MISUSE OF MARKET POWER:

IMPROVING THE AUSTRALIAN SLC MODEL

August 2020

Brent Fisse*

I Australian SLC model of misuse of market power: Fit for purpose?

1. Section 46 of the Competition and Consumer Act 2010 (Cth), as amended in 2017, prohibits a corporation with a substantial degree of power in a market from engaging in conduct in that market that has the purpose, effect or likely effect of substantially lessening competition in a market (**Australian SLC Model**).[1]

2. The Australian SLC Model is an advance on the former s 46, which was widely criticised and discredited.[2] However, the revised s 46 is prone to overreach, underreach and uncertainty. The section is not based on a cogent underlying theory of exclusionary conduct.[3]

3. The weaknesses in the Australian SLC Model are well-known, in Australia and overseas. The more significant are:

- **Overreach – no exclusionary element**[4]

  There is no 'exclusionary' element. The s 46 prohibition does not specify that the conduct must be likely to exclude, deter or impair rivalry on the part of existing or potential competitors.

---

* Brent Fisse Lawyers, Sydney; Consultant, Asian Development Bank; Honorary Professor, University of Sydney; Adjunct Professor, Australian School of Taxation and Business Law, UNSW Business School. The usual disclaimers apply. These notes sketch out the main points in my commentary on Katharine Kemp's excellent presentation at the session on misuse of market power at the CLPINZ conference, 19 August 2020. That presentation and my commentary focussed on the proposed reform of s 36 of the Commerce Act 1986 (NZ), that reform is to follow the Australian SLC Model: https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/review-of-section-36-of-the-commerce-act-and-other-matters/.

1 See A Duke, *Corones' Competition Law in Australia* (7th ed, 2019) ch 9.

2 See J Clarke, 'Section 46: its purpose and the proposed new effects test' (2017) 45 Australian Business Law Review 364. The heading of s 46(1) ('Corporations not to take advantage of market power'), is hallucination.

3 See K Kemp, *Misuse of Market Power: Rationale and Reform* (2018).

4 See Part II below.

- **Underreach and overreach – subjective purpose**[5]

  Under the 'purpose' limb, the test is subjective. Subjective purpose does not adequately capture anti-competitive economic harm. Liability should not depend on a firm's subjective assessment of the competitive impact of its conduct. The subjective assessment may also be accurate. However, it may be foolhardy, mistaken, self-preferring, reckless or careless. Overreach is also possible. The subjective SLC purpose may be merely a strategy or plan that has yet to be implemented, or has been implemented by taking a preliminary step that does not have the effect or likely effect of substantially lessening competition.[6]

- **Overreach (and chilling effect) – efficiencies, ex post assessment of 'effect'**[7]

  Efficiencies

  The SLC test is concerned with competitive rivalry. Efficiencies are an important consideration when applying the SLC test. However, pursuit of efficiencies may have the effect or likely effect of substantially lessening competitive rivalry and yet also promote consumer welfare.

  Ex post assessment of 'effect'

  Under the 'effect' limb of the SLC test, conduct is exposed to potential liability on the basis of its actual effects. The analysis of actual effects is conducted ex post. The actual effects may not have been reasonably foreseeable ex ante at the time of the conduct.

- **Uncertainty (and inconsistency) – 'substantial'**[8]

  Although the SLC test is familiar and long-standing, the meaning of 'substantial' in the test is uncertain and obscure. For instance, it is unclear what degree of lessening of competitive rivalry is required or over what period of time the effect or likely effect on competition needs to be assessed.

---

5 See Part III below.
6 See [28] below.
7 See Part IV below.
8 See Part V below.

4. Attempts to gloss over the weaknesses of s 46 are unconvincing:

- *"The SLC test applies to other major prohibitions and is well understood"*
  - A 'one-size-fits-all' SLC approach is simplistic and forecloses the development of legal rules responsive to the known difficulties of definition presented by exclusionary conduct.[9]
  - Exclusionary conduct is not defined in terms of a SLC test in US or EU competition law.
  - Although pivotal, the requirement that the lessening of competition be 'substantial' remains obscure.
- *"It is possible to cut to the chase by focussing on 'competition on the merits' when applying s 46"*
  - 'Competition on the merits' is a slogan, not a workable legal test.[10]
- *"Authorisation is a sufficient and appropriate safeguard against overreach"*
  - Authorisation is a bureaucratic, time-consuming and costly solution that requires disclosure of commercial plans to the public and hence to competitors and free-loaders.[11]
  - Authorisation is no substitute for defining exclusionary conduct in a better way than s 46.[12]
- *"Australia has conducted an extensive debate on misuse of market power and all the issues that matter have now been canvassed and resolved"*
  - Significant issues that matter have not been resolved, which explains this commentary.

