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Misuse of Market Power in Australia: Early Assessment of the Amended Section 46 of the Competition and Consumer Act

By Mel Marquis & Rhonda Smith

Edited by Barbora Jedlickova

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I. Introduction

In the nearly 50-year saga of modern Australian competition law, the section relating to the misuse of market power has recently been substantially revised. The revisions include removal of the requirement to establish a nexus between substantial market power and the alleged anti-competitive conduct and the introduction of an effects test as an alternative to proving and anti-competitive purpose. Significant uncertainty now looms large in this area of the law, and authoritative judicial interpretations are needed so that businesses can better gauge how far the most recent amendments in 2017 have augmented the legal risks that shape their conduct.

Our early assessment is that there seems to be cause for concern. Unless future jurisprudence proves us wrong, it appears that the former defects in Section 46 ("s.46") of the Competition and Consumer Act 2010 ("CCA") (i.e. the prohibition against "misuse of market power") that provoked the 2017 amendments were less troubling than the new problems caused by those revisions. Whereas the previous form of the prohibition was criticized by some for allowing false acquittals as the price of avoiding false convictions, the scales may now have been tipped too far to the other side. In this paper we explain why we are cautiously pessimistic.

Section II discusses the former version of s.46 of the CCA. Section III recalls the impact of the so-called Harper review, which led to a complete re-write of s.46 in 2017. Section IV tentatively assesses how the 2017 reform may affect outcomes, and comments on what appears to be a new period of uncertainty that may dampen investment and desirable competitive conduct.

II. The Vintage Section 46

After a false dawn for competition law in Australia in 1906, and another in 1965, a modern competition statute with meaningful prohibitions was finally adopted in 1974.[2] Since then, s.46(1) has been revised periodically, most recently in 2017. The pre-2017 version provided:

> 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:
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> (a) eliminating or substantially damaging a competitor of the corporation …
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> (b) preventing the entry of a person into that or any other market; or
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> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Two features are worth highlighting. First, the phrase 'shall not take advantage of that power' was understood to require a causal link between the firm's market power and the impugned behavior.[3] The requirement of the causal link was relaxed when the High Court suggested that it would suffice to show that market power "materially facilitated" the conduct at issue.[4] Yet it remained the case that no contravention was

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[1] Mel Marquis is Deputy Associate Dean at Monash University, Faculty of Law. Rhonda Smith is Senior Lecturer at the University of Melbourne, Faculty of Business and Economics, and former Commissioner of the ACCC.

[2] *Australian Industries Preservation Act 1906 (Cth)*; *Trade Practices Act 1965 (Cth)*.

[3] This contrasts with Article 102 TFEU, for example, in respect of which there is no formal need to show that an imaginary non-dominant firm would not have engaged in the same conduct. See Case 6-72, *Europemballage and Continental Can v. Commission*, EU:C:1973:22, para 27. On the other hand, it is likely (in an exclusionary conduct case) that there must be a logical link between the dominant position and the harm, i.e. between the dominant position and effect of the conduct on an otherwise "effective competition structure." See Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart 2010) 73-79; Renato Nazzini, *The Foundations of European Union Competition Law and the Objectives and Principles of Article 102* (OUP 2011) 176-178. In other words, the (seldom articulated) issue is not on whether a hypothetical non-dominant firm would have engaged in the conduct, but whether the same conduct by a non-dominant firm would have had the same anti-competitive effect.

[4] See *Melway Publishing v. Robert Hicks* (2001) 205 CLR 1; *Rural Press v. ACCC* (2003) 216 CLR 253.

established if the factor that enabled the conduct was not a defendant's market power but rather its financial power, or "material and organisational assets."[5]

Second, while the above "proscribed purposes" may be relevant to the issue of foreclosure, the provision appears to neglect the interests of consumers, other than an oblique reference in s.46(c). Later judgments had to clarify that exclusionary conduct only contravenes s.46 if the foreclosure is meaningful to the "competitive process," that is to say if it would serve to weaken competitive constraints or keep competitive pressure at bay.[6] Consumer interests are thus protected indirectly. Nevertheless, the wording of s.46 may have overemphasized the "proscribed purposes" and the impact on particular competitors.[7] In the 2003 *Boral* case, where the High Court rejected allegations of predatory pricing, Chief Justice Gleeson and Justice Callinan felt obliged to warn that it was "dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage of market power. Indeed, in such a case, a process of reasoning that commences with a finding of purpose of eliminating or damaging a competitor and then draws the inference that a firm with the objective must have and be exercising a substantial degree of power in a market is expected to be flawed."

