Submission in response to Harper Competition Policy Review Final Report on Unilateral Conduct and the Role of the Purpose Test in section 46 of the Competition and Consumer Act 2010 (Cth)

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INTRODUCTION

This submission is based in part on my doctoral thesis which examined the role of the purpose test by considering, inter alia, the policy objectives of section 46 as a whole, which in turn required an examination of the link between section 46 and Pt IV of the *CCA* generally. The policy objectives of section 46 and Pt IV have aroused a great amount of public debate and controversy. Are the policy objectives of section 46 and Pt IV intended to protect competition or competitors? Does the purpose test in section 46 have a role to play in protecting small business from anticompetitive conduct by big business? Would an effects test be more appropriate? Is the purpose test an objective or subjective test?

Section 46 regulates unilateral anticompetitive behaviour on the part of a corporation with substantial market power. It is the purpose which gives rise to the prohibition rather than its effect. Misuse occurs when a corporation takes advantage of the power for a proscribed purpose regardless of the actual effect of the conduct whether it be the achievement of a proscribed purpose or substantial lessening of competition.

Purpose in s 46 is attached to a particular form of conduct – the taking advantage of market power for a proscribed purpose. This illustrates the close relationship between a firm's conduct and its intent or purpose. Once the purpose of the conduct is exposed, the legitimacy of that purpose and the means by which it is proposed to be attained come to the foreground. The purpose test therefore plays an important role in helping to distinguish between pro-competitive and anticompetitive conduct. The purpose test also plays a preventive role in that it seeks to capture conduct that has an anticompetitive purpose where there is no immediate anticompetitive effect. For this reason, the purpose test is considered to be more appropriate than an effects test.

Despite the High Court confirming that s 46 is about protecting competition, not competitors,[1] the provision has been drafted in such a way that it appears to be aimed at protecting individual competitors. For example, subsections 46(1) and 46(1AA) refers to eliminating a *competitor*, preventing the entry of a *person* into a market, and deterring a *person* from engaging in competitive conduct. In order to prevent a tendency to equate injury to a competitor with injury to competition, the High Court has put a 'gloss' on the interpretation of s 46.

The first part of this submission looks at the policy objectives of s 46 and Pt IV before concentrating on the role of the purpose test. The submission then goes on to discuss whether the purpose test promotes the policy objectives of s 46 and Pt IV.

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[1] *QWI* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J); 213 (Toohey J); *Melway* (2001) 205 CLR 1, 13 (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, 411 (Gleeson CJ and Callinan J).

OBJECTIVES OF SECTION 46 AND PT IV

In order to determine the role of the purpose test, it is necessary to take a contextual approach, by identifying the legislative policy behind the provision in an attempt to ascertain the objectives of s 46.

The need to have regard to the purpose of a particular provision has been emphasised by the High Court, especially by Kirby J. In *Visy Paper Pty Ld v ACCC,*[2] His Honour stated:

> It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the TPA that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law.

The objectives of the *TPA* are set out in s 2:

> The object of TPA is to enhance the *welfare of Australians* through the *promotion of competition* and *fair trading* and provision for consumer protection (emphasis added).

Promotion of competition and fair trading are expressly stated as objectives under s 2. Although the legislation provides no further guide to the 'welfare of Australians', it is generally accepted that the *TPA* is primarily concerned with economic welfare. There are a number of different ways in which 'welfare' may be measured. The economic concept of consumer welfare would consider changes in consumer welfare without regard to off-setting changes in producer welfare.[3] The consumer welfare standard only takes into account efficiencies that will be passed on to consumers in the form of lower prices or better products.[4] Another way to measure welfare is to adopt a 'total welfare' approach. Total welfare treats consumer welfare and producer welfare as being of equal value.

In *Re Qantas Airways Limited,*[5] the Tribunal adopted the total welfare standard. Under this standard, all resource savings benefit society (producers as well as consumers) even if these savings are not passed onto consumers. However, McHugh J adopted the consumer welfare standard in *Boral*:[6]

> When a court applies the provisions of s 46 it must do so with the legislative object of the section in mind. While conduct must be examined by its effect on the competitive process, it is the flow-on result that is the key – the effect on *consumers*. Competition policy suggests that it is only when *consumers* will suffer as a result of the practices of a business firm that s 46 is likely to require courts to intervene and deal with the conduct of that firm (emphasis added).

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[2] (2003) 216 CLR 1, 24.
[3] Corones, above n 5, 93.
[4] Re Qantas Airways Ltd [2005] ATPR 42-065 [171].
[5] [2005] ATPR 42-065, [185].
[6] *Boral* (2003) 215 CLR 373, 458-9 (McHugh J).

Economists regard conduct as pro-competitive if consumers are better off, and anticompetitive if consumers are worse off.[7] Consumers are harmed by conduct that artificially reduces output, raises prices or reduces choice, quality or service.[8] The High Court has confirmed that the object of s 46 is to promote competition for the benefit of consumers.[9] Under this approach, harm to competition is equated with harm to consumers.[10] This suggests that the High Court favours a consumer welfare approach rather than a total welfare approach. Promoting the welfare of consumers is therefore an important objective of s 46, together with the protection of competition.

In *Boral Besser Masonry Ltd v ACCC* ('*Boral*'),[11] Gaudron, Gummow and Hayne JJ stated that:

> The provisions of Pt IV are to be interpreted in accordance with the subject, scope and purpose of the legislation, in particular the object stated in s 2 of enhancing the welfare of Australians through the *promotion of competition* (emphasis added).

It is evident that promotion of competition is the main focus of s 46 and Pt IV of the *TPA*. Section 2 was inserted in 1995, but it is clear from the detailed language of the key provisions that the object of the *TPA* was the same before 1995, and would have been the same after 1995 even if s 2 had not been inserted.[12]

In general terms, the fundamental objectives of s 46 are the same as the other provisions in Pt IV, that is, protecting competition and thereby promoting consumer welfare. The specific role of s 46 is to regulate the conduct of a corporation which has a substantial degree of power in a market. However, the way in which s 46 can best achieve these objectives continue to be disputed. The High Court has often stated that s 46 protects competition, not competitors. Competition could mean rivalry in the sense of having or maintaining a large number of competitors in a market (minority view) or in the sense of a competitive process leading to economic efficiency which enhances consumer welfare (majority view). If the minority view is correct, then s 46 has the populist goal of protecting competitors to maintain a large number of competitors in the market. The wording of the purpose test also suggests that s 46 is aimed at protecting individual competitors.

The authorisation process reflects the majority view that competition is not an end in itself but an important mechanism for achieving economic efficiency.[13]

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[7] Corones, above n 5, 381.
[8] Ibid.
[9] QWI (1989) 167 CLR 177, 191; Melway (2001) 205 CLR 1, 13; Boral (2003) 215 CLR 374, 411.
[10] Ibid.
[11] *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 373.
[12] *ACCC v Baxter Healthcare Pty Ltd* (2007) 237 ALR 512 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[13] Part VII provides for the authorisation of conduct when that conduct is justified in the public interest, notwithstanding a lessening of competition. Authorisation is not available for conduct which falls within the prohibition imposed by s 46 however, if the same conduct also falls within ss 45, 45B, 47 or 50 for which there is an authorisation in force, such conduct is not rendered unlawful under s 46.

However, the fact that anticompetitive conduct under s 46 cannot be authorised (unlike other conduct prohibited under Pt IV) suggests that the objective of increasing the number of competitors in a market (minority view) trumps the objective of economic efficiency (majority view). This acknowledges that not all efficiencies are competition enhancing.

In 1986, the Attorney-General, Lionel Bowen, upon introducing amendments to the *TPA*, stated that:

> The Trade Practices Act plays an important role in ensuring that the maximum benefits are obtained through an *efficient allocation of our national resources*, as well as protecting the interests of the consuming public and reputable businesses. The Government attaches great importance to ensuring that the TPA is effectively and appropriately achieving its dual aims of promoting efficiency through competition, and thereby ensuring *goods are provided to the consumer at the cheapest price*, and providing consumers and business people with an appropriate measure of protection against unscrupulous traders[14] (emphasis added).

This supports the majority view of competition as well as the consumer welfare standard.

There is a view that the High Court in *Queensland Wire Industries* adopted an economic efficiency approach but did not discuss the policy implications of its decision and the broader policy objectives of competition law.[15] Competition and economic efficiency are regarded as separate concepts under the *TPA*.[16] Yet the two concepts are inextricably linked because competition drives economic efficiency. Corones has suggested that the reference to competition in s 2 of the TPA is a reference to a process of rivalry among firms – a state of affairs which results in resources being allocated efficiently.[17] On the other hand, he has also stated that if 'competition' means 'rivalry', then there would appear to be little scope for efficiency considerations.[18] Such statements do not assist in working out the objectives of the provision.

The economic goal of efficiency of firms and ultimately efficiency of the economy as a whole, promoted by the effective working of the market mechanism, which is maintained by s 46 and Pt IV of the *TPA*, was seen by the Blunt Committee[19] as the most important objective. The Blunt Committee was not in favour of the minority view of competition as rivalry in the sense of increasing the number of competitors in a market because such a policy

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[14] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 1986, 1626.
[15] Peter Prince.
[16] Corones, 38.
[17] Stephen Corones, 'The Characterisation of Conduct under Section 46 of the Trade Practices Act' (2002) 30 Australian Business Law Review, 409, 411.
[18] SG Corones, Competition Law in Australia (4th ed), 2007, 38.
[19] Trade Practices Consultative Committee, *Small Business and the Trade Practices Act*, December 1979 ('Blunt Committee'). There have been 12 Parliamentary Committees and Review Panels which have examined section 46 of the TPA since the legislation was enacted in 1974.

objective would ignore the other objectives of economic efficiency and the welfare of consumers as well as conflict with the restraints imposed on a small Australian market by minimum scale requirements in many industries.[20]

Although s 2 does not mention economic efficiency as an objective of the competition provisions, there is some indirect support for this objective. For example, Brunt supports the view that the *TPA* was conceived as economic law.[21] In his Second Reading Speech in September 1973, Senator Murphy commented on the drafting of the Trade Practices Bill as follows:[22]

> Legislation of this kind is concerned with *economic* considerations. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision … (emphasis added)

Deane J in *QWI* said:

> The starting point of a consideration of that first question is the fact 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 notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct by precluding advantage being taken of "a substantial degree of power in a market" for any of the proscribed purposes (emphasis added).[23]

In *Melway*, the majority of the High Court stated:

> To ask how a firm would behave if it lacked a substantial degree of power in a market … involves a process of *economic* analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of s 46. But the cogency of the analysis may depend upon the assumptions that are thought to be required by s 46 (emphasis added).[24]

The objectives that s 46 and Pt IV should seek to achieve and the nature of competition itself were examined by the Federal Government's Treasury Department ('Treasury') in its submission to the Cooney Committee.[25] Treasury noted the important policy goal of improving economic efficiency so as to increase community welfare through higher per capital incomes. A lack of competition can allow firms to raise their prices, earning monopoly profits or failing to minimize costs, thereby leading to a loss in consumer welfare and

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[20] Blunt.

[21] Maureen Brunt, 'Preface' in Ray Steinwall (ed), *25 Years of Competition Law*, (2000) p xii. See also Robert Baxt, 'Insights Into the Commission: Views Of a Former Chairman' in Ray Steinwall (ed), *25 Years of Competition Law*, (2000) 75; Neville R Norman, 'Economics and Competition Law: How Far Have We Come?' in Ray Steinwall (ed), *25 Years of Competition Law*, (2000) 84.

[22] Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech, 27 September 1973, Senator Lionel Murphy, 1015.

[23] *QWI* (1989) 167 CLR 177 (Deane J).

[24] *Melway* (2001) 205 CLR 1.

[25] Commonwealth Government, '*Competition Policy: Submission to the Cooney Committee Inquiry into Mergers, Monopolies and Acquisitions*' (Treasury Economic Paper No 15, Department of the Treasury, 1991) 1.

economic efficiency.[26] This illustrates that it is difficult to treat 'competition', 'consumer welfare' and 'economic efficiency' as separate concepts. In *QWI*, the High Court appeared to treat economic efficiency as an inherent part of the concept of competition.[27]

Despite the majority view that the competition provisions are concerned with economic considerations, fair trading is expressly stated as an objective in s 2 of the TPA. It is unclear whether the fair trading objective is intended to apply to all forms of conduct proscribed by the TPA, including s 46.[28] On one hand, the objects of the TPA refer to 'fair trading' which suggests that traders, including small business, might expect protection under the TPA from 'unfair trading'. This is consistent with the minority view. Although the Blunt Committee considered the aim of the provisions of Pt IV is primarily against anticompetitive conduct that works against the attainment of efficiency, it recognised that this aim is tempered to some extent to protect the market position of small business and promote fairness.[29] The protection of small business as a separate and independent policy objective of s 46 is discussed below.[30]

The Reid Committee concluded that small businesses were often disadvantaged in their dealings with big business and recommended a number of specific measures to induce behavioural change on the part of big business towards smaller businesses, and to provide unfairly treated small business operators with adequate means of redress. [31] However, the Committee concluded that s 46 was not the appropriate vehicle for dealing with unfair trading.[32] This suggests that fair trading objective does not apply to conduct proscribed by s 46 (majority view).

What constitutes fair dealing and the concept of 'fairness' itself is elusive and not susceptible to objective assessment. 'Fairness' requires subjective value judgments made according to the facts of individual situations. Fairness resides only in the eye of the beholder and depends on the facts and circumstances of individual cases.[33]

Unlike the Blunt Committee which noted that fairness is a subjective concept, the Treasury considered the concepts of fairness such as fairness of process and fairness of outcomes.[34] Fairness of process arises from the ability to undertake transactions in the absence of coercion, trickery or misleading

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[26] Ibid.
[27] QWI
[28] Corones, 31. Corones states that on one interpretation, Pt IV is only concerned with enhancing the welfare of Australians by the promotion of competition and not with fair trading.
[29] See 3.2.1 'Protecting Small Business or Protecting Competition'.
[30] See
[31] Commonwealth, House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia,* May 1997 (the Reid Committee) 124.
[32] The areas of concern identified in the Reid Report were unfair conduct, retail tenancy, franchising, misuse of market power, small business finance and access to justice and education.

[33] Ibid.
[34] Ibid, 19.

information. Fairness of outcomes is related to the degree of equality of income or wealth that is achieved. According to the Treasury, the second view of fairness – a more equal distribution of wealth or income – is quite often consistent both with fairness of process and the goal of economic efficiency. However, it may be inappropriate for competition policy to prefer unduly the welfare of consumers over that of producers in particular industries. While such preference may be consistent with maintaining productive efficiency – because it keeps prices and costs down – it may not be consistent with allocative efficiency through dynamic competition – because it may prevent short term 'excess' returns in particular industries that may be fundamental to attracting new competitors to the market or signaling the need for additional investment by existing firms.[35] This also suggests that Treasury favoured the total welfare standard.

In its submission to the Dawson Committee, the ACCC stated that s 46 has a fair trading objective of protecting smaller business from anticompetitive conduct of firms that possess substantial market power.[36] This supports the minority view that the fair trading objective in s 2 of the TPA is intended to apply to all forms of conduct proscribed by the *TPA*, including s 46.[37] The ACCC stated that perhaps more so than the other prohibitions in Part IV, s 46 is also directed towards the promotion of fair trading.[38] A fair trading objective might include, inter alia, the protection of small business from illegitimate competition by large competitors. According to the ACCC's submission, a fair trading objective is promoted by both s 46 and the other prohibitions of Part IV and that this is consistent with the competition objectives of Part IV.

It is argued that fairness between competing firms is an appropriate and desirable goal of competition policy. Certainly firms should be protected from the abuse of market power in the circumstances set out in s 46. On the other hand, a form of inequality between firms can be fundamental to the workings of a highly competitive market. Vigorous competition will result from time to time in less efficient firms exiting industries and freeing their resources for more beneficial employment elsewhere. More efficient firms will often take over the operation of less efficient firms to the benefit of consumers and shareholders.[39] The goal of fairness among firms therefore has to be interpreted as allowing the freedom to fail and not to be protected from competition. Otherwise fairness among firms may be inconsistent with economic efficiency and consequently difficult to reconcile with the promotion of consumer welfare.[40]

The potential conflict between 'fairness' and 'economic efficiency' was noted by Pengilley: [41]

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[35] For a definition of productive and allocative efficiency, see p 16.

[36] Ibid.

[37] See Corones, above. He notes that on one interpretation, Pt IV is only concerned with enhancing the welfare of Australians by the promotion of competition and not with fair trading.

[38] Ibid 67.

[39] Ibid.

[40] Ibid.

[41] Warren Pengilley, Submission to the Dawson Committee, 33 <http://www.tpareview.treasury.gov.au/content/subs/008_Submission_Pengilley.pdf> at 24 June 2008.

> There is, in s 46, considerable doubt even as to the most fundamental standards to be applied. The section itself leaves open a vast possibility for the application of different sets of values. Perhaps the main problem is whether courts should apply standards of 'fairness', the traditional way in which lawyers see problems, or whether the courts should apply objective criteria of efficiency which is the traditional approach of the economist … Which evaluative criteria are the correct ones to apply? I doubt if we have really even squarely faced this issue, let alone solved it, in interpreting s 46.

While economic efficiency and fair dealing are desirable objectives, it is argued that they should not override the broader policy objectives of s 46 and Pt IV which seek to promote competition and enhance consumer welfare.

Protecting Small Business or Protecting Competition

This part discusses whether the protection of small business is a separate and independent policy objective of s 46. When s 46 was amended in 1986 to lower the threshold test from control of a market to the possession of substantial market power, the Attorney-General, Lionel Bowen, in his Second Reading Speech, stated:

> … a large enterprise may be able to exercise enormous market power either as a buyer or seller, to the detriment of its competitors and the competitive process. Accordingly, an effective provision controlling misuse of market power is most important to ensure that *small business* are given a measure of protection from the predatory actions of powerful competitors[42] (emphasis added).

It is apparent from the Second Reading speech for the Trade Practices Revision Bill 1986 that a major reason for controlling the misuse of market power was to protect small businesses from predatory conduct by more powerful rivals.[43] Thus the legislative intent was to protect competitors as much as the competitive process.

The protection of small business is also linked to the view that dominant firms must act with special restraint and are not free to act like any other firm.[44] As Scalia J stated in the US Supreme Court in *Eastman Kodak Co v Image Technical Services Inc*:[45]

> Where a defendant maintains substantial market power, his activities are examined through a special lens: behaviour that might otherwise not be of concern to the antitrust laws – or might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist.[46]

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[42] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 1986, 1624, <http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=328498&table=HANSARDR> at 19 June 2008.
[43] See above n 6.
[44] Ibid.
[45] (1992) 504 US 451, 448.
[46] This paragraph was cited with approval by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Melway* (2001) 205 CLR 1 (Kirby J).

This passage was cited with approval by Gleeson CJ, Gummow, Hayne, Callinan and Kirby JJ in *Melway*.[47] There is support for this view in the European Community cases on Article 82 (abuse of a dominant position) of the European Community Treaty.[48]

However, in *Olympia Equipment Leasing Co v Western Union Telegraph Co,*[49] Judge Posner said that 'the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors" and "it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches'. This statement was cited with approval by McHugh J in *Boral*.[50] It is difficult to reconcile these opposing views by the judges of the High Court.

The role of s 46 in protecting small business has been reviewed by parliamentary committees and government review panels on a number of occasions, starting as far back as 1976 with the Swanson Committee.

The Blunt Committee noted that some proponents of competition laws see competition as desirable because it limits the accumulation and use of power by large firms. Competition is seen as preferable because it replaces the direct influence of big business or government with the impersonal, dispassionate control of the market. A broader aspect of this approach is the limiting of the 'social' power of large firms. The justification for this approach is the view that fragmented economic power with many independent proprietors, rather than economic concentration with power wielded by corporate bureaucrats, is desirable in itself. This assumption is principally structural and ignores how big business performs in terms of efficiency and growth or how it conducts itself in the market place. This is consistent with the minority view that competition means rivalry in the sense of maintaining a large number of competitors in a market. The Blunt Committee did not agree with this view and recommended against amending the TPA to give small business a privileged position or to preserve small business for its own sake.[51]

According to the Cooney Committee, the apparently contradictory nature of s 46 has often been commented upon.[52] On one hand, the section appears to be aimed at ensuring that competition and the competitive process is at the heart of the protection provided for by the legislation. On the other hand, the

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[47] *Melway* (2001) 205 CLR 1, 18.

[48] Article 82 is the counterpart to s 46 of the *TPA* in that the prohibition is focused on unilateral conduct of firms that have substantial market power. In *Compagnie Maritime Belge NV and Dafra Lines v Commission of the European Communities* (29/10/98 Joined Cases C-395/96P and C-396/96P) ¶114, the court appeared to endorse the suggestion by Advocate General Fennelly that for undertakings that are near-monopolists conduct which is demonstrably intended to prevent the emergence of any competition may be assessed according to a higher standard.

[49] 797 F 2d 370, 375 (7th Cir, Ill, 1986).

[50] *Boral* (2003) 215 CLR 374 (McHugh J).

[51] See above n 13, 35.

[52] Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, December 1991, (the Cooney Committee) 78, [5.5].

words of subsection 46(1)(a) and (b) indicate that individual competitors such as small business should also be entitled to protection.

The way in which s 46 has been drafted supports the view that one of the goals of the provision is to protect small business. Clarke, in his submission to the Cooney Committee, argued that s 46 'cannot be regarded as being primarily concerned with [the] preservation or enhancement [of competition], because the section can be contravened by conduct which has no effect on competition'.[53] Without agreeing that s 46 should protect small business, Clarke indicated that the primary purpose of s 46 *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.[54] This interpretation lends support to the minority view on the role of s 46.

Pengilley has suggested that subsection 46(1)(a) should be repealed or substantially amended because it is an invitation to the court to interpret s 46 as a section protecting a competitor rather than as a section protecting the competitive process as a whole.[55] Although this invitation has not been accepted by the High Court, Pengilley states that the wording of s 46 is 'aimed at preventing big business exploiting the small'.[56]

In 2003, the Dawson Committee's terms of reference included reviewing the operation of the competition and authorisation provisions of the *TPA,* specifically Parts IV and VII, to determine whether they provided an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power.[57] This has been interpreted by one commentator as determining whether there is an appropriate balance of power between competing businesses, particularly between small and large businesses.[58]

Corones agrees that the proscribed purposes in s 46(1) draw attention to an intent to harm or damage an actual or potential competitor which may mislead potential litigants into thinking that the section is designed to protect competitors rather than competition.[59] In support of the majority view, Corones referred to *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia,*[60] where Lindgren J stated that '[i]t is not

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[53] Clarke, Submission to the Cooney Committee.
[54] Ibid.
[55] Pengilley, Submission to the Dawson Committee <http://www.tpareview.treasury.gov.au/content/subs/008_Submission_Pengilley.pdf> at 24 June 2008.
[56] Warren Pengilley, Misuse of Market Power: Australia Post, Melway and Boral (2002) 9 Competition and Consumer Law Journal 201, 201.
[57] *Review of the Competition Provisions of the Trade Practices Act*, January 2003 (the Dawson Committee), <http://tpareview.treasury.gov.au/content/report.asp> at 17 June 2008.
[58] <http://tpareview.treasury.gov.au/content/subs/075_Submission_McComas.rtf> at 17 June 2008. This was a submission to the Dawson Committee by Robert (Bob) McComas. Mr McComas was the second Chairman of the Trade Practices Commission who held office for three years from February 1985 to February 1988.
[59] Corones, Submission to the Dawson Committee, 18 June 2002, [1.3], <http://www.tpareview.treasury.gov.au/content/subs/011_Submission_Corones.pdf> at 24 June 2008.
[60] (2001) ATPR 46-212.

the object of s 46 to protect the private commercial interests of a competitor, perhaps, a fortiori, one whose business is parasitic … on the activities of a professional association.'[61]

In its submission to the Dawson Committee, the ACCC stated that Parliament, in enacting s 46, clearly intended to provide legislative protection for small businesses against unacceptable anticompetitive behaviour.[62] The ACCC linked the fair trading objective in s 2 with the protection of small business from unlawful competition by large competitors. Smaller and more vulnerable firms are entitled to protection under Part IV from anticompetitive conduct of rival firms that is aimed at or has the effect of harming smaller firms. The ACCC stated that conduct engaged in by firms that possess substantial market power and that does not conform to the norms of competitive markets is inherently unfair.[63]

Despite the ACCC's views, the Dawson Committee confirmed that the purpose of the competition provisions of the *TPA* is to promote and protect the competitive process rather than to protect individual competitors.[64]

The ACCC's views on this issue appear to have changed since its submission to the Dawson Committee.[65] More recently, the current Chairman of the ACCC, Graeme Samuel, stated:[66]

> It is essential that all businesses in Australia understand that TPA is built upon a foundation stone of vigorous lawful competition between small, big and medium sized businesses right across the board. Competition enables businesses that can innovate, be creative, provide choice, provide convenience and provide quality and lower prices to consumers to thrive. Vigorous lawful competition will enable that to occur. Anticompetitive conduct will do harm not only to consumers but to businesses that are attempting to behave and operate within the confines, the purview, of the trade practices law. Anticompetitive conduct ought to be stopped, but vigorous lawful competition ought to be promoted. Promotion of competition does not involve the protection of any sector of the economy from competition*. It does not involve the protection of small or medium business or any individual big businesses from the normal processes of vigorous competition.* Small business has a range of protections available under TPA. It has the fundamental protection that if it is an innovative, creative small business then it should be able to thrive in a vigorous, competitive economy; thus Part IV of TPA, which promotes vigorous competition between all businesses, has an inherent protection for small business (emphasis added).

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[61] Ibid.

[62] ACCC, Submission to Trade Practices Act Review, June 2002, <http://tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf> at 19 June 2008.

[63] Ibid 68.

[64] Ibid.

[65] The ACCC Chairman at the time was Professor Allan Fels.

[66] Commonwealth, Government Senators Report, Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, March 2004, 81-2, <http://www.aph.gov.au/Senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf> at 24 June 2008.

This confirms that the ACCC no longer views the protection of small business as a separate and independent objective of s 46.

In 2002, the Senate Economics References Committee inquired into the effectiveness of the *TPA* in protecting small business.[67] The Committee indicated that s 46 and Pt IV can best protect competition by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the TPA should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct.[68] This is consistent with the majority view of competition as rivalry in the sense of a competitive process leading to economic efficiency which enhances consumer welfare.

Corones noted that the distinction between promoting competition and protecting small business competitors has been a source of confusion, especially in relation to s 46.[69] The words themselves should be interpreted in the light of the policy objectives of s 46 however the problem with s 46 arises from disagreement as to its policy objectives.[70] Section 2 of the *TPA* leaves unresolved the fundamental question of whether competition should be defined primarily from the perspective of competitors or consumers or both. This means that the courts are left with the dilemma of having to reconcile aims that sometimes conflict.[71]

The foregoing discussion illustrates the differing views on the role of s 46 and whether s 46 has a separate and independent objective of protecting small business. The minority view derives strong support from the wording of the provision itself and the Attorney-General's Second Reading speech for the Trade Practices Revision Bill 1986. Indirect support for this view is also given by the Explanatory Memorandum to the Trade Practices Legislation Amendment Bill (No 1) (2007) which recognised that small business has lost a degree of confidence in the ability of s 46 to address predatory pricing given that *Boral* is the only predatory pricing case considered by the High Court and it failed.[72] The Explanatory Memorandum states that if this lack of confidence leads small business to exit particular markets or deter others from entering, the level of competition in those markets will be reduced. This lends support to the minority view of competition as rivalry in the sense of maintaining a large number of competitors in a market.

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[67] Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, March 2004, <www.aph.gov.au/SEnate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf> at 19 June 2008. Refer to Appendix 3A for the list of inquiries into s 46 of the TPA since 1974.

[68] Ibid.

[69] Corones, above n 5, 34.

[70] Ibid 35.

[71] Ibid 411.

[72] Explanatory Memorandum, Trade Practices Legislation Amendment Bill (No 1) 2007, 11. The *Trade Practices Legislation Amendment Act (No 1)* 2007 ('TPLA') inserted a new section 46(1AA) which prohibits a corporation with a substantial 'share of a market' (as opposed to 'degree of market power') from engaging in sustained below-cost pricing conduct for one of the same purposes proscribed in s 46(1). This is the Birdsville amendment.

However, the High Court has clearly indicated that s 46 is about protecting competition and not competitors. For example, in *QWI,* Mason CJ and Wilson J stated:[73]

> 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.

This principle was subsequently reaffirmed by McHugh J in *Boral Besser Masonry Ltd v ACCC* ('*Boral*'),[74] quoting the United States Court of Appeal, 7th Circuit, in *Ball Memorial Hospital Inc v Mutual Hospital Insurance Inc:*[75]

> Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. The firm that slashes costs the most capture the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are by-products of vigorous competition, and the antitrust law are not balms for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors.[76]

In conclusion, the majority view, including the view of the High Court, is that s 46 is intended to protect competition rather than protect small business. On balance, the majority view is the preferred view of the role of s 46 because it promotes the fundamental objectives of s 46 and Pt IV – promoting competition and thereby enhancing consumer welfare.

DOES THE PURPOSE TEST PROMOTE THE OBJECTIVES OF SECTION 46?

Having identified the policy objectives of s 46, the role of the purpose test is examined in this part to see whether it meets those objectives.

Although conduct under s 46 may also contravene one of the specific anticompetitive prohibitions in Pt IV, for example, ss 47, 48 and 50, the fundamental difference between s 46 and the other provisions in Pt IV is that s 46 applies to conduct by a corporation with substantial market power whereas other provisions in Pt IV can apply to conduct by a corporation with or without substantial market power. The ability to engage in anticompetitive conduct is a consequence of the possession of market power and it is why only corporations with substantial market power are scrutinised under s 46.

The purpose test in s 46 seeks to prevent a firm with substantial market power engaging in conduct that it could not engage in if it were operating in a market that was workably competitive. The threshold requirement (substantial market power) ensures that s 46 only applies to conduct that poses a realistic threat

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[73] *QWI* [1989] 167 CLR 177 at 191 (Mason CJ and Wilson J).
[74] *Boral* [2003] 215 CLR 374 at 260 (McHugh J).
[75] 1986) 784 F 2d 1325 at 1338.
[76] *Boral* [2003] 215 CLR 374 at 260 (McHugh J).

to the competitive process. The majority view is that competitors are protected only to the extent necessary to protect competition – inefficient competitors are not protected against competitive conduct. Mere harm to competitors without harm to the competitive process does not breach s 46.

A problem which arises frequently is that anticompetitive and pro-competitive conduct look alike, particularly in the single-firm context.[77] This reinforces the view that the role of the purpose test is to protect the competitive process by distinguishing between conduct that is lawful (pro-competitive) and conduct that is unlawful (anticompetitive). Misuse occurs when a corporation with substantial market power takes advantage of its power for a proscribed purpose regardless of the actual effect of the conduct whether it is the achievement of a proscribed purpose or substantial lessening of competition.

The purpose test also plays a preventive role in that it seeks to capture inchoate conduct that has an anticompetitive purpose where there is no immediate anticompetitive effect.

As part of the consideration of the role of the purpose test, an ancillary question is whether the purpose test should be objective or subjective.

Subjective or Objective Purpose

> My purpose in doing something is my reason for doing it, in the sense of what I am trying to do or what I want to accomplish by doing it. Hence, to specify a purpose is to give an explanation, whereas to specify an intention is not necessarily to do so. We do things with an intention, but for a purpose, since the intention may only accompany the action, whereas the purpose must be the reason for it.
>
> AR White[78]

The raison d'être of the purpose test may derive from the common law requirement that there be a consciousness of wrongdoing before adverse legal consequences attach to that conduct. The wording of s 4F suggests that the relevant purpose is a subjective purpose.[79] There is a difference of judicial opinion as to whether the purpose test is to be ascertained subjectively or objectively. In *Universal Music Australia Pty Ltd v ACCC* ('*Universal*'),[80] which was decided after the High Court decision in *Boral*, the Full Federal Court (Wilcox, French and Gyles JJ) considered the issue of purpose and the debate about whether the purpose test is objective or subjective. Although their discussion was in relation to s 47, it is relevant to s 46 because they also considered various authorities bearing on the nature of the purpose to be demonstrated under Pt IV of the *TPA*.

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[77] This is because the same conduct can have both beneficial and exclusionary effects making it difficult to distinguish conduct that is lawful from conduct that is unlawful.

[78] AR White, *Grounds of Liability: An Introduction to the Philosophy of Law* (1985) 73.

[79] Donald Robertson, 'The Primacy of Purpose in Competition Law – Part 2' (2002) 10 *Competition & Consumer Law Journal* 1, 2. He states that this does not necessarily follow and that s 4F is merely an evidentiary provision.

[80] (2003) 131 FCR 529.

Their Honours stated that:[81]

> The debate about subjective and objective purposes has an air of unreality in connection with corporate conduct. The purpose of a corporation is a legal fiction. A corporation has no mind and can have no purpose, in the usual sense of that word. Its activities will necessarily reflect the purposes of the individuals who make the decision which control those activities. In the case of most corporations, this will be a group rather than a single individual. Their minds are the mind of the corporation: see *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 370 (Gibbs CJ) and 384 (Mason J). The members of the group will often have differing reasons for arriving at a decision, some spoken and some unspoken. Necessarily, therefore, a finding about the purpose of a corporation is a legal conclusion expressed as an attributed state of mind. The distinction between subjective and objective purpose will ordinarily be blurred; although, where there is a single directing mind, the subjective purpose of that mind may conceivably differ from the objective purpose inferable from conduct and its predictable outcomes.

In *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)*,[82] Lockhart, Gummow and von Doussa JJ stated that '[t]here was no dispute that in s 46 "purpose" was to be ascertained "subjectively" rather than "objectively"'. They reviewed the authorities including similar purposive provisions in Pt IV and endorsed Toohey J's statements in *Hughes v Western Australian Cricket Association (Inc)*:[83]

> I accept the view that it is the *subjective* purpose of those engaging in the relevant conduct with which the court is concerned. All other considerations aside, the use in s 45(2) of 'purpose' and 'effect' tends to suggest that a *subjective* approach is intended by the former expression. The application of a *subjective* test does not exclude a consideration of the circumstances surrounding the reaching of the understanding (emphasis added).

In *Dowling v Dalgety Australia Ltd* ('*Dowling*'),[84] Lockhart J stated: [85]

> The determination of purpose for the purposes of s 46 is to be ascertained subjectively, in the sense of ascertaining the intent of the corporation in engaging in the relevant conduct: see *Hughes v Western Australian Cricket Association,* per Toohey J; *Queensland Wire,* per Toohey J; *ASX Operations*; *Tillmanns Butcheries Pty Ltd* and *Taprobane Tours WA Pty Ltd v Singapore Airlines Ltd*. "Purpose" in s 46 is not concerned directly with the effect of conduct, but with purpose in the sense of motivation and reason, though, as mentioned earlier, purpose may be inferred from conduct: see *Hughes v Western Australian Cricket Association,* per Toohey J (citations omitted).

In *Eastern Express Pty Ltd v General Newspapers Pty Ltd* ('*Eastern Express'*),[86] the Full Court of the Federal Court approved the statement of

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[81] *Universal* (2003) 131 FCR 529, 587.
[82] (1990) 27 FCR 460, 474–7.
[83] (1986) 19 FCR 10, 38.
[84] (1992) 34 FCR 109.
[85] *Dowling* (1992) 34 FCR 109, 143.
[86] Ibid.

Lockhart J in *Dowling* that purpose was to be ascertained subjectively, in the sense of ascertaining the intent of the corporation in engaging in the relevant conduct.[87]

However, in *General Newspapers Pty Ltd v Telstra Corporation* ('*General Newspapers*'),[88] the Full Court of the Federal Court stated that the ultimate test is an objective one:[89]

> The term "purpose" necessarily has subjective implications for, although it does not mean motive, it means "the effect which it is sought to achieve – the end in view", per Lord Denning … in *Newton v Federal Commissioner of Taxation (Cth)*, or "the result aimed at", per Dawson J in *Gulland*; and it carries with it "the notion of an intent to achieve the result spoken of in each of the paragraphs of s 46(1)", per Toohey J in *Queensland Wire*. The factors which influence a transaction will be relevant as casting light upon the transaction and may bring a transaction within the section notwithstanding that, if purely objective criteria were examined, the transaction might appear not to breach the section. The thinking behind a transaction may clarify what the transaction was designed to achieve and was likely to achieve. But, ordinarily those matters can be inferred from the terms of the arrangement made, from the way in which they were implemented, and from the existence or absence of monopoly-type conduct such as predatory pricing (citations omitted).

The Full Federal Court in *Universal* confirmed that '[t]he purpose in s 46 is the actual subjective purpose of the corporation in question. What is to be ascertained is the "intent of the corporation engaging in the relevant conduct"'.[90]

Section 46(7) is consistent with a subjective test of purpose.[91] This provision was enacted in 1986 which permits the court to infer a proscribed purpose where there is no direct evidence as to purpose. The courts may rely on inferences drawn from the actual consequences of the defendant's conduct and other circumstances without the need for direct evidence in the form of 'smoking gun' documents.

The ACCC has indicated that subjective purpose is difficult to prove in the absence of 'smoking gun' documents.[92] It expressed the view that it is not easy to distinguish between a misuse of market power and a socially acceptable and permissible use of competitive strength to forge ahead of a rival, except in the presence of 'smoking gun' documents as to the purpose of the conduct.[93] This is because all firms have a commercial intention to do better than their rivals and gain market share, or to protect their market

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[87] *Eastern Express* (1992) 35 FCR 43, 66 (Lockhart and Gummow JJ).
[88] (1993) 45 FCR 164.
[89] *General Newspapers* (1993) 45 FCR 164,187 (Davies and Einfeld JJ).
[90] (2003) 131 FCR 529, 587.
[91] Cf Donald Robertson, 'Taking Advantage of Market Power in the Modern Economy' (2004) 10 *New Zealand Business Law Quarterly* 26. He suggests that the provision is merely an evidentiary provision.
[92] Until recently, the ACCC was the main proponent of an effects test on the basis that there was a high burden of proof required to establish purpose.
[93]

environment from incursions from any source.[94] In other words, anticompetitive intent is indistinguishable from pro-competitive intent.

An alternative view is that the purpose test is too easily satisfied. As Mason CJ and Wilson J said in *QWI*:[95]

> 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.

An intention to harm one's rival may be consistent with both pro-competitive and anticompetitive conduct. If a general intent to crush one's rivals was all that was needed, then few impugned corporations could deny this and the purpose element would be met.[96]

Clough states that this is how the courts have interpreted the purpose test in s 46 – if the very nature of competition is 'deliberate and ruthless' as indicated by Mason CJ and Wilson J in *QWI*, then such conduct seems inherently anticompetitive in its purpose and will satisfy the purpose test.[97] Under this approach, proving purpose is not difficult (contrary to the ACCC's view). However, the problem with this construction is that the purpose test in s 46 is basically rendered redundant on the assumption that all firms intend to injure competitors – that is the very nature of the competition process.[98]

The Full Court of the Federal Court in *Eastern Express* indicated that the probative value of so-called 'smoking gun' documents will always depend on the circumstances in which they are made and on the particular conduct under consideration. For example, with predatory pricing, subjective statements which indicate an intention to price cut are unlikely to be conclusive as to predatory intent as they are equally consistent with competitive conduct.[99] The difficulty of drawing inferences of subjective purpose from statements of subjective intent was indirectly mentioned by the court in *Eastern Express*.[100] In contrast, the Full Court of the Federal Court in *ACCC v Boral Ltd*[101] accepted the trial judge's findings that purpose in s 46 involves an actual subjective purpose which was ascertained from the corporation's internal memoranda. These 'smoking gun' documents were obtained by the ACCC pursuant to its statutory powers under s 155 of the *TPA*.

Although 'smoking gun' documents are consistent with a subjective test of purpose, it is submitted that an excessive reliance on 'smoking gun'

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95 *QWI* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J).

96 Ahdar. There are similar statements about intent in the US antitrust law cases.

97 Clough, above n 193, 338.

98 Ibid.

99 Kathryn McMahon, 'Predatory Pricing under Section 46 of the Trade Practices Act and the Decision in Eastern Express v General Newspapers – Part II' (1993) 1 *Trade Practices Law Journal* 130, 140.

100 *Eastern Express* (1992) 35 FCR 43, 68-9 (Lockhart and Gummow JJ).

101 (2001) 106 FCR 328.

documents only establishes intent to harm competitors, not intent to harm competition.

The approach of the Full Court of the Federal Court in *Eastern Express* has been criticised.[102] On one view, the High Court in *QWI* moved away from a subjective purpose-based test for liability for s 46 to an economic efficiency test based on an objective test and that was a key factor in determining liability under s 46.[103] Yet *Eastern Express* failed to apply the economic approach taken by the High Court in *QWI*. To the extent that determination of purpose was relevant, *QWI* indicated that this should be based largely on an objective test of the economic effect of the defendant's conduct, rather than a subjective examination of the defendant's motives.[104]

In *General Newspapers*, the Full Court of the Federal Court appeared to follow the economic efficiency approach in *QWI*.[105] Davies and Einfeld JJ stated that:[106]

> However, on our reading of the judgments in *Queensland Wire*, after it has been ascertained what the nature of the conduct was, what the conduct was designed and was likely to achieve and what was the manner of its implementation, the ultimate test is an *objective* test which, as Deane J said, involves notions of markets, market power, competitors in a market and competition (emphasis added).

This acknowledges that the question of purpose under s 46 is closely linked to an objective assessment of the economic effects of the defendant's conduct.[107]

Despite this, it is clear that the purpose test in s 46 has been generally interpreted as the requirement for proof of subjective purpose.[108] However, the *General Newspapers* decision is an important rejection of the exclusive reliance on 'subjective intentions' to prove this purpose.[109] This reliance on 'subjective intentions' ('smoking gun' documents) has meant that there has been a failure to analyse purpose within the wider context of the identification of exclusionary conduct and has reduced it merely to the problem of difficulty of proof.[110] The determination of purpose has tended to be interpreted as a necessity for proof of subjective intentions instead of a more sophisticated analysis of the economic realities of the conduct in question.[111] It is this conduct which provides a more reliable determinant of the 'subjective' predatory purpose. However, a pure 'objective' approach could unfairly

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[102] Peter Prince, 'Queensland Wire and Efficiency – What Can Australia Learn From US and New Zealand Refusal to Deal Cases' (1998) 5 *Competition & Consumer Law Journal* 237, 248.
[103] Ibid.
[104] Ibid, 246.
[105] Ibid.
[106] *General Newspapers* (1993) 45 FCR 164, 186 (Davies and Einfeld JJ).
[107] Prince, above n 75, 246.
[108] McMahon, above n 72, 144.
[109] Ibid.
[110] Ibid.
[111] Ibid.

punish competitive conduct.[112] There is also the potential danger that objective assessments of intent may become a substitute for a full competitive analysis of the conduct in question.[113]

Robertson argues that there are good policy reasons why the relevant purpose should be an objective purpose.[114] The objective purpose rather than the subjective purpose of the corporation is the correct test because it focuses the analysis on the protection of the economic process of competition and the ends sought to be achieved by the economic agents.[115] If the purpose test is analysed on an objective standard, it will better assist the courts to distinguish between vigorous competitive behaviour engaged in for legitimate business purposes and conduct engaged in for anticompetitive purposes.[116]

Corones states that if it is possible to infer an anticompetitive purpose from the conduct itself or the surrounding circumstances, a plaintiff may establish a proscribed anticompetitive purpose objectively.[117] However, in a particular case a plaintiff may establish an anticompetitive purpose subjectively where there is evidence of an anticompetitive purpose such as 'smoking gun' documents.[118] Corones has previously argued that the subjective purpose element in s 46 is unhelpful and that an objective test based on the effect, or likely effect, of the conduct on competition would be more in keeping with the policy objective of the *TPA*.[119]

There is some support for the view that while the relevant purpose in s 46 proceedings is the subjective purpose of the respondent corporation, this purpose is determined objectively.[120] This means that both objective and subjective factors will be important. In short, the purpose element of s 46 requires an objective test, to which subjective evidence may be relevant.[121] Subjective considerations are only employed as a cross-check on the position established by the objective considerations and, in the event of conflict between the position established by the objective considerations and the position established by the subjective considerations, the latter should yield to the former. This should not be confused with an objective test of purpose which is used in taxation cases.[122]

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[112] Ibid.
[113] Mark Berry, 322.
[114] Robertson, above n 96, 9.
[115] Ibid 10.
[116] Ibid 11.
[117] Corones, above n 4, 398.
[118] Ibid.
[119] Stephen Corones, 'The Characterisation of Conduct under Section 46 of the Trade Practices Act' (2002) 30 *Australian Business Law Review* 409, 412.
[120] Brenda Marshall & Rachael Mulheron, 'Access to Essential Facilities under Section 36 of the Commerce Act 1986: Lessons from Australian Competition Law' (2003) 9 *Canterbury Law Review* 248, 263.
[121] Ibid 263.
[122] Tax cases such as *FCT v Spotless Finance Pty Ltd* (1996) 141 ALR 92 use a reasonable person test to determine the dominant purpose of the person.

In relation to purpose, Kirby J in *Boral* stated that identifying the corporate 'purpose' of any such conduct, necessarily involved estimates of the subjective will of the officers of the impugned corporation who acted on its behalf in the context of an objective analysis of the state of the market and the level of competition within it.[123] His Honour agreed with Beaumont J's statement that the question was a subjective one and that high-level planning documents of a strategic kind should provide the best evidence of the subjective intent (as distinct from 'effects') required by s 46.[124] The internal documents were consistent with the existence of Boral's purpose, to eliminate or substantially damage a competitor or to prevent the entry of a person into the market, or to deter or prevent a person from engaging in competitive conduct.[125]

The law as it currently stands clearly adopts a subjective standard to the purpose test in the context of s 46 and other similar purposive provisions in Pt IV.[126] The question is ultimately one of characterisation and proof.[127] Robertson states that an objective purpose test avoids the problems which arise when trying to determine the purpose of a collective body such as a corporation.[128] However, this problem is specifically addressed by s 84.[129]

An objective examination of the monopolist's intent may well provide the best evidence to assist a court in determining the legality of otherwise ambiguous conduct.[130] In *ACCC v Safeway*, the court said that asking the question of *why* Safeway engaged in the impugned conduct was not the same question as to whether one or more of the statutorily proscribed purposes existed.[131] It is necessary to look at not only what the firm did (the conduct) but why the firm did it (purpose of the conduct).[132] This suggests that the court in *Safeway* was making a distinction between objective and subjective evidence of purpose.[133]

The *Safeway* case is a good example of how a firm's subjective purpose can be determined objectively.[134] The Full Court of the Federal Court used s 46(7) to analyse Safeway's conduct and draw inferences from that conduct rather than impute Safeway's manager's subjective intention in formulating its

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123 *Boral* (2003) 215 CLR 374, 484 (Kirby J).
124 Ibid.
125 Ibid.
126 Donald Robertson, 'The Primacy of Purpose in Competition Law – Part 2' (2001) 9 *Competition & Consumer Law Journal* 1.
127 Ibid.
128 Ibid.
129 Section 84 allows the purpose of the corporation to be imputed from its board of directors, officers or employees acting within the scope of their authority.
130 Berry, 323.
131 ACCC v Safeway at [329].
132 See Donald Robertson, 'Taking Advantage of Market Power in the Modern Economy' (2004) 10 *New Zealand Business Law Quarterly* 26, 36. Robertson argues that if an objective purpose test is adopted, these two questions will converge to a single inquiry.
133 Ibid 34. Robertson states that the Full Court of the Federal Court in *Safeway* placed greater weight on the objective considerations by asking why Safeway engaged in the conduct.
134 *Safeway* (2003) 129 FCR 339.

deletion policy.[135] In other words, the court ascertained Safeway's purpose by analysing the facts to see what it said about the likely purpose of the impugned conduct.

Support for this approach is also found in *Universal*, where the Full Federal Court stated:

> Of course, proof of the required purpose is not limited to direct evidence as to those purposes. Further, the court is not bound to accept such evidence. Indeed, it will normally be critically scrutinised; it is often ex post facto and self-serving … a finding of purpose is an inference to be drawn from all of the circumstances on the balance of probabilities. That inference, however, is as to the purpose of the particular respondent, not of some hypothetical bystander. That said, the objective circumstances will be of considerable (often critical) probative value in assessing whether to draw the inference.[136]

Purpose should also be distinguished from motive.[137] Sometimes the cases treat purpose and motive as synonyms and it is not easy to know if the discussion is of motive in the sense of a psychological attitude to engaging in particular conduct, or purpose which includes the ultimate goal of a course of conduct.[138] In *Melway*, Gleeson CJ, Gummow, Hayne and Callinan JJ stated that '[p]urpose, in this connection [referring to s 46], involves intention to achieve a result'.[139] In *QWI*, Toohey J commented that the reference to "for the purpose of" in s 46(1) 'carries with it the notion of an intention to achieve the result spoken of in each of the paragraphs'.[140] This suggests that the latter interpretation is favoured by the High Court. It also indicates that there is a close relationship between objective evidence of the firm's subjective purpose and effect.

In a similar vein, albeit in a different statutory context, in *Commissioner of State Revenue v Purdale Holdings Pty Ltd*,[141] Nettle J stated that 'purpose is not confined to effect but effect is a significant indicator of purpose and, depending upon the circumstances, effect may be determinative of purpose'.

The use of objective evidence to determine the firm's subjective purpose is supported by the common law principle that persons are in general to be taken as intending the direct consequences (effects) of their acts.[142] As Judge Learned Hand said in *US v Aluminium Co of America ('Alcoa'),*[143] 'no intent is relevant except … an intent to bring about the forbidden act'. In this sense, objective evidence of the likely effects of the impugned conduct is relevant to the subjective test of purpose. Such objective evidence of

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[135] Ibid 408.
[136] *Universal* (2003) 131 FCR 529, 589.
[137] Robertson, 116-20.
[138] Ibid 116-7.
[139] *Melway* (2001) 205 CLR 1, 18-19.
[140] *QWI* (1989) 167 CLR 177, 214 (Toohey J).
[141] [2003] VSC 289 at [27].
[142] *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 452.
[143] 148 F 2d 416, 432 (2nd Cir, 1945).

subjective purpose is mandated by s 46(7) which allows the inference of a proscribed purpose based on the firm's conduct and its likely consequences.

Despite favouring an objective purpose test, Robertson states that the presumption that a person intends the probable consequences of their actions has no place in competition law.[144] However, he agrees that knowledge of intent may help a court predict consequences, because it is generally assumed that if someone is rational and acts so as to bring about a consequence, that consequence is likely to be brought about. In other words, purpose can be inferred by resort to objective evidence including the natural consequences of the conduct. It is submitted that this approach actually supports such a presumption if objective evidence is used to construe a firm's purpose. Analysis of purpose provides one of the best indications of the likely effect of the impugned conduct.

McHugh J argued in *South Sydney* that it probably would have made little difference to the matter in issue in that case whether the word 'purpose' in s 4D was construed 'objectively' or 'subjectively':[145]

> Questions of construction are notorious for generating opposing answers, none of which can be said to either clearly right or clearly wrong. Frequently, there is simply no 'right' answer to a question of construction.

McHugh J stated his preference for purpose to be determined objectively but was reluctant to overrule the subjective interpretation favoured by the Full Court of the Federal Court which had stood for 17 years unless it was plainly wrong.[146] In any event, His Honour noted that by considering the surrounding circumstances, the court will be using objective considerations to determine whether the parties held the subjective purpose they claim. This is similar to the comments made by the New Zealand Court of Appeal in *Commerce Commission v Port Nelson ('Port Nelson')*.[147] In *Port Nelson,* the court noted that, in practice, the objective versus subjective distinction was generally unimportant as 'there will be little difference in most cases between ascertaining subjective purpose by inference from what was said and done and ascribing objectively a purpose from evidence of what was said and done'.[148] This case was based on s 36 of the *Commerce Act* 1986 (NZ)[149] which is equivalent to s 46 of the *TPA*. In New Zealand, the courts do not consider this to be an issue because 'purpose may be established or negatived on either a subjective or an objective analysis'.[150] However the NZ

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144 Robertson, above n 137, 120.
145 (2003) 215 CLR 563, 580.
146 Ibid.
147 (1995) 6 TCLR 406.
148 Ahdar, above n 100, 268.
149 Section 36(2) of the *Commerce Act* 1986 (NZ) currently provides, inter alia, that a person that has a 'substantial degree of power in a market' must not 'take advantage of' that power for the *purpose* of restricting the entry of a person or preventing a person from engaging in competitive conduct or eliminating a person in that or any other market. The events with which the case was concerned took place at the time before s 36 was amended in 2001 to replace 'dominance' with 'a substantial degree of power in a market' and 'use' with 'take advantage of'.
150 Rex Ahdar, 'Escaping New Zealand's Monopolisation Quagmire' (2006) 34 *Australian Business Law Review* 260, 268.

courts prefer an objective approach because a subjective approach might lead to erroneous conclusions based on either, at one extreme, the 'undue sway of the unabashed albeit imprudent sinister statement or, at the other extreme, the calculated attempt at exculpation from disingenuous, self-serving comments'.[151] In this regard, it is noted that s 36B of the *Commerce Act* allows purpose to be inferred from conduct. This is the statutory equivalent of s 46(7) of the *TPA.*

In conclusion, preference should be given to objective evidence of the firm's purpose because this evidence focuses on harm to competition. Subjective evidence of purpose tends to focus on harm to competitors and therefore does not assist the court to distinguish between pro-competitive and anticompetitive unilateral conduct. A literal interpretation of s 46 suggests that the primary object of the provision is the protection of individual competitors, rather than protecting the competition process. In order to avoid this, the High Court has deliberately added a 'gloss' on the purpose test by linking the determination of a firm's subjective purpose for its conduct to its likely economic effects. It appears that the High Court has done this to ensure that the construction of the purpose test is consistent with the objects of the provision to protect competition for the benefit of consumers. This 'gloss' has fundamentally shifted the focus from protecting competitors to protecting competition.

Arguments For and Against an Effects Test

The arguments for and against an effects test, as an addition or alternative to the purpose test, are discussed in this part. Law reform material from the various parliamentary reviews on s 46 indicate that the Trade Practices Commission (TPC) and its successor, the ACCC, continued to lobby for an alternative to the purpose test in s 46 on the basis that there was a high burden of proof required to establish purpose.[152]

In 1991, in a submission to the Cooney Committee, the Commonwealth Treasury expressed concerns that an effects test might unduly broaden the scope of conduct captured by s 46 and challenge the competitive process itself.[153] The TPC proposed that an addition be made to the *TPA* aimed at preventing certain defined behaviour which results in a substantial lessening of competition.[154] The Cooney Committee acknowledged that the proof of purposive conduct under s 46 clearly posed considerable difficulties for the

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[151] Ibid.

[152] The ACCC was the main proponent of an effects test in previous inquiries.

[153] Commonwealth, 'Competition Policy: Submission to the Cooney Committee Inquiry into Mergers, Monopolies and Acquisitions' (Treasury Economic Paper No 15, Department of the Treasury, 1991), 70.

[154] Ibid 69. The TPC suggested the following action could be covered by the proposed section: pre-emption of access to scarce facilities or resources required by competitors; buying up of products to prevent the erosion of existing price levels; adopted of product specifications that are incompatible with products produced by any other person and designed to prevent entry into or to eliminate competition from a market; impeding or preventing entry into or expansion in a market by squeezing, by a vertically integrated supplier, of the margin available to unintegrated competitors; impeding or preventing entry into or expansion in a market by acquisition by a supplier of customers who would otherwise be competitors of a supplier; selective introduction of fighting brands introduced; raising rivals' costs; and strategic creation of entry barriers.

TPC and private litigants.[155] However the Committee accepted that it was appropriate that a distinction between purpose and consequence be retained and that purpose is an essential element of the contravention.[156] The Committee stated that the process of effective competition involves engaging in conduct the potential effect of which is to produce the very ends proscribed in s 46 and considered that prohibiting such conduct by reference to its effect may challenge the competitive process itself.[157]

In 1993, the Hilmer Committee[158] rejected an effects test because it would not adequately distinguish between socially detrimental and socially beneficial conduct. The TPC proposed that unilateral conduct should be prohibited if it has the effect of substantially lessening competition. However the Committee said that there was a serious risk of deterring legitimate competitive conduct by such a broad prohibition. According to the Committee, s 46 has been interpreted by the High Court in a manner which accords with the policy intention of distinguishing between a misuse of market power and aggressive competitive behaviour.[159] In *QWI*, Mason CJ and Wilson J stated that:[160]

> 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 the inevitable consequence of the competition s 46 is designed to foster (citations omitted).

The Hilmer Committee concluded that there was a need to strike a balance between deterring undesirable unilateral conduct, encouraging business certainty and minimizing the regulatory interference in daily business decisions.[161] It was not satisfied that any perceived difficulties with the current operation of s 46 are sufficient to warrant an amendment that would create additional uncertainty and thus potentially deter vigorous competitive activity.

In its 2002 submission to the Dawson Committee, the ACCC stated that the operation of s 46 would be improved by incorporating an effects test to supplement the existing purpose test.[162] The ACCC noted that the *TPA* is an economic statute and the concern of economic policy is with the effect of behaviour.[163] The ACCC acknowledged that there is an ongoing debate about the balance to be struck in the law between protecting and deterring competition but was of the view that the introduction of an effects test would

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[155] Cooney Committee, above n 50, 96, [5.62].

[156] Ibid 96, [5.64].

[157] Ibid 96, [5.65].

[158] Commonwealth, Report by the Independent Committee of Inquiry, *National Competition Policy*, 1993 (the Hilmer Committee).

[159] Ibid 71.

[160] QWI (1989) 167 CLR 177, 191.

[161] Hilmer, above n 87, 74.

[162] ACCC, Submission to the Trade Practices Act Review, June 2002, 60 <http://tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf> at 19 June 2008.

[163] Ibid.

not affect the distinction between legitimate and illegitimate behaviour.[164] The ACCC argued that the introduction of an effects test would overcome forensic difficulties associated with proving purpose and better serve the underlying economic goals of Part IV by more effectively protecting the process of competition.[165]

It is interesting to contrast the evidence given by Fels to the Baird Committee in July 1999 in relation to the pros and cons of introducing an effects test in s 46. He noted that although an effects test would strengthen of the section, it could deter genuinely pro-competitive behaviour. It could also create greater uncertainty for business. At that time, Fels stated that the purpose test, for all its imperfections, is a way of ensuring that s 46 is not carried too far because it is far less likely to catch unintended behaviour.[166]

However, all previous inquiries, with the exception of the Green Paper, did not recommend the introduction of an effects test on the basis that such a test does not distinguish between anticompetitive conduct and pro-competitive conduct, so that welfare enhancing conduct might be deterred. It would also create significant uncertainty by unduly widening the ambit of s 46.

Opponents of the introduction of an effects test in s 46 noted that such an approach is not universally supported, even among those who recognize the shortcomings of the current purpose test.[167] According to this view, incorporating an effects test into s 46, or replacing the purpose test with an effects test could have the unintended consequence of capturing conduct undertaken for legitimate or competitive purposes which has the effect of eliminating competitors from the market or preventing the entry of new entrants. Such an approach could prevent legitimate business activities, contrary to the overall purpose of s 46, which is to promote competition. The dilemma reflects the difficulties inherent in distinguishing between desirable and undesirable competitive conduct in s 46. Whilst the object of s 46 is to protect the competitive process, it is targeted at improper business practices, rather than conduct that is merely exclusionary or injurious of it. Although the conduct having the effect of exclusion or of lessening competition otherwise than by competition has a detrimental effect on the competitive process, to extend the section to prohibit legitimate business activity via an effects test would take it beyond the restrictive trading practices it was designed to prohibit. It was also debatable whether an effects test would make it any easier to separate predatory from legitimate competitive behaviour, or contribute to the achievement of the section's objectives any better than the current purpose test.

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[164] Ibid.

[165] Ibid, 80-81.

[166] Evidence to Joint Select Committee on the Retailing Sector, Parliament of Australia, Canberra, August 1999, 1161 (Allan Fels) <http://www.aph.gov.au/hansard/joint/commttee/j2384.pdf> at 19 June 2008.

[167] Ibid 19.

