Competition Policy Review Committee

Submission

Misuse of Market Power:

The Under-Inclusive 'Take Advantage' Standard,

A Proposal for an Onus-Shifting Approach,

and the Canadian SLC Alternative

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Summary of Submissions

1. The 'take advantage' element should be removed from the misuse of market power prohibition in s 46(1) of the *Competition and Consumer Act 2010* (Cth).

    1.1 The 'take advantage' standard for unilateral anticompetitive conduct has been interpreted inconsistently, and has been under-inclusive in its application, such that even intentionally exclusionary dominant-firm conduct, with no plausible efficiency justification, has been absolved.

    1.3 Examples of unilateral anticompetitive conduct that may not be captured by the 'take advantage' test (even after the addition of section 46(6A)) include: anticompetitive conduct that 'uses financial power'; predatory pricing; 'cheap' exclusion; and conduct that is profitable for a non-dominant firm but still anticompetitive on the part of a dominant firm.

    1.2 Even on its most inclusive interpretation, the 'take advantage' test has relied on the flawed assumption that conduct that is profitable for a non-dominant firm cannot create substantial anticompetitive effects when adopted by a dominant firm.

2. A 'substantial lessening of competition' test (SLC test) should be adopted.

    2.1 The SLC test is likely to target more effectively the kind of unilateral conduct that raises competition concerns.

    2.2 Claims by critics that the SLC test would capture competitive price-cutting and the introduction of superior products can be refuted.

3. Efficiency justifications may be taken into account by:

    3.1 adopting an 'onus-shifting' approach, whereby conduct will not infringe if it has a plausible procompetitive or efficiency justification, unless the anticompetitive effects of the conduct outweigh any efficiency gains; or

    3.2 expressly requiring the court to consider these as part of the SLC assessment, as under the Canadian competition legislation.

4. Proposals for a stand-alone 'take advantage' or 'rational business decision' defence should be rejected.

    4.1 The incorporation of a 'take advantage' defence would be likely to import all of the previously identified weaknesses into the reformed law.

    4.2 Having regard to the approach taken by the Australian courts to date, a 'rational business decision' defence might be too readily established.

1. Introduction

This submission relates to draft recommendation 25 in the Competition Policy Review Draft Report, regarding proposed changes to the misuse of market power prohibition in section 46(1) of the *Competition and Consumer Act 2010* (Cth) (*CCA*).

This submission supports the Panel's conclusion that the 'take advantage' test for unilateral anticompetitive conduct has proved to be uncertain and inconsistent in its application, and should be removed. It supports the introduction of an effects-based test. It supports an express requirement to weigh any efficiency justification for the impugned conduct against its actual or likely effect on the competitive process.

2. Unilateral Anticompetitive Conduct

In this submission, 'unilateral anticompetitive conduct' is defined as single-firm conduct which has the effect or likely effect of protecting or enhancing the firm's substantial market power without creating any (or any proportionate) increase in economic efficiency.

It is generally accepted that the possession of substantial market power (the power to price above the competitive level) is a justifiable reward for, and incentivizes firms to engage in, superior performance and innovation.[1] It is also accepted that conduct that permits firms to obtain, maintain or increase market power is often efficient conduct, which benefits consumers. Further, dominant firms will often be prevented from exploiting consumers on an enduring basis because monopoly profits attract rivals: markets are self-correcting. These are the main reasons that antitrust jurisdictions generally tolerate dominance per se.

However, dominant firms sometimes protect or enhance their market through conduct that does not reflect superior performance or efficiency gains, but which nonetheless excludes

[1] See, eg, Suzanne Scotchmer, *Innovation And Incentives* (Massachusetts Institute of Technology, 2004) 34-38.

competitive responses by rivals or potential rivals. This type of conduct hobbles the self-correcting tendencies of markets and ultimately harms consumers. This is the type of conduct that unilateral conduct rules are intended to address.

