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**MISUSE OF MARKET POWER IN AUSTRALIA  
AND ABUSE OF DOMINANCE IN CANADA:  
TWO LEGISLATED EFFECTS TESTS FOR  
UNILATERAL CONDUCT**

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# Misuse of Market Power in Australia and Abuse of Dominance in Canada: Two Legislated Effects Tests for Unilateral Conduct

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*The new Australian law against misuse of market power (as amended in 2017) shares a number of similarities with the Canadian law against abuse of dominance. This article makes a comparative analysis of these laws against unilateral anti-competitive conduct, highlighting their similarities, including their focus on whether the impugned conduct has the effect or likely effect of substantially lessening competition. It also identifies important differences, including the Australian requirement to prove “purpose or effect” in contrast to the Canadian requirement to prove “purpose and effect” and the respective methods of addressing “legitimate business purpose” claims. It illustrates some of these differences with reference to a recent digital economy case in which the Canadian Commissioner of Competition succeeded in proving that a firm abused its dominance by imposing restrictions on access to data it controlled, notwithstanding the firm’s attempted justifications on privacy grounds.*

## I. INTRODUCTION

In 2017, the Australian Parliament substantially amended the law on misuse of market power following decades of debate on the effectiveness of the prohibition.<sup>1</sup> The new Australian law on misuse of market power – contained in s 46 of the *Competition and Consumer Act 2010* (Cth) (CCA) – bears a number of similarities to the Canadian law on abuse of dominance – contained in ss 78 and 79 of the *Competition Act* (Canadian Act).<sup>2</sup> Both laws provide statutory definitions of unilateral anti-competitive conduct<sup>3</sup> which only apply to firms<sup>4</sup> with a substantial degree of market power and which depend, in part, on whether the firm’s conduct had the effect, or likely effect, of substantially lessening competition in a market.

However, these laws also diverge in important respects, including with regard to the requirement of an exclusionary element; the manner in which the firm may raise arguments that its conduct was in fact driven by a “legitimate business purpose or rationale”; and the role attributed to the dominant firm’s purpose under the legislation. Importantly, in this last respect, the Australian law permits an applicant to prove a contravention on the alternative bases of the purpose, effect or likely effect of the conduct (purpose *or* effect), whereas the Canadian abuse of dominance provisions require the Commissioner of Competition to prove both the purpose of the conduct and its effect or likely effect in all cases (purpose

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth) s 46 was amended by the *Competition Policy Review (Misuse of Market Power) Act 2017* (Cth), with effect from 6 November 2017. This amendment largely followed the recommendations for reform of Australia’s misuse of market power law made by the Competition Policy Review Panel (the Harper Panel), which from 2014 to 2015 conducted the first major review of Australian competition law and policy in over 20 years. See further Julie Clarke, “Section 46: Its Purpose and the Proposed New Effects Test” (2017) 45 ABLR 364.

<sup>2</sup> *Competition Act*, RSC 1985, c C-34, ss 78, 79.

<sup>3</sup> As defined in Part IIA.

<sup>4</sup> The *Competition and Consumer Act 2010* (Cth) s 46(1) refers to a “corporation”, while the *Competition Act*, RSC 1985, c C-34 refers to a “person”. The term “firm” is used for ease of reference in this article.



plus effect).<sup>5</sup> The laws also differ as to the type of purpose which must be proved; the Australian law requiring proof of the individual firm's subjective purpose while proof of objective purpose suffices under the Canadian law.<sup>6</sup>

This article makes a comparative analysis of the laws against unilateral anti-competitive conduct in Australia and Canada, with a particular focus on their respective methods of distinguishing anti-competitive conduct from vigorous competition and avoiding the deterrence of beneficial competitive conduct. The question of what is the appropriate test (or tests) for identifying such conduct continues to occupy competition policymakers around the world, with numerous proposals for consensus and reform in this area.<sup>7</sup> The New Zealand government, for example, is currently considering whether to amend its law against misuse of market power to adopt an effects-based test for unilateral anti-competitive conduct.<sup>8</sup> A comparative analysis of the Australian and Canadian laws against unilateral anti-competitive conduct is therefore particularly useful as an aid to understanding Australia's new misuse of market power law, and in informing this broader, ongoing international debate on unilateral conduct rules.

This article proceeds as follows. Part II provides an overview of the unilateral conduct problem, Australia's misuse of market power prohibition, Canada's abuse of dominance law and their respective objectives. Part III explains the similarities between the relevant laws in Australia and Canada, including their threshold market power requirement, their adoption of a "substantial lessening of competition" standard, and the possibility of liability for "monopoly leveraging". Part IV describes areas of divergence between the Australian and Canadian laws, including the requirement of an exclusionary element and a "practice" of acts under the Canadian law; the role of purpose under the respective laws; and how the respective laws permit a defendant firm to raise arguments that the relevant conduct had a "legitimate business purpose or rationale". This last area of divergence is illuminated by the recent Canadian case, *Toronto Real Estate Board v Commissioner of Competition*,<sup>9</sup> which is only the second abuse of dominance case to receive a hearing on the final issues before the Federal Court of Appeal.

## II. OVERVIEW OF UNILATERAL CONDUCT LAWS

### A. The Unilateral Conduct Problem

"Unilateral anti-competitive conduct" may be defined as:

- conduct by a firm which possesses substantial market power;
- that suppresses rivalry in a market;
- such that:
  - the firm's market power is likely to be preserved or extended;<sup>10</sup> or
  - competition in the market is otherwise substantially hindered or impeded.

As explained later in this article, many courts and commentators, especially in the United States, would argue against this last alternative as a part of the definition of unilateral anti-competitive conduct, being

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<sup>5</sup> As explained in Part IVC.

<sup>6</sup> As explained in Part IVC2.

<sup>7</sup> See Eleanor M Fox, "Antitrust without Borders: From Roots to Codes to Networks" (E15 Expert Group on Competition Policy and the Trade System, Think Piece, 2015) 4.

<sup>8</sup> Office of the Minister of Commerce and Consumer Affairs, New Zealand, "Outcomes of the Targeted Review of the Commerce Act 1986 and Other Measures to Promote Competition" (2017) <<http://www.mbie.govt.nz/publications-research/publications/business-law/cabinet-paper-outcomes-of-the-targeted-review-of-the-commerce-act-1986.pdf>>.

<sup>9</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236.

<sup>10</sup> See B Douglas Bernheim and Randal Heeb, "A Framework for the Economic Analysis of Exclusionary Conduct" in Roger D Blair and D Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics* (OUP, 2014) Vol 2, 4, 5–6, 26. See also Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993) 62, stating that: "Firms with market power may be able to engage in conduct which exceeds the limits of vigorous competition, and thereby entrench their market positions to the detriment of the competitive process. ... The challenges are to define conduct which is 'excessive' in a policy sense, and to develop a mechanism which can identify practical instances of such 'excessive' conduct." See further Richard Posner, "The Social Costs of Monopoly and Regulation" (1975) 83 *Journal of Political Economy* 807, 807–808.

of the view that there should be no potential liability for unilateral conduct if it does not preserve or extend market power such that output in the market is limited.<sup>11</sup> However, outside the United States, especially in countries which follow the approach of the European Union, this “lesser” effect is often regarded as a sufficient basis for antitrust liability.<sup>12</sup>

Unilateral anti-competitive conduct is frequently distinguished from the other “pillars” of antitrust, namely multilateral anti-competitive conduct (including cartels and vertical restraints) and mergers.<sup>13</sup> The regulation of unilateral anti-competitive conduct has proven particularly vexing for competition policymakers, in large part because unilateral conduct occurs constantly whenever a firm does any business and because there may be a fine line between vigorous, efficient competition and the anti-competitive suppression of competition.<sup>14</sup> With this in mind, courts and policymakers have often been at pains to ensure that unilateral anti-competitive conduct rules do not do more harm than good by unduly “chilling” beneficial competitive conduct.<sup>15</sup>

## B. Australia: Misuse of Market Power Overview

The general law against unilateral anti-competitive conduct in Australia is contained in s 46 of the *CCA*. Following substantial amendments to this provision in 2017, the elements of the prohibition under s 46(1) are that:

- the firm possesses a substantial degree of market power in a market; and
- the firm engages in conduct which has the purpose, effect, or likely effect, of substantially lessening competition in one of the listed markets.<sup>16</sup>

The *CCA* was further amended in 2017 to permit a corporation to seek authorisation from the Australian Competition and Consumer Commission (ACCC) for conduct which might otherwise infringe s 46(1) of the *CCA*, as explained below.<sup>17</sup>

This new law marks a fundamental change from the previous prohibition against misuse of market power in Australia, which required proof that the firm had “taken advantage of” its market power. This was interpreted to require proof that a firm *without* substantial market power could not (or, sometimes, would not) engage in the same or similar conduct: it was necessary to establish a link between the firm’s market power and its ability (or at least its tendency) to engage in the conduct.<sup>18</sup> It was also necessary to prove that the firm engaged in one of three, broadly worded exclusionary purposes,<sup>19</sup> which were interpreted to require proof of the firm’s subjective purpose.<sup>20</sup>

<sup>11</sup> See Eleanor M Fox, “What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect” (2002) 70 *Antitrust Law Journal* 371, 374–375, 382, 405, 409–411.

