CHAPTER 5

MISUSE OF MARKET POWER: S46

The existing provision

5.1 Section 46 of the Act prohibits a corporation having a substantial degree of market power from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor,
- preventing entry into a market, or
- deterring or preventing a person from engaging in competitive conduct.

The previous provision

5.2 When introduced in 1974, section 46 dealt with conduct characterised as 'monopolization'. Prior to 1977, the section prohibited corporations in a position to substantially control a market from taking advantage of their market power to, in general terms, damage competitors, prevent entry into markets or deter or prevent competitive behaviour. The section was amended in 1977 to specifically incorporate a purpose test when evaluating the conduct in issue. This amendment adopted a recommendation of the Swanson Committee.

5.3 Further amendments in 1986[1] lowered the threshold and changed the character of the provision from 'monopolization' to 'misuse of market power'. The requirement 'substantially to control a market' was said by the Attorney-General to be 'of quite limited effectiveness ... principally because the section applies only to

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1 *Adopting a recommendation made in the 1979 Blunt Report and canvassed in the 1984 Green Paper.*

monopolists or those with overwhelming market dominance.'[2] It was therefore replaced by a requirement that the corporation have a 'substantial degree of market power.'[3] Proof of purpose was to be made easier by the insertion of subsection 46(7), enabling the court to infer purpose from conduct or from other relevant circumstances, and the substitution of a new subsection 84(1), enabling the attribution of purpose where offences were committed by bodies corporate.

5.4 In 1989, the Griffiths Committee reviewed the operation of section 46 and recommended that it be retained in its existing form.[4]

Objectives of the section

5.5 The apparently contradictory nature of the section has often been commented upon. For example, Professor Baxt has drawn attention to the 'as yet unresolved problem of whether the section is a section aimed at ensuring that competition and the competitive process is at the heart of the protection provided for by the legislation, or whether, as the words of ss 46(1)(a) and (b) (in particular) indicate, individual competitors might also be the beneficiaries of the amendments to the law'.[5]

5.6 In introducing the amended provision in 1986, the Attorney-General stated that it was 'most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors'.[6]

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2 *Hansard, House of Representatives, 19 March 1986, p 1626.*

3 *For discussion of the operation of this threshold compare Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd (1987) ATPR 40-809: a 33% share of the ski-boot market constituted a substantial degree of power, and D & R Byrnes (Nominees Pty Ltd v Central Queensland Meat Export Co Pty Ltd (1990) ATPR 41-028: a 7% market share did not give the respondent a substantial degree of market power.*

4 *Griffiths Report, para 4.6.34.*

5 *Submission, p 11.*

6 *Hansard, House of Representatives, 19 March 1986, p 1626.*

5.7 However, in a frequently quoted passage, Mason CJ and Wilson J in their joint judgment in the Queensland Wire Case said:

> the object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort ... and these injuries are an inevitable consequence of the competition s 46 is designed to foster.[7]

5.8 In a gloss on this passage, Wilcox J observed that the section:

> seeks to protect traders against damage from their competitors. Yet it is one of a series of provisions designed to foster, not limit, trading competition; and it is axiomatic that effective competitive activity by one market participant inflicts damage upon other participants. The more competitive the market, the more the principles underlying Part IV are applied, the greater the damage likely to be sustained by less efficient participants.[8]

5.9 AFCO suggests that the section is generally seen as a provision 'to guarantee competition, rather than as a means of pursuing powerful corporations who deal harshly and unfairly with smaller competitors.'[9]

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7 *Per Mason CJ and Wilson J in Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd (1989) 63 ALJR 181 at 186. In the same case, Deane J (at p 187) stated that "the essential notions with which s 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones ... The objective is the protection and advancement of a competitive environment and competitive conduct ..."*

8 *Eastern Express Pty Ltd v General Newspapers Pty Ltd (1991) ATPR 41-128.*

9 *Submission, p 11.*

5.10 Yet Professor Clarke observes that, despite having a link with competition, the section 'cannot be regarded as being primarily concerned with its preservation or enhancement, because the section can be contravened by conduct which has no effect on competition. Notwithstanding the fact that the kinds of conduct prohibited are likely to have an adverse effect on competition, the primary purpose of s46 appears to be the protection of individuals and firms, usually small ones, against the predatory conduct of large firms, rather than of competition as such.[10]

5.11 These different perceptions of its objectives underlie many of the proposals for reform of the section.

Retention of the existing provision

5.12 A number of submissions oppose any change to the provision,[11] on the basis that in the absence of evidence of need, section 46 in itself is adequate for the purpose for which it was passed and no further provision is required.[12]

5.13 Under its terms of reference, the Committee has considered three specific proposals for reform of section 46: the incorporation of an 'effects' test, the addition of further conduct to that currently prohibited, and the extension of the range of remedies, and in particular the inclusion of a remedy of divestiture.