5. What follows below:

Part II – Infuse objective purpose standard into s 46

Part III – Add an exclusionary rule

Part IV – Delete purpose limb of SLC test

Part V – Add defence of reasonable necessity and proportion

Part VI – Clarify 'substantial' lessening of competition

Part VII – Summary and main recommendations

---

9 See Kemp, *Misuse of Market Power*.

10 See R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2nd ed, 2013) 361-362.

11 See [37] below.

12 See [37] below.

II Infuse objective purpose standard into s 46

6. Section 46 is based on simplistic belief in the suitability of a SLC test. The section is not based on a cogent underlying theory of exclusionary conduct.[13]

7. A compelling theory of exclusionary conduct is advanced in K Kemp, *Misuse of Market Power: Rationale and Reform* (2018).[14] That work sets out an objective purpose standard (**Objective Purpose Standard**) derived from Australian and comparative law and commentary on exclusionary conduct.

> In defining and articulating an 'objective anticompetitive purpose' standard for unilateral conduct, this [book] draws out a norm which has been present in the case law and commentary in this area for many years but which has not been clearly articulated. The implicit norm is that a firm should not engage in conduct which has the purpose, objectively assessed, of creating, protecting or enhancing market power by suppressing rivalry without creating proportionate benefits for the competitive process, having particular regard to the interests of consumers. This standard should be used as a foundation for understanding, framing and analysing unilateral conduct rules.[15]

8. Two key questions thus arise under the Objective Purpose Standard:
   a. Is the objective purpose of the conduct by a corporation with substantial market power to suppress rivalry by competitors or potential competitors? and
   b. If so, is the objective purpose to create proportionate benefits for the competitive process having particular regard to the interest of consumers?

9. The Objective Purpose Standard is commendable. It distils and catalyses the wisdom on this subject from extensive experience around the world.

10. The Objective Purpose Standard could be implemented by means of statutory rules developed on a clean slate. However, in Australia that is now politically unattractive.

11. Is it possible instead to infuse the Objective Purpose Standard into s 46? Section 46 could be interpreted and applied in ways that approximate the Standard.[16] That approach is well worth taking where possible. However, in my view, the Objective Purpose Standard seems unlikely to be followed widely and consistently by courts, regulators and other stakeholders unless it is reflected in and backed by legislation.

---

13 See Kemp, *Misuse of Market Power*.
14 Cambridge University Press.
15 Kemp, *Misuse of Market Power*, 242.
16 Id, at 231-242.

12. Moreover, useful feedback on the Objective Purpose Standard is unlikely to emerge from the application of s 46 or the authorisation process unless the Standard is an explicit requisite consideration to be heeded by those from whom feedback is sought.

13. One statutory impediment to be overcome when infusing the Objective Purpose Standard into s 46 is the rule in s 4F(1)(b) of the Competition and Consumer Act 2010 (Cth) that, where multiple purposes are present, any one of those purposes is sufficient if it is a substantial purpose.

14. Consider this setting:

> Under section 46(1), a court may consider the proportionality of the conduct under the 'purpose' limb of the SLC test in determining the plausibility of any claim that the conduct had a procompetitive or beneficial purpose, rather than a purpose of substantially lessening competition.[17]

15. Proportionality undoubtedly is relevant and helpful when determining purpose under the purpose limb of the SLC test. However, a problem arises where D acted with two substantial purposes: (a) the purpose of benefitting consumer welfare; and (b) the purpose of substantially lessening competitive rivalry in the market. The latter may be a secondary or ancillary purpose but under s 4F(1)(b) that is irrelevant if the secondary or ancillary purpose is a substantial purpose.[18]

III Add an exclusionary rule

16. The s 46 prohibition against misuse of market power requires 'conduct' by a corporation with substantial market power that has a SLC purpose, effect or likely effect. The element of 'conduct' is undefined and broad. The conduct need not be 'exclusionary':[19] there is no requirement that conduct be likely to exclude, deter or impair rivalry on the part of existing or potential competitors.

