CHAPTER 3: SECTION 46 — MISUSE OF MARKET POWER

Background

The legislation

Section 46 of the Act provides that:

> 'A corporation that has a substantial degree of power in a market may not take advantage of that power 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;
>
> (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.'

The production of direct evidence is not essential to demonstrate one of the proscribed purposes in the section. Section 46(7) makes it clear that purpose may be established by inference from the conduct of the corporation or of any other person or from any other relevant circumstances. Under section 4F of the Act, the purpose must be a substantial purpose, but it does not have to be the sole or dominant purpose.

Pecuniary penalties are provided by section 76 for breaches of Part IV of the Act, which includes section 46. Under section 77, the ACCC may institute proceedings for the recovery of pecuniary penalties. In addition, any person who suffers loss or damage by reason of a contravention of section 46 may, under section 82(1) of the Act, recover damages. Section 87(1B) also allows the ACCC to bring a representative action for damages on behalf of persons who suffer loss or damage by reason of a contravention of section 46.

History

In its original form in 1974, section 46 reflected the provisions of the *Sherman Act 1890* in the United States and the *Australian Industries Preservation Act 1906* in this country. Section 46 also reflected the interpretation

by the European Court of Justice of Article 82 of the European Community Treaty.[1] The Court held that abuse of a dominant position arising from a substantial change in the supply structure that jeopardised consumer choice in a market, such that it almost eliminated competition, would amount to abusive conduct under Article 82. With this background, section 46 was concerned with monopolistic practices and was headed 'Monopolisation'. The word monopolisation did not appear in the body of the section, but the conduct proscribed was that of a corporation in a position substantially to control a market — a reference to monopoly power in the broader sense. The section was, therefore, directed at various forms of conduct that a corporation in a position to substantially control a market might employ against existing or potential competitors. In this respect section 46 differed, and continues to differ, from other operative provisions of Part IV of the Act, namely, sections 45, 47 and 50. It is concerned with the conduct of a single corporation operating independently, whereas sections 45, 47 and 50 are concerned to prevent the anti-competitive co-ordination of business activity between two or more corporations.

As originally drafted, section 46 did not contain the phrase 'for the purpose of' and merely prefaced each of the forms of proscribed conduct with the word 'to'. In 1976, the Swanson Committee thought that it was uncertain whether the section was directed at the purpose of the corporation or the effect of its conduct. It expressed concern that the section in its then form could refer to the effect of the corporation's conduct and thus prohibit 'normal behaviour'. In 1977, the section was amended to confine its operation to the use by a monopolist of its market power with a proscribed purpose.

In 1984, a Green Paper questioned the effectiveness of section 46 on the ground that the requirement of 'substantial control' of a market was so rigorous that it applied to only a few powerful corporations.[2] Subsequently, in 1986, the Act was amended to lower the threshold, requiring a corporation to have only a 'substantial degree' of power in a market. At the same time, the heading of the section was changed from 'Monopolisation' to 'Misuse of market power'.

1 *Europemballage Corporation and Continental Can Company Inc v. E.C. Commission* (1973) Common Market Law Reports, p. 199.

2 Evans, G.J., Willis, R., and Cohen, B. *The Trade Practices Act: Proposals for change*, Canberra, February 1984.

The main issue

The ACCC submitted that the purpose test should be retained in section 46, but that an 'effects test' should be added. The ACCC's proposal was generally supported in a number of submissions and opposed in other submissions. Many of the submissions in support were based on the assumption that an effects test would be easier to prove than purpose. With an effects test as proposed, section 46 would read:

> 'A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose, **or with the effect or likely effect,** 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;
>
> (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.'

The principal reason advanced by the ACCC for its proposed amendment was that the section has a limited application because of the difficulty in proving purpose.

Analysis

Proving purpose

The difficulty in proving purpose may be doubted. Not only may purpose be inferred, but the proof that is required is on the civil standard of the balance of probabilities only, and not on the criminal standard of proof beyond reasonable doubt. The purpose does not have to be the sole or dominant purpose. An admission of purpose is not required, much less an admission in the documentary form of a 'smoking gun'.

Since the scope of the section was clarified in *Queensland Wire*,[3] a number of cases have demonstrated that proof of purpose need not be an obstacle in the application of the section (see Box 3.1).

3 *Queensland Wire Industries P/L v. BHP* (1989) Vol. 167 Commonwealth Law Reports, p. 177.

Box 3.1: Is proving purpose a problem?

Queensland Wire Industries P/L v. BHP: BHP's purpose in refusing supply to Queensland Wire was found to be to prevent Queensland Wire competing as a manufacturer and wholesaler of star pickets.

