THE Dominance and Monopolies Review

Eighth Edition

Editors
Maurits Dolmans and Henry Mostyn

THE LawReviews

THE DOMINANCE AND MONOPOLIES REVIEW

EIGHTH EDITION

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This article was first published in July 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-446-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP

ANJARWALLA & KHANNA

ANJIE LAW FIRM

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PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It's] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental, and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists, and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorientating the goals of antitrust policy away from the consumer welfare standard towards a broader societal test; reversing the burden of proof; per se bans on certain categories of conduct (including prophylactic controls on vertical integration); lowering the standard of judicial review; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly-evolving rules concerning abuse of dominance? Helpfully, this eighth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily-understandable summary of global abuse of dominance rules. As with

previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments. From those thoughtful contributions, we identify three notable points from last year's enforcement.

Exploitative abuses pre- and post-covid-19

Exploitative abuses have in recent years enjoyed somewhat increased attention from regulators. The covid-19 pandemic intensifies that trend. It is leading to extreme demand and price volatility for certain products, as well as fluctuations in firms' costs. As firms struggle to manage these changes, agencies are aggressively seeking to show they are preventing consumer exploitation during the crisis. Charging excessive prices or imposing unfair terms and conditions constitutes an abuse of dominance in many countries, including almost all OECD members. In the US, excessive prices are not in and of themselves a matter for competition enforcement at the federal level, but many states have laws that prohibit price gouging and the current administration recently issued an executive order designed to prevent hoarding and price gouging.

Governments across the world have indicated that they will remain vigilant to sudden and significant price hikes during the pandemic. For example, in March 2020 the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that 'it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g., face masks and sanitising gel) remain available at competitive prices'. In a similar vein, on 27 March, Commissioner Vestager explained that 'a crisis is not a shield against competition law enforcement' and that the European Commission (EC) 'will stay even more vigilant than in normal times if there is a risk of virus-profiteering'. Several national authorities have opened investigations or created task forces dedicated to preventing excessive prices during the crisis.[1]

Even before covid-19, however, EU agencies were increasingly pursuing exploitation theories. In 2016, Commissioner Vestager stressed that the EC would seek to 'intervene directly to correct excessively high prices'. So far, most recent exploitation cases have been in the pharmaceutical sector, but the French and German agencies have pursued exploitative abuse theories in the technology sector. We pick out four developments over the last year.

First, the Court of Appeal judgment in *Pfizer/Flynn*, discussed in the UK chapter of this book, brings helpful clarity to evidence required to bring an excessive pricing case. As a recap: in 2016, the Competition and Markets Authority (CMA) imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the Competition Appeal Tribunal (CAT) on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. In March 2020, the Court of Appeal upheld the CAT's judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a 'good result.'

1 For further discussion, see Cleary Gottlieb, *Exploitative Abuse of Dominance and Price Gouging in Times of Crisis*, 31 March 2020.

In a nutshell, the Court of Appeal held that competition agencies have a 'margin of manoeuvre' in deciding how to prove their cases, including the 'Cost Plus' method that the CMA had used. Importantly, though, if a defendant adduces evidence that challenges the agency's methodology (as the defendants did in this case), the agency should consider that evidence. The extent of the agency's duty to consider the evidence adduced by the defendant will depend on the extent and quality of the evidence (i.e., there is no need to investigate each and every claim the parties bring up if those claims are not sufficiently substantiated). On the facts of the case, the Court held that there was an obligation on the CMA to evaluate the defendants' evidence regarding the prices of phenytoin capsules because it was prima facie evidence that prices were fair.

Second, in the *Sanicorse* case, discussed in the France chapter, the Paris Court of Appeal annulled the French Competition Authority's (FCA) decision of imposing a €199,000 fine on Sanicorse for imposing excessive price increases for medical waste treatment. The FCA had found that Sanicorse had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Repeating the dictum from the *United Brands* ruling, the Court emphasised that an exploitative abuse arises in a situation where a dominant firm 'has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'. The Court of Appeal found that the authority had failed to demonstrate that Sanicorse's price increases were unfair, and it accordingly annulled the decision.

Third, in December 2019, the FCA found in its *Gibmedia* decision (also discussed in the France chapter of this book) that Google's termination of three advertisers' Google Ads accounts was abusive. The authority's theory is that termination policies that allegedly lack objectivity and transparency, and are discriminatory, are a form of exploitation of customers. An apparent problem with the theory, however, is that a decision to terminate supply cannot, by definition, exploit the customer – it does not 'reap a trading benefit' from the trading partner, as required by United Brands and stressed by the Paris Court of Appeal in its *Sanicorse* decision.

Fourth, in February 2019, the Bundeskartellamt found that Facebook's terms and conditions relating to its collection of user data constitute an abuse (discussed in the Germany chapter). The Bundeskartellamt held that Facebook's terms and conditions, under which users agreed to the combination of their data from, for example, WhatsApp, Instagram and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse of dominance, the Bundeskartellamt held that Facebook committed an exploitative abuse by combining data from different sources. In August 2019, however, the Düsseldorf Court of Appeal granted suspensive effect to Facebook's appeal against the decision, holding that there are serious doubts about its legality. The Court found that users are not exploited by Facebook's use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. The Court also held that the Bundeskartellamt had failed to prove the required causal link between Facebook's abuse and its market power: it failed to show that Facebook's terms deviated from the terms that would exist in a more competitive scenario. The judgment on the merits is pending.

Despite the renewed appetite to bring exploitation cases, these cases should in our view – in line with Advocate General Wahl's warning in the *Latvian Banks* case – remain rare and

exceptional. Otherwise, there is a risk that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law and that require broader discussion outside individual cases.

A greater push for interim measures

The second notable development in abuse of dominance enforcement in 2019 was the EC's decision – for the first time in an antitrust case in almost 20 years – to impose interim measures on Broadcom (this decision is discussed in the EU chapter). The decision orders Broadcom to cease to apply exclusivity provisions in six agreements with manufacturers of TV set-top boxes and modems, while the Commission's full investigation continues. On announcing the decision, Commissioner Vestager stressed that interim measures decisions are 'so important', especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'.

Like other developments at EU level, push for greater use of interim measures has been encouraged by national authorities, particularly in France, with the Commissioner citing France as a source of inspiration. The UK CMA has also stated that greater use of interim measures is 'essential if the CMA is to respond to the challenges thrown up by rapidly changing markets', and Germany is adopting new rules to accelerate proceedings and apply interim measures.

Two examples discussed in the French chapter illustrate the FCA's expansionist approach to interim measures, both in cases involving Google. First, in *Amadeus*, the authority found Google's decision to suspend the Google Ads accounts of a paid phone directory services operator to be an exploitative abuse (similar to the theory in the *Gibmedia* case discussed above). The Paris Court of Appeal subsequently partly annulled the decision. Second, in early 2020, the authority found that Google's refusal to pay news publishers for showing preview snippets in search results alongside a link to the publisher's site may also amount to an exploitative abuse. The decision orders Google to enter into good faith negotiations with publishers, although it also makes clear that the negotiations may result in zero monetary compensation to publishers (considering that Google sends traffic to the publishers that they can monetise via ads on their page or convert users to paid subscribers).

