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*Over the past 15 years, there have been ongoing calls for an “effects” test in s46, as “purpose” is said to be too hard to prove. While case law shows this concern is unfounded, the perception remains. But key policy issues are at stake: giving the ACCC easier s46 cases might sound good for small business, but it also puts at risk genuine competitive conduct that benefits consumers. And it may not help smaller players anyway. With an eye to the promised “root and branch” review, here’s our contribution to an informed debate.*

# the state of COMPETITION

## The grass is always greener?

### The effects vs purpose debate resumes

The countdown to the much awaited “root and branch” review of competition law and the ACCC is on, and the issue of inserting an effects test into the misuse of market power prohibition in s46 is again in the spotlight.

It may sound like heresy to the economists and lawyers who toil in the field but reform of competition law is rarely driven by a desire to achieve outcomes closer to the economic ideal. Competition law is a tool in the policy toolkit of Government and usually there are more pragmatic issues at play. The forthcoming review is driven by a post-election policy framework premised on the view that (in the words of Bruce Billson) “the engine-room of the modern economy is not in Canberra but in the hundreds of thousands of small businesses across Australia” creating a need for “competition laws that encourage everyone to compete”.

Indeed, it is instructive that the promised review is clearly the baby of Bruce Billson, the Small Business Minister, as opposed to Treasurer Joe Hockey (whose department is the traditional guardian of competition law reform).

To understand the genesis of the review, one year ago Tony Abbott and Bruce Billson (then in Opposition) issued a joint press release outlining the plan for growing small business under a coalition Government, with the aim of seeing small business providing more than half the jobs in the private sector. Step 6 of this plan was to establish a “genuine root and branch review of competition laws, to ensure that small business can compete equally with big business”.

The significance of this was neatly explained by *Business Spectator* (17 September 2013), commenting on the unique nature of the Abbott ministry with a Small Business Minister in inner cabinet. *Business Spectator* observed that most of the one million jobs the Government has promised to create will be in small business; thus small business strategies are pivotal to the Government’s success or failure in respect of one of its key objectives:

*The influence of small business on the affairs of the Coalition cabinet will have some parallels to the influence of unions on ALP government cabinets. It is small business people who dominate Coalition membership and funding. There is considerable evidence they also delivered Abbott his big majority and played a key role in breaking the Greens-ALP control over the Senate. Large companies and organisations (including... public servants) will need to take notice of the new cabinet structure because many will have to change the way they operate to conform to the new government emphasis on small business.*

We are just trying to

make sure that the

toolkit available to the

[ACCC] is fit for purpose...

– Bruce Billson



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*A dreamer, not a doer? Is s46, in the words of Bruce Billson, “a hunting dog that doesn’t leave the porch”?*

This is the climate in which the current debate about the prohibition against misuse of market power is taking place. Section 46 and the interests of small business have become inextricably bound – not just with a view to protecting small business but arguably also with the desire to use s46 as a lever to shift market share to small business. We'll come back to this thought later, but first let's talk about why people seem to call for an effects test so regularly.

### Why an effects test?

As we'll discuss shortly, s46 has had several iterations. As it now stands, there are 3 essential elements to proving a misuse of market power: the existence of substantial market power, the taking advantage of that power and the existence of a proscribed purpose (eg to damage a competitor). The "effects vs purpose" debate broadly involves removing this last element and replacing it with a competition test, such that a corporation with substantial market power would be prohibited from taking advantage of that power if it had the effect of substantially lessening competition (see the example below, from Part XIB of the Act).

*A real life effects test – this is how s151AJ(2) reads:*

**(2) A carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider:**

**(a) has a substantial degree of power in a telecommunications market; and**

**(b) either:**

**(i) takes advantage of that power in that or any other market with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or**

**(ii) takes advantage of that power in that or any other market, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.**

Bruce Billson is on record as saying he sees value in an effects test, telling the *Daily Telegraph* back in March that introducing an effects test would make it much easier for the ACCC to win s46 cases. "We are just trying to make sure that the toolkit available to the Australian Competition & Consumer Commission is fit for purpose. In my mind, the toolkit needs to be revisited to deal with the modern and emerging economy. There are some deficiencies."