<sup>12</sup> Fox, n 11, 374–375, 409–411.

<sup>13</sup> Paul Crampton, “‘Abuse’ of ‘Dominance’ in Canada: Building on the International Experience” (2006) 73 *Antitrust Law Journal* 803, 803.

<sup>14</sup> See, eg, D Daniel Sokol, “Troubled Waters between US and European Antitrust” (2017) 115 *Michigan Law Review* 955, 960–969; Crampton, n 13, 803.

<sup>15</sup> See, eg, Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993) 62; *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* [1990] 73 CPR (3d) 1 (Canadian Competition Tribunal), 199; *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398, 407–408, 414 (2004); United States, Department of Justice, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* (2008) 11–12 <<http://www.usdoj.gov/atr/public/reports/236681.htm>>.

<sup>16</sup> The relevant markets are explained in Part IIIB.

<sup>17</sup> *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) Sch 9.

<sup>18</sup> See Katharine Kemp, “‘Taking Advantage’ of Substantial Market Power, and Other Profit-focused Tests for Unilateral Anticompetitive Conduct” (2015) 41 *Monash University Law Review* 655.

<sup>19</sup> The proscribed purposes were, in short form: eliminating or substantially damaging a competitor in any market; preventing the entry of a person into any market; or deterring or preventing a person from engaging in competitive conduct in any market. Some argued that these purposes were overbroad since they included the purpose of harming “a competitor”, as opposed to harming rivalry more generally.

<sup>20</sup> See *ACCC v Pfizer Australia Pty Ltd* (2015) 323 ALR 429, 444 [47]; [2015] FCA 113; *ACCC v Cement Australia* (2013) 310 ALR 165, 513 [1913], 745–746 [3005]–[3006]; [2013] FCA 909; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43, 66.

The current Australian law instead relies on the much-anticipated “effects test”, according to which liability may be imposed on the basis of the effect of the conduct in a relevant market, in particular, whether the conduct has, or is likely to have, the effect of substantially lessening competition.<sup>21</sup> To provide greater certainty about the scope of the new law, the ACCC has issued “Interim Guidelines on Misuse of Market Power” (ACCC Interim Guidelines), which outline its interpretation of the law as well as its enforcement priorities.<sup>22</sup>

If a court finds that a firm has infringed s 46(1), the court may impose a pecuniary penalty,<sup>23</sup> or grant an injunction.<sup>24</sup> A firm may apply to the ACCC for authorisation of proposed conduct which would or might contravene s 46(1).<sup>25</sup> The ACCC may grant such authorisation if:

- (a) the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- (b) the conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.<sup>26</sup>

Such an authorisation is only available in respect of future conduct. The ACCC has no power to grant an authorisation for conduct which is in train or has already occurred.<sup>27</sup>

According to the case law, the objective of the previous version of s 46 of the *CCA* was the protection of the competitive process (rather than particular competitors), having particular regard to the interests of consumers.<sup>28</sup> With regard to the amended provision, the Revised Explanatory Memorandum to the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (Cth) (Revised Explanatory Memorandum) states that the “objective of section 46 is to prevent firms from engaging in unilateral conduct that harms the competitive process”, and that this “requires distinguishing between vigorous competitive activity which is desirable, and economically inefficient monopolistic practices that may exclude rivals and harm the competitive process”.<sup>29</sup>

The Revised Explanatory Memorandum goes on to explain that “the competitive process is harmed, and competition is lessened, when actual or potential competitors are prevented or deterred from competing on their merits”.<sup>30</sup> Further, “the objective of section 46 is not to shield inefficient competitors from the natural effects of strong competition in a market”.<sup>31</sup> Interestingly, given judicial statements

<sup>21</sup> See Clarke, n 1, 364–367.

<sup>22</sup> ACCC, *Interim Guidelines on Misuse of Market Power* (Interim Guidelines, October 2017) <[https://consultation.accc.gov.au/compliance-enforcement/draft-guidelines-on-section-46-reforms/supporting\\_documents/Interim%20guidelines%20for%20misuse%20of%20market%20power%2025%2010%202017.pdf](https://consultation.accc.gov.au/compliance-enforcement/draft-guidelines-on-section-46-reforms/supporting_documents/Interim%20guidelines%20for%20misuse%20of%20market%20power%2025%2010%202017.pdf)> (ACCC Interim Guidelines).

<sup>23</sup> *Competition and Consumer Act 2010* (Cth) s 76(1)(a). The penalty must not exceed the greater of \$10 million, treble the amount of the value of the benefit that has been obtained and is reasonably attributable to the act or omission, or, if those benefits cannot be determined, 10% of annual turnover for the previous financial year.

<sup>24</sup> *Competition and Consumer Act 2010* (Cth) s 80(1).

<sup>25</sup> *Competition and Consumer Act 2010* (Cth) s 88(1).

<sup>26</sup> *Competition and Consumer Act 2010* (Cth) s 90(7).

<sup>27</sup> *Competition and Consumer Act 2010* (Cth) s 88(6). See further Katharine Kemp, *Misuse of Market Power: Rationale and Reform* (CUP, 2018) 102–104, 179–180.

<sup>28</sup> See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, [24]; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, 13 [17] (Gleeson CJ, Gummow, Hayne and Callinan JJ); [2001] HCA 13; *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, 411 (Gleeson CJ and Callinan J); [2003] HCA 5. See also Clarke, n 1; Stephen Corones, “Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the Protection of Small Business” (2003) 31 ABLR 210; *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165, [3013] (Greenwood J); [2013] FCA 909, explaining that the competitive effect of conduct “is measured as an effect upon the *process* of competition not individual competitors. To the extent that impacts upon particular competitors are analysed, it is done so only for the purpose of assessing the effect of that impact upon broader rivalrous conduct, potential or actual, within the market”.

<sup>29</sup> Revised Explanatory Memorandum, *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (Cth) 7 [1.13].

<sup>30</sup> Revised Explanatory Memorandum, *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (Cth) 7–8 (emphasis added).

<sup>31</sup> Revised Explanatory Memorandum, *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (Cth) 7 [1.13].

under the previous provision, the Revised Explanatory Memorandum makes no mention of consumer interests in its explanation of this objective. However, it seems likely that Australian courts will continue to have regard to effects on consumer interests as an important measure of how well the competitive process is functioning.<sup>32</sup>

In Australia, cases under s 46(1) may be initiated by the ACCC or a private applicant. No case has been brought under the amended prohibition at the time of writing.

### C. Canada: Abuse of Dominance Overview

The general law against unilateral anti-competitive conduct in Canada is contained in ss 78 and 79 of the *Canadian Act*.<sup>33</sup> Under the *Canadian Act*, abuse of dominance occurs when:

- a firm or group of firms “substantially or completely control, throughout Canada or any area thereof, a class or species of business”;
- the firm(s) engages in any of a list of specified “anti-competitive acts”, or in an “anti-competitive act” not specified in the legislation;
- the firm(s) engages in a “practice” of such acts; and
- this practice “has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”.<sup>34</sup>

Even if the Tribunal finds an abuse of dominance to have occurred, however, the Tribunal retains a discretion whether to issue an order prohibiting the firm from engaging further in the relevant conduct.<sup>35</sup>

Under the Canadian abuse of dominance provisions, it is necessary to prove both a practice of anti-competitive acts and an actual or likely effect of substantial lessening of competition. The Tribunal has interpreted the “anti-competitive act” element to require proof of purpose,<sup>36</sup> and particularly “an exclusionary, predatory or disciplinary purpose” (exclusionary purpose), on the part of the dominant firm. Further, in the context of assessing whether such a purpose exists, the Tribunal has determined that the existence of a “legitimate business justification or objective” for the conduct will be relevant.<sup>37</sup> Therefore, the Canadian abuse of dominance provision requires proof of both exclusionary *purpose* and actual or likely anti-competitive *effect*, and the respondent firm may argue that the conduct had a legitimate business objective such that there was no exclusionary purpose.<sup>38</sup> Importantly, as explained later in this article, neither exclusionary purpose nor legitimate business purpose requires proof of the firm’s subjective purpose or intent.

While the Canadian abuse of dominance provisions have been in force in substantially the same form since 1986, the relevant remedy provisions were significantly amended in 2009.<sup>39</sup> Prior to the 2009 amendments, if the Tribunal found an abuse of dominance to exist, the conduct constituted a “civil reviewable practice”, and the Competition Tribunal could impose injunctive relief and other remedies to restore competition in the relevant markets.<sup>40</sup> Since the 2009 amendments, upon a finding of abuse of

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<sup>32</sup> See Peter Armitage, “The Evolution of the ‘Substantial Lessening of Competition’ Test – A Review of the Case Law” (2016) 44 ABLR 74, 74, 77, 81, and the cases cited therein; Katharine Kemp, “‘The Big Chill’? A Comparative Analysis of Effects-based Tests for Misuse of Market Power” (2017) 40 *University of New South Wales Law Journal* 493; Kemp, n 27, 106–109.