Several points of caution should be heeded from the appetite to bring interim measures cases. Interim measures decisions should focus on the most egregious and clear-cut abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigour, due process, and the right to be heard. Interim measures should not prejudge the final decision from the authority on the merits. Accordingly, they should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer. Finally, the new appetite to impose interim measures should not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and satellite appeals.

Per se bans on self-preferencing

The third development is the wide-ranging proposals to overhaul competition rules to address the perceived challenges of the digital economy. Proposals in the pipeline include the EC's suggestion for further regulation of digital platforms; mandatory codes of conduct in Australia to address perceived bargaining power imbalances between platforms and media

companies; and, in the UK, the CMA's aim to develop 'a coherent and innovation-friendly approach to governing digital technologies to ensure their benefits are shared far and wide'.

Describing all these proposals is beyond the scope of the present editorial. We instead focus on one eye-catching suggestion: the suggestion – included in several of the reports commissioned by governments and agencies, such as the EU Special Advisors' Report, the Furman Report in the UK, the German ARC Amendments, and the Stigler Report – to introduce per se bans on digital platforms or companies that perform a 'regulatory function' from engaging in 'self-preferencing.' The reports, however, do not explain precisely what they mean by 'self-preferencing'. Self-preferencing is a generic expression that covers a range of different practices, for example, margin squeezing, tying and refusal to supply.

For example, keeping an indispensable asset to oneself and refusing to supply it to rivals is an example of abusive self-preferencing. But the refusal to deal in case law makes clear that it is, so far, not abusive for a dominant company to favour itself by reserving for its own use an asset that is not indispensable, but merely 'advantageous.' On the contrary, it is generally pro-competitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*:

> *it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business . . . Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".*

This makes sense, for several reasons. First, there is an inherent contradiction between competition and duties to supply rivals; competition rules seek to encourage companies to compete vigorously against each other, not cooperate. Second, a duty to supply interferes with fundamental rights to dispose of property and to conduct business. Third, duties to supply reduce incentives to innovate for both the supplying company and the company that receives supply. Fourth, in industries with fast innovation cycles, a duty to integrate rivals into constantly-evolving technologies may delay – or preclude – new developments.

The Courts, therefore, only allow interference with the freedom to contract in exceptional and limited circumstances. By contrast, we are concerned that a per se ban on self-preferencing could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.

Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries: the UK High Court held that this was 'pro-competitive' and an 'indisputable' product improvement. Not only was Google's introduction of the thumbnail map not likely to harm competition, but the conduct was also objectively justified. This was because showing rival maps would have degraded the overall quality of Google's search services, for example, via delays in returning results. Under the contemplated presumptions against self-preferencing, however, companies would have to ask themselves before launching this type of improvement whether they could prove the negative (i.e., that it would not lead to long-run exclusionary effects). That appears to be a difficult threshold to cross before launch.

Accordingly, we believe we should be looking at measures that make a real improvement to consumer welfare and avoid chilling innovation and investment. Neat-sounding slogans – such as a presumptive and generic ban on self-preferencing – can prove harmful in practice.

As a recent CMA report into competition and regulation recognised, 'greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.' Similarly, in her speech on 'Remembering Regulatory Misadventure', FTC Commissioner Wilson recalled that attempts to prescribe 'fairness', 'non-discrimination', and 'reasonable and just' prices in the airline and railroad industries led to distortions of competition and restricted output. Removing these regulations 'significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus'. This is not to say that regulation is not desirable for objectives other than fostering competition, but regulation to encourage competition is likely to result in outcomes that any pro-competition and pro-innovation regime should avoid.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this eighth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2020

Chapter 2

AUSTRALIA

Prudence J Smith. Jason A Beer and Mitchell J O'Connell[1]

I INTRODUCTION

In Australia, unilateral market conduct issues are primarily regulated by Section 46 of the national competition statute, the Competition and Consumer Act 2010 (Cth) (CCA). Section 46 prohibits a corporation with substantial market power engaging in conduct that has the purpose or likely effect of substantially lessening competition in the market in which the corporation[2] has market power or in any other market in which the corporation supplies or acquires the goods or services.

While the prohibition is drafted with reference to competitors, consistent with the approach in Europe in abuse of dominance cases, Australian courts have made clear that the primary concern of the provision is to protect consumers and the competitive process itself, not particular competitors who may be affected by an exercise of market power. It should also be noted that it is not a contravention for a corporation to have, or to merely exercise, its market power: see, for example, the decision of the Privy Council in *Commerce Commission v. Carter Holt Harvey Building Products Group*[3] in relation to a similar provision under the NZ Commerce Act 1986:

> *The law of New Zealand does not disable a trader who is in a dominant position in a market from competing with other traders in that or any other market. It is open to the trader to compete on price as well as quality so long as he does not use his dominant position for the purposes of producing an effect which is anti-competitive . . . More over the trader is entitled, before he enters upon a line of conduct which is designed to affect his competitors, to know with some certainty whether or not what he proposes to do is lawful . . . The question which lies at the heart of the appeal to the Board is how, in this difficult area, lawful conduct can be distinguished from unlawful conduct.*

Predatory pricing will contravene Section 46 if engaged in by a corporation with market power and with the likely effect of substantially lessening competition in any relevant market, or where that is its purpose.

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1 Prudence J Smith is of counsel and Jason A Beer and Mitchell J O'Connell are associates at Jones Day. The authors wish to thank Nicolas J Taylor, Matthew J Whitaker and Lachlan J Green for their generous assistance in preparing previous versions of this chapter.

2 Through corresponding legislation enacted by each of the Australian states equivalent provisions also apply to persons other than corporations. References to corporation throughout this chapter should, therefore, be read to apply equally to all other types of entities carrying on a business.

3 *Commerce Commission v. Carter Holt Harvey Building Products Group* [2007] AU ER (D) 235 (Jul).

Previous versions of the provision

On 6 November 2017, an amendment to Section 46 of the CCA came into effect. The amended provision is unchanged to the extent that it requires that it be established that a corporation has a substantial degree of power in a market. From that point on, the provision has changed. Formerly, the requirement of Section 46 was that a corporation take advantage of that market power for a prescribed purpose: eliminating or substantially damaging a competitor; preventing the entry of a person into that or any other market; or deterring or preventing a person from engaging in competitive conduct in that or any market.

Following the amendment, the focus has shifted from proscribed purposes to whether the conduct itself substantially lessens competition or has that purpose. Specifically, the CCA prohibits corporations that have a substantial degree of market power from engaging in conduct that has the purpose, or likely effect, of substantially lessening competition in a market in which the corporation has market power; in any other market in which the corporation has market power; or in any other market in which the corporation supplies or acquires goods or services.