And in July 2013, he proclaimed that the 3 elements of s46 are "virtually impossible" to prove:

*Yet section 46, misuse of market power, was supposed to be so omnipotent as to deal with any anti-competitive mischief in our economy. Yet it has been found wanting. I describe it as a hunting dog that doesn't leave the porch. Sounds great. But it hasn't lived up to its billing.*

Meanwhile the Monash Business Policy Forum in its recently released *Agenda for National Competition Policy Inquiry* has come out strongly against an effects test in s46 saying that it would be counter-productive: "It risks making unlawful strong but fair competitive conduct by efficient businesses that benefits consumers but harms competitors."

### How did we arrive at the current s46?

Most lawyers familiar with the background and application of s46 by the courts would subscribe to the mantra of "protecting competition not competitors" but it's worth asking if s46 has failed to live up to its billing. As is our wont at *The State of Competition*, let's look back at what s46 was supposed to do and whether the cases reveal some structural deficiency.

The drafting of the 1974 *Trade Practices Act* adopted a different approach to the old *Restrictive Trade Practices Act* it replaced (described at the time as "one of the most ineffectual pieces of legislation ever passed by this Parliament"). Instead of detailed prohibitions that would involve treating the underlying economic concepts as if they were capable of absolute legal precision, the 1974 legislation was drafted so as to afford the courts an opportunity to apply the law "in a realistic manner in the exercise of their traditional judicial role". At the time, there was some apprehension that this approach would lead to uncertainty.

In introducing the Act, then Attorney-General Lionel Murphy observed:

*It is of course desirable that uncertainty be kept to the minimum in this as in any other law. But it is questionable whether detailed drafting leads to more certainty. Often it does no more than obscure the broad purpose of a provision. Chief Justice Hughes of the United States Supreme Court made this very point... when he said of the Sherman Act: It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularisation defeat its purposes by providing loopholes for escape.*

Wise words we should keep in mind during the forthcoming debate. (If only they thought about this when drafting s47!)

The original form of s46 was headed "monopolization" and read as follows:

*(1) A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position –*

*(a) to eliminate or substantially to damage a competitor in that market or in another market;*

*(b) to prevent the entry of a person into that market or into another market; or*

*(c) to deter or prevent a person from engaging in competitive behaviour in that market or in another market.*

It was clear from the outset that "take advantage" was the central concept in s46. As noted in the Second Reading Speech:

*Clause 46... makes it clear that it does not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.*

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**– Then A-G Lionel Murphy introducing the TPA**

*Generally, the expression "competition on the merits" implies that a dominant enterprise can lawfully engage in conduct that falls within the area circumscribed by that phrase, even if the consequence of that conduct is that rivals are forced to exit the market or their entry or expansion is discouraged. Despite many years of competition law enforcement across OECD countries, however, both the perimeter of that area and the underlying principles that ought to define it remain largely unclear. Although it may be easy to agree that certain types of conduct are outside or inside the acceptable area, it is not always easy to agree on why they are, and for other types of conduct it has proven difficult even to reach agreement on whether to locate them in or out of the acceptable area in the first place.*

*OECD, What is Competition on the Merits? (2006)*

The law was aimed at preventing market power from being used in a particular way that economic theory would categorise as "abuse" – not at curbing or undoing market power or preventing particular outcomes. And our key problem has always been the absence of a bright line legal test that captures the economic line between "abuse" of market power and legitimate competition "on the merits" (see the excerpt from the OECD above).

The reference to "purpose" came a few years after the Act had been in operation, following the 1976 report of the Swanson Committee. The Swanson Committee considered submissions on the ambiguity in the use of the word "to" which could be interpreted as "in order to" or "with the result that". The majority of submissions, and the Committee, supported clarifying that *intent* was a prerequisite to breaching s46 as the section was not intended to catch normal competitive behaviour that merely brought about a particular result (ie a clear preference for purpose over effect). Thus, in 1977, an amendment was made to clarify that a firm engages in prohibited conduct only if its *purpose* is to bring about the results listed in s46(1)(a) – (c).