17. Misuse of market power is subject to an exclusionary rule in most jurisdictions; Australia is unusual.

18. Lack of an exclusionary rule in s 46 creates overreach. Examples:

---

17 Id, at 239.

18 See further, in the context of cartel conduct, B Fisse, 'Australian Cartel Law: Biopsies", Competition Law Conference, Sydney, 5 May 2018, 11-13, at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf

19 Kemp, *Misuse of Market Power*, 183-186.

- Dominant firm X decides to cease production in Australia in order to focus on more lucrative markets in the US and EU. X is the largest and most effective competitor in the Australian market. [20]
- A dominant supplier of a critical input to manufacturers in one downstream market unilaterally withdraws from that business to use the entire output of its own product as an input in the production of a more highly valued product in a separate downstream market.[21]
- R, a retailer with a substantial degree of market power, offers a discount to any customer that finds a better price elsewhere. The likely effect of this offer (a facilitating practice) is to discourage other competitors from offering lower prices. [22]

19. Preventing overreach in such examples requires the addition of an exclusionary rule to s 46. One commendable model is the definition of an 'exclusionary act' under s 1(1) of the Competition Act 1998 (South Africa) as 'an act that impedes or prevents a firm from entering into, or expanding within, a market'. [23]

20. An exclusionary rule like the South African rule would exclude liability in the examples of overreach in [18] above.

21. Consider the facilitating practice example in [18] above.

- Section 46 will apply to a company with substantial market power that engages in a facilitating practice where the practice has the purpose, effect or likely effect of substantially lessening competition in a market. The element of 'conduct' is broad and encompasses a facilitating practice. 'Conduct' is not limited to the unilateral conduct of a firm. In relation to multilateral conduct, 'conduct' is not limited to a contract, arrangement or understanding. Nor is it limited to a concerted practice.

---

20 B Fisse, 'The Australian Competition Policy Review Final Report 2015: Sirens' Call or Lyre of Orpheus?', NZ Competition Law & Policy Institute, 26th Annual Workshop Auckland, 16 October 2015, 11, at: http://www.brentfisse.com/images/Fisse_Harper_Report_Critique_(Oct_2015).pdf

21 Id, at 12-13.

22 See further B Fisse, "Facilitating Practices, Vertical Restraints and Most Favoured Customers: Australian Competition Law is Ill- Equipped to Meet the Challenge" (2016) 44 ABLR 325 at 326-332, 343.

23 See further Kemp, *Misuse of Market Power*, 184. See also PNG, *Consumer & Competition Framework Review* (2017) 82, at: https://3c2356ed-c2cc-48e8-bcc4-9e08d49eaa13.filesusr.com/ugd/43809e_43ccc327d7224b1b9a407de0d95f6e74.pdf.

- Section 2 of the Sherman Act (monopolization) has been applied to agreements between competitors.[24]. Section 2 also applies to facilitating practices, but the requisite element of exclusionary conduct in s 2 often precludes liability.[25]
- An exclusionary rule like that in the Competition Act 1998 (South Africa) would exclude facilitating practices in most situations from the operation of s 46. Under s 1(1) of the Competition Act an 'exclusionary act' is 'an act that impedes or prevents a firm from entering into, or expanding within, a market'. Facilitating practices give competitors an incentive to co-ordinate but do not impede or prevent them from entering into, or expanding within, a market.

22. The exclusionary rule commended in [19] above is applied objectively. It reflects the first element of the Objective Purpose Standard. There is no requirement that the exclusion be accompanied or actuated by purpose or intention.

23. It may be desirable to exclude the application of 46 to mergers and acquisitions.[26] Consider this example:

> GOCO, a company with substantial market power, acquires EXCO, another corporation, in circumstances where the likely effect of the acquisition is to substantially lessen competition in a market.

Section 46 will apply as well as s 50: there is no savings provision equivalent to s 46 of the Commerce Act 1986 (NZ) (which excludes the application of s 36 to the acquisition of assets or shares).

24. A savings provision like s 46 of the Commerce Act (NZ) would seem desirable:
    - there is no purpose limb in the SLC test under s 50 and it would seem odd to allow a purpose test to enter through a back door;
    - an exclusionary rule of the kind proposed above would not be enough to exclude liability for misuse of market power in this context:
        - in the example in [23] above the acquisition of EXCO by GOCO will impede or prevent EXCO from expanding within a market.

---

24 See ABA, *Antitrust Law Developments (Eighth)* (2017) Vol I, 313-315.

25 See P Render, B Macdonald, & T York, 'Sending the Wrong Message? Antitrust Liability for Signaling' (2016) 31(1) Antitrust 83.

26 In the US s 2 of the Sherman Act is applicable to mergers and acquisitions; see ABA, *Antitrust Law Developments (Eighth)* (2017) Vol I, 312-313; K Limarzi & H Phillips, '"Killer Acquisitions," Big Tech, and Section 2', CPI Antitrust Chronicle, May 2020, 2.