<sup>33</sup> There are other provisions which address specific categories of conduct under the *Competition Act*, RSC 1985, c C-34, eg, refusal to deal (s 75) and exclusive dealing (s 77).

<sup>34</sup> *Competition Act*, RSC 1985, c C-34, ss 78, 79.

<sup>35</sup> Anita Banicevic, Mark Katz and Charles Tingley, “Abuse of Dominance in Canada: A Possible Model for the EU” [2005] *Global Competition Review* 1, 2.

<sup>36</sup> *Commissioner of Competition v Air Canada* 2003 Comp Trib 13, [54].

<sup>37</sup> *Commissioner of Competition v Air Canada* 2003 Comp Trib 13, [54].

<sup>38</sup> Davit Akman, Ian Macdonald and Francois Baril, “Canada” in *Antimonopoly & Unilateral Conduct* (Global Competition Review, 2016) <<http://globalcompetitionreview.com/jurisdiction/1000450/canada>>.

<sup>39</sup> *Competition Act*, RSC 1985, c C-34, s 79; George Addy, John Bodrug and Charles Tingley, “Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement” (2012) 25 *Canadian Competition Law Review* 276, 279.

<sup>40</sup> Addy, Bodrug and Tingley, n 39, 278.

dominance, the Tribunal may impose further remedies, including an order for the divestiture of shares or assets,<sup>41</sup> and the imposition of an administrative monetary penalty.<sup>42</sup>

Litigated cases under the abuse of dominance provisions in Canada have been relatively rare, with only seven cases litigated to a final decision under s 79.<sup>43</sup> This is in part as a result of the Competition Bureau's enforcement policies.<sup>44</sup> Particularly during the period from 1986 to 2009, the Competition Bureau adopted "'a program of compliance' that stressed voluntary conformity with the Act, facilitating compliance in particular situations through communication and education, and responding to non-compliance through a variety of enforcement tools".<sup>45</sup> This approach emphasised "voluntary corrective action" and sometimes formal consent orders.<sup>46</sup> A further factor limiting the number of litigated cases is that private applications cannot be made under s 79.<sup>47</sup>

In 2009, however, the Competition Commissioner signalled a commitment to increased enforcement action, including in abuse of dominance cases, leading to the launch of three abuse of dominance cases in approximately two years, which commentators called "a busy docket".<sup>48</sup> The Canadian Bureau has more recently highlighted the detrimental impact of anti-competitive conduct on innovation and indicated that it is particularly focusing on "digital economy cases", including the abuse of dominance case concerning Toronto Real Estate Board's attempt to restrict access to its house sales data, discussed later in this article.<sup>49</sup>

The Canadian Bureau has issued two general sets of guidelines in respect of the abuse of dominance provisions. The first, in 2001, were quite detailed guidelines which were supplemented by specific guidelines and bulletins on the Bureau's approach to predatory pricing and its approach to abuse of dominance in certain industries.<sup>50</sup> However, in 2012, these instruments were replaced by a new "streamlined" set of guidelines on abuse of dominance.<sup>51</sup>

Some commentators have pointed out that "the absence of a well-developed body of jurisprudence has magnified the importance of such administrative guidance for parties seeking to assess the competition law risk associated with certain kinds of unilateral conduct".<sup>52</sup> Others have criticised the "streamlining" of the guidelines in 2012 as "incongruous with the Bureau's past approach of encouraging voluntary

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<sup>41</sup> *Competition Act*, RSC 1985, c C-34, s 79(2).

<sup>42</sup> Not exceeding \$10 million for a first order and \$15 million for each subsequent order: *Competition Act*, RSC 1985, c C-34, s 79(3).

<sup>43</sup> Akman, Macdonald and Baril, n 38. Judgment in *Toronto Real Estate Board v Commissioner of Competition* [2017] FCA 236 was delivered after this review, which noted six cases litigated to a final decision.

<sup>44</sup> Mark Katz, "Abuse of Dominance" in James B Musgrove (ed), *Fundamentals of Canadian Competition Law* (The Canadian Bar Association, 2007) 149–150.

<sup>45</sup> Addy, Bodrug and Tingley, n 39, 281, citing Competition Bureau, *Program of Compliance* (March 1993).

<sup>46</sup> Addy, Bodrug and Tingley, n 39, 281.

<sup>47</sup> Akman, Macdonald and Baril, n 38.

<sup>48</sup> Addy, Bodrug and Tingley, n 39, 298.

<sup>49</sup> Competition Bureau, Canada, *Year at a Glance: Performance Update for Fiscal Year 2016-17* (2017) 7. "Digital economy cases" are defined as "cases that support innovation and the competitiveness of the digital economy (including but not limited to e-business, online promotions, sales and transfers, infrastructure support) by deterring anti-competitive conduct such as impeding new entrants, products or services".

<sup>50</sup> Competition Bureau, Canada, *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (July 2001); Competition Bureau, Canada, *Draft Enforcement Guidelines on the Abuse of Dominance in the Airline Industry* (February 2001); Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act as Applied to the Grocery Sector)* (November 2002); Competition Bureau, Canada, *Information Bulletin: Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (June 2008); Competition Bureau, Canada, *Predatory Pricing Enforcement Guidelines* (July 2008).

<sup>51</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012).

<sup>52</sup> Akman, Macdonald and Baril, n 38.

compliance through a variety of instruments”, instead “supporting an enforcement agenda focused on contested cases by reducing the risk of Bureau guidance prejudicing enforcement proceedings” and at the risk of “creating significant uncertainty in an area that was previously relatively well understood”.<sup>53</sup>

With regard to the objective of the Canadian abuse of dominance law, the Competition Tribunal has noted that:

It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even “tough” competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.<sup>54</sup>

The Tribunal stated further that s 79 “is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power” and that “[s]uch abuse includes ... entrenchment and extension of market power”.<sup>55</sup> Similarly, in the Abuse of Dominance Guidelines, the Competition Bureau states:

Section 79 guards against anti-competitive conduct by firms with market power, and promotes conditions under which all firms are afforded an opportunity to succeed or fail on the basis of their respective ability to compete.<sup>56</sup>

The Bureau is particularly concerned to target conduct which is designed to make competitors, or potential competitors, less effective, by preventing them from entering a market, eliminating them from a market, or making them less effective at disciplining the exercise of the dominant firm’s market power.<sup>57</sup>

### III. SIMILARITIES BETWEEN THE AUSTRALIAN AND CANADIAN LAWS

#### A. Threshold Market Power Requirement

As with most unilateral conduct laws, the Australian and Canadian laws contain a threshold requirement that the firm possesses a certain degree of market power before the provision will apply, but liability is not imposed for the possession of this power alone.<sup>58</sup> It is also necessary to establish the existence of some anti-competitive *conduct* by the firm.

Under s 46(1) of the CCA, the firm must possess “a substantial degree of power in a market”.<sup>59</sup> The provision adds detail to this element. Regard must be had to the extent to which the firm’s conduct in the relevant market is constrained by the firm’s actual or potential competitors, or its suppliers or customers, in that market.<sup>60</sup> However, it is not necessary to show that the firm has absolute freedom from constraint by the conduct of these entities, nor is it necessary to show that the firm substantially controls that market (which was the requirement under an earlier version of s 46).<sup>61</sup> Importantly, a firm

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<sup>53</sup> Addy, Bodrug and Tingley, n 39, 299–301, 307–308.

<sup>54</sup> *Director of Investigation and Research v Tele-Direct (Publications) Inc* [1990] 73 CPR (3d) 1 (Canadian Competition Tribunal) (citations omitted).

<sup>55</sup> Crampton, n 13, 836, citing *Director of Investigation and Research v Tele-Direct (Publications) Inc* [1990] 73 CPR (3d) 1 (Canadian Competition Tribunal) 179.

<sup>56</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 1.

<sup>57</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 11.

<sup>58</sup> See, eg, *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1 (Canadian Competition Tribunal).

<sup>59</sup> See Caron Beaton-Wells, *Proof of Antitrust Markets in Australia* (Federation Press, 2003) Ch 2, on the principles applicable to the definition of the relevant market in Australia. See also ACCC Interim Guidelines, n 22, 5–7.

<sup>60</sup> *Competition and Consumer Act 2010* (Cth) s 46(4)(a).