The High Court also offered the following observations with regard to the "take advantage" element: "[I]f the impugned conduct has a business rationale, that is a factor pointing against any finding that conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of that power." The latter statement became a basic litmus test, with courts focusing on counterfactual market comparisons and, where relevant, whether the firm had already implemented a practice prior to acquiring substantial market power.[8] However, uncertainty emerged again when some cases used the phrase *could engage* instead of *would engage*, or combined or conflated the two,[9] which may have further restricted the scope of application of s.46.[10] Considering the confusion caused by *would* versus *could*,[11] the Australian Parliament in 2008 clarified that the operative word was *would*, thus removing any doubt as to the implicit condition that the hypothetical benchmark firm active on this imagined market should be assumed to be a rational profit-maximiser. The relevant provision added at that time, s.46(6A)(c), became moot in 2017 when the legal test for misuse of market power was overhauled.

It is worth noting briefly that both prior to 2017 and still today, some forms of potentially exclusionary behavior can also trigger the prohibition against exclusive dealing (including tying conditions).[12] At least in unusual circumstances, a firm that does not have a substantial degree of market power could still cause a substantial lessening of competition, in particular if the market is at the crease between competitive conditions and

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[5] See *Rural Press*, *supra* note 4, para 53.

[6] The role of this notion of the "competitive process" is well illustrated in the opposite but consistent outcomes reached in two cases from the 1980s, *Outboard Marine v. Hecar Investments (No 6)* [1982] FCA 265 and *Mark Lyons v. Bursill Sportsgear* (1987) 74 ALR 581.

[7] *Cf.* Allan Fels, *The Australian Controversy over Abuse of Market Power Law*, in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 197, 208 (Damien Gerard & Ioannis Lianos, eds., 2019) ("While it is true that the High Court has imposed an underlying competition test into s. 46, the fact is that in one case after another it was obvious that judges liked to look very carefully at whether the behaviour breached conditions (a), (b) and (c) in s. 46(1) (those are the provisions that refer to damage to competitors) […].").

[8] To dispel doubts, the High Court had to clarify that the relevant counterfactual did not call for the heroic assumption of a perfectly competitive market, but only a (workably competitive) market where no firm has substantial market power. See *Melway*, *supra* note 4, paragraph 52.

[9] See Arlen Duke, *The Need to Close the "Take Advantage" Gap in the Regulation of Unilateral Anti-Competitive Conduct*, 15 COMP. & CONSUMER LAW J. 284, 292 (2008).

[10] For detailed discussion of the uncertainty arising from the 'old' s.46 and its application in case law, see KATHARINE KEMP, MISUSE OF MARKET POWER: RATIONALE AND REFORM (2018), for example at 148-153.

[11] This confusion and its significance have however been downplayed. See Caroline Coops, *A Fly in the Ointment for the ACCC? Implications of the Cement Australia decision for the interpretation of section 46*, 23 *AUST. J. COMP. & CONSUMER LAW* 83 (2015).

[12] Given the partial overlap between the scope of s.46 and that of s.47, claims of misuse of market power have commonly been accompanied by parallel allegations of unlawful exclusive dealing under s.47. See, e.g. *ACCC v. Safeway Stores (No 2)* (2003) 119 FCR 339; *ACCC v. Baxter Healthcare* (2008) 170 FCR 16; *ACCC v. Pfizer Australia* [2018] FCAFC 78.

overly rigid barriers due to a thicket of vertical contracts.[13]

There was little doubt that the pre-2017 requirement of a causal link between market power and alleged misconduct played a significant role in the formative s.46 jurisprudence, though it was softened somewhat by the above-mentioned Section 46(6A).[14] Having remodeled s.46, the Parliament has unambiguously deleted that requirement.

III. The Harper Review and the 2017 Reconstruction of Section 46

The "root and branch" expert review of the Competition and Consumer Act 2010, i.e. the Harper Review,[15] drew much attention. With regard to s.46, and controversially,[16] the expert panel endorsed a near-total recast of the prohibition. The revised formulation, which survived vigorous lobbying by big business[17] and was ultimately enshrined in the Act in November 2017, reads in pertinent part:

> A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in (a) that market; or (b) any other market in which that corporation, or a body corporate that is related to that corporation: [supplies or acquires goods or services, or is likely to do so].[18]

Gone are two trademark elements of the old version of this provision: the "take advantage" test, and with it the requirement of a causal link between the firm's market power and the allegedly unlawful conduct; and the need to match the conduct with one of the "proscribed purposes." While the amendment is a striking departure from the previous version of Section 46, the "substantial lessening of competition" standard had already long been embedded within the other provisions of the Act governing mergers, exclusive dealing and (non-cartel) restrictive agreements.