IV Delete purpose limb of SLC test

25. 'Purpose' under the purpose limb of the SLC test in s 46 means subjective purpose.[27]

26. The subjective purpose test does not capture anti-competitive economic harm adequately.[28]

> .. a focus on the dominant firm's actual or subjective purpose is not in keeping with the objectives of the CCA or the prohibition of unilateral anticompetitive conduct. In particular, liability for unilateral anticompetitive conduct should not depend upon the dominant firm's own subjective assessment of the competitive impact of its conduct, which may be indeterminate, mistaken, self-preferring or the product of simple inattention. Rules against unilateral anticompetitive conduct are intended to regulate objective economic consequences, not the hearts and minds of dominant firms. An objective analysis of dominant firm conduct is preferable to focus attention on the relevant harm.

27. Example of underreach:

> The management of GCO, a corporation with substantial market power, act on the advice of a leading consulting firm that it can engage in the manufacture and distribution of new technology (NT) without affecting competition significantly. This is a mistake of fact. In fact, the planned restrictions on interoperability for NT make the likely adverse effect on competition considerable.

28. Example of overreach:

> Assume that MAXVAX, a firm with substantial power in the market for COVID-19 vaccines, plans to corner the market by contracting with many other potential manufacturers of COVID-19 vaccines to acquire their vaccines exclusively if possible. 20 other potential manufacturers of COVID-19 (VAX1, VAX2, VAX3, etc) are targeted in the plan. The first other manufacturer to be approached is VAX1, a struggling firm. MAXVAX and VAX1 sign a letter of intent under which VAX1 intends to supply its vaccines to MAXVAX on an exclusive basis. Consider the far-reaching concept of SLC purpose endorsed by the Full Federal Court in *Universal Music Australia Pty Ltd v ACCC*.[29] In that case, UMA was not liable for misuse of market power because it did not have substantial market power. However, it was liable under s 47 for unlawful exclusive

---

27 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* 1991) 27 FCR 460, 474.

28 K Kemp, 'A Third Way: Objective Anticompetitive Purpose', Submission in Response to The Treasury Discussion Paper on Options to Strengthen the Misuse of Market Power Law, 22, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735898. See also Kemp, *Misuse of Market Power*, 233, 236; D Robertson, 'The Primacy of Purpose in Competition Law – Pt 2' (2002) 10 CCLJ 11.

29 (2003) 131 FCR 529. The author acted for UMA.

dealing. The alleged exclusive dealing conduct was to impose a restraint on music retailers that would lessen competition. The effect or likely effect of that conduct was to lessen competition, but that lessening of competition was not substantial. UMA was held liable on the basis that the exclusive dealing conduct had an inchoate SLC purpose:

> '.. the conduct was carried out in order to implement a wider strategy or plan. The purpose of the strategy or plan was the purpose of the particular contravening conduct was a step to implement a strategy or plan to substantially lessen competition.'[30]

Applying the same reasoning, MAXVAX is liable for misuse of market power. MAXVAX's letter of intent with VAX1 is a step to implement a strategy or plan to substantially lessen competition. Like UMA, MAXVAX has acted with an inchoate SLC purpose. That extension of liability is inconsistent with general common law principles of penal liability.[31] However, it follows from the ratio decidendi of *Universal Music Australia Pty Ltd v ACCC*. By contrast, liability for attempted monopolization under s 2 of the Sherman Act requires a 'dangerous probability of success'.[32]

29. The underreach and overreach of s 46 illustrated above are best avoided by deleting the purpose limb of the SLC limb.

30. There is no purpose limb in the SLC test adopted for abuse of market power in the Competition and Consumer Act 2016 (Samoa) (s 33). The same approach is followed in the PNG *Consumer and Competition Framework Review*.[33] Rationale:

- a purpose limb is undesirable given that a purpose test is prone to underreach and overreach as indicated above; and
- a purpose limb is unnecessary − attempting to misuse market power is covered by liability for attempting to engage in misuse of market power.

---

30 (2003) 131 FCR 529, [261]. The ACCC did not rely on s 47(1)(b) (SLC test in s 47 applicable to conduct alleged and 'other conduct of the same or a similar kind'): (2003) 131 FCR 529, [239].