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10 *Clarke PH, 'Trade Practices Policy and the Role of the Trade Practices Commission', (1989) 17 ABLR 291 at 296-7.*

11 *See, for example, submissions from Mr McComas, Victorian Employers' Chamber of Commerce & Industry, CAI and the Insurance Council of Australia Ltd.*

12 *Mr McComas, submission, p 9.*

An 'effects' test

5.14 Both the TPC and Professor Baxt point to the difficulty of proving purpose under section 46.[13] Professor Baxt says that 'the difficulty of showing purpose (as distinct from the lesser test of showing effect on competition) means that unless there is very clear evidence of a predatory purpose, or unless someone is prepared to act as a 'deep throat', it will be very difficult to prove the case'.[14]

5.15 Recognition of this problem is also evident in the Attorney-General's Second Reading speech in 1986, and in a number of recent legal cases. For example, in TPC v Carlton & United Breweries Ltd,[15] Northrop J stated:

> A contravention [of section 46] may take many forms and in many cases a wink or a nod may be more effective than the written or expressed word. Proof of those aspects may be difficult to obtain.

5.16 In Eastern Express Pty Ltd v General Newspapers Pty Ltd,[16] Wilcox J, with specific reference to breaches of section 46 by predatory pricing stated:

> ... the outward decision to engage in predatory pricing is a lowering of prices, an action which, on its face, is pro-competitive. The factor which turns mere price-cutting into predatory pricing is the purpose for which it is undertaken. That will often be difficult to prove.

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13 *TPC submission, p 33; Professor Baxt submission, p 10.*

14 *The Independent Monthly, August 1991, p 21.*

15 *(1990) ATPR 41-037 at p 51,549.*

16 *(1991) ATPR 41-128 at p 52,895.*

5.17 And in Berlaz Pty Ltd v Fine Leather Care Products Ltd,[17] Wilcox J drew a careful distinction between purpose and consequence. While the termination of a distributorship agreement may have had the consequence of getting rid of or damaging a competitor, his Honour could find no evidence that this was the defendant's purpose.

In favour of an 'effects' test

5.18 One option that has been suggested to overcome these difficulties is the amendment of section 46 to prohibit conduct which has or is likely to have an **effect** on competition. It is said such an approach is consistent with the one taken in sections 45, 47, 49 and 50 of the Act. Professor Baxt states:

> Most of the provisions of the statute (other than those provisions that deal with mergers and the per se offences) speak of practices, arrangements, understandings etc which have the purpose or effect or likely effect of substantially lessening competition in a relevant market. Why is not such an approach adopted in the area of misuse of market power? The business community may well want consistency of approach unless there are very strong grounds for having a special test or exemption from such an approach.[18]

5.19 Prohibiting misuse of market power by reference to its **effect** rather than its **purpose** was rejected by the Swanson Committee in 1976 and in the Blunt Report in 1979. It was suggested in the 1984 Green Paper but not adopted in the 1986 amendments. However, as noted above, amendments were made to s84(1) and s46(7) to facilitate proof of purpose by expressly permitting its inference from particular conduct and other relevant circumstances. In 1989, the Griffiths Committee

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17 *(1991) ATPR 41-118.*

18 *Submission, p 13.*

considered the introduction of an effects test, but concluded that insufficient evidence had been presented to support the need for a major redrafting of section 46.

