Chapter 2

Views on the bill

2.1 This chapter provides a summary of the views expressed in submissions received by the committee. Of the 35 submissions received, most commented only on the amendments outlined in schedule 1 to the bill. As such, this chapter will focus mainly on those measures.

2.2 An underlying theme in the evidence received by the committee was the importance of well-functioning and effective competition law, not only for consumers, but for the Australian economy as a whole. However, submitters to the inquiry expressed mixed views as to whether the amendments in the bill would achieve this goal.

Support for the bill

2.3 The majority of submitters were broadly supportive of bill, with some remarking that the proposed amendments to section 46 would, if passed, represent a significant step forward and improvement to Australian competition law.[1]

2.4 In its submission, Optus noted:

> An effective and well-functioning misuse of market power law that acts to deter conduct that harms competition and consumer interests is a necessary component of an effective competition regime.[2]

2.5 Master Grocers Australia (MGA) welcomed the introduction of the bill, commenting that 'in any competitive environment it is essential for there to be a level playing field'.[3] MGA also noted the benefits of a more robust competition regime:

> MGA submits that supermarket customers are entitled to the benefits of genuine competition, which will deliver cheaper grocery products, diversity in retail offers and a supply chain that makes efficient use of Australia's resources but also one which results in a more equitable distribution of the available profits. The proposed amendments in the draft Bill will provide opportunities for more robust competition in which there is greater opportunity for all parties to prosper and contribute to economic growth in Australia.[4]

2.6 Dr Julie Clarke, Associate Professor at Deakin Law School, asserted that the bill addresses key deficiencies of the current section 46, also commenting that the

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1 See, for example, Dr Julie Clarke, *Submission 7*, p. 2; Master Grocers Australia, *Submission 13*, p. 4.

2 Optus, *Submission 2*, p. 2.

3 Master Grocers Australia, *Submission 13*, p. 3.

4 Master Grocers Australia, *Submission 13*, p. 3.

'proposed new provision is better aligned with the objectives of the law than the one it will replace'.[5]

2.7 A number of submitters discussed the foreseen benefits of the proposed amendments for small business in Australia. For example, the National Farmers' Federation (NFF) contended that the introduction of an effects test to section 46 'will help protect Australia's 135 000 farm businesses from unfair marketplace conduct, which will in turn drive innovation and jobs growth for the Australian economy'.[6]

2.8 The Australian Small Business and Family Enterprise Ombudsman welcomed the proposed amendments and their perceived benefit for small business, commenting that:

> …I strongly support a business environment that allows small businesses to participate in markets and compete on their merits alongside larger businesses. This freedom depends on the existence of a level playing field where those with substantial market power are effectively prevented from using that power to lessen competition.[7]

2.9 The Ombudsman also emphasised that 'the point is not that small businesses, individually or as a class, should be protected from the rigours of healthy competition – rather, that the competitive process itself should not be distorted'.[8]

2.10 The Australian Chamber of Commerce and Industry echoed this view, commenting that 'small business should not be protected from the rigours of merit based competition. However, it is important to ensure that large firms cannot use their market power to exclude an equally efficient competitor.'[9]

2.11 The Institute of Public Accountants (IPA) highlighted the effect that Australia's concentrated market structure has on competition, noting that 'small or medium size businesses are especially vulnerable to exploitation, or exclusion, by firms with substantial market power'.[10]

Deficiencies of the current section 46

2.12 As outlined in the previous chapter, under the current section 46, for a determination that a firm has undertaken conduct that constitutes a misuse of market power, two legal tests must be satisfied. First, the conduct must have involved taking

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5 Dr Julie Clarke, *Submission 7*, p. 1. See also Institute of Public Accountants, *Submission 12*, p. 6.

6 National Farmers' Federation, *Submission 3*, p. 1.

7 Australian Small Business and Family Enterprise Ombudsman, *Submission 18*, p. 1.

8 Australian Small Business and Family Enterprise Ombudsman, *Submission 18*, p. 1.

9 Australian Chamber of Commerce and Industry, *Submission 25*, p. 3. See also Master Grocers Australia, *Submission 13*, p. 7.