31 Consider first the common law principle that the *mens rea* and *actus reus* of an offence must coincide: J Horder, *Ashworth's Principles of Criminal Law* (9th ed, 2019) 178-180; W LaFave & A Scott, Jr, *Criminal Law* (2nd ed, 1986) ¶ 3.11 (the mental element for criminal liability must *actuate* the act or omission); J Dressler, *Understanding Criminal Law* (6th ed, 2012) 199 (the defendant's conduct that caused the social harm must have been set into motion or impelled by the thought process that constituted the *mens rea* of the offence). Consider secondly the further restraining common law principles for preventive offences: A Ashworth & L Zedner, *Preventive Justice* (2014) 109-116. The first and second set of general principles apply to liability to a pecuniary penalty as well as to criminal liability.

32 *Spectrum Sports v McQuillan* (1993) 506 US 447, 456. See further ABA, *Antitrust Law Developments (Eighth)* (2017) Vol I, 336-342.

33 81-83, at: https://3c2356ed-c2cc-48e8-bcc4-9e08d49eaa13.filesusr.com/ugd/43809e_43ccc327d7224b1b9a407de0d95f6e74.pdf

31. Reflecting the Objective Purpose Standard in s 46 does not require retention of the purpose limb of the SLC test. In my view, the work of the Objective Purpose Standard can largely be achieved by adding an exclusionary rule to s 46, as recommended in Part III above, and a defence of reasonable necessity and proportion, as recommended in Part V below.

V Add defence of reasonable necessity and proportion

32. Unilateral conduct may often have the effect or likely effect of substantially lessening competition in a market and yet also promote consumer welfare.[34] This tension is deep-seated, as Marsden has probed:[35]

> To distinguish the good from the bad and the ugly one could just try to see whether the activity is efficient or simply exclusionary. However, this does not help when the conduct is both efficient and exclusionary. Obviously asking if the conduct is exclusionary is not enough; you need a framework to identify some broader harm to the efficient operation of the market on behalf of consumers than merely inhibiting the entry or expansion of rivals, or even actively forcing them out.

33. Efficiencies are relevant to the application of the effect and likely effect limbs of the SLC test in s 46. In addition to allocative efficiency, account is to be taken of productive efficiency and dynamic efficiency: [36]

> If certain conduct reduces price competition, it should be relevant that the same conduct has led to an increase in innovation, or dynamic competition. .. Further, a relatively minor lessening of competition in respect of some sales in the market may be more than offset by increases in dynamic efficiency and productive efficiency to the extent that the conduct is likely to enhance rivalry.

34. Nonetheless, there are situations where, despite procompetitive efficiencies, there will be a residual SLC effect or likely effect. Example:[37]

> Assume that a monopoly supplier of rare earth materials decides to cease supplying those materials because it has acquired a major technology manufacturer and wants to use all the rare earth materials in order efficiently to manufacture superior high-

---

34 See H Hovenkamp, *The Antitrust Enterprise* (2005) 154.

35 P Marsden, 'Exclusionary Abuses and the Justice of "Competition on the Merits"', in I Lianos & I Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (2010) 411, 413.

36 Kemp, *Misuse of Market Power*, 178. Contrast narrower interpretations of the SLC test; see eg J Land, J Owens & L Cejnar, 'The Meaning of "Competition"' (2010 24 NZULR 98.

37 B Fisse, 'The Australian Competition Policy Review Final Report 2015: Sirens' Call or Lyre of Orpheus?', NZ Competition Law & Policy Institute, 26th Annual Workshop Auckland, 16 October 2015, 12-13, at: http://www.brentfisse.com/images/Fisse_Harper_Report_Critique_(Oct_2015).pdf

> technology products with strong export as well as domestic potential. Assume further that the refusal to continue to supply rare earths is likely to raise downstream rivals' costs so considerably as to drive them out of business over the next 18-24 months. It is difficult to see why, under the current law on the SLC test .. that welfare-enhancing conduct would not entail a likely substantial lessening of competition in the downstream markets affected. The process of rivalry test under the QCMI canon is a test of competitive rivalry, not a test of consumer welfare. 'Competition on the merits', 'normal competition' and 'genuine undistorted competition' promote consumer welfare but in some circumstances consumer welfare may be promoted by conduct that lessens competition.[38]

35. There is also the hazard of an ex post SLC effect where that effect was not reasonably foreseeable at the time of the conduct. Example:[39]

> Consider the example of a pharmaceutical brand company dominant in the supply of a drug, which launches a reformulation of the drug shortly before the expiry of its patent. …. [A]ssume that, as part of the launch of the reformulated drug, the dominant firm applied to have the old formulation of the drug delisted from PBS and that imminent generic competition was thereby prevented. If, after twelve months on the market, it becomes apparent that there is in fact very little improvement in reported side effects, the losses in price competition from generic manufacturers may far outweigh the competitive gains from the purportedly side-effect-reducing innovation in the reformulated drug. The court must consider these actual impacts on rivalry in the market under the 'effect' limb of the SLC test. While the existence of earlier contradictory research might signal the need for strong evidence that side effects were not in fact significantly improved and that there was a substantial reduction in competition due to the prevention of generic rivalry, the apparently procompetitive purpose of the conduct at the outset does not alter its actual impact.

