the proposed acquisition?

(ii) Is the acquisition one of a series in the same line of business or area, and is it part of a policy of growth through acquisition?

(iii) Why is the particular plant or property desired, and specifically what advantages to the company are expected to result from the acquisition?

(iv) How does the company intend to use the acquired plant or other property? Specifically, will the acquired plant or property be used to replace any existing facilities of the company? Will any of the company's existing facilities be closed down?

(v) Outline any alternative course of action available to accomplish the objectives which it is believed will be accomplished by the proposed acquisition. What advantages or disadvantages are involved in such possible alternatives?

E. The anticipated, likely and possible effects of the proposed transaction on competition in each relevant market

These are conclusions that must be drawn from the basic facts as identification in A to D. Less important than the direct business effects on the profit or loss of the enterprises involved are the effects on the business of the two corporations as competitive factors in the relevant market. The factors to be taken into account with respect to each corporation are:

1. Growth or decline of volume and percentage of market, including actual or estimated volume figures.

2. Addition or loss of a competitor in the relevant market or markets.

3. Effect on the structure of the industry involved in the nation as a whole or in the regions of geographical areas affected.

4. *Vertical integration* — degree to which independence of companies in the industry on independent sales outlets or sources of supply may be affected.

5. Effect on goodwill.

In making an assessment of these factors, it will be important to know whether or not the two corporations compete, or might compete with one another, either in buying raw materials and supplies of manufactured goods, or in selling. In some cases, particularly conglomerate acquisitions, such competition may not exist. However, where there is such competition, it must be defined with precision.

1. Do the two corporations compete in the purchase of raw materials or products? If so, identify the products involved.

2. Do the two corporations compete in selling their products?

3. Identify the customers and areas in which this competition occurs.

Misuse of Market Power

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The object of this paper is to discuss the way the Federal Court has considered section 46 of the Trade Practices Act since it was amended in 1986. Prior to the amendments the section was known by the shorthand description "Monopolization" but has now been re-titled "Misuse of market power". Before the 1986 amendments the Act provided, "A corporation that is in a position substantially to control a market . . . shall not take advantage of the power in relation to that market that it has by virtue of being in that position for the purpose of eliminating or damaging a competitor, preventing market entry or deterring or preventing competitive conduct." The section now provides, "A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of eliminating or damaging competitors, preventing entry to a market or deterring or preventing competitive conduct.

2. Section 46 is concerned with the capacity of a corporation with a substantial degree of market power to use that market power for anti-competitive purposes. Note that there is nothing wrong with such a corporation competing vigorously so long as its market power is not misused. The section does not attack market power as such — its proscribes misuse of that power.

3. This raises the question of what conduct can be described as misuse of market power? There is no exhaustive list but it would seem to include predatory pricing, some refusals to supply and price discrimination. The range of conduct referred to in sections 45, 45B, 47, 49 and 50, of the Act namely anti-competitive agreements between competitors, anti-competitive covenants, exclusive dealing and mergers and acquisitions would also seem to be candidates unless authorization has been granted by the Commission or notification lodged[1] — Queensland Wire case[2]. But query whether other conduct which may bear upon market activities, such as the exercise of legal rights, will attract the Act. The cases we will look at will give some indication of the Court's attitudes in some circumstances. I will refer to section 46 then comment on the cases since 1986 and finally hazard a guess or two as to how the Court may or may not develop the section.

4. I will adopt the approach of French J in Od Transport case[3] in which he outlined the elements that must be established to support an action under section 46 as:

(a) The characterisation of the respondent as a corporation.

(b) The characterisation of the respondent as a supplier

of goods or services, in a market for those goods or services.

(c) The possession by the respondent of a substantial degree of power in that market.

(d) The characterisation of the applicant as a competitor of the respondent in that or any other market [or as a person to whom section 46(1)(b) or (c) applies].

(e) The taking advantage by the respondent of that power for the purpose of eliminating or substantially damaging a competitor, preventing entry to, or deterring or preventing competitive conduct in that or any other market.