10 Institute of Public Accountants, *Submission 12*, p. 3. See also Dr Julie Clarke, *Submission 7*, p. 3.

advantage of the firm's market power and second, the conduct must have been undertaken for one of a list of prohibited purposes.[11]

2.13 Schedule 1 to the bill removes both the 'take advantage' and 'prohibited purpose' elements in the current section 46. These features were highlighted in the Harper Review's Final Report as key deficiencies of section 46 in its current form.[12]

2.14 A number of submitters reiterated this view. For example, Dr Clarke commented:

> The existing misuse of market power provision is deficient in two key respects:
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> - the 'take advantage' element fails to distinguish competitive from anti-competitive conduct;
> - the purpose element is inconsistent with a law designed to target conduct harmful to competition rather than individual competitors.[13]

2.15 As explained by the Australian Competition and Consumer Commission (ACCC) in their submission, the 'take advantage' and 'prohibited purpose' elements have proven problematic when it comes to taking action against firms with market power engaging in anti-competitive conduct.[14] The ACCC further explained:

> …a firm with substantial market power need only show that the conduct it engaged in is conduct that a small firm would also engage in, in order to avoid breaching the prohibition.
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> This is highly unsatisfactory as it ignores the very different consequences that flow from the conduct undertaken by a large firm compared to a small firm in same the market.[15]

2.16 The IPA also noted the deficiencies of the existing legislation.[16] In particular, the IPA submitted that the restrictive judicial interpretation of the phrase 'take advantage' fails to recognise the greater propensity of conduct undertaken by firms with market power to foreclose the market, simply because that conduct could theoretically be engaged in by a firm without market power.[17]

2.17 The causal connection that currently exists between the 'take advantage' element and the ability, or indeed inability, to then satisfy the 'prohibited purpose' element has led to there being few successful court actions under section 46. As noted

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11 See Competition Policy Review, *Final Report*, March 2015, p. 337.

12 See Competition Policy Review, *Final Report*, March 2015, p. 347.

13 Dr Julie Clarke, *Submission 7*, p. 3. See also Institute of Public Accountants, *Submission 12*, p. 3.

14 Australian Competition and Consumer Commission, *Submission 26*, p. 2.

15 Australian Competition and Consumer Commission, *Submission 26*, p. 2.

16 See Institute of Public Accountants, *Submission 12*, p. 3.

17 Institute of Public Accountants, *Submission 12*, p. 4. See also Australian Competition and Consumer Commission, *Submission 26*, p. 4.

by the Australian Hotels Association (AHA), the fact that there have been few proved contraventions 'on balance leads to the conclusion that the current "purpose test" provision is too onerous to prove'.[18] Similarly, MGA commented that, in its current form, section 46 'has caused interpretation problems that have resulted in extensive costly litigation and legal debate'.[19]

2.18 With regard to the 'prohibited purpose' element of the current section 46, some submitters argued that this misdirects prohibition towards conduct intended to harm *competitors*, rather than the intended target of conduct that is harmful to the *competitive process*.[20]

2.19 The ACCC explained why conduct that impacts competitors is part of the competitive process, as opposed to conduct that harms the competitive process, arguing that conduct that intends to impact competitors is 'part and parcel of competitive behaviour'.[21] Expanding on this point, the ACCC explained that:

> …it is a natural consequence of robust competition that more efficient firms damage less efficient firms by attracting customers and increasing their market share. Striving to grow, succeed and acquire market share and potentially market power at the expense of one's rivals is what drives competition and innovation.[22]

2.20 In expressing support for the bill, some submitters commented on how the introduction of an effects test will place greater focus on the outcomes of conduct on the competitive process, rather than just the purpose of the conduct. For example, Optus commented:

> Optus supports the reforms set out in the Bill that aim to improve the operation of s46 so that its application is more certain and that it is more effective in discouraging conduct that harms competition. We believe the Bill achieves this by adopting a test that places greater focus on the 'effects' of conduct - i.e. whether particular behaviour harms the process of competition. In contrast, the current provisions appear to focus narrowly on the 'purpose' of conduct and whether a firm has or has not been able to leverage its market power rather than on the outcomes of that conduct.[23]

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18 Australian Hotels Association, *Submission 9*, p. 1.

19 Master Grocers Australia, *Submission 13*, p. 5.

20 See, for example, Australian Competition and Consumer Commission, *Submission 26*, p. 2; Dr Julie Clarke, *Submission 7*, p. 3; Institute of Public Accountants, *Submission 12*, p. 3.

21 Australian Competition and Consumer Commission, *Submission 26*, p. 2.

22 Australian Competition and Consumer Commission, *Submission 26*, p. 2.

23 Optus, *Submission 2*, p. 2. See also Australian Chamber of Commerce and Industry, *Submission 25*, p. 3.

Concern that amendments will 'chill' competition

2.21 A common concern raised by submitters in opposition to the bill was that the proposed amendments could 'chill' competition by causing risk-aversion in business and, consequently, deterring vigorous competitive conduct.