Two years later in 1979, we had the Blunt review which was established precisely to consider the relationship between small business and the Act. The Blunt report identified a number of disadvantages faced by small businesses (many of which remain relevant today) but concluded that most of these cannot be addressed by competition law. Notably, the Blunt report observed:

*The protection of small business as an end in itself would derive justification from the structural assumption that big business is bad (which we do not make) and from the conviction that many competitors, with none large enough to singularly influence prices or output, [are] desirable for social or political reasons. Such a policy would ignore the other objectives of efficiency of industry or the welfare of consumers and it would probably conflict with the restraints imposed on a small Australian market by minimum scale requirements in many industries.*

That said, the Blunt report recognised that whilst preservation of small business is not necessarily a desirable economic end in itself, firms with market power should not be able to insulate

themselves from competition by denying smaller firms the opportunity to compete and driving them out. In the long term, the report recognised, this sort of outcome may well work *against* efficiency. It also recognised that small firms are often an important source of innovation and that they can be vital to keeping large businesses "on their toes" and preventing them from freezing market forces that would otherwise drive change. That's why it's not necessarily a question of protecting competition versus protecting competitors.

While the Blunt committee recommended lowering the threshold for s46, it considered the purpose element should remain, due to concerns that removing the requirement of purpose could bring legitimate business conduct within the ambit of s46. The committee saw it as fundamental that competitive conduct should not be outlawed and "inadvertent conduct or efficiency inspired conduct" should not be put at risk, only *purposive misuse* of market power.

Jumping forward 25 years, we had another inquiry focused on small business, which again looked at s46 (the [2004 Senate Economics References Committee Report on The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business](#)). The Committee addressed the issue of whether the Act should seek to protect competition or competitors, saying that it can best protect competition by maintaining a range of competitors "who should rise and fall in accordance with the results of competitive rather than anti-competitive conduct". "This means the Act should protect businesses (large or small) against anti-competitive conduct, and it should not be amended to protect competitors against competitive conduct."

### Is proving purpose as hard as we're told?

In the 5 years preceding the Senate report, there had been a fair degree of attention paid to s46, particularly the issue of whether purpose made it harder to prove than would a test based on effects. In 1999 the Baird inquiry was instigated following the demise of independent retail grocers and the expansion of supermarket chains.

Considering claims by independent grocers that s46 was ineffective to deal with the chains undercutting them on price, the Baird Committee looked at proposals to supplement s46 with an effects test that would reverse the onus of proof – namely if a substantial lessening of competition could be shown, then there would be a reverse onus on purpose. The ACCC argued that this was needed because to litigate s46 cases it had to embark on a "cops and robbers type search" for a smoking gun on purpose. Given its other recommendations to address grocery sector issues, the Baird inquiry recommended revisiting the question of amending s46 later.

In 2003 the [Dawson Review](#) found that proving purpose was not as difficult as asserted by many, including the ACCC:

*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'...*

Indeed the Committee was not persuaded that proving purpose was unnecessarily onerous for the ACCC given its statutory powers.

The Dawson review expressed concern about how an effects test would change the character of s46, blurring the distinction between legitimate (pro-competitive) conduct and illegitimate (anti-competitive) conduct:

*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.*



However, while the Dawson review was taking place in 2002, there were a number of significant s46 cases (*Safeway*, *Rural Press*, *Boral* and *Universal Music*) still before the courts. Thus, it concluded:

*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.*

Taking up this invitation in 2004, the Senate Economics References Committee considered concerns as to whether the subsequent decisions in these cases had made it harder for the ACCC to bring s46 cases. Stoking the fires, the ACCC informed the Committee that it had discontinued 4 cases as a consequence of the High Court's decision in the *Boral* case (lost on the threshold issue of market power). Ultimately, however, the Committee only recommended a few "tidying up" amendments to s46, which were made in 2007.

These amendments were clearly presented as being to remove concerns that courts may unduly restrict the *intended* operation of s46 due to technicalities of language (rather than trying to extend the reach of the section into new territory). They were presented as being about protecting small business *within the framework of competition*, ie by ensuring competitive markets rather than by insulating small business from competitive market pressure.