5. Although section 46 is expressed in terms of a corporation, section 6 provides that section 46 conduct engaged in by non-corporate persons in overseas or interstate trade or commerce or in connection with the supply of goods or services to the Commonwealth or its authorities or instrumentalities is caught by the section.

Corporation

6. Normally the characterisation of a corporation should not be controversial. Most will be trading or financial corporations. However, problems may arise in respect of whether government bodies incorporate are corporations within the Act or whether they can claim immunity by virtue of being agents of the Crown in right of Commonwealth, a State or Territory. In the Bradken case[4] the Commissioner for Railways in Queensland was found not to be a trading corporation. In Od Transport[3] French J found that there was a serious issue to be tried as to whether the Western Australian Government Railway Commission was a trading corporation. The Victorian Superannuation Board was not entitled to immunity: State Superannuation Board case[5] and in Burgundy Royale Investments case[6], the Act was held not to bind the Crown in the right of the Northern Territory. However, where the Commonwealth and Commonwealth authorities carryon business, they are caught by the Act as if they were corporations[7]. Telecom is an example of an authority to which the Act applies: Tytel case[8]. The Trade Practices (Telecommunications Exemptions) Regulations provide that Telecom, OTC and AUSSAT are exempt from section 46 only to the extent that conduct by such an authority takes advantage, in the market to which the conduct primarily relates, of a substantial degree of power that has in that particular market. Exemption applies in respect of certain conduct relating to the provision of communications equipment and services until 31 December 1988 for some matters and 30 June 1989 for other matters.

The Corporation as Supplier or Acquirer of Goods or Services

7. Generally, this element should not be controversial. There may be debate about the nature of goods or services provided and their proper delineation, but it is unlikely that there will be argument as to whether the corporation did supply some goods or services. However, an indication that this matter cannot be taken for granted is the case of Queensland Wire appeal case. The Full Court of the Federal Court held there was no market for a steel product known as "Y-Bar" because the respondent never sold that product as that product, but rather had converted it into star pickets, and sold the star pickets[9].

Substantial Degree of Market Power

8. A corporation will not be caught unless it has a substantial degree of market power. This is a threshold test which must be met before any element following it becomes relevant. "Substantial" has been considered in a number of cases dealing with substantially lessening competition. The expression has been described as meaning "real or actual", "Not minimal or insignificant", "not trivial or minimal" and "it imports something greater rather than lesser".[10] Thus, "large" is as good an alternative as any. But as a thing can only be large in relation to something else, query whether the corporation must be large in relation to the person being restricted —to some or all in the market — to those whose position may be adversely affected by use or misuse of power in the market — or large in terms of its importance to others as a source of goods or services.

9. The word "degree" connotes a stage in a scale, or relative rank. Section 46 provides some help in sub-section 3, by providing that, in determination of the degree of market power, regard shall be had to the extent the conduct of corporation is constrained by the conduct of competitors or potential competitors or person from whom or to whom the corporation acquires or supplies goods or services in that market. The Explanatory Memorandum touches on "degree" but does not help much, merely stating that the concept of "degree" is relative and participants in the market may have a degree of market power from negligible to great[11]. Note also that section 46(2) provides that for the purpose of determining the degree of power held by a corporation, the market power of the corporation and its related corporations in the market shall be aggregated.

10. "Power" ordinarily means the ability to act — the capability of doing or effecting something — one who or that which possesses or exercises authority or influence. Sub-section 4(a) provides that "power" means "market power" and the Explanatory Memorandum states that "market power" is a recognised economic concept[12]. If the hope of the Explanatory Memorandum inclusion was to introduce economic theory as a way of determining the meaning of words in the Act, that hope, on present cases, may have been overly optimistic. "Market power" clearly means having power in a market and a corporation can only have power in a market if in some way or another it can exercise substantial influence in that market.

