

# MISUSE OF MARKET POWER

Competition Policy Review (Harper Review) Draft Report

## Current position

### Substantive law

- Section 46(1) prohibits a corporation with substantial market power taking advantage of that power for the purpose of either (a) eliminating or substantially damaging a competitor; (b) preventing entry; or (c) deterring or preventing a person engaging in competitive conduct (*supported by various interpretative sub-sections*)
- Section 46(1AA) prohibits a corporation with a substantial share of a market from supplying, or offering to supply, goods or services for a sustained period at a price less than the relevant cost to the corporation of supply, for a prohibited purpose (same as for s 46(1))

### Remedies

- Various remedies available but no divestiture power

## Harper Panel draft proposal (rec 25, chapter 16)

### Substantive law

- Section 46(1) should be amended to prohibit a corporation with a substantial degree of market power from engaging in conduct if it would have the purpose, or would have or be likely to have the effect, of substantially lessening competition

This prohibition would be subject to a new defence which would be established where the conduct:

- would be a rational business decision by a corporation that did not have a substantial degree of power in the market; **and**
  - would be likely to have the effect of advancing the long-term interests of consumers
- Section 46(1AA) should be repealed
  - If amendment made to s 46(1) post-2007 amendments (including s 46(6A) directed toward the 'take advantage' element) should be repealed

### Remedies

- No new divestiture power should be introduced

[summary prepared 11 October 2014]