

Recent developments in the application of section 46: *Melway* and *Boral* considered

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Introduction

The prohibition on misuse of market power contained in s46 is part of the legislative scheme embodied in Part IV and related parts of the *Trade Practices Act 1974* (Cth). A purpose of the Act as a whole, and Part IV in particular, is to enhance the welfare of Australians through the promotion of competition.¹

Taken together with the remedies sections of the *Trade Practices Act* found in Part VI, s46 provides a powerful weapon which can be used by the regulator and other market participants, including commercial rivals, to eliminate anti-competitive conduct and to promote competition.

Like most powerful weapons, however, it is essential to identify the correct target and deploy the weapon so as to hit that target. Otherwise, the blast from the weapon may do substantial damage to what one is trying to protect.

The recent decisions of the High Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*² and the Full Federal Court in *Australian Competition and Consumer Commission v Boral Ltd*³ provide illustrations of the operation of s46 and its potential impact on competition.

Purpose and wording of s46

Whilst the major statutory elements of a contravention of s46 have become a familiar part of the law, it is worthwhile to state them again:

1. The respondent must have a substantial degree of power in a market.
2. The respondent must take advantage of that power.
3. The respondent must so take advantage for one of the purposes set out in s46(1)(a), (b) or (c), namely:
 - (a) eliminating or substantially damaging a competitor;
 - (b) preventing a person entering a market;
 - (c) deterring or preventing a person from engaging in competitive conduct.

It is worthwhile drawing attention to those elements, familiar as they are, because it serves as a reminder of how different s46 is from the other prohibitions in the major anti-trust sections of Part IV⁴. In those latter sections the requirement that the conduct have the purpose or effect of substantially lessening competition is generally an express and essential element of the prohibition⁵. Section 46 approaches the problem somewhat differently.

There is no doubt that s46 has the same aim or purpose as those other sections. In *Melway*, the majority of the High Court put it this way: ‘Section 46 aims to promote competition, not the private interests of particular persons or corporations’,⁶ citing the well known passage from *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd*⁷. ‘But the object of s46 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.’

A literal reading of s46, and especially the descriptions of the prescribed purposes, might suggest that the purposes of the section extend beyond protecting and promoting competition to include protecting individual market participants, for example, by preventing a firm with substantial market power from injuring or interfering with a particular competitor or potential competitor. Such an approach would involve a misunderstanding of the application of s46 and has the potential to subvert the purpose of the section.

The fact that the wording of s46 can give rise to problems and may be applied so as to stifle rather than promote competition is illustrated by the recent Full Court decision in *Boral*. It is possible to characterise the Full Court’s decision as involving a finding of contravention of s46 where the damage to competition and any resultant harm to consumers are far from obvious and may in fact be non-existent.

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The High Court's decision in *Melway* provides an interesting contrast. That decision can be seen as the Court approaching s46 having regard to the aim it is to serve, the economic principles it embodies and the commercial context in which it operates. The underlying rationale for the majority of the High Court's decision in *Melway* appears to be a reaffirmation that s46 is aimed at protecting and promoting competition rather than individual competitors, or in *Melway*'s case, an individual, would-be distributor.

The *Melway* decision contains a warning on proceeding too readily from a finding of purpose to a finding of substantial market power. The *Boral* decision might be seen as an example of what can go awry when purpose is allowed to swamp the other elements of s46.

Melway: A background

Melway was essentially a refusal to supply case, although the High Court emphasised that it was important for its decision that the refusal to supply was in the context of an exclusive distribution system established and operated by *Melway*.

Melway was a publisher of a street directory for metropolitan Melbourne. The respondent was a wholesaler of motor vehicle parts and accessories. The *Melway* publication was by a significant extent the largest selling street directory in Melbourne and had been so for many years.

Melway distributed its street directories through wholesalers, which it appointed. Each appointed wholesale distributor was confined by agreement to an allocated market segment and each market segment was allocated on an exclusive basis (save for one exception not connected with the proceedings).