Melway Publishing P/L v. Robert Hicks P/L: the evidence of employees suggested that Melway had the requisite anti-competitive purpose. The action was unsuccessful because Melway was found to have not taken advantage of its market power.

ACCC v. Boral Ltd: Boral was found to have used its market power against a competitor for each of the three proscribed purposes in section 46. The evidence on purpose was based on internal documentation. The decision is on appeal to the High Court.

ACCC v. Universal Music Australia P/L: Hill J inferred that the refusal to supply had the purpose of preventing the entry into the wholesale market of potential competitors. The decision is on appeal, which will address the issue of whether Universal and Warner had substantial market power.

ACCC v. Australian Safeway Stores P/L: Safeway was found to have not taken advantage of its market power. Although the trial judge concluded it was unnecessary to address the issue of purpose, he found a proscribed purpose could be inferred from the conduct concerned in two of the ten alleged breaches. Otherwise, it was found that there was substantial evidence that the purpose of Safeway was pro-competitive. The decision is on appeal.

Rural Press Ltd v. ACCC: Rural Press and Bridge Printing were found to have the purpose of deterring or preventing Waikerie Printing from engaging in competitive conduct in the relevant market. The appeal to the full Federal Court turned on whether Rural Press and Bridge Printing had 'taken advantage' of their market power.

Finally, in relation to purpose, it should be observed that the ACCC has, under section 155 of the Act, extensive powers to compel the provision of information and the production of documents. These powers are not available to a private litigant but should, in the ACCC's case, afford an invaluable tool in eliciting evidence to prove the necessary purpose where it exists.

The Committee is not persuaded that proving purpose is an unnecessarily onerous hurdle for the ACCC. Whilst proving purpose may be more difficult for an individual litigant who does not have the investigative powers of the ACCC, section 83 of the Act enables an individual to rely upon the findings in an action brought by the ACCC under section 46.

Consistency

In addition to contending that the requisite purpose under section 46 is difficult to prove, a number of submissions, including that of the ACCC, suggested that to introduce an effects test would be to bring section 46 into line with those other provisions of Part IV (sections 45, 47 and 50) which are directed at conduct that has the purpose, effect or likely effect, of substantially lessening competition. Section 45 is concerned with contracts, arrangements or understandings, section 47 is concerned with exclusive dealing and section 50 is concerned with mergers and acquisitions.

However, those other provisions are, as is noted above, concerned with conduct involving competitive relationships between two or more corporations, whereas section 46 is concerned with unilateral anti-competitive behaviour on the part of a corporation with a substantial degree of market power. It is the behaviour which gives rise to the prohibition rather than its effect although, of course, the ultimate object of the section is to protect and advance a competitive environment and the competitive process rather than to protect individual competitors.[4] The section pursues that object by restraining the misuse of market power. Misuse occurs when a corporation takes advantage of the power for a proscribed purpose, regardless of the actual effect of the conduct, whether it be the achievement of a proscribed purpose or the substantial lessening of competition.

International laws

The ACCC also submits that the incorporation of an effects test in section 46 would bring the Act into line with overseas competition laws. However, save for New Zealand, there is no real counterpart to section 46 in other countries and comparison is difficult and unhelpful. Where effect is the test, as in the European Union, there is the higher threshold of market dominance. It is clear that in the United States an attempt to monopolise under the *Sherman Act 1890*

4 *Queensland Wire Industries P/L v. BHP* (1989) loc. cit.

requires a specific intent[5] and monopolisation itself requires an element of wilfulness.[6] Section 79(1) of the Canadian *Competition Act 1985* adopts an effects-based test for proscribed 'anti-competitive acts', but the Canadian Competition Tribunal has held that purpose is a necessary component of an 'anti-competitive act'.[7] In New Zealand, section 36 of the *Commerce Act 1986* is the counterpart of section 46. The introduction of an effects test to section 36 was rejected because it would unduly expand the scope of the section so as to deter efficient commercial activity and would increase the risk of error in determining whether or not conduct was in breach of the legislation.

Consistently with the Australian experience, there are relatively few cases taken overseas under the misuse of market power/monopolisation provisions. The Committee is of the view that international practice, so far as it is of assistance, does not indicate that the introduction of an effects test to section 46 would be appropriate.

Discouraging competition

Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour. The section is aimed against anti-competitive monopolistic practices, not competition, even aggressive competition. The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency. For example, predatory pricing is prohibited under section 46. Pricing is predatory where a corporation sells at unsustainably low prices in an attempt to drive competitors from the market. However, predatory pricing may be difficult to distinguish from legitimate pro-competitive conduct, such as vigorous discounting. Vigorous competition is desirable because it is likely to deliver economically efficient outcomes. An effects test, which would disregard purpose, would make it even more difficult to draw a distinction between pro-competitive and anti-competitive behaviour than is currently the position under section 46 where purpose may be called in aid.

