SECTION 46:
THE HIGH COURT, DAWSON AND THE SENATE
A REVIEW OF THE RECENT DEBATE.

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SECTION 46: WHERE WE HAVE BEEN AND WHERE WE ARE GOING: A REVIEW OF THE RECENT DEBATE.

Two recent reviews of Part IV of the Trade Practices Act (Cth) (1974) have looked specifically at the operation of Section 46 of this Act and come to very different conclusions concerning its efficacy. The Dawson review (2003) argued that no change to s46 was required as the courts were providing sufficient guidance in the application of the legislation in this respect. The Senate Committee review (2004) came to contrasting conclusions arguing that the Act needed clarification in regard to certain sections. These reports highlight the controversy which has surrounded this section of the Trade Practices Act for the past thirty years. The aim of this paper is to consider these reviews and evaluate the extent to which the High Court has been able to provide guidance in the application of legislation which prohibits the misuse of market power.

Keywords: Trade practices legislation, Section 46, Misuse of market power.

JEL D40, K22, L41
1. Introduction

The Trade Practices Act 1974 (TPA) which forms the basis of competition law in Australia has been the subject of a number of major inquiries in the last thirty years. Of these, perhaps the most significant in recent times has been the report of the Hilmer Committee in 1993. This review influenced the 1995 amendment to the TPA and led to the establishment of the Australian Competition and Consumer Commission (ACCC) in November 1995. The 1995 amendment to the TPA and the creation of a competition watchdog, with a much broader mandate than previously, has had a significant impact on the application of competition policy. There remains however, one issue which neither the courts nor the ACCC have been able to resolve in a satisfactory manner and that is the issue of misuse of market power.

Part IV of the Trade Practices Act, specifically s46, deals with anti competitive behaviour on the part of firms with substantial market power which damages competitors. This section of the Act has had few changes since 1974. The changes that have been made have been highly significant and have had important consequences in terms of the application of the law. In 1976 the Swanson Review of the Act recommended that the wording of s46 be changed to emphasise the ‘purpose’ or intent of the firm in pursuing particular forms of anti competitive behaviour. Following the recommendations of the Swanson Committee, the TPA was amended in 1977 to incorporate ‘proscribed purpose’. A further amendment in 1986 lowered the threshold requirement of market power to cover firms with a ‘substantial degree’ of market power rather than ‘substantial control’ of a market (Dawson, 2003, p.76). Far from clarifying the operation of the Act these changes have contributed to the controversial nature of s46. Many of the issues raised with these amendments have been the subject of debate in the High Court in recent years. In response to the growing complexity associated with interpreting s46 the Government initiated another review in 2001. The Review of the Competition Provisions of the Trade Practices Act (the Dawson Review) was commissioned specifically to inquire into Parts IV and VII of the TPA and reported to Parliament in January 2003. This was followed by another inquiry by the Senate Economics References Committee (Senate Committee) which reported in March 2004. The reports of these two inquiries have highlighted a shift in the emphasis of the debate concerning s46 and misuse of market power. They point to a growing concern that the application of the legislation does not achieve the objectives of the Act. It is the purpose of this paper to review the progress of the debate and analyse the extent to which recent cases before the High Court have helped to clarify the intent of the legislation. The paper will proceed by considering the background to the debate. It will then review the High Court decisions in relation to four significant cases regarding s46 and assess them in regard to the conclusions of the two inquiries.
2. The Background to the Debate: The Issues Surrounding the Legislative Framework of section 46

Section 46 of the Trade Practices Act states that:

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

a) eliminating or substantially damaging a competitor of the corporation or a body corporate that is related to the corporation in that or any other market;

b) preventing the entry of a person into that market or any other market; or

c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The ambiguous nature of the wording of the legislation and the lack of guidance as to the policy objectives of the section have been the source of continued legal and economic argument. Specifically four problem areas have influenced the outcome of the application of the section in deterring anti competitive behaviour. These are:

- the definition of ‘substantial degree of market power’
- the issue of ‘taking advantage’ of that market power
- the problem of proving ‘purpose’ as opposed to ‘effect’
- the apparent duality of policy objectives

The problems associated with interpreting a ‘substantial degree of market power’ fall into two categories. Namely those associated with defining the market and those of determining market power within that market. Economists define markets with reference to three elements: the product market; geographic boundaries and the functional market. Whilst these conceptual elements are fairly widely accepted, it is the varying emphasis placed on each element by the courts and their significance in identifying the relevant market that has differed widely. Recent s46 cases which have come before the High Court demonstrate the difficulties encountered in applying theoretical constructs consistently.¹

Even if consensus can be achieved on market definition, the issue of ‘substantial degree of market power’ has to be interpreted. The Act does not specifically describe market power and accordingly it has been characterized in a number of ways. For example, market power has been determined in relation to the discretionary ability to charge prices without regard to the market forces of supply and demand. It has also been determined in a more general sense as a situation in which a corporation can act independently of competition and competitive forces (Edwards, 2003, p.158; Smith and Round. 2002, p. 205). Yet another way of looking at the issue has been to consider the extent to which conduct is indicative of market power.