Pengilley has stated that there is an unfortunate tendency to give undue weight to the ACCC's views.[168] He suggests that it is 'probably not unreasonable in evaluating the submissions of the ACCC to put in a discount factor for proselytizing'.[169] He argued that if an effects test were introduced as a basis of s 46 illegality, conduct which prima facie resulted in injury to a competitor would be illegal. Yet the High Court in *QWI* has acknowledged that competition by its very nature is deliberate and ruthless and competitors almost always try to injure each other. According to Pengilley, what on its face would be illegal if an effects test were introduced might be quite defensible conduct if its purpose were to be explained. For example, in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd ('Melway'),*[170] a refusal to supply was prima facie anticompetitive in effect but it was justified on the basis that its purpose was to maximize profits by maintaining a segmented exclusive wholesale distribution system. An effects test would result in illegality without the opportunity to explain the reason for engaging in the relevant conduct. This would threaten the competition process itself and the ultimately consumer welfare.

In 2002, Corones submitted that the purpose test should be removed from s 46 for the following reasons.[171] He argued that the purpose test is more appropriate for a prohibition that has as its policy objective, fairness and freedom of traders, not one aimed at promoting competition. If the policy objective of s 46 is the promotion of competition, then liability should only arise when the conduct is likely to cause economic harm. Competition is a process of rivalry; it involves aggressive and ruthless behaviour which damages competitors. The essential characteristic of s 46 should be an evaluation of the effect or likely effect of the respondent's conduct on competition in the light of the structure of the relevant market.[172] The purpose test impedes this evaluation by requiring the court to focus on the subjective purpose existing in the mind of the actor instead. Corones argued that the purpose test is unworkable since most business conduct will have a dual purpose. Trying to separate out the legitimate purpose from the illegitimate purpose and deciding whether the illegitimate purpose is a substantial purpose, when in fact the purposes are dual and inseparable, is artificial and contrived and should be abandoned.[173]

Corones suggested that an effects test could be introduced into s 46, based on the Law Council's preferred wording:[174]

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[168] Warren Pengilley, Submission to the Dawson Committee, 16, <http://www.tpareview.treasury.gov.au/content/subs/008_Submission_Pengilley.pdf> at 24 June 2008.

[169] Ibid.

[170] (2001) 205 CLR 1.

[171] Stephen Corones, 'The Characterisation of Conduct under Section 46 of the Trade Practices Act' (2002) 30 *Australian Business Law Review* 410, 412.

[172] Ibid.

[173] Ibid.

[174] Corones, see above n 101. The Law Council of Australia did not support the introduction of an effects test in its submission to the Dawson Committee however, if the Dawson Committee was to recommend its introduction, this was the Law Council's preferred wording.

> A corporation that has a substantial degree of power in a market shall not take advantage of that power to engage in conduct with the *effect, or likely effect, of substantially lessening competition* in that or any other market (emphasis added).

An effects test would make it clear that, in considering whether the respondent's conduct on balance harms competition and, therefore, contravenes s 46, the focus is on the effect of that conduct on competition, not upon the purpose or intent behind it.[175] Under this approach, a comparison would be made between the level of competition in the market 'with' and 'without' the conduct under scrutiny to determine whether the net effect on competition in the relevant market is a substantial lessening of competition.[176] The test is referred to as 'the future with and without test' and is now well established in relation to ss 45 (contracts, arrangements or understandings in restraint of trade or commerce) and 47 (exclusive dealing) of the TPA.[177]

Corones appears to provide some indirect support to proponents of the effects test in his submission to the Dawson Committee.[178] While not advocating the introduction of an effects test in s 46 in the format suggested by the ACCC, he recommended that the section be re-drafted to shift the emphasis away from a purpose or intent to harm competitors in favour of emphasizing the effect of the conduct in question on competition.[179] Purpose or intent should only be relevant in so far as it assists the court to gauge the effect of the conduct on competition.[180] However, this view appears contrary to the statement in the Explanatory Memorandum to the Trade Practices Legislation Amendment Bill 2008.[181] The Explanatory Memorandum makes it clear that s 46 focuses on the *purpose* of the firm's conduct because this is considered to be the best way of distinguishing between pro-competitive and anticompetitive behaviour.[182] The section does not look to the *effect* of the firm's behaviour. If it did, there is a risk that pro-competitive conduct by firms with substantial market power would be deterred, with consequentially reduced gains in efficiency and productivity and economic welfare.[183]

Despite advocating the inclusion of an effects test, the ACCC submission to the Dawson Committee noted that the current purpose test promotes the policy objectives of s 46 and Pt IV for the following reasons:[184]

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175 See above n 166.

176 Ibid.

177 Ibid 413.

178 Corones Submission to the Dawson Committee, [5.3] <http://tpareview.treasury.gov.au/content/subs/011_Submission_Corones.pdf> at 17 June 2008.

179 Ibid.

180 Ibid.

181 2008 Explanatory Memorandum, Trade Practices Legislation Amendment Bill 2008, 30 <http://www.austlii.edu.au/au/legis/cth/bill_em/tplab2008351.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/tplab2008351.pdf> at 3 September 2009.

182 Ibid.

183 Ibid.

184 ACCC submission to the Trade Practices Act Review, June 2002, 78-79.

- If a firm has substantial market power, takes advantage of that power and also has a purpose of damaging a competitor, it is likely that the purpose will be achieved. This is because the firm is in the best position to appreciate the consequences of its conduct. Accordingly, it should not be necessary to wait for the outcome of the firm's conduct to become apparent.

- If a firm has substantial market power, takes advantage of that power and also has a purpose of damaging a competitor, the conduct should be unlawful whether or not the firm is actually able to achieve the purpose (for example, the purpose is misconceived).

This reinforces the view that purpose establishes an appropriate standard for liability in those cases when exclusionary conduct is undertaken for a proscribed purpose but anticompetitive effects are not immediately apparent. Examples include strategic but potentially anticompetitive conduct by incumbent firms with market power in deregulated markets, when purpose may be evident but the immediate effect on competition is difficult to establish.

The purpose test promotes the objectives of s 46 and Pt IV by arresting anticompetitive conduct at a time when the conduct is still in its incipiency, before harm to competition is effected. In this sense, it is a superior test to the effects test which only captures anticompetitive conduct when anticompetitive effects are proven. It is enough that the conduct has an anticompetitive purpose as proscribed by s 46. The role of the purpose test is 'to catch the weed in the seed to keep it from coming to flower'.[185]

There is a clear philosophical and practical distinction between purpose and effect which the law recognizes.[186] In *Crofter Handwoven Harris Tweed Co v Veitch,* the House of Lords noted that:

> The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in the truth the object in the minds of the combiners when they acted as they did. It is not the consequence that matters, but purpose ...[187]

As the Swanson Committee stated, '[i]t should be possible to halt such conduct of a monopolist without proof that the conduct has already achieved the object'.[188]

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[185] *Brooke Group v Brown & Williamson Tobacco Corp*, 509 US 209, 252 (1993).
[186] Donald Robertson, 'The Primacy of Purpose – Part 1' (2001) 9 *Competition & Consumer Law Journal* 101, 120.
[187] *Crofter Handwoven Harris Tweed Co v Veitch* [1942] AC 435, 445. The issue in this case was whether a trade union combination had an unlawful purpose of injuring trade.
[188] Commonwealth, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs,* August 1976 (the Swanson Committee), 40.

CONCLUSION

This submission examined the role of the purpose test by considering the policy objectives of the section and Pt IV of the *TPA* as a whole. It is submitted that the fundamental policy objectives of s 46 and Pt IV are to promote competition and enhance consumer welfare. The purpose test promotes these objectives by distinguishing between pro-competitive and anticompetitive conduct. An effects test is under-inclusive because it would not cover conduct that has an anticompetitive purpose without immediate anticompetitive effects. Purpose is an important filter for discerning likely competitive harm without a full analysis of the detailed facts of the case.

There is a close relationship between purpose and effects of conduct. Analysis of purpose provides one of the best indications of the likely effect of the impugned conduct. The purpose test is preferred over an effects test because there is rarely sufficient information to make fully-informed decisions as to the proper scope of the market of the likely future effects of conduct.[189] It also has the advantage of capturing the impugned conduct in its incipiency, before competition is harmed.

Although the purpose test has been interpreted as a subjective test of purpose, weight should be given to objective evidence of the firm's purpose in order to avoid equating harm to a competitor with harm to competition. A literal interpretation of the purpose test in s 46 suggests that the provision is aimed at protecting competitors. However, the High Court has clearly stated that the object of the provision is to protect competition, not competitors. To achieve this object, the High Court has added a 'gloss' on the purpose test by linking the determination of the firm's subjective purpose to its likely economic effects.

Dr Shirley Quo
3 June 2015

[189] Donald Robertson, 'The Primacy of Purpose in Competition Law – Part 1' (2001) 9 *Competition & Consumer Law Journal* 101, 102.