2.22 Woolworths emphasised this point in its submission, stating that 'we are faced with the very real potential of slowing legitimate commercial decision-making', and noting that 'consumers are the least likely to win in such a scenario'.[24]

2.23 Arnold Bloch Leibler, a commercial law firm, contended that 'in many cases, it will be safer and easier for businesses not to pursue aggressive competitive strategies'.[25] Similarly, the Retail Council commented that 'businesses may be deterred from making what would be pro-competitive decisions that benefit consumers because they fear being accused of breaching s46'.[26]

2.24 Submitters presented various arguments underlying this concern. These included that the proposed amendments will: undermine business certainty when assessing competitive conduct against section 46; risk over capturing pro-competitive conduct; and place an unreasonable burden on large business.

Undermining certainty of assessment

2.25 A number of submitters argued that the proposed amendments are unnecessary as section 46 is 'well understood and operates effectively in its current form to restrict egregious anti-competitive conduct'.[27] Moreover, as previously noted, some submitters commented that the proposed changes would undermine the certainty with which businesses could approach competitive strategy.

2.26 The Retail Council emphasised this view, remarking that 'the proposed changes will make the law less clear, less simple and less predictable for business and end in years of costly and lengthy legal battles'.[28] The Business Council of Australia (BCA) expressed a similar view, describing the proposed amendments as 'too broad and ambiguous'. The BCA also submitted that the changes do not 'provide the clarity that is needed for businesses to compete vigorously'.[29]

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24 Woolworths Limited, *Submission 19*, p. 2.

25 Arnold Bloch Leibler, *Submission 24*, p. 4.

26 Retail Council, *Submission 5*, p. 2. See also Housing Industry Association Limited, *Submission 14*, p. 3; BlueScope, *Submission 17*, p. 3.

27 Insurance Council of Australia, *Submission 11*, p. 1. See also Business Council of Australia, *Submission 27*, p. 2; Woolworths Limited, *Submission 19*, p. 1.

28 Retail Council, *Submission 5*, p. 2.

29 Business Council of Australia, *Submission 27*, p. 3.

Removal of the 'take advantage' element

2.27 Telstra contended that the main source of uncertainty introduced by the bill is the proposed removal of the 'take advantage' element from section 46:

> This test allows a firm to assess, with a reasonable level of certainty, whether it is able to engage in conduct because of any alleged market power or whether it is simply engaging in competition on the merits.
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> …
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> To date, the take advantage test has allowed Telstra to gain greater certainty about the risks associated with its conduct than it could by relying solely on a complex assessment of the likely 'effect' its conduct may have on competition.[30]

2.28 BlueScope described the existing 'take advantage' element of section 46 as a 'low-cost and reliable screening device' for business to apply, and expressed concern that the removal of this element and the introduction of an effects test would compound regulatory risk for Australian manufacturers.[31]

2.29 MinterEllison also argued that:

> …there is a real risk that removing the 'take advantage' element and so relying on a competition test as the only filter sorting good from bad conduct for firms with market power will not give sufficient certainty for businesses to be able confidently to proceed with normal pro-competitive conduct.[32]

Qualification of the term 'conduct'

2.30 Some submitters raised the qualification of the term 'conduct' in the proposed reforms to section 46 as a potential way of addressing uncertainty and, in turn, the risk of chilling competition. For instance, the BCA submitted:

> While there may not be a case for prescribing specific forms of conduct per se, there is a need for the provision to clearly focus on conduct that is 'exclusionary'.
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> …
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> Importantly, this would make it clear to a business engaging in conduct that is not 'exclusionary' that it is not at risk under the law and it free to compete on merit. By contrast, 'any conduct' by a business with substantial market power could be captured under the provision as drafted.[33]

30 Telstra, *Submission 10*, p. 2. See also Arnold Bloch Leibler, *Submission 24*, p. 2.

31 BlueScope Steel Limited, *Submission 17*, p. 3.

32 MinterEllison, *Submission 15*, p. 1.

33 Business Council of Australia, *Submission 27*, p. 5.

2.31 Some submitters also noted that the ACCC's draft 'Framework for misuse of market power guidelines'[34] outlines the objective of section 46 as the prohibition of what is broadly referred to as 'exclusionary conduct'. Additionally, some submitters argued that this qualification of the type of conduct targeted by the provision should be explicitly clarified in the bill.[35]

2.32 MinterEllison expressed a similar view:

> …it would be helpful to express generically what type of conduct the Act is aiming to catch – not just in an ACCC guideline or explanatory materials – but in the statute itself. Identification of some adjectival qualification such as 'exclusionary' conduct or 'anti-competitive' conduct for example could assist with the issues around certainty and chilling risks, giving some comfort to businesses on those issues that 'normal' competitive conduct is not intended to be caught by the competition test.[36]

Risk of over capture

2.33 The ability of the reframed section 46, as drafted in the bill, to distinguish between legitimate pro-competitive activity and anti-competitive conduct was a concern in a number of submissions. Some submitters contended that, by removing the 'take advantage' and 'prohibited purpose' elements in the current legislation—against which businesses have been able to reliably and predictably assess their competitive strategies—and substituting these with an effects test, the proposed legislation risks inadvertently capturing pro-competitive conduct.