The CCA previously contained two provisions prohibiting predatory pricing that were both repealed in November 2017. Such conduct is now subject to the general provisions.

Until November 2017, Section 46 provided that corporations with a substantial degree of market power could not use that power, in any market, for the purpose of:

a substantially damaging or eliminating a competitor;

b substantially damaging or eliminating competitors generally, a class of competitors or any particular competitor; or

c preventing or deterring anyone from engaging in competitive conduct in any market.

To make out a contravention, an applicant had to establish that a corporation was using its market power (as opposed to any other power), and that it was doing so for a proscribed purpose. This was established by assessing the way in which the corporation would have acted in a competitive market, or how a profit-maximising firm functioning in a competitive market would have acted.

The provision was focused on the purpose for which the market power was used or was intended to be used, instead of whether conduct had an anticompetitive effect.[4]

The amendment followed recommendations in which it was proposed to expand the 'purpose' element to a 'purpose, effect or likely effect' test; remove the 'take advantage' element; and shift the legislative focus from damage to a specific competitor to damage to the competitive process itself.[5]

The proposed Competition and Consumer Amendment (Misuse of Market Power) Act 2017[6] passed the House of Representatives on 28 March 2017 and came into effect on 6 August 2017. These amendments were in part intended to remedy a significant perception that the Australian Competition and Consumer Commission (ACCC) has not been able to bring enough Section 46 actions under the previous form of the prohibition, and of those

4 In *Queensland Wire Industries Pty Ltd v. Broken Hill Pty Ltd* [1989] HCA 6; (1989) 167 6LR 177; 83 ALR 577; 63 ALJR 181; (1989) ATPR 40-925.

5 2015 Australian Competition Policy Review Final Report.

6 The Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Act 87 of 2019).

that it has brought, it has had a relatively low success rate.[7] The ACCC itself had been a vocal supporter of changes to Section 46, with Chairman Rod Sims stating that the prohibition was 'almost unusable' in addressing misuse of market power by dominant corporations.[8]

II YEAR IN REVIEW

While it was anticipated that the amended Section 46 provision would result in a significantly higher number of cases being brought by the ACCC, this has not been the case. Prior to 2019, no cases had been brought by the ACCC under the new provision.

The ACCC brought its first case under the amended Section 46 provisions in December 2019, instituting Federal Court proceedings against Tasmanian Ports Corporation Pty Ltd (TasPorts) alleging that TasPorts had engaged in conduct in breach of Section 46 by seeking to prevent Engage Marine Tasmania Pty Ltd (Engage Marine) from competing effectively in providing towage and pilotage services in Tasmania.

The ACCC alleges that in response to Engage Marine's attempted entry into the Tasmanian market, TasPorts:

a imposed new charges which would require Engage Marine's sole customer to pay A$750,000 in fees to TasPorts after the customer switched service providers from TasPorts to Engage Marine;

b prevented Engage Marine from expanding in Australia by failing to provide long term berths for its boats and refusing to place it on the shipping schedule, which is necessary for it to provide towing services; and

c prevented Engage Marine from providing pilotage services by failing to provide training to Engage Marine's employees, which only they could provide.

The claim alleges that:

a TasPorts has a substantial degree of power in the markets for the supply of marine services in Tasmania;

b in engaging in this behaviour, TasPorts was attempting to prevent or hinder Engage Marine from competing effectively with its marine pilotage and towage businesses in the relevant markets;

c TasPort's actions were driven by an anticompetitive purpose, with the purpose, effect and likely effect of substantially lessening competition; and

d TasPort's actions substantially lessened competition in the relevant markets by denying Grange and other Tasmanian customers the benefits of competition in the supply of marine services in this market.

7 C Coops, 'A fly in the ointment for the ACCC? Implications of the Cement Australia decision for the interpretation of Section 46', Australian Journal of Competition and Consumer Law (2015) 23 AJCCL 83.

8 M Hefernan 'Misuse of market power laws "almost unusable", ACCC chairman Rod Sims says', *Sydney Morning Herald*, 30 April 2017.

The ACCC is seeking injunctions, declarations, penalties and costs. In a defence filed in March 2020, TasPorts admitted to charging additional fees to the owner of the local port, but has denied that those actions constituted a misuse of market power and that they substantially lessened competition in Tasmania.[9] The trial has been tentatively set for February 2021.

In its claim, the ACCC has made use of the broader 'effects' test post-amendment, claiming that in addition to having a purpose of substantially lessening competition, the actions also had the effect or likely effect of doing so. The outcome of this proceeding is likely to provide further clarity on the interpretation of the amended provision, and is also likely to influence the appetite of the ACCC to instigate further proceedings pursuant to Section 46 in the future.

Since the amended rule was introduced, the larger portion of cases invoking Section 46 that have come before the courts have been a result of private actions. As a result, there were several judgments in respect of private actions considering Section 46 in 2019.

a Of particular note was the decision in *B&K Holdings (Qld) Pty Ltd v Garmin Australasia Pty Ltd,*[10] the first to consider the amended Section 46 provisions. The Court considered an application for summary judgment on a claim regarding predatory pricing practices alleged to have been engaged in by Garmin. The application was unsuccessful, as the Court was not satisfied that B&K Holdings had no reasonable prospects of succeeding at trial. In relation to the amended Section 46 as it relates to predatory pricing, the Court noted that 'If a business with substantial market power utilises it for the purposes of substantially lessening competition by engaging in below cost pricing, the mere fact that the cessation of that conduct will cause prices to increase does not immunise the conduct.'[11]

b The applicants in *Black & White Cabs Pty Ltd & Ors v Regent Taxis Limited*[12] and *RSA Express Pty Ltd v Aaron Guilfoyle, Work Health and Safety Prosecutor*[13] sought interlocutory injunctions, relying on the amended Section 46. Both applications were dismissed due to the applicants' failure to establish a prima facie case. In *Black & White Cabs*, while it was accepted that the respondent had a substantial degree of power in the market, the applicants had not demonstrated any substantial lessening of competition.[14]

c Further proceedings seeking to rely on Section 46 of the CCA dealt with the issue in a summary way. In *Zaghloul v Jewellery and Gift Buying Services Pty Ltd & Anor,*[15] the Court considered that there was no breach of the consumer law or oppressive conduct by the respondent; and in *Zierholz@UC Pty Ltd v University of Canberra* [2019] ACTSC 310, the Court noted that while the respondent had a substantial degree of market power, there was no evidence that this market power had been used at all, noting that even if it had been used, it would have needed to have been used for a proscribed purpose (pursuant to the previous formulation of Section 46).

9 M Bolza, 'TasPorts slams ACCC case, says extra fees don't amount to misuse of market power', Lawyerly, 31 March 2020.

10 *B&K Holdings (Qld) Pty Ltd v Garmin Australasia Pty Ltd* [2019] FCA 64.