5.20 Professor Baxt is generally in favour of the introduction of an effects test, but perhaps confined to 'deregulated industries'. In A Revival for Trade Practices Law and Competition Policy, Professor Baxt says:

> Another change that might be considered to s46 so as to in effect bring it on par with the other provisions of the statute (other than the mergers provision) is to prevent the misuse of market power where the purpose or effect of the misuse is to create detriment to the competitive environment - ie to lead to a substantial lessening of competition. If an effects test was introduced (as has been suggested by the Trade Practices Commission especially in relation to the deregulated industries) other parts of the section would have to be changed, in my view, to make sure that it is the competitive process rather than competitors that will have to be shown to have been damaged to obtain the necessary relief. If we do not change the impact of the relevant conduct this may amount to swinging the pendulum too far the other way.[19]

5.21 The TPC believes that, even given the decision of the High Court in the Queensland Wire Case, establishment of 'purpose' within the meaning of section 46 will continue to require a high burden of proof.

5.22 The TPC proposes the insertion of a new provision which would, 'subject to the conduct having the **purpose or effect** of substantially lessening competition, prevent a corporation with a substantial degree of market power from engaging in certain defined conduct'.[20] The new section would be directed at competition rather than competitors (which accords with Professor Baxt's views), and would provide for

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19 *Hansard, Senate, 15 October 1991, p 2019.*

20 *Submission (29.8.91), p 33.*

the conduct concerned to be authorised. The existing section 46, targeted at competitors, would remain as is.

5.23 This new section is seen as particularly relevant to ensuring access to 'essential facilities' during the initial phase of deregulation of the 'natural monopolies',[21] and is endorsed by Professor Baxt.[22]

5.24 The section could also cover conduct that substantially lessens competition but is not directed at a specific person such as:

- pre-emption of access by competitors to scarce facilities or resources;
- buying up of products to prevent the erosion of existing price levels;
- adoption of product specifications incompatible with products produced by any other person and designed to prevent entry into or eliminate competition from a market;
- impeding or preventing entry into or expansion in a market by:
  - (i) squeezing, by a vertically integrated supplier, of the margin available to unintegrated competitors; or
  - (ii) acquisition by a supplier of customers who would otherwise be competitors of a supplier;

selective introduction of fighting brands;

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21 *For example the utilities, telecommunications, postal services and railways*

22 *Baxt submission, p 13.*

. raising rival's cost; and

. strategic creation of entry barriers.[23]

5.25 In response, Treasury states that these new categories of conduct would, if truly anti-competitive, more likely than not be caught by the existing provision. Treasury concludes that the inadequacy of section 46 has not been demonstrated, and adds that some of the features of the TPC's proposal would be potentially damaging to competition. For example, the proposed prohibition on product specifications might hinder the adoption of new technology, and attempts to regulate 'margin-squeezing' by vertically integrated suppliers 'could remove the incentive efficiently to vertically integrate and/or to pass such benefits on to consumers.'[24]

5.26 Acknowledging that the TPC's approach is conditioned by difficulty in the proof of purpose, Treasury suggests that 'a more direct approach would be to turn section 46 into an effects rather than purpose related provision.'[25]

Against an 'effects' test

5.27 The introduction of an 'effects' test is opposed by, among others, the Attorney-General's Department, the Business Council of Australia, the Confederation of Australian Industry, the Law Council, CRA Ltd, Dr Pengilley and Mr McComas.

5.28 The Attorney-General's Department, CRA Ltd and BCA[26] endorse the view of the Griffiths Committee that no case has been made out for amendment of the

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23 *TPC submission (29.8.91), p 34.*

24 *Submission, p 60.*

25 *Ibid, p 61.*

26 *Attorney-General's Department submission, p 26; BCA supplementary submission (26.9.91), p 12; CRA Ltd submission, p 6.*

section, and cite with approval the statements of Mason CJ and Wilson J in Queensland Wire as to the ruthlessness of competition. BCA states that 'an effects test is likely to have unintended anti-competitive results, in that companies will be concerned that they might breach such a provision and may well become somewhat conservative in their competitive behaviour.'[27]

5.29 The Attorney-General's Department does not support an 'effects' test in section 46 either by way of general application or by reference to the deregulated industries. It recognises the difficulties inherent in the proof of purpose but is of the view that these may be directly addressed by a rebuttable presumption of intent in defined circumstances.[28]

5.30 The view of the Law Council is that 'purpose is an essential element of the contravention', and that, in most cases, its proof is not difficult.[29] Further:

> The critical element of section 46 should be that it operates so as to permit pro-competitive conduct, even where aggressive and having an effect on individual competitors who are perhaps marginal to the competitive process, but so as not to permit conduct which exploits a dominant position in a way which is positively harmful to the competitive process. To introduce an objective (effects) test into section 46 would destroy this distinction and, in the process, act as a strong disincentive to healthy competitive conduct.[30]

5.31 The Law Council observes that adoption of an effects test would also complicate the harmonisation of Australian and New Zealand business law.