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5 *Spectrum Sports Inc. v. McQuillan* (1993) Vol. 113 United States Supreme Court Reports, p. 884 at pp. 890-91.

6 *United States v. Grinnell Corp* (1966) Vol. 384 United States Supreme Court Reports, p. 563 at p. 577.

7 *Director of Investigation and Research v. NutraSweet Co.* (1990) 32 Canadian Practice Reports (3d) 1 (Competition Tribunal) 35.

Under an effects test the proscribed purposes in section 46 (substantially damaging a competitor; preventing entry to the market; deterring competitive conduct) would become proscribed effects. Normal competitive behaviour by a firm with substantial market power which injured a competitor would be likely to satisfy an effects test. For example, a large firm which established a new outlet in a specific market would not necessarily be behaving in an anti-competitive manner but rather to increase competition in the market. However, it is likely that the effect would be to damage incumbent firms. An effects test would apply and capture behaviour with an adverse impact on competitors, but not necessarily on competition. The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.

It is also relevant to note that the operation of an effects test would not necessarily be confined to large corporations, but could extend to small business as well. An effects test could, in the view of the Committee, discourage legitimate competitive practices by small businesses having the effect of injuring a competitor or discouraging a potential competitor, in the same way as with larger businesses.

Taking advantage of market power

True it is that to fall within section 46 a corporation must 'take advantage' of its market power, but, as interpreted by the High Court, that means little, if anything, more than 'use' of its market power. Use of market power by a corporation occurs where the existence of market power facilitates the corporation's actions.[8] The ultimate test of the use of market power is whether the corporation's conduct was made possible by the absence of competitive conditions, but the application of that test may lead to somewhat unpredictable results and, of itself, it affords an uncertain safeguard against the capture by an effects test of legitimate business conduct.

Part XIB

Experience with an effects test in relation to the misuse of market power under Part XIB of the Act is informative.

Part XIB of the Act incorporates an effects test specifically for the telecommunications markets based on a substantial lessening of competition.

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8 *Queensland Wire Industries P/L v. BHP* (1989) loc. cit., *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) Vol. 205 Commonwealth Law Reports, p. 1.

The inclusion of a special provision for telecommunications was considered appropriate because of the particular features of the rapidly changing telecommunications sector. The intention was that, once competition was established in the telecommunications markets, the industry would be governed by the same regulations as other industries.

The Productivity Commission has found that Part XIB has the potential negative effect of encouraging regulatory error and overreach and deterring acceptable pro-competitive conduct.[9] While the Productivity Commission recommended the retention of Part XIB, this conclusion was based on the unique circumstances in the telecommunications industry. The Productivity Commission recommended that Part XIB should only be a transitional measure, and should be further reviewed in three to five years.

It was also submitted to the Committee that the effect of Part XIB has been to discourage pro-competitive behaviour, and that an effects test has not generated superior outcomes in terms of ease of proof or greater effectiveness in distinguishing between pro-competitive and anti-competitive behaviour.

Previous proposals

Proposals for the introduction of an effects test have been examined on at least nine previous occasions (see Box 3.2). Only the 1984 Green Paper recommended the introduction of an effects test. The proposal was not taken up. Instead, section 46(7) was inserted in 1986 to affirm that purpose could be inferred. The considerations which led previous reviews to reject an effects test included the concern that such a test would capture legitimate business conduct, that there was insufficient evidence that proving purpose is overly difficult, and that such a change would generate much uncertainty. Given the number of times such proposals have been examined and rejected and given the ultimate recommendation of this Committee, it is undesirable that the introduction of an effects test should be further reconsidered in a periodic review of the Act.

9 Productivity Commission 2001, *Telecommunications Competition Regulation*.

Box 3.2: History of the effects test

In 1976, the Trade Practices Act Review Committee (the Swanson Committee) recommended that the section should only prohibit abuses by a monopolist that involve a proscribed purpose.

In 1979, the Trade Practices Consultative Committee (the Blunt Review) rejected an effects test because it would give the section too wide an application, bringing within its ambit much legitimate business conduct.

The 1984 Green Paper, *The Trade Practices Act Proposals for Change*, recommended the introduction of an effects test because of difficulty in establishing purpose.

In 1989, the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) concluded that there was insufficient evidence to justify the introduction of an effects test into section 46.

In 1991, the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) concluded that an effects test might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.