36. Where there is a residual SLC effect or likely effect, or where an ex post SLC effect is not reasonably foreseeable at the time of the conduct, the only escape route under the present law is authorisation by the ACCC.

37. The test for authorisation in Australia applies to misuse of market power and has now been broadened to apply to conduct that is unlikely to substantially lessen

---

38 Perhaps the monopolist's new plan might increase competitive rivalry in the market(s) for the high technology products and that increase might offset the reduction in competitive rivalry in the market for the rare earth materials. However, the SLC test in s 46 does not allow such an offset between competition effects in one market with those in another. See Kemp, *Misuse of Market Power*, 178-179.

39 Kemp, *Misuse of Market Power,* 238-239.

competition.[40] However, authorisation does have disadvantages. In Kemp's summary,[41] authorisation:

- can only be sought for future conduct, such that planned conduct must be put on hold while the application is considered
- may reduce the impact of competitive strategies of the firm by exposing them to scrutiny by customers and rivals
- firms may be reluctant to apply for authorisation where application may be seen as an admission the firm possesses SMP
- is therefore not the functional equivalent of an efficiency defence
- [is subject to possible delay and imposes cost].

38. The Harper Review Draft Report suggested that there be a defence requiring a corporation to prove that the conduct in question would be: (a) a rational business decision by a corporation that did not have a substantial degree of power in the market; and (b) likely to have the effect of advancing the long-term interests of consumers.[42] Element (a) posited a counterfactual test comparable to the unsatisfactory test under the former 'take advantage' element of s 46. Element (b) required a seemingly superhuman ability to predict 'long-term' benefits for consumers.

39. Others have proposed a defence of legitimate business justification. For instance, Russell McVeagh has proposed a defence where it a corporation can demonstrate that:

a) it engaged in the conduct for the dominant purpose of protecting a legitimate business interest; and

b) the conduct was reasonably necessary to protect that legitimate business interest.[43]

---

40 Competition and Consumer Act 2010 (Cth) s 90(7)(a).

41 'Misuse of Market Power – What an 'Effects Test' Would Mean for New Zealand', CLPINZ conference, 19 August 2020, penultimate slide. See also C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.13.

42 Competition Policy Review Draft Report September 2014, Draft Recommendation 25, at: http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf

43 Submission to the Ministry of Business, Innovation and Employment, Review of section 36 of the Commerce Act and other matters, 1 April 2019 [21] at: https://www.mbie.govt.nz/dmsdocument/7087-russell-mcveagh-review-of-section-36-of-the-commerce-act-and-other-matters-submission-pdf

One concern about such a defence is that the meaning of 'legitimate' is far from clear and may foster laxity.[44]

40. A better approach, in my view, is to add a defence of reasonable necessity and proportion to s 46:

- D must prove that, at the time of conduct impugned, the lessening or likely lessening of competition by the conduct was reasonably necessary for, and a proportionate means of, achieving the benefits for consumer welfare that the conduct aimed to achieve.
- D carries an evidentiary burden of proof and a persuasive burden of proof.

41. The proposed defence of reasonable necessity and proportion seeks to reflect the proportionality dimension of the Objective Purpose Standard advanced in Kemp, *Misuse of Market Power*.

42. The defence proposed in [40] above has this rationale:

- The defence addresses the tension that arises where unilateral conduct has the effect or likely effect of substantially lessening competition in a market and yet also promotes consumer welfare.
- The defence avoids liability where there is a residual SLC effect or likely effect despite procompetitive efficiencies and where the lessening of competition is justifiable as a means of achieving the consumer welfare benefits which the conduct sought to achieve.
- The defence avoids liability for an ex post SLC effect where, at the time of conduct impugned, the conduct was a reasonably necessary and proportionate means of achieving the benefits for consumer welfare that the conduct sought to achieve.

43. The proposed defence is intended to crystallise in workable terms a 'rule of reason' without attempting to reflect all facets of the US rule of reason.[45] The defence reflects the recommendation on a rule of reason defence in the PNG *Consumer & Competition Framework Review* (2017) [46] and a similar policy decision in the *Fijian Competition and Consumer Protection Policy Statement* (2020).[47]

---

44 See further Kemp, *Misuse of Market Power*, 220-228.
45 See eg Hovenkamp, *The Antitrust Enterprise*, ch 5.
46 At 82-83.
47 [17].