11 ibid at [29].

12 *Black & White Cabs Pty Ltd & Ors v Regent Taxis Limited* [2019] QSC 50.

13 *RSA Express Pty Ltd v Aaron Guilfoyle, Work Health and Safety Prosecutor* [2019] FCA 1605.

14 *Black & White Cabs Pty Ltd & Ors v Regent Taxis Limited* [2019] QSC 50 at [39].

15 *Zaghloul v Jewellery and Gift Buying Services Pty Ltd & Anor* [2019] ACTSC 310.

A decision was recently handed down in *ACCC v Ramsay Health Care Australia Pty Ltd*,[16] a proceeding brought by the competition regulator alleging that Ramsay had contravened Sections 46 and 47 of the CCA (as they stood in August–September 2015) which prohibited misuse of market power and exclusive dealing. The ACCC alleged that in four pleaded conversations, Ramsay conveyed words to the effect that if certain surgeons were to open a new day surgery in Coffs Harbour, their access to operating theatre time at Ramsay's private hospital in Coffs Harbour 'would be substantially reduced or entirely withdrawn'.

With respect to misuse of market power, the ACCC needed to establish that Ramsay had a substantial degree of power in a market. The Court favoured the view of the ACCC which provided a purposive approach.[17] Griffith J accepted that there was a market in which private hospitals competed to attract surgeons. Upon finding that there were no close competitors in the relevant market, a high barrier to entry to the market, and that Ramsay was not constrained by surgeons, the Court concluded that Ramsay did possess a substantial degree of market power (which was corroborated by Ramsay's own internal documents).

The second and third limbs of the previous Section 46 provision required the ACCC to establish that Ramsay took advantage of its substantial market power for a proscribed purpose. The Court distinguished between the purpose and motive of conduct and cautioned that the two were not to be equated, holding that 'purpose' relates to the end sought to be accomplished by the conduct.[18] In order to establish that a corporation took advantage of substantial market power for a proscribed purpose, the Court held, and the ACCC accepted, that a corporation must 'use' that market power to engage in impugned conduct.[19] On this point, however, the Court refrained from making any findings given that it had already found that no communications to the effect alleged by the ACCC had taken place. However, even upon the assumption that the alleged contravening conduct did occur, the Court opined that Ramsay's alleged conduct (if it did occur) would have been justified by legitimate business rationale (including considerations of economic profitability, and balancing day and overnight surgery).

Considering exclusive dealing, the Court clarified that the practice of exclusive dealing involves supply upon condition, and that conditions need not be legally binding but must have 'attributes of compulsion and futurity'.[20] In light of this, the ACCC failed to establish that Ramsay offered to supply services to surgeons on condition that they not acquire services from a competitor. The alleged contravention was framed as a threat to revoke or withdraw operating theatre lists in the event a competitor entered the market (an event which was at least two or three years in the future). The Court held there could not exist a supply or offer to supply services on the condition that surgeons would not acquire services from a competitor in circumstances 'where there were no services to acquire and there was no competitor'.[21]

16 *Australian Competition and Consumer Commission (ACCC) v Ramsay Health Care Australia Pty Ltd* [2020] FCA 308.

17 ibid [339].

18 ibid [388] citing *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, [18].

19 ibid [391].

20 ibid [422].

21 ibid [425].

Proceeding to nonetheless consider whether there was likely to be a substantial lessening of competition, the Court found against the ACCC on the evidence, given that even after the relevant pleaded conversations, the surgeons continued to explore planning the new day surgery for many months.

Active competition authority cases

The active competition authority cases are set out in the following table.

Sector	Investigating authority	Conduct	Case opened
Ports and infrastructure	ACCC	Alleged misuse of market power in relation to conduct by Tasmanian Ports Corporation, which sought to prevent a new entrant, Engage Marine Tasmania, from competing effectively	December 2019

III MARKET DEFINITION AND MARKET POWER

The prohibition against misuse of market power contained in Section 46 of the CCA applies only to corporations that have a 'substantial degree of power in a market'. Courts in Australia have tended to consider the analysis of market definition and market power together.

i Market definition

Sections 46(8)(b) and 4E of the CCA provide that, for the purposes Section 46, a reference to 'market' is a reference to a market for goods or services, and includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services; and is a market in Australia.

Given the definition of market in the CCA, analysis focuses initially on the identification of substitutes. Both the ACCC and the Australian courts often commence an analysis of the borders of a market using the hypothetical monopolist test (HMT).[22] The HMT examines the effect of a small but significant non-transitory increase in price by a hypothetical monopolist in a market for the good or service in question.

Owing to the input-intensive nature of the HMT analysis, the ACCC limits its inquiry in most cases to examining a list of product and geographic characteristics that tend to satisfy the test.[23] This analysis consists of physical characteristics and portability in addition to economic metrics such as cross-elasticity of demand.

The meaning of 'in Australia' has recently been the subject of consideration in a decision of the Full Court of the Federal Court of Australia. A majority of the Court held, in the context of price-fixing enforcements in the airfreight market, that a market that is located both outside and within Australia was a market in Australia for the purposes of the CCA.

ii Market power

Unlike many other jurisdictions, there are no statutory or court-based market-share presumptions. Proof of market power in Australia always needs to proceed on the basis of a full economic analysis. Market shares are helpful in identifying the degree of market power;

22 See, e.g., ACCC's Merger Guidelines (2008), 17–18 and *ACCC v. The Australian Medical Association Western Australia Branch Inc* [2003] FCA 686; 199 ALR 423 at [305].

23 ACCC's Merger Guidelines.

however, a large market share does not necessarily mean that a corporation holds a substantial degree of market power. Section 46(7) provides that more than one corporation may have a substantial degree of market power in a market. Australian courts place significant focus on the existence and scale of barriers to entry in determining to what extent an entity possesses market power.[24] Courts have also placed weight on other evidence of related but distinct indications of market power,[25] including:

a the ability of the firm to raise prices above the supply cost without rivals taking away customers in due time;

b the extent to which a corporation's conduct in the market is constrained by that of competitors or potential competitors;

c the market share of the corporation (although not determinative by itself);[26] and

d the existence of vertical integration.

In its interim guidelines for market power, the ACCC indicates that market power exists where a firm can only engage in the conduct in question absent competitive constraint. This freedom, the ACCC notes, can be assessed having regard to the factors indicated in *Queensland Co-operative Milling Association Limited and Defiance Holdings Limited*:

a the number and size of distribution of independent sellers, especially the degree of market concentration;

b the height of barriers to entry; that is, the ease with which new firms may enter and secure a variable market;

c the extent to which the products are characterised by extreme product differentiation and sales promotion;

d the character of 'vertical relationships' with customers and suppliers, and the extent of vertical integration; and

e the nature of any formal, stable and fundamental arrangements between firms that restrict their ability to function as independent entities.[27]

An important element of the analysis is determining whether market power is 'substantial' in nature. For market power to be substantial, courts have held that it needs to be 'real and of substance rather than trivial or minimal',[28] or put another way, 'large or weighty' or 'considerable, solid or big'.[29]

Courts have held that merely because a corporation is not profitable does not mean that it lacks market power.[30] Financial power is also not evidence of market power.[31]

24 *ACCC v. Boral Ltd* [1999] FCA 1318 at [140]-[148]; See also *ACCC v. Pfizer Australia Pty Ltd* (ACN 008 422 348) [2015] FCA 113; 323 ALR 429.

