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THE USE AND MISUSE OF SECTION 46

1 Introduction

In March 2016, almost a year after the Competition Policy Review chaired by Professor Ian Harper recommended wholesale changes to section 46 of the Competition and Consumer Act 2010 (CCA), the Commonwealth Government finally committed to implementing the recommendation in full.

If it survives the legislative process, the new section 46 will remove the requirements to prove purpose and a taking advantage of market power, and will capture any conduct by a business with substantial market power that has the purpose, effect or likely effect of substantially lessening competition.

In assessing that conduct, a court must consider the extent to which it has the purpose, effect or likely effect of increasing competition, including by enhancing efficiency, innovation, product quality or price competitiveness; and of lessening competition, including by preventing, restricting or deterring the potential for competitive conduct or new entry into the market.

The new section has been described as an “effects test”, since it adds an effects-based alternative to what has always been an examination of purpose. A number of effects tests have been proposed for section 46 in reviews and inquiries beginning with the Swanson Report in 1976 – just two years after the Trade Practices Act 1974 was enacted.¹ Ten reviews over 30 years considered an effects test and chose to retain the purpose requirement. The Harper Review has now gone the other way.

The difference between purpose and effect is easy to explain and understand, and it is no surprise that the spotlight has remained on the effects test element of the change. But that difference has been eroded by section 46(7), which allows purpose to be inferred from all the circumstances, and by court decisions such as *Universal Music v ACCC*,² in which Hill J noted that “in most cases, the best evidence of subjective purpose will be objective effect.”³

The far more significant change is the removal of the “take advantage” element, which requires that the business not only has market power but has used that power. In conjunction with the three anticompetitive purposes set out in the current section 46, this element gives the section its character as a misuse of market power provision. Its task is to identify conduct that would not be expected in a workably competitive market, and is therefore likely to be a use or misuse of market power.

The courts have framed this proposition in quite different ways. Would the business have done the same thing without its market power? Could a business without market power have engaged in the same conduct? Was the conduct materially facilitated by market power? While the ACCC has never lost a section 46 case for failing to prove purpose, it has lost a number on taking advantage: *Melway*,⁴ *Rural Press*,⁵ *Cement Australia*.⁶ Section 46(6A) was introduced in 2008 to move the interpretation away from the “could” and towards the “would”, but too late: the “take advantage” test will soon be gone, and section 46 will no longer require a use or misuse of market power.

But serious questions remain about the use – and misuse – of the section itself. The new section represents a significant reworking and there is disagreement over what the new law is likely to prevent or permit – what it would do, or could do. There is also disagreement over what it should do.

Should the law be framed broadly, to capture any conduct that may be of concern? Or should it be framed narrowly, to avoid deterring vigorous competition? Should it give discretion to regulators or certainty to businesses? Should it apply to any conduct by a business with market power, or should it be limited to abuses of market power for exclusionary purposes? And should its primary or only focus be on consumers, on competitors, or on competition?

Although the goal of consumer welfare has become the orthodoxy in Australia, key proponents of the change to the law argue that it should – and would – protect independent supermarkets from their larger competitors and agricultural suppliers from their larger customers. The same ambitions were expressed in debates around the Sherman Act and the Australian Industries Preservation Act more than a century ago.⁷

Equally, those who argue against further regulatory intervention are concerned that it will cause uncertainty for businesses and raise prices for consumers. These arguments are also familiar. In 1905 the first member for North Sydney warned that the APIA would “affect the cost of living in every household, and especially in those which can least afford to bear an increase.”⁸ In 1911 the US magazine Puck ran a cartoon showing the ship of American Business sailing past the buoy of the Department of Justice and into the uncertain fog of the Sherman Law.⁹

Since its enactment in 1974, section 46 has been amended six times – in 1977, in 1986, in 1992, in 2006, in 2007 and in 2008. Now we are facing the most significant change to section 46 since its introduction, and the debate has been particularly fierce. There is little agreement over what the law should do, what the current section does, and what the new section could or would do.

This paper will examine the function of the misuse of market power law, review the operation of the current law and evaluate the change to which the government has committed. What is the purpose of the law, what is the effect of the current law, and what is the likely effect of the proposed law?

2 The purpose of a misuse of market power law

The goals of antitrust law have been jealously contended since the beginning of modern competition law, which we may for convenience date to the introduction of the United States Sherman Act in 1890. The intentions of that Act and its many framers have long been debated, but it is clear that the familiar elements of the debate – competition, competitors and consumers – were present from the beginning.

Sherman’s original drafting would have prohibited trusts that prevented competition, fostered monopoly or raised the cost of necessary items for consumers. But Senator George of Mississippi emphasised that the trusts were robbing agricultural producers by insisting on low prices, and explained his duty “to destroy the advantages which such corporations had over smaller enterprises”¹⁰ in language that remains familiar:

It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises...

The people complain; the people suffer; the people in many parts of our country, especially the agricultural people, are in greater distress than they have ever been before. They look with longing eyes, they turn their faces to us with pleading hands asking us to do something to relieve them for their trouble.¹¹

In 1966 Robert Bork acknowledged that legislators had sought to protect smaller enterprises from larger combinations, and give farmers relief from the low prices demanded by powerful purchasers, but argued that these benefits were ancillary to the overriding aim of promoting consumer welfare.¹² Bork’s reading has been criticised as selective, and it has been argued that consumer welfare may in fact have been the secondary benefit, and other goals such as protecting producers paramount.¹³

The courts' interpretation has been swayed in both directions by the record of the debates. *US v Alcoa* suggests a belief that "great industrial consolidations are inherently undesirable, regardless of their economic results", citing Sherman's speeches to Congress.¹⁴ *US v Von's Grocery Co* considered that the intention of the Sherman Act was "to prevent economic concentration in the American economy by keeping a large number of small competitors in business".¹⁵

However, by 1979 the Supreme Court had endorsed Bork's view of consumer welfare as the primary goal of antitrust law,¹⁶ and this view has rarely been challenged since.

Exclusionary conduct and competition on the merits

The legislators debating the Sherman Act quickly recognised that the proposed legislation risked capturing competition on the merits, including competition by successful small businesses. Senator Kenna of West Virginia put the question like this:

Is it intended by the committee, as the section seems to indicate, that if an individual... by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act?¹⁷

Senator Edmunds of Vermont replied, somewhat shortly:

Anybody who knows the meaning of the word "monopoly," as the courts apply it, would not apply it to such a person at all, and I am sure my friend must understand that.¹⁸

Senator Hoar of Massachusetts expanded:

[T]he courts of the United States would say... that a man who, merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.¹⁹

However, the distinction between exclusionary conduct and competition on the merits has often proved elusive, as the Court found in *US v Alcoa*:

[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.²⁰

Australian approaches

In Australia, the early trade practices legislation was explicitly protectionist – of Australian manufacturers against international combinations like the combine harvester trust, and canegrowers from the low prices demanded by the Colonial Sugar Refining Company.²¹

When the Trade Practices Act 1974 (TPA) was introduced, both sides of parliament emphasised the need for trade practices legislation to protect small business. Peter Morris MP argued for the government that "no sector of business has suffered as much as the independent food retailer because of the lack in the past of effective trade practice legislation".²² Opposition MP Ian Sinclair, the Member for New England, went further:

[U]nless this type of legislation exists, it is big business that is going more and more to monopolise the sinews of industry in this country... This will mean that instead of the small man—the person who substantially we on this side of the Parliament represent—being able to maintain his effective operation, he is likely to go out of business.²³

The instinct that the competition law should specifically protect small businesses, particularly from the major supermarket chains, has rarely been far from the political focus. It was the subject of the Joint Select Committee on the Retailing Sector report *Fair Market or Market Failure?* in 1999,²⁴ and the Senate Economics References Committee's Inquiry into the Effectiveness of the Trade Practices Act 1974 in *Protecting Small Business* in 2004.²⁵

It was also one of the key drivers for the Harper Review. In arguing for the necessity of another review, former Small Business Minister Bruce Billson said:

I am sure when Professor Fred Hilmer contemplated the reforms he was advocating he didn't anticipate two major supermarket chains doubling their market share. I am quite certain the law that followed didn't anticipate the extraordinary imbalance this would create between a big business retailer and a smaller businesses or grower in negotiating a fair price and terms for supplying goods and produce.²⁶

In fact Professor Hilmer warned the nascent Harper Review against “trying to solve the problem of the supermarkets or the problem of the petrol stations or the problems of small business or the problems of rural areas.”²⁷ But, given this history, it is not surprising that in announcing that the Government would implement the Harper Review's recommendation on section 46, the Prime Minister said:

We are reforming our competition laws to promote greater protection and encouragement for small and medium businesses.²⁸

Does competition law need a purpose?

Eleanor Fox argues that the US debate on the goals of antitrust – which has a great deal in common with the Australian debate – tends to obscure the more important question of what we want from markets and from antitrust. She suggests that what we want is for markets to be robust, and for antitrust to create and preserve robust markets.²⁹

This approach is somewhat familiar to the Australian competition law, which in most circumstances focuses in practice on the preservation of competition rather than on its potential beneficiaries. The CCA is agreed to serve the interests of consumers, but outside the authorisation and notification context there is no defence or exception for conduct that benefits consumers, just as there is no direct prohibition of conduct that harms consumers. The Tribunal's extensive consideration of the nature of competition in QCMA remains illustrative of the scope and limits of the concept in Australian law:

Competition expresses itself as rivalrous market behaviour... In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.³⁰

The High Court's description of the role of competition in *Queensland Wire* remains equally relevant:

[T]he object of s.46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.³¹

That is, the immediate focus of the Australian law is clearly on rivalry and not on consumers. Competition may in principle be a means to the end of promoting consumer welfare, but if that has no practical consequence in Australian law, do we need to look beyond competition?

Even if we look no further, we still need to decide what competition is, and how to measure it. This may lead us back to the questions we are trying to avoid: do we measure competition by the number and variety of actual or potential competitors, or do we measure it by reference to efficiency and ultimately consumer welfare? Bork despaired at the many possible meanings of the term, including the process of rivalry; the absence of restraint; the state in which individual buyers or sellers cannot influence price, or the existence of fragmented markets preserved by protecting small businesses. He rejected all those meanings in favour of competition as a synonym for consumer welfare.³²

Fox concludes that the best approach may be to accept that antitrust is for competition and consumers, and notes that the US Antitrust Modernization Commission reached the same conclusion in 2007.³³ That Commission's report states simply that “antitrust law prohibits anticompetitive conduct that harms consumer welfare”.³⁴ This seems like a useful synthesis and a reasonable purpose for a misuse of market power law – though it may stretch the ordinary meaning of the language of our Act and the way it has been interpreted in the Australian jurisprudence.

3 The effect of the current section 46

To what extent has section 46 fulfilled its purpose? There is a view that escalated through the Harper Review and its aftermath that at least since the Rural Press case,³⁵ if not before, section 46 has become ineffectual. Rod Sims has described it as “unworkable”.³⁶ Bruce Billson describes it as “a dud” and “a hunting dog that won’t leave the porch.”³⁷ Former ACCC Chair Allan Fels has called it “an embarrassing exception” to the prevailing international position.³⁸

Some of these claims can be tested. By our count there have been 20 section 46 cases brought by the TPC and ACCC since the landmark Queensland Wire v BHP case.³⁹ It won the section 46 element in 12 cases, or 60%. It withdrew three and lost five – Rural Press,⁴⁰ Universal Music,⁴¹ Boral,⁴² Cement Australia,⁴³ and Pfizer.⁴⁴ But the Commission usually brings alternative causes of action in relation to the same complaint, and if those are taken into account it has overall won 17 cases, or 85%. It has withdrawn one action and has only lost two cases outright – Boral and now Pfizer, which has been appealed to the Full Federal Court with judgment reserved.

Year	Defendant	s46	SMP	T/A	Purpose	Overall	Other sections
1990	Carlton & United Breweries	Won	Y	Y	Y	Won	s46 only
1991	CSR	Won	Y	Y	Y	Won	s47
1994	Pioneer Concrete	Won	Y	Y	Y	Won	s46 only
1997	Bureau of Meteorology	Won	Y	Y	Y	Won	s46 only
1997	Darwin Radio Taxi Co-op	Won	Y	Y	Y	Won	s45
1997	Garden City Cabs	Won	Y	Y	Y	Won	s45
2003	Qantas	W/D				W/D	s46 only
2003	Boral	Lost	N	N	Y	Lost	s46 only
2003	Universal Music	Lost	N	N	Y	Won	s47
2003	Safeway	Won	Y	Y	Y	Won	s45
2003	Rural Press	Lost	Y	N	Y	Won	ss45 & 4D
2004	Fila	Won	Y	Y	Y	Won	s47
2005	Eurong Beach Resort	Won	Y	Y	Y	Won	ss45, 4D & 47
2007	Knight & Ross	W/D				Won	s45
2008	Baxter Limited	Won	Y	Y	Y	Won	s47
2010	Cabcharge	Won	Y	Y	Y	Won	s46 only
2011	Ticketek	Won	Y	Y	Y	Won	s46 only
2013	Cement Australia	Lost	Y	N	Y	Won	s45
2014	Pfizer	Lost	Y	Y	N	Lost	s47
2015	Visa	W/D				Won	s47

There have also been more than 50 private section 46 actions since Queensland Wire,⁴⁵ and a number of them have been critical to the development of the jurisprudence: Robert Hicks v Melway,⁴⁶ Pont Data v ASX,⁴⁷ News v Australian Rugby League,⁴⁸ NT Power v Power and Water Authority⁴⁹ and Seven v News.⁵⁰ Successes in private actions are less common and a certain proportion of these claims are struck out. But there have been notable successes including Pont Data,⁵¹ O’Keeffe v BP,⁵² NT Power⁵³ and of course Queensland Wire.⁵⁴ And there have been other cases where a private party has obtained an interlocutory injunction and the case has subsequently settled.

This does not necessarily seem like an unworkable provision. And yet there is little doubt that dissatisfaction has been growing over a long period. Where has it come from?

Queensland Wire: a new beginning

Amendments to the TPA in 1986 lowered the threshold test from substantial control of a market to substantial power in a market, and made it clear that purpose could be inferred from all the circumstances. As Peter Shafron notes, the 1986 amendments had a strong flavour of small business protection, with their genesis in the Small Businesses and the Trade Practices Act report prepared in 1979 by Gaire Blunt's Trade Practices Consultative Committee.⁵⁵ That report considered that:

[T]he primary thrust of the competitive provisions of the Act should be towards efficiency. However, there should be protection of small firms from the predatory conduct of other firms with any substantial degree of market power to support such conduct, irrespective of their size. While small business preservation is not necessarily a desirable economic end in itself, it may well be desirable for social, economic or political reasons. Without protection, firms possessing substantial market power have well been able to insulate themselves from competition from small firms by driving them from markets or by preventing them from entering markets.⁵⁶

Shortly after the amendments took effect, the Queensland Wire⁵⁷ case appeared to herald a new age of section 46 enforcement possibilities. BHP was the only Australian manufacturer of Y-bar, which it used to make star picket posts for rural fencing. Queensland Wire wanted to buy Y-bar from BHP to make its own star pickets, but BHP refused to sell it Y-bar at a reasonable price.

Mason CJ and Wilson J found that BHP had substantial power in the market for steel and steel products, and that in constructively refusing to supply Y-bar it had taken advantage of that power:

If BHP lacked that market power – in other words, if it were operating in a competitive market – it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.⁵⁸

Deane J reached the same conclusion slightly differently, finding that BHP had the purpose of preventing Queensland Wire from becoming a manufacturer or wholesaler of star pickets and that:

That purpose could only be, and has only been, achieved by such a refusal of supply by virtue of BHP's substantial power in all sections of the Australian steel market as the dominant supplier of steel and steel products.⁵⁹

That is, while Mason CJ and Wilson J found that BHP would be unlikely to engage in the conduct without its market power, Deane J found that BHP would be unable to achieve its purpose without that market power. It is perhaps unfortunate that these and other tests have been viewed as alternative, rather than complementary, tests for the taking advantage of market power.

Melway: a fork in the road

In 2001 the High Court had a chance to build on its work in Queensland Wire⁶⁰ in another case involving a refusal to supply. Melway was the publisher of the most popular street directory in Melbourne, which it distributed through a number of wholesalers, each responsible for a retail segment. Robert Hicks had been Melway's sole distributor to automotive parts retailers, until Melway chose another wholesaler for that segment and terminated its arrangements with Robert Hicks.

The High Court decision again centred on the "take advantage" element. The High Court majority referred to the Queensland Wire case and found that:

A majority of the Court considered that the way to test whether BHP was taking advantage of its power was to ask how it would have been likely to behave in a competitive market.⁶¹

However, it also considered that:

[I]n a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power.⁶²

Since Melway had operated its exclusive distribution system since long before it had market power, the High Court majority found that maintaining the system was not an exercise of its market power.

Kirby J dissented, considering that Melway could not and would not have refused to supply the substantial volume of street directories requested by Robert Hicks in a competitive market.

In the present context it is worth asking whether Melway is properly a section 46 case at all.⁶³ Unlike the situation in *Queensland Wire* – and in the US and European cases Kirby J cited in his dissent – Melway was not vertically integrated, and did not operate in the market in which competition was arguably affected. This appears to be a vertical restraint and not an example of exclusionary conduct.

Boral and Rural Press: a wrong turn?

If Melway suggested that the High Court’s approach in *Queensland Wire* might not be as simple as it seemed, 2003 began and ended with two further High Court cases that raised additional questions about the potential of the section.

Boral was essentially a predatory pricing case.⁶⁴ Boral had around 30% of the Melbourne market for concrete masonry products and had a number of competitors of similar size. A downturn in the construction market led to a protracted price war. Boral considered exiting the market but decided to hang on, knowing that its competitors would be in the same position and hoping one of them would exit first. The ACCC argued that, in pricing below its costs and increasing its capacity during the price war, Boral had taken advantage of substantial market power.

The Full Federal Court found that Boral had substantial market power and a proscribed purpose. On appeal, the High Court majority considered that Boral’s pricing had sometimes fallen below its variable cost but only in response to market conditions; and that it had no prospect of recouping any losses by charging supra-competitive prices after one or more of its competitors had left the market. It concluded that Boral did not have substantial market power could not have taken advantage of any market power. Kirby J dissented.

Rural Press was initially investigated as a market-sharing arrangement until the unilateral aspects of the conduct became clear.⁶⁵ Rural Press published regional newspapers in many parts of Australia, including the Murray Valley Standard which was the only newspaper published in the Murray Bridge area. Waikerie Printing published a similar regional newspaper, the River News, in an adjacent area. Following a restructure of council areas, Waikerie decided to extend the circulation of the River News into part of the Murray Bridge area. Rural Press told Waikerie that unless it withdrew from that area, Rural Press would distribute a new regional newspaper – perhaps for free – in the Waikerie area. Waikerie Printing withdrew from Mannum, and Rural Press did not expand into the Waikerie area.

The High Court majority found that the parties had entered into an illegal market-sharing arrangement but did not find a breach of section 46. It considered that Rural Press had a substantial degree of market power and a proscribed purpose, but did not consider that it had taken advantage of that market power. It noted that the “take advantage” element specifically requires a use of market power, and not simply a purpose of protecting that market power:

To reason that Rural Press and Bridge took advantage of market power because they would have been unlikely to have engaged in the conduct without the “commercial rationale” – the purpose – of protecting their market power is to confound purpose and taking advantage.⁶⁶

That is, the High Court majority explicitly rejected a “would” test and insisted on the “could” test that it said it had applied in *Melway*. However, the majority in *Melway* appears to have used “could” and “would” interchangeably, and endorsed the “would” test in *Queensland Wire*. The majority also left open the possibility that the “take advantage” test could also be satisfied if the market power materially

facilitated the conduct, a possibility also acknowledged by the High Court in *Rural Press*:

The Commission failed to show that the conduct of Rural Press and Bridge was materially facilitated by the market power in giving the threats a significance they would not have had without it. What gave those threats significance was something distinct from market power, namely their material and organisational assets.⁶⁷

Kirby J dissented, arguing that the threats were only made because Rural Press had market power to protect:

If Rural Press and Bridge did not enjoy substantial market power in the Murray Bridge market, they would have faced competitive restraints from other suppliers. Such restraints would have deprived them of any significant benefit from procuring an undertaking from Waikerie to withdraw from the Murray Bridge market. The only way in which the conditional threats made commercial sense, therefore, was because Rural Press and Bridge had enjoyed a near monopoly in the Murray Bridge market and were seeking to restore that monopoly position by taking advantage of their market power.⁶⁸

It certainly seems arguable that if the Murray Bridge market had been workably competitive, rural Rural Press would have no reason, and would not be likely, to threaten a new entrant in that market. Only the narrowest interpretation of the “take advantage” test – confined to examining what would be possible, rather probable or profitable, without market power – would excuse that conduct in those circumstances. Such a narrow test does not appear prior to *Rural Press* and, despite initial concerns and some recent characterisations of the law, has not been applied in any judgment since.

2007 and 2008 amendments

The Boral decision prompted the Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business,⁶⁹ which also considered the *Rural Press* decision. The Inquiry recommended amending section 46 to lower the “substantial degree of power” threshold arguably raised in *Boral* (to the extent that it required freedom from competitive constraint), and broaden the “take advantage” element arguably narrowed in *Rural Press* (to the extent that it required an examination of what a firm without market power could do). The Inquiry also recommended a sharper focus on predatory pricing, allowing the court to consider below-cost pricing but not requiring the capacity to recoup the losses resulting from a predatory pricing strategy.

The recommendations inspired separate bills from the Government and from Family First Senator Steve Fielding. Both bills were referred to the Standing Committee on Economics, which endorsed the Government’s bill and recommended against the Fielding Bill. Senator Barnaby Joyce dissented from the Committee’s report, arguing that the Government bill was ineffective and that:

Competition in the market must be protected from large market players destroying small businesses via financial and pricing powers.⁷⁰

Senator Joyce proposed an alternative amendment prohibiting a corporation with substantial market share selling below a relevant measure of cost for a sustained period and for a proscribed purpose. This was the “Birdsville amendment” and was adopted by the Senate when the bill came back before it in September 2007.

More of the inquiry’s recommendations were introduced in the Trade Practices Legislation Amendment Act 2008,⁷¹ which failed to return the Birdsville amendment to more familiar economic concepts but expanded the “take advantage” element to allow a Court to consider:

- a. whether the conduct was materially facilitated by the corporation’s substantial degree of power in the market;
- b. whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
- c. whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; and

- d. whether the conduct is otherwise related to the corporation's substantial degree of power in the market.⁷²

Shortly after the 2008 amendments were enacted, Federal Court Justice Middleton considered that section 46(6A) had probably been helpful and may have led to a different outcome if Rural Press were decided again:

It makes it clear that the “higher” threshold connection is not required, and sets out a variety of factors which the court may consider, synthesising strands of analysis from the previous case law... the factors set out in s 46(6A) provide some much needed clarification to this area of competition law... Would the list of factors in s 46(6A) have affected the outcome of Rural Press? Probably, yes.⁷³

Katharine Kemp considers that the amendments have had some effect on the interpretation of the “take advantage” element:

The addition of s 46(6A), it must be admitted, has materially improved the interpretation of “taking advantage”. It is now clear that it is not necessary to prove that a firm in a competitive market “could not” engage in the conduct in question: s 46(6A) permits courts to take account of a broader range of factors in determining whether a firm has taken advantage of its market power.⁷⁴

Bill Reid considers that the even the broadest consideration set out in the amendments – whether the conduct is “otherwise related to” market power – does not overturn the need to establish an active engagement or use of market power, and that:

[I]t is unlikely that the new para 46(6A)(d) upsets this basic element or indeed, the High Court's findings in Rural Press, to the effect that an endeavour to protect market power (without having used it) may not suffice to make out a “taking advantage” of that power.⁷⁵

However, Katharine Kemp has further argued that the classic example of conduct not historically considered a taking advantage of market power – French J's famous arsonist hired to burn down a competitor's factory – would in fact be a breach of section 46:

[O]n a proper interpretation of s 46(1), now read with s 46(6A), a firm takes advantage of its substantial market power when it engages in conduct which is profitable because of that power and not because the conduct is efficient in economic terms...

It must be acknowledged that the firm engaged in the relevant conduct because it expected to gain from the resulting market power (that is, the protection or enhancement of its market power as a result of the conduct), rather than from any increases in efficiency. The resulting market power is the source of the gain. However, the dominant firm's existing substantial market power made gains by such methods both more probable and more substantial.⁷⁶

Viewed this way, conduct that maintains or increases a firm's substantial market power may well take advantage of that market under section 46, even if the method employed to maintain or increase market power does not by itself require a use of that market power. This requires a broader concept of “use” than is suggested by Bill Reid, by Rural Press and perhaps by the ordinary meaning of the word. However, as discussed below, in Europe the courts have interpreted the legislative term “abuse” to encompass similarly broad connections with market power. Even in Australia, the courts' consideration of whether a firm without market power would be likely to engage in the same conduct suggests a more expansive and less literal approach to the concept of “use”. This suggests that the language of section 46(6A) would not necessarily be read down and could well lead to a different result if Rural Press were decided again – or if French J's arsonist were ever brought to justice.

However, when the Harper panel came to consider the “take advantage” element, it gave the amendments short shrift:

Following Rural Press, Parliament amended section 46 in an attempt to explain the meaning of “take advantage”. It is doubtful that the amendments assisted.⁷⁷

Recent cases

Even after Rural Press, a number of section 46 cases were successfully brought by the ACCC and private parties. Although these cases applied the law as it was before the 2008 amendments, the courts consistently took a broader approach to the “take advantage” than the narrow “could” test applied in Rural Press.

For example, in *NT Power v PAWA*, the High Court found that the Power and Water Authority had taken advantage of its market power in refusing to grant NT Power access to its electricity transmission and distribution infrastructure, since:

[I]f PAWA had been operating in a competitive market for the supply of access services, it would be very unlikely that it would have been able to stand by and allow a competitor to supply access services.⁷⁸

In *RP Data v State of Queensland*, the Federal Court found that in ceasing to supply real estate data to RP Data, the State of Queensland had taken advantage of its market power, answering in the affirmative the question:

[W]as the conduct of the respondent taking advantage of its market power in withdrawing the supply of the Excluded Data, such that an entity with no substantial degree of market power in the Wholesale Market would not, as a matter of commercial judgment, engage in that conduct?⁷⁹

And in *ACCC v Baxter Healthcare* the Full Federal Court found that Baxter had taken advantage of its market power in the sterile fluids market by bundling those sterile fluids with the peritoneal dialysis (PD) fluids it supplied in competition with other providers:

Baxter was taking advantage of its market power. Had there been any serious competitor in the sterile fluids market, Baxter could not rationally have made what appears to have been an unrealistically high item-by-item price for sterile fluids. It would have been constrained from doing so by the competition in the market.⁸⁰

The ACCC also concluded a number of section 46 actions by consent, including *Fila* (exclusive dealing),⁸¹ *Eurong Beach Resort* (predatory pricing),⁸² *Cabcharge* (refusal to deal and predatory pricing)⁸³ and *Ticketek* (refusal to deal).⁸⁴

In fact, since Rural Press the ACCC has only lost two section 46 cases, both at first instance: *Cement Australia* in 2013 and *Pfizer* in 2015. It won *Cement Australia* on section 45, securing \$18.6 million in penalties. It lost *Pfizer* altogether – the only time that has happened other than *Boral* – and has appealed that decision.

Cement Australia

Cement Australia bid on, and won, two contracts to acquire flyash from power stations to refine, classify and supply to customers for use in the production of cement. It won both contracts, which gave it preferential rights to most of the relevant supply in the area. The Court found that it bid on both contracts for the purpose of meeting its ongoing requirements and providing a diversified supply, since it had no guarantee of winning either contract, and one of the contracts was for an unproven source of flyash. There was also evidence that management had the secondary purpose of maintaining *Cement Australia*’s margins by restricting potential competitors from obtaining supply. But *Cement Australia* had not bid a significantly higher price for the contracts than other bidders, and the Court found that it had not taken advantage of its market power.

*Cement Australia*⁸⁵ was governed by the law before the introduction of the 2007 and 2008 amendments, including those designed to widen the “take advantage” element. Nevertheless, the Court considered a similar range of inquiries relevant to determining whether *Cement Australia* had taken advantage of its market power, including whether a firm without market power could profitably have engaged in the same conduct, and whether conduct was made easier or materially facilitated by the market power. The Court also made it clear that the counterfactual analysis must focus on the particular conduct in question, and not on forms or categories of conduct. This nuance has not always been observed in the popular characterisation of the “take advantage” test.

Criticism of the case tends to focus on what is said to be an inconsistency: the Court found that provisions of the contracts had the purpose and in some instances the effect of substantially lessening competition in breach of section 45; but it also found that in bidding for those contracts Cement Australia had not taken advantage of its market power in breach of section 46. If a corporation with market power engages in conduct that has the purpose or effect of substantially lessening competition, shouldn't that be a misuse of market power?

This criticism does not distinguish between the act of bidding for the contracts and the specific provisions of those contracts, which were treated separately by the court. It also ignores the fact that different and more demanding standards often apply to unilateral conduct in competition law frameworks around the world. As the Issues Paper for New Zealand's Targeted Review of the Commerce Act 1986 notes:

[S]ome have queried the coherence of the competition regime where unilateral conduct that does not contravene the prohibition in section 36, if carried out by two or more parties in concert, would contravene the anticompetitive arrangements prohibition in section 27 of the Act. They query if the same standard for anticompetitive conduct should apply to unilateral conduct as for multiple party conduct... On the other hand, of course, most competition law regimes treat multilateral conduct more harshly than unilateral conduct – having different results under different provisions is thus not unusual worldwide.⁸⁶

Pfizer

Pfizer⁸⁷ centred around the cholesterol-lowering drug atorvastatin, which Pfizer had patented and marketed as Lipitor as well as under its generic name. Pfizer's patent was about to expire and it entered into a number of loyalty rebate arrangements to encourage pharmacists to continue to acquire the Pfizer product rather than the flood of generic substitutes about to be unleashed. The ACCC took action under section 46 and also section 47.

Interestingly, in its section 47 claim the ACCC only argued there had been a purpose, and not an effect or likely effect, of substantially lessening competition. It is apparent that Pfizer's actions did not in fact have the effect – and may never have had any chance – of preventing

competition from the generic manufacturers or protecting Pfizer's atorvastatin market share, which dropped from 100% to 35% within a month of patent expiry. In these circumstances it is not easy to square this case with arguments that it is the effect of conduct, and not its purpose, that matters.

The Court also found that Pfizer did not have an exclusionary purpose proscribed by section 46 or a purpose of substantially lessening competition under section 47. Rather, Pfizer's purpose was to remain competitive in the atorvastatin market – and, indeed, to remain in the market. If Pfizer had other, more anti-competitive purposes, they were not substantial purposes.

The pleadings also depended on conduct that “cumulatively” comprised three distinct elements of Pfizer's strategy which only partly overlapped in time and, critically, did not all take place in the period in which the Court found that Pfizer had a substantial degree of market power.

Although Pfizer did not have a substantial degree of market power for the whole of the relevant timeframe, it had taken advantage of its market power in engaging in the rebate scheme and in imposing direct supply on its pharmacy customers. In its analysis, the Court referred explicitly to the section 46(6A) factors added by the 2008 amendments:

It may be accepted at the outset that in determining whether a corporation has taken advantage of a substantial degree of market power it is relevant to have regard to whether the corporation would have engaged in the conduct under scrutiny if it did not have that power: Competition and Consumer Act s 46(6A).⁸⁸

As in Cement Australia, the Court again insisted on examining the particular conduct rather than any general or abstracted form of the conduct:

In offering a rebate on its products, Pfizer may well have been pursuing no different strategy than was open to any other manufacturer of pharmaceutical products... To offer a rebate on products does not itself involve or require the taking advantage of any market power.⁸⁹

However, the Court found that in offering this particular rebate scheme, Pfizer did take advantage of its market power:

It was only by reason of the market power possessed by Pfizer in January 2011 that it could announce a rebate scheme without at the same time telling pharmacies how they could recover the monies that were accumulating for their benefit.⁹⁰

Although the ACCC lost the Pfizer case – at least until the appeal judgment is delivered – it did not lose it for any of the reasons advanced for changing section 46. Examining effect rather than purpose would have made no difference. The Court did not apply the narrow interpretation of the “take advantage” test attributed to Rural Press, but took into account the broader factors suggested by the new section 46(6A). It did not immunise conduct on the basis that a firm without market power could or would have engaged in similar conduct, but closely examined the particular conduct in question – and found a taking advantage of market power.

How is the section working?

Given this background, claims that the section is unworkable must be seen as largely rhetorical. The ACCC has failed in only two cases involving a section 46 claim – Boral and Pfizer – and in neither case did the section manifestly fail to distinguish between vigorous competition and anti-competitive exclusionary conduct, or fail to protect competition for the benefit of consumers. Both cases saw intense competition and low prices with no evidence of subsequent damage to consumer welfare.

Since the modern restatement of the law in *Queensland Wire*, the TPC and ACCC have won 17 of the 20 cases they have brought that included a section 46 claim – including eight of the nine cases brought in the years since Boral and Rural Press. Around twice as many private actions have been brought, and while these less often reach a successful final judgment, section 46 frequently forms the basis for interlocutory relief and plays a clear role in resolving disputes.

The ACCC has argued that there have been cases not brought or investigations not pursued because they do not have sufficiently high prospects of success under the current law.⁹¹ Clearly the ACCC is not in a position to disclose details of these investigations. But that makes it difficult to determine whether these are cases that should be brought. There are doubtless cases that small businesses think should be taken but that the ACCC declines. Many would agree that a failure to protect less efficient businesses from vigorous competition, or suppliers from conduct that is not exclusionary, is not a defect in the current section 46 but a necessary element in any misuse of market power law.

Alignment with international approaches

Most countries now have a prohibition against misuses of market power or abuses of dominance, but they vary widely. Canada requires an anti-competitive purpose and an effect of substantially lessening competition. Indonesia requires taking advantage of a dominant position for an improper purpose. China prohibits selling commodities at unfairly high prices or buying them at unfairly low prices. Malaysia prohibits buying up a scarce supply of resources required by a competitor without a reasonable commercial justification. South Africa prohibits both a number of specific exclusionary acts and exclusionary acts generally, with different burdens of proof and penalties for each. South Korea prohibits conduct that has the purpose of unjustly excluding competitors or unjustly and substantially harming consumers’ interests. And the competition statutes of the great antitrust jurisdictions of the United States and Europe are nothing like each other and give very little indication of the kind of conduct they have come to address.

The varying language of the world’s competition statutes would be irrelevant if the judicial interpretation of those laws were consistent. But while there has been a degree of convergence, there remain fundamental differences in approach and detail. While both the US and Europe would say that they protect competition, the US aligns “competition” more closely with consumer welfare and efficiency, while Europe focuses more clearly on protecting the process of rivalry itself. The US tends not to directly prohibit exploitative conduct such as monopoly pricing – though it prohibits exclusionary conduct that would allow exploitative conduct – while Europe and other jurisdictions modelled on its law have no hesitation in prohibiting conduct that is exploitative but not necessarily exclusionary.

This divergence has become more apparent as globalisation increases and the same transaction or conduct is assessed by authorities in different jurisdictions. The attempted merger of GE and Honeywell in 2000 is a watershed example. Approved by the US Department of Justice but blocked by the European Commission, it provoked a view in US commentators looking at Europe pithily expressed as: “You protect competitors; we protect competition”.⁹²

A similar dynamic has played out in subsequent cases. While, in the US, Microsoft was threatened with a break-up for bundling Internet Explorer with Windows, after appeals and settlement it was allowed to continue with its conduct and its structure. By contrast, in Europe it was required to create an unbundled version of Windows and pay billions in fines. Similarly, the Federal Trade Commission and the Canadian Competition Bureau have closed investigations into Google’s conduct in relation to search results,⁹³ while the European Commission is pressing ahead with Statements of Objections.⁹⁴

So there is considerable divergence in the world’s misuse of market power statutes and in the approaches of its courts and regulators. What happens when we compare some of our more controversial cases with similar scenarios in other jurisdictions?

Predatory pricing: Brooke Group and Boral

*Brooke Group v Brown & Williamson*⁹⁵ remains the leading statement of the modern law on predatory pricing in the United States, and provides a useful point of comparison to Boral.

Faced with declining cigarette revenues in the 1980s, Brooke Group’s subsidiary Liggett had developed a market segment for low-cost generic cigarettes in black and white packaging. Brown & Williamson introduced its own generic brand with similar packaging and wholesale prices that undercut Liggett’s. A price war ensued and Liggett took action against Brooke Group for predatory pricing. The Supreme Court affirmed that any claim required both proof of pricing below an appropriate level of cost and a dangerous probability of recoupment:

Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory

pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.⁹⁶

The High Court in Boral was careful to point out that recoupment was not a necessary element of a predatory pricing case under section 46. However, its finding that Boral had no expectation of recovering its losses by pricing above competitive levels in the future was relevant to its conclusion that Boral did not have or take advantage of substantial market power. McHugh J noted, citing a promising young economist:

As Mr Geoff Edwards has argued, “it is a contortion to find that a firm possesses substantial market power if the firm cannot use that power to obtain economic profits”.⁹⁷

Given that finding, it is unlikely that Boral would have been decided differently in the United States. Recoupment is not an explicit requirement in the European analysis of predatory pricing.⁹⁸ However, Article 102 only applies to firms in a dominant position, which the Courts have defined as:

[A] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.⁹⁹

Whether this is in effect any different from a substantial degree of market power, it is unlikely that Boral – or indeed any company unlikely to recoup its losses – would be in this position.

Buying up inputs: Weyerhaeuser and Cement Australia

Weyerhaeuser¹⁰⁰ is a useful counterpoint to Cement Australia and the argument that the Harper Review's section 46 would better capture exclusionary conduct such as buying up all essential inputs.

Weyerhaeuser was accused of using its dominant position in the alder sawlog market to bid up the price of sawlogs to reduce the profits of its rivals in the sawmill market and drive them out of business. The Supreme Court held that the predatory pricing analysis of Brooke Group applied equally to predatory bidding, whether that involved overpaying for inputs or overbuying inputs. It noted that:

There are myriad legitimate reasons—ranging from benign to affirmatively procompetitive—why a buyer might bid up input prices... A firm that has adopted an input-intensive production process might bid up inputs to acquire the inputs necessary for its process. Or a firm might bid up input prices to acquire excess inputs as a hedge against the risk of future rises in input costs or future input shortages... There is nothing illicit about these bidding decisions. Indeed, this sort of high bidding is essential to competition and innovation on the buy side of the market.

¹⁰¹

The Supreme Court held that in order to meet the Brooke Group standard, the plaintiff must prove that the bidding led to below-cost pricing of the predator's outputs, and also that it had a dangerous probability of recouping its losses through the exercise of monopoly power. The plaintiff conceded that it could not meet that standard and so the Supreme Court found in favour of Weyerhaeuser. It is likely that the facts in Cement Australia would have led to a similar result.

Rethinking international comparisons

These comparisons suggest that even in some of its most controversial cases, the Australian position is fairly closely aligned with that of the United States, perhaps slightly less so with Europe. Claims that Australia is an international outlier are exaggerated.

Even the argument that every other country has an effects test is a simplification. The Harper Review itself recognises that “internationally, competition laws have been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct”.¹⁰² Effects are rarely mentioned in statutes, but they are examined by courts – just as they are in Australia, according to Hill J's view in *Universal Music* that “the best evidence of subjective purpose will be objective effect.”¹⁰³

Despite the significant differences between misuse of market power laws and their judicial interpretations, a number of core elements may be discerned. These are:

- + a threshold requirement of market power – such as a dominant position in Europe, monopolization in the United States, and a substantial degree of market power in Australia;
- + a focus on exclusionary conduct – as developed by courts and regulators in the US and set out in the Australian legislation, though Europe also has a focus on exploitative conduct;
- + an examination of both purpose and effect – as set out in the Canadian legislation and expressed in a number of tests and defences in the US and European jurisprudence;
- + a connection between the market power and the conduct or its effect – whether the conduct increases or maintains market power, relies on market power for its exclusionary effect, or otherwise takes advantage of market power, as variously contemplated by the legislation and jurisprudence of the US, Europe and Australia in particular; and
- + protection for conduct that has an efficiency or legitimate business justification – as set out in the legislation of South Africa, developed in the jurisprudence of the US and Europe, and implied in the “take advantage” element in Australia.

A focus on these elements suggests that the current section 46 aligns closely with misuse of market power laws around the world – while the proposed section 46 removes a number of key elements and represents a significant divergence from international norms.

4 What is the likely effect of the proposed change?

If effect is the best evidence of purpose, it is also true that purposes can be used to predict likely effects.¹⁰⁴ However, predicting the effect of the proposed change to section 46 is made more difficult by the fact that, just as in the debates preceding the Sherman Act in the 1880s or the Trade Practices Act in the 1970s, the various proponents of the new section have had fundamentally different purposes – and even cross-purposes – for supporting it.

Many participants in the Harper Review and subsequent political process have argued that section 46 should be changed to better protect small businesses from larger competitors.¹⁰⁵ Others have argued that section 46 should be changed to better protect small suppliers from their larger customers.¹⁰⁶

The ACCC says that the proposed section 46 should not – and will not – protect small businesses from more efficient competitors or affect vertical relationships between suppliers and purchasers. Naturally, the ACCC would prefer a broad discretion to do its job, and to win every case it takes.

Big business agrees with the ACCC that section 46 should not protect small businesses from efficient competitors or larger purchasers. But it is concerned that the section may be broad enough to prohibit what small business and supplier advocates say it should and would do. Naturally, big business wants to operate without interference and to make money for its shareholders.

Whether the ACCC's goals or big business's goals are better aligned with the interests of consumers is a matter of opinion, but it is clear that both sets of goals play an essential part in the market system. And it is also clear that this is the most significant change to section 46 since it was first enacted.

Purpose and effect

Adding an effects test is significant, and retaining an alternative purpose test is even more significant. The Law Council argued persuasively to the Harper Review that, if an effects test were adopted, a purpose alternative should not be retained, particularly in the absence of a “take advantage” element:

The Committee is very concerned that a corporation with substantial market power may contravene the proposed provision simply where it is found to have the “purpose” of substantially lessening competition in a market. This risks prohibiting statements of hostile (but aggressively competitive) intent, rather than only anticompetitive conduct, by firms with substantial market power.¹⁰⁷

The Harper Review acknowledged “the force of this submission” but considered that the Law Council's concern was mitigated by “altering the focus of the prohibition from a purpose of harming a competitor to a purpose of substantially lessening competition.”¹⁰⁸ The Law Council did not agree that its concern was mitigated, and continued to advocate that purpose be removed from the recommendation.¹⁰⁹

The ease with which a purpose of harming competitors may lead to a purpose of substantially lessening competition is illustrated by the Universal Music case.¹¹⁰ In that case, two record labels were found to have the purpose of substantially lessening competition by discouraging retailers from using parallel imports, even though there was little prospect of an effect of substantially lessening competition and the conduct was directed at only a handful of retailers.

Internationally, purpose may be required in addition to an anti-competitive effect, or as evidence of a likely anti-competitive effect, but it is rarely if ever considered sufficient to establish liability without more. In Australia, the consequences of retaining a purpose alternative are exacerbated by the fact that a proscribed purpose does not need to be the only purpose or even a primary or dominant purpose: it only needs to be a substantial purpose – where

“substantial” may mean only “real or of substance and not insubstantial or nominal”.¹¹¹ And although purpose can be inferred from objective circumstances, it is subjective purpose that is relevant. As a result, even if the primary purpose and the effect of the conduct are legitimate, any other subjective anti-competitive purpose an officer or employee might accidentally write down – as long as it is real and not insubstantial – can place a company in breach of the law.

The effect-based alternatives are also broad. An effect does not need to be foreseeable to be prohibited. “Likely” does not mean more probable than not; it simply means more than a mere possibility. And “lessening competition” includes preventing or hindering competition. So if any conduct has a real and not insubstantial purpose, or an unforeseeable effect, or more than the mere possibility of an effect, of lessening, preventing or hindering competition in any market that is meaningful or relevant to the competitive process – it can be caught.

Taking out take advantage

Removing the “take advantage” requirement is a fundamental change. A misuse of market power test that does not require a use of market power, or in fact any connection with market power, will not align Australia with similar laws overseas. It also seems an overreaction to a single objectionable decision which does not appear to have affected subsequent decisions but has been addressed by significant – and as yet barely tested – legislative changes.

It is true that only Australia and New Zealand have an explicit “take advantage” element. But the term has its origin in the language of Article 86 of the Treaty of Rome, which used the French “d’exploiter de façon abusive” and German “missbräuchliche Ausnutzung”. Those terms were translated into English as “taking improper advantage” in the versions of the Treaty that were available in English before the United Kingdom joined the European Economic Community.¹¹² The same expressions were rendered as “abuse” in the official English documents. The Australian courts have long held that “take advantage” simply means “use”. And references to the use, misuse or abuse of market power or a dominant position are of course ubiquitous in competition laws and jurisprudence around the world.

Some decisions of the European Courts have suggested that there is no need to show a link between a dominant position and its abuse, noting that “the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty regardless of the means and procedure by which it is achieved”.¹¹³ However, this still discloses a requirement of connection: that is, that the conduct should strengthen the undertaking’s dominant position. This is similar to the position in the United States, where it is necessary to prove that “the reprehensible behaviour has contributed significantly to the achievement or maintenance of a monopoly.”¹¹⁴

Rural Press denied that conduct that protects market power but does not rely on market power can take advantage of market power. But this restriction is not necessarily reflected in subsequent decisions or by the 2008 amendments. Section 46(6A)(c) asks “whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market”. Is it likely that Rural Press would have threatened a new entrant if it did not have market power to protect?

Renato Nazzini argues that in Europe, the specific connection required by Article 102 is better characterised as a connection between the market power and the effect or effectiveness of the conduct in excluding competitors and harming consumer welfare:

Article 102, therefore, is not a prohibition of socially harmful conduct that applies only to dominant undertakings but is a prohibition of conduct that is socially undesirable because it is carried out by dominant undertakings... Any firm can refuse to supply a rival or grant retroactive discounts that result in incremental sales below cost. Dominance is a necessary condition for neither form of conduct. But it is a necessary condition for either form of conduct to reduce competition and harm long-term consumer welfare within the meaning of Article 102.¹¹⁵

This perspective appears to satisfy the insistence that the activities of a firm with substantial market power are to be examined through a “special lens”¹¹⁶ as well as the Harper Panel’s concern that the same conduct may or may not raise competition concerns depending on whether it is undertaken by a firm with market power.¹¹⁷ Critically, it does so without abandoning any connection between a corporation’s market power and the conduct to be prohibited.

By contrast, the Harper proposal is a prohibition of socially harmful conduct that applies only to corporations with a substantial degree of market power. While broadening the connection to market power required by section 46 – or clarifying the breadth of that connection – may align the section with international analogues, removing any connection altogether is inconsistent with the majority of laws internationally and is unsatisfying in principle.

The substantial lessening of competition test

Removing the exclusionary purposes and the “take advantage” element from section 46 leaves the identification of prohibited conduct to the “substantial lessening of competition” (SLC) test. The ACCC has said that the SLC test would inherently be limited to certain forms of conduct that exclude competitors.¹¹⁸ It would not prohibit ruthless competition that forced many rivals from the market and significantly increased concentration – even to monopoly.¹¹⁹ It would not apply to purely vertical arrangements such as powerful purchasers demanding low prices from their suppliers.¹²⁰

This seems like a great deal to ask of the SLC test. That test is most often applied in the merger context, where it is often satisfied by a substantial increase in concentration and indeed by the removal of a single competitor. The case law does not appear to provide any shortcuts, but requires a comparison between the future level of competition in the market with and without the conduct.

The QCMA case established that the level of competition in a market is largely a function of the structure of the market, and identified as the first two essential elements of market structure:

- + the number and size distribution of independent sellers, especially the degree of market concentration; and
- + the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market.¹²¹

In Baxter, Dowsett J surveyed the authorities on the SLC test and noted that:

- + whether changes in market concentration have the effect of lessening competition must be determined by reference to competitive characteristics in the market; and
- + the effect of the elimination of a competitor must also be addressed by reference to such characteristics.¹²²

Particularly in a market characterised by high barriers to entry, it is not obvious that conduct that may be innovative and competitive in the short term, but results in competitors exiting the market and not being replaced in the longer term, could never be found to have an SLC effect.

Rachel Trindade, Alexandra Merrett and Rhonda Smith agree that the SLC test itself does not suggest any particular form of conduct:

The ACCC Chairman captured a popular sentiment in his speech to the RBB Economics Conference in November this year when he dismissed criticism of the use of the SLC test in section 46, saying:

To be held to have substantially lessened competition you have to do something anti-competitive; pro-competitive behaviour, whatever the outcome, cannot be held to SLC...

To repeat, to SLC there must first be behaviour that could be seen as anti-competitive. There cannot be an SLC through competition on its merits.

Many people appear to agree with this general approach, but it's actually putting the cart before the horse... One simply cannot determine whether something is anticompetitive (or conversely "competition on the merits") without doing a proper competition analysis. The result of the competition analysis is what allows you to attach the label "anti-competitive" – in other words, conduct that substantially lessens competition in a market is anti-competitive. You can't start by characterising conduct as anti-competitive and then work backwards – that's exactly the type of error of reasoning our High Court has warned against.¹²³

In fact, the future "with and without" counterfactual test itself appears to prevent any focus on particular forms of conduct. Conduct that manifests vigorous competition in the present will not necessarily increase the level of competition in the future – and indeed may have a real chance of lessening competition in the future. Far from focusing on exclusionary conduct and exempting competition on the merits, the SLC test appears to explicitly ignore the form and the immediate effect of conduct, and judges all conduct according to the future with or without that conduct.

The forms of conduct most often identified as candidates for assessment under the law – bundling, discounting, exclusive distribution, securing supply of scarce inputs – can all be competitive actions with immediate efficiency and consumer benefits that are not reflected in a future "with or without" analysis, but may have a real chance of reducing

future rivalry in ways that will all too easily be reflected in that test. And even conduct that does not fall into these categories may be seen to have a real chance of substantially lessening competition if it leads to increased concentration and reduced rivalry in the future – particularly in a market with significant barriers to entry. In these circumstances the test could well protect inefficient competitors from conduct that benefits consumers.

It also seems possible that conduct that does not affect a competitor of the corporation with market power may still be seen to substantially lessen competition in that or any other market. Suppliers and their representatives have argued that the conduct of powerful purchasers can "have a serious impact on competition as they reduce incentives to compete and invest in new industries and products".¹²⁴

Even if the ACCC would not take these matters to court, the new law represents an opportunity for third parties to chance their arms. And a future ACCC could well interpret the test differently.

Cost and uncertainty

Effects tests in general are considered to be relatively costly tests to apply, depending on the nature of the effect that is to be measured. As the International Competition Network has said:

The effects-based approach tends to lead to a more accurate assessment of a particular case. However, because this approach generates fact-driven outcomes, it tends to lead to greater delays and costs for the agency and those under investigation. The approach also makes it more difficult for business planners and counsel to predict whether specific conduct is likely to result in an infringement decision. This uncertainty may result in a chilling effect, as firms avoid conduct that may in fact be procompetitive and lawful.¹²⁵

The US Department of Justice examined a test balancing effects on consumer welfare and concluded:

The Department believes that it is better for long-run economic growth and consumer welfare not to incur the costs and errors from attempting to quantify and precisely balance procompetitive and anticompetitive effects as required under this test.¹²⁶

By requiring the court to have regard to the extent to which conduct increases and lessens competition, the Harper proposal appears to involve a balancing test likely to incur the same costs and errors. It is further complicated by the fact that the proposed law will prohibit conduct on the basis of purpose alone or effect alone, while the mandatory factors appear to provide that both pro-competitive and anti-competitive purposes and effects must be considered in every analysis.

As in the United States and Europe, the Australian courts may over time develop rules and shortcuts that will reduce the need to engage in a full balancing of effects and purposes. For example, in the United States the rule in *Brooke Group* provides that predatory pricing requires pricing below an appropriate cost and a dangerous probability of recoupment.¹²⁷ Of course, the Australian courts' attempts to improve clarity by introducing similar concepts have not always been welcomed – which is why we now have section 46(1AAA), which provides that a likelihood of recoupment is not necessary.

Like the other changes to section 46 over the years, the Harper proposal is largely a response to decisions of the court that have been seen as objectionable. This time, we are not tweaking the jurisprudence but wiping the slate clean.

It will be interesting to see whether the Australian courts will seek to introduce new principles that will help clarify the new section and avoid the need to undertake a complete purpose and effect balancing inquiry in relation to every case. And it will be even more interesting to see whether the legislature will accept the decisions of the courts, and when they will start amending the new section. Given the ongoing disagreement about the purpose of section 46, it should not be too long.



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