

## TOPIC 9 - MISUSE OF MARKET POWER

- ❖ Section 46 prohibits a corporation with substantial market power *taking advantage* of that market power for a prohibited anti-competitive purpose.
- ❖ It is one of the act's most controversial provisions.
- ❖ The Harper Report recommended introduction of a competitive effects test – if introduced it would represent a substantial change to the current prohibition.

### Introduction

The key provision of the *Competition and Consumer Act 2010* (Cth) is section 46, which provides that:

*46. A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:*

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or in any other market*
- (b) preventing the entry of a person into that or any other market*
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*

- At the outset you should note that s 46 does not prevent the *acquisition* of market power, or its exercise as such; rather it proscribes the use of market power for certain specified anti- competitive purposes.
- No attempt is made to prohibit or regulate other exercises of market power. Importantly, for example, it does not prevent a firm with market power taking advantage of that power to charge consumers supra-competitive prices.
- The italicised portion of the extract above represents the change made to s 46(1) by the *Trade Practices Legislation Amendment Act (No 1) 2007* which entered into force on 25 September 2007.
- That legislation also – controversially - introduced a new section 46(1AA) (the 'Birdsville Amendment') dealing specifically with predatory pricing.

### Purpose of S 46

- s46 does not prohibit the acquisition of market power or possession of such; it merely regulates the way in which market power may be used.
- The misuse of market power section deals with three forms of conduct:
  - Misuse of market power generally, including predatory pricing: s46(1)
  - Predatory pricing: s46(1AA)
  - Misuse of trans-Tasman market power: s46A
- The focus of this unit is s46; s46(1AA) is highly controversial and has no relevant case law.

- The purpose of s46 is to promote competition generally and not to protect individual competitors, or groups of competitors (Melway).

**s46: Misuse of Market Power**

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:

- Eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market
- 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 other market.

...

In determining... the degree of power that a body corporate has in a market, the court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of

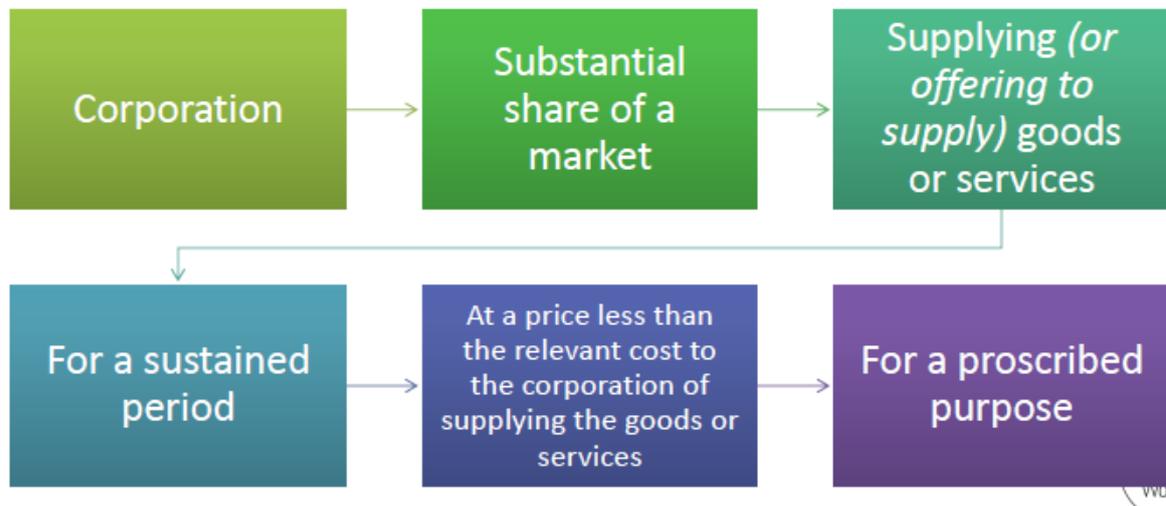
- Competitors, or potential competitors, of the body corporate in that market, or
- Persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