25 *Eastern Express Pty Ltd v. General Newspapers Ltd* (1992) 35 FCR 43, 62-63.

26 A market share of 30 per cent has been referred to as indicative of market power in *Boral Besser Masonry Ltd v. ACCC* [2003] HCA 5; 215 CLR 374.

27 (1976) 8 ALR 481, 512.

28 *Mark Lyons Pty Ltd v. Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581.

29 *Dowling v. Dalgety Australia Pty Ltd* (1992) 34 FCR 109.

30 *Seven Network Ltd v. News Ltd* (2009) FLAFC 166; (2009) 262 ALR 160; 282 FCR 160; (2009) ATDR 42-301.

31 *NT Power Generation Pty Ltd v. Power & Water Authority* [2004] HCA 48; (2004) 219 CLR 90; 210 ALR 312; 79 ALTR 1; (004), ATDR 42-201.

Since the amendment, the provision no longer explicitly provides that a corporation with a substantial market share is prohibited from supplying, or offering to supply, goods or services for a sustained period at below the relevant cost of supplying goods or services where the corporation's purpose was to substantially damage or eliminate a competitor, competitors generally, a class of competitors or any particular competitor; or prevent or deter anyone from engaging in competitive conduct in any market. Such conduct will now be subject to the general prohibition.

iii Purpose or likely effect of substantially lessening competition

Substantial market power

For the provision to apply, it is necessary to establish that a corporation has substantial market power. Such market power can be described to be 'considerable', 'big' or 'not merely nominal'.[32] The explanatory memorandum accompanying the bill introducing the concept in 1986 indicated that substantial was to be regarded as 'large or weighty' or 'considerable, solid or big'.[33]

While the introduction of the competition test is recent for the operation of Section 46, the test is well established in the Australian legal landscape in relation to anticompetitive contracts, arrangements or understandings, and mergers or acquisitions, which have all been prohibited where the conduct concerned has been likely to result in a substantial lessening of competition for some time. These authorities are informative as to the likely approach of the courts in relation to application of the test in the context of Section 46.

The ACCC, in its interim guidelines, has observed that 'conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deferring, preventing or limiting competition. This can be done by raising barriers to entry or to entry into a market'.[34] As noted elsewhere in this chapter, 'substantial' must be meaningful to the competitive process.[35],[36] The ACCC identifies at Paragraph 2.26 of its interim guidelines that lessening competition means that the field of rivalry is diminished or lessened, or that the competitive process is compromised or impacted. The ACCC notes that the commercial rationale for the conduct will be relevant to the assessment.[37]

IV ABUSE

i Overview

The prohibition in Section 46 requires not only satisfaction of the elements of market power and engaging in conduct with the purpose or likely effect of substantially lessening competition.

Section 46(4) provides the following non-exhaustive list of factors the court may consider to determine whether a corporation has taken advantage of market power:

32 See *Tillmanns Butcheries Pty Ltd v. Australasian Meal Industry Employees Union* (1979) 27 ALR 367; (1979) ATPR 40-138.

33 See also *Eastern Express Pty Ltd v. General Newspaper Pty Ltd* (1992) 106 ALB 297; 35 FCR 43; (1992) ATPR 4-16 at 63 (FCR).

34 ACCC, Interim guidelines on misuses of market power; 6 November 2017, Paragraph 2.22, p. 8.

35 ibid. at Paragraph 2.27.

36 See *Stirling Harbour Pty Ltd v. Bunbury Post Authority* [2000] FCA 38.

37 ibid. at Paragraph 2.27.

a whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;

b whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;

c whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; and

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

ii Purpose

The purpose element in Section 46(1) will be established where it can be shown merely that there is an intention to achieve a result,[38] rather than the fulfilment of that intention.[39]

While courts have taken a range of approaches to determining purpose, including assessing conduct on a subjective basis,[40] it appears likely that the position going forward is that, while there are subjective elements to assessing purpose, the ultimate test is objective.[41] In the *Telstra Corporation* case, the Federal Court placed weight on the requirement, which provides that the court may find that a corporation's purpose where that purpose is ascertainable only by inference from the corporation's conduct or the conduct of any other person, or from other relevant circumstances. The Court took the approach that if, upon consideration of the nature and substance of the conduct, it can be said that the substantial purpose for that conduct was to substantially lessen competition, or if such a purpose can be inferred, it is not necessary to consider the subjective reasons for the conduct.[42]

To contravene Section 46(1), the proscribed purpose need not be the sole purpose of the conduct, merely a substantial purpose.[43] If the conduct was motivated by both a legitimate purpose and purpose to substantially lessen competition, and both are substantial purposes, the corporation will have contravened Section 46(1).[44] However, Section 46(1) will not be contravened where a corporation was motivated entirely by a legitimate purpose, or dual purposes where the purpose of substantially lessening competition was not substantial.[45] For example, in *Dowling v. Dalgety Australia Ltd*, the respondents' dominant purpose was to use their valuable asset without sharing it with a person who had no proprietary interest in it, and restricting competition was found to be a subsidiary purpose.[46]

38 *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) 205 CLR 1; [2001] HCA 13, [31].

39 *Australian Competition & Consumer Commission v. Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339; [2003] FCAFC 149, [333]; *Australian Competition & Consumer Commission v. Baxter Healthcare Pty Ltd* (2008) 170 FCR 16; [2008] FCAFC 141, [171].

40 *ASX Operations Pty Ltd v. Pont Data Australia Pty Ltd* (No 1) (1990) 27 FCR 460; [1990] FCA 515, [39]–[47]; *Eastern Express Pty Limited v. General Newspapers Pty Limited* (1992) 35 FCR 43; [1992] FCA 138, [83]. *Dowling v. Dalgety Australia Ltd* (1992) 34 FCR 109; [1992] FCA 35, [106].

41 *General Newspapers Pty Ltd v. Telstra Corporation* (1993) 45 FCR 164; [1993] FCA 473, [67].

42 ibid. at [71].

43 CCA Section 4F.

44 *Mark Lyons Pty Ltd v. Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581; [1987] FCA 282.

45 *Top Performance Motors Pty Ltd v. Ira Berk (Queensland) Pty Ltd* (1975) FLR 286; *Dowling v. Dalgety Australia Ltd* (1992) 34 FCR 109; [1992] FCA 35.