<sup>61</sup> *Competition and Consumer Act 2010* (Cth) s 46(5). The predecessor to *Competition and Consumer Act 2010* (Cth) s 46(1), *Trade Practices Act 1974* (Cth) s 46(1), originally referred to “a corporation that is in a position substantially to control a market”, but this threshold requirement was amended in 1986 to refer to “a corporation that has a substantial degree of power in a market”: *Trade Practices Revision Act 1986* (Cth) s 17.



may possess substantial market power even if another firm possesses substantial market power in the same market.<sup>62</sup>

Neither the courts nor the ACCC has proposed a market share threshold above which substantial market power is presumed to exist. In the case law, the Australian courts have focused primarily on the height of barriers to entry in determining whether a corporation possesses substantial market power, with less consideration given to market shares or market share thresholds.<sup>63</sup>

Under the Canadian abuse of dominance law, the firm must “substantially or completely control, throughout Canada or any area thereof, a class or species of business”.<sup>64</sup> Notwithstanding the language of “control” and “business”, this requirement has been held to be synonymous with market power, which “is generally accepted to mean an ability to set prices above competitive levels for a considerable period”.<sup>65</sup> This requires the definition of a relevant market for the purposes of demonstrating such market power:<sup>66</sup> the phrase “class or species of business” in s 79 refers to the relevant product market, while the phrase “throughout Canada or any part thereof” refers to the relevant geographic market.<sup>67</sup>

The Canadian Guidelines state that the Canadian Bureau’s general approach in investigating allegations of abuse of dominance is to examine the allegation further when the firm has a market share in excess of 50%, whereas a market share between 35% and 50% will “only prompt further examination if it appears the firm is likely to increase its market share through the alleged anti-competitive conduct within a reasonable period of time”.<sup>68</sup> A market share below 35% will not generally prompt further investigation.<sup>69</sup>

Despite these thresholds, the decided cases under s 79 have all involved respondents that controlled over 80% of the relevant market.<sup>70</sup> At least one Canadian commentator has expressed the view that Australian courts are liable to find substantial market power to exist with lower market shares.<sup>71</sup>

A significant difference between the Canadian law and the Australian is that more than one firm in possession of “joint dominance” may engage in an abuse of dominance under the *Canadian Act*, even if no single member of the group possesses market power on its own.<sup>72</sup> The regulation of abuses of joint dominance stems from the concern that oligopolies result in subcompetitive performance even where no cartel behaviour is present.<sup>73</sup> Where there is an allegation that a group of firms is jointly dominant,

<sup>62</sup> *Competition and Consumer Act 2010* (Cth) s 46(7). See *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, 423 [136]–[137] (Gleeson CJ and Callinan J); [2003] HCA 5, regarding the requirement that the market power be “substantial”.

<sup>63</sup> See George A Hay and Rhonda L Smith, “‘Why Can’t a Woman Be More Like a Man?’ – American and Australian Approaches to Exclusionary Conduct” [2007] *Monash University Law Review* 1099, 1117–1118.

<sup>64</sup> *Competition Act*, RSC 1985, c C-34, s 79(1)(a).

<sup>65</sup> *Director of Investigation and Research v Nutrasweet Co* [1990] 32 CPR (3d) 1, 28 (Competition Tribunal); *Commissioner of Competition v Canada Pipe Co* 2006 FCA 236 (Canadian Federal Court of Appeals) 3 [6].

<sup>66</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 2–6.

<sup>67</sup> Brian A Facey and Dany H Assaf, “Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey” (2003) 70 *Antitrust Law Journal* 513, 530–531.

<sup>68</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 8.

<sup>69</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 8.

<sup>70</sup> Akman, Macdonald and Baril, n 38.

<sup>71</sup> Crampton, n 13, 813–814, referring to the finding of the Full Federal Court of Australia that the firm in question possessed substantial market power with between 16% and 20% market share. See *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, 402–403; [2003] FCAFC 149.

<sup>72</sup> *Competition Act*, RSC 1985, c C-34, s 79(1)(a); Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 9.

<sup>73</sup> Jason Gudofsky, Evangelia Litsa Kriaris and Lucian Vital, “Abuse of Joint Dominance: Is the Cure Worse Than the Disease” (Presentation at Canadian Bar Association 2010 Annual Competition Law Conference, 30 September to 1 October 2010, Gatineau, Canada) 2–4.

the Bureau will examine the allegation further if the combined market share of those firms is at least 65%.<sup>74</sup>

There is no concept of “joint dominance” under the Australian misuse of market power law. A single corporation (together with its related bodies corporate) must meet the threshold requirement of possessing substantial market power. The focus of this article is therefore on the regulation of single-firm conduct. It is not within its scope to consider abuses of joint dominance in detail.

## B. Substantial Lessening of Competition

### 1. Australia: “Substantial Lessening of Competition” Test

The prohibition in s 46(1) of the *CCA* applies if the firm engages in conduct which has the purpose, or has or is likely to have the effect, of substantially lessening competition (the SLC test). The SLC test also appears in other anti-competitive practice provisions in Pt IV of the *CCA* and so the substantial body of case law under these provisions provides guidance as to the likely meaning of the SLC test under the amended s 46.<sup>75</sup>

According to the case law, the question is whether the conduct has substantially lessened rivalry in the relevant market; that is, whether it has harmed the competitive process.<sup>76</sup> Such harm does not occur simply because a rival is forced to exit the market, since this can be a natural outcome of healthy competition.<sup>77</sup> The issue is whether rivalry more broadly is lessened. However, rivalry can be lessened by the exit of a single competitor where that competitor was a particularly important one in terms of the constraints it imposed on the firm’s market power.<sup>78</sup> Further, competition need not be completely excluded, but may be substantially lessened where it is “prevented” or “hindered”.<sup>79</sup>

The SLC test is not a test of the absolute level of competition in the market but a test of the level of competition in the presence of the impugned conduct relative to the level of competition in the absence of that conduct. Thus it requires the court to consider the extent of rivalry in the market “with and without” the impugned conduct,<sup>80</sup> and not simply “before and after” the conduct. Accordingly, it may be necessary to take into account other changes in the market and the extent to which competition would have been less, or even greater, than that which existed before the conduct.

According to the case law, the effect or likely effect on competition is “substantial” if it is “meaningful or relevant to the competitive process”.<sup>81</sup> The ACCC Interim Guidelines note this definition of “substantiality” and state that the required anti-competitive effect “is a relative concept and does *not*

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<sup>74</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 8. See Edward M Iacobucci and Ralph A Winter, “Abuse of Joint Dominance in Canadian Competition Policy” (2010) 60 *University of Toronto Law Journal* 219, regarding the appropriate treatment of “facilitating practices” and “parallel exclusionary practices”.

<sup>75</sup> See Armitage, n 32; Kemp, n 32.

<sup>76</sup> *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165, 747–748 [3013] (Greenwood J); [2013] FCA 909; *Re Queensland Co-Op Milling Association Ltd* (1976) 25 FLR 169, 188 (Woodward J, Members Shipton and Brunt).

<sup>77</sup> See, eg, *Stationers Supply Pty Ltd v Victorian Authorised Newsagents Associated Ltd* (1993) 44 FCR 35, 56 (Ryan J); *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, 585 (The Court); [2003] FCAFC 193; *Qantas Airways Ltd* [2005] ATPR ¶42-065, 42 936, 42 944 (Goldberg J, Mr Latta and Prof Round); *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165, 747–748 [3013] (Greenwood J); [2013] FCA 909.

<sup>78</sup> See, eg, *Rural Press Ltd v ACCC* (2003) 216 CLR 53, 73; [2003] HCA 75; *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165, 779–780 [3087]–[3088]; [2013] FCA 909.

<sup>79</sup> *Competition and Consumer Act 2010* (Cth) s 4G.

<sup>80</sup> *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165, 747–748 [3013] (Greenwood J); [2013] FCA 909.

<sup>81</sup> *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR ¶41-752, 40 732; [2000] FCA 38; *ACCC v Australian Medical Association Western Australia Branch Inc* (2003) 199 ALR 423, 483 (Carr J); [2003] FCA 686; *Rural Press Ltd v ACCC* (2003) 216 CLR 53, 71 (Gummow, Hayne and Heydon JJ); [2003] HCA 75; *Australian Gas Light Company (ACN 052 167 405) v ACCC (No 3)* [2003] FCA 1525, [351]; *ACCC v Cement Australia Pty Ltd* (2013) 310 ALR 165, 747–748 [3013] (Greenwood J); [2013] FCA 909.

require an impact on the *whole* market”.<sup>82</sup> This accords with some earlier decisions under Pt IV of the CCA which found a substantial lessening of competition to occur, for example, on the basis of a lessening of *intra*brand competition, apparently without considering the extent of *inter*brand competition.<sup>83</sup>

However, more recent decisions on the SLC test have stated that it is necessary to consider the competitive effects “in the overall market”.<sup>84</sup> It is also interesting to note statements made by the ACCC in the “Guidelines for Authorisation of Conduct (Non-Merger): For Consultation” (ACCC Authorisation Guidelines).<sup>85</sup> According to the ACCC Authorisation Guidelines, “the ACCC takes the view that a lessening of competition is substantial if the proposed conduct for which authorisation is sought *confers an increase in market power that is significant and sustained*”.<sup>86</sup> It therefore remains to be seen whether the courts will interpret the SLC test to require an assessment of the effect of the impugned conduct on market power in the overall market over a sustained period, or whether the necessary effect may be assessed in a certain segment of the market, for example, in respect of a particular brand.