2.34 The Retail Council was one organisation that expressed this view, explaining that it believed section 46 in its current form:

> ...strikes the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship as evidenced by the successful cases brought by the ACCC. We remain concerned that the proposed changes to s46 will remove this balance casting a wide net over business and capturing pro-competitive behaviour, bringing on regulatory failure.[37]

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34 The ACCC's draft *Framework for misuse of market power guidelines* was released for consultation on 5 September 2016, concurrent with the release of the exposure draft legislation. The feedback from this consultation will inform the development of the ACCC's final guidelines. In line with the Harper Review's recommendation, the guidelines intend to outline the ACCC's approach to the proposed section 46. Also, as noted in the framework, 'the purpose of the guidelines will be to provide clarity of the types of conduct and circumstances that may cause the ACCC concern under the proposed s46, and importantly, the types of conduct that and circumstances that will not cause the ACCC concern', p. 2.

35 See, for example, Woolworths Limited, *Submission 19*, p.3; Insurance Council of Australia, *Submission 11*, pp. 2–3; Housing Industry Association, *Submission 14*, p. 4.

36 MinterEllison, *Submission 15*, p. 4.

37 Retail Council, *Submission 5*, p. 2.

2.35 Telstra also raised the risk of over capture in relation to the proposed removal of the 'take advantage' element from the current legislation:

> Without this relatively more certain test, the new law risks over capturing pro-competitive conduct and/or dampening competition and innovation as firms face greater regulatory uncertainty. Telstra believes this could have unintended consequences for businesses, consumers and the economy.[38]

Mandatory Factors

2.36 As outlined in Chapter 1 (paragraph 1.20), the Harper Review recommended that additional guidance be given to the courts by including mandatory factors to be considered when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition. The proposed amendments to section 46 adopt these mandatory factors to be considered. It is the intention that, by having regard to these factors, the provision will better target anti-competitive conduct. Moreover, the mandatory factors aim to make it clear that the re-framed section 46 is not intended to prevent pro-competitive conduct, and therefore ensure that conduct is considered in a holistic manner.[39]

2.37 The IPA expressed its support for this directive, noting that it includes 'a broad and sensible list of factors that must be regarded as increasing competition; efficiency, innovation, quality and price competitiveness'. The IPA also submitted that the factors broad reference to both pro-competitive and anti-competitive effects 'avoid the risk of focusing attention too narrowly on specific forms of conduct'.[40]

2.38 Dr Clarke echoed this view, commenting:

> This directive, which requires the court to consider, for example, the extent to which the conduct has the purpose or effect of increasing competition by enhancing efficiency and innovation, should mitigate concern that it will be interpreted in a narrow way which may risk 'chilling' genuine competitive activity.[41]

2.39 However, the proposed mandatory factors were raised as an issue of concern in a number of submissions. Some submitters asserted that their inclusion in section 46 would unnecessarily complicate the legislation, potentially leading to uncertainty, confusion and protracted litigation.[42]

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38 Telstra, *Submission 10*, p. 2.

39 Explanatory Memorandum, pp. 10–11.

40 Institute of Public Accountants, *Submission 12*, p. 6.

41 Dr Julie Clarke, *Submission 7*, p. 5.

42 See, for example, Master Grocers Australia, *Submission 13*, p. 9; Australian Bankers' Association, *Submission 22*, p. 3; Australian Competition and Consumer Commission, *Submission 26*, p. 5.