3. Unilateral Anticompetitive Conduct Not Captured by Section 46(1)

Under the current wording of section 46(1), the requirement that a firm 'take advantage' of its substantial market power plays the central role in distinguishing between unilateral anticompetitive conduct and vigorous competition.[2] Applying the 'take advantage' standard, Australian courts have variously asked whether a firm *without* substantial market power could, could profitably, or would, engage in the impugned conduct. If the answer is 'no', the dominant firm has taken advantage of its market power. The 'take advantage' standard therefore uses non-dominant firm conduct as the benchmark for competitive behaviour.

It is submitted that, according to the interpretation of the 'take advantage' element over the last decades, this standard has proved both uncertain and under-inclusive. In the following paragraphs, I outline four categories of unilateral anticompetitive conduct that are unlikely to be captured by the 'take advantage' test, as it is currently interpreted, namely:

- anticompetitive conduct that requires only the 'use of financial power';
- predatory pricing;
- 'cheap' exclusion; and
- profitable non-dominant firm conduct that is anticompetitive when adopted by a dominant firm.

[2] I have analysed the legislative origins of the 'take advantage' element and its rationale in detail elsewhere: see 'Uncovering the Roots of Australia's Misuse of Market Power Provision: Is it Time to Reconsider?' (2014) 42 *Australian Business Law Review* 329.

3.1 Anticompetitive conduct that requires only the 'use of financial power'

In *Rural Press Ltd v ACCC* ('*Rural Press*'),[3] the High Court majority held that there could be no contravention of section 46(1) unless the impugned conduct was made possible by the defendant's substantial market power. On this basis, the majority found that Rural Press did not contravene section 46(1) when it made threats of predation to deter a rival from entering the market in which Rural Press enjoyed a near monopoly.

This conduct gave rise to no plausible efficiency gains. Its sole purpose and effect was to protect the dominant firm's substantial market power. According to the majority, however, Rural Press did not contravene section 46(1) because it could have engaged in the same acts without market power, relying instead on its substantial financial resources and printing capacity. The majority emphasized that section 46(1) does not condemn a firm for preserving its market power by 'use' of some other power, in this case financial power.

Greenwood J recently reiterated this principle in *ACCC v Cement Australia Pty Ltd* ('*Cement Australia*').[4] In this case, his Honour found, in part, that the defendant, by electing to extend a contract for the exclusive supply of an essential input, had incurred losses over a number years.[5] His Honour also found that the defendant believed at that time that, if a rival succeeded in obtaining access to the input and entering the market, the defendant's dominant position would be threatened and its profit margins would drop substantially.[6]

Nonetheless, Greenwood J found that the defendant did not take advantage of its substantial market power when it extended the exclusive supply agreement. The fact that the defendant had the financial resources to absorb or withstand a deferral in revenues was 'not the

[3] (2003) 216 CLR 53.

[4] [2013] FCA 909.

[5] [2013] FCA 909 [2418].

[6] [2013] FCA 909 [2673]-[2676], [2971].

expression of market power'.[7] A non-dominant firm *could* have done the same.[8] His Honour did not indicate whether, or how, such conduct would be profitable for the non-dominant firm. Rather, he emphasized that a dominant firm was entitled to preserve its substantial market power, so long as it 'used' some other power, such as financial power, to do so.[9]

It might be argued that *Rural Press* would be decided differently today, because section 46(6A) has since been added to the *CCA* to clarify the meaning of 'take advantage' and arguably to broaden the scope of the concept. However, some contend that Rural Press *would* be decided in the same way today, on the ground that section 46(6A) does not expressly remove the overarching requirement that the dominant firm has 'used' its market power, as opposed to some other power.[10] This seems also to have been the approach taken by Greenwood J in the *Cement Australia* case, where the 'market power vs other power' consideration was treated as an overarching requirement.

