25 June 2014

To the Competition Policy Review Secretariat,

I attach as a submission to the Review a revised version of a speech I gave on Monday 19 May 2014 at the University of Melbourne.

Yours sincerely,

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THE COMPETITION REVIEW

BY

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THE COMPETITION REVIEW

I INTRODUCTION

I congratulate Professo Caron-Beaton Wells on holding this event.

In this speech I wish to discuss the following matters:

- Section 46
- Simplification of the competition provisions of the Competition and Consumer Act (CCA)
- Broadening s 45

More briefly I will comment on:

- Exemptions to the CCA, including the abolition of Part X of the CCA
- International price discrimination
- Third party appeals from merger and competition decisions of the Competition Tribunal

Today I will not comment on wider issues concerning the review.

II SECTION 46

There are two primary issues I wish to discuss in respect of section 46: whether an effects test should be added and, relatedly, whether section 46 should generally be rewritten.

The abuse of market power is a key component of competition law. The other two key components concern cartels and mergers. Generally speaking, the latter two parts of the law are working well in Australia.

Section 46, which prohibits abuse of market power, is especially important in Australia as we have a highly concentrated economy. Moreover, the terms of reference refer to retail, petrol and utilities, all concentrated industries.

Generally speaking, s 46 is, in my view, less effective than it should be.

Private litigation is very difficult, especially for small firms that may be the victims of abuse of market power, as the legal costs are very high – especially if they lose.

Litigation by the ACCC is also difficult. Firstly, cases are complex compared to cartel and merger cases. One key reason is the need to draw a line between the striking down of anti-competitive behaviour and the deterring of pro-competitive behaviour. Secondly there is usually tenacious resistance by defendants who are usually well-heeled. Thirdly, cases take a long time. The Safeway case, for example, took over seven years. Fourthly, there are difficulties in getting evidence. One is that if the anti-competitive behaviour destroys a competitor, little or no evidence may be forthcoming from that former entity. On

the other hand, if there is early intervention by the regulator there may be no present harm – no dead body, so to speak, as a prime exhibit. Fifthly, on some occasions it is hard to prove or infer purpose. Finally, I have never been convinced that the sanctions are adequate. There is a case to have a divestiture power for courts if there are breaches of s 46, as there are in many other countries. I believe the Committee needs to set up debate on this issue. Any economist would regard it as in principle a logical solution to the problem of misuse of market power in some cases.

Today, however, I will concentrate on just two issues: whether the words of s 46 should be changed to incorporate an effects test, and whether s 46 should be totally rewritten

A *Adding an Effects Test to Section 46*

The terms of reference require the Committee to look at whether the misuse of market power provisions 'capture all behaviours of concern' and 'address the breadth of matters expected of them'.[1] In light of this, it is impossible to ignore the absence of an effects test in s 46.

A key principle of competition law is that a firm with market power should not be allowed to take advantage of that power to harm competition. This principle is nearly universally accepted. In Australia, however, there is no law agains firms with market power taking advantage of that power to harm competition unless it can be proved (or inferred from the effect of the behaviour) that indeed its purpose was to harm competition.

I believe this is a wrong approach in principle.

Purpose on its own is the wrong test.

The Competition and Consumer Act is an economic statute. It is not generally concerned with the subjective motivations of participants in the market. Rather, it is a statute designed to prevent harm to the economy from anti-competitive behaviour. It is the effect on competition, not the intent of behaviour, that counts.

There is an old saying that competition law is about the health of the economy rather than about the good or bad intentions of behaviour. It is about hygiene not morals. Section 46 is about morals, not hygiene. A 'purpose test' causes the wrong focus.

Virtually every other country in the world – around 125 countries – has an effects test based on the principle I stated. It is very clear that the European Union, and many countries which have adopted its law, has an effects test.