## 2. Canada: “Preventing or Lessening Competition Substantially in a Market”

Section 79 of the *Canadian Act* refers to a firm which engages in a practice of anti-competitive acts which “has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”. As under the Australian law, the test is a relative one, requiring a comparison of competition in the market “with and without” to determine whether the relevant market would be substantially more competitive in the absence of the conduct.<sup>87</sup> The Tribunal has stated that competition will be substantially lessened where the conduct preserves or adds to the firm’s market power.<sup>88</sup> The entrenchment and extension of market power have generally been assessed in terms of price effects, but the Competition Tribunal and the Federal Court of Appeal have also indicated a concern with non-price effects on customers,<sup>89</sup> which might include effects on innovation, choice and ease of switching.<sup>90</sup> Further, where a firm has a high degree of market power in a market which is uncompetitive at the outset, even a small impact on competition may be substantial.<sup>91</sup>

Some argue that the balancing of effects conducted by the Competition Tribunal has sometimes “been very subjective and impressionistic in nature” and therefore “somewhat unpredictable and arguably prone to inaccuracy”.<sup>92</sup> Further, as in Australia, the Tribunal has been criticised for failing to explicitly address the “*degree* of prevention or lessening that is required to meet the ‘substantiality’ threshold” in abuse of dominance cases, but only stating that the degree will vary according to the level of market power held by the firm in question.<sup>93</sup>

The *Canadian Act* also specifically requires the Tribunal to consider whether any lessening of competition is “a result of superior competitive performance” of the dominant firm.<sup>94</sup> Katz gives the

<sup>82</sup> ACCC Interim Guidelines, n 22, 8 [2.23] (emphasis added).

<sup>83</sup> *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, 590, 591; [2003] FCAFC 193.

<sup>84</sup> *ACCC v Air New Zealand Ltd* (2014) 319 ALR 388, 610 [1107], 634 [1243] (Perram J); [2014] FCA 1157.

<sup>85</sup> ACCC, *Guidelines for Authorisation of Conduct (Non-Merger): For Consultation* (Consultation Guidelines, November 2017) <<https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>>.

<sup>86</sup> ACCC, *Guidelines for Authorisation of Conduct (Non-Merger): For Consultation* (Consultation Guidelines, November 2017) <<https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>> 38 [7.7] (emphasis added).

<sup>87</sup> *Canada (Commissioner of Competition) v Canada Pipe Co Ltd* 2006 FCA 233, [44], [58].

<sup>88</sup> *Canada (Director of Investigation and Research) v Nutrasweet Co* [1990] 32 CPR (3d) 1, 47.

<sup>89</sup> Crampton, n 13, 845.

<sup>90</sup> Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 11.

<sup>91</sup> *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1 (Canadian Competition Tribunal).

<sup>92</sup> Crampton, n 13, 845–846.

<sup>93</sup> Crampton, n 13, 860.

<sup>94</sup> *Competition Act*, RSC 1985, c C-34, s 79(4).

example that “it may be legitimate for a firm to exploit its advantage over rivals in terms of lower costs, better distribution/production techniques or a broader array of product offerings, even if this leads to the elimination of inferior competitors”.<sup>95</sup>

### C. Market in Which the Anti-Competitive Effect Is to Be Assessed

Conduct may be prohibited under both the Australian and Canadian laws where the conduct has, or is likely to have, an anti-competitive effect in markets beyond the market in which the firm possesses substantial market power. In fact, the relevant effect may be assessed in a broad range of markets under both laws.

The Canadian law does not restrict the markets in which the anti-competitive effect must occur, but requires only that the effect or likely effect occurs “in a market”.<sup>96</sup> Similarly, under the original Misuse of Market Power Bill in Australia, it was possible to prove a contravention by demonstrating the relevant purpose, effect or likely effect in *any* market.<sup>97</sup> However, the statute as finally passed restricted the markets in which an anti-competitive effect might contravene the provision.<sup>98</sup> Accordingly, in Australia, the market must essentially be one in which the firm currently or potentially supplies or acquires goods or services, *or* one in which the firm’s related body corporate currently or potentially supplies or acquires goods or services.<sup>99</sup> Commentators have criticised the addition of this specificity as convoluted, verbose and unnecessary, arguing that it is unlikely that a dominant firm’s conduct could have the purpose, effect or likely effect of substantially lessening competition outside these categories of markets in any event.<sup>100</sup>

Given the scope of the relevant markets under the respective statutes, it is possible to argue in both Australia and Canada that the relevant substantial lessening of competition is constituted by the dominant firm “[l]everaging market power in one market through anticompetitive acts designed to obtain market power in another market”.<sup>101</sup> But will conduct infringe either of these provisions where it is *not* possible to show that the impugned conduct had, or is likely to have, the effect of preserving or enhancing the firm’s market power? Is it sufficient if the conduct hinders competition in a market without preserving or enhancing market power?

Commentators in Canada have pointed out that, in certain cases, the Tribunal’s consideration of whether there was a “substantial lessening of competition” did not mention any effect on market power “but focused instead on the extent to which the anticompetitive practices in question had adversely impacted entry and expansion” or “the impact of the anticompetitive practices on the volume of competitors’ business” without “discussion of how these practices had impacted price or nonprice dimensions of competition”.<sup>102</sup> Similarly, as explained in the discussion on the Australian SLC test above, both the ACCC Interim Guidelines and certain judicial statements support the view that a substantial lessening of competition may be established in the absence of proof that the conduct preserved or enhanced the firm’s market power. While the position is not certain in either case, under both Canadian and Australian law, it seems at least possible that single-firm conduct may be condemned where that conduct has an effect in a market in which the firm is not dominant even though it is unlikely to preserve or enhance the firm’s market power, for example, by hindering competition or providing the firm with a competitive advantage in that market.<sup>103</sup>

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<sup>95</sup> Katz, n 44, 158–159.

<sup>96</sup> *Competition Act*, RSC 1985, c C-34, s 79(1).

<sup>97</sup> See Clarke, n 1, 383–384.

<sup>98</sup> *Competition and Consumer Act 2010* (Cth) s 46(1).

<sup>99</sup> *Competition and Consumer Act 2010* (Cth) s 46(1).

<sup>100</sup> See, eg, Clarke, n 1, 383–384.

<sup>101</sup> Crampton, n 13, 839. See also Brian A Facey and Dany H Assaf, “Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey” (2003) 70 *Antitrust Law Journal* 513, 562–563, citing tele-direct 1997 143–144, but arguing that “leveraging conduct must go beyond creating a competitive advantage in the second market”.

<sup>102</sup> Crampton, n 13, 861–862.

<sup>103</sup> See Fox, n 11, 374–375, 382, 405, 409–411.

## IV. AREAS OF DIVERGENCE

### A. Specification of Types of Abuse

While the Australian legislation contains only a general prohibition against misuse of market power, the Canadian legislation provides a list of specific types of conduct which are considered to be “anti-competitive acts”. Section 79 of the *Canadian Act* sets out the elements which must be established before the Tribunal can make an order prohibiting unilateral conduct, including the existence of a practice of “anti-competitive acts”. Section 78 provides a non-exhaustive list of nine types of conduct which will amount to an anti-competitive act,<sup>104</sup> including some familiar categories of unilateral anti-competitive conduct, such as margin squeezes; pre-emption of scarce facilities or resources; inducement not to deal; and predatory pricing. This is similar to the approach under the European Union and South African competition laws, for example, both of which provide lists of specific conduct which may amount to unilateral anti-competitive conduct.<sup>105</sup>

In this way, the Canadian legislation highlights certain practices which should raise a “red flag” for dominant firms. At the same time, since the list in s 78 is non-exhaustive, the certainty it provides for dominant firms is limited: it is still necessary to distinguish “healthy” or “normal” competition from anti-competitive acts for conduct that falls outside this list.<sup>106</sup> In the case law, the Tribunal has found examples of anti-competitive acts beyond the categories in s 78, including “most favoured nation” clauses; requirements on customers to reveal quotes or bids provided by competitors; threats of spurious litigation against customers; and the acquisition of competitors.<sup>107</sup> Most recently, the Tribunal found an anti-competitive act in the form of a dominant firm imposing restrictions on access to, and use of, data in a data-driven industry, as explained further in respect of “legitimate business justifications” below.<sup>108</sup>

Section 46 of the *CCA* provides no list of problematic conduct. However, the ACCC Interim Guidelines do indicate several types of conduct which the ACCC may find to contravene s 46(1), as well as the tests the ACCC will apply in assessing such conduct. For example, the ACCC has explained its approach to predatory pricing under s 46(1), apparently adopting the familiar Areeda-Turner test for predation.<sup>109</sup> The ACCC Interim Guidelines also explain how the ACCC will assess refusals to deal; tying or bundling; margin squeezes; loyalty rebates; and restricting access to an essential input.<sup>110</sup> In terms of certainty for business, this guidance may have a similar effect to a legislated, but non-exhaustive, list of specific types of unilateral anti-competitive conduct. In both cases, businesses are provided with some indication of potential “danger zones”, while the possibility of liability for conduct which falls outside these categories remains.