The Regulation Impact Statement for the 2007 bill acknowledged the importance of small business to the economy but stuck to the mantra of "competition not competitors". It's worth reporting its conclusions in some detail:

*2.37 Section 46 applies to the full range of business structures across the Australian economy. If the uncertainty about the ability of section 46 to effectively address unilateral anti-competitive conduct were to remain unresolved, both existing firms and potential new entrants may be deterred from competing as vigorously in Australian markets. This, in turn, may lead to a reduction in economic growth, employment and innovation, with consequent impacts on economic welfare.*

*2.42 In a competitive market, rival firms vie for customers by offering different product-price-quality packages. Firms sometimes seek greater market share by setting a price for their goods or services at a level that is sufficiently low to prevent their rivals from making an adequate return. Pricing in this way may drive competitors out of the market, or prevent new firms from entering the market. When firms set their prices in this way, they do so either intending to harm their rivals or, at the very least, in the knowledge that their competitors will be harmed.*

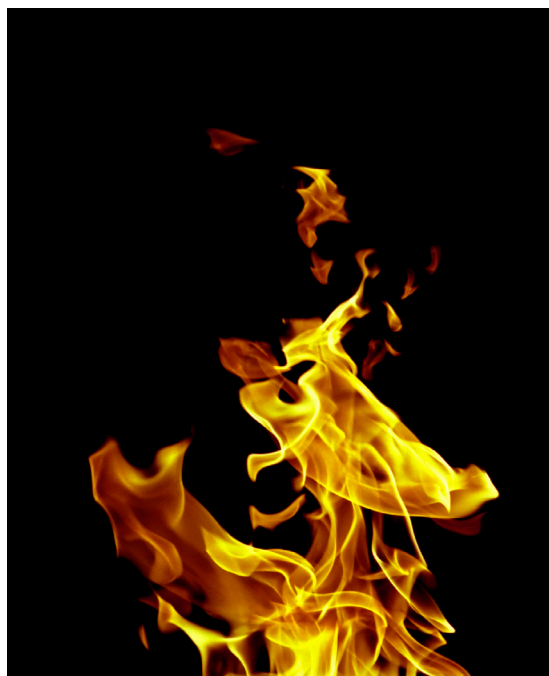
*2.43 This behaviour may ultimately benefit consumers because less efficient firms are driven out of the market, ensuring prices for goods and services are set at a level equivalent to the costs of supply for an efficient firm. Even if there is only a small number of remaining firms in the market, prices are likely to be kept at an efficient level because of rivalry between the remaining firms and the threat of new firms entering the market.*

*2.44 In contrast, consumers will be harmed if efficient firms are driven out of, or prevented from entering, the market, thus weakening competition. This result could be achieved through predatory pricing...*

It was recognised that an effects test was inconsistent with the principle of "competition not competitors". The Explanatory Memorandum to the 2007 amendments noted that s46 "does not look to the effect of the firm's behaviour. If it did, there is a serious risk that pro-competitive conduct by firms with substantial market power would be deterred, with consequentially reduced gains in efficiency and productivity and hence economic welfare".

### The real action is in taking advantage

Meanwhile our courts had been busily building on the "take advantage" cornerstone of s46. Sit in on a competition law class and you're bound to hear the example given by (now Chief Justice) French in the 1992 case *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems*: if a monopolist engages an arsonist to burn down a rival's factory to deter or prevent the rival from engaging in competitive activity, they will certainly breach the criminal law but – notwithstanding the clear anti-competitive purpose of the conduct – they would not be *taking advantage* of their market power.



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*Where there's smoke, there may well be fire...  
but that doesn't mean there's any taking advantage*

The "smoking gun" correspondence in *Queensland Wire v BHP* (in which BHP stated that its policy was to refuse supply of Y-bar to preserve its position in selling fence posts) was ultimately fatal to BHP not as proof of the anti-competitive purpose but more because in the circumstances it revealed the causal connection demanded by the "take advantage" element – even though the High Court's explanation of this sparked an academic debate about "could" versus "would":

*It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. 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.*

Come 2001 and the High Court had a chance to explain this more precisely in *Melway v Robert Hicks*. We described the *Melway* facts in Issue 12 but essentially it involved a refusal by Melway to supply its street directories to a would-be distributor where to do so would have been inconsistent with Melway's long-standing distribution system based on exclusive market segments. By the time the case reached the High Court, all judges to date had agreed that the purpose element of s46 had been met (essentially saying that such a distribution system inherently met the purpose test, being "two sides of the same coin"). But the High Court was concerned that "there are cases in which it is dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage".