There should be no doubt that the acts in *Rural Press* constituted unilateral anticompetitive conduct. Conduct of this kind has been described by antitrust commentators as 'plain' exclusion:[11] that is, behaviour that 'unambiguously fails to enhance any party's efficiency, provides no benefits (short or long-term) to consumers, and in its economic effect produces only costs for the victims and wealth transfers to the firm(s) engaging in the conduct'.[12] Eleanor Fox calls this the 'consensus wrong'.[13] That is, regardless of the ongoing debate over the precise kind of effect a plaintiff should have to prove in a unilateral conduct case, all agree that conduct that has the purpose and effect of lessening output and increasing prices should be condemned.

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[7] [2013] FCA 909 [2688].

[8] [2013] FCA 909 [2687]-[2688].

[9] [2013] FCA 909 [2278], [2680]-[2681].

[10] Bill Reid, 'Section 46 – A New Approach' (2010) 38 *Australian Business Law Review* 41, 50.

[11] Susan A Creighton et al, 'Cheap Exclusion' (2005) 72 *Antitrust Law Journal* 975, 983 ff.

[12] Ibid 982.

[13] Eleanor M Fox, 'Abuse of Dominance and Monopolization: How to Protect Competition Without Protecting Competitors' (2003) *European Competition Law Annual* 69, 70.

While it is to be expected that unilateral conduct rules will sometimes fail in ambiguous cases, it is unacceptable that they should fail to condemn straight-forward instances of the consensus wrong.

3.2 Predatory pricing

The reasoning in the *Rural Press* and *Cement Australia* must also give rise to uncertainty about how predatory pricing, or other predatory behaviour, would be treated under section 46(1).

In the only predatory pricing case to be considered by the High Court to date, namely *Boral Besser Masonry Ltd v ACCC*,[14] McHugh J provided an explanation of how predatory pricing could infringe section 46(1). His Honour stated that, if a dominant firm prices below cost, and thereby incurs losses which can only be recouped by the firm's *future* exercise of market power to increase prices, the firm thereby takes advantage of its substantial market power.[15]

However, it is submitted that this explanation is at odds with the interpretation of section 46(1) by the High Court majority in *Rural Press*, which requires the dominant firm to rely on its *ex ante* substantial market power to engage in the impugned conduct, without regard to the motivation provided by the market power likely to *result* from the conduct. Is it actually permissible to consider whether the dominant firm 'takes advantage' of its anticipated, ex post market power to engage in the conduct in question?

This uncertainty is not resolved with any clarity by section 46(6A), which addresses the issue of 'whether, by engaging in conduct, a corporation has taken advantage of its

[14] (2003) 215 CLR 374.

[15] (2003) 215 CLR 374, 465: 'if [a firm] has substantial market power and cuts prices below cost for a proscribed purpose with the intention of later recouping its losses by using its market power to charge supra-competitive prices, it has taken advantage of its market power to cut prices below cost to damage competitors.'

substantial degree of market power'. Does a dominant firm, by engaging in below-cost pricing, take advantage of its existing market power, or is it acting in reliance on the market power it expects as a result of the conduct? It is not clear how section 46(1) would currently address genuinely predatory pricing.

3.3 'Cheap' exclusion

'Cheap' exclusion is defined as 'conduct that costs or risks little to the firm engaging in it, both in absolute terms and when compared to the gains (or potential for gains) it brings'.[16] While some unilateral anticompetitive conduct (such as predatory pricing) entails substantial costs and uncertain gains even for a dominant firm, cheap exclusion offers the attraction of very low costs and may involve little or no sacrifice of profits. Examples of cheap exclusion include abuse of standard-setting processes; abuse of governmental processes;[17] fraudulent acquisition of a patent;[18] and 'gaming' of patent regulations to stall the introduction of generic rivals.[19]

How is cheap exclusion treated under the 'take advantage' standard? French J (as he then was) famously explained that a dominant firm would not take advantage of its market power if it burned down a rival's factory.[20] This illustration has generally been accepted as representative of the position under section 46(1), and yet this conduct clearly amounts to both 'cheap' exclusion and 'plain' exclusion, as described above.