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27 *Supplementary submission (26.9.91), p 12.*

28 *Submission, p 26.*

29 *Evidence, p 142 (Mr Featherston).*

30 *LCA, attachment to submission, p 4.*

Other conduct

5.32 The Attorney-General's Department accepts the 'theoretical concept' that section 46 might be amended to extend to other conduct, currently beyond its reach, but notes that no specific proposals defining such conduct have been made.[31]

5.33 However, the Department does propose one amendment. The current provision refers to conduct designed to eliminate or otherwise harm 'a competitor' or 'a person'. Conceivably, the Department argues, action might be taken with the purpose of eliminating competitors generally, rather than with a purpose directed at a particular rival. The Department suggests an amendment to provide that conduct engaged in for the purpose of eliminating or harming a class shall be taken to have been engaged in for the purpose of affecting each member of that class.[32]

5.34 Mr McComas, who approves of this proposed amendment, noted that it would enable the TPC to examine conduct aimed at frustrating competition rather than simply injury to competitors.[33]

5.35 As noted above, the TPC identifies a range of conduct indicating misuse of market power that might be covered by its proposed additional provision.[34] In essence, the response of Treasury is that this conduct is presently covered by the existing categories.[35]

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31 *Submission, p 27.*

32 *Ibid, p 27. This particular amendment is viewed by CRA Ltd as unnecessary: submission, p 7.*

33 *Evidence, p 233.*

34 *See paras 5.22 and 5.24 above.*

35 *See para 5.25 above.*

Excessive pricing

5.36 The TPC also notes that section 46 does not control excessive pricing per se, and suggests that the Act may need to be amended to cover this.[36]

5.37 The PSA, however, does not believe that such an amendment would be appropriate as long as it retains its separate existence. Were the mooted merger between the PSA and the TPC to be consummated, the PSA suggests a power to control prices should not be included in section 46, but rather incorporated as a separate provision in the Act to be administered by a tribunal. Adoption of this approach would also accord with the objective of achieving greater harmonisation between the business legislation Australia and New Zealand.[37]

5.38 Dr Pengilley considers that controls over excessive pricing is 'quite wrong'. He questions how one determines what an excessive price is.[38]

Injury to consumers

5.39 AFCO believes that section 46 should also prohibit a corporation with a substantial degree of market power from engaging in conduct 'that is likely to cause significant injury to consumers, having regard to price quality and availability of products or services'. AFCO's greatest concern is that the section should define and clarify the position of firms controlling essential facilities or monopolies of supply. It also believes that the section should apply to a wider number of firms, especially those in oligopoly situations. It does not specify a means.[39]

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36 *Submission (29.8.91), p 24.*

37 *Submission, p 10*

38 *Evidence, p 363.*

39 *Submission, p 12.*

Remedies

Divestiture

5.40 The Act currently enables the Court to order divestiture only where a merger or acquisition has been undertaken in breach of s50 of the Act.[40]

5.41 A proposal to permit the TPC to seek, and the court to order, divestiture of the assets of a firm in a situation of 'intractable and continuous breach of s46' was considered by the Griffiths Committee. That Committee concluded:

> As section 46 cases do not involve acquisitions, divestiture as a remedy for contraventions of section 46 would most likely involve an arbitrary decision about which part of the offending corporation should be divested. Such a decision may result in a corporation having to divest a part of its operations which may have had little to do with the circumstances of the contravention in question.[41]

5.42 Divestiture as a remedy for misuse of market power has the explicit support of the former Chairman of the TPC, Professor Baxt. He considers one of the major and enduring weaknesses of Australian anti-trust law to be that, in an economy which has much evidence of high concentration, unless you have a remedy of divestiture, you will not be able to get to the heart of the problem.[42] Elsewhere, Baxt has commented:

> It may not be possible to stop a large corporation misusing its market power to prevent a competitive environment developing. In such circumstances, adequate discipline may only be exercised by breaking up the company (by virtue of a divestiture power) or by the court