IV. The Effect of the Changes to Section 46: An Early Assessment

It has been nearly five years since the revised s.46 came into force, yet the effect of these changes remains uncertain. Only one matter — *TasPorts*[19] — has reached the court, and it is of limited precedential value as it was not fully litigated. In this case, Engage Marine ("Engage") won a contract to provide towage and pilotage services to Grange Resources ("Grange") at Port Latta in Northwest Tasmania; the contract had previously been held by the incumbent, TasPorts. After Grange notified TasPorts that it was going to switch to Engage, TasPorts imposed a new port access charge on Grange, potentially making use of Engage's services uneconomic. The ACCC alleged that the incumbent's conduct prevented Engage from servicing the contract and expanding its operations in the relevant market. TasPorts imposed new charges on Engage's tugboats, thus making it uneconomic for Engage to use TasPorts' temporary berths, while failing to provide long term berths as well. This forced Engage to deploy a temporary offshore mooring outside of another port, and prevented deployment of the second tug required under its Grange contract. TasPorts also failed or

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[13] *Contra* the arguably overbroad opinion expressed in IAN HARPER ET AL., COMPETITION POLICY REVIEW: FINAL REPORT 375 (2015) ("It is well accepted that vertical restrictions will not substantially lessen competition unless they are imposed by a corporation with substantial market power.").

[14] Opinions differed regarding the extent to which s.46(6A) broadened the scope of the "take advantage" test. See Luke Woodward & Matt Rubinstein, *The use and abuse of section 46* (2016), p.10, https://cdn.brandfolder.io/3RTTK3BV/as/pev81q-9t241k-dovisy/Luke_Woodward-Theuseandmisuseofsection46.pdf. Commenting on the *Cement Australia* and *Pfizer* cases, the authors emphasize the impact of s.46(6A), stating for example with regard to *Pfizer* that the Federal Court "did not immunise conduct on the basis that a firm without market power could or would have engaged in similar conduct."

[15] See Harper et al., *supra* note 13.

[16] See, e.g. Woodward & Rubinstein, *supra* note 14 (reforming s.46 amounted to fixing a provision that was not broken, or at least was not broken following the addition of interpretive guidance in s.46(6A)).

[17] See Fels, *supra* note 7, at 218.

[18] *Competition and Consumer Act 2010 (Cth)* s.46(1), as amended by the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Cth)*.

[19] See *ACCC v. Tasmanian Ports Corporation* [2021] FCA 482, Annexure. See also Press Release, ACCC, TasPorts declared to have misused its market power (May 5, 2021).

refused to provide marine pilot training to Engage. As TasPorts admitted these breaches, the Federal Court did not adopt a fully considered decision but issued a Declaration giving effect to those admissions on May 5, 2021. Under the circumstances, this matter provides no insights as to how the Australian courts will interpret the revised s.46.

The lack of a fully litigated case is particularly significant given the nature of the CCA. Compared to statutes such as the Sherman Antitrust Act 1890,[20] which identifies two general forms of conduct and relies on judges to give them meaning, the Australian CCA is far more prescriptive. However, the revised s.46 is an exception: the provision is now more open-textured, and somewhat ambiguous. What is clear, as explained above, is that s.46 can only apply if a firm possesses substantial market power. The conduct must then be shown to have the purpose and/or effect or likely effect of substantially lessening competition. A firm with substantial market power is entitled to defend its market position from aggressive competitors by adding value — improving its product and/or reducing its costs — but not by engaging in exclusionary conduct that harms the competitive process.

As we have also seen, under the revised s.46, it is no longer necessary to show that the conduct involves the use (i.e. the "taking advantage") of the firm's market power. This is significant because, previously, whether a firm had taken advantage of its market power was generally assessed by whether the relevant conduct would be economically rational absent the firm's market power.[21] For example, a firm with substantial market power might refuse to supply because it would facilitate competition but would not refuse if the market were competitive and the buyer could obtain supply elsewhere. However, if the supplier was concerned about the buyer's creditworthiness, or concerned about the buyer producing low quality products which would tarnish the supplier's reputation, it would presumably refuse supply even in a competitive market. In the latter circumstance, there would have been no contravention under the "old" s.46.

