

THE DAWSON REVIEW AND SECTION 46: THE GOOD, THE BAD, AND THE UGLY

MICHAEL JACOBS*

The Dawson Committee ('the Committee') has decided that s 46 of the *Trade Practices Act 1974* (Cth) ('TPA') (misuse of market power) is best left alone, rejecting the submission by the Australian Competition and Consumer Commission ('ACCC') that an 'effects test' should be added to the current version of the law.¹ Perhaps this decision reflects the adage 'better the devil you know', or perhaps it bespeaks a bureaucratic affinity for that portion of the Hippocratic Oath that states 'first, do no (more) harm'. On its face, however, it marks a rejection of the ACCC's main (and only) argument in support of the submission, namely 'that the [current] section has a limited application because of the difficulty in proving purpose'.²

On a certain level, the Committee's approach to the ACCC's submission has an air of rough empiricism about it. Citing a number of cases starting with *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,³ continuing through to *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd t/as Auto Fashions Australia*⁴ ('Melway') and including a number of cases that are still on appeal to the High Court (though excluding *Boral Besser Masonry (now Boral Masonry Ltd) v Australian Competition and Consumer Commission*⁵ ('Boral') – the Committee concluded that proving purpose has not, as a matter of fact, been 'an unnecessarily onerous hurdle for the ACCC',⁶ and that therefore the Commission's argument lacked a solid factual foundation. On this basis, and for other reasons discussed below, the Committee seems in my view to have reached the right conclusion. That's the good news. The bad news is that s 46 remains in serious need of repair or reformation.

* Professor of Law, DePaul University College of Law, Chicago. The author served as a Visiting Scholar with the Australian Competition and Consumer Commission from July 1998 to June 1999. He continues to consult with the ACCC on various matters and is a Special Counsel to Blake Dawson Waldron. The opinions expressed in the article, of course, are his own.

1 Australian Competition and Consumer Commission, *Submission to the Trade Practices Act Review* June 2002.

2 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the w* (2003) (the 'Dawson Review') 77.

3 (1989) 167 CLR 177.

4 (2001) 178 CLR 253.

5 (2003) 195 ALR 609.

6 Dawson Review, above n 2, 79.

Section 46 of the *TPA* provides relevantly that:

A corporation that has a substantial degree of power in a market may not take advantage of that power for the purpose of:

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

The ACCC's proposal would have added the words 'or with the effect or likely effect'⁷ after the purpose clause in the first paragraph, and would thus have extended liability to cases in which the ACCC could have proved *either* a proscribed purpose *or* an actual or likely anti-competitive effect, in addition to the other elements of the offence, which would remain unchanged.

Had the ACCC's proposal been accepted, the Committee observed, a corporation with the requisite degree of power found simply to have used that power – imagine that it charged low but above cost prices because its market share afforded it economies of scale unavailable to its smaller rivals – could be found liable under s 46 for having succeeded in eliminating a less efficient rival or discouraging a less efficient potential entrant from entering its market. But because 'the effect of legitimate competitive activities may result in the lessening of competition in a market',⁸ the ACCC recognised that the proposed amendment 'would be likely to catch pro-competitive as well as anti-competitive conduct',⁹ and would thus discourage the former, at least on the margin. This kind of discouragement would pervert rather than promote the aims of competition. Consequently, the Committee had a powerful theoretical reason, in addition to the empirical one, for rejecting the ACCC's proposal.

What remains after the Dawson Review, then, is the old s 46, the known devil. Unfortunately, however, it is no less devilish for being known. Under this section, as the Dawson Review admits, the only thing that matters in assessing liability – once the corporation in question can fairly be said to have a substantial degree of power in a market – is the behaviour of the corporate defendant.¹⁰ Thus, in the words of the Review, 'misuse' within the meaning of the section 'occurs when a corporation takes advantage of the power for a proscribed purpose, *regardless of the actual effect of the conduct*, whether it be the achievement of a proscribed purpose or the substantial lessening of competition' (emphasis added).¹¹ Using one's power to eliminate a competitor, for example, is forbidden by the *TPA*, presumably even if the competitor is less efficient than the defendant or even if consumers would be made better off as a result of the competitor's demise.

7 Australian Competition and Consumer Commission, above n 1, 94.

8 Dawson Review, above n 2, 85.

9 Ibid.

10 Ibid.

11 Ibid 79.

But why should this be so? What logic or principle of economics might support the notion that motive divorced from its effects should be the critical factor in assessing liability? Several reasons suggest themselves, none of them terribly persuasive.

First, it could be that Australian antitrust law cares nothing for anti-competitive effects, regarding them as irrelevant to competition policy. This, however, seems highly unlikely. The notion that the *TPA* is concerned only with certain kinds of purposeful conduct but not with its effects seems to have been properly disavowed by the Dawson Committee itself, albeit somewhat indirectly. Thus, if 'vigorous competition is desirable because it is likely to deliver economically efficient outcomes',¹² then, by parity of reasoning, conduct impairing competition is objectionable because of the inefficient outcomes it is likely to generate.