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[1] Competition Policy Review Committee, Commonwealth Parliament, *Terms of Reference* (2014)

Regarding the USA, the position is equally clear. For example, the US Court of Appeals in the Microsoft case held that:

> First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect". That is, it must harm the competitive process and thereby harm consumers.[2]

Neither the EU, nor the US, nor any other country that I'm aware of (barring exceptions suc as NZ and one or two countries that modelled their system on Australia's) have a purpose test rather than an effects test.

The ACCC has said in the past – and continues to maintain – that there are some cases that it would bring under s 46 if it did not have to prove purpose.

The origin of the purpose test is the 1976 Report on the Act by a Committee headed by the late Gaire Blunt. I regard the 1976 amendments as concessions made under very heavy pressure from big business. The logic used was weak. The principal argument I heard at the time was that there were problems in that if a big fish "wagged its tail" it would not necessarily know that it was hurting little fish and so the behaviour should only be unlawful if it was intentional. However, I think it is only rarely that a firm will not know its anti-competitive behaviour is harming competition as a whole, though it may be hard to prove. Moreover, purpose may be of some relevance to sanctions, fines or punishment that may be imposed but it is not a reason why anti-competitive behaviour by firms with market power that harms competition should be permitted.

In defence of the 1976 recommendations, it was early days in the history of the Act and s 46, with its unique wording, was an unknown quantity. It was only the High Court decision of *BHP v Queensland Wire* in the 1980s and later decisions that clarified what the Act was about and imposed sensible economic limits on its interpretation.[3]

B *The Consequences of Section 46's Shortcomings*

The failure to include an effects test has led to ongoing pressure from small business, farmers and other interested parties for something to happen and has ultimately caused, and will continue to cause, undesirable and unnecessary political amendments to the law to accommodate the pressure.

The first example is the Birdsville amendments to the Act in 2007, which say that firms with a substantial market share should not price below cost, a law not adopted in 128 out of 129 competition statutes around the world, a law with potential to do harm, probably under private litigation.

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[2] United States v Microsoft Corp. 253 F.3d 34, 58-59 (D.C. Cir. 2001).
[3] *BHP v Queensland Wire* (1989) 167 CLR 177.

The second is the amendments in 2008 chiefly in Section 46 (6A) which lengthened the Act without adding any substance to it – they only reflected what had been said in High Court decisions.[4]

The third is the series of changes to the Act, not necessarily bad ones, concerning unconscionable conduct, and Codes of Conduct, made by governments under pressure to do something for small business but not being willing to change s 46.

C *Section 46 Generally*

Before considering possible objections to my proposals, I would like to discuss section 46 more generally.

Section 46 is poorly worded. There are three subsections (1)(a)-(c) which refer to behaviour that damages competitors and does not refer to any substantial lessening of competition as a whole.

Section 46 refers to behaviour that has the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Sections such as these should not be in the Act at all.

This brings me to another point about s 46. I feel uncomfortable with the words "take advantage". I believe the courts make rather heavy going of it. A recent example is the Cement Australia decision.

Incidentally one reason for the problem is that the "bad" wording of s46 puts a heavy burden on the words "take advantage" as a vehicle for converting s 46 into a "substantial lessening of competition" test.

Accordingly, I see merit in a completely redesigned s 46 which simply states that

> firm with a substantial degree of power in a market shall not act in a way that has the purpose or effect of substantially lessening competition in a market.

An obvious issue here is that some people think that a firm may engage in genuine competitive behaviour, eliminate weaker competitors, end up with a monopoly or greater market power and that this could be seen as being in breach of the provision. I don't think that the Australian o international

[4] See *Trade Practices Legislation Amendment Act (No. 1) 2007* (Cth) and *Trade Practices Legislation Amendment Act 2008* (Cth).

jurisprudence supports that interpretation at all, but if people can show that I am incorrect then one could provide some kind of legislative guidance such as in an Explanatory Memorandum which make it clear that this is not what is being done in moving to a simpler s 46. I am not keen to leave the troublesome words "take advantage" in s 46.