44. The proposed defence does not require a balancing of the anti-competitive effects of the conduct impugned with the benefits of the conduct for consumer welfare:[48]

> A more achievable task for both courts and firms is to determine the plausibility of any procompetitive purpose claimed for the conduct and the proportionality of the relevant conduct as a means of achieving that purpose – that is, whether, objectively assessed, the conduct had no anticompetitive purpose. Courts and commentators have often noted the need to look for 'the most likely explanation' for the impugned conduct, having regard to its proportionality, including whether there were clearly less restrictive means of achieving any beneficial purpose.

45. Compare the approach in Areeda and Hovenkamp's antitrust 'bible':[49]

> Exclusionary conduct means acts that
>
> (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and
>
> (2) that either
>
> (a) do not benefit consumers at all, or
>
> (b) are unnecessary for the particular consumer benefits that the acts produce, or
>
> (c) produce harms disproportionate to the resulting benefits.

46. The approach of Areeda and Hovenkamp in (c) assesses the proportion between the lessening of competitive opportunity and the consumer benefits that actually result from that lessening of competitive opportunity. In comparison, the defence proposed in [40] above assesses whether the lessening of competitive rivalry is a proportionate means of achieving the consumer benefits which the lessening of competitive rivalry is aimed at achieving. That is a more achievable task; see [44] above.

---

48 Kemp, *Misuse of Market Power*, 239.

49 PE Areeda and H Hovenkamp, *Antitrust Law* (2nd ed, 2002) ¶651a. See also Hovenkamp, *The Antitrust Enterprise*, 152.

VI Clarify 'substantial' lessening of competition

47. Although the SLC test is familiar and long-standing, the meaning of 'substantial' in the test is uncertain. Yet the requirement that a lessening of competition be 'substantial' is fundamental to the application of s 46.[50]

48. The case law offers limited guidance. 'Substantial' does not mean 'large' or 'big'.[51] The cliché that 'substantial' means 'meaningful or relevant to the competitive process'[52] is evasive. Decisions applying the SLC test give more concrete indications. However, the indications given are not always clear or consistent.[53] Assessment of evidence about substantial lessening of competition now depends much on unstated assumptions about what 'substantial' is taken to mean.

49. The ACCC *Guidelines on Misuse of Market Power*[54] are not very helpful on the meaning of 'substantial': [55]

> There is no legislative definition of 'substantially lessen competition'; however, the test is longstanding within Australia's competition laws. In essence, conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deterring, hindering or preventing competition. This can be done by raising barriers to competition or to entry into a market.

50. Class exemptions may offer rules of thumb that bypass the SLC test but they have yet to emerge and are unlikely to cover a very wide range of the conduct potentially subject to s 46.[56]

51. Consider these open questions about the SLC test:

- what is the necessary duration of competition effects required under the SLC test?

---

50 There are other important issues, not addressed here. One is the SLC counterfactual in situations where an IP holder refuses to license the IP, or licenses the IP on terms that restrict competition; see A Duke, *Corones' Competition Law in Australia* (7th ed, 2019) 588-590; A Duke, 'The repeal of section 51(3) of the Competition and Consumer Act: A mistake in need of correction' (2020) 43 UNSWLJ 250, 277-278.

51 *Re Queensland Independent Wholesalers Ltd* [1995] ATPR 41-438 at 40,926.

52 *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ. Compare Commerce Act 1986 (NZ) s 2(1A) ('substantial' means 'real or of substance'); Commerce Commission, Decision 638, *DFS Group Limited/The Nuance Group* (28 March 2008) (lessening must be 'considerable and sustainable').

53 See Kemp, *Misuse of Market Power*, 181-182.

54 At: https://www.accc.gov.au/publications/guidelines-on-misuse-of-market-power.

55 Id, at [2.24].

56 For the power to create class exemptions see Competition and Consumer Act 2010 (Cth) ss 95AA, 95AB. For a critique, see B Fisse, 'The Productivity Commission's Recommendations on the Intellectual Property Exemption under the Competition and Consumer Act' (2017) 45 ABLR 260, 268-269.

- what degree of lessening of competitive rivalry is required?
- can the SLC test be applied by reference to the competitive process and/or outcomes such as price effect? [57]
- if measured by price effect, what is the threshold? 5%?[58]
- will an effect only be meaningful or relevant to a competitive process if it confers a significant increase in market power upon a market participant or participants? [59]
- does the standard of substantiality vary in accordance with the probability of the competition lessening effects?
- why are statutory factors for applying the SLC test included in s 50, but not s 45 or s 46?