The respondent had been an appointed wholesaler of *Melway*'s street directories, but that appointment had been terminated by *Melway*, following a change in the shareholding of the respondent. *Melway* terminated the distributorship and indicated that it did not propose to have any further dealings with the respondent.

The respondent requested supply of between 30,000 and 50,000 directories per year, and indicated that it expected to supply the customers which it had previously supplied and that it expected to supply new customers without regard to the market segment in which those customers operated. The respondent expected to compete for sales with existing wholesale distributors. *Melway* refused to supply the respondent.

The majority's consideration of the elements of a s46 contravention

In the High Court, the market and *Melway*'s substantial power in that market were not in dispute. Nor was the finding that there was strong competition between retailers in relation to the sale of *Melway* street directories, particularly in relation to price. At the wholesale level, however, there was

little competition between *Melway* distributors in relation to *Melway*'s street directory. Whether or not the various markets in which the distributors operated were competitive was not a matter that was referred to.

The majority of the High Court affirmed the approach of the Court in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd*⁸ that the expression 'take advantage of' means nothing more than 'use', and that moral blameworthiness or predatory conduct does not enter the equation.

Having succinctly disposed of the concept of 'take advantage of', the majority moved to an examination of how the concept of 'purpose' related with 'take advantage of'.

Analysing the facts of the present case, the majority commented that:

[w]hat *Melway* intended to do, and did, was to terminate the respondent's *Melway* distributorship, with the necessary consequence that it would cease to be a wholesaler of *Melway* street directories. *Melway* was not the only possible source of supply of Melbourne street directories. It was the only possible source of *Melway* street directories, but that would have been the case if it only had 10 per cent of the market, or if it had no substantial degree of market power. Its ability to stop the respondent becoming a wholesaler of *Melway* directories resulted from the fact that it was *Melway*, and could appoint, or not appoint, distributors as it saw fit in its commercial interests.⁹

Following that factual analysis, the majority warned against the temptation to 'proceed too quickly from a finding about purpose to a conclusion about taking advantage'.¹⁰

This serves to emphasise the importance the Court placed on a stringent analytical examination of the particular facts which support a finding of conduct amounting to taking advantage of market power and the facts which underlie the purpose of the conduct. The Court, commenting on the particular facts in *Melway*, noted:

[w]here distributorship arrangements are concerned, an intent to give a particular distributor exclusivity may constitute a very insecure basis for concluding that there had been a taking advantage of market power.¹¹

Given that *Melway*'s purpose did fall within the proscribed purposes in s46(1), the Court was essentially grappling with the factual connection – if any – between the existence of market power – which was uncontested – and taking advantage of, or using, that power for a proscribed purpose. The Court was ultimately of the view that each element could independently exist without it necessarily following that the elements combined to result in a contravention of s46.

The majority focused on the meaning of the concept of market power, which is central to the operation of s46 (and indeed Part IV of the TPA). It discussed the approach taken by the members of the Court in the *Queensland Wire*, noting that consistent with that approach, consideration ought to be given to the question of how *Melway* would

likely have behaved it if had lacked market power.

The majority's conclusion on the 'real question'

The High Court formulated what it called 'the real question'¹³ as being whether without its market power, Melway could have maintained its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market. The majority in the High Court observed that the majority in the Full Court had failed to address that question specifically, whereas Heerey J had. The majority of the High Court held that Heerey J's reasoning was to be preferred¹³. Heerey J had concluded that Melway had not taken advantage of its market power because it has adopted its exclusive distribution system before it acquired its market dominance, there was no reason to believe that Melway would not have been able or willing to continue its distribution system in a competitive market and Melway was not denying itself sales by doing so in this case. That was sufficient to dispose of the appeal¹⁴.

The Court's rejection of the respondent's primary argument

The majority, however, went on¹⁵ to reject the respondent's main argument that in refusal to supply cases, if the supplier has a substantial degree of market power, the grant or refusal of supply is 'necessarily' taking advantage of market power. The respondent argued that this conclusion followed because the power to grant or refuse supply is the power substantially to control the market. What the corporation may or may not have done in a competitive market, it was argued, was nothing to the point.