Removal of the "take advantage" requirement from s.46 means that differentiating between anti-competitive conduct and possibly aggressive "competition on the merits" now falls to the substantial lessening of competition test. As Kemp points out, the provision "does not expressly permit the dominant firm to raise an efficiency defence or justification for its conduct."[22] Under the old s.46, conduct that did no more than increase efficiency would likely have been pursued by a firm in a competitive market and it would not have been a taking advantage of market power. That same line of reasoning does not mesh easily with s.46 in its current form.[23] Nevertheless, as Kemp[24] and Williams[25] have argued, increased efficiency — productive, allocative and dynamic — fuels competition. Consequently, if conduct is being assessed to determine whether it substantially lessens competition, the extent to which it increases efficiency should be a relevant consideration. On the other hand, it is not yet clear how demanding Australian courts will be with regard to efficiency claims under s.46 following the 2017 reform.[26]

One of the problems with the substantial lessening of competition test that has been highlighted by the concerns about the effectiveness of the mergers provision of the CCA (s.50) is the requirement of evidence regarding

[20] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-2).
[21] See *Queensland Wire Industries v. BHP* (1989) 167 CLR 177.
[22] Kemp, *supra* note 10, at 170.
[23] Prior to November 2017, authorization, that is, an exemption granted on the basis that the conduct would result in a net public benefit, was not available for behavior constituting a misuse of market power. As this mechanism is now available for s.46 conduct, efficiency gains could, at least in theory, justify such an authorization (provided the conduct has not yet been implemented). However, since an application for authorization amounts to an invitation to the regulator, by a firm with substantial market power, to test claims that the 'public benefit' would outweigh the 'public detriment', such applications might prove rare. The incentive to apply may be particularly weak if a firm fears its submission would later be turned against it as an admission of substantial market power. See Kemp, *supra* note 10, at 180.
[24] Kemp, *supra* note 10, at 176-179.
[25] Philip Williams, *Fact-Value Complexes in the Old and New Versions of Section 46*, in CURRENT ISSUES IN COMPETITION LAW VOL. II: PRACTICE AND PERSPECTIVES, 127, 139-147 (Michael Gvozdenovic & Stephen Puttick, eds., 2021).
[26] One constraint on claims of efficiency is that, for purposes of the SLC test, efficiencies produced in a market other than that on which the lessening of competition occurred will not be considered. See Kemp, *supra* note 10, at 178-179.

the effect of future conduct which satisfies the Evidence Act 1995. In the context of unilateral conduct, the challenged practice in some cases may already have occurred, and sufficient time may have elapsed to identify its effect. Frequently, however, this will not be the case: sufficient time will not have passed before the conduct ceases in response to an inquiry by the ACCC and/or because there is the potential for litigation.

Enforcement of competition law involves trade-offs between the risk that pro-competitive conduct will mistakenly be found anticompetitive (Type I error) and the risk that anticompetitive behavior will mistakenly be found not to be so (Type II error). Traditionally, the view has been that Type I errors have more adverse effects than Type II errors and so (all else being equal) the priority should be to minimize Type I errors.[27] The amendments to s.46 tend toward the opposite view. They broaden the catchment for finding a misuse of market power. Is the provision now too broad? Will it over-reach? In part, this depends on the effectiveness of the substantial lessening of competition test in distinguishing pro-competitive conduct from anticompetitive conduct, as noted above. However, leaving that to one side, it also depends on the wording of the section. Consider the following example. Assume that a company with substantial market power seeks to increase its purchases of a necessary input to meet increased demand for its product. It enters into contracts with suppliers, including some that supply its competitors. Consequently, some competitors may no longer be able to acquire sufficient inputs to continue to operate, or they may be uncompetitive because they face increased input costs. Under the old s.46 it might be argued that the company is simply seeking to produce more and maximize its profits: it has not used its market power to engage in exclusionary conduct, and it has no anticompetitive purpose. Under the revised s.46, the outcome is less clear. Irrespective of its purpose, if the effect of the conduct is to foreclose existing competitors (and likely raise entry barriers), it may well contravene s.46. Such a scenario illustrates a degree of uncertainty for business following the 2017 reform. Much will depend on how the ACCC and ultimately the courts consider that s.46 should be applied.