If such conduct were considered today, in light of section 46(6A), a court could take into account whether a firm without substantial market power *would* engage in the same conduct. It has been pointed out that, in a 'highly competitive market' where firms are 'price takers', a firm would not engage in such conduct, because the competitive constraints

[16] Creighton et al, above n 11, 977.

[17] Robert H Bork, *The Antitrust Paradox* (Basic Books, 1978) 347 ff.

[18] Jonathon B Baker, 'Exclusion as a Core Competition Concern' (2013) 78 *Antitrust Law Journal* 527, 553.

[19] Creighton et al, above n 11, 983 ff.

[20] *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) 111 ALR 631, 637.

of such a market would ensure that it could gain nothing by doing so.[21] However, in practice, the Australian courts have tended to ask whether the relevant conduct would be profitable on the part of a firm with less than substantial market power, rather than hypothesizing a 'highly competitive market' of price takers. As it is possible for firms with less-than-substantial market power to profit from cheap exclusionary strategies,[22] this may lead to the conclusion that such conduct by a *dominant* firm would not amount to 'taking advantage' of substantial market power.

Cheap exclusion may also be absolved in Australia on the basis that the conduct is not a 'use' of market power, there being no 'causal connection' between the market power and the conduct.[23]

3.4 Profitable non-dominant firm conduct that is anticompetitive when adopted by a dominant firm

Before the *Rural Press* decision, the High Court adopted a somewhat broader interpretation of the 'take advantage' standard in the seminal case of *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* ('*Queensland Wire Industries*').[24] In that case, BHP was found to have 'taken advantage' of its market power essentially on the basis that the impugned conduct would not be profitable on the part of a firm that did not possess substantial market power.[25]

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[21] Donald Robertson, 'Causal Concepts in Competition Law and Economics' (2001) 29 *Australian Business Law Review* 382, 400-401.

[22] See, eg, the *Unocal* case in which Unocal deceived a standard-setting body in order to acquire monopoly power in the market for producing a standard-compliant input: William E Kovacic, US Federal Trade Commission, 'Market Forces, Competitive Dynamics, and Gasoline Prices' (Statement to the Subcommittee on Oversight and Investigations, US House of Representatives) 22 May 2007, available at http://www.ftc.gov/sites/default/files/documents/one-stops/oil-and-gas/070522ftc_-initiatives_to_protect_competitive_petroleum_markets.pdf

[23] *Venning v Suburban Taxi Service Pty Ltd* (1996) ATPR 41-468, 41,753.

[24] (1989) 167 CLR 177.

[25] See *Queensland Wire Industries* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J); 202-203 (Dawson J).

This approach to 'taking advantage' relies on the assumption that conduct that is profitable for a firm without substantial market power is competitive conduct, even when adopted by a dominant firm. The underlying rationale is that firms in a competitive market are likely to engage in efficient conduct since non-efficient conduct would be sanctioned by the normal outcomes of the competitive process.

In other jurisdictions, however, the courts do not consider it necessary to determine whether a firm would have acted in the same way without market power, because it is recognized that firms with and without market power 'can do the same things for different reasons and with different competitive consequences'.[26]

In this respect, it is important to bear in mind the relevance of the requirement that a firm possess a substantial degree of market power under section 46(1). 'Substantial market power' is a legal construct, rather than an economic concept.[27] Market power, as an economic concept, generally refers to a firm's power to exercise some control over price, as opposed to being a price taker with no control over price.[28] Almost all firms have some degree of technical market power, along the spectrum from the trivial all the way to a monopoly.

Unilateral conduct rules in most jurisdictions include a requirement that the defendant possess a 'significant' or 'substantial' degree of market power. This is not because there is some definable level of market power above which firms become capable of anticompetitive conduct and below which all conduct is procompetitive. Rather, the market power requirement acts as an important screening device, which is intended to ensure a more cost effective application of the law by focusing enforcement efforts on the range of

[26] JM Cross et al, 'Use of Dominance, Unlawful Conduct, and Causation Under Section 36 of the New Zealand's Commerce Act 1986: A United States Perspective' (2012) 18 *New Zealand Business Law Quarterly* 333 at 337-339. See also Alison Jones and Brenda Sufrin, *EU Competition Law* (4th ed, Oxford University Press, Oxford, 2011) 366.