The majority pointed to the inconsistency of this argument with the reasoning of four of the five judges in *Queensland Wire* who had held that in determining the question of taking advantage it was relevant to consider how the corporation would have behaved without its substantial market power, that is, in a competitive market. The majority held that:

it does not follow that because a firm in fact enjoys freedom from competitive constraint, and in fact refuses to supply a particular person, there is a relevant connection between the freedom and the refusal. Presence of competitive constraint might be compatible with a similar refusal, especially if it is done to secure business advantages which would exist in a competitive environment.¹⁶

A sidelight

Interestingly, in an aside, the majority accepted to a limited extent the argument made by the ACCC (intervening) that s46 would be contravened if the market power enjoyed '*had made it easier* for the corporation to act for the proscribed purpose than otherwise would be the case.'¹⁷ Application of that principle could result in a finding of a contravention of s46 in circumstances where the corporation's power (although not overwhelming) is

sufficient to assist it to act for the proscribed purpose – even in circumstances where it does not enjoy a dominant market position, but shares a market with other competitors.

Boral

The Full Court's decision in *Boral* provides an interesting contrast. If the Full Court's judgment is correct, s46 may prove to be an instrument for the suppression of competitive pricing conduct in many Australian markets. A corporation with substantial capital backing, which is confronted by a highly competitive market characterised by excess capacity and low demand may, by engaging in vigorous price competition, run a very serious risk of being found to have contravened s46.

Background

Boral was essentially a predatory pricing case.

Boral, through its subsidiary Boral Besser Masonry (BBM) competed with a number of other companies in relation to the manufacture and supply of concrete masonry products (CMP) which were used in the building industry for walls and flooring. The impugned conduct in *Boral* occurred from April 1994 to October 1996.

In the narrow concrete masonry products market found by the Full Court (although it had been rejected by the trial judge), BBM had a market share of approximately 33 per cent in 1994. C&M had entered the market as recently as late 1993 and by 1994 it had a market share of eight per cent. In addition, at that time Pioneer had a share of 24 per cent, Rocla 24 per cent, Budget four per cent and others seven per cent. By late 1996, C&M had substantially increased its market share but Rocla and Budget had both left the market¹⁸. C&M, the relatively new competitor, operated out of a modern and highly efficient plant. BBM was of the view that its own plant was obsolete and uncompetitive, and took steps to construct plant so as to increase its productive capacity and rationalise its costs¹⁹.

What was described as a 'price war' initially between BBM, Pioneer, Rocla and Budget had commenced in about mid-1993²⁰. This appears largely to have continued until December 1995 (judging by incidents four to 28 referred to in Beaumont J's reasons for judgment²¹). Thereafter it appears to have petered out²². During this period, BBM's conduct could fairly be described as matching or slightly undercutting competitors' prices in many cases but in some cases either refusing to match or to undercut competitors. Even when BBM matched or undercut prices it was not always successful in securing the business.

In addition, during the relevant period, building activity was depressed until about 1994 and real improvements were not apparent until 1996 or 1997. The recession in Victoria from the early 1990s affected the level of demand for concrete masonry products. There was substantial excess capacity. Customer acceptance of concrete masonry

products was at a very low level and developers and builders, working for the most economic outcomes, were very receptive to suggestions that they change to alternative products and building systems²³.

Heerey J at first instance described the Victorian building industry as a ‘highly competitive market’ and noted that blocklayers and builders were able to force masonry manufacturers down and down²⁴. If the instances identified by Beaumont J and referred to above are considered, it does not appear that BBM was unconstrained by the conduct of competitors or potential competitors²⁵. It was forced to reduce its prices to match or undercut its competitors’ prices on many occasions. These conclusions on the state of competition were not directly challenged by the Full Court. Nonetheless, the Full Court found that BBM had a substantial degree of market power.

