



# Competition Law in Australia of Section 46

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**Abstract:** In 2016-2017 a landmark change was observed. The Competition and Consumer Act 2010 was amended in relation to Section 46 with the aim of strengthening the Competition law and policy in Australia and keep large corporations in check. This essay will examine the impact of the replacement of the misuse of market power provision in old Section 46 with the effects test in the amended Act. The purpose and impact of substantial lessening of competition under Section 46 would thus be examined with reference to case law and articles.

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## 1 Background

It is necessary to examine the background leading up to the change in Section 46 to understand the importance of substantial lessening of the competition. The Harper review played a forefront role in bringing about this change. The aim of section 46 has always been to prevent abuse of dominant position by large firms wielding great market power. The misuse of power test only prohibited the most egregious by firms whereas smaller acts distorting competition were left at the mercy of other provisions to keep in check. Thus, instead of misuse of market power the test was framed as to prohibit a corporation from engaging in an act which has the purpose, effect or likely effect of substantially lessening competition in that market.

This new test creates uncertainty for corporations

to assess their conduct as before law was certain. Now with the subsequent change, it was necessary for firms to understand the meaning of purpose, effect, likely effect and substantial lessening of competition in order to regulate their conduct. This can be achieved through examination of cases in early years after introduction of this new section.

## 2 Substantial lessening of competition and Section 46

Section 46 is now the standard Australian anti-competition provision in which a corporation holding a 'substantial degree of power' in the market is forbidden from engaging in any conduct that will have the 'effect' of substantially reducing competition in the market and associated supplies of goods and services. This provision of the 2010 Act was amended by the Competition and Consumer Amendment (Misuse of Market Power) Act 2017 was a new provision, repealing its counterpart and introducing a new 'effects test' in competition law<sup>[5]</sup>.

However, the 2017 'substantial lessening of competition' test actually allows various conducts that may be aimed at individual competitors if such conducts do not have the 'effect' of 'substantially reducing the competition'. These conducts and practices thus obviously include anti-competitive practices like refusals to deal, discrimination in price, predatory pricing.

Prima facie, the addition of the 'effects test' in Section 46 can be seen to be an improvement on the previous law. This is because that it is exceedingly cumbersome to acquire evidence of a 'purpose' which may prove to be anti-competitive in a company or a corporation, in which decisions are made by different 'minds' and are almost always deliberately not

documented.

This was seen in the case of *Barton v Westpac Banking Corporation*<sup>[6]</sup>. It may also be the case that relevant documents pertaining to a ‘purpose’ as was stated in the now repealed provision was not retained by a company, and it was not easy to discern whether such deletion was deliberate or inadvertent.

In discussing the effects test, it is also important to critically analyze the use of the words “engage in conduct” in Section 46(1). This statutory language replaces the words ‘taking advantage’ in the old law. This provides the law with the certainty that was previously lacking, and it removes any possibility of various interpretations of ‘taking advantage’ by the Courts.

Apart from its (perhaps, purposely) unclear language, the Section is problematic in many ways: Firstly, a newcomer to market competition, i.e., a potential entrant, does not possess a market share to begin with, as is the requirement of Section 46. Thus, it is a circular argument to conclude that since the market share of this entrant is not large enough, there is no necessary conclusion that any conduct of exclusion or predatory targeting has the ‘effect’ of ‘lessening market competition substantially’. This assessment of substantially lessening competition in a short time. This assessment of substantially lessening competition in a short time frame runs the risk of hindering economic progress by lessening the diversity and dynamism in a market which comes from emerging competition.

### 3 Measurement of competition in a market

The ACCC Merger Guidelines (2008) lay out how competition is measured in the Australian markets<sup>[7]</sup>. The ‘Competition Test’, laid out in Section 50 of the Act, is explained in Chapter 3 of the guidelines, which point out that mergers and acquisitions can alter or change the level of competition, which is defined as ‘a state of ongoing rivalry’ between firms. One of the most obvious ways of measurement is pointed out by the guidelines to be an increase in market power. In essence, this means that one firm (or more) have acquired the ability to raise prices to their profit. The Regulator will, according to the guidelines, look at a foreseeable future, around two years, and will look at each merger factor separately to discern whether there will be any lessening of competition. Particularly, in *Re QCMA* the court

enlisted elements of market structure and pointed out that in assessment/measurement of competition in a market, the identification of markets was the first essential step.