46 *Dowling v. Dalgety Australia Ltd* (1992) 34 FCR 109; [1992] FCA 35, [148].

iii Exclusionary abuses

Predatory pricing

Predatory pricing will now be dealt with under the general misuse of market power prohibition in Section 46(1), and will be prohibited if engaged in by a corporation with market power, and the purpose or likely effect of the conduct substantially lessens competition in any relevant market. Conduct will be considered predatory pricing if the corporation has market power and is selling below cost. Typically, the conduct drives competition from the market, following which the offender will increase its price and recover its losses. As per Finkelstein J in *ACCC v. Cabcharge Australia Limited*:

> *Firms engage in predatory pricing 'to drive rivals out of business and scare off potential entrants' . . . Then, they raise prices, capturing monopoly oligopoly rents.*
>
> *Once firms gain monopoly/oligopoly power, it is often extremely difficult to take that power away and firms are likely to be deterred from entering the market because they know that the incumbent has the ability to undercut them and to engage in predatory pricing.*[47]

To establish that a firm has engaged in predatory pricing in contravention of Section 46, two questions will arise. First is assessing when will the price be sufficiently low to be regarded as predatory. In relation to costs, the courts have yet to settle on the appropriate costs measure to establish predatory pricing. In *Eastern Express Pty Ltd v. General Newspaper Pty Ltd*,[48] the court found that no specific category of pricing tends to imply a misuse of market power. On the question of recoupment, the Australian courts have not yet established that recoupment is necessary to establish a contravention. In *Boral Besser Masonry Ltd*[49] *v. ACCC*, per Gleeson CJ and Callinan JJ, 'While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of Section 46, it may be of factual impertinence'.[50] Accordingly, although not a necessary precondition to establishing a contravention, the ability to recoup may be an indication of market power.

Margin squeeze

While there is no judicial precedent, a possible theory of harm of a 'price squeeze' that may fall within Section 46(1) suggests that a vertically integrated firm with substantial market power in the provision of an essential upstream product sets the wholesale price for the upstream product and retail price for the final product in such a way that the margin 'squeezes' an efficient downstream rival from the market.

Exclusive dealing

The CCA specifically prohibits all corporations from, in trade or commerce, engaging in the practice of exclusive dealing where such conduct has the purpose, or would have the effect or likely effect, of substantially lessening competition.[51]

47 *ACCC v. Cabcharge Australia Limited* [2010] FCA 126; (2010) ATPR 42-331.

48 (1992) 106 ALR 297; 35 FCR43; (1992) ATPR 41-167.

49 Now Boral Masonry Ltd.

50 (2003) HCA 5; (2003) 215 CLR 374; 195 ALR 609; 77 ALJR 623;(2003) ATPR 41-915.

51 CCA Section 47(1).

A refusal to supply may not substantially lessen competition if it does not alter the market structure by raising barriers to entry or reducing price competition, and is unlikely to substantially lessen competition if it is a refusal to supply one of a number of competing retailers in a generally competitive market.[52]

Additionally, regardless of whether the purpose or likely effect is to substantially lessen competition, a corporation will contravene the CCA if it:

a supplies, or offers to supply, goods or services at a particular price, or at all, or gives or allows, or offers to give or allow, a discount, allowance, rebate or credit, on the condition that a person to whom a corporation supplies, or offers or proposes to supply, the goods or services (or a related corporation), will acquire goods or services directly or indirectly from another person (not being a related corporation);[53] or

b refuses to supply goods or services at a particular price, or at all, or to give or allow a discount, allowance, rebate or credit, for the reason that a person (or a related corporation) has not acquired, or has not agreed to acquire, goods or services directly or indirectly from another person (not being a related corporation).[54]

Exclusive dealing conduct notified to the ACCC may be immunised unless the ACCC is of the opinion that the likely public benefit of the conduct will not outweigh the likely detriment.[55]

Tying and bundling

A tying scheme may fall within one of the exclusive dealing provisions discussed above if it has the purpose or likely effect of substantially lessening competition. If a corporation with market power grants a discount on condition that a purchaser acquires other goods from it or a third party, such a tying or forcing arrangement may contravene Section 46(1) or Section 47(1) of the CCA.

It will need to be proved that the tying or bundling conduct was exclusionary. For example, in some cases, requiring a customer to obtain consumables from the equipment supplier may be justified as the only way to ensure the safe functioning of the equipment.

Refusal to deal

The general position is that there is no obligation to deal with everyone seeking to deal. Operators have the freedom to choose whom they deal with, and under what conditions. This is subject to the prohibition in Section 46. To contravene Section 46(1), there must be a connection between a refusal to deal and market power. A court considers the business rationale for the refusal, and whether a corporation would have refused to deal even if it was subject to competitive constraints in the market. In particular, where there was a cooperative relationship between parties and a party with substantial market power terminates this dealing, a court may require evidence of some change in circumstances justifying the refusal to continue that relationship. The court will also need to be persuaded that the purpose or likely effect of the conduct is to substantially lessen competition in a relevant market.

52 *Outboard Marine Australia Pty Ltd v. Hecar Investments (No. 6) Pty Ltd* (1982) 66 FLR 120; [1982] FCA 265.

53 CCA Section 47(6).

54 CCA Section 47(7).

55 CCA Section 93.

Some refusals to supply or acquire goods or services for failure to comply with a requirement will contravene the exclusive dealing provisions in Section 47 of the CCA.

Refusal to license intellectual property rights can also attract Section 46(1) if the criteria are met.[56]

iv Discrimination

Price discrimination was specifically prohibited by the former statutory regime if it was likely to have the effect of substantially lessening competition. This provision was repealed in 1995 following a government report concluding that price discrimination generally enhances economic efficiency except in cases otherwise falling within Section 46.[57] Price discrimination will only be prohibited if there is a misuse of market power where the purpose or likely effect of the conduct is the substantial lessening of competition in a relevant market. It will not constitute taking advantage of market power if it is justified by efficiency considerations.

Buyer-induced price discrimination can also constitute a misuse of market power within Section 46(1).

v Exploitative abuses

Mere exploitation of market power by charging the maximum price the market will bear does not generally fall within Section 46(1), provided it does not have the purpose or effect of substantially lessening competition [58]

Different considerations may apply where a monopoly input supplier competes in a downstream market, and the high price charged has an exclusionary purpose and is associated with price discrimination or a price squeeze.

For example, BHP was held to have contravened Section 46(1) by offering to supply QWI with Y-bars at an 'excessively high' price, which would have made it impossible for QWI to compete with BHP in the downstream rural fencing products market.[59]

V REMEDIES AND SANCTIONS

i Sanctions

Section 76 of the CCA provides that a contravention of a provision of Part IV (on 'restrictive trade practices'), including Section 46, can lead to pecuniary penalties of the largest of the following: A$10 million; where the court can determine the value of benefits that have been obtained that are reasonably attributable to the contravening act or omission, three times the total value of the benefits; or where the court cannot determine the value of benefits that have been obtained, 10 per cent of the annual turnover of the offender over the previous 12 months.[60]

For an individual, a penalty of up to A$500,000 may apply.