For each year of the relevant period, BBM’s total sales revenue exceeded variable costs of manufacture and supply. Nonetheless, the monthly sales revenue from sales of all concrete masonry products by BBM did not exceed the variable costs of manufacture and supply for eight months out of the 31 months comprising the relevant period.²⁶

It might be thought that, against this background, BBM’s struggle to survive in 1994 to 1996 was quintessentially competitive behaviour. The fact that some competitors withdrew from the market or went out of business might be seen as the consequence of ‘deliberate and ruthless’ competition working as it should to achieve a more efficient allocation of resources. The Full Court thought differently. It held that BBM had a substantial degree of market power in the concrete masonry products market and misused that power in contravention of s46 for a relevant purpose by engaging in a predatory pricing scheme²⁷.

Issues for consideration

There are many aspects of the Full Court’s decision which require exploration and consideration. In this paper, we shall not attempt a comprehensive review but shall identify some of the issues which arise out of the decision and briefly review some arguments and problems relevant to one or two of them. Each issue probably warrants its own paper. The issues which arise include:

(a) How is predatory pricing in contravention of s46 to be distinguished from competitive price cutting? Are the concepts of ‘below cost pricing’ and ‘recoupment’ useful guides?

(b) Has the Full Court done any more than find that BBM had a prohibited purpose? Was its reasoning circular or otherwise defective in this regard?

(c) What conduct was found to have constituted the taking advantage of market power and how did the Full Court conclude that it amounted to a taking advantage of market power?

(d) Did BBM have a substantial degree of market power in a market having regard to the

criteria identified in s46 (3)?

(e) Is it correct to find that a barrier to entry exists by reason only that economic circumstances – such as falling demand, over-capacity and low prices – make it unattractive for a new entrant to enter the market?

Predatory pricing in contravention of s46 and competitive price cutting

In the Attorney General’s second reading speech on the 1986 amendments to s46, ‘predatory pricing’ was given as an example of what might ‘in certain circumstances’ amount to misuse market power²⁸. Nonetheless, it is important to recognise that merely because pricing conduct might be able to be described as ‘predatory’ it does not follow that such pricing is prohibited by s46. It was only pricing conduct which amounts to taking advantage of market power by a corporation with a substantial degree of market power for a prohibited purpose that contravenes s46.

What was the ‘something more’ that transformed BBM’s conduct from vigorous price competition into predatory pricing which contravened s46?

Heerey J answered that question at first instance when summarising his analysis as follows:

selling below cost plus recoupment by supra-competitive pricing equals predatory pricing [which contravenes s46]. Absent the second element, or at least the hope or expectation thereof, there is no more than ruthless competitive conduct, something which the TPA does not forbid, but rather promotes.²⁹

At first glance, these two elements of below cost pricing and recoupment might appear to be an unjustified, additional gloss on the requirements of s46. This is in effect what the Full Court in *Boral* held.

This gives rise to two matters for further consideration. First, do the tests of below cost pricing and recoupment have a role to play in the application of s46 to pricing conduct? Secondly, is the Full Court’s approach workable or consistent with the purpose or aim of s46?

Below cost pricing and recoupment

These concepts of below cost pricing and recoupment are derived from the US authorities on s2 of the *Sherman Act*. They clearly are not reflected in the wording of s46 (nor for that matter do they appear in s2 of the US statute). Some of the relevant authorities were referred to by Heerey J at first instance³⁰.

These concepts in the context of s46³¹ can be deployed as, at least, useful factual tests to determine whether there is likely to be any contravention of the *Trade Practices Act*.

Pricing below a certain measure of cost may tend to indicate, but does not necessarily prove, that advantage is being taken of market power. A corporation, whether or not it has market power, is able to cut its prices to a level below an appropriate measure of cost (whatever that might be held to be

in any particular cases involving alleged predatory pricing) in some instances. Conversely, if a corporation is merely engaging in pricing above the appropriate level of cost it would not usually be said to be doing something which could only be done by a corporation with substantial market power. Thus, identifying the presence or absence of below cost pricing may be a helpful step in determining whether there has been a use of substantial market power. Absent unusual circumstances³², if there is no below cost pricing it is unlikely that s46 will have been contravened.