[27] See Louis Kaplow and Carl Shapiro, 'Antitrust' (2007) *Working Paper 12867, NBER Working Paper Series*, 20, available at http://www.nber.org/papers/w12867.

[28] Ibid 3.

conduct most likely to create anticompetitive effects.[29]

But it is possible for firms with less-than-substantial market power to increase their power through exclusionary conduct. In the United States, such conduct could even be condemned as monopolization, since the law requires proof that the defendant possessed monopoly power *after* it engaged in the relevant conduct,[30] and not (as in Australia) *before* it engaged in the conduct. It is also possible for firms to engage in conduct that would be efficient in a competitive market, but which could have anticompetitive effects if adopted by a firm with substantial market power, as illustrated below.

Alan Devlin points out that, particularly in 'new economy' markets which display powerful network effects, it is now recognized that fringe firms may profit from conduct that was previously considered profitable only as a predatory strategy on the part of a dominant firm.[31] This has important implications for the 'take advantage' standard.

Consider the following example. The owner of a new and attractive technology plans to enter a market, which is characterized by direct network effects and dominated by an incumbent with an objectively inferior, but widely adopted, product.[32] The incumbent enjoys a first-mover advantage. In this initial phase of its operations, it is rational for the entrant to price below cost to encourage sufficient, timely adoption of its product by consumers.[33] This is procompetitive conduct. The firm is offering consumers a superior product at a low price, and that product will become more valuable as the network grows.

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[29] If unilateral conduct laws applied to all firms, the costs of enforcement, compliance and litigation would be enormous. Such rules are therefore limited in their application to those firms that are most likely to succeed in causing harm through their unilateral acts - that is, firms that possess, in lawyers' terms, substantial market power. This threshold requirement filters out the myriad cases that might create little benefit to competition while imposing significant costs on authorities, plaintiffs and defendants. See Kaplow and Shapiro, above n 27, 101, 103. See also Philip L Williams, 'Should an Effects Test Be Added to s46?' (Paper presented at the Competition Law Conference, Sydney, 24 May 2014) 2.

[30] See Alan Devlin, 'Analyzing Monopoly Power Ex Ante' (2009) 5 *NYU Journal of Law and Business* 153.

[31] Ibid 180-183.

[32] This illustration is derived from various scenarios suggested by Devlin, above n 30,186 ff.

[33] Ibid 186-189.

Suppose that the entrant, having secured the necessary network and scale efficiencies, eventually achieves a dominant position and increases price to monopoly levels. This, in itself, is not cause for antitrust concern: a firm is generally considered to be entitled to the rewards of its superior performance and innovation.

But what if a *new* rival later attempts to enter that market with a superior product? Should the now-dominant incumbent be permitted to drop its price below cost to deter competitive entry and protect its substantial market power?[34] The dominant firm would no longer be investing in establishing a network,[35] but in protecting its substantial market power. But under the 'take advantage' standard, the dominant firm would point out that it engaged in the very same below-cost pricing when it possessed minimal market power as a new entrant.[36] Its conduct cannot therefore be said to be taking advantage, or using, its current market power.

The dominant incumbent should, on this basis, be free to engage in repeated predatory pricing to prevent any competitive entrant from obtaining the necessary network effects to enter the market. Indeed, in time, the reputational effect of its past predatory pricing may be sufficient to deter competitive entry without any need for price cuts.

Answering the question whether a non-dominant firm would profit from the impugned conduct cannot always answer the question whether that conduct has an anticompetitive effect when adopted by a dominant firm.

4. The 'Substantial Lessening of Competition' Test

Having found that the 'take advantage' test has not served its purpose well, the Panel

[34] A similar situation might arise if the firm initially entered the market by tying its new technology to an attractive complementary product, and later took up a similar tying practice in response to new entry.