### B. Absence of an Exclusionary Element under the Australian Law

The Canadian abuse of dominance law contains two further elements which are not present under the Australian law, namely that there is a “*practice*” of anti-competitive acts, and the requirement, in all cases, of an exclusionary, predatory or disciplinary *purpose* on the part of the dominant firm.

The term “practice” has been held to generally require more than an isolated or single act, but a single act may constitute a “practice” if it is sustained and systematic and has a lasting impact on competition.<sup>111</sup> There is no similar requirement under the Australian law, although the extent and duration of the conduct will be relevant to the “substantiality” of any lessening of competition.

<sup>104</sup> *Canada (Director of Investigation and Research) v Nutrasweet Co* [1990] 32 CPR (3d) 1, 33–34.

<sup>105</sup> See Kemp, n 32, 514–515, 528.

<sup>106</sup> Facey and Assaf, n 101, 546.

<sup>107</sup> Katz, n 44, 155–156.

<sup>108</sup> *Toronto Real Estate Board v Commissioner of Competition* [2017] FCA 236, [51].

<sup>109</sup> ACCC Interim Guidelines, n 22, 11–12.

<sup>110</sup> ACCC Interim Guidelines, n 22, 9–16.

<sup>111</sup> *Canada (Director of Investigation and Research) v NutraSweet Co* (1990) 32 CPR (3d) 1 (Canadian Competition Tribunal).

The Canadian abuse of dominance law also requires proof of a threshold exclusionary purpose in all cases. In particular, the Competition Tribunal has determined that the common element in the specific anti-competitive acts listed in s 78 is that they each require an element of anti-competitive purpose on the part of the dominant firm:<sup>112</sup> the relevant purpose is a “predatory, exclusionary or disciplinary effect on a competitor”.<sup>113</sup> Accordingly, under the *Canadian Act*, both purpose and either effect or likely effect must be proved to establish an abuse of dominance.

However, the focus at the “purpose” stage of the analysis is on whether the conduct was directed at a *competitor or competitors* in the relevant market, in the exclusionary, predatory or disciplinary sense. Further, “competitors” are defined broadly: the competitor need not be a rival of the dominant firm itself, but only a competitor, or a potential entrant, in the relevant market.<sup>114</sup> This is separate to the question whether there is an actual or likely substantial lessening of *competition* in the market more broadly.<sup>115</sup>

Proof of the “purpose” element under the Canadian abuse of dominance provisions thus sets a relatively low threshold, only requiring proof that the conduct had an exclusionary, disciplinary or predatory purpose in respect of a competitor in a market either on the basis of the firm’s subjective intent or on the basis of objective factors alone. Nonetheless, this requirement ensures that the provision is focused on the type of conduct which is designed to suppress rivalry.

The Australian misuse of market power law, as amended in 2017, has been criticised for failing to include a similar exclusionary element.<sup>116</sup> While the ACCC Interim Guidelines appear to focus on exclusionary conduct, commencing with the statement that “a firm with substantial market power may maintain or advance its position by *restricting or undermining its rivals’ ability to compete*, rather than by offering a more attractive product”,<sup>117</sup> neither s 46(1), nor the SLC test itself, contain any requirement that the conduct in question has the purpose or effect of excluding a competitor. According to the current wording of the provision, it is possible for conduct to infringe where competition is substantially lessened in the absence of any suppression of rivalry, for example, where a dominant firm withdraws from one market to use a certain input more efficiently in another market.<sup>118</sup> This seems inconsistent with the objective of protecting the competitive process, given that there is no purpose or threat of suppressing rivalry in such cases.

## C. The Role of Purpose

### 1. Introduction

Perhaps the most significant difference between the Australian and Canadian laws, however, is the role which the dominant firm’s purpose plays under each. As noted earlier, the Australian law permits an applicant to prove a contravention on the basis of the purpose or effect or likely effect of the conduct (purpose *or* effect), whereas the Canadian abuse of dominance provisions require the Commissioner of Competition to prove both the purpose of the conduct and its effect or likely effect in all cases (purpose *plus* effect).

In Australia and Canada, a number of courts and policymakers have also raised the question whether the dominant firm acted with an acceptable purpose, justification or rationale in determining whether unilateral anti-competitive conduct has occurred. As explained in the following analysis,

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<sup>112</sup> See Competition Bureau, Canada, *Enforcement Guidelines: The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act* (20 September 2012) 10–11; Crampton, n 13, 836.

<sup>113</sup> *Canada (Director of Investigation and Research) v Nutrasweet Co* [1990] 32 CPR (3d) 1, 33–34.

<sup>114</sup> *Toronto Real Estate Board v Commissioner of Competition* [2017] FCA 236, [54]–[55].

<sup>115</sup> Katz, n 44, 157, citing *Canada (Commissioner of Competition) v Canada Pipe Co* 2006 FCA 233.

<sup>116</sup> See Brent Fisse, “The Australian Competition Policy Review Final Report 2015: Sirens’ Call or Lyre of Orpheus?” (Paper presented at the New Zealand Competition Law and Policy Institute, 26<sup>th</sup> Annual Workshop, Auckland, 16 October 2015) 12–13; Kemp, n 32, 523.

<sup>117</sup> ACCC Interim Guidelines, n 22, 4 [1.1] (emphasis added).

<sup>118</sup> See Fisse, n 116, 11.

these considerations represent an attempt to discern the objective purpose or rationale of the conduct, sometimes explained as its “nature” or “character”, and not an inquiry into the subjective purpose or intent of the dominant firm. However, the manner in which such arguments may be raised is quite different under the Australian and Canadian laws.

## 2. Subjective or Objective Purpose

### *Australia: Subjective Purpose as an Independent Ground for Liability*

Under s 46(1) of the *CCA*, the dominant firm’s “purpose” of substantially lessening competition is an independent ground for liability. That is, a firm may, on the basis of its purpose, be liable under the provision even if its conduct does not have the effect, or the likely effect, of substantially lessening competition. Further, while there is currently no judicial interpretation of the term under the new s 46, the relevant purpose will almost certainly be interpreted to mean the firm’s *subjective* purpose, given that Australian courts have interpreted “purpose” in this way under other provisions that adopt an SLC test in Pt IV of the *CCA*.<sup>119</sup>

Some Australian courts and commentators have suggested that, since courts are permitted to take account of objective factors in determining subjective purpose, it may matter little whether the test of purpose is subjective or objective, since the outcome will often be the same.<sup>120</sup> However, while an inference as to the firm’s subjective purpose may be drawn from all the circumstances of the conduct, in the Australian context, that inference is nonetheless “as to the purpose of the particular respondent, not of some hypothetical bystander”.<sup>121</sup> In the past, the ACCC has pointed out that this subjective purpose is inherently difficult to prove, and increasingly so as corporations become more sophisticated about covering their tracks and concealing their intentions.<sup>122</sup>

### *Canada: Exclusionary Purpose, No Need to Prove Subjective Intent*

Purpose also plays a significant role under the *Canadian Act*, but quite a different one. The Competition Tribunal determined that the common element in the specific anti-competitive acts listed in s 78 is that they each require an element of anti-competitive purpose on the part of the dominant firm:<sup>123</sup> the relevant purpose is a “predatory, exclusionary or disciplinary effect on a competitor”.<sup>124</sup>

However, under the Canadian abuse of dominance law, proof of purpose does *not* require proof of the firm’s subjective purpose,<sup>125</sup> an approach which the legislature intentionally avoided.<sup>126</sup> In fact, the Tribunal has stated that “it might be more apt to speak of the overall character of the act”.<sup>127</sup> All relevant factors must be considered in determining the “nature and purpose” of the act, including “the reasonably foreseeable or expected objective effects” and any legitimate business justification.<sup>128</sup> Evidence of the

<sup>119</sup> See, eg, *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 37–38; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd [No 1]* (1990) 27 FCR 460, 482–483. See further Katharine Kemp, n 27, Ch 6.

<sup>120</sup> See, eg, *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 580 [44] (McHugh J); [2003] HCA 45; Donald Robertson, “The Primacy of ‘Purpose’ in Competition Law – Part 2” (2002) 10 *Competition and Consumer Law Journal* 42, 42; *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, 587; [2003] FCAFC 193.

<sup>121</sup> *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, 589 [256]; [2003] FCAFC 193.

<sup>122</sup> ACCC, Submission No 56 to the Commonwealth Department of Treasury, Committee of Inquiry, *Review of the Competition Provisions of the Trade Practices Act 1974*, 2 July 2002, 79, 82–83.

<sup>123</sup> See Crampton, n 13, 836.

<sup>124</sup> *Canada (Director of Investigation and Research) v Nutrasweet Co* [1990] 32 CPR (3d) 1, 33–34.

<sup>125</sup> *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1, 264 (Canadian Competition Tribunal).

<sup>126</sup> *Canada (Commissioner of Competition) v Canada Pipe Ltd* 2006 FCA 233, [70]–[71].

<sup>127</sup> *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1, 264 (Canadian Competition Tribunal); *Canada (Commissioner of Competition) v Canada Pipe Ltd* 2006 FCA 233, [67].