52. Headway will not be made by indulging the vacuity that 'substantial lessening of competition' is a 'category of indeterminate reference'[60] or by running for a dictionary. Progress will require practical elucidation of the test. An instructive start has been made by Tom Leuner.[61] Leuner's premise:

> .. it is better to understand and debate the fundamentals of the effects will meet that standard, than to rely upon the vagaries of instinctual responses to competition law. Although many commentators debate the possible causes of competition effects and the factors that play a role in assessing the likelihood of competition effects, there is a need to focus on what will ultimately be indicative of a breach. [62].

53. Leuner advocates guideline thresholds[63] on:

(a) the degree of harm to competition;

(b) the critical duration of harm to competition; and

(c) the probability of harm to competition.

54. The thresholds suggested as a starting point are:

(a) a price increase threshold of 5%;

---

57 For the argument that the SLC test under s 27 of the Commerce Act is concerned with the process of competition and not the effects of competition see J Land, J Owens & L Cejnar, 'The Meaning of "Competition"' (2010) 24 NZULR 98, 106-109 (an increase in prices may be an indication that competition has been lessened in a market but it is not itself an aspect of lessening of competition; a lessening of competition is determined by whether there is a lessening of the level of constraints on market power).

58 In *Commerce Commission v Woolworths Ltd & Ors* (2008) 12 TCLR 194 (CA) at [191] the Court of Appeal said that there is no precise metric.

59 A question raised in C Coops, 'Substantial lessening of competition test', LCA, Competition Law Workshop, Adelaide, 10-11 October 2014.

60 J Stone, *Legal System and Lawyers' Reasonings* (1964) 263-7.

61 T Leuner, 'Time and the dimensions of substantiality' (2008) 36 ABLR 327.

62 Id, at 365-366.

63 Id, at 348-359.

(b) a critical duration threshold of 18 months; and

(c) a probability threshold of 30%.

55. Leuner concedes the difficulty of trying to measure any of the dimensions of substantiality precisely but contends that an approximate framework of the kind suggested is 'a roadmap of what a substantial lessening of competition looks like' and 'will assist the development of more consistent decision-making and hopefully lead to more debate in relation to the underlying policy issues'.[64]

56. Statutory changes based on Leuner's suggested approach, or akin thereto, are overdue.

VII Summary and main recommendations

57. Although an advance on the previous law, the Australian SLC Model introduced in 2017 has significant weaknesses. Section 46 is not based on a cogent underlying theory of exclusionary conduct. Attempts to gloss over the weaknesses of s 46 are unconvincing. See Part I above.

58. A compelling theory of exclusionary conduct is advanced in K Kemp, *Misuse of Market Power: Rationale and Reform* (2018). That work sets out an Objective Purpose Standard derived from Australian and comparative law and commentary on exclusionary conduct. See Part II above.

59. Two key questions arise under the Objective Purpose Standard:

    a. Is the objective purpose of the conduct by a corporation with substantial market power to suppress rivalry by competitors or potential competitors? and

    b. If so, is the objective purpose to create proportionate benefits for the competitive process having particular regard to the interest of consumers?

60. Commendable as the Objective Purpose Standard is, it seems unlikely to be followed widely and consistently by courts, regulators and other stakeholders unless reflected in and backed by legislation. '

61. To wait and see is to leave the door open to inertia and inaction. To wait and see is no more likely than to wait and not see.

---

64 Leuner, 'Time and the dimensions of substantiality', 363.

62. The Australian SLC Model could be improved considerably by amendments targeted at reducing or mitigating the weaknesses of s 46 in ways that are consistent with the Objective Purpose Standard.

63. Four main recommendations are made:

A. Add an exclusionary rule to s 46. One commendable model is the definition of an 'exclusionary act' under s 1(1) of the Competition Act 1998 (South Africa) as 'an act that impedes or prevents a firm from entering into, or expanding within, a market'. See Part III above.

B. Delete the purpose limb of the SLC test in s 46, on the grounds of underreach, overreach and redundancy. See Part IV above.

C. Add a defence of reasonable necessity and proportion:

- D must prove that, at the time of conduct impugned, the lessening or likely lessening of competition by the conduct was reasonably necessary for, and a proportionate means of, achieving the benefits for consumer welfare that the conduct aimed to achieve.
- D carries an evidentiary burden of proof and a persuasive burden of proof.

See Part V above.

D. Clarify the meaning of 'substantial' in the SLC test by answering legislatively the more important questions that remain at large. See Part VI above.