[35] There are diminishing marginal network effects beyond a certain level of consumer acceptance: Devlin, above n 30, 187.

[36] It is apparent from the *Cement Australia* case [2291]-[2296] that it is not necessary to have regard to the different motives of a firm attempting to gain entry and a dominant incumbent seeking to protect its substantial market power.

proposes that section 46(1) should instead incorporate test based on the effects of the impugned conduct in a market. In particular, a corporation with a substantial degree of power in a market would be prohibited 'from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market' ('the SLC test').

The SLC test comes with the obvious advantage that it has been interpreted in the context of other provisions in Part IV of the *CCA* for many years now. This standard requires a comparison between the likely state of competition 'with' the impugned conduct, and the likely state of competition 'without' the impugned conduct. The SLC test would permit the court to consider whether the dominant firm's conduct is likely to exclude competition in a way that protects or enhances the firm's market power. But questions have been raised as to how this test would take into account possible efficiency justifications for unilateral conduct. These questions are addressed in the following sections.

5. Criticisms of the Proposed SLC Test

5.1 Claimed deterrence of competitive price cuts

Some critics have claimed that the proposed SLC test would condemn dominant firms for offering lower prices to consumers if some smaller rivals could not compete with those prices. Others argue that a dominant firm that lowers its production costs by achieving scale economies could be said to substantially lessen competition: presumably, the argument here is that the firm would eliminate rivals by subsequently lowering its prices to consumers, since a reduction in production costs, without more, cannot give rise to any exclusionary effect.

It is submitted that there is little substance in claims of over-deterrence in this respect. Generally speaking, a firm that reduces its prices to consumers does not thereby gain the ability to 'give less and charge more', even if some rivals fail due to their inability to compete with those prices. Plausible arguments that price cuts are likely to substantially

lessen competition are most likely to arise when below-cost pricing is employed as a strategy to cause harm to the competitive process, as opposed to rivals per se. In this regard, a theory of harm would need to be established, having regard to current economic theory concerning the necessary conditions for predatory pricing.

5.2 Claimed deterrence of R & D leading to better products

Other critics contend that a dominant firm might substantially lessen competition by investing in research and development that gives rise to a better product. If a dominant firm creates a product that is so superior that the dominant firm dramatically increases its market share, an applicant might argue that the conduct is likely to enhance the firm's market power. But, as noted earlier, such monopoly profits are generally regarded as a justifiable reward for superior performance and innovation.

A defendant in such a situation might legitimately contend that its success in creating a better product does not substantially lessening competition. Even if the superiority of the dominant firm's product was so great that the firm became a monopolist, the power of potential competition – competition 'for the market' – may be at least as strong as competition 'within the market' would otherwise have been. In the absence of the firm engaging in other strategic conduct, the competitive process is likely to be at least as healthy with the creation of the superior product as without.

Nonetheless a number of parties have expressed concern that the SLC test alone might not be applied so as to take a proper account of justifications for a dominant firm's conduct. This uncertainty may result, in particular, from the existing Australian approach of separating the SLC assessment (made by the courts) from the assessment of efficiency claims (made by the Tribunal).

Accordingly, the Panel has proposed a defence. In the following sections, consideration is given to the Panel's proposed defence, as well as two alternatives.

6. The Proposed Defence

According to the proposal made by the Panel in the Draft Report, the new provision would include a defence so that the primary prohibition would not apply if the conduct:

(a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; (the 'non-dominant business decision' limb) and

(b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers (the 'long-term consumer interest' limb).

At the outset, it is submitted that it **should not be necessary for a defendant to prove both** the 'non-dominant business decision' limb and the 'long-term consumer interest' limb. The fact that a non-dominant firm would engage in the conduct as a rational business decision is evidence that weighs in favour of a finding that conduct is predominantly efficient,[37] but it seems unduly onerous that a firm should be required to prove both of these aspects independently.