<sup>128</sup> *Canada (Commissioner of Competition) v Canada Pipe Ltd* 2006 FCA 233, [67].

firm's subjective intent may also be "informative in assessing the totality of the evidence", but it is not necessary to prove the firm's subjective purpose or intent.<sup>129</sup>

### 3. Legitimate Business Purpose or Rationale

#### *Canada: Legitimate Business Justification or Rationale*

In Canada, the Competition Tribunal and courts have regularly asked whether there is any objective "legitimate business justification" or "identifiable efficiency rationale" for allegedly anti-competitive conduct, although these terms do not appear in the statute.<sup>130</sup> As noted earlier, this is relevant in assessing the overriding purpose of the impugned conduct to determine whether there has been an "anti-competitive act". It does not require proof of the respondent firm's subjective intent. In fact, the Canadian Competition Tribunal has gone so far as to find a valid business justification even where the respondent had not raised that particular justification itself.<sup>131</sup>

The Competition Tribunal and the Federal Court of Appeal have also added some content to this concept. According to the Tribunal, a legitimate business justification is not constituted by "self-interest", or the purpose of "retaining or obtaining a dominant position in order to defend against another firm potentially becoming dominant".<sup>132</sup> Rather it is "a credible efficiency or pro-competitive rationale for the conduct in question".<sup>133</sup> The Federal Court of Appeal has explained that "the evidence must demonstrate how the practice generates benefits which allow it to better compete in the relevant market".<sup>134</sup>

The proportionality of the conduct for the claimed purpose will be relevant. According to the Competition Tribunal, the "mere proof of *some* legitimate business purpose" is not sufficient to support a finding that there is no anti-competitive act.<sup>135</sup> Instead the Tribunal must weigh the justification in light of any anti-competitive effects to establish "the overriding purpose" of the conduct.<sup>136</sup> The justification may provide "an alternative explanation as to why the impugned act was performed"; that is, it may "overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question".<sup>137</sup>

This framework for considering legitimate business purpose claims is illustrated by the recent case of *Toronto Real Estate Board v Commissioner of Competition*.<sup>138</sup> The Commissioner alleged that the Board abused its dominance by imposing restrictions on access to, and use of, real estate sales data, which reduced the ability of "virtual office websites" (VOWs) to compete with more conventional real estate brokerages. However, the Board argued it had no exclusionary purpose but only the legitimate business purpose of fulfilling its privacy obligations under the Canadian privacy legislation on the basis that the privacy consents it had obtained regarding the personal information in question were insufficient to cover the access and uses proposed by the VOWs.<sup>139</sup>

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<sup>129</sup> *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1, 264 (Canadian Competition Tribunal).

<sup>130</sup> *Director of Investigation and Research v Laidlaw Waste Systems Ltd*, (Unreported, Canadian Competition Tribunal CT – 1991/002 – Doc # 72, Reed J, 20 January 1992) [77], [86]–[87].

<sup>131</sup> *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1, 360 (Canadian Competition Tribunal): "The respondents did not argue the business justification 'that customers understand with whom they are dealing' to justify the refusal to supply specifications to consultants, although this was raised as a justification for other acts. However, we are of the view, based on the evidence, that this business justification is applicable here."

<sup>132</sup> *D & B Co of Canada Ltd* (1995) 64 CPR (3d) 216, [67].

<sup>133</sup> *Commissioner of Competition v Canada Pipe Ltd* 2006 FCA 233, [73].

<sup>134</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [149].

<sup>135</sup> *D & B Co of Canada Ltd* (1995) 64 CPR (3d) 216, [73]–[74].

<sup>136</sup> *D & B Co of Canada Ltd* (1995) 64 CPR (3d) 216, [69].

<sup>137</sup> *Commissioner of Competition v Canada Pipe Ltd* 2006 FCA 233, [87].

<sup>138</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236.

<sup>139</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [160].



Nonetheless, the Tribunal found that the facts demonstrated that the overriding purpose of the conduct was exclusionary, given that the terms of the respondent's broadly worded privacy consents did actually permit the proposed uses and disclosure of the disputed data,<sup>140</sup> that the impugned restrictions on the data went further than the obligations imposed by the privacy legislation,<sup>141</sup> and that the disputed data was already lawfully available to the public under other legislation.<sup>142</sup> In the Tribunal's view, the evidence therefore supported a finding that the overriding purpose of the conduct was "to maintain control over the disputed data in an effort to forestall new forms of competition, and not ... any efficiency, pro-competition or genuine privacy concerns".<sup>143</sup> The Federal Court of Appeal upheld these findings.<sup>144</sup>

However, the Federal Court of Appeal confirmed that exclusionary conduct *could*, in principle, be absolved on the basis of a legitimate business purpose of complying with regulatory obligations, including obligations under the privacy legislation.<sup>145</sup> Reinforcing the objective nature of this purpose, the Court held that the respondent firm need not establish that such regulatory compliance was its actual "original or seminal motivation" for the conduct, but only that there was "a factual and legal nexus between that which the statute or regulation requires and the impugned [conduct]".<sup>146</sup> Thus it appears from the Canadian case law that the justification or purpose in question need not be the respondent firm's primary, subjective motivation for the conduct. However, it must be credible; it must provide an "efficiency or procompetitive rationale for the conduct in question"; and it must relate to and counterbalance "the anticompetitive effects and/or subjective intent of the acts" which would otherwise establish the exclusionary purpose of those acts.<sup>147</sup>

### *Australia: Legitimate Business Rationale*

#### *Legitimate Business Rationale under the "Old" s 46*

In Australia, the relevance of a firm's legitimate business purpose or rationale was evident in certain decisions under the *previous* version of s 46(1).<sup>148</sup> In *ACCC v Australian Safeway Stores Pty Ltd* (Safeway), for example, Heerey and Sackville JJ rejected the primary judge's finding that, because a non-dominant firm might just as easily have engaged in the impugned conduct, Safeway had not infringed s 46(1).<sup>149</sup> Their Honours took account of the *purpose or rationale* for the conduct in determining whether Safeway had "taken advantage" of its substantial market power. According to Heerey and Sackville JJ, the primary judge overlooked the critical issue of Safeway's purpose or rationale in engaging in the conduct:

In our view, this analysis ignores the question of *why* Safeway engaged in the impugned conduct. This is not the same question as to whether one or more of the statutorily proscribed purposes existed. Before reaching that point it is necessary to look at not only what the firm did, but why the firm did it. That is why a business rationale for the conduct, independent of the question of market power, is relevant. ... The rationale for the conduct is critical.<sup>150</sup>

<sup>140</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [161], [165].

<sup>141</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [165].

<sup>142</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [174].

<sup>143</sup> *Commissioner of Competition v Toronto Real Estate Board* 2016 Comp Trib 7, [369], [389]–[390].

<sup>144</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [150].

<sup>145</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [146].

<sup>146</sup> *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [146]–[147].

<sup>147</sup> See *Toronto Real Estate Board v Commissioner of Competition* 2017 FCA 236, [148].

<sup>148</sup> See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 193; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128, 135; [1999] FCA 664. See also *ACCC v Boral Ltd* [1999] ATPR ¶41-715, [158]; [1999] FCA 1318.

<sup>149</sup> *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, 407–408; [2003] FCAFC 149.

<sup>150</sup> *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, 408; [2003] FCAFC 149.

Similar references to the presence or absence of a “legitimate” rationale or reason underlying the impugned conduct formed a common thread in the case law on “taking advantage” under the previous version of the misuse of market power law in Australia.<sup>151</sup>

Labels such as “legitimate”, “commercial” or “business” do not, of themselves, provide any guidance on the types of objective purpose which are sufficient to make exclusionary conduct acceptable. The case law on the previous version of s 46(1) in Australia also provided relatively little explanation of what these terms mean.

In *Safeway*, after emphasising the importance of the “rationale” for the conduct, Heerey and Sackville JJ considered the rationale for the defendant’s conduct with reference to the objective circumstances of the case by asking whether a firm would be likely to behave in the same way if it did not possess market power.<sup>152</sup> The impugned conduct was Safeway’s termination of supplies from bakery suppliers (known as “plant bakers”) who supplied bread to rival supermarkets at a discount. According to their Honours:

Its reason for doing so was to induce the plant baker to cease supplying discounted bread to an independent retailer in competition with a Safeway supermarket. As we have explained, there would have been no purpose in Safeway acting in this manner in a competitive market. On the contrary, had Safeway done so it would have inflicted economic harm on itself for no gain.<sup>153</sup>

The crucial matter was the objective rationale or purpose of the conduct as inferred from the surrounding circumstances.<sup>154</sup> Implicitly, the conduct contravened because its underlying purpose was the suppression of rivalry from competing supermarkets selling discounted bread to preserve the dominant firm’s market power, rather than a purpose which would make sense in a competitive market in the absence of any potential to preserve market power.<sup>155</sup>

*Legitimate Business Purpose or Reason under the “New” s 46*

In respect of the new version of s 46 of the CCA, the relevance of rationale was also raised in the ACCC “Framework for Misuse of Market Power Guidelines” (ACCC Draft Framework), which the ACCC released following the publication of the Exposure Draft of the Bill in September 2016.<sup>156</sup> In the ACCC Draft Framework, the ACCC stated that a firm with a substantial degree of market power might infringe the proposed amended s 46(1) if it engaged in a refusal to deal in certain circumstances “without any legitimate commercial reason”.<sup>157</sup> Similarly, the ACCC would take into account the absence of a “legitimate business reason” in respect of claims of land banking and predatory pricing.<sup>158</sup> The ACCC

<sup>151</sup> See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 193, pointing out that BHP failed to provide a “legitimate reason” for its refusal to sell; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128, 135; [1999] FCA 664, noting that the lack of a legitimate business reason for the refusal informed the decision in *Aspen Skiing*; *ACCC v Boral Ltd* [1999] ATPR ¶41-715, [158]; [1999] FCA 1318, arguing that the existence of a business rationale for apparently bad conduct suggests that a firm has not taken advantage of its market power, and that if a firm without market power engages in certain conduct as a matter of commercial judgment, then another firm engaging in the same conduct is likely not taking advantage of its substantial market power.