2.40 The BCA outlined how the requirement to 'weigh up' the proposed mandatory factors could create uncertainty and cause risk-aversion in business:

> When businesses are making decisions to innovate, expand their business or reduce prices they will be required to go through this 'weighing of factors' process internally and second guess how a court might interpret their conduct under the legislation. It will be time–consuming and costly to apply. This will create uncertainty and cause risk-aversion in business, with consumers and the economy bearing the ultimate costs should vigorous competition be impeded.[43]

2.41 The Australian Lottery and Newsagents' Association (ALNA) contended that the mandatory factors 'are too inflexible and will become law by itself', further submitting that assessment of conduct will 'focus on these factors and not the alleged misconduct'.[44]

2.42 The Queensland Law Society expressed concern that the mandatory factors, if introduced, create the possibility that the concept of 'substantially lessening competition' will be interpreted differently in section 46 than in other sections of the CCA.[45]

2.43 The ACCC also highlighted concerns in relation to the mandatory factors. In particular, the ACCC noted the uncertain impact of the mandatory factors relating to efficiency and innovation, concepts that are new to the context of competition law enforcement, arguing that these factors could provide a potential loophole and unnecessarily complicate the litigation process:

> Further, the ACCC considers that the factor relating to efficiency and innovation, will impose additional complex elements to be applied in determining whether there has been a contravention of the section. This creates scope for judicial interpretation about the interaction between efficiencies and competition, and innovation and competition, that could lead to further uncertainty about the application of section 46.
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> …
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> The impact of introducing them into the section 46 test is uncertain and unclear. This factor may provide a potential loophole and will unnecessarily add complexity, making it more difficult for the ACCC, and private litigants, to establish a breach of the revised section 46.[46]

43 Business Council of Australia, *Submission 27*, p. 6.

44 Australian Lottery and Newsagents' Association, *Submission 29*, p. 2. See also Mr Hank Spier, *Submission 28*, p. 2.

45 Queensland Law Society, *Submission 31*, p. 1.

46 Australian Competition and Consumer Commission, *Submission 26*, p. 5.

2.44 Some submitters contended that, although the ACCC indicated in its draft 'Framework for misuse of market power guidelines' (see footnote 34) that pro-competitive conduct such as enhancing efficiency and innovation would not cause it concern under section 46, this should be specified in the legislation itself. For example, the Australian Bankers' Association (ABA) commented:

> The Draft Guidelines indicate that new section 46 is concerned about the effect on the 'competitive process' rather than on individual competitors, and broadly the ACCC states that a range of conduct would not breach the new section 46 (section 4.7 and Table 2 of the Draft Guidelines), this should be made clear in the legislation itself, if that is the intention. This will help ensure that the scope of new section 46 of the Bill will not be interpreted to inadvertently capture conduct that is pro-competitive.[47]

Burden on large business

2.45 The issue of increased regulatory burden on large business was identified in some submissions as another factor contributing to the risk of chilling competition. Complex competition analysis was highlighted as a principal issue of concern, with some arguing that such increased assessment would be commercially unfeasible in certain markets.[48]

2.46 Arnold Bloch Leibler emphasised this point in its submission:

> The proposed s 46 would apply the substantial lessening of competition (SLC) test to each and every aspect of a business' unilateral conduct… While such scrutiny may be justifiable and workable for a major and infrequent business event like a substantial merger, it is completely unworkable in the context of routine, ordinary business decision-making.[49]

2.47 Some submitters also commented on the regulatory costs associated with undertaking increased assessment of competitive strategies. BlueScope, for example, argued:

> The effect or likely effect on competition of ordinary business decisions cannot be properly measured by manufacturers but will require detailed analysis by competition lawyers and economists which will introduce unnecessary regulatory costs and risks, and dampen competition and innovation.[50]

2.48 The ACCC acknowledged that the proposed amendments to section 46 'will expose a very small number of firms – those with substantial market power – to more scrutiny'. However, the ACCC also submitted that 'this additional responsibility is imposed upon firms with substantial market power because of the significant

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47 Australian Bankers' Association, *Submission 22*, p. 3. See also Arnold Bloch Leibler, *Submission 24*, p. 6.

48 See, for example, Woolworths Limited, *Submission 19*, p. 2.

49 Arnold Bloch Leibler, *Submission 24*, p. 3.

50 BlueScope Steel Limited, *Submission 17*, p. 3.

competitive consequences that flow from anti-competitive unilateral conduct by a firm with substantial market power'.[51]

Arguments that the effects test is neither novel or uncertain

2.49 A number of submitters argued against claims that the proposed re-framing of section 46 risks chilling competition, claiming that such concerns are without foundation or were, at best, exaggerated.[52]

2.50 The ACCC stressed that the proposed effects test is neither a novel or uncertain concept in Australian competition law:

> To the contrary, it is a well-established and well understood test that is applied in the majority of the other competition provisions of the CCA, including anti-competitive agreements, mergers and acquisitions. It has a demonstrated ability to effectively filter harmful anti-competitive conduct from benign or pro-competitive conduct.
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> ...
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> Further, it is a test applied internationally to conduct and so will also be well understood by multinational firms carrying on business in Australia.[53]