One way of testing the effect of the changes to s.46 is to assess whether cases that were unsuccessful under the former s.46 would be likely to succeed under the revised s.46. In *Rural Press*[28] the ACCC was successful in proving that a non-compete agreement between two publishers of local subscription newspapers in South Australia would substantially lessen competition in contravention of s.45, the prohibition of anticompetitive agreements. However, it was unsuccessful in establishing that a threat by one of the publishers to enter the other's territory with a free newspaper would contravene s.46 even though fear that this would occur at the least contributed to entry into the non-compete agreement. The reasoning of the High Court on appeal in relation to the failure under s.46 was that Rural Press *could* engage in such a threat even in a competitive market, that is, it did not need market power to do so. With respect, perhaps the relevant question was whether Rural Press would have achieved its objective by its threat, and whether the conduct would have been profitable had the market been competitive. Under the revised s.46, to succeed in its claim the ACCC would need to establish that the purpose of the threat was to force Waikerie Printing into the non-compete agreement and/or that the threat had that effect which in turn, as established in relation to s.45, had the effect of substantially lessening competition.

Pegg carries out a similar assessment in relation to *Cement Australia.*[29] In that case, the ACCC was successful in establishing that Cement Australia had engaged in conduct that substantially lessened competition under s.45. The trial judge found that:

> [T]he scope of the rights provision was included for a substantial purpose of preventing or discouraging a rival from obtaining access to Tarong and Tarong North raw flyash for processing ... and to

[27] See, e.g. Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010).
[28] *Supra* note 4.
[29] *ACCC v. Cement Australia* [2013] FCA 909; John Pegg, *Section 46 and the "Effects Test": A Shot in the Arm for the ACCC?*, 21-11 UNIV. NEW SOUTH WALES LAW J. 11 (Student Series 2021).

> prevent a rival entering the SEQ [South East Queensland] concrete grade flyash market with processed Tarong or Tarong North flyash. Thus, a substantial purpose of the formulation and inclusion of [the relevant clauses] was a substantial purpose of substantially lessening competition in each market.[30]

However, the ACCC was unsuccessful in its claim that the conduct — entering into contracts to purchase more flyash than it reasonably required — was a misuse of market power intended to prevent or deter competition. Pegg sums up the trial judge's findings as follows:

> While Cement Australia had a substantial degree of power within the cement market and the conduct undertaken by Cement Australia was for the prescribed purposes of locking out competitors, the conduct did not involve Cement Australia taking advantage of their market power… [because] a firm sans market power *could* have entered into these agreements and therefore… [His Honour] did not conclude that Cement Australia had taken advantage of its market power.[31]

As in *Rural Press*, arguably the problem is the way in which the counterfactual is expressed. Leaving that aside, considering the court's finding that the effect of the contracts was to substantially lessen competition contrary to s.45, it seems likely that, if there had been no "take advantage" criterion under s.46 at that time, Cement Australia's conduct would have breached the latter provision as well.[32]

A survey by Gilbert & Tobin (2021) of applications and settlements since November 2017 when the revisions to s.46 took effect suggests that the reform may have encouraged private litigation.[33] They found that "over the last 18 months, while no final judgments have been made, there have been interim remedies ordered (injunctions against both Facebook and Google) and evidence of at least two commercial settlements."[34] However, various problems still face private litigants, particularly as "[p]rivate litigation almost always turns, ultimately, on price."[35] Past experience indicates that courts are not well equipped to make orders concerning pricing, given the complexity of arriving at an effective form of injunctive relief in this context.[36] As the authors conclude: "for private litigants, the attractiveness of section 46 as a legal claim will depend to a substantial degree on whether Courts can develop a set of remedies that adequately respond to anti-competitive pricing practices."[37]

V. Conclusion

In this paper we have questioned whether the perceived flaws in the drafting of the "old" abuse of dominance provision in Australia have been overcorrected, resulting in a perverse "cure" for an exaggerated disease. If the Australian courts do nothing to allay these concerns, in particular by interpreting the reformulated s.46 in a supple way that allows for socially beneficial aggressive competition even where it has incidental foreclosure effects, yet another redesign may be required. As noted above, the public authority has brought only one case so far under the revised s.46, and the matter was not litigated but rather was resolved through judicial approval of an admission of contravention and penalty. The future approach of the Courts in this area of the law thus remains unknown.

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[30] *Id*. paragraph 3153.
[31] Pegg, *supra* note 29 (emphasis added).
[32] See *id*. at 11.
[33] Gilbert & Tobin, *Section 46 of the CCA rides again but on a different horse* (March 2, 2021), https://www.gtlaw.com.au/insights/section-46-cca-rides-again-different-horse.
[34] *Id*.
[35] *Id*.
[36] See *id*.
[37] *Id*.