D *Summary of Options For An Effects Test*

Regarding the specific question of an effects test, there are a number of options:

- Add the words "effect or likely effect" to s 46 and otherwise leave the section unchanged

- Insert a new subsection in s 46. This would say that

  a firm with substantial market power should not take advantage of it for the purpose or effect of substantially lessening competition.

  This option, although somewhat clumsy compared with the simple option of total rewrite of s 46, would avoid linking the effects test with the current undesirable wording in parts of section 46.

- Add in changes to s 46 but as part of a general rewrite of the Act or this Part of the Act, as discussed above.

- Some other, more minor, options include:
  - To introduce an object test in place of, or additional to, the purpose test
  - To replace the terms "take advantage" with more suitable words

I believe it is important that the Committee should come up with a specific drafting on a new s 46 rather than general principles. I discuss this below.

E *Possible Objections*

Here I wish to respond to some of the possible objections to these proposals.

1. *It will chill competition*

First, it should be noted that although there is frequent reference to the idea that s 46 could chill competition, this is typically a one-sided view. Section 46 needs to draw a line or balance between preventing anti-competitive conduct by big firms with market power and not chilling competition. Both considerations need to receive equal weight in discussions.

Second, an effects tes as such does not seem to chill competition in other countries.

Third, the case law has evolved over the years to achieve the approximately correct drawing of the line, and that line or balance does not depend on an effects test; it depends on other criteria and on economic analysis.

Finally, it is wrong to resolve the balance question by excluding an effects test. The way to do it is by proper economic interpretation of the competition provisions of s 46 as happens in other countries with an effects test.

2. *The issue has been settled by earlier enquiries*

It is true that the Dawson Review opposed an effects test. First, however, the Dawson Review simply did not address the issue of principle. Its only focus was on whether a purpose test was hard to prove, not whether proof of a effect is, in principle, a desirable test. Second, a key point is that Dawson only considered an ACCC proposal that the words "or effect" be added to the existing s 46. One could argue that s 46 is already badly drafted and there is a danger that adding "or effect" to the statute would be harmful. I do not agree with this point. As I indicated above, I believe there is very strong case law support for the proposition that the correct interpretation of s 46 is that it only considers behaviour to be unlawful if a firm with substantial market power takes advantage of it for the purpose of "substantially lessening competition". Accordingly an "effect" would only breach the law if it amounted to a substantial lessening of competition.

However, if this is a concern, option two discussed above (although not my preferred option) would resolve that question, i.e. a new subsection is added which prohibits the misuse of market power with the effect, or likely effect, of substantially lessening competition.

Third, the Dawson commentary on international law was wrong. For example, it mistakenly took the view that the EU "dominance" test differs substantially from Australia's "substantial market power" test. The Review stated that Europe had an effects test, but that this is only in the context of single firm dominance. Of course nearly everyone knows that in Europe "dominance" includes "collective dominance" and so for all practical purposes the test is the same as in Australia. Dawson also misunderstood American law.

Fourth, another point about previous inquires is that adding an 'effects' test was not really a central issue. There is a limit on how many reforms you can get and the ACCC, usually the main source of pressure for sensible reform, chose to pres for the criminalisation of cartels at the expense of other issues.

3. *There is little or no need for an effects test*

Another frequent objection to an effects test is that the section works well (a view mainly espoused by big business interests) and the ability to infer purpose from effect means we are 'close enough' to having an effects test.

Let me be clear. I do not think adding an effects test to s 46 in one way or another would make a large difference. So why change it?

It is bad to have a law based on a wrong principle. Until it i changed to a law based upon a correct principle applied in virtually all countries there will be strong pressure from small business, farmers and others to take less desirable actions.

There would also be virtually no prospect of the Birdsville amendment and other undesirable parts of s 46 being repealed.

There would be no prospect of repealing s 47 (as I will discuss later).