2.51 Optus agreed with this view, noting that the telecommunications industry has been subject to a similar effects test with no evidence of detriment to competition:

> Contrary to the repeated claims of some opponents of reform, the concept of 'significant lessening of competition' is well understood by business, regulators and the courts. Such analysis is undertaken to apply other parts of the Competition Law. Further, telecommunications has operated under a similar effect test in Part XIB of the Act since 1997. There is no evidence that the 'effects test' under Part XIB has undermined competitive behaviour or caused an undue level of litigation.[54]

2.52 The Australian Small Business and Family Enterprise Ombudsman also commented that 'we believe the proposed amendment is sufficiently clear to be reliably and consistently applied by business, the ACCC and the courts to distinguish between pro-competitive and anti-competitive conduct'.[55]

2.53 Australian Dairy Farmers (ADF) noted that consistency is a key principal in any policy or law, and that the proposed amendments not only provide an opportunity

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51 Australian Competition and Consumer Commission, *Submission 26*, p. 4.

52 See, for example, Dr Julie Clarke, *Submission 7*, p. 6; Institute of Public Accountants, *Submission 12*, p. 6; Master Grocers Australia, *Submission 13*, p. 6.

53 Australian Competition and Consumer Commission, *Submission 26*, p. 3. See also Dr Julie Clarke, *Submission 7*, p. 4; Institute of Public Accountants, *Submission 12*, p. 6.

54 Optus, *Submission 2*, p. 3.

55 Australian Small Business and Family Enterprise Ombudsman, *Submission 18*, p. 2.

to make section 46 consistent with other sections of the CCA, but would also move Australian competition law closer to international best practice.[56]

2.54 Dr Clarke acknowledged that 'there will, of course, always be a period of adjustment to new law' but also argued that 'natural levels of uncertainty associated with new law is no justification for retaining bad law'.[57] Dr Clarke also commented on concerns that the proposed amendments risk over capturing pro-competitive conduct:

> Vigorous competition which harms less efficient competitors, or innovation which is rewarded with temporary enhancement to market power or share, is not anticompetitive; it is what is expected of effective competition and should deliver efficiency gains to firms and benefits to consumers in the form of lower prices and better or more diverse products or services. This would be recognised in any appropriate assessment of the 'substantial lessening of competition' test, which is capable itself of distinguishing competition on the merits from anti-competitive exclusionary behaviour.[58]

Relevant Market

2.55 As noted in the Explanatory Memorandum, extensive consultation with stakeholders following the release of the Harper Review's Final Report revealed a concern that the reference to substantially lessening competition in 'any market', as recommended by the review, made section 46 excessively broad in scope. To address this issue, the scope of section 46 was limited to those markets in which a corporation's conduct is most likely to have a purpose, effect or likely effect of competition concern.[59]

2.56 The Housing Industry Association (HIA), while generally opposed to the bill, commented that it considers this change an improvement and that it 'reduces the uncertainty and complexity from the previous definition of market'.[60]

2.57 However, other submitters contended that the change to the definition of 'market' from that which featured in the Harper Review's Final Report and subsequent exposure draft legislation is unnecessarily complicated.[61]

2.58 The IPA commented:

> The proposed s 46(1) in the Misuse of Market Power Bill is significantly more convoluted than that proposed in the Harper Report. This has resulted from attempts to define, in some detail, the market or markets in which the substantial lessening of competition must occur.

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56 Australian Dairy Farmers, *Submission 6*, p. 2.

57 Dr Julie Clarke, *Submission 7*, p. 6.

58 Dr Julie Clarke, *Submission 7*, p. 5.

59 Explanatory Memorandum, p. 12.

60 Housing Industry Association, *Submission 14*, p. 3.

61 See, for example, Dr Julie Clarke, *Submission 7*, p. 7; Master Grocers Australia, *Submission 13*, pp. 8–9.

> …
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> In the IPA's view this amendment is unfortunate; it unnecessarily complicates the law. Nevertheless, as it is not envisaged that this change will significantly diminish the scope of the provision, it does not alter the IPA's support for the Bill.[62]

2.59 The Law Council of Australia's Small and Medium Enterprise Business Law Committee (SME Committee) noted that the new definition of the market, as drafted in the bill, differs from other provisions in the CCA and expressed concern about the ramifications of the change.[63]

