MISUSE OF MARKET POWER

Laws prohibiting unilateral anticompetitive conduct have been the subject of vigorous international debate for decades, as policymakers, antitrust scholars and agencies continue to disagree over how best to regulate the market conduct of a single firm with substantial market power. Katharine Kemp describes the controversy over Australia's misuse of market power law in recent years, which has mirrored the international debate in this sphere and culminated in the fundamental reform of the misuse of market power prohibition under the *Competition and Consumer Act 2010* (Cth) in 2017. *Misuse of Market Power: Rationale and Reform* explains Australia's new misuse of market power law, which adopts an 'effects-based test' for unilateral conduct and makes a comparative analysis between Australian tests for unilateral anticompetitive conduct and tests from the US and the EU. This text also illuminates the frequently mentioned, but little understood, concept of 'purpose' and its role in framing unilateral conduct standards.

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Misuse of Market Power

RATIONALE AND REFORM

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107184763
DOI: 10.1017/9781316882566

First published 2018

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
NAMES: Kemp, Katharine, 1975– author.
TITLE: Misuse of market power : rationale and reform / Katharine Kemp, University of New South Wales.
DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2018. | Based on author's thesis (doctoral – University of New South Wales Faculty of Law, 2016). | Includes bibliographical references and index.
IDENTIFIERS: LCCN 2018006328 | ISBN 9781107184763 (hardback) | ISBN 9781316636138 (paperback)
SUBJECTS: LCSH: Antitrust law–Australia. | Industrial concentration–Government policy–Australia. | Australia. Competition and Consumer Act 2010.
CLASSIFICATION: LCC KU977 .K46 2018 | DDC 343.9407/21–dc23
LC record available at https://lccn.loc.gov/2018006328

ISBN 978-1-107-18476-3 Hardback

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Foreword

Around the world there is a growing evidence of and much commentary about public mistrust in large and powerful institutions. Headlining such accounts are often references to big corporates, not least those in the tech sector. This is so despite the fact that the likes of Google, Amazon, Apple and others of their ilk have had a positive, transformative impact on many aspects of our lives.

What troubles us about power? In particular, why do we baulk at market power and the conduct of businesses that possess or have earned it? Even more particularly, what should our policymakers, politicians and enforcement agencies do to assuage our concerns?

These are not new questions. They have lain at the heart of laws directed at anticompetitive unilateral conduct laws for over a century at least. Yet questions regarding the 'correct' definition of the economic, social and political problems associated with market power have attracted enduring debate within and across jurisdictions, and consensus as to the 'appropriate' legal response appears elusive as ever.

It is in this setting that *Misuse of Market Power: Rationale and Reform* enters the fray – a courageous step by the author given the amount of ink that has been spilt on the topic by so many before her.

The immediate impetus for the book could be seen as the amendments made to Australian misuse of market power law in 2017, a development that those close to the debate might well describe as 'historic'. The amendments replace former elements of the law relating to the taking advantage of substantial market power and the subjective purpose of the firm in question with a broad test concerned with whether a purpose, effect or likely effect of substantially lessening competition may be established.

To say that the proposed adoption of the so-called 'effects test' attracted controversy would be an understatement. It was a proposal that had been the subject of no less than fourteen previous reviews over more than forty years and divided lawyers,

economists, business people and politicians. For its proponents and possibly even some of its opponents, the long-awaited passage of these amendments would have come as a huge relief, the only challenge now remaining (and a not insignificant one) being to work out just what it means.

This book will be an indispensable resource in that endeavour. Not least it will serve as a salient reminder to those interpreting and applying the new law of the need to be vigilant in undertaking such tasks with an unwavering eye on the objectives in regulating unilateral conduct. It will also provide ready access to an extensive review and careful critique of the statutory and jurisprudential history of the misuse of market power rules in Australia. Invoking the wisdom of Winston Churchill: 'those that fail to learn from history are doomed to repeat it'.

But this work will not just be of interest and substantial benefit to the Australian competition law community. And it is so much more than a timely aid to statutory interpretation of an amended law in a single jurisdiction. The book goes beyond these important contributions in at least three respects.

First, it proposes a holistic framework for evaluating legal tests for unilateral conduct – a framework that will be readily applicable in every jurisdiction regulating such conduct. The framework identifies four standards against which such tests should be assessed: their error costs, certainty, administrability and legitimacy. Too often, scholarship in this field focuses on attempting to measure the accuracy with which various approaches or methods identify conduct that is harmful to the competitive process or ultimately to consumer welfare. Kemp evades that criticism. As she aptly observes, 'there is no benefit in having a test that perfectly describes harmful unilateral conduct if it can only be accurately applied by a Nobel Prize winner'.

Second, the author provides an insightful categorization of the various liability tests that have waxed and waned in the law of the two antitrust giants – the United States and Europe – over decades. She distinguishes for this purpose between profit-focused tests and effects-based tests and undertakes a sophisticated examination of the ways in which these approaches have been formulated by courts and enforcement agencies, while at the same time submitting them to scrutiny from the perspective of each of her evaluative criteria.