11. In economic terms market power is the ability to raise prices without losing sales or existing competitors or new entrants so that the increase is unprofitable: Scherer[13]. The Trade Practices Tribunal in the Queensland Milling case (QCMA)[14] said "undue market power is the antithesis of competition." The US Department of Justice has put it in this way:

"Market power is . . . the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time . . . the result is a transfer of wealth from buyers to sellers and a mis-allocation of resources. Market power also encompasses the ability of a single buyer or group of buyers to depress the price paid for a product to a level that is below the competitive price. Market power by buyers has wealth transfer and resource mis-allocation effects analogous to those associated with market power by sellers."[15] [Note that market power can be misused by buyers as well as sellers: section 46(3)(c).]

The analytical technique used by economists to assess market power of a corporation is structural analysis to determine the extent of ability to increase price. The essential structural aspects are the number and size of participants in the market and the height of various barriers to entry. The analysis should also include behavioural and performance aspects of the market. However, the problem as with most theories is that there are a number of economic approaches or models but no single measure has been found that can be said to be "the measure": Scherer[16]. It is difficult to see the court giving much more credence to economic evidence of market power than it has to economic evidence in the past, that is, while accepting it as useful in describing general economic theory of competition and markets, that is the extent to which it is acceptable. Economist's evidence is not admissible hearsay evidence for the purpose of determining the very issue before the court i.e. the existence or otherwise of market power[17].

12. Another approach to assessing market power may be to use the dominant corporation test in section 50 as the high point sustantiality reference point. "Dominant" is construed in its ordinary sense (as in the Ansett and Australian Meat Holdings cases[17]), as "having a commanding influence over". In the Australian Meat Holdings case, the Court adopted the view that dominance is not primarily concerned with the formal relationship between entities but rather with their conduct towards each other within a particular market environment. If the size or strength of a particular entity is such that, in practice, other entities are unable or unwilling actively to compete with in a particular market, that entity is dominant in that market. If a corporation is dominant it has market power. But market power as used in section 46 should not be equated only with dominance — it can exist at a lower level than that. The problem is deciding how low the level can go.

13. The question of market definition, which is relevant to market power, is relatively clear so far as the law is concerned. The Court has by and large, adopted the approach of the Trade Practices Tribunal in the QCMA case in which the Tribunal described a market as ". . . an area of close competition between firms . . . or, the field of rivalry between them . . ." within the bounds of a market there is substitution between one product and another and between one source of supply and another in response to changing prices. So a market is the field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution at least in the long run, if given a sufficient price incentive . . . it is the possibilities of . . . substitution which set the limits upon a firm's ability to "give less and charge more." The Tribunal went on to set down a process for assessing whether competition exists in a market. That process includes a consideration of the elements of market structure. The elements stressed are:

(a) the number and size of independent sellers especially the degree of market concentration;

(b) the height of barriers to entry; that is the ease with which new firms may enter and secure a viable market;

(c) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;

(d) the character of "vertical relationships" with customers and with suppliers and the extent of vertical integration;

(d) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities[14].

This analysis has been adopted as the most authoritative statement on market definition. Behavioural and performance aspects must also be taken into account in competition assessment.

Take Advantage of That Power

14. "Take advantage" may be defined as "to impose upon (as take advantage of someone): make use of (take advantage of an opportunity)." It seems therefore, that the expression can be said to be used in a pejorative sense in the first example and a neutral sense in the second. "Pejorative" means deprecatory, tending to make worse, disparaging. These expressions indicate disapproval, unfairness or blameworthiness. The question is — for the purposes of section 46, should the meaning of "take advantage" to be pejorative or neutral? Given the context in which the expression is used and its connection with a purpose of eliminating or substantially damaging a competitor or preventing the entry of a person into a market, or deterring a person from engaging competitive conduct, there is a strong case that the expression should be construed in the pejorative sense. The Act is about encouraging and maintaining competition and it is difficult to accept, that once a corporation's purpose is shown to be to eliminate or damage a competitor or limit competition, that its conduct aimed at achieving that purpose, could be said to be neutral. The language of the Explanatory Memorandum does not support the view that the "take advantage" should be interpreted in a neutral sense if a court were to find it necessary to refer to the Memorandum. The Memorandum indicates the pejorative sense. In its own terms, "take advantage" indicates that the corporation is, ". . . better able, by reason of its market power to engage more readily or effectively in the proscribed conduct. It is better able by reason of its market power to engage in that conduct. Its market power gives it leverage which it is able to exploit and this power is deployed so as to take advantage of the relative weakness of other participants or potential

participants in the market"[19]. Earlier cases indicate that "take advantage" may entail abuse of power by unfair, restrictive or predatory practices[20] or must entail an element of conscious predatory behaviour[21].