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40 *Trade Practices Act 1974, section 81.*

41 *Griffiths Report, para 7.2.17.*

42 *Evidence, p 37.*

> ordering the rewriting of contracts which may have given that company a significant power base.
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> These remedies would be used only if a misuse of market power seriously harmed competition. Such a remedy, while rarely used, exists in the United States and Canada and is a very significant discipline on larger players.[43]

5.43 Professor Baxt proposes that the power be exercised not by the TPC but by the courts. He is of the view that, although the power would be rarely used, the ability to obtain such an order in the appropriate circumstances would represent a breakthrough in the development of a mature competition law. These sentiments are echoed in submissions from AFCO[44] and the NCAAC.[45]

5.44 The Communications Law Centre (CLC), while not ruling out the appropriateness of divestiture in some cases (instancing News Ltd), recognises the difficulties inherent in such an action, especially if not ordered promptly. As companies are fused, the potential obstacles to orderly divestiture which do not penalise parties other than the defendant become considerable.[46]

5.45 The Attorney-General's Department notes that although divestiture as a remedy for misuse of market power exists under US, UK, Canadian and EC law, it has been ordered only in the US, in a limited number of situations, including the recent break-up of AT&T.[47] New Zealand makes no provision for divestiture in these situations.

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43 *The Independent Monthly, August 1991, p 21.*

44 *Submission, p 10: courts may be unwilling to use such a punishment because of its potentially far-reaching consequences.*

45 *Submission, p 5.*

46 *Submission, p 11.*

47 *Submission (9.8.91), p 29.*

5.46 Divestiture as a remedy in the circumstances covered by section 46 is opposed by VECCI[48] and CAI, which totally rejects 'the oppressive and disruptive nature of this suggestion.'[49]

5.47 Mr McComas, CRA Ltd and BCA, each view the proposal as unnecessary given that there has been no indication in the cases that have arisen to justify such an order, nor that the range of remedies presently available is inadequate.[50]

5.48 The BCA views divestiture as an inappropriate remedy for provisions such as section 46 which are directed to conduct rather than structure:

> Misconduct can always be restrained for the future by injunction of the court (and a business which breaches an injunction will find itself liable to be dealt with for contempt of court). Divestiture would be an unwarranted and arbitrary punishment. The fact that, by reason of the inherent complexity of a provision such as section 46, the lawfulness of particular conduct will often be debatable only adds to the objection. The threat of divestiture over a business for conduct of this kind would introduce great uncertainty and would be a disincentive to investment.[51]

5.49 Divestiture is also seen as inappropriate by Dr Pengilley in the circumstances of a refusal to supply such as applied in Queensland Wire. If divestiture were ordered simply because prices had been declared 'unreasonable' this would

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48 *Submission, p 4.*

49 *Submission, p 4.*

50 *McComas submission, p 9; BCA submission, p 12; CRA Ltd submission, p 7.*

51 *BCA submission, p 13.*

involve the Courts in evaluations for which they were singularly unsuited[52] and which might result in the creation of an unviable company.[53]

5.50 Dr Pengilley considers that section 46 should be redrafted in terms of its American equivalent, and should specify conduct considered to be a misuse of market power with reasonable certainty.[54]

5.51 Where there is a refusal to supply, as occurred in Queensland Wire, Professor Corones considers that a structural remedy such as divestiture would appear to be inappropriate: injunctions, damages and appropriate ancillary orders are seen as being adequate.[55]

5.52 A similar attitude is expressed by Treasury, which agrees that judicial intrusion into price-setting is undesirable, but argues that this does not justify a remedy such as divestiture:

> For breaches of section 46 not related to access to facilities, for example predatory pricing, divestiture would be difficult to apply, as there is no acquisition of separable plant to order divestiture of. Difficulties would arise in identifying which part of a business should be divested. In this case divestiture is likely to involve an arbitrary decision about which part of the corporation is to be divested and may involve divestiture of part of the business which had little to do with the actual breach of the Act.[56]

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52 *Submission, pp 1-2.*

53 *See also Attorney-General's Department submission, p 30: where growth has occurred through accretion it may not be possible to separate components.*