¹ For example in Boral Besser Masonry Limited v ACCC(Boral).
Market power in itself does not necessarily lead to anti competitive behaviour. To be in breach of s46 a firm has to ‘take advantage’ of its market power for a ‘proscribed purpose’. The High Court in *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited* (*QWI*) set the standard for the interpretation of ‘take advantage’ which it deemed simply as ‘use’ of market power. Yet two points of uncertainty have continued to reoccur. Confusion in interpretation has arisen in respect to the degree to which the link between market power and the conduct under consideration exists. Was the behaviour only ‘facilitated’ by the existence of market power or would it not have occurred without such power (Corones, 2002a, p. 420)? The second point of confusion has arisen when attempts have been made to view the issues of market power and taking advantage as synonymous. That is, to attempt to establish market power with reference to the particular form of conduct under investigation.

Under the Act, ‘purpose’ is proscribed in three ways: substantially damaging competition, preventing entrance to a market and preventing competitive market behaviour. The courts must be satisfied that there was a deliberate intent on the part of a firm with substantial market power to use that power in a manner which harms competition in that market. The efficacy of the ‘purpose test’ has initially been the focus of much discussion. The debate over the issue of ‘purpose’ hinges on whether or not an effects test would be more appropriate in analysing misuse of market power. Several grounds are put forward for the retention of a purpose test in preference to the introduction of an effects test. These include: the argument that an effects test is too invasive and may deter genuinely competitive behaviour; it is less likely to catch intended actions by firms that lead to anti competitive outcomes and finally that it creates greater uncertainty for business (Pengilly, 2002, p.2).

Exponents of an effects test argue that purpose is difficult to establish. Furthermore the essential issue should not be the intent but the impact, or likely impact, of the firm’s actions on competition within the market. Stephen Corones, (2002b) has argued that purpose should only be relevant to the extent that it assists the courts to determine the impact of conduct on competition. The ACCC (2002, p.80) also argued along similar lines, that conduct can have anti-competitive effects regardless of intention and that the policy objective of Part IV of the Trade Practices Act was to protect competition.

A further issue in the debate has been the question of the main policy objective of the Act. Stephen Corones (2002a, p.411) argues that the absence of clear policy goals and identifiable beneficiaries has contributed to the problem of identifying conduct which could be construed as misuse of market power. Corones points to evidence that suggests dual policy objectives may have been intended when the Act was amended in 1986. These objectives are the protection of the competitive process and the protection of smaller competitors. High Court interpretations of the Act in a number of significant cases suggest that it places more emphasis on protecting competition than it does on protecting competitors (Corones,
2002a, pp.410-411). The recent Government response to the Senate Report also indicates continued support for this position.

The High Court has considered these issues in the four s46 cases that have come before it: *QWI*, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (Melway)*; *Boral Besser Masonry Limited v ACCC (Boral)* and *Rural Press Limited v ACCC (Rural Press)*. The following section of the paper will consider the direction provided by the High Court in addressing these issues and implications of these decisions.

3. Direction Provided by the High Court

In 1989 the High Court undertook its first analysis and application of s46 in *QWI*. This case has provided the benchmark by which subsequent cases have been compared.

The High Court ruling arose from the action of BHP towards competitors of its wholly owned subsidiary, Australian Wire Industries (AWI). BHP manufactured a steel product called ‘Y-bar’ and supplied it to AWI for the production of star picket posts used in rural fencing. BHP refused to supply Y-bar to AWI’s competitor, Queensland Wire Industries (QWI), at other than ‘an unrealistically high price’ thereby effectively refusing supply (*QWI*, 1989, p.195). The High Court was unanimous in deciding that BHP had breached s46 by its action. Analysis of the decision is divided into the separate issues raised by s46.

3.1 Substantial Degree of Market Power

In determining the degree of market power it is necessary in the first instance to identify the market. In *QWI* the High Court established the validity of using economic theory in its approach to market definition. In the judgment however, each of the judges provided a different perspective on the significance of the various aspects of defining market power.

Justice Dawson highlighted the importance of the existence of barriers to entry in both defining the market and in ascertaining the existence or otherwise of market power. He also argued that certain forms of conduct could be a manifestation of market power such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal (*QWI*, 1989, p.200). Chief Justice Mason and Justice Wilson defined market power as “the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time” (*QWI*, 1989, p.188). They stated that such power was evidenced by a large market share and also emphasized the importance of barriers to entry. In this context vertical integration could be a means to capitalize on market power. This was an issue subsequently raised in *Boral*. The judges also said that where a firm is vertically integrated, the relevant market for the purpose of determining market power, is “at the product level which is the source of that power” (*QWI*, 1989, p.187).

Due to BHP’s obvious dominance at all levels in the Australian steel industry it was not necessary for the Court to apply the theoretical construct of market definition in forming a conclusion as to the relevant market.
Justice Dawson said “In this case the definition of the relevant market poses no great problem because BHP clearly has a substantial degree of market power however widely the market is drawn.” (QWI, 1989, p.201). After canvassing a range of possible markets each of the judgments agreed with Justice Dawson’s conclusion regarding BHP’s substantial market power.

Although the High Court was able to establish market power, the differing perspectives of the judges in identifying the relevant market highlights the difficulties of interpretation of this section of the Act. In addition the specific facts before the Court restricted it in addressing certain issues. For example, the important issue (which arose subsequently in Rural Press) of whether the market in which the market power exists must be the same as that in which market power is misused, was not discussed.

3.2 Taking Advantage
In considering this issue, the High Court focussed primarily on whether the phrase implied a requirement for hostile intent as was found by the trial judge and secondly how to establish such a finding. All members strongly rejected the notion of a pejorative requirement (QWI, 1989, pp.191,194,202,213). The Court was united in stating that the issue was whether a firm with substantial market power had used that power for a proscribed purpose (QWI, 1989, pp.191,194,202,213).

Justice Deane found that BHP had “clearly taken advantage of that substantial power…” (QWI, 1989, p.198). He concluded the purpose for which the Court found BHP had undertaken the conduct could only be achieved by such conduct if it had substantial power in the market. Chief Justice Mason and Justice Wilson looked at the issue from a different perspective. They considered BHP’s likely commercial response had it not had substantial market power. Justice Dawson agreed with Justice Deane that the purpose could not have been achieved without the market power and said that BHP “used that power in a manner made possible only by the absence of competitive conditions” (QWI, 1989, p.202).

Subsequent cases have revealed the open nature of the term ‘use’ and the many degrees of variation the word may have in the context of s46. Significantly, no case since QWI has been able to establish taking advantage of market power at High Court level.

3.3 Proscribed Purpose
The Court found BHP did have a proscribed purpose and focussed its attention on selecting the appropriate purpose. This was difficult to determine because there was no firm conclusion as to whether the relevant market was for star pickets, rural fencing or steel products. Did BHP intend to exclude Queensland Wire from the market (not if the relevant market was the wider market for steel products) or merely prevent it competing in the (narrower) rural fencing market? Justice Deane found that whether the applicable purpose was to prevent entry of Queensland Wire into the narrow market or to deter or prevent Queensland Wire acting competitively in a broader market both had been established on the facts (QWI, 1989, p.198). Chief Justice Mason and Justice Wilson found that the proscribed purpose
was deterring or preventing Queensland Wire engaging in competitive conduct in the rural fencing market (QWI, 1989, p.198) whilst Justice Toohey found that the purpose was to prevent entry into the star picket market (QWI, 1989, p.211).

3.4 Purpose of Section 46 and the Competition Provisions

In QWI the Court also took the opportunity to comment on what it saw as the purpose of s46. Chief Justice Mason and Justice Wilson stated that the object was to protect consumers through fostering competition. They went further to explain that competition by its very nature can be “ruthless” and involves “injuring” competitors” and “these injuries are the inevitable consequence of the competition s46 is designed to foster” (QWI, 1989, p.191). Justice Deane said “The objective is the protection and advancement of a competitive environment…” (QWI, 1989, p.194).

QWI was a landmark case in that it validated use of economic analysis in establishing the elements of a breach of s46 such as market definition and market power. It also removed the debate concerning the pejorative interpretation of ‘taking advantage’. Beyond that it clarified very little leaving issues such as how to apply economic theory to the facts, the boundaries of the term ‘use’, and the relationship between the elements to be considered in subsequent cases.

4. Guidance in subsequent cases

Action against firms for breach of s46 has not succeeded at High Court level in any case subsequent to QWI. It is appropriate therefore, to consider these cases according to the elements of s46 to identify the areas of difficulty and examine the direction the High Court has taken since QWI in its application of the elements. Table 1 summarises the outcome of these cases with respect to the major issues.

Insert Table 1 here

It is evident from this table that establishing proscribed purpose has not been as difficult as some commentators had suggested. Substantial market power has also been established in two of the three s46 cases to reach the High Court since QWI. The element that has proven most difficult to establish is ‘taking advantage’ of market power. It is understandable, therefore, that this has become the element of s46 subject to the greatest scrutiny and debate in recent times. Analysis by the High Court of each element in the three cases subsequent to QWI will be examined to determine what guidance it has provided.

4.1 Market Power

For example this was a particular focus of the Senate Economic References Committee in 2004.
As the table indicates, market power was found to exist in two of the three cases subsequent to QWI. In Melway, where the maintenance of an exclusive distributorship arrangement at wholesale level was under scrutiny, the relevant market was not in dispute. Consequently there was limited discussion in regard to the matter other than to restate the findings of the lower courts and comment that “the notion of market power as the capacity to act in a manner unconstrained by the conduct of competitors is reflected in the terms of s46(3)” (Melway, 2001, p.21).

In Boral, the Court examined the conduct of Boral Besser Masonry Ltd (BBM) a subsidiary of Boral Ltd in Melbourne during the period April 1994 and October 1996. BBM manufactured concrete masonry blocks, bricks and pavers. The relevant conduct was its pricing of products and expansion of production capacity during a period of economic recession in Victoria which particularly affected the commercial building industry. Justice Heerey, the trial judge, held that Boral did not have substantial market power in relation to a widely defined market. On appeal, the Full Federal Court found Boral did have substantial market power but in a narrower market than that found by Justice Heerey. The High Court subsequently agreed with the Full Federal Court in relation to the relevant market but found that Boral did not have substantial market power in that narrow market. The Court reiterated its support for a market being the area of close competition.

After extensive examination of the findings of fact in regard to the market the Court found that the Full Federal Court had concentrated on the supply side of the market but had neglected to consider the powerful position of BBM’s customers. The Court stated that consideration of demand as well as supply was not only necessary to define the scope of the market but also assisted in indicating the extent of market power or lack of it (Boral, 2003, p.620). This raised the issue of what factors should be considered in determining market power. Chief Justice Gleeson and Justice Callinan argued that market power is the capacity to act without constraint (Boral, 2003, p.635) and that the market structure should be examined to indicate the presence or otherwise of such constraint. Barriers to entry were considered a vital factor. Market share and vertical integration were seen as potential indicators of market power. Vertical integration was relevant to the facts of this case and was used by the Court to provide a rational explanation for BBM’s pricing behaviour (Boral, 2003, p.622). Pricing behaviour was found to be ‘the critical test’ (Boral, 2003, p.635) in examining ‘market behaviour that manifests power’ (Boral, 2003, p.635). However, the majority of the Court rejected financial strength as an aspect of market power or even a manifestation of market power (Boral, 2003, p.648). Some members of the Court suggested it may be an explanation of that power (Boral, 2003, p.635). The Court concluded that market power was the ability to act in a certain way without fear of “competitive reprisals” (Boral, 2003, p.636).

The most recent case in which the High Court has examined s46 is Rural Press. The majority found that Rural Press (a publisher of a regional newspaper in the Murray Bridge area) had not contravened s46 when it
threatened to publish a free newspaper in a neighbouring area if the rival publisher, Waikerie Printing, did not withdraw circulation of its newspaper from the Murray Bridge area.

The trial judge found that the relevant market was the regional newspaper market in the Murray Bridge area. The Full Federal Court did not overturn this finding. The High Court did not address this matter directly as it said that market definition was not before the Court (Rural Press, 2003, p.229), although there was some suggestion of dissatisfaction with the scope of the market as defined in the lower courts (Rural Press, 2003, p.229).

The High Court quoted the Full Federal Court judgment in which it suggested that the market in which there is substantial power must be the same market in which the power is misused (Rural Press, 2003, p.231). Even though this requirement had not previously been examined by the High Court it did not comment further. The issue was subsequently raised by the Senate Committee and it recommended an amendment to §46 (Senate Committee, 2004, p.25) to clarify that the misuse could take place in any market. This was one of the few Senate Committee recommendations accepted in the Government response (Australian Government Response, 2004, p.7). The Full Federal Court approach of excluding the financial resources and scope available to Rural Press also raises questions as to what should be included in an analysis of the market and market power? In particular, to what extent the financial power and other resources available to a firm arising from being part of a corporate group are relevant issues?

The High Court specifically excluded these aspects from consideration in Rural Press. Following this the Senate Committee recommended their inclusion in future considerations. This recommendation was subsequently rejected in the Government response. With little further comment or analysis the majority of the High Court found that Rural Press had substantial market power as there were monopoly conditions in the relevant Murray Bridge market.

As cases such as Boral have shown, the application of economic theory to the facts has proven more complex than perhaps envisaged in QWI. The Court has however, consistently stressed the importance of barriers to entry in assessing market power. In QWI the Court foreshadowed that vertical integration and its role in assessing market power may need to be considered. It subsequently did examine this issue in both Boral and Rural Press. In Boral, the Court suggested it may be an indicator of market power rather than an aspect to consider in measuring such power. Two members of the Court also said the corporate group structure of Boral provided an explanation of its pricing behaviour. In Rural Press, the Court did not overturn the Full Federal Court’s specific exclusion of a group corporate structure and its financial resources as elements in determining the presence and scope of market power but it did not appear to necessarily endorse those views. It is possible therefore, that exclusion of these factors may be confined to the facts of Rural Press allowing further examination in the future.
4.2 Taking advantage

As previously discussed, in each of the cases subsequent to *QWI*, the High Court has found that the firm had not taken advantage of market power. In *Melway* the majority stated that they did not question the decision in *QWI* that ‘take advantage’ means to ‘use’ substantial market power (*Melway*, 2001, p.17). However, they did introduce the concept that ‘taking advantage’ could be satisfied if the impugned conduct was ‘materially facilitated’ by the existence of the power even though it may not have been absolutely impossible without the power (*Melway*, 2001, p.23). The majority stressed the importance of proving a sufficient and relevant connection between the market power, impugned conduct and proscribed purpose rather than the mere co-existence of the elements (*Melway*, 2001, p.21). The majority drew a distinction between *Melway* and *QWI*. They stated that in *QWI* circumstances were such that the purpose, as found by the Court, could only have been achieved by a firm with market power which inevitably led to the conclusion in that case that the firm had used its market power. Such a situation was not present in *Melway* and was demonstrated by the fact that the conduct under scrutiny had occurred prior to *Melway* obtaining market power. An alternative method of proving ‘taking advantage’ of market power was required to satisfy the sufficient connection and this issue of proof had not been satisfied in this case (*Melway*, 2001, p.28). The Court rejected as flawed the approach adopted by the Full Federal Court to compare the conduct of the firm when it had market power, with the conduct it would expect in a ‘competitive’ market, to draw the inference that the firm had ‘taken advantage’ of its market power (*Melway*, 2001, p.24-25).

Again in *Boral*, the Court stressed the importance of a connection between the elements and not just their co-existence. It warned against inferring that advantage of a substantial degree of power in a market had been taken merely because of the existence of a proscribed purpose (*Boral*, 2003, pp.632, 649,681). Chief Justice Gleeson and Justice Callinan stressed the importance of finding a rational commercial explanation for *Boral*’s conduct and agreed with the reasoning of Justice Heerey at first instance that [the conduct] “…did not involve a taking advantage of market power, but constituted a rational and legitimate business response…”(*Boral*, 2003, p.629).

They used the finding of a rational business response to substantiate the conclusion that it had not taken advantage of market power. The majority also supported Justice Heerey’s findings that if the impugned conduct was engaged in by a firm without market power then a firm with market power engaging in the same conduct would not usually be taking advantage of its power (*Boral*, 2003, p.643). It would appear that the Court took the slight shift in the interpretation of ‘take advantage’ in *Melway* one step further in *Boral*.

The majority in *Rural Press* applied the *Melway* test of whether the conduct was ‘materially facilitated’(*Rural Press*, 2003, p.233) and the failure to prove it was the reason the element ‘taking advantage’ was not satisfied in that case. The Court applied that test in a way that it could only
be satisfied if the conduct were not possible without such market power. The majority argued the word ‘could’ was crucial whereas the word ‘would’ undertake the relevant conduct was not adequate to reflect the concept of take advantage (Rural Press, 2003, p.233). That is, to satisfy the test the impugned conduct was only possible if substantial market power was present not merely that the conduct was more likely if such market power was present. Thus, if similar conduct had occurred when there had not been market power (as in Melway) it would indicate that the conduct did not satisfy the test of ‘taking advantage’ of its market power.

On the face of it the Court has not overturned the finding of QWI that to ‘take advantage’ means to ‘use’ and the subsequent gloss on that term given in Melway to ‘materially facilitate’. However, the application of the test, initially in Boral and subsequently in Rural Press, may indicate a subtle shift in that the test may now only be satisfied if the conduct is not possible without substantial market power. The one issue, however, in which the Court has provided clear and consistent direction is the requirement of a connection between the elements and not just mere co-existence.

4.3 Proscribed Purpose
In all cases following QWI the High Court has found that a proscribed purpose was established. In each case the Court did not appear to have any difficulty establishing such purpose on the facts and gave greater attention to giving direction about the error of inferring ‘take advantage’ from the presence of a proscribed purpose (Melway, 2001, p.18, Boral, 2003, p.632, Rural Press, 2003, p.233). This reinforces the conclusions drawn by the Dawson Review and the Senate Committee that there is no need for an effects test as establishing purpose has not proven to be a difficulty for the courts.

4.4 Purpose of Section 46 and the Competition Provisions
The majority in Melway were clear in their view that the purpose of s46 was “to promote competition, not the private interests of particular persons or corporations.” (Melway, 2001, p.13) This was restated by the majority in Boral (Boral, 2003, pp.625, 647). There can be no doubt that one area in which the Court has provided clear and consistent direction has been in what it believes is the purpose of the competition provisions generally and s46 specifically. The Court has not wavered from its position that the purpose is to protect competition not competitors and that this informs its interpretation of the section and application to the cases before it. The suggestion of a duality in policy objectives is not one to which the High Court subscribes.

4.5 Overview of the direction provided by the High Court
The following table summarises the contribution of each of the High Court cases to the four problem areas identified.

Insert Table 2 here
From the table it is clear that High Court decisions have resulted in the clarification of some issues whilst others remain unresolved. The majority in all four cases has been consistent in its approach that the purpose of the Act is to ‘promote competition’. The High Court has also identified a ‘proscribed purpose’ in all four cases (Table 1). Some development is also evident in interpreting the ‘take advantage’ requirement of s46. The High Court in QWI established the precedent that taking advantage of market power meant ‘use’ of market power. Succeeding cases have built on this judgment. A clear progression of interpretation is apparent as the High Court has moved to apply the initial decision to differing circumstances. In QWI the decision was relatively straightforward. ‘Purpose’ could only be achieved if the firm had market power, this was not the case in Melway, Boral or Rural Press. In Melway the judgment stressed the importance of the link between market power, conduct and proscribed purpose. It was not enough for the elements to co-exist, they must be actively connected. In this context the concept of ‘materially facilitated’ by market power was introduced. In Boral the application of this test was extended by introducing the concept of a ‘rational business explanation’. That is, if firms without market power engaged in the same conduct, then a firm with market power would not usually be taking advantage of that power. Finally in Rural Press the adoption of the ‘could’ test has further refined this interpretation. However, even though judicial interpretation has resulted in progressive clarification of s46 in this respect, it has not resulted in a finding of breach of the section in recent cases. QWI is the only case where taking advantage has been successfully proven (Table 1). Progressive judicial elucidation appears to have made it more difficult to substantiate ‘taking advantage’.

Whilst the judgments of the High Court have developed the interpretation of ‘take advantage’ the same cannot be said for ‘substantial degree of market power’. There has been little clarification of market definition from the High Court. A constraint has been that in two of the four cases it was not an issue addressed by the Court. It may be coincidental that these were cases in which market power was established (Table 1). In QWI a precise definition of the markets was not required as it was clear BHP had market power in several related markets. In Boral the Court accepted the definition established by the Full Federal Court and agreed that the market was an ‘area of close competition’. Despite agreeing with the Full Federal Court’s definition of the market it came to the opposite conclusion regarding the presence of market power. The zig zag of conclusions between the different courts concerning the scope of the market and the presence or absence of market power illustrates the confusion existing and lack of direction provided in regard to these crucial elements of s46. The High Court have been not been able to provide guidance in a consistent and structured manner in this area. Consequently there has been no clear progression of interpretation as is evident in Table 2. This is an area of s46 which remains problematic.

5. Recent Reviews of Section 46
As previously discussed, in the past three years the issues surrounding the workability of s46 of the TPA have been the subject of two major inquiries. The reports of these investigations come to very different conclusions regarding the efficacy of s46 in promoting competition.

The Dawson Committee laid the foundation for its investigation in the first place by assessing the value of competition. “Competition” it was argued, was not an end in itself. Instead, it was an important means by which efficiency could be achieved. The achievement of economic efficiency is the ultimate goal (Dawson, 2003, p.32). This statement is significant in that it highlights the underlying thrust of the report. The Committee was concerned to ensure that the current trade practices legislation promoted the type of competitive behaviour which would lead to greater efficiency in markets and in so doing improve economic welfare. In this regard the report concluded generally that the prevailing regulatory framework in respect to competition provisions was appropriate to Australia’s circumstances (Dawson, 2003, p.39).

Of the four problems surrounding the application of s46 discussed earlier, the Committee identified the main issue as being that of the purpose versus effects test. The other concerns rated only a minor mention in the report. After hearing opinions presenting both sides of the argument the Dawson Committee concluded in favour of retaining the purpose test. It argued that there was no apparent difficulty in proving purpose as suggested in some submissions and that a number of cases had indicated that proof of purpose was not an obstacle to the application of s46 (Dawson, 2003, p.79). This conclusion is borne out in Table 1 which indicates that the High Court has not found this a difficult issue to resolve.

The Dawson Committee ultimately recommended that no amendment to s46 was required. In doing so, it was argued it was the function of the courts to provide guidance in the application of the policy objectives enshrined in the legislation. The High Court in particular, had an important role in this respect. It was felt that changing the Act at this time would result in a loss of valuable jurisprudence and lead to an increase in uncertainty which would have a negative impact on competition. The Committee concluded “…it would not be in the interests of competition and consumers to change section 46, given that the cases currently before the courts offer a real prospect of developing a better understanding of the true scope of section 46” (Dawson, 2003, p.84). The preceding discussion suggests that the Committee may have been overly optimistic in assuming the courts are able to effectively resolve the issues surrounding s46 in the short term at least.

Following the outcome of Boral a Senate Committee was commissioned to report into “The effectiveness of the Trade Practices Act 1974(Cth) in protecting small business”. The different emphasis of this committee is immediately apparent in the title and was reiterated in the introduction of the report. The purpose of the TPA, it was stated “…should protect businesses (large or small) against anti competitive conduct…” The aim of the inquiry was to consider how well the Act achieved this goal
(Senate Committee, 2004, p. xi). The switch from promoting competition to improve efficiency to ‘protecting business’ is a notable difference in approach between these two reports and is reflected in their recommendations to Parliament.

The two main concerns which occupied the attention of the Senate Committee in respect to s46, were that of defining substantial market power and of ‘taking advantage’ of that market power. Of the seven specified issues dealt with by the Committee, five concerned matters relating to the problem areas of substantial market power or taking advantage. The other questions considered were those of predatory pricing and the effects test. The Senate Committee made six recommendations for change to the provisions of s46. In respect to the issue of substantial market power, the Committee found that the intention of Parliament needed clarification and that rather than wait for the courts to provide direction it was preferable to act directly on this matter. The Committee endorsed a proposal put forward by the ACCC and recommended that the Act be amended to state that the threshold of ‘a substantial degree of power in the market’ is lower than that of ‘substantial control’. It was also argued that a declaratory provision which outlined matters to be considered in making this determination be included (Senate Committee, 2004, p.11). Other findings in relation to market power recommended that ‘substantial financial power’ be included in the determination of substantial market power and that it also include provisions relating to co-ordinated market power in contradistinction to the recent decisions of the High Court.

In addressing the issue of ‘take advantage’ the Committee recommended that a declaratory provision be included in the Act outlining the matters the courts should consider in determining whether or not a firm had taken advantage of its market power. It was also recommended that the Act be amended to include taking advantage of market power in relation to secondary markets (Senate Committee, 2004, p. 15, 25).

The findings of the Senate Report in contrast with those of the Dawson Review indicate the substantial shift in the direction the debate over s46 has taken in recent times. The focus has shifted to place a much greater emphasis on the related issues of determining ‘substantial market power’ and ‘take advantage’. This shift has been driven by recent High Court decisions which have set the agenda for the future application of the legislation.

The Government response to the Senate Report in June 2004 has added a further dimension to the debate. The Government was unconvinced by many of the arguments put forward for change to the Act especially in regard to the purpose of the TPA. This was reflected in the rejection of many of the recommendations. Specifically it did not accept the recommendation that clarification was needed in regard to the threshold requirement of ‘substantial degree of power in the market’. It rejected the argument put forward in favour of this recommendation which implied that after the finding in *Boral* the threshold had effectively returned to one of ‘substantial control’ (Australian Government Response, 2004, p.3). The Government went further in also rejecting the recommendation in regard to
the inclusion of substantial financial power arguing that it would extend the scope of s46 in an ‘uncertain and undesirable manner’ (Australian Government Response, 2004, p.6). However, it did accept the need to amend the Act to take account of the influence of market power in other markets thereby clarifying the issue raised but not resolved in Rural Press. The Government also accepted the recommendation to take into account the impact of co-ordinated market power in assessing the degree of market power (Australian Government Response, 2004, pp.7-8).

The Government rejected the Committee’s recommendation concerning the need to specify the elements of ‘take advantage’. It argued that unlike consideration of ‘substantial market power’ sophisticated economic analysis was not required. There was no ambiguity in its application and the recent High Court decisions had not hindered the operation of the Act (Australian Government Response, 2004, pp.4-5).

Recently proposed amendments to the TPA have been introduced to Parliament incorporating the recommendations of the Dawson report (House of Representatives, 2004). Further amendments have been foreshadowed incorporating those recommendations of the Senate Review accepted by the Government. Whilst these will refine interpretation of some areas of interpretation of s46 as discussed above, many issues such as defining the market, market power and application of the test for ‘taking advantage’ remain for the courts to resolve.

6. Conclusion

The preceding review of the debate over the application of s46 indicates that considerable controversy remains in relation to the issue of misuse of market power. The two recent reports highlight the difficulties in this respect. The Dawson Report stated that there was no need for legislative change to s46. It argued that it was the role of the courts to give direction on the application of the Act. The Senate Committee on the other hand, emphasised the need for change to clarify the meaning of the Act in this regard. The Government response to both reviews implicitly accepts that the courts have a major role to play in determining the way in which the legislation is applied.

The four major cases that have come before the High Court and which establish the precedent for future application of s46 have resulted in some clarification of specific issues. The objective of the Act and matter of proscribed purpose are both matters which appear to have been resolved. The more complex questions of establishing substantial market power and ‘taking advantage’ remain issues of contention. Whilst there is development in the definition and application of ‘taking advantage’ it has been accompanied by the inability to prove this element in recent cases. It may be that the development has led to a stricter interpretation of that element leading to a more restrictive application of s46 itself. In respect to establishing market power, the various cases have not resulted in the same degree of progress. One reason for this may be that the High Court has not fully addressed the question of market definition which forms the basis for
identifying market power. The issues of defining the market and establishing the presence of market power involve complex economic analysis which may not be well suited to the legal context before the Court. It may be that the only guidance the High Court can give in this respect is to judge each case on its merits.
REFERENCES
Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd and Another (1989) 167 CLR 177.
<table>
<thead>
<tr>
<th></th>
<th>QWI</th>
<th>Melway</th>
<th>Boral</th>
<th>Rural Press</th>
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<tr>
<td>Substantial Market power</td>
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<td>Proscribed Purpose</td>
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<tr>
<td>Taking advantage</td>
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**TABLE 2**

A SUMMARY OF THE MAJOR FINDINGS IN THE FOUR HIGH COURT CASES RELATING TO S46.

<table>
<thead>
<tr>
<th>Substantial Degree of Market Power: Identifying the market</th>
</tr>
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<tbody>
<tr>
<td>QWI: The issue of market definition not resolved. Precise definition was not seen as a problem because BHP had market power in a very wide market. Economic analysis accepted a useful tool.</td>
</tr>
<tr>
<td>MELWAY: Market not in dispute.</td>
</tr>
<tr>
<td>BORAL: Market ‘an area of close competition’. Demand as well as supply factors must be considered, rejection of consideration of financial strength.</td>
</tr>
<tr>
<td>RURAL PRESS: Market given narrow scope, lower court’s definition questioned but not overturned.</td>
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<thead>
<tr>
<th>Substantial Degree of Market Power: Establishing market power</th>
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</thead>
<tbody>
<tr>
<td>QWI: No consensus on establishing market power. Barriers to entry are important, certain forms of conduct may be indicative of market power, vertical integration should be considered.</td>
</tr>
<tr>
<td>MELWAY: Market power is the ability to increase price above supply cost without losing customers to rivals</td>
</tr>
<tr>
<td>BORAL: Vertical integration may be a rationalisation for behaviour.</td>
</tr>
<tr>
<td>Pricing policies are a critical indicator of market power.</td>
</tr>
<tr>
<td>Market power is the ‘ability to act without reprisals’.</td>
</tr>
<tr>
<td>RURAL PRESS: Significance of this case lies in what was excluded from determinants of market power: ie financial power, corporate group resources.</td>
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<tr>
<th>Taking Advantage</th>
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<tbody>
<tr>
<td>QWI: Refers to ‘use’ of market power.</td>
</tr>
<tr>
<td>MELWAY: Take advantage proven if conduct ‘materially facilitated’ by market power.</td>
</tr>
<tr>
<td>BORAL: Extended application of Melway test by stressing ‘rational business behaviour’ as an alternative explanation to ‘taking advantage’.</td>
</tr>
<tr>
<td>RURAL PRESS: Introduction of ‘could’ test to establish conduct being ‘materially facilitated’ by market power.</td>
</tr>
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<tr>
<th>Proscribed Purpose</th>
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<tr>
<td>QWI: Proscribed purpose found to exist.</td>
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<tr>
<td>MELWAY: Proscribed purpose found to exist.</td>
</tr>
<tr>
<td>BORAL: Proscribed purpose found to exist.</td>
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<td>RURAL PRESS: Proscribed purpose found to exist.</td>
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<thead>
<tr>
<th>Purpose of s46</th>
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<tbody>
<tr>
<td>QWI: Various interpretations of purpose but all focus on the promotion of competition.</td>
</tr>
<tr>
<td>MELWAY: Promote competition.</td>
</tr>
<tr>
<td>BORAL: Promote competition.</td>
</tr>
<tr>
<td>RURAL PRESS: promote competition.</td>
</tr>
</tbody>
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