### 4 Purpose of substantially lessening competition in a market

It is found that there are multiple views observed in Australia regarding the purpose of the substantially lessening competition. It is highlighted in the judgments of different case laws among which are the case of *Seven Network*<sup>[8]</sup>. *Dowsett and Lander JJ* considered the concept of substantial purpose in these lines that it is important to draw relevance to the subjective purpose when a provision includes a contract or arrangement and the word purpose here does not mean motive because the motive will demonstrate the reasons behind the inclusion of the provision, but it will not demonstrate the purpose of the provision. It was further observed that Section 4 of the Competition and Consumer Act is relevant for Section 45, 45B, 46 and 47 while highlighting the insufficiency of the same section. *Dowsett and Lander JJ* noted that the definition of substantial is ambiguous, and it varies to include from a considerable to not merely nominal based on context. According to *Hodgekiss* the dicta in *Seven Networks* that the purpose was different than knowledge and that the purpose needs not be the only purpose rather a substantial purpose. Section 4F (1) (a) (i) is found to be relevant.

Likewise, another view was observed by *French J* in *Stirling Harbour* that while deciding that the proposed conduct has purpose, impact or likely effect, there is no need for Court to consider the current situation of competition in the market against its extended state in the occasion the event happens<sup>[9]</sup>. It is somewhat a matter of considering the future condition of competition in the relevant market with and without the impugned conduct. Furthermore, anti-competitive agreements (Section 45) and mergers (Section 50) are barred only if they have purpose, impact or likely impact of substantially lessening competition. However certain factors are to be evaluated in order to apply the concept of substantially lessening competition in the relevant market such as nature and extent of the market as well as probable nature and extent of the competition. Moreover, the extent and nature of the contemplated

lessening must also be assessed in regard to the conduct in question.

Moreover, Federal Courts analyzed the meaning of purpose specifically in regard to substantially lessening competition and various meanings were observed in various case laws such as Dowling, Universal Music, Liquorland, Pont Data, Baxter Healthcare and Seven Network<sup>[10-12]</sup>.

## 5 Effect or likely effect substantial lessening of competition in case law

It was found in another case *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* that there is no doubt that the contractual provisions had the effect of substantially lessening competition in both the stock exchanges market, in which ASX and other related companies operated. The court was of the opinion that better approach would be to make declarations as against ASXO, the contracting party which locates identifying, and declaring void, the particular contractual terms which offend the statute such as a misuse of market power, a provision substantially lessening competition or creating price discrimination.

Furthermore, the test of lessening competition is extremely complex and difficult. This is evidenced in many cases. In *TPC v TNT Management and Others* the facts of the case involved transport brokerage services; the Trade Practices Commission did not manage to convince the Court that competition was in fact ‘substantially lessened’<sup>[13]</sup>.

Further case laws demonstrate the difficulties in the cases as well: In the case of *AGL v ACCC (No. 3)*, AGL wanted to acquire the maximum possible shares allowed in LYP Power Station (35%)<sup>[14][15]</sup>. After being denied informal declaration by the Regulator respondents, AGL asked the court for a declaration that such an acquisition would not contravene Section 50 of the Trading Practices Act 1974<sup>[16]</sup>. French J granted the declaration and held that such a vertical merger would not ‘substantially lessen competition’. What is interesting however, is that later on in his judgment, he himself noted that this condition of substantially lessening competition ‘imports uncertain judgments about the post-acquisition state of competition...’ but conclusively decided that ‘. Uncertainty is an inescapable aspect...’ of the Section under moot.