54 *Evidence, p 363.*

55 *Submission, p 16.*

56 *Submission, pp 61-62.*

5.53 The view of the Attorney-General's Department is that no compelling case has been made for the inclusion of divestiture as a remedy for breach of section 46, and that intractable breaches of that section should be addressed by increases in monetary penalties. The Department considers divestiture to be a 'very blunt and frequently ineffective remedy'.[57]

Other remedies

5.54 The TPC proposes that the courts have the power to make wide discretionary orders to rectify market power abuse, including the power to 'impose market place solutions'.[58] These include an order for the divestiture of a significant shareholding in a competitor where that holding has enabled anti-competitive pressure to be placed on the competitor, or (in a situation where, for example, Australian Airlines or Ansett refused to supply Compass Airlines with space on its airport lease) an order for the provision of space or an order for a reduction in the duration of the leases held by Australian and Ansett. Other remedies noted include:

- an order for the mandatory provision of essential facilities on competitive (or even favourable) terms in the deregulated industries
- compensation orders
- severance of unjust gain
- award of damages.[59]

5.55 A number of these remedies are specifically endorsed by Professor Baxt.[60]

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57 *Submission (9.8.91), p 29.*

58 *Submission, p 35.*

59 *Ibid, p 36.*

60 *Evidence p 38.*

Remedies for refusal to supply

5.56 Most of the reported cases on section 46 have involved refusal to supply. It has been suggested that there are problems with giving the court power to order supply in these situations.

5.57 The Full Federal Court in the Pont Data case noted the reluctance of the US Courts to re-write contractual provisions as to price, but thought that the wide discretionary remedies under s 87 'may mean that this reluctance should not necessarily translate to the Australian situation ... Nevertheless the Court must be slow to impose upon the parties a regime which could not represent a bargain they would have struck between them.'[61] However, Professor Baxt doubts that under s 87 the courts are empowered to re-write contracts in the manner he views as potentially necessary.[62]

5.58 Dr Pengilley is of the view that the solution to the problem of fixing the terms of supply and price is to legislate for certainty in the area. If control of the prices charged by those having a substantial degree of market power is desired, then, he suggests, this is a task for bodies such as the PSA, not for judicial regulators.[63]

5.59 Professor Corones also considers that reference to the PSA or the TPC (rather than to the courts) would provide a less unsatisfactory basis for arriving at a supply price in cases of refusal to supply. These organisations are better qualified than the courts to set and monitor prices on an 'as if competition' basis.[64] Corones argues

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61 *Dr Pengilley submission, p 8.*

62 *Evidence, p 38.*

63 *Dr Pengilley submission, p 10.*

64 *Corones notes that other legislation (for example, the Telecommunications Act 1991 s 154 and the Copyright Act 1968 Pt VI) makes similar provision where parties are unable to agree a price for certain services.*

that the possibility of referral to them would act as a strong disincentive to misuse of market power.

5.60 In its submission the PSA makes a similar observation. Prefacing its comments with the statement that 'in general, it seems very unlikely that the courts will have sufficient expertise and resources to determine reasonable prices' (illustrated by the decision in Queensland Wire), it suggests that if the TPC and the PSA were to be merged it would be appropriate to either:

- not include a power to control prices in section 46 but rather to incorporate this power as a separate provision of the Act and continue with the administrative tribunal approach (which is also the New Zealand approach); or

- substantially modify section 46 to allow for consideration of cases by an administrative tribunal such as the Trade Practices Tribunal [possibly joined with the existing PSA] rather than enforcement by the courts (which is an approach akin to the UK Mergers and Monopolies Commission).

5.61 The PSA notes that taking advantage of a dominant position to impose prices or other terms of dealing that could not otherwise be imposed was one of the three instances of 'monopolisation' examinable by the Trade Practices Tribunal under the Trade Practices Act 1965, if the Commissioner of Trade Practices considered this conduct to be against the public interest.[65]

65 *Submission, p 10.*

Conclusions

5.62 The proof of purposive conduct under section 46 clearly poses considerable difficulties for the TPC and private litigants. These difficulties were addressed in 1986 with the addition of ss46(7) and 84(1) enabling purpose to be inferred from conduct and other relevant circumstances, and facilitating the proof of conduct where engaged in by a corporation. However, the Committee accepts that establishment of a purpose will continue to present difficulties of proof for litigants relying on section 46.