56 *NT Power Generation Pty Ltd v. Power and Water Authority* (2004) 219 CLR 90; [2004] HCA 48, [84]–[85].

57 Repealed by the Competition Policy Reform Act 1995 (Cth) following recommendation of the 'Hilmer' Independent Committee of Inquiry, National Competition Policy (AGPS, Canberra, 1993) 79.

58 *Pont Data Australia Pty Ltd v. ASX Operations Pty Ltd* (1990) 21 FCR 385, 419.

59 *Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co Ltd* (1989) 167 CLR 177; [1989] HCA 6.

60 CCA Section 76(1A)(b).

In addition, a person who suffers loss or damage as a result of a contravention of Section 46 can recover the amount of the loss or damage against the offender.[61]

Importantly, there is a broad accessorial liability for penalties, damages and other orders for any natural or corporate person who aids, abets, counsels, procures or is 'knowingly concerned' in a breach. Companies are prohibited from indemnifying their staff.

In addition to imposing fines and injunctions, the court can also make the following orders:

a a declaration in relation to the operation of Section 46;[62]

b non-punitive orders, being:
- community service orders;
- probation orders;
- orders for disclosure of information; and
- orders requiring the offender to publish an advertisement on the terms specified in the order;[63]

c an adverse publicity order in relation to a person who has been ordered to pay a fine for a contravention of Section 76;[64] and

d a disqualification order preventing a person from managing corporations for a period the court considers appropriate.[65]

ii Behavioural remedies

The CCA also allows for the court to grant an injunction prohibiting a corporation from engaging in contravening conduct, or requiring a corporation to engage in particular conduct, where it is satisfied that the corporation has engaged in, or is proposing to engage in, conduct that constitutes or would constitute a contravention of the restrictive trade practices provisions.[66]

The court may also make such orders as it thinks appropriate against the offender pursuant to Section 87 of the CCA if the court considers that the orders will compensate the person who made the application, or prevent or reduce the loss suffered, or likely to be suffered, by such a person.[67] These orders may include:

a voiding a contract or certain provisions of a contract;

b varying a contract;

c refusing to enforce any or all of the provisions of a contract; or

d an order directing the person who contravened Section 46 to:
- refund money;
- return property;
- pay the person who suffered loss the amount of the loss or repair; or
- provide services or parts for goods that had been supplied to the person who suffered the loss.[68]

61 CCA Section 82.
62 CCA Section 163A(1)(a).
63 CCA Section 86C.
64 CCA Section 86D.
65 CCA Section 86E.
66 CCA Section 80(1)(a)(i).
67 CCA Section 87(1).
68 CCA Section 87(2).

iii Structural remedies

The CCA does not currently provide any structural remedies for contraventions of Section 46.[69]

iv Statutory immunity

The ACCC guidelines on misuse of market power provide that parties can seek authorisation of conduct that would potentially breach Section 46 of the CCA.

Authorisation provides protection against legal action for future conduct, and parties can apply to the ACCC for authorisation where they believe that there is some risk that the conduct they propose to engage in would or may breach Section 46 and they require the certainty provided by an authorisation to undertake the activity. [70]

Authorisation requires that the applicant satisfy the ACCC that the proposed conduct is either unlikely to substantially lessen competition or that it is likely to result in a net public benefit.

VI PROCEDURE

The ACCC is Australia's peak competition and consumer protection enforcement agency, and is responsible for enforcement of the CCA.

i Investigating and gathering evidence

The CCA contains multiple far-reaching powers that the ACCC can use for investigating and gathering evidence for investigations, including in relation to Section 46. The ACCC both pursues complaints from third parties and investigates on its own initiative.

The ACCC exercises discretion to direct resources to matters that harm the competitive process or result in widespread consumer detriment. Breaches of the prohibition of misuse of market power are regarded as a priority.

ii Power to obtain information, documents and evidence

Section 155 of the CCA is the ACCC's most widely used mandatory information-gathering power. It gives the ACCC the power to require a person to provide information and documents and give evidence relating to a possible contravention where the ACCC has reason to believe that a person is capable of doing so. Failure to comply with a notice is an offence punishable by a fine or imprisonment,[71] and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

The ACCC also has the option to seek a warrant to conduct search and seizure operations (i.e., dawn raids).

iii Enforcement

The ACCC has a range of enforcement remedies under the CCA, with lower order matters often being dealt with administratively, while more serious violations are pursued through the courts.

69 CCA Section 81.

70 Australian Competition and Consumer Commission, '*Guidelines on misuse of market power*', August 2018, page 17.

71 CCA Section 155(7).

Recent amendments to this provision provide that a 'reasonable search' may provide a defence to compliance with such a notice. While this addition is yet to be subject to judicial consideration, the search need only extend to information in the addressees' knowledge or control.

iv Undertakings

An administrative resolution often involves an undertaking from the corporation pursuant to Section 87B of the CCA. An undertaking is not an admission of the ACCC's allegations. An undertaking is approximately equivalent to a consent injunction. The terms may vary, but most commonly the trader agrees to stop the conduct and compensate those who have suffered a detriment because of it, and to take other measures necessary to ensure that the conduct does not recur.

v Court proceedings

The ACCC is more likely to proceed to litigation in circumstances where:

a the conduct is particularly egregious;
b there is reason to be concerned about future behaviour;
c a high-profile corporation is involved; or
d the party involved is unwilling to provide a satisfactory resolution.

However, few cases concerning breaches of Section 46 have been fully litigated, as commencement of legal proceedings often encourages parties to resolve a matter by negotiating and settling a statement of agreed facts and consent orders.[72]

VII PRIVATE ENFORCEMENT

i Overview

Notwithstanding that the CCA provides a ready means of enforcement for private litigants, private actions have historically been few in number.[73] Further, while it is increasingly common for high-profile ACCC proceedings to trigger subsequent private damages suits (in 'piggy-back' proceedings),[74] these were historically limited in number.

The reframing of Section 46 to include an 'effects test' was anticipated to increase the efficacy of the provision by broadening the range of conduct captured, which is intended to increase the number of successful ACCC proceedings and encourage private litigants to make greater use of the provision. Interestingly, the provisions have not been significantly utilised by the ACCC, with the first case under these provisions being brought in December 2019, and private actions have been the main avenue for cases invoking Section 46 coming before the courts as noted in Section II.

72 See, for example, *Australian Competition and Consumer Commission v. Ticketek Pty Ltd* [2011] FCA 1489.

73 C Beaton-Wells and K Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35 *UNSW Law Journal* 648.

74 C Beaton-Wells and K Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35 *UNSW Law Journal* 648, 649.

ii Availability and remedies

While there are no structural remedies available to private parties (or indeed the ACCC) in respect of Section 46 contraventions, behavioural and other remedies are provided for under the CCA, and are available to private litigants.