Even so, why do I promote the change? I favour making sensible changes to the Act and especially to focus the priorities more sharply on the economic issues rather than the forms of behaviour and the legalisms. But the history of competition law in this country is that it is extremely difficult to push through sensible changes. There was massive opposition from most of the competition law community and the big business community to the sensible 1993 change to replace the dominance with a substantial lessening of competition test. Likewise there was deafening silence from the same when the ACCC proposed criminal sanctions for hardcore cartel behaviour (not to mention ACCC near-silence concerning the legislative adoption of criminal sanctions for hardcore cartels from July 2003 until late in the life of the Howard Government).

F *Further Section 46 Considerations*

1. *Should purpose be retained?*

Yes, because it is necessary to nip behaviour in the bud when its aim is to harm competition. It is notable that in the USA the "monopolisation" prohibition in section 2 of the Sherman Act applies to "monopolisation", "attempted monopolisation" and "conspiracy to monopolise".

There are some issues as to whether purpose should be supplemented with or replaced by an "object" (i.e. an objective purpose) test.

III SIMPLIFICATION OF THE CCA

The competition provisions of Australia's Competition and Consumer Act are the longest in the world. Part IV of the CCA is 74 pages long! In fact the Inquiry's terms of reference refer to this by stating that Australian law is "highly codified". By contrast, most countries have short, sharp provisions focused on the economic question of whether there is harm to competition.

For example, the operative parts of the Sherman Act in the US and the EC Treaty are very short. These provisions are quoted in the appendices to this paper and it will be seen that they are very short.

I believe we should shorten the statute. The reasons for this are:

- This is a root and branch review and so it should review the structure of the Act. If the Act is badly written, now is the time to move. In fact, the change has been long overdue, but other reforms have had to have priority;

- The legal and technical details in the Act distract attention from the key economic issues, which are whether the behaviour substantially lessens competition or is likely to or has that purpose. It also causes a focus on technical issues. For example, in my opinion a recent case concerning Bradken seemed to focus on a technical issue concerning the behaviour of Mr Greiner and his firm.[5] As I understand it – and I stand ready to be corrected – in that case Bradken wanted to make a bid for its rival but the rival refused to allow it to do so. Bradken then went to a private equity firm and got it to do the bidding for it. The court held that as a technical matter the two were in potential competition and therefore there had been a breach under the per se provisions in relation to bid-rigging. I think it would have been better to focus on whether there was a real competition issue;

- Similarly, I was very disappointed in relation to the SuperLeague case involving Murdoch and Packer that after a large consumption of court time we got the narrowest imaginable verdict based on exclusionary behaviour and all the important economic questions, such as defining the sports market, were excluded;[6]

- Shortening the statute fits the red tape reduction agenda being pursued elsewhere in government; and

- The change will make the Act more intelligible to lay people – at the moment it is unreadable.

A *Options For Simplification*

It is possible to consider simplifying Part IV without changing the substance very much at all, as I will discuss below.

Years ago, I mentioned it would not/should not make much difference if the Act was reduced to two lines – namely that any behaviour that substantially lessens competition is prohibited unless authorised. I do not actually believe the Act should be reduced to two lines.

There are two approaches. One is to start with the simple principle that the Act needs to state that "any behaviour that substantially lessens competition" should be prohibited (unless authorised), and then to ask what needs to be added by

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[5] *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235
[6] *News Ltd v Australian Rugby League Ltd (No 2)* (1996) 64 FCR 410

way of detail e.g. as per the test for price-fixing etc. On this approach one would work through each section to determine what additions or variations would be needed. Today I will not adopt that approach. Instead, I will "work backward" and ask what provisions could most obviously be eliminated or simplified with no or very little change to the substance of the Act.

I believe the Committee should conclude that the Act needs to be simplified over time, and that the process should begin with some obvious simplification as discussed below. These changes have little or no effect on the meaning and interpretation of the statute.

I do not expect the Committee to go too far on simplification. The best approach is for it to endorse the principle of simplification as a general direction in which the Act should head. It should recommend some changes now, in the interests of simplification, and see how they work, and if they work well other parts of the Act could be simplified in future years.

My priorities would be to eliminate ss 96-100 in relation to resale pric maintenance as being unnecessary and as constituting an over-specified part of the law. Consideration should be given to including a competition test, or a reverse onus of proof, in s 48, but that is a separate issue.

Then the repeal of s 47 should be possible, providing that s 46 i repaired properly and providing perhaps that s 45 is slightly broadened beyond the concept of "contract, arrangement or understanding", as discussed below. But in short, ss 45 and 46 should be able to do the job that s 47 is set up to do.

On consequence is that the per se prohibition under s 47(6) in relation to third line forcing would go. This would be a good thing. However, if it were thought not to be a good thing there are several options. One would be to continue to have a simple provision about third line forcing being prohibited on a per se basis. Another would be to transfer it to the consumer part of the law and not have it cluttering up Part IV.

Regarding Part IV Division 1 - Cartel Conduct there is a case for simplifying it by adopting the New Zealand provisions, but I would not pursue this question today as many other submissions will be advocating that.

Regarding s 45, both ss 45B and 45C could be eliminated or shortened considerably. I will discuss this later. There would also be no harm in shortening s 50 regarding mergers and acquisitions but it is not a priority.

Some are concerned that my proposal goes too far in replacing the "form" of unlawful behaviour with a law based on an economic principle. I do not think that my proposals, which retain much of s 45 and 50, go too far in that direction and in section s 46 they potentially improve it.

I believe that the best way to make progress would be for someone, preferably the Review Committee, to draft a simplified Act without commitment, for discussion.

B *What are the objections?*

1. *Why tear up fifty years of jurisprudence?*

The changes would change the law very little, if at all, in substance. Indeed, there would be some improvement, for example in the treatment of third line forcing and resale price maintenance if they were made subject to a competition test.

It also needs to be remembered that jurisprudence of competition law is much the same everywhere in the world and the interpretation of competition provisions is unlikely to differ from what Australia has done in the past, nor from international practice. This could be made clear in drafting the changes and in ACCC guidelines.

2. *The courts are not up to applying a purely economic statute*

The courts already do this. In fact, they have done a fairly good job in interpreting the Act.

3. *There would be more uncertainty*

Most uncertainty revolves around the meaning of economic terms in the statute, that is "substantial lessening of competition" and other such economic phrases. That uncertainty would remain, but there would be a sharper focus on the economic meaning, which is desirable.

Legal techniques could also be used to incorporate within a changed Act signals to the judiciary that previous jurisprudence could be largely followed and international jurisprudence could be drawn upon. The ACCC could also be asked to provide guidelines on the application of the new law. This would all minimise the chance of there being a change in the substance of the law.

4. *Isn't it a low priority?*

This is a root and branch review and possibly the last chance to simplify the Act for a long time. Also it would fit well alongside a s 46 revamp.

It would be unfortunate, however, if the Committee merely did a high level finding that "effects" should in principle be adopted and that there should be future simplification. The Dawson Committee endorsed the idea of criminal sanctions for cartels without trying to resolve the main questions of principle involved in implementation eg the relationship between civil and criminal sanctions. This caused a delay of several years while options were debated.

IV SECTION 45 ISSUES

The main problem with s 45 is that the courts have tended to adopt a restricted interpretation of the term "contract, arrangement or understanding". This was one of the reasons for the price signalling legislation being introduced.

I believe it would be better to put some additional words into s 45. It would be desirable to have an explicit provision outlawing anticompetitive facilitating practices, or possibly to introduce the words "acting in concert" in addition to the provisions regarding "contract, arrangement or understanding". Personally I would be prepared to trade that for an abandonment of the price signalling laws.

As I've said, I'd also look to some shortening of s 45, preferably by eliminating s 45B and 45C. These provisions relate to covenants and some other very narrow things that could be picked up by a small definitional note or by incorporating them into the Act without the lengthy, repetitious provisions that are in s 45B and 45C and that make the whole section hard to read.