5.63 Proposals to change the section by adopting an effects test would encourage greater use of the section by litigants, and have the virtue of consistency with the Act's other restrictive trade practices provisions.

5.64 However, the Committee accepts that in a provision directed explicitly at **misuse** of market power it is appropriate that a distinction between purpose and consequence be retained. The Committee accepts that purpose is an essential element of the contravention. To prohibit the taking advantage of market power where this has **or is likely to have** the effect of, for example, preventing a person from engaging in competitive conduct would unduly widen the operation of the prohibition. It would force corporations to evaluate the potential effect of their every action on their competitors and potential competitors.

5.65 The Committee accepts that the process of effective competition involves engaging in conduct the potential effect of which is to produce the very ends proscribed in section 46,[66] and considers that prohibiting such conduct by reference to its effect may challenge the competitive process itself.

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66 *See Queensland Wire Industries v BHP (1989) 63 ALJR 181 at 186.*

5.66 If the difficulty with section 46 is proof of purpose, the Committee considers that this would best be dealt with by requiring a corporation, once the TPC has established that it is as likely as not that an offence has occurred, to bring forward evidence showing that it did not have a proscribed purpose.

5.67 **The Committee recommends that section 46 be amended by adding a further subsection to provide that, although the Trade Practices Commission has the overall onus of proving a breach of that section, when it has brought forward evidence which makes it as likely as not that one has occurred then one will be taken to have occurred unless the corporation in question shows otherwise.**

5.68 During the Inquiry it was suggested that the section might also be amended to include other forms of conduct within the prohibition so as to deal with excessive pricing, with misuse of market power affecting consumers, and with the various forms of conduct detailed by the Trade Practices Commission in their proposed additional section 46A.

5.69 On the basis of the material before it, the Committee considers that excessive pricing is better dealt with under the Prices Surveillance Act.

5.70 The Committee considers that misuse of market power affecting consumers is adequately dealt with under the existing consumer protection provisions of the Trade Practices Act.

5.71 The Committee notes that the proposed new section by the TPC was originally raised before the Griffiths Committee in 1989.[67] Before that Committee the TPC argued that it was a means of replacing a number of other provisions of the Act (specifically sections 46, 47, 49 and 93) rather than complementing them. The Committee has been provided with insufficient evidence to fully evaluate this proposal

67 *Griffiths report para 4.4.12.*

and considers that it would be better dealt with as part of a more general review of the Act.

5.72 The Committee considers that the conduct specified in the TPC's additional section would, if it were actually anti-competitive, be caught by the existing section 46. Many of the forms of conduct specified are also somewhat vague and uncertain.

5.73 However, the Committee considers that some doubts exist as to the applicability of section 46 to conduct affecting not merely competitors of a corporation with substantial power in a market, but the competitive process.

5.74 **The Committee recommends that section 46 be amended to provide that where persons engaged in conduct for the purpose of eliminating from or harming a class of persons in a market they shall be taken to be doing so in respect of a specific member of it.**

5.75 Divestiture of assets is a remedy currently available for breach of the merger provisions of the Act, but not for repetitive and serious abuses of market power.

5.76 Divestiture as a remedy for market power abuse is available under US, UK, Canadian and EC law, but has been used infrequently, if at all. It is not a remedy available in these circumstances in New Zealand.

5.77 Divestiture is essentially a structural remedy. Misuse of market power is essentially a matter of conduct. When divestiture is applied to an established corporation, it may result in the break up of the corporation without predictable results. The resulting parts of the corporation may be made less productive, less efficient, perhaps unprofitable, perhaps even non-viable.

5.78 Were divestiture available for misuse of market power, and were a judge disposed to order it in a particular case, there may be limited evidence available to enable him or her to do so in the most appropriate manner. A court may be an awkward instrument to affect a satisfactory divestiture. Given the Constitution it is difficult to see what other body could order it. In any event, it well may be that no other body would do as well as a court.

5.79 It is one thing to order divestiture of a merger or acquisition recently affected. It is another to order it for a corporation functioning as an established unit. The risk of destruction of a company in the first instance is much less than in the second.

5.80 **The Committee recommends that serious and persistent misuse of market power be dealt with by increased monetary penalties. It recommends that divestiture not be made available as a remedy.**