The Concept of Misuse of Market Power

by S. G. Corones

The concept of misuse of market power which is prohibited by s.46(1) of the *Trade Practices Act* 1974 has two separate elements: first, the "taking advantage" of market power, and secondly, the purpose with which a corporation acts. While "purpose" and "taking advantage" are analytically distinct concepts, evidence which goes to show a prohibited purpose may equally go to show that there has been a taking advantage of market power. This relationship was recognised by Bowen C.J. in *Victorian Egg Marketing Board v. Parkwood Eggs Pty. Ltd.* (1978) ATPR 40-081, where it was held that the Board had taken advantage of its position substantially to control the Victorian market by undercutting prices in the A.C.T. market. Bowen C.J. stated his conclusion in the following terms (at p. 17,789):

"Accordingly, I consider that its intended pricing practice in the A.C.T., could, upon the evidence, properly be held to be for a purpose proscribed by sec. 46(1). That being so, it is my view that its intended actions would be a "taking advantage" of its power. There is a close relationship between "taking advantage" of its power, and the purpose for which it is acting."

However, this will not always be the case. In *Williams & Anor. v. Papersave Pty. Limited* (a decision of Sheppard J. dated 19 May 1987 (1987) ATPR 40-781, it was found that the respondent corporation acted with one of the proscribed purposes but had not taken advantage of its market power.

In this case, the relevant market was for the collection and treatment of waste computer paper in the inner Sydney metropolitan area. The respondent's market share was 60% and that of its nearest competitor, Lombous, 25% TNT and Brambles combined had a market share of 15%. On the basis of this evidence, Sheppard J. found that the respondent had a substantial degree of power within the meaning of that expression in sec. 46.

Acting with a proscribed purpose

One of the directors of the respondent, Mr Bird, discovered that a former employee, Mr Williams, was about to acquire a lease of certain premises for the purpose of establishing a business in competition with the respondent. Mr Bird approached the lessor's agent with a view to obtaining the premises for the respondent. Mr Bird denied that he had decided to take the lease in order to hinder the applicants' attempt to enter the market. There was no direct evidence of Mr Bird's purpose. Sheppard J. disbelieved Mr Bird's denial for a number of reasons. What he said had to be weighed against the background of what he did or failed to do on being notified that the respondent's existing premises were to be re-developed. Mr Bird failed to instruct an agent to find suitable alternative premises. His decision to take a lease of the same premises in which Mr Williams expressed an interest was taken on the spur of the moment even though they were considerably smaller than the respondent's existing premises.

According to Sheppard J., it seemed unlikely that Mr Bird would have proceeded so precipitately if it had not been for Mr Williams' proposed entry into the market.

It was acknowledged that in many cases the denial by a witness of a particular state of facts will not, if disbelieved, provide evidence of the existence of that state of facts. However, his Honour cited *Steinberg v. Commissioner of Taxation* (1975) 134 C.L.R. 640 as authority for the proposition that in certain circumstances an inference can be drawn from the fact that a witness has told a false story, for example, that the truth would be harmful to him. In this case Sheppard J. held that the disbelief of Mr Bird's evidence as to his purposes, entitled the Court to draw an inference that he did have one of the proscribed purposes in mind when he decided to take the new lease.

Taking advantage of market power

Nevertheless, it was held that the respondent had not taken advantage of its market power. There had been no attempt to offer the lessor more advantageous terms. Rather, it appeared that the lessor was attracted to the respondent because of its greater financial stability.

Counsel for the applicants submitted that it was the respondent's economic power which permitted it to do what it was attempting to do. This economic power came from its activity in the market place and therefore it could be said to be taking advantage of its market power.

Sheppard J. did not accept this submission. Even though the respondent's financial stability resulted from its success in the market place and it was this financial stability which probably induced the lessor to prefer it over the applicants, his Honour found that the respondent had taken advantage of the information it had received that the premises were still available for lease and not its market power. It seems that if the respondent had attempted to use its "deeper pocket" to exclude the applicant from entering the market by offering to pay the lessor a higher rent or more advantageous terms, Sheppard J. would have been prepared to hold that there was a taking advantage of its market power.

This case lends support for the view that a corporation with a substantial degree of market power is not required to exercise special restraint simply because of its market power. The respondent was not prevented from making the most of an opportunity it had to lease new premises

even though this had the effect of excluding a new entrant from those premises. To violate s.46, a corporation must have fended off entry or hastened the demise of a competitor other than through legitimate competition on the merits.