Third, and perhaps most significantly, the book makes a fresh contribution to the seemingly inexhaustible discourse on this topic. While most commentary has set out to distinguish major approaches to characterizing exclusionary conduct, Kemp does just the opposite. Instead, she argues that despite apparent differences between jurisdictional methods, in fact a 'common thread' is discernible. There is a unifying theme, an implicit norm, at work here, namely that 'a firm should not engage in conduct that has the purpose, *objectively assessed*, of creating, protecting or enhancing monopoly power by suppressing rivalry without creating proportionate benefits for the competitive process, having regard to the interests of consumers'. It is this theme or norm, she cogently argues that not only best fits with the underlying

rationale for unilateral conduct regulation but also fulfils the criteria of reducing error cost and facilitating certainty and administrability.

Kemp acknowledges that given entrenched institutional contexts and path dependencies, it is unlikely that her proposed 'objective anticompetitive purpose' test will find its way soon, if ever, into express changes in the law, whether in the USA, Europe, Australia or elsewhere. However, having regard to recent Australian events – if not also the shifts in the law in other places, which her scholarship so skilfully traces – such modesty may well prove misplaced.

This book should not just be added to the shelves of anyone anywhere who seeks to unravel the intricacies and challenges of this crucial tenet of competition law. It should be read from cover to cover.

Professor Caron Beaton-Wells
University of Melbourne
November 2017

Acknowledgements

Chapter 4 contains some material from Katharine Kemp, '"Taking Advantage" and Other Profit-Focused Tests for Unilateral Anticompetitive Conduct' (2016) 41 *Monash University Law Review* 655, and is reproduced with permission of the editors.

Chapter 5 contains some material from Katharine Kemp, '"The Big Chill"? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power' (2017) 40 *University of New South Wales Law Journal* 493, and is reproduced with permission of the editors.

Chapters 5 and 6 contain some material from 'A Unifying Standard for Monopolization: Objective Anticompetitive Purpose' (2016) 39 *Houston Journal of International Law* 113, and is reproduced with permission of the editors.

I developed many of the ideas in this book during my doctoral research at the Faculty of Law, UNSW Sydney, supervised by Professor Ross Buckley and Dr Rhonda Smith. I am very grateful for their support and direction, throughout my PhD and beyond, and especially to Ross for pushing me to publish this book. I am also grateful for the encouragement of Professor Theunis Roux. The dissertation was examined by Professor Caron Beaton-Wells and Professor George Hay, who were very generous with their excellent comments. Caron also did me the great honour of writing the foreword to this book.

For the past four years, I have benefited from discussions and debates with regular participants at two annual conferences, the Competition Law Conference in Sydney, and the Competition Law and Economics Workshop co-hosted by University of South Australia and the Australian Competition and Consumer Commission. Michael Hodge's good-spirited and rigorous arguments were particularly helpful.

I am also thankful:

To Elizabeth Kelly, for your wisdom and diligence in copyediting.

To the Sydney Competition Law Discussion Group, for the thought-provoking debates, the comments on drafts, and the footpath chats in

between; and for your friendship – especially Chris Hodgekiss, Brent Fisse, Geoff Edwards, Jennifer Fish, Luke Woodward, Martyn Taylor and Matt Rubinstein (whose quiet but extensive understanding of this area does us all a great good).

To David Howarth, for lending your extraordinary knowledge and insight to this task, when I'd done nothing at all to earn it.

To Jane Muir, for your inimitable versions of friendship and babysitting.

To Lewis McLean, for the spark; for strength and patience, fine company and sea air through roller doors.

To Mum, Dad, Helen, Aaron, Julian and Daniel, for a lifetime of love and support. I don't know where to start or where I could finish with the six of you, who never say no. You are my bedrock.

To Marc, for Saturday night proofreading; for being clever enough (and brave enough) to offer criticism; for enduring football, athletics and assorted child-related purgatory alone; for love that doesn't wear out.

Finally, my three little boys – there can be no doubt that you were, collectively, the greatest obstacle to me completing this book. But, equally, there can be no doubt that you were my sweetest and most heartfelt supporters, and the only people who ever offered to write the thing for me.

My deepest gratitude to all of you.

List of Abbreviations

ACCC	Australian Competition and Consumer Commission
AIPA	*Australian Industries Preservation Act 1906* (Cth)
CCA	*Competition and Consumer Act 2010* (Cth)
EC Guidance Paper	*Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* [2009] OJ C 45/2
2017 Harper Amendments	*Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth) and the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) Sched 9 collectively
Harper Panel	Competition Policy Review Panel
Harper Proposal	Ian Harper et al, *Competition Policy Review: Final Report* (March 2015), Recommendation 30
Interim Guidelines	Australian Competition and Consumer Commission, 'Interim Guidelines on Misuse of Market Power' (October 2017)
Sherman Act	15 USC §§ 1–7 (1890)
TFEU	*Treaty on the Functioning of the European Union*, opened for signature 7 February 1992 [2009] OJ C 115/199 (entered into force 1 November 1993)
TPA	*Trade Practices Act 1974* (Cth)
TPC	Trade Practices Commission