Recoupment, as an analytical tool, may be similarly deployed as a practical, factual yardstick. In the ruthless struggle to survive in the competitive market that Part IV is designed to foster, competitors may have to reduce prices to obtain business and in these circumstances firms without market power often price low for a variety of reasons, including attempting to survive. The facts of the present case present examples of the other firms (some of whom must have lacked market power) pricing at or below the levels of BBM's prices.

The ability to recoup or, at least the reasonable prospect of being able to recoup, past losses out of future supra-competitive prices is what distinguishes taking advantage of market power from beneficial competitive conduct. A firm without market power faced with a competitive market with over-capacity and depressed demand does not have the prospect of recoupment and must price low because it does not have the market power to resist the price competition of its rivals. That is not to say that such a firm does not hope or expect that it can withstand such low pricing levels longer than its competitors so that it will be one of the last left standing and thus able to increase prices to normal competitive levels.

It is the ability to recoup from supra-competitive prices that makes it rational and possible for a firm with market power to engage in price cutting that it would not or could not otherwise engage in with a view to eliminating or damaging a competitor or preventing new entry. If the conduct would be engaged in whether or not recoupment was reasonably likely, the conduct should not as a matter of fact amount to taking advantage of market power.

Recoupment, thus, provides an additional useful, factual guide for determining whether the pricing conduct complained of could amount to a taking advantage of market power or not, even if all other elements of s46 are satisfied.

In the present case, BBM does not appear to have been pricing at a level significantly different from pricing levels of its competitors, some of whom at least did not have market power. It was always conceded that BBM did not have any reasonable prospect of being able to recoup its losses from supra-competitive pricing even after Rocla and Budget left the market. In those circumstances, it is most unlikely that competition has been harmed in

the market and that consumers would be harmed in the short or long term. Accordingly, in those circumstances a court should be very wary of concluding that there has been a breach of s46.

The Full Court's approach

At paragraph 266 Finkelstein J held that:

Predatory pricing is no more than a price set at a level designed to eliminate a competitor or keep potential competitors from the market ... It is all that is necessary for the purposes of s46.

Nonetheless, his Honour went on to hold at paragraph 299 that:

BBM's conduct in persistently selling at below average cost for the purpose of eliminating or damaging its competitors, Rocla and Budget, or preventing the entry of C&M into the market (that is, predatory pricing on any view) will contravene s46 only if it can be shown that BBM "ha[d] a substantial degree of power in a market [and had taken] advantage of that power for [that] purpose": s46(1).

Merkel J dealt with the question similarly³³.

Finkelstein J's analysis of market power and taking advantage is instructive. Having determined, contrary to Heerey J's finding, that the market was the narrower concrete masonry products market³⁴, his Honour noted that s46 does not require 'monopoly power' to be shown but only considerable and not minimal market power³⁵.

On the basis of United States authorities dealing with monopoly power, Finkelstein J concluded that market power exists not only when a firm is in a position to set its price above 'marginal cost' (which appears to reflect notions such as long run marginal cost – paragraph 323) but also when a firm has the power to exclude competition³⁶.

Finkelstein J went on:

Generally, an analysis of abuse of market power involves a two-stage process: first, it is necessary to determine whether a firm has market power, second it is necessary to examine whether that power has been abused. However, when the existence of market power is defined by reference to the firm's ability to exclude competition, the two step investigation is not appropriate. The evaluation of market power and the abuse of that power are part of the same analysis. The existence of market power based on this approach cannot be examined independent of the alleged exclusionary conduct. It is the exclusionary conduct that establishes market power, not the reverse.

Merkel J adopted a similar approach³⁷.

There followed in Finkelstein J's reasons for judgment a consideration of barriers to entry as the single most important determinant of a firm's ability to exercise market power although the extent to which the firm faced competition from existing rivals was acknowledged to be important. In that reasoning, His Honour appears to accept that market conditions leading to vigorous price competition, low prices and low returns may be 'strategic' barriers to entry - for example, it was held that inadequate demand resulting from an economic cycle would be a barrier to entry³⁸.