15. In the Queensland Wire case the Full Court referred to "take advantage" in terms of whether the power is exercised only if the conduct warrants some epithet such as "predatory" or "unfair". It said that another view would be that the presence of the necessary "purpose" of acting to the detriment of another person gives, on the face of the section itself, sufficient content and force to the concept of the respondent taking advantage of its power[22].

Purpose

16. Purpose is a concept well known to the law and should not present many problems. It may be defined as "the object for which anything is done: intended or desired result: intentional determination". The Explanatory Memorandum indicates that the conduct of the corporation by which it takes advantage of its market power must be directed to the impairment of competition in the market[23]. If conduct has a particular effect that effect may be evidence of its purpose[24].

17. Section 46(7) of the Act provides that purpose may be established by inference only. Query whether this does any more than flag a well known legal technique. The courts have always exercised the power to infer from facts. Notice also, that this provision in no way reverses the onus of proof — it remains on the applicant throughout — it is for the applicant to adduce sufficient evidence to enable the inference properly to be drawn that the respondent acted in a proscribed manner. However, sufficient such evidence by the applicant may require the respondent to rebut the evidence tendered and failure to do so, or to do so adequately, may enble the necessary inference to be drawn.

18. Does the "purpose" of the corporation have to be its one and only purpose? Section 4F of the Act provides that where purpose is an element it may be proved by showing that the relevant purpose was one of the purposes for which the Act was done and that purpose was a substantial purpose. Therefore, providing the conduct engaged in had at least one purpose which was a substantial purpose the conduct would be caught irrespective of whether there were other purposes for which the corporation engaged in the conduct.

19. Clearly there is a psychological element involved in purpose. A corporation's "mind" can only be that of its directors or employees and section 84(1) of the Act provides that where it is necessary to establish the state of mind of a body corporate it is sufficient to show that a director, servant or agent of a corporation being a director, servant or agent by whom the conduct was engaged in, within the scope of the person's actual or apparent authority, had that state of mind.

Proscribed Purposes

20. There is no contravention unless the corporation takes advantage of its market power for the purposes of:

(a) eliminating or substantially damaging a competitor, in that market or any other market;

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

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

There is probably not much problem with the meaning of this part of the section. But query whether a corporation can act for the purpose of eliminating or substantially damaging a potential competitor? It would seem that subsection (a) applies only where the target is a competitor, sub-section (b) applies to potential competitors and sub-section (c) to both competitors and potential competitors: Parkwood Eggs case[25].

21. Given the backdrop of the section, and comments made on it what have the cases had to say about misuse of market power?

Warman International & Ors v Envirotech Australia Pty Ltd & Ors[26]

22. The judgement was delivered on 30 June 1986. Warman and others were manufacturers and suppliers of slurry pumps and as manufacturers of those pumps held about 90% of the Australian slurry pump market. They also supplied 84% of the Australian market for spare parts for those pumps. Warman sued Envirotech under section 52 of the Act alleging false representations that information in manuals and drawings were the property of Envirotech when in fact they were the property of Warman. Envirotech countered by alleging that Warman was prohibited by section 46 from taking that action because Warman had the purpose of eliminating or substantially damaging Envirotech.

23. In its judgement the Court gave "market power" little more than a passing glance saying (apparently on the basis of market share only) that "there is no doubt that Warman enjoys a dominant role in the Australian slurry pump market and in the market for replacement for its parts: the figures (market share) have already been mentioned. Dominance may properly be described as a substantial degree of market power in the market for pumps and for replacement parts."