The consequence of that danger had been articulated by Heerey J (dissenting in the Full Court, before his ultimate vindication):

*in 1968 Melway commenced with zero share of the market and over the next thirty years built up its share to the present 80-90 per cent. At some point in this period it achieved a substantial degree of market power. Obviously there must have been an earlier period in which it did not have such power. Thus the operation of its segmented market system was not dependant on the possession of market power. Put another way, the same activity, the maintenance of the segmented distribution system, cannot change its nature simply because a substantial degree of market power has been achieved.*

As Melway had clearly used the same distribution system before it had market power in Melbourne (and continued to do so in Sydney where it did not have market power), Heerey J did not agree with the Full Court majority that it had taken advantage of any market power. He stated: "If the majority view is correct, the achieving of a substantial degree of market power brings a new peril to any firm which operates a distribution system, be it market-segmental, geographical, or on any other basis."

Two years later in 2003, the High Court had another opportunity to expand on the importance of the "take advantage" element in distinguishing between conduct that s46 was designed to catch and conduct that was outside its intended scope. In *Rural Press v ACCC*, the High Court explained that:

*If a firm with market power has a purpose of protecting it, and a choice of methods by which to do so, one of which involves power distinct from the market power and one of which does not, choice of the method distinct from the market power will prevent a contravention of [s46] from occurring even if choice of the other method will entail it.*

Where the ACCC ultimately lost its s46 argument was its failure to convince the court that the method chosen by Rural Press to protect its market power (the threat to introduce a newspaper on its would-be rival's home turf) involved the use of market power (because the newspaper would be given away to teach its rival a lesson), as opposed to a straight market sharing arrangement. The way the ACCC put its argument to the High Court was less than convincing:

**High Court Judge:** *I thought they said they were indifferent to whether they made any profit when they intruded into the new area... I thought there was some evidence that they did not care, that it would be a salutary lesson...*

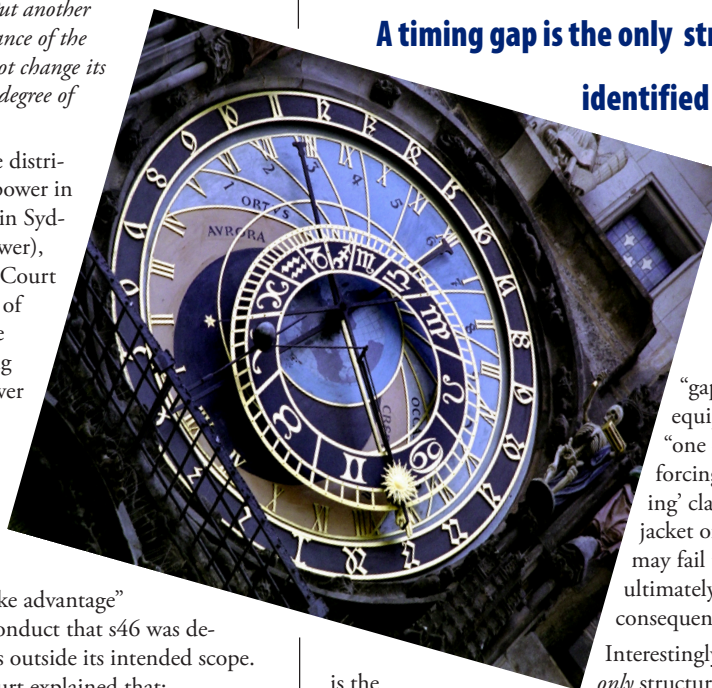
**ACCC's Counsel:** *I am not sure about that... I will check it overnight.*

That illustrates one of the difficulties that has beset the ACCC's approach to Part IV litigation. Small details which are vital to the economic case theory often seem to get lost in the wash or are considered unimportant to the legal case pleaded before the court, leaving the judges puzzled as to just what problem the ACCC is seeking to put before them.

It could be said that this happened in the 2003 case *Boral v ACCC*, where a key part of the ACCC's economic case (an "irrational" expansion of capacity prior to embarking on below-cost pricing) seemed to have disappeared by the time the High Court came to consider the matter. That made it much harder for the ACCC to explain why it considered Boral to have market power, leaving the High Court concerned that the ACCC was simply trying to prosecute vigorous price competition.