Other matters raised

Removal of predatory pricing provision

2.60 The ADF and Queensland Dairyfarmers' Organisation expressed concern that the removal of the specific prohibition against predatory pricing from section 46 could lead to potential difficulties in proving such conduct.[64] The ADF requested that this amendment be monitored and reviewed no later than three years post-implementation.[65]

Commencement date

2.61 The bill currently provides that the amendments will take effect from a date to be fixed by Proclamation. If any provisions do not commence within six months from the date of Royal Assent, then they will take effect from the date after that period ends.[66] The ABA argued that a 12 month transition period should be provided from the date of Royal Assent prior to the commencement of any amendments to section 46. The ABA reasoned that:

> ABA's members will require detailed legal and operational advice to develop their compliance arrangements, review their activities and relationships in banking and financial markets and institutionalise their compliance arrangements across all sectors of the bank – retail, wholesale, commercial and institutional – including for the way ahead.[67]

Tribunal access

2.62 Some submitters noted the importance of small business owners having appropriate access to a tribunal to adjudicate competition issues and provide an

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62 Institute of Public Accountants, *Submission* 12, pp. 6–7.

63 Law Council of Australia, *Submission 20*, p. 2.

64 Australian Dairy Farmers, *Submission 6*, p. 3; Queensland Dairyfarmers' Organisation, *Submission 16*, p. 2.

65 Australian Dairy Farmers, *Submission 6*, p. 3.

66 Explanatory Memorandum, pp. 3–4.

67 Australian Bankers' Association, *Submission 22*, p. 1.

affordable means to raise their concerns.[68] The Waste Buying Group emphasised this point in its submission, commenting:

> Without access to an affordable and approachable adjudicator this change in law is really just a waste of time and is as useless to the cause of improving competition as is the clause(s) that it seeks to replace.[69]

Repeal of Part XIB

2.63 The proposed repeal of the telecommunications-specific anti-competitive conduct provisions, set out in Divisions 2 and 3 of Part XIB of the CCA, received mixed support from submitters.

2.64 Telstra agreed with the proposal that the Part XIB provisions are no longer necessary or appropriate given the amendments to section 46.[70] Telstra also commented:

> With the threshold for section 46 being lowered it is imperative that the telecommunications sector only be subject to anti-competitive rules that generally apply across different sectors.[71]

2.65 While broadly supportive of the proposed reforms to section 46 of the CCA, Optus submitted that the case for repealing Part XIB 'is more finely balanced'. Optus contended that the Part XIB provisions should only be repealed if the amendments to section 46 are made, reasoning that:

> The telecommunications market remains highly concentrated and is in a period of transition as related services and markets are starting to converge. New sources of market power are arising that are divorced from traditional ownership of infrastructure. The protections afforded by Part XIB are no less as important as they were in 1997.[72]

2.66 Vodafone Hutchison Australia (VHA) expressed its strong opposition to the repeal of Divisions 2 and 3 of Part XIB, characterising the proposed amendments as 'unnecessary' and 'premature'.[73]

2.67 VHA argued that the Part XIB provisions 'remain more appropriate to dynamic telecommunications markets in which the detrimental effects of anti-competitive conduct could have swift and profound negative impacts'.[74] Moreover, these unique provisions continue to have a significant deterrent effect on anti-

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68 See, for example, Waste Buying Group, *Submission 1*, p. 1; Australian Chamber of Commerce and Industry, *Submission 25*, p. 4.

69 Waste Buying Group, *Submission 1*, p. 1.

70 Telstra, *Submission 10*, p. 3.

71 Telstra, *Submission 10*, p. 5.

72 Optus, *Submission 2*, p. 2. For the full telecommunications-specific provisions, see *Trade Practices Amendment (Telecommunications) Act 1997*.

73 Vodafone Hutchison Australia, *Submission 34*, p. 2.

74 Vodafone Hutchison Australia, *Submission 34*, p. 3.

competitive conduct and are an imperative part of the current telecommunications competition regime.[75]

2.68 VHA further submitted that any reforms to Part XIB should be reserved until the ACCC has completed its current market study[76] of the communications sector:

> It would simply make no sense to substantially reduce competition oversight in the communications sector without a serious examination of the state of competition in the communications sector. The ACCC has just embarked upon exactly this exercise and any reforms to Part XIB must be placed on hold until the conclusion of the ACCC's Communications Market Study.[77]

2.69 The Competitive Carriers' Coalition (CCC) also conveyed their opposition to the repeal of the Part XIB provisions. The CCC submitted that the creation of these telecommunications-specific provisions in 1997 recognised the particularly difficult conditions that existed in communications markets, and that these conditions 'can on no reasonable measure be said to have ceased to exist'.[78]