24. Section 46 does not prohibit monopolisation as such — it is limited to the activities it defines and that conduct is limited in taking advantage of market power. To exercise in good faith an extraneous legal right though the effect may be to lessen, or even eliminate a competitor is to take advantage of that right not market power. The Court found that Warman did not seek to take advantage of its market power rather it sought to take advantage of rights which it claimed in particular documents those rights depending upon the nature and soure of the information in the documents. The right of Warman's

position in this case would be the same if it held only 10% of the market or indeed even if it ceased altogether to manufacture pump parts.

Tytel Pty Ltd & Ors v Telecom[8]

25. This judgement was given on 7 July 1986. In 1985 Telecom began supplying Versatel premium model telephones which it imported exempt from customs duty. Tytel and others were suppliers of Teleace and 731 premium telephones. The Teleace had been supplied since 1982 and the 731 since 1984. Tytel alleged Telecom was in breach of section 46 because it was in a position substantially to control the market for premium telephones, had deliberately decided not to add the cost of the customs duty of which it was exempt to its telephones and that its intention in pricing the Versatel telphone at $299 was to remove Tytel and others from the market for premium telephones.

26. Note that the allegation is made under the old section 46 which included that a requirement that it be shown that the corporation had substantial control of a market. However, the analysis of the degree of market power remains relevant in that substantial control would presumably include a substantial degree of market power.

27. The applicant contended that Telecom was in a position of market control even prior to its entry into the market for premium telephones because of its network of Telecom offices, fact that telephones could not be attached to the telephone system without Telecom's approval, and, further, Telecom had "deep pocket" capacity. The Court found that Telecom had the necessary degree of market power in respect of the market for premium telephones and also the wider market of supply of telephone communication services.

28. As to "taking advantage" Tytel's allegation was that Telecom fixed a price for Versatel telephones which was artificially low because it did not include a factor for customs duty from which it was exempt, and that the purpose of such a low price was predatory and designed to remove Tytel and others from the relevant market.

29. For the reason that to make a finding as to taking advantage would require a resolution of a question of credibility of Telecom's witnesses and at that stage of the proceedings that was not appropriate, the Court declined to make such a finding. However, it found enough evidence, which if accepted, was open to the interpretation that Telecom used its power in the proscribed way, but that the balance of convenience did not favour the grant of an interlocutory injunction against Telecom.

Od Transport Pty Ltd v W.A. Government Railways Commission[27]

30. This judgement was delivered 24 December 1986. Od, a transport company, alleged that the Railways Commission had engaged in predatory pricing for a purpose proscribed by section 46. Od and the Railways Commission competed in the provision grain transport services from receival points in the State to ports. The Railway Commission had a statutory monopoly over areas of the State designated "regulated areas". In other, "deregulated" areas, competition was allowed. Accordaing to Od the Railways Commission priced its services so low that it must have been intending to operate the farm-to-rail leg of the transport service (i.e. the road transport component) at a loss and the purpose was to eliminate or substantially damage Od in the deregulated areas.

31. Evidence was given and accepted that the Railways Commission's share of the market for transport of grain in Western Australia was 73% and the Commission had a substantial degree of power in the market for the provision of services for the transport of grain whether the market by defined by reference to regulated areas or by reference to regulated and deregulated areas.

32. The evidence that the Commission took advantage of its market power would require an inference that the pricing structure adopted by it in deregulated areas somehow was supported by its monopoly position in regulated areas. On the evidence such an inference could not be drawn.

33. As to purpose, it was plain enough that the Commission intended to win from Od at least part of the latter's market share in the deregulated areas, but on the evidence it was questionable whether it was a purpose of the Commission to eliminate or substantially damage Od.

34. The applicant established a serious question to be tried but not a sufficient case for the grant of an interlocutory injunction.

Williams & Anor v Papersave Pty Ltd[28]

35. This judgement was given on 19 May 1987. In this case Mr Williams alleged that Papersave, a company with 60% share of the market for the collection and treatment of waste computer paper in the inner Sydney metropolitan area had taken advantage of its market power for a proscribed purpose by acquiring the lease of a property Williams intended to rent and use for the purpose of establish a business to be run in competition with Papersave.