The Impact of the Castlemaine Tooheys Case

by S. G. Corones

Castlemaine Tooheys Ltd. v. Williams & Hodgson Transport Pty. Ltd. (1986) 68 ALR 376 is the first case on the application of one of the substantive provisions of Part IV to reach the High Court since *Quadramain Pty. Ltd. v. Sevastapol Investments Pty Ltd* (1976) ATPR 40-013. Section 45 was amended in 1977 partly to counter the Court's interpretation in the *Quadramain* case. It may be that subs. 47(6) will now have to be amended to counter the Court's interpretation in the *Castlemaine Tooheys* case.

Although the High Court was unanimous in finding that subs. 47(6) did not apply to the appellant's conduct, three Federal Court judges (Wilcox J. at first instance, and Lockhart and Sweeney JJ. on appeal), held that it did. It is interesting to compare the differing judicial views expressed as to the "commercial reality" behind the conduct in question.

The Judgment of Wilcox J.: Reported at (1985) ATPR 40-609. To understand the issue involved it is necessary to explain the background in some detail. The case concerned the sale of "Fourex" beer which is brewed by Castlemaine Tooheys Ltd ("Castlemaine") only in Brisbane. Retailers who wished to purchase it in the north Queensland area could do so either by taking delivery at one of Castlemaine's four regional depots, or by purchasing ex-Brisbane, in which case Castlemaine arranged delivery through its "approved carrier" Queensland Railfast Express ("QRX"). The disadvantage associated with the former method of purchase was that licence fees are calculated as a percentage of the total price paid by the retailer including the cost of transport. The licence fees payable on beer purchased ex-Brisbane on the other hand were calculated as a percentage of the Brisbane beer price alone; the cost of insurance and freight being disregarded. Since the cost of transporting beer to north Queensland was considerable, retailers preferred to purchase ex-Brisbane and thereby avoid paying additional licence fees.

Retailers acquiring ex-Brisbane were forced to do so pursuant to a so-called "c.i.f. contract". In fact, as Lockhart J. pointed out on appeal, the essential element of a c.i.f. contract, namely that property in the goods passes on the delivery of the documents, was absent in the dealings between the parties. Nevertheless, because of the exclusive arrangement between Castlemaine and QRX, retailers were forced to acquire the transport services of QRX irrespective of any preference they may have had for a particular carrier.

Williams & Hodgson Transport Pty. Ltd. ("Williams & Hodgson") was a transport company based in Brisbane. In August 1983, the Commissioner for Railways appointed it as a contract carrier to nine centres on the north Queensland coast. It opened depots in three of the nine centres but had not opened depots in the other six because, it claimed, it had failed to obtain a share of the deliveries of bulk beer to north Queensland. Beer, wine and spirits were said to constitute some 30% of the inward freight of each of the six centres in question. The exclusive arrangement between Castlemaine and QRX excluded Williams & Hodgson from a significant share of the market for transport services to north Queensland. Furthermore, it prevented Williams & Hodgson from making the most economical use of its rail contract since the charge for loads between 36 and 42 tonnes (the capacity of railway wagons) was the same as for 36 tonnes.

Williams & Hodgson began to solicit business from liquor outlets in north Queensland and offered freight rates lower than those charged by QRX. Some retailers placed orders with Castlemaine for the delivery of bulk beer to north Queensland specifying Williams & Hodgson as their carrier, but Castlemaine refused to permit Williams & Hodgson to take delivery and dispatched the orders via QRX. The reasons given by Castlemaine for its exclusive arrangement with QRX were to minimise congestion at the Brisbane brewery and to ensure the most expeditious return of empty kegs. Williams & Hodgson instituted proceedings under s.80 of the Act for an injunction and under s.82 for damages alleging a contravention of subs. 47(6).

Counsel for Castlemaine denied that it supplied or offered to supply beer in north Queensland simpliciter; rather, it supplied beer only as part of a package of goods and services consisting of the beer itself, the transportation of the beer from Brisbane to the retailers premises and insurance.

Wilcox J. did not accept this argument. His Honour expressed the view (at p. 46,920) that:

> "The whole purpose of subsec. (6) is to prevent a supplier forcing onto a purchaser, who wishes to acquire particular goods or services, a "package" containing those goods and services and an obligation to acquire goods and services of a particular kind or description from some other person. The purpose of the subsection would be entirely frustrated if the reference to a corporation supplying, or offering to supply, goods or services were interpreted in such a manner as to exclude the conduct of a corporation