2.70 Macquarie Telecom Group (MTG) noted that it has raised complaints regarding conduct it considered to be in breach of Part XIB as recently as 2016, commenting that 'these recent complaints demonstrate the ongoing importance of and utility of the provisions'.[79]

Post-implementation review

2.71 Some submitters recommended that a post-implementation review be carried out within two years of any enactment of the bill. Woolworths commented that this would provide an opportunity to assess the impact of the reforms and address any unintended consequences that may arise from its implementation.[80]

2.72 The BCA submitted that a post-implementation review:

> …should assess post-implementation costs and benefits of the changes, including the impacts on innovation and pricing activity. The review should test whether actual compliance costs for business are consistent with the estimate in the RIS of $2.5 million a year, or $25 million over 10 years.[81]

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75 Vodafone Hutchison Australia, *Submission 34*, p. 4.

76 The ACCC commenced a market study of the communications sector in September 2016. The study will examine existing or emerging competition and consumer issues in the sector and has an indicative final reporting date of November 2017.

77 Vodafone Hutchison Australia, *Submission 34*, p. 1.

78 Competitive Carriers' Coalition, *Submission 32*, p. 2.

79 Macquarie Telecom Group, *Submission 33*, p. 1.

80 Woolworths Limited, *Submission 19*, p. 4.

81 Business Council of Australia, *Submission 27*, p. 8.

Committee view

2.73 The committee notes that reforms to section 46 of the CCA have been the subject of very extensive stakeholder consultation and public debate, through the Harper Review as well as subsequent discussion paper and exposure draft consultations. The committee again thanks all individuals and organisations that have contributed to the inquiry.

2.74 The committee agrees with arguments that section 46 is unfit for purpose and deficient in its current form. By using what could be done by a firm lacking market power as a threshold for distinguishing anti-competitive conduct, the current section 46 has created an effective safe harbour for anti-competitive conduct carried out by firms with substantial market power.

2.75 The committee considers that the current section 46 has not provided adequate protection for non-dominant firms from the destructive actions of firms with substantial market power. The removal of the 'take advantage' and 'prohibited purpose' elements from the current legislation and introduction of an effects test, as proposed in the bill, will provide a more equitable market in which all businesses can flourish. The committee emphasises that these amendments do not represent an argument for small versus big; rather they represent support for open and fair markets that allow all businesses to participate and compete on their merits.

2.76 The committee acknowledges concerns expressed during the inquiry that the proposed amendments to section 46 could potentially create a lack of certainty and risk chilling vigorous competitive conduct. However, the committee considers that these concerns are possibly overstated. The committee is aware that the concept of the purpose, effect or likely effect of substantially lessening competition is not new to Australian competition law and has been subject to much discussion over the years. However, the committee is satisfied that this well-understood, existing jurisprudence will inform the application of this concept in the context of the proposed amendments to section 46.

2.77 The committee considers it appropriate that legislation designed to deter the misuse of market power focuses not only on the purpose of conduct, but also on the outcomes of the conduct on competition. The bill achieves this by focusing on conduct that harms the competitive process, rather the individual competitors, therefore bringing the provisions in to line with the objectives of the provision.

2.78 The committee notes the suggestion made by some submitters that elements of the ACCC's draft 'Framework for misuse of market power guidelines' should be incorporated into any new legislation regarding section 46. However, the committee emphasises that the draft guidelines reflect the ACCC's approach to the interpretation of the proposed legislation, not that of the courts.

2.79 The committee acknowledges concerns expressed by many submitters, including the ACCC, in relation to the proposed introduction of mandatory factors to be considered by the courts when determining whether conduct constitutes a misuse of market power. The committee considers that the introduction of these factors is unnecessary and the other reforms to section 46, as drafted in the bill, are more than

sufficient to address the deficiencies evident in the current legislation. Additionally, the committee considers that the removal of the mandatory factors will aid in reducing uncertainty among affected stakeholders.

Recommendation 1

2.80 The committee recommends that the proposed mandatory factors, as drafted in subsection 46(2) of the bill, be removed.

2.81 While the committee is confident that the bill will effectively and appropriately target anti-competitive conduct, it also recognises that the reforms represent a significant change in the context of competition law enforcement. Therefore, the committee considers that a comprehensive post-implementation review assessing the impacts and outcomes of the reforms is justified.

Recommendation 2

2.82 The committee recommends that the government undertake a post-implementation review of the reforms to section 46 at least five years after commencement.

Recommendation 3

2.83 The committee recommends that the bill be passed.

Senator Jane Hume
Chair