In *Vodafone Hutchinson (2020)*, the ACCC

announced its opposition of a merger between Vodafone and TPG Telecom, which was challenged in Federal Court<sup>[17]</sup>. The Court once again held that such conduct would not substantially lessen competition. Calum Henderson, in their commentary on the case point out that merger cases are quite different to regular cases before the ACCC: there are only opinions and assumptions about what will occur after the proposed merger, no evidence as yet. Thus, expert business people often hold sway in decisions like these that are opposed by the ACCC for being anti-competitive. The illustration of this is also seen in *ACCC v Pacific National Ltd*, in which the Competition regulator was concerned that an acquisition of the Acacia Ridge Terminal via the long-term subcontract would be anti-competitive as it would be a deterrent to any ‘new entrant’ that sought to also provide similar services in competition. Thus, these cases clearly illustrate and breathe life into the argument that the Section is inherently problematic.

Reference can be made to the seminal case of *AGL v ACCC (No.3)* Judges in this case emphasized on the fact that AGL’s 35% interest in an electricity generator against another Company, LYP, amounts to the violation of s.50 (1) of the CCA. The merger in this case was termed as a vertical merger and the main argument of the ACCC rested on the fact that this, resultantly enhanced LYP’s market power to increase prices in the spot market for electricity. Labelling competition as process rather than situation, the court held that the lessening of the competition was substantial if the impact of the conduct was meaningful or relevant to the competitive process. Keeping the aforesaid in view, it can be inferred that substantial lessening might have better effect on the market.

## 6 Substantial lessening of the competition in the eyes of authors

Firstly, Competition needs to be defined before going on to understand what is meant by substantial lessening of the competition. The definition of the term competition is found per se in the Competition and Consumer Act 2010 where it is defined as “competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.”

Hodgekiss however notes that courts especially in the case of *Re QCMA* focus on the process of

competition rather than the theory of it. Hodgekiss also notes in his article that the right concept of substantial lessening of competition through counterfactual analysis is important. This was in background to the decision in the *Liquorland* case<sup>[18]</sup>. Hodgekiss also noted that purpose is not the same as knowledge. Relying on the dicta in *Seven Network* not only purpose but substantial purpose of lessening the competition must be preset.

Furthermore, Peter Armitage is of the view that substantial lessening of the competition is only considered substantial where the impact of the conduct can be considered meaningful or relevant to the competitive process<sup>[19]</sup>. This view is tenable and was affirmed by the High Court in the case of *Rural Press* and also by the Federal Court in the case of *Tillmans* where it was held that substantial lessening of the competition meant something more than trivial or minimal<sup>[20]</sup>.

Duke, Arlenotes that Section 46 in practice has not been invoked in case law as frequently as it should have been especially in light of repeal of Section 51(3) of the Competition and Consumer Protection Act 2010<sup>[21]</sup>. It is noted in *Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd* ('Pfizer FC') a breach of Section 46 and 47 was alleged<sup>[22]</sup>. However, the defendant sought to rely on Section 51(3) as a defense invoking licensing requirements in relation to Intellectual Property Rights. Here Duke, Arlen notes that Section 46 and substantial lessening of the competition was never invoked nor use otherwise it could have served an important role in negating the contentions of the defendant and preventing abuse of competition<sup>[23]</sup>.

Other areas under the Consumer and Competition Act 2010 are also interrelated to Section 46 and they delve further on the meaning of substantial lessening of competition. One such area is Section 50 which relates to prohibition of acquisitions that result in substantial lessening of the competition. What sets Section 50 apart is that it has a detailed test on what constitutes as substantial lessening of competition which can then serve as a useful guideline. It is done by scrutiny through the ACCC which considers all relevant market factors and iterates the same guidelines found under case law of Section 46, namely that there has to be a substantial and discernable. In case of merger ACCC will look at market power after the merger as a method of

measure as well<sup>[24]</sup>.

## 7 Conclusion

Therefore, it follows that the test for Substantial Lessening of the competition and what it entails is a fluid one. There is no one single codified definition of it, instead one has to go through case law and take views of authors to construct boundaries within which substantial lessening of competition lies. This presents an issue for market which thrives on certainty which Section 46 lacks. It is also seen that within the Australian governance system the ACCC, courts legislation seems to be portraying differing scope of application of Section and it is difficult to find an equivalent section in the legal system of the United states for example to act as precedent. Given that the law is relatively new, and its jurisprudence is still being developed by courts and concurrently with Section 50, it is only a matter of time before things settle and these terms of substantial lessening of the competition, purpose, effect or likely effect are holistically defined.

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