take advantage" element is removed – see paragraphs 4.14 to 4.17.
12. If mandatory factors were adopted, what should those factors be?	NA
13. Should authorisation be available for conduct that might otherwise be captured by section 46?	There is no harm in making authorisation available, but it is most important to ensure that the substantive prohibition only proscribes anticompetitive conduct. Authorisation should not be relied on for this purpose.
14. [Can] quantitative data on the regulatory impact of alternative options on stakeholders (including the methodologies used) ... be provided?	No response.
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?	Yes – we propose the following alternative option: that section 46 not be amended except to repeal subsections (1AA), (1AB) and (1A) of that provision. See paragraph 5.2.
16. Which of options A through F above is preferred? What are the relative strengths and weaknesses of each option? What information can you provide regarding the regulatory impact of each option on businesses?	Option A is preferred. See Annexure 1 for relative strengths and weaknesses and business impact.
17. Are there any other options (not outlined above) that should be considered?	Yes – we propose the following alternative option: that section 46 not be amended except to repeal subsections (1AA), (1AB) and (1A) of that provision. See paragraph 5.2.