<sup>152</sup> *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, 407–408; [2003] FCAFC 149.

<sup>153</sup> *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, 409; [2003] FCAFC 149.

<sup>154</sup> See *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339; [2003] FCAFC 149, referring to the “reason” and “purpose” underlying Safeway’s conduct.

<sup>155</sup> *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, 410; [2003] FCAFC 149.

<sup>156</sup> See Australian Competition and Consumer Commission, *Framework for Misuse of Market Power Guidelines* (Draft Guidelines, September 2016) <<https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark>>, published by the ACCC following the publication of the Exposure Bill and providing a summary of the proposed guidelines the ACCC would publish if the amended provision were passed. See also Treasury, Australian Government, *Competition Law Amendments: Exposure Draft Consultation* <[https://consult.treasury.gov.au/market-and-competition-policy-division/ed\\_competition\\_law\\_amendments](https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments)>.

<sup>157</sup> ACCC, *Draft Framework for Misuse of Market Power Guidelines* (September 2016) <<https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark>> 8.

<sup>158</sup> ACCC, *Draft Framework for Misuse of Market Power Guidelines* (September 2016) <<https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark>> 10, 11.

also stated that, in its assessment of conduct more broadly under the proposed s 46, it would take into account various factors, including “whether there are legitimate business reasons for engaging in the conduct”.<sup>159</sup>

This approach by the ACCC was potentially problematic. If a corporation with substantial market power were to face allegations that it contravened the new version s 46(1) on the ground that its conduct had the *effect* of substantially lessening competition, on the wording of the provision, it would not be open to the corporation to argue that, notwithstanding the proof of a clear effect of substantially lessening competition, its conduct should be excused on the basis that there was an objective and legitimate business reason for the conduct. Such conduct would be judged on its actual effects.

In the subsequent ACCC Interim Guidelines, the ACCC removed certain of the references to “legitimate business reasons” and “legitimate commercial reasons” which appeared in the ACCC Draft Framework. These changes may have been made to avoid creating the impression that a dominant firm might defend its conduct on the basis of “legitimate business reasons” under the “effect” and “likely effect” limbs of s 46 in particular. The ACCC Interim Guidelines now state only that “[w]hen assessing whether the conduct has the purpose, effect or likely effect of substantially lessening competition, the ACCC will consider the commercial rationale for the conduct”.<sup>160</sup>

As noted, the Federal Court of Appeal in Canada has accepted that a refusal to permit competitors access to data might be justified under s 79 of the *Canadian Act* on the basis of a legitimate business purpose of complying with privacy legislation (privacy compliance objective). This example provides an interesting means of illustrating the differences between the Canadian and Australian legislation.

Under s 46(1) of the *CCA*, allegations of misuse of market power might be made on the basis of similar refusals to deal or attempt to impose restrictions on access to key data in a market.<sup>161</sup> If the allegation were raised under the “purpose” limb of the provision, the relevance of the privacy compliance objective would be uncontroversial: the issue would be whether that was in fact the respondent’s subjective purpose or whether one of the respondent’s substantial purposes was in fact to substantially lessen competition in the relevant market.

Further, the existence of a rationale other than the suppression of rivalry by competitors is one factor which a court might reasonably take into account in determining whether the conduct had a real chance of substantially lessening competition at the outset (under the “likely effect” limb), or what the effect of the conduct was on the balance of probabilities (under the “effect” limb). Particularly where the effect or likely effect of the conduct is unclear, the existence of a plausible, objective explanation for the conduct may be relevant to the assessment of its actual or likely effect.

However, the existence of such a rationale would not absolve dominant firm conduct which *clearly* has the *actual effect* of substantially lessening competition. It is conceivable that the pursuit of a privacy compliance objective could lead to a finding that rivalry in the market was, on the balance of probabilities, substantially reduced by the refusal to provide access to the disputed data. On the other hand, a firm might argue that its privacy protections represent *increased* competition in respect of this quality (that is, the privacy terms) of the relevant services.<sup>162</sup>

In Australia, a firm that is concerned that such a strategy may infringe s 46(1) might apply to the ACCC for authorisation of the proposed conduct.<sup>163</sup> However, as noted earlier,<sup>164</sup> the authorisation

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<sup>159</sup> ACCC, “*Draft Framework for Misuse of Market Power Guidelines* (September 2016) <<https://consultation.accc.gov.au/compliance-enforcement/consultation-on-draft-framework-for-misuse-of-mark>> 7.

<sup>160</sup> ACCC Interim Guidelines, n 22, [2.27].

<sup>161</sup> See ACCC Interim Guidelines, n 22, 9–16. See also *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460, where it was held the terms on which the dominant firm supplied financial transaction data contravened the earlier *Trade Practices Act 1974* (Cth) s 46(1)(c).

<sup>162</sup> See Maurice E Stucke and Allen P Grunes, *Big Data and Competition Policy* (OUP, 2016) 54–66.

<sup>163</sup> *Competition and Consumer Act 2010* (Cth) ss 88(1), 90.

<sup>164</sup> See the text accompanying n 27.

provisions make no provision for the justification of *past* conduct which has not been authorised prior to its implementation. This is the case even if the firm plainly engaged in the relevant conduct for a legitimate business purpose but the intended outcome failed to ensure that, on balance, competition was not substantially lessened.

While it remains possible to apply for authorisation of conduct in advance, this course has some limitations, including the substantial delay in implementing commercial strategies pending the outcome of an authorisation application, and the potential for firms to see an application for authorisation as an implied admission that the relevant firm possesses substantial market power under s 46, which might put the firm at a disadvantage in any subsequent proceedings.<sup>165</sup> Accordingly, the Australian authorisation procedure is not equivalent to the Canadian legitimate business justification which permits a firm to defend its conduct on an *ex post* basis by reference to a procompetitive or efficiency rationale.

## V. CONCLUSION

The Australian misuse of market power law and the Canadian abuse of dominance law share a number of similarities, including the provision of statutory definitions of unilateral anti-competitive conduct which only apply to firms with a substantial degree of market power and which depend, in part, on whether the firm's conduct had a certain effect or likely effect in a market. The fact that both laws focus on harm to the competitive process (as opposed to harm to competitors alone) and the question whether the conduct has an actual or likely effect of substantially lessening competition, provide fruitful grounds for comparison.

There are also significant differences between these laws in respect of the role of purpose in particular. The Australian law is arguably more expansive than the Canadian, permitting liability to be established on the basis of the firm's subjective purpose alone as an alternative to proof of effect or likely effect. By contrast, the Canadian law requires proof of both purpose *and* effect in all cases, but the requisite proof of purpose sets a relatively low threshold for inclusion, essentially requiring proof that, from an objective perspective, the conduct was designed to exclude, discipline or harm a competitor, thereby focusing enforcement on conduct which is directed at suppressing rivalry in a market. At the same time, this consideration of purpose permits a respondent firm to justify its conduct after the event, by arguing that the purpose of the conduct was in fact the furtherance of a legitimate business objective. In Australia, such arguments could only be used to justify conduct by making an application to the ACCC for authorisation of the conduct *before* engaging in the conduct, unless it can be shown that the objective in question succeeded in ensuring that there was in fact no actual or likely substantial lessening of competition.

Given the growing debate concerning the risks and benefits of "big data",<sup>166</sup> it is particularly interesting to note that the Federal Court of Appeal in Canada has indicated that a firm might justify imposing restrictions on access to its data on the basis of its privacy obligations. By contrast, a firm with substantial market power in Australia would not always be able to defend its conduct on similar grounds after the fact. One upside for consumers in Australia may be that a firm will need to make its commitment to consumer data privacy timely, genuine and central to its business design if it plans to rely on these obligations as a justification for restricting access to personal data.

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<sup>165</sup> Fisse, n 116; Kemp, n 27, 102–104, 179–180.

<sup>166</sup> See, eg, Stucke and Grunes, n 162.