The High Court made the point in *Boral* that s46 was not intended to be a catch-all for any conduct that might adversely impact on competition. As McHugh J remarked, even if vigorous price-cutting might lead to an uncompetitive market, if the firm does not first have market power there is a timing

## A timing gap is the only structural problem identified by the courts in relation to s46



"gap" which s46 is not equipped to overcome: "one of the difficulties in forcing a 'predatory pricing' claim into the straight-jacket of s46 is that its terms may fail to catch conduct that ultimately has anti-competitive consequences."

Interestingly, this timing gap is the only structural problem with s46 thrown up over the course of a number of fairly complex cases. Other than that, the courts have shown that s46 can be an effective surgical instrument to sort the wheat from the chaff.

In *ACCC v Safeway* (2003), the court had to consider conduct by Safeway towards bread suppliers that the ACCC regarded as being designed to deter those suppliers from selling discounted bread to independent retailers who undercut Safeway on price. Safeway argued that it had a legitimate business rationale, merely seeking the best price from suppliers (in order to be more competitive) and only if suppliers did not provide such best price "case deals" did it delete their products from its supermarkets.

The Full Court majority started by asking "not only what the firm did, but *why* the firm did it" (our emphasis). Although Safeway had deleted suppliers' products 9 times in total, in 5 instances it had first sought "case deals" in response to undercutting by the independents. The other 4 times, however, it hadn't. These 4 "over-deletions" could not be explained by the legitimate business rationale asserted by Safeway:



*What Safeway did was not the sort of thing that happens by accident in a large commercial organization... [T]he fact that the deletions had adverse consequences for Safeway strongly suggests that there must have been a rational purpose underlying its conduct. That purpose could only have been to persuade the plant bakers to cease supplying discounted bread to the independent retailers and, in turn, to end discounting by those retailers.*

The reasoning of the majority lends weight to the comments by the Dawson review that, where there is a genuine misuse of market power, proving purpose is not as difficult as the ACCC sometimes makes out:

*[W]e have taken into account the observation in the joint judgment in Melway Publishing... that purpose, in connection with s 46(1) of the Act “involves intention to achieve a result”... Moreover, the inference of a proscribed purpose (while giving due weight to the rule in Briginshaw v Briginshaw [see Issue 3]) is one which need only be drawn on the balance of probabilities; it is not a question of excluding all hypotheses reasonably consistent with innocence. And the inference need only be that the purpose was one of a number of purposes, provided it was a substantial purpose ...*

## What would an effects test mean?

So what would happen if we shifted the goal posts? What if we moved to an absolute effects test – in other words a test that prohibited anyone with market power from doing anything that might lessen competition or injure competitors?

Well, the first implication we’d need to think through is that this would remove the need for a causal connection between market power and conduct (“taking advantage”) which is the current lynchpin for best practice compliance. The case law provides reassurance to companies that, regardless of whether they may be found to have market power, if they are behaving no differently from how they would in situations where they had no market power, then they are doing nothing wrong – even if they engage in vigorous competition that hurts their competitors.

Observing injury to competitors in the marketplace tells you nothing about whether this has occurred as a result of competition that will ultimately benefit consumers or because there has been a misuse of market power that will harm consumers.

As the High Court famously said in *Queensland Wire*:

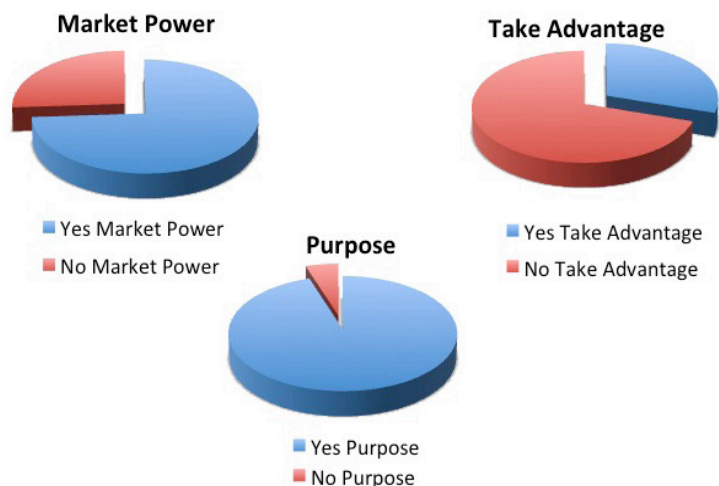
*Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to ‘injure’ each other in this way... and these injuries are the inevitable consequence of the competition s46 is designed to foster.*

**Section 46 is designed to ensure those with market power don’t use it to insulate themselves from competitive pressure; but s46 shouldn’t be used to insulate small business either**

And 25 years later in *NT Power*, the High Court added: “Competition is also dynamic. It tends to create conditions of constant turbulence. It generates instability. These circumstances trigger the emulation and striving which produce competitive benefits.”