On the other hand, it is submitted that **the 'non-dominant business decision' limb should *not* be made a stand-alone defence**. As explained and illustrated at paragraph 3.4 above, conduct that is profitable for a non-dominant firm can nonetheless be anticompetitive when adopted by a dominant firm. Making the 'non-dominant business decision' limb a stand-alone defence would absolve anticompetitive conduct in these circumstances.

Further, the suggestion by some that there should be a defence that the dominant firm did not 'take advantage' of its substantial market power, should not be adopted. To permit a defendant to raise a general 'take advantage' defence would import all of the weaknesses identified in the current provision into the reformed law.

7. An 'Onus-Shifting' Approach

One alternative to these suggestions would be to shift the onus between the two limbs of

[37] Although it is not conclusive evidence that the conduct is predominantly efficient.

the proposed defence. That is, it would be a defence for the defendant to prove that the conduct:

(a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; *unless*
(b) the effect or likely effect of the conduct is to harm the long-term interests of consumers.

With this approach, once the defendant proved that the conduct would be a rational business decision for a non-dominant firm, the onus would shift to the applicant to prove that the conduct is nonetheless likely to harm the long-term interests of consumers.

However, this particular wording is not recommended. At the outset, it does not make clear that the likely benefits of the conduct should be weighed against the likely harm. Further, it is submitted that the elements of the 'non-dominant business decision' defence might be too readily established in Australia. That is to say, Australian courts have demonstrated a willingness to accept conduct as a 'rational business decision' on the part of a non-dominant firm, without expressly considering the likely outcome of the conduct, or the source of any likely gain, in the absence of substantial market power.[38] The defence might be made out even if the conduct makes no economic sense in the absence of its exclusionary effect, so long as it would still be a rational option for a firm without substantial market power.[39]

Nonetheless it is submitted that there would be merit in adopting an onus-shifting approach, as adopted in unilateral conduct rules in other jurisdictions. Stephen Corones has described this approach in the US case law on monopolization under section 2 of the Sherman Act, and particularly the reasoning of the Federal Court of Appeals (DC Circuit) in *United States v Microsoft Corp*.[40]

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[38] See, eg, *Cement Australia* [2013] FCA 909 [2687]-[2688]; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160, 276-277.

[39] Cf Gregory J Werden, 'Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test' (2006) 73 *Antitrust Law Journal* 413.

[40] See Stephen Corones, 'The Characterisation of Conduct under Section 46 of the Trade Practices Act' (2002) 30 *Australian Business Law Review* 409, 417 ff.

In South Africa, an onus-shifting approach is legislated under section 8(c) of the *Competition Act* 1998 in respect of abuse of dominance.[41] According to this provision, the onus is first on the complainant to prove that the respondent was a dominant firm (as defined), that the dominant firm engaged in an exclusionary act (as defined) and that that act had an anticompetitive effect. If the respondent then proves that the act gave rise to a 'technological, efficiency or other pro-competitive, gain', the onus shifts to the complainant to prove that the anticompetitive effect of the act outweighed those gains.

A similar approach to proof could be adopted under section 46(1). Once the applicant proved an actual, likely or purported substantial lessening of competition resulting from the conduct, the onus would shift to the defendant to show that there was a plausible procompetitive or efficiency justification for the conduct. If the defendant established such a justification, the onus would be on the applicant to prove that the anticompetitive effect of the conduct outweighed the benefits claimed by the defendant.

One of the advantages of such an approach is that it expressly requires a weighing of any benefits claimed by the defendant as against the actual or likely harm to the competitive process proved by the applicant.[42] Such an approach also means that close cases – where it is not possible to determine, on the balance of probabilities, whether the anticompetitive or procompetitive consequences of the conduct are likely to prevail – will be decided in favour of the defendant.

[41] Section 8(c) provides that 'It is prohibited for a dominant firm to - … engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain'. The South African abuse of dominance provisions are explained in more detail in my first submission to the Competition Policy Review Committee.