I would probably retain s 45 as it is, at this stage, but subject to some variations. Basically I would retain s 45 including the per se provisions regarding price fixing, bid rigging, market sharing and probably exclusionary provisions or collective boycotts. I would also retain ss 45D, 45E and 45F on the grounds that the current government has a very strong commitment to them and a very strong mandate – although one day it would be nice to simplify the secondary boycott provisions.

V PROBLEMATIC EXEMPTIONS

There are three obvious points about exemptions. First, there is the NBN exemption. This has no part in competition law. It is the biggest anti-competitive arrangement ever in Australia, as far as I can see. A competition committee needs to review this. It cannot go down in history as having turned a blind eye to this.

Secondly, the intellectual property exemption is quite problematic. I think it would be desirable to implement the Ergas Review recommendations made many years ago but not acted on.

Thirdly, Part X (the x-rated part of the Act, as I call it) should go. This is an unwarranted exemption to the shipping industry.

VI PRICE DISCRIMINATION

There has been some misunderstanding about what this term of reference is about.

I believe the review is mainly about international price discrimination (i.e. Australian prices are higher than in other countries). Where this is purely the result of commercial behaviour, there is often no competition law concern. Where it is enabled by statute, especially restrictions on parallel imports, the

statute should be repealed, as has already happened with CDs, computer software and other fields. Books are the obvious target.

We should move to the New Zealand position where all restrictions on parallel imports caused by statute have been abolished. Regarding pharmaceutical products, if there is a need to restrict them this can be done under other laws such as health laws

VII MERGERS AND THE AUSTRALIAN COMPETITION TRIBUNAL

Recent amendments mean that the Australian Competition Tribunal has both original and final jurisdiction over certain merger matters. This means that the Tribunal has the power to licence a monopoly – an extremely important power. Under the new law there is no right of appeal in relation to these decisions (other than an appeal on legal issues to the Federal Court). I believe that the best solution would be to revert to the long-standing practice that the ACCC has original jurisdiction and that there is a right of appeal to the Competition Tribunal by all interested persons.

VIII MARKET STUDIES

The Review needs to recommend that the Act specifies that the ACCC can undertake market studies in the same way as most other countries already do. I am sure the ACCC will set out detailed reasons for this change.

IX CONCLUSION

There is a "policy bandwidth" problem with competition law reviews, that is there is generally massive opposition to sensible changes to the Act that could be seen as disturbing the comfortable status quo. So much effort was expended in achieving precious major reforms – the merger test change from dominance to substantial lessening of competition in 1993, together with higher fines (opposed by unions due to fears of the secondary boycott provisions) and the criminalisation of cartels in 2003 that it has not been possible to have a wide-ranging debate about an effects test, and all the matters of simplification, until now. Whilst there are many other matters for the Review to consider, it is timely to move on the ones I have examined.

APPENDIX 1

Article 101 of the Treaty on the Functioning of the Economic Union (ex Article 81 of the EC Treaty)

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

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

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

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings; - an decision or category of decisions by associations of undertakings; - an concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 of the Treaty on the Functioning of the Economic Union (ex Article 82 of the EC Treaty)

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

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

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

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

APPENDIX 2

US SHERMAN ACT

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal […]

Section 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony […]

The *Clayton Act* of 1914 declares illegal fou specified types of restrictive or monopolistic practice. They are in brief:

a) price discrimination (section 2)
b) exclusive-dealing and tying contracts (section 3)
c) acquisitions of competing companies (section 7)
d) interlocking directorates (section 8)

All these sections are qualified by provisos (some more elaborately defined than others) to the general effect that the practice concerned becomes unlawful only when its 'effect may be to substantially lessen competition or tend to create a monopoly'. The section dealing with price discrimination was revised in the Robinson-Patman Act of 1936 and that dealing with acquisitions in the Celler-Kefauver Act of 1950 (Neale, The Antitrust Laws of the USA, Cambridge 170 (2nd ed), 3).