In addition, it was also apparently accepted that behaviour of incumbent firms to exclude rivals by a

variety of restrictive or uncompetitive practices also constitutes a barrier to entry. In the course of this analysis, Finkelstein J identified two types of exclusionary behaviour as relevant in the present case: the predatory pricing carried out in a sustained fashion between 1993 and 1996; and, the upgrade of the plant to increase BBM's production capacity³⁹, the latter notwithstanding that s46 (5) takes the acquisition of plant or equipment outside the operation of section 46 (1).

The market conditions and the exclusionary behaviour, it was held created strategic barriers to entry which confer on BBM a substantial degree of market power. As a result, it was concluded that: 'BBM has substantial power in the concrete masonry products market and it misused that power for a relevant purpose when it engaged in a predatory pricing scheme'⁴⁰.

Further Consideration

After consideration of the Full Court's decision, one might ask:

(a) Where is the harm to competition and how have consumers been harmed, in all of this?

(b) How should BBM have acted so as to avoid a contravention, given its 'exclusionary' purpose?

(c) Is there not a significant risk that the Full Court's decision, if it is correct, will have the effect of suppressing vigorous price competition?

Any competitor with more than 20 to 30 per cent of market share, if it is financially strong or well supported, will risk contravening s46 if it competes vigorously on price in a market which is characterised by low demand and excess capacity, especially if one or more of the competitors exits the market as a result of the price cutting. It seems unlikely that this was intended by the Parliament. Has something gone wrong with the Full Court's analysis?

First, the Full Court's reasoning appears to involve a degree of circularity. In summary, the Full Court appears to be arguing that the existence of a substantial degree of market power can be demonstrated by the persistent ability to engage in exclusionary conduct. BBM's purpose was exclusionary and its pricing conduct over a considerable period was motivated by that purpose⁴¹. Thus, it engaged in sustained exclusionary conduct which achieved, in part at least, its purpose. Therefore, BBM must have had the requisite degree of market power. Having found a substantial degree of market power as a result of the ability to engage in exclusionary conduct, it is inherent in the Full Court's conclusion that the exclusionary conduct constituted a taking advantage of that market power.

If this reasoning were a legitimate approach to the application of s46, any persistent conduct engaged in for a so called 'exclusionary purpose' would justify a finding of the existence of a substantial degree of market power and use of that power.

What appears to have occurred is that the Full Court has moved too readily and without a proper

foundation from a finding of an 'exclusionary' purpose to 'exclusionary conduct' and findings of market power and taking advantage⁴³.

Next, to adapt the reasoning of the High Court in *Melway* and assuming for the purposes of argument at this point that BBM did have a substantial degree of market power, the real question which the Full Court should have addressed was: Without its market power, could BBM have engaged in the pricing conduct complained of? Or, put another way, could BBM have acted in this manner in a competitive market?

One obvious way to answer the questions would have been to examine whether other firms, for example, Pioneer, Budget, Rocla and C&M were able to and did engage in similar pricing conduct. The evidence referred to in the various reasons for judgement at first instance and on appeal suggests that they did. It can probably be safely assumed that those firms did not have substantial market power. Yet, they engaged in similar price-cutting. Indeed, this is presumably why Budget and Rocla eventually left the market.

Furthermore, by rejecting the factual tests of below cost pricing and recoupment as useful even if not determinative guides to the existence and use of market power, the Full Court allowed itself to focus primarily on purpose and not on whether BBM actually possessed the requisite degree of market power and used it.

Finally, it appears to have been an influential consideration for the Full Court that BBM had been successful, at least in relation to Rocla and Budget, in achieving its exclusionary or predatory purpose. Both firms left the market. The Full Court appears to have assumed that these exits were caused by BBM's conduct and thus it misused its market power. This assumption is, on a proper analysis, questionable. It is arguable that the departures of Rocla and Budget were not the product of 'exclusionary conduct' by BBM in the exercise of market power. Rather, they were the natural result of the market adjusting to the disequilibrium constituted by excess production capacity, falling demand and falling prices. The market, in the sense of the totality of the conduct of all market participants not just BBM, was operating competitively and produced the consequences that competitive markets should produce.

What should Boral or BBM have done?