36. As to market definition the Court held there was no need to define the geographic market beyond the reference to inner Sydney metropolitan area. Papersave's competitors were TNT and Brambles with a combined 15% of the market and Loumous with 25%. Evidence led and not objected to was that Papersave had the remaining 60% and that was a substantial degree of market power in terms of section 46.

37. The Court found that all relevant times Papersave had been aware that Williams intended to lease the relevant premises for the purpose of establishing a business to compete with Papersave, and that Papersave had decided itself to take the lease of those premises for purposes which included preventing the entry of Mr Williams into the market or deterring or preventing competitive conduct therein. However, there would be

no breach unless advantage is taken of market power for one of the specified purposes.

38. The conduct of Papersave could be engaged in by any company holding any share of the market. Counsel for Mr Williams argued that, Papersave having a substantial degree of power in the market had used the economic power which it had, to produce an effect on the market which was to prevent Mr Williams commencing business. It was said that it was the economic power which Papersave had which permitted it to do, what it was attempting to do. It was further argued that where economic power, that is to say "the bank balance" comes from activity in the market, the position was clearer. In such a case that use of economic power to prevent an entrant from gaining a hold was in fact a use of power derived as a market operator. Counsel summarized his contentions by saying "that Papersave was taking advantage of its market power because it was exercising economic power derived from its activities in the market."

39. The Court found that it was not demonstrated that Papersave took advantage of its power in the market for a proscribed purpose. It had the purpose of preventing entry to the market or deterring or preventing competitive conduct but the evidence did not establish that it was taking advantage of its power in the market to achieve either of them. Rather it took advantage of information which it had obtained that the premises that Mr Williams intended using for his business had probably not been secured by him and were available on the market for a lease and had in fact leased the premises at the same cost which would have applied to Mr Williams.

40. The Court did not find earlier cases or the Explanatory Memorandum helpful in interpreting the "taking advantage" element.

41. The decision was taken on appeal to the Full Federal Court which delivered its judgement on 12 October 1987[29]. In upholding the decision the Full Court found that the offer to lease or taking of the lease by Papersave was not shown to be taking advantage of any market power. Further, the Full Court did not question the analysis or lack thereof of the degree of market power held by Papersave.

42. Fox J pointed out that a corporation which has a substantial degree of market power does not take advantage of it whenever it is placed in a juxtaposition with a competitor and acts adversely towards it. While a corporation with substantial degree of market power is perhaps, not free to do what another corporation without the power may be free to do . . . the forbidden area must be related to the market and the market power so that it can be seen that the market power is taken advantage of for one of the State purposes.

43. Beaumont J said in relation to Papersave that nothing was done to use, let alone taking advantage of, its market power.

44. Burchett J said the taking of the lease involved no utilisation of any aspect of market power possessed by Papersave. It was not even shown that Papersave offered a higher let alone an inappropriately higher rental than that offered by Mr Williams or otherwise exerted in any way its financial capacity if that alone could be properly regarded as an aspect of market power.

Mark Lyons Pty Ltd v Bursill Sports Gear Pty Ltd[30]

45. This judgement was delivered on 25 August 1987. Mark Lyons was a ski equipment retailer which operated retail shops and also sold from warehouses and public halls and discounted ski equipment. Bursill had an import monopoly on Salomon ski boots. Salomon was a market leader in the field of ski equipment. In practical terms a retailer had to stock Salomon products. Ski boot models not in current production were known as "close out stock" and those in the current range were "in line stock". From time to time Bursill received complaints from Mark Lyons competitors about unfair competition arising from Mark Lyons' warehouse sales.

46. Bursill refused to supply in line ski boots for the 1987 season. The Court's analysis of market definition relied on QCMA[14] and Re Howard Smith[17] and a finding was made that the test was one of substitutability. There may be a case where a particular brand of product is so distinctive that no other product or brand can be seen by customers as possible substitutes. In such a case the market is constituted by the trade in that product. Perhaps, more frequently, other products are realistic alternatives and will also be within the market. Salomon boots were not so distinctive as to be insensitive to price competition from other brands. The market was held to be the Australian ski boot market.