[42] Steven C Salop has explained the nature of this 'balancing' exercise in some detail: see Steven C Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard' (2006) 73 *Antitrust Law Journal* 311, 330 ff.

8. The Canadian Approach: SLC Test Including Efficiency Considerations

Another alternative is that the provision could specifically direct the court to consider any efficiency claims *as part of* the SLC test. This is the approach taken in Canada, where there is a legislated SLC test for abuse of dominance.

Under the Canadian *Competition Act*, a dominant firm must not engage in anticompetitive conduct which 'has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market'.[43] Under this test, the Tribunal is required to inquire into the economic effects of the dominant firm's impugned conduct, and, specifically, into whether that conduct preserves, entrenches or enhances the market power of the dominant firm, for example, by creating or heightening barriers to entry or expansion.[44] The Canadian SLC test therefore bears obvious similarities to the Australian SLC test.

Under the Canadian *Competition Act*, the matter of efficiency gains is addressed, not by permitting the defendant to raise a defence as such, but by directing the Tribunal to consider whether any actual or likely lessening of competition is 'a result of superior competitive performance'.[45] James B Musgrove states that it may, for example, be legitimate for a firm to exploit its advantage over rivals in terms of lower costs, better distribution or production techniques, or a broader array of product offerings, even if this leads to the elimination of inferior competitors.[46]

The advantage of this approach is that it focuses attention on whether the likely

[43] *Competition Act*, RSC 1985, c. C-34, s 79(1).

[44] See *Canada (Commissioner of Competition) v Canada Pipe Co* (2005) CT-2002-006, para 265-268, rev'd by 2006 FCA 233 and 2006 FCA 236; Mark Katz, 'Abuse of Dominance' in James B Musgrove (ed), *Fundamentals of Canadian Competition Law* (2010, Carswell) 156, citing *Canada (Director of Investigation & Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp Trib); *Canada (Director of Investigation & Research) v D & B Co of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp Trib); Abuse Guidelines, at s. 3.2.3.

[45] *Competition Act*, RSC 1985, c. C-34, s 79(4).

[46] Mark Katz, 'Abuse of Dominance' in James B Musgrove (ed), *Fundamentals of Canadian Competition Law* (2010, Carswell) 157. Katz contrasts the abuse of dominance test with the Canadian merger provision, which prevents the Tribunal from issuing an order to prohibit or dissolve a merger if the efficiencies generated by the merger outweigh anticompetitive effects. Under the abuse of dominance provision, 'superior competitive performance' is only one factor to be considered in assessing the impact of the conduct.

preservation or enhancement of the defendant's market power was a result of, or dependent on, an improvement in the defendant's efficiency.[47] However, Australia's method of separating the consideration of SLC from the consideration of efficiency gains under other provisions in Part IV may be an obstacle to such an approach.

9. Conclusion

The Panel's proposal to introduce an effects-based test under section 46(1) is a welcome step in the direction of a more effective unilateral conduct rule. As the Economic Advisory Group on Competition Policy pointed out when it advocated an economic effects analysis for the EU abuse of dominance prohibition:

> It is not a question of having more or less intervention, but of more effective intervention. The goal is to focus on the important competitive harms, while preserving and encouraging efficiency.[48]

The outcome of unilateral conduct cases under *any* test, including an effects-based test, will not be uniformly certain. This is especially so in cases where the purpose and effects of the conduct are ambiguous. However, under an effects-based test parties can at least direct their minds and arguments to the real issue – that is, whether the conduct is likely to harm the competitive process – rather than getting lost in semantic by-ways, seeking to establish whether the dominant firm can be said to have 'used' its market power to engage in the conduct. Further, the cases where there is uncertainty are likely to involve genuinely ambiguous conduct, while the 'take advantage' test has absolved conduct that unequivocally damages the competitive process.

[47] See Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 *Stanford Law Review* 253.

[48] Economic Advisory Group on Competition Policy, *An Economic Approach to Article 82* (2005), available at *ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf*