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Misuse of Market Power – Small Business versus Big Business

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A key provision of Australia's competition law is s 46 of the *Trade Practices Act* 1974 (Cth) (the TPA), which targets the 'misuse of market power' by corporations with a substantial degree of power in an Australian market. In recent years, s 46 has been the subject of an interesting array of High Court decisions and, spurred by the ongoing policy battle between 'big business' and 'small business', at the centre of recurring governmental inquiry and review.

Two such reviews of the TPA and s 46 are the Dawson Review[1] and the Senate Review.[2] The Dawson Review, which undertook a general evaluation of the competition provisions of the TPA in 2002 and released its findings in January 2003, recommended no changes to s 46. In contrast, the 2004 Senate Review, expressly charged with examining the effectiveness of the TPA in protecting small business, recommended a broad range of s 46 reforms.

This article considers developments in the judicial interpretation of s 46 in the High Court, together with recent recommendations for reform of the provision – touted as balancing the interests of small business with big business – and consequential amendments to the section, both enacted and proposed.

Elements of section 46

Entitled 'Misuse of Market Power', s 46 is found in Part IV of the TPA, which is headed 'Restrictive Trade Practices'. Section 46(1) provides:

> 'A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.'

Three essential elements must be satisfied before a contravention of s 46 will arise: (i) a corporation with a substantial degree of *market power*; (ii) must *take advantage* of that power; (iii) for a *purpose* prohibited by s 46(1)(a), (b) or (c).[3]

Significant cases

The interpretation of s 46 has featured in five decisions of Australia's High Court, considered in chronological order below. Interestingly, of the three essential elements of the provision, most judicial attention has focused on the requirement that the respondent corporation must 'take advantage' of its market power.

1. *Queensland Wire*

In 1989, *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[4] ('*Queensland Wire*') became the first s 46 case to reach the High Court.

The facts of the case are as follows. BHP, responsible for approximately 97% of Australia's steel output, produced Y-bar,[5] which it sold exclusively to its wholly owned subsidiary Australian Wire Industries (AWI). AWI produced fence posts from the Y-bar and sold these as a producer. Queensland Wire Industries (QWI) sought supply of the Y-bar produced by BHP in order to produce fence posts and compete against AWI in the rural fencing market. BHP offered to supply the Y-bar at prices which were so high that its conduct amounted to a constructive refusal to supply.

On appeal to the High Court, QWI successfully claimed that BHP had breached s 46. The Court accepted that BHP had a substantial degree of power in the Australian market for steel and steel products (based on its monopolistic market share of 97%), and had taken advantage of this power to deter or prevent QWI from engaging in competitive conduct in that market.[6]

With respect to the element of 'take advantage', the High Court determined that this was a neutral concept (so that proof of hostile intent is not required), with a meaning equivalent to 'use'.[7] In order to establish whether BHP had 'used' its substantial market power, the Court analysed the likely actions of BHP had the company not possessed such power. The Court reasoned that had BHP been operating in a 'competitive market', it would have been unlikely to 'stand by' while QWI secured supply from another firm. It followed, therefore, that BHP had used, or taken advantage of, its market power in refusing to supply QWI.[8]

2. *Melway*

Twelve years after *Queensland Wire*, the case of *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[9] ('*Melway*') presented the High Court with its next opportunity to consider s 46.

In this case, Melway Publishing produced a street directory for the Melbourne metropolitan area and bad captured 80-90% of the local street directory market. The company attributed its success, in part, to its wholesale distribution system, under which it supplied directories to a limited number of distributors who were authorised to sell those directories only in the particular market segments allocated exclusively to them. Auto Fashions (the name under which Robert Hicks Pty Ltd traded) had been the appointed distributor for the automotive parts segment of the market for a number of years when Melway Publishing terminated its distributorship. On being informed by Auto Fashions that it nevertheless wished to obtain copies of the directory (30,000-50,000 per annum) for sale to the retail market, Melway Publishing refused supply.

The High Court held on appeal that Melway Publishing was not in breach of s 46. Although it was not disputed that

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the company had a substantial degree of power in the wholesale and retail market for street directories in Melbourne (based on its 80-90% market share), the Court found that Melway Publishing had not taken advantage of this power in refusing to supply the street directories to Auto Fashions.[10]

In reaching this conclusion, the High Court specifically endorsed the 'competitive market' test of 'take advantage' espoused in *Queensland Wire* – that a firm should be regarded as having taken advantage of market power when it has behaved differently from the manner it which it would be likely to behave if it were operating in a competitive market.[11]

However, the Higb Court also noted that it might be equally useful to ask whether the firm's market power 'materially facilitated' the conduct in question.[12] In this regard, the Court pointed out that s 46 requires 'not merely the co-existence of market power, conduct, and proscribed purpose, but a *connection* such that the firm whose conduct is in question can be said to be taking advantage of its power.'[13]

The need for a causal nexus between a corporation's market power and its conduct had been explained very clearly by French J in tbe earlier Federal Court case of *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*:[14]

> 'If a corporation with substantial market power were to engage an arsonist to burn down its competitor's factory and thus deter or prevent its competitor from engaging in competitive activity, it would not thereby contravene s 46. There must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power.'[15]

The point is this: if a firm with market power hires an arsonist to burn down a competitor's factory, the 'causal connection' required by s 46 is missing, as market power is not required to hire an arsonist.

In the *Melway* case, it was the lack of any causal link between Melway Publishing's dominant market position and its refusal to supply Auto Fashions which justified the Court's conclusion that Melway Publishing had not taken advantage of its market power.

3. *Boral*

In February 2003, the High Court's judgment in *Boral Besser Masonry Ltd v ACCC*[16] *('Boral')* provided a useful reminder of the primacy of the market power element in establishing a breach of s 46.

The case concerned Boral Besser Masonry Ltd (BBM), a manufacturer of concrete masonry products which, over a period of 18 months, sold a number of its products below cost. The Australian Competition and Consumer Commission (ACCC) took action against BBM, alleging that the company had misused its market power by engaging in 'predatory pricing'.

On appeal, however, the High Court concluded that the threshold requirement for the application of s 46 was not satisfied in this case, as BBM did not have a substantial degree of power in Melbourne's concrete masonry products market.[17] In these circumstances, with the first element of the provision not established, the s 46 claim necessarily failed.

4. *Rural Press*

Rural Press Ltd v ACCC[18] *('Rural Press')* was decided by the High Court in December 2003, providing the fourth occasion for the Court to comment on s 46.

To briefly summarise the facts of this case, Waikerie Printing House Pty Ltd, a small publisher operating in the Riverland market in South Australia, sought to enter the nearby Mannum market, where Rural Press Ltd had been the sole newspaper publisher. Rural Press threatened Waikerie Printing by stating that it would establish a rival newspaper in the Riverland market unless Waikerie Printing withdrew from the Mannum market. Waikerie Printing promptly retreated, and the ACCC alleged that Rural Press had breached s 46.

The High Court dismissed the ACCC's case on appeal. There was no dispute that Rural Press had a substantial degree of power in a number of regional newspaper markets, including Mannum, so the critical finding by the Court was that the company had not taken advantage of this power in breach of s 46.[19]

As between the 'competitive market' (*Queensland Wire*) and 'materially facilitated' (*Melway*) tests of 'take advantage', the High Court in *Rural Press* favoured the latter approach.[20] However, in the Court's view, the ACCC had failed to show that the conduct of Rural Press in this case was materially facilitated by its market power.[21] Instead, the Court concluded that what gave the company's threats significance was 'something distinct from market power, namely [its] material and organisational assets'.[22] Hence there was no contravention of s 46.

5. *PAWA*

The High Court's 2004 decision in *NT Power Generation Pty Ltd v Power and Water Authority*[23] *('PAWA')* is its most recent consideration of s 46.

There, PAWA, a statutory authority established as a body corporate by the *Power and Water Authority Act* 1987 (NT), generated electricity and distributed it, across its own power transmission lines, for sale to consumers in the Northern Territory. NT Power Generation Pty Ltd wished to sell electricity, produced by its own generation facilities, to persons in the Northern Territory, in competition with PAWA. NT Power sought access to PAWA's electricity distribution infrastructure, as the cost of constructing its own transmission lines and associated facilities was prohibitive. After months of negotiations, PAWA refused to grant the access which had been sought. NT Power claimed that this refusal amounted to a misuse by PAWA of its market power.

On appeal, the High Court concluded that PAWA clearly had taken advantage of its monopoly power in the market for the sale of electricity in the Northern Territory to prevent NT Power from becoming a supplier of electricity.[24]

Returning to the 'competitive market' test of 'take advantage' articulated in *Queensland Wire*, the High Court asked in this case how PAWA would behave in a hypothetical competitive market for the supply of electricity distribution and transmission facilities if PAWA were asked to make its infrastructure available to a third party who wished to compete with PAWA in the downstream electricity supply market.[25] The Court's answer was that a profit-maximising firm would not 'stand by' and allow a competitor to supply the third party with distribution and transmission facilities, without at least bidding for that business.[26] In other words, PAWA would not simply refuse to grant access to its infrastructure.

Stakeholders: 'Big' and 'small' business

The decisions outlined above have been criticised by small business for placing 'too great an emphasis on the role of s 46 in promoting and fostering competition without giving due weight to its role in protecting competitors.'[27]

Small business would argue that, given the text of s 46, there should be an increased focus on individual competitors. Section 46 is distinct from other provisions in Part IV of the TPA, in that it does not contain a test of 'substantially lessening competition' and hence no explicit protection of competition *per se*.[28] Further, the proscribed purposes in s 46(1) all involve conduct against competitors, or prospective competitors, rather than the institution of competition.

However, neither the legislature nor the courts have shown sympathy for these arguments.

In fact, s 2 of the TPA specifically provides that '[t]he object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.' This conforms to the fundamental precept of market liberalism that legislation should not artificially perpetuate inefficient and otherwise unsustainable entities, but rather create incentives for continuing improvement.[29] Thus the TPA as a whole, including s 46, is designed to protect the institution of competition, rather than individual competitors.[30]

Consistent with this approach, the High Court in *Queensland Wire* emphasised that the objective of s 46 is and should remain 'the protection and advancement of a competitive environment and competitive conduct.'[31] This approach was confirmed in *Melway*, where the High Court was emphatic that s 46 'aims to promote competition, not the private interests of particular persons or corporations.'[32]

A market which has a high degree of competition ensures that consumers obtain the best quality goods, for the lowest prices. If weaker or less efficient firms are forced to leave the marketplace because they cannot compete, that is merely a harsh reality of a competitive marketplace.

The High Court has recognised that competition is 'ruthless' and involves injury to competitors as 'the inevitable consequence of the competition s 46 is designed to foster.'[33] In the face of this reality, it is far too simplistic to characterise s 46 as a 'David versus Goliath' provision, and hold blindly to the 'belief that David is virtuous and needs protection from an overbearing Goliath.'[34]

Reform of section 46

Section 46 was amended in significant respects by the *Trade Practices Legislation Amendment Act (No 1)* 2007 (Cth). This was an initiative of the Howard Government aimed at giving effect to certain recommendations made by the Senate Review three years previously. These amendments, summarised below, were largely a reaction to perceived dissatisfaction with the High Court's *Boral* and *Rural Press* decisions.

- Section 46(1) was amended to clarify that a corporation must not take advantage of its market power in any market, not just the particular market in which the corporation has substantial market power. This proposition had been implicitly excluded by the High Court in *Rural Press*.
- A second prohibition was incorporated into s 46, namely s 46(1AA) which prohibits a corporation that has a substantial share of a market from supplying, or offering to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services for any of the purposes prohibited by s 46(1). Note that the familiar concepts of 'substantial power in a market' and 'taking advantage' of such power are absent from this provision.
- Accompanying s 46(1AA) was s 46(1AB) which provides that for the purposes of determining whether a corporation has a 'substantial share of a market', the court may have regard to the number and size of the competitors of the corporation in the market.
- Although existing s 46(3) provides that, as one indicator of market power, a court shall have regard to how a corporation is constrained by competitors, suppliers, and acquirers of its product, four new provisions were enacted to help inform the question of whether a corporation has a substantial degree of market power:
  - Section 46(3A) – which permits a court to have regard to power resulting from any contracts, arrangements or understandings that the body corporate has with another party or parties.
  - Section 46(3B) – which states that ss 46(3) and (3A) do not limit the matters to which regard may be had in assessing a corporation's degree of market power.
  - Section 46(3C) – which specifies that a corporation may have a substantial degree of power in a market even though: (a) the body corporate does not substantially control the market; or (b) the body corporate does not have absolute freedom from constraint by the con-

duct of competitors, suppliers, and acquirers of its product.

* Section 46(3D) – which stipulates that more than one corporation may have a substantial degree of power in a market.

- Section 46(4A) was passed to make predatory pricing a clearer target of s 46(1), by expressly permitting a court to have regard to below-cost pricing strategies on the part of powerful corporations.

On 28 April 2008, only seven months after the 2007 Amendment Act took effect, the new Rudd Government announced a series of further amendments to the TPA aimed at protecting small business from anti-competitive conduct. Two months later, on 26 June 2008, the *Trade Practices Legislation Amendment Bill* 2008 was introduced into Federal Parliament. The Bill has yet to pass the Senate.

In summary, the changes proposed by the 2008 Bill are as follows:

- Amend s 10 to require that at least one Deputy Chairperson of the ACCC must have knowledge of, or experience in, small business matters.
- Amend s 46(1AA) so that, rather than prohibiting a corporation with a substantial share of a market from engaging in sustained below-cost pricing for a prohibited purpose, it would prohibit a corporation with a substantial degree of power in a market from taking advantage of its power in that or any market by supplying, or offering to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, where the conduct is engaged in for one or more of the anti-competitive purposes presently identified in s 46(1). However, no attempt has been made to clarify the meaning of many of the expressions which would be central to an amended s 46(1AA), such as 'relevant cost' and 'sustained period'.
- Repeal existing s 46(1AB) and substitute with: 'A corporation may contravene subsection (1AA) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services at a price less than the relevant cost the corporation of the supply.' The effect will be that those claiming to be victims of predatory pricing will not need to prove that the predator has the ability to recoup losses from undercutting its smaller rival.
- Repeal existing s 46(4A), as the provision would be redundant in light of the proposed changes to ss 46(1AA) and (1AB).
- Introduce a new s 46(6A), to clarify the meaning of 'take advantage', in these terms:

  'In determining ... whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the Court may have regard to any or all of the following:

  (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; or

  (d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.'
- Amend s 86 to extend the jurisdiction of the Federal Magistrates Court (where the monetary limit is presently $750,000) to include matters arising under s 46. The aim of this amendment is to reduce the costs and delays associated with bringing s 46 matters in the Federal Court, particularly for small business.

Conclusion

The concept of misuse of market power will continue to divide stakeholders over what constitutes a fair balance of power in the Australian economy. Since its enactment, s 46 of the TPA has been a controversial provision, attracting high-level legislative inquiry and reform, along with substantial, and at times divergent, judicial analysis. Nevertheless, within the last ten years especially, the High Court's determinations in cases involving alleged breaches of s 46 have substantially elucidated the section's three essential elements.

While questions relating to the operation of s 46 still remain, it is unclear whether ongoing legislative reform will provide the answers.

Of course, certainty in legislative interpretation is always difficult to attain. However as more cases are decided, greater clarity should accrue to the interpretation of s 46, so that small and big business will be better able to ascertain their rights and responsibilities with respect to market power.

References

1. Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, Canberra, 2003) ('Dawson Review').
2. Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (Report tabled 1 March 2004) ('Senate Review').
3. Purpose can be established by inference, and does not have to be the sole or dominant purpose: see s 46(7) and s 4F of the TPA.
4. (1989) 167 CLR 177.
5. Y-bar is used to produce star picket posts by cutting the Y-shaped steel into fence post lengths and drilling holes through which wire will pass. Star picket fencing is the most popular form of rural fencing in Australia
6. Per Mason CJ and Wilson J, Deane J, Dawson J, Toohey J.
7. Above n 4, 194 (Mason CJ and Wilson J).
8. Ibid 192.
9. (2001) ATPR 41-805.
10. Per joint judgment of Gleeson CJ, Gummow, Hayne and Callinan JJ; Kirby J dissenting.
11. Above n 9, 42,758.
12. Ibid.
13. Ibid 42,757 (emphasis added).
14. (1992) ATPR 41-196.
15. Ibid 40,644 (emphasis added).
16. (2003) ATPR 41-915.
17. Per Gleeson CJ and Callinan J, Gaudron, Gummow and Hayne JJ, McHugh J; Kirby J dissenting.
18. (2003) ATPR 41-965.
19. Per Gleeson CJ and Callinan J, Gummow, Hayne and Heydon JJ; Kirby J dissenting.
20. Above n 18, 47,591 (Gummon, Hayne and Heydon JJ).
21. Ibid.
22. Ibid.
23. (2004) ATPR 42-021.
24. Per joint judgment of McHugh ACJ, Gummow, Callinan and Heydon JJ; Kirby J dissenting.
25. Above n 23, 49,043.
26. Ibid.
27. R Gardini, 'The Dawson Review: A Small Business Perspective' (2003) 26 *University of New South Wales Law Journal* 268, 271.

[28] ACCC, 'Submission to the Senate Economics References Committee Inquiry into the Effectiveness of the *Trade Practices Act* 1974 in Protecting Small Business' (2004) 13.
[29] Above n 1, 30.
[30] Ibid 29.
[31] Above n 4, 194 (Deane J).
[32] Above n 9, 42,752 (Gleeson CJ, Gummow, Hayne and Callinan JJ).
[33] Above n 4, 191 (Mason CJ and Wilson J).
[34] W Pengilley, 'Misuse of Market Power in Australia: Are the Tests not those of Fairness, Efficiency or Business Justification?' (2001) 8 *Canterbury Law Review* 70, 70.

Reflect and debate:

Dr Craig Emerson, currently the Federal Minister for Small Business and Minister Assisting the Finance Minister on Deregulation, has been quoted as saying: '[I]t is not the job of government to protect businesses – big or small – from genuine competition' (The Australian, 1 May 2008). Do you agree, or are you sympathetic to claims that small business needs a helping hand? In light of your previous response, what do you consider to be the legitimate aims of s 46 of the TPA?

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