No business (big or small) enjoys being put under this pressure and being forced to become more efficient or, as they say, to “build a better mousetrap”. The aim of s46 is to ensure businesses with market power do not use their power to insulate themselves from this pressure. It should not be used as a tool to insulate small businesses from this pressure either.

## 23 High Court Judges on s46



In any event, analysis of the cases (see the diagram above and the insert over the page) shows it is misleading to suggest that the 3 elements of s46 are virtually impossible to prove – and just plain wrong to suggest that ACCC cases fail on account of purpose. The crucial element to prove, and on which the cases have ultimately turned, is “take advantage” and, as discussed, this is as it should be. The biggest challenge for the ACCC is its “hit or miss” scorecard on aligning what it does in court (the technical legal mechanics of how it pleads and presents evidence to prove its case) with the “vibe” of the economic concerns that drove its investigation.

## Would it help prove cases in court anyway?

Another point, often overlooked, is whether an effects test would indeed make proving misuse of market power any easier. Much like in *Melway*, we have real life “counterfactuals” that can provide guidance:

- the ACCC’s success rate in merger cases – which are subject to the effects test set out in s50 – is nothing to write home about. Likewise, where s46 cases have been run alongside a substantial lessening of competition claim, the results are ambivalent. In *Universal Music*, for example, the ACCC failed to prove its s46 case or its effects case, but it *did* succeed in showing a *purpose* to substantially lessen competition. Proving anything substantially lessens competition is extremely difficult. To think that it would be markedly easier than proving purpose runs counter to case law and experience;
- we’ve actually had an effects test for misuse of market power for almost 2 decades and with no result! Section 151AJ of the Act (see page 2) imposes an effects test in addition to s46 for conduct affecting telecommunications markets. This forms part of a special suite of laws that were effectively brought in to keep Telstra in line. But the ACCC can point to no successful prosecution under this section to support the view that an effects test is indeed easier to prove.

Looking at the 7 s46 cases that went to the Full Court or High Court over the last 15 years:

\* Putting aside issues of immunity, a total of 51 judges turned their minds to the three elements of s46

\* 11 out of 51 did not believe the threshold element of market power had been met. Nonetheless, of these, 8 said the purpose element was met

\* Of the 40 who thought there was market power, 16 said the “take advantage” element had not been met. But, of these, 14 said the purpose element was met

\* Of the 24 who considered there had been a taking advantage of market power, 23 said the purpose element had been met. Only one judge thought there was a misuse of market power that escaped s46 because the “purpose” element was not met (Dowsett J in Baxter (Full Court))

So, of the 28 appeal court judges who thought there was no market power and/or no taking advantage, 22 still found a proscribed purpose

### Further practical considerations

Having to try to assess what the outcome of their actions might be introduces a huge compliance cost to anyone at risk of being considered to have market power. So we would probably end up with the ACCC issuing some guidelines as to types of conduct that it would consider to be legitimate competition on the merits versus conduct that is likely to create issues (effectively “rules of thumb”). But the list would inevitably over-reach and chill competitive conduct as regulators in such circumstances tend towards so-called type II errors (erring on the side of objecting to “good” conduct in order not to mistakenly give a safe harbour to “bad” conduct).

Adding to this, over recent years we have arguably seen a lowering of the threshold for when a firm *might* be considered to have market power. The courts have been very clear that market power is not a matter of market share or size; it is much more nuanced and complex. Many firms who don’t think of themselves as dominant might have market power from time to time and in certain situations.

McHugh J in *Boral* noted the fact that:

*In cyclical industries such as construction and building materials, firms may have no substantial degree of market power at the bottom of the economic cycle when competition is fierce and margins slender. As demand increases, however, some firms may acquire a substantial degree of market power.*

The majority in *Safeway* referred to this “waxing and waning of excess capacity” as a relevant factor in determining whether or not a firm has a substantial degree of market power.