The difficulties inherent in the Full Court's approach and conclusion are highlighted by consideration of the question of what Boral and BBM should have done to avoid a contravention in this case, given that they had a proscribed purpose. The most obvious answer is that they should not have competed on price by matching or undercutting their competitors' prices. If s46's aim is to promote competition and consumer welfare, this would appear to be a surprising result.

Conclusion

The themes in the development of the application of s46 illustrated by the two cases under consideration in this paper can perhaps be summarised in the following comments:

(a) The purpose which underlies s46 is the promotion of competition for the benefit of all Australians⁴³ and not the protection of individual market participants. Section 46 should be applied so as to give effect to that purpose and not so as to make it an instrument for the potential suppression of beneficial competitive activity.

(b) An anti-competitive purpose is a most unsure foundation upon which to construct conclusions concerning the existence and use of a substantial degree of market power. Each of the elements of a s46 contravention should be considered independently having regard to commonsense, commercial considerations and the aim of s46.

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- 1 Section 2 of the *Trade Practices Act 1974* (Cth).
 - 2 [2001] HCA 13.
 - 3 [2001] FCA 30. A special leave application has been filed.
 - 4 Sections 45, 47 and 50.
 - 5 The exceptions are the so-called per se contraventions under s4D, s45A and s47 (6) and (7).
 - 6 [2001] HCA 13 at paragraph 17.
 - 7 (1989) 167 CLR 177 at 191.
 - 8 (1989) 167 CLR 177.
 - 9 [2001] HCA 13 at paragraph 30.
 - 10 [2001] HCA 13 at paragraph 31.
 - 11 [2001] HCA 13 at paragraph 31.
 - 12 [2001] HCA 13 at paragraph 61.
 - 13 [2001] HCA 13 at paragraph 62.
 - 14 The dissenting judgment of Kirby J in *Melway* merits separate analysis which, given the scope of this paper, it is not possible to include here.
 - 15 [2001] HCA 13 at paragraph 63 and following.
 - 16 [2001] HCA 13 at paragraph 67.
 - 17 [2001] HCA 13 at paragraph 51. Emphasis added. Note also paragraph 69.
 - 18 [2001] FCA 30 paragraph 4.
 - 19 [2001] FCA 30 paragraph 68.
 - 20 *Australian Competition and Consumer Commission v Boral Limited* (1999) 166 ALR 410 at 420 paragraph 48.
 - 21 [2001] FCA 30 paragraphs 48 – 83.
 - 22 [2001] FCA 30 paragraphs 84 – 87.
 - 23 [2001] FCA 30 paragraph 43.
 - 24 (1999) 166 ALR 410 at 439 paragraph 151 and note section 46 (3) (b).
 - 25 Note section 46 (3) (a).
 - 26 (1999) 166 ALR 410 at 432 paragraph 110.
 - 27 [2001] FCA 30 paragraph 349, 233
 - 28 Hansard, House of Representatives, 19 March 1986 p. 1626.
 - 29 (1999) 166 ALR 410 at 443 paragraph 173.
 - 30 (1999) 166 ALR 410 at 440 - 442 paragraphs 159 - 168.
 - 31 It appears that under section 2 of the Sherman Act the relevance of below cost pricing and recoupment fit into the analysis in a slightly different way – see *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 70ff.
 - 32 For example, circumstances where the above cost pricing in question could only be engaged in by a firm with the requisite degree of market power.
 - 33 [2001] FCA 30 at paragraph 197.
 - 34 [2001] FCA 30 at paragraph 320.
 - 35 [2001] FCA 30 at paragraph 321.
 - 36 [2001] FCA 30 at paragraph 325.
 - 37 [2001] FCA 30 at paragraph 222.
 - 38 [2001] FCA 30 at paragraph 338.
 - 39 [2001] FCA 30 at paragraphs 343 and 347.
 - 40 [2001] FCA 30 at paragraph 349.
 - 41 In that Rocla and Budget left the market.
 - 42 Something which the High Court warned against in another context in *Melway* [2001] HCA 13 at paragraph 31.
 - 43 Section 2 of the *Trade Practices Act 1974* (Cth).