Second, it could be that corporate behaviour (and I am speaking throughout of behaviour by a firm with the requisite degree of market power) motivated by an improper purpose invariably produces anti-competitive effects. But there seems little empirical support for this proposition, even assuming agreement on the difficult definitional question of what might constitute 'an improper purpose'. To some it might seem that the opposite conclusion is at least equally powerful. Suppose an oligopoly market of two or more firms with equal market shares, no evidence of collusion, and a history of vigorous competition. Such markets exist in the real world: the long-standing and very bitter rivalry between Coca Cola and Pepsi provides one well-known example. And suppose as well that each firm wants nothing more than to put its rivals out of business, by using its size, its economies of scale and any other lawful means at its disposal. Suppose that's their only articulated purpose. Suppose that they set out to achieve their purpose by competing as vigorously as possible, lowering prices, increasing consumer choice, and improving service. And suppose finally, that despite its avowed purpose, no firm accomplishes its aim. There is, in other words, market-wide proscribed purpose, no anti-competitive effect, and indeed quite a bit of pro-competitive effect. Under s 46, all firms would violate the *TPA*, although consumers would benefit from the violations.

Third, one cannot avoid the difficult definitional question. If true, the Dawson Review's conclusion that proof of purpose is not too difficult a hurdle for the government to surmount is unsettling. Why is it not more difficult to prove purpose? In *Boral* and *Melway*, evidence taken from internal memoranda provided the basis for concluding that each firm had a proscribed purpose, but the evidence was of the kind that most American courts now take with an enormous grain of salt. Consumers benefit when firms want to take market share from their rivals, or establish lower-cost distribution systems. Giving voice to this aspect of corporate rivalry cannot in itself be anti-competitive, even if the language chosen by the speaker is grandiose, ill-intentioned, or imagines a monopoly future for which all firms pine but few achieve, because consumers suffer no harm from the anti-competitive longings of large or powerful firms.

12 Ibid 80.

Prices do not rise. Output does not fall. Rivals' costs are not raised. When consumers suffer at the hands of powerful companies, they are hurt by its conduct, not by memos, emails, or the 'rah-rah' sentiments of a few salesmen.

Fourth, an antitrust regime – or that portion of it that deals with constraining the behaviour of powerful firms – must not only proscribe anti-competitive conduct but must also attempt to provide as much guidance as possible about the range of conduct permitted for the powerful. It seems both highly inadequate and very ineffective to confine institutional guidance to the issue of internal corporate communication. Should the presence or absence of 'smoking' memos or emails really spell the difference between a possible prosecution and regulatory approval or acquiescence? Is the law more concerned with forcing large firms to watch their language or with having them consider the competitive impacts of their conduct? When powerful firms stop their use of anti-competitive language once and for all, will the ACCC close its doors? Of course not.

All powerful corporations must on a regular basis answer the following three questions, questions that are problematic for every antitrust regime in the world. First, what kinds of responses are permissible for a firm with a substantial degree of power, when a smaller rival takes away some of its market share? Second, what kinds of strategies are permissible to a powerful firm that anticipates (as they all do) changes or growth in their markets? Finally, by what metric should powerful firms generally determine how vigorously and in what ways they may compete? None of these questions is answered by reference to the language used by corporate employees in the isolated email or the single memo plucked from an array of thousands.

In order for s 46 in its present form to contribute meaningfully to competitive markets and to provide the degree of guidance needed by powerful firms in order to compete vigorously and lawfully, it must be interpreted in a way that will allow it to respond to the kinds of questions described above. This may be possible via one of two routes, although one of these seems foreclosed by High Court precedent. First, the 'take advantage' clause of s 46 could be read to require a misuse (rather than simply a 'use') of the defendant's market power. With that opening, the issue of 'misuse' could then form the linchpin of antitrust analysis, as it does through different terminology in the United States, through words such as 'anti-competitive', 'wrongfully exclusionary' and 'predatory', all of which might just as easily mean 'misuse'. Given this gloss, 'misuse' could then serve as a surrogate for the notion of 'harm to consumer interest'. Firms could determine and defend their actions on the basis of their *ex ante* assessment of the reasonably anticipated effects of the conduct or transaction on consumer welfare so conceived. But, this road is closed, I realise, by the High Court's clear interpretation of the meaning of the 'take advantage' clause.

What remains then is to use the language of 'purpose' in s 46 to import the same notion described in the previous paragraph. More room for manoeuvre may exist for this interpretative stratagem. In gauging whether the firm in question had the proscribed 'purpose', the term would be treated so that, for example, a purpose to 'eliminate a competitor' would be read to mean 'a purpose to eliminate a competitor through conduct not defensible *ex ante* as conducive to

consumer welfare'. It would remain the government's burden to prove this purpose, and the defendant would be able to rebut, if possible, the government's proof.

Because it places consumer welfare at the centre of the relevant inquiry, I regard this particular purpose-driven approach to s 46 as very much preferable to the current state of affairs. Businesses might not know what their employees are saying to one another, might not wish to bank the competitive fires of their most loyal employees, and might not be able effectively to police all of their communications in any event. But they should have some idea beforehand whether their plans and anticipated conduct are apt to promote consumer welfare. They might be wrong in the event, but that is not the point. Companies motivated by this purpose, in part or in whole, should be free to act on it without fear of antitrust liability. As long as consumers stand to benefit from their conduct, powerful firms cannot and should not be said to have misused their power.