If we had a list of problematic conduct that applied as soon as a business crossed the market power line, then it would become critical for businesses to be aware exactly *when* they

crossed the line. But it is not a clear line. For example, consider the issues around both geographic and time dimensions for market definition in supermarkets or electricity, which could result in alleged market power over, say, a 5km radius or a 5 minute interval. Alternatively, think about *Melway* – at what point in time over a 30 year period did it cross the line into having market power?

Alternatively, would we end up jettisoning the threshold of market power and simply creating a level playing field in which no-one can do anything that might lessen competition? The prospect may seem attractive to some, but it would be unworkable. And would we then need to introduce some kind of “business judgement” rule/defence to encourage vigorous competitive behaviour?

Although economic theory is concerned about misuse of market power because of the effect on competition (*not* competitors), a legal test for unilateral conduct that turns on effect is a blunt instrument compared to the fine tuning our courts can bring to the current purposive test with its lynchpin of take advantage. There is no perfect legal test that will be tough enough to deal with any anti-competitive mischief in our economy yet accommodating enough to allow consumers to reap the full benefit of fierce competition.

### Fit for what purpose?

So, to the forthcoming “root and branch review” and talk that the “toolkit” of laws that the ACCC has to work with isn’t “fit for purpose”. But what purpose? Is the current public debate subtly redefining s46 as a lever in the policy toolkit to shift market share to small business against the tide of an “oligopoly economy” (as Andrew Robb put it prior to the election) where the achievement of efficiency and scale will inevitably mean fewer and larger businesses?

Former ACCC Chair Graeme Samuel has come out in defence of our competition laws as “already among the best in the world” and the Monash Business Policy Forum has suggested that introducing an effects test into s46 would create business risk with little if any gain. We would agree. Fixing deficiencies identified by the case law is a reason for amending the law; simply trying to make it easier to win cases is not a reason for lowering the bar for legal liability or extending its reach.

### The ACCC is not a “000” service for small business – it is not equipped to provide legal advice or a speedy dispute resolution service

That is not to say that more cannot be done (outside s46) to address the genuine problems faced by small business. These problems include things like access to competition law expertise and the cost of obtaining advice. It is hard to find expertise outside the big law firms where the rates are just too costly for most small businesses. Even where the law is on their side, there is the time, cost and resources of asserting their rights in court (especially if there is a risk of having to go all the way to the High Court and where complex economic evidence is required). And even dealing with the ACCC can be difficult at times for small businesses.

Perhaps small businesses have an unrealistic expectation of the ACCC – they want access to quick and accurate advice about the law and outcomes almost like a dispute resolution service. The ACCC is just not equipped to do this. It is not a field hospital or “000” service and its processes can be slow and technical. The official line is “we don’t give legal advice” and there are reasons for that, but it can be a source of frustration for small businesses with their backs to the wall.

A key focus for the forthcoming “root and branch” review, therefore, should perhaps be to look at other practical ways the ACCC or some other body can help small business, using *different* tools. This is surely preferable to trying to turn a scalpel into a sledgehammer by introducing an effects test into s46.

To date, no-one has come forward with a real-life example of conduct which should be caught by s46 but escapes because of purpose. In fact, there’s only ever been one case lost solely on account of purpose, the obscure *RP Data v Queensland* (if you read it, we’re sure you’ll agree with the judge’s view on purpose). Agitators for an effects test tend to provide examples where competitors or even competition are adversely affected, but where there has been no use of market power. If we want to extend the reach of the law to prohibit such conduct, then we should have a proper assessment of the costs and benefits of doing this – and a proper, detailed regulatory impact statement – because this would be a fundamental shift in our regime.

Meanwhile, the experts in the trade can do their bit too. Sometimes competition law practitioners can be accused of being a little possessive about “our” Act – nothing should be changed unless we (of course!) happen to be the authors of such change. But frequently there’s a wealth of knowledge and history underpinning such apparent recalcitrance. Sometimes, however, we just forget to share our reasons. Engaging in the debate rather than ignoring it is surely the preferable course.

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*Rachel and Alexandra are both Australian Legal Practitioners within the meaning of the Legal Profession Act 2004 (Vic), with liability limited by a scheme approved under Professional Standards Legislation.*

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