



Misuse Of Market Power In Australia

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Section 46 of the Competition and Consumer Act 2010 (previously the Trade Practices Act 1974) is directed to conduct that takes advantage of market power for an anticompetitive purpose. The object of the Competition and Consumer Act (“the Act”) is to enhance consumer welfare through the promotion of competition. The Act reflects the premise that effective competition requires a legal system to limit the use and concentration of economic power, to encourage innovation, and to place appropriate checks on the market mechanism and the excessive pursuit of self-interest.

Section 46 addresses the use, rather than the concentration, of market power. This book commences with an explanation of the key concepts of competition and markets, and their extraterritorial aspects. I examine the sources of market power, how market power is identified, and how it may be distinguished from other things such as financial power, or superior skill. I have included entire chapters on important and difficult topics such as barriers to entry, the counterfactual test for whether conduct has taken advantage of market power, and predatory pricing.

Despite the relative clarity and elegant simplicity of the key provisions (sections 46(1), 46(3) and 46(7)), section 46 has vexed legislators, courts, and commentators since its introduction. In part, the difficulty reflects the complexity of the concepts of competition, markets, market power, and taking advantage of market power, all of which are factors for consideration in determining whether particular conduct contravenes the section. The problems of interpretation also stem from the difficulty in distinguishing anticompetitive conduct from competitive conduct. The latter does not use market power, and may even indicate its absence. Unless the market is growing, any conduct of a firm that increases its sales will likely harm its competitors by reducing their sales. Competition is ruthless, and driven by pursuit of self-interest, and competitors usually try to injure each other to win sales and increase profits. The Act’s underlying premise is that consumers benefit from this rivalry between firms, and that unless conduct makes use of market power, it is of no concern to section 46.

The 1986 amendments introduced the threshold test of a substantial degree of power in a market into section 46(1). As the Explanatory Memorandum to the Trade Practices Revision Bill 1986 recognized, however, a corporation having the requisite degree of market power is not prohibited from engaging in any conduct directed to one of the objectives mentioned in section 46(1)(a), (b), or (c), because such a prohibition would unduly inhibit competitive activity. The section is directed to the misuse of market power, not size or competitive behaviour. It recognizes that competitors will often intend to harm each other in their quest to win sales, but that such behaviour and objective should not be condemned unless it makes use of market power.

Although the book treats the misuse of market power in Australia, many of the concepts of markets, competition, market power, and use of market power are applicable in foreign jurisdictions, and considerable reference is made to American law and cases. Consequently, the book will be of interest to readers who have an interest in the area of competition law or antitrust, whether they are situated in Australia, New Zealand, the United States, the United Kingdom, or Europe.

Ian B Stewart has published several articles on misuse of market power in leading Australian law journals, and he appeared as junior counsel in the leading High Court of Australia decision of *Boral v ACCC*.

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