Section 82 permits private litigants to seek damages for loss or damage suffered owing to the conduct of another party in contravention of Section 46.[75] Section 80 also permits private litigants to seek an injunction restraining a party from engaging in certain conduct, or compelling a party to do a certain act or thing, so as to prevent or stop a breach of Section 46.[76] Injunctive relief may be appropriate where a litigant wishes to prevent another party from initiating or continuing on a course of conduct, or to compel the other party to engage in some positive action (like in the case of a refusal to deal) in response to conduct that may amount to a misuse of market power.[77]

iii Calculation of damages

Courts are largely guided by general common law principles in assessing damages.[78] To rely upon Section 82, the person must have suffered actual loss or damage (thus, potential damage is not sufficient).[79] Secondly, there is a causal requirement that this loss or damage was sustained by the other party's contravention. If it is found that such loss or damage has been incurred, then the court must quantify the loss, even if this requires a degree of approximation or conjecture. Finally, in accordance with general principles governing damages, loss or damage under Section 82 encompasses economic or financial loss but may also extend to consequential loss that arises directly from the impugned conduct.[80]

iv Availability of collective actions

There are no competition law-specific collective actions, but collective actions to enforce the CCA are available under the general provision for commencement of representative proceedings.[81] A collective action may be commenced only if seven or more persons have claims against the same person; the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and all the claims give rise to a substantial common issue of law or fact.

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75 CCA Section 82(1). Note that pecuniary penalties are available under Section 76 but are payable to the Commonwealth (so are not a private action remedy as such).

76 CCA Section 80(1).

77 Such as in the recent case of *Ocean Dynamics Charter Pty Ltd v. Hamilton Island Enterprises Limited* [2015] FCA 460 (www.austlii.edu.au/au/cases/cth/FCA/2015/460.html) in which the Federal Court granted an interlocutory injunction to restrain the respondent from preventing the applicant from using a marina (after the respondent decided not to renew a business licence agreement with the applicant). The applicant had a prima facie case on the basis that the respondent's refusal to deal constituted taking advantage of market power (the marina services market) for a proscribed purpose (either eliminating or substantially damaging the applicant in the luxury yacht market or deterring them from competitive conduct in that market) (at [8]).

78 *Norcast SárL v. Bradken Limited* (No 2) (2013) 219 FCR 14, 89-90 [301]–[303] (www.austlii.edu.au/au/cases/cth/FCA/2013/235.html); *Marks v. GIO Australia Holdings Limited* (1998) 196 CLR 494, 526–527.

79 *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514, 526.

80 *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514, 525-526, 544; *Frith v. Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 232 (www.austlii.edu.au/au/cases/cth/FCA/1983/28.html).

81 Section 33C of the Federal Court Act 1976 (Cth).

In relation to standing, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a collective action.[82] Further, actions are subject to an opt-out regime, so that potential claimants who fall within a class definition will be members of that class unless they opt out, although it should be noted that in some cases, class definitions will be sufficiently narrow that they in effect require claimants to opt in (by defining members as those who have made arrangements with a certain funder or engaged a particular law firm).

Collective actions in respect of damages for anticompetitive conduct are underutilised in Australia.

v Interaction between government investigations and private enforcement

The public and private enforcement regimes interact in a way that both facilitates and frustrates the bringing of private actions. Under Section 83 of the CCA, findings of fact made by a court in a successful proceeding (in respect of a contravention of Section 46) may be used as prima facie evidence of that fact in a subsequent action. A private litigant may therefore rely upon findings of fact made in a successful ACCC proceeding by producing the relevant documents under seal of the court (rather than needing to adduce its own evidence in support of the finding).

On the other hand, some aspects of the ACCC regime may inhibit successful private actions. For instance, while the ACCC has at its disposal a wide range of investigative (and coercive) powers to enable the gathering of evidence, private litigants have no such means of obtaining evidence (for instance, by compelling production of documents). Thus, they face greater hurdles in obtaining sufficient evidence to support a claim of misuse of market power. Further, where a party has engaged in an alleged contravention of the CCA, the ACCC has the discretion to accept a formal undertaking from the party under Section 87B of the CCA. Such undertakings are enforceable by a court and subject to monitoring for compliance (as well as being made a matter of public record). However, undertakings do not necessarily require an admission by the party that it has contravened the CCA. Further, undertakings cannot be relied upon in the same way as findings of fact under Section 83.

Therefore, where the ACCC chooses to settle a matter administratively, rather than initiate proceedings, they may inadvertently discourage (or reduce the likely success of) a later private enforcement action.

VIII FUTURE DEVELOPMENTS

With respect to enforcement going forwards, the Chairperson of the ACCC, Rod Sims has indicated that misuse of market power will remain a focus for the regulator in 2020, stating that 'We will continue to pursue companies that we consider use their market position to harm competition and consumers, and are expecting to deal with further matters involving the amended section 46 misuse of market power prohibition in 2020.'[83]

It is likely that the question of market power which may be alleged to be held by digital platforms, will be a particular focus for the ACCC in the near future. In August 2019, the ACCC delivered its final report following an 18-month inquiry into digital platforms.

82 Section 33D of the Federal Court Act 1976 (Cth).

83 R Sims, 'Australia: Competition and Consumer Commission', *Asia-Pacific Antitrust Review 2020*, Global Competition Review, 27 March 2020.

The report highlighted the substantial market power enjoyed by Google and Facebook, and warns of the ability and incentive of these platforms to favour their own business interests. The report identified that Google and Facebook hold substantial power in crucial digital markets (Google for its general search and search advertising services, and Facebook for its social network and display advertising services), and that this poses a risk to competitive processes.

The ACCC has indicated that a major area of focus going forward will be consumer protection in the digital space. In its final report, the ACCC recommended that mandatory codes of conduct be developed to govern relationships between digital platforms and media businesses.[84] In addition, it has indicated a commitment to building its capacity to aggressively enforce the competition rules as they relate to digital platforms, recommending the government establish a specialist branch within the ACCC, with the role of proactively monitoring digital platforms and identifying potentially anticompetitive conduct, or conduct that may breach Australian consumer laws.

84 Australian Competition and Consumer Commission, 'Digital Platforms Inquiry: Final Report', June 2019, page 32.

Appendix 1

ABOUT THE AUTHORS

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Prudence Smith is a highly experienced competition law practitioner who advises clients on a full range of competition regulatory law issues. She has extensive experience in merger clearance, cartel and anticompetitive conduct investigations and litigation, Australian Competition and Consumer Commission immunities, authorisations and notifications of contracts affecting competition.

Prior to joining Jones Day, Prudence held the position of principal lawyer in the Australian Competition and Consumer Commission.

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Mitch holds a bachelor of laws and a bachelor of business (management) from Bond University in Queensland.

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ISBN 978-1-83862-446-0