In 1993, the Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Committee) rejected an effects test because it would not adequately distinguish between socially detrimental and socially beneficial conduct.

In 1997, the House of Representatives Standing Committee on Industry, Science and Technology (the Reid Committee) noted the effects test and the views of the Hilmer Committee, but did not recommend its introduction.

In 1999, the Joint Select Committee on the Retailing Sector (the Baird Committee) rejected an effects test on the basis that such a far reaching change to the law may create much uncertainty in issues dealing with misuse of market power.

In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration (the Hawker Committee) noted significant opposition to an effects test and that five inquiries since 1989 had not recommended its introduction. The Committee expressed a preference to await the outcome of further cases on section 46 before considering any change to the law.

Judicial interpretation

Since section 46 was last substantially amended in 1986, there have been a number of court cases that have contributed to the development of the jurisprudence relating to the misuse of market power. Two High Court decisions (*Queensland Wire*, *Melway*) clarified the scope of the section and there are other cases currently before the Court (*Safeway*, *Rural Press*, *Boral* and *Universal Music*). Perhaps the ACCC has been reticent in the past in initiating proceedings under section 46 because of the uncertainties which it perceived to be inherent in the section. But judicial interpretation is gradually reducing those uncertainties and it would be regrettable if amendment of the section were to re-introduce them. Cases currently before the courts should provide greater practical guidance in the application of section 46. Experience elsewhere shows that in this area of legislative endeavour, reliance is necessarily placed upon the courts to refine the broad terms in which the legislation is cast in order to achieve its object. Fundamental change that risks renewed uncertainty is to be avoided.

The introduction of an effects test would mean that at least part of the current jurisprudence surrounding section 46 would be lost. It would take time before a new jurisprudence could be developed. A number of submissions emphasised that the cost of adjusting to the change would be reflected in the uncertainty that business would face while the significance of the change was sorted out. The benefits expected from the change in terms of a better rule would need to be weighed against the dampening effect that the change would have on competition in the interim.

In the Committee's view, it would not be in the interests of competition or consumers to change section 46, given that the cases currently before the courts offer a real prospect of developing a better understanding of the true scope of section 46. The position can, of course, be reviewed when the cases have been decided and there has been an opportunity to appreciate the impact of the decisions.

Alternative proposal

An alternative to the effects test proposed by the ACCC is to be found in some of the submissions. It is the amendment of section 46 to prohibit a corporation that has a substantial degree of market power from taking advantage of that power with the effect or likely effect of substantially lessening competition in a market.

However, such an amendment would only serve to exacerbate the difficulties identified above in relation to the ACCC's proposed amendment. It would change the focus of section 46 from that of conduct with a proscribed purpose to that of conduct with a proscribed effect, the effect being the substantial lessening of competition in a market. Since the effect of legitimate competitive activities may result in the lessening of competition in a market, the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct. Competitive behaviour would be discouraged by the prospect of proceedings under section 46.

The requirement that a corporation take advantage of its market power for its conduct to fall within section 46 would do little to alleviate the problem. As observed above, 'take advantage of' essentially means 'use' and a corporation with a substantial degree of market power can readily be seen to use that power by engaging in the competitive process. The amended section would, unlike sections 45, 47 and 50, be directed against the activity of an individual corporation rather than its relationship with another corporation or other corporations and would be likely to inhibit free engagement in competition.

If such an amendment were to be made focusing on the effect or likely effect of substantially lessening competition in a market, the entire section would need to be rewritten in order to provide a mechanism to distinguish pro-competitive from anti-competitive behaviour. As mentioned previously, that would mean losing the benefit of the courts' decisions in past and present litigation.

Reversing the onus of proof

A third proposal made to the Committee was that, in the absence of an effects test, section 46 should be amended to impose on a corporation the burden of proving that it did not take advantage of its market power for a proscribed purpose. Currently the burden of proving that purpose rests upon the complainant.

Of course, this amendment is also proposed because of the perception that proving purpose under section 46 is difficult. The Committee is not persuaded that the difficulty ordinarily exists. Nevertheless, there are other objections to the proposed amendment.

Since, under section 46, purpose can be inferred from the misuse of market power, the evidentiary burden of disproving a proscribed purpose would ordinarily fall on the corporation in any event. As was observed by the Privy

Council[10] and by the High Court,[11] use and purpose, though separate requirements, are not easily separated. However, the ultimate burden of disproving purpose would, under the proposal, rest upon the corporation. If, at the end of the day, a court were unable to reach a conclusion upon the question of purpose, it would nevertheless, the other requirements of section 46 being satisfied, be required to find a breach of the section. That, in the view of the Committee would be unfair, particularly having regard to the penalties available for breach of section 46 ($500,000 maximum for an individual and $10 million for a corporation) and potential liability for substantial damages. The burden would be unduly difficult to discharge involving, as it does, the proof of a negative in relation to what may be only one of a number of purposes. It would be a departure from the generally accepted principle that the onus of proving an allegation should rest upon the party making the allegation.