4A. Without limiting the matters to which the court may have regard for the purposes of determining a contravention of ss(1), the Court may have regard to

- Any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services, and
- The reasons for that conduct

- However, the Harper Report noted that the form of the current prohibition in s 46 means that there is a focus on harm to individual competitors ...
  - [page 339] Presently, the purpose test in section 46 focuses on harm to individual competitors — conduct will be prohibited if it has the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.
- Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself — that is, the competitive process.
- The Panel concluded that the current ‘purpose’ test, by focusing on harming competitors, is ‘misdirected as a matter of policy and out of step with equivalent international approaches’ and that it ‘ought to be directed to conduct that has the purpose or effect of harming the competitive process’. (page 340 Final Report)

## Elements of S 46



- The actual prohibition in s 46 is contained in s 46(1), the elements of which are as follows:
  - The respondent must be a corporation or the extension provisions must apply.
  - The respondent must have a 'substantial degree of power in a market'.
  - The respondent must 'take advantage' of that power.
  - The respondent must do this for one or more of three proscribed anti-competitive purposes.
- Please also note that, in addition, s 46(2)–(7) and s 46A (2A)–(9) contain a number of definition, clarification and deeming provisions.

### A Corporation

- Reference to a corporation does not mean it has to be a single firm with market power. s46(2) and 46A(2) provide that the market power of related corporations can be added together for the purposes of satisfying the requirement.

### Substantial Market Power

- In the recent (February 2015) decision in *ACCC v Pfizer* Australia the Federal Court dismissed the ACCC's allegation of misuse of market power, finding that Pfizer's market power was 'not substantial' at the time that much of the conduct took place and that the requisite proscribed purpose was not established.
- The ACCC has appealed the decision; as the next directions hearing is set for 30 October 2015.

### Taking Advantage of Market Power

- This has been the most controversial element of s 46. The Harper Panel noted that the meaning of 'take advantage' is 'subtle and difficult to apply in practice' when coupled with the term 'market power' (page 337 Final Report).
- They concluded that 'take advantage' is 'not a useful test by which to distinguish competitive from anti-competitive unilateral conduct' and that it has 'undermined confidence in the effectiveness of the law'.

- Importantly, they also noted that: Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns’ (page 339 Final Report)
- The *Cement Australia* decision was the latest misuse of market power case to fall down on the element of ‘take advantage’. As it was a first instance judgment and the future of the take advantage element is in doubt, I will not require you to read the full case (which runs to 965 pages) ... but please read this brief note setting out key points from the case.

### ***ACCC v Cement Australia’ (2014) 22 AJCCL 146***

<b>Facts:</b>	<ul style="list-style-type: none"> <li>• This involved an allegation that CA had brought supplies of flyash in excess of their needs in order to prevent others from purchasing it and this constituted both a misuse of market power and an ant-competitive agreement in contravention of s45.</li> </ul>
<b>Held:</b>	<ul style="list-style-type: none"> <li>• succeeded on s45 claim, failed on s46.</li> <li>• Greenwood J held that CA could have done the same thing absent any market power. ss6A was not available for judicial consideration at the time the conduct took place.</li> </ul>

- It is interesting to note that in the *Pfizer* case, the take advantage element was the only element the ACCC did successfully establish in their section 46 claim!

## “Taking advantage” - Causation

**Must demonstrate respondent would not have engaged in the conduct under competitive conditions**

- Dowling: ‘has the corporation exercised a right that it would be highly unlikely to exercise or could not afford for commercial reasons to exercise if the corporation was operating in a competitive market’

**Must be connection between MP and conduct**

- Not satisfied if you have MP and eliminate competition by burning down their factories – no market power required to do that (*Natwest*)

**If conduct has business rationale it points against taking advantage (majority in Boral)**

- If firm with no MP would engage in the conduct for commercial reasons it would follow that a firm with MP engaging in the same conduct is not taking advantage of MP