As with the introduction of an effects test, the reversal of the burden of proof would discourage corporations from engaging in competitive conduct for fear of being unable to discharge the reversed onus. It is likely that greater caution would be taken to avoid litigation under section 46, which would discourage rather than encourage competitive behaviour.

Unconscionable conduct

The Committee received a few submissions suggesting the amendment of Part IVA of the Act. In particular, it was submitted that section 51AC should be amended to prohibit various practices in relation to contracts, such as the unilateral variation of contracts or the presentation of 'take it or leave it' contracts. In addition, it was said that a new Part IVB should be added to the Act to deal with unfair contractual terms in a manner similar to the Unfair Terms in Consumer Contract Regulations in the United Kingdom. It was submitted that Part IVA was within the Committee's terms of reference because it offered remedies that might operate as an alternative to, or in addition to, the remedies provided by section 46 for misuse of market power.

The Committee's terms of reference confine it to Part IV (and associated penalty provisions) and Part VII of the Act and do not, in the Committee's view, extend to a review of the provisions relating to unconscionable conduct or possible legislation in relation to unfair contracts. Section 46 does not

10 *Telecom Corporation of New Zealand v. Clear Communications Ltd* (1995) Vol. 1 New Zealand Law Reports, p. 385.

11 *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001), loc. cit.

purport to cover every kind of unconscionable or unfair conduct in the market place. Whilst the Committee may consider aspects of the Act other than Parts IV and VII, the Committee would only be within its terms of reference in doing so if it were acting within the context of the competition provisions. Accordingly, the Committee must reject the submission that the issues sought to be raised are within its terms of reference. The Committee did not seek or receive submissions from all parties on those issues and did not attempt to consider the operation of relevant State and Territory legislation.

The Committee would add that there may be some uncertainty about the operation of Part IVA. Section 51AC was only added in 1998 and applies only prospectively so that its scope has, perhaps, not yet been fully explored. The Committee suggests that the ACCC consider issuing guidelines concerning its approach to Part IVA.

Intellectual Property

The Committee received a number of submissions about the operation of section 46 in relation to intellectual property. One concern was that the application of section 46, particularly in relation to copyright, is uncertain. It was proposed that the section be amended to clarify and strengthen the position of owners of intellectual property.

The extent to which intellectual property confers market power on the owners for the purposes if section 46 of the Act is a question currently before the courts on appeal from the decision in *Universal Music*.[12] In that case, the question was whether it was a misuse of market power for the owners of the copyright in certain compact discs to place restrictions on businesses selling parallel imports of compact discs. The case followed the Government's decision to remove the restriction on parallel importation, which is a policy decision that is beyond the scope of this review. Even if it were inclined to do so and it was within its terms of reference, the Committee considers that it would be premature to consider this matter before a final decision in *Universal Music*.

On 28 August 2001, the Government asked the ACCC to issue guidelines on the application of Part IV to intellectual property. The Committee believes it would be desirable for these guidelines to be issued as soon as possible, but appreciates that the ACCC may be awaiting the final decision in *Universal Music*.

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12 *ACCC v. Universal Music Australia Pty Ltd* (2002) Australian Trade Practices Reports, para. 41-855.

Authorisation

Another suggestion made to the Committee was that parties should be able to seek authorisation for conduct that would otherwise breach section 46. As it stands, section 46(6) provides a collateral exemption from the operation of section 46 for conduct that has been authorised for the purposes of sections 45, 45B, 47 and 50. The Committee is not persuaded that there is a need to further extend the availability of authorisation. The economic and social consequences of misuse of market power conduct mean that it is most unlikely to be in the public interest, and hence most unlikely to be authorised.

Conclusions

- Existing case law on section 46 does not substantiate the view that purpose is an unnecessarily onerous hurdle to prove.
- The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour.
- Overseas experience, so far as it is of assistance, does not indicate that the introduction of an effects test would be appropriate.
- Cases presently before the courts provide an opportunity for the section to be further clarified and it would not be in the interests of consumers or competition to change the section at this stage.

Recommendations

3.1 No amendment should be made to section 46.

3.2 The ACCC should give consideration to issuing guidelines on its approach to Part IVA.

3.3 The ACCC should consult with industry and issue guidelines on the application of Part IV to intellectual property.