47. As to the substantiality of the degree of market power, the Court referred to Tillman Butchers and Cool Brothers[10] and concluded that "substantial" is something that is real and of substance, more than trivial minimal. If the question be asked whether Bursill has power in the Australian ski boot market which is more than trivial or mimimal or is real or of substance the answer is clear. Section 46(3) makes relevant to this question not only the conduct of competitors but of persons who supply Bursill (in this case Salomon) and of persons supplied by Bursill. In this connection it should be noted that the company had been granted sole distribution rights of a brand of boot which accounts about one-third of all sales and is widely regarded as leader in terms of innovation and which 90% of Australian ski retailers find it necessary to stock.

48. As to taking advantage of market power, the Court concluded: ". . . there is no doubt that in denying supply of in-line boots to Mark Lyons, Bursill took advantage of its power in the market. It was able to deny supply in the knowledge that no other source of supply was available."

49. Mark Lyons contended that Bursills' purpose was to restrict outlets at which in-line boots would be sold and restrict the ability of Mark Lyons to compete with retail shops by discounting such boots at warehouse sales. Bursill said it refused supply for the purpose of preserving

the image of the product and proper after sales service. The Court found that restrictions on Mark Lyons was a purpose, even if there were other purposes. One purpose at least, was to protect established dealers from the retail activities of Mark Lyons.

Queensland Wire Industries Pty Ltd v Broken Hill Pty Company Limited & Anor[2]

50. BHP steel fence posts (star pickets) are the most popular rural fence posts in Australia. BHP was the sole domestic producer and imports were insignificant. Star pickets are manufactured from steel product known as "Y Bar" produced only at BHP rolling mills. BHP did not sell Y Bar. Queensland Wire was a supplier of fence posts and wanted to acquire Y Bar to manufacture and supply star pickets in competition with BHP. BHP refused to supply Y Bar and Queensland Wire alleged misuse of market power in that BHP refused supply for the purpose of preserving its monopoly of star pickets.

51. The relevant markets were found to be the supply of steel and steel products and the supply of rural fencing materials and because BHP and its related companies manufactured most of the rural fencing in Australia the Court had little trouble concluding that it had a substantial degree of market power.

52. The main dispute arose as to the meaning of "take advantage". BHP contended that the expression is not used in a neutral sense and this was accepted by the Court. The Court held that in all cases dealt with in Australia in which "take advantage" had been given any significant consideration indications were that the expression is to be interpreted in a pejorative rather than a neutral sense. While the Court did not accept that characterising the act complained of here (refusing supply) as merely an exercise of legal rights whether contractual or otherwise, it appears that the Australian cases tend to support the view that there is no advantage taken unless there is a misuse of power. The Court was of the opinion that the expression refers to an abuse of position, to something unusual, predatory, forceful or deceitful.

53. The court also held that there was little difficulty in finding the necessary purpose existed. It was clear that BHP wanted to prevent market entry. However, it did not use its market power in the pejorative sense. It had not, in this case, used its monopoly in a way which ordinarily would be regarded as reprehensible: in particular, its refusal to supply a competitor with Y Bar to enable the competitor to compete more effectively would not be regarded in commerce as deserving criticism. The central point that impressed the Court was BHP was doing no more than declining to sell a product, it had not previously sold and which it desired to keep for further processing. It wanted to sell only completed posts rather than the material which makes them and that does not appear to be proscribed by section 46. In the absence of some additional element of unfairness or predation such conduct would not constitute any infringement of the section.

54. There is nothing in the wording or history of section 46 to suggest that it was intended that a charge under section 46 could be met by the respondent demonstrating that its actions would, apart from section 46, have been lawful use of power. If a monopolist acquires, under contracts, complete control of all the manufacturing facilities or all the raw materials, or all the distributors in a market, its exercise of its legal rights under such contracts so as to preserve and enhance its monopoly may, apart from section 46 be unobjectionable. If one were to exclude from the concept of taking advantage of market power the use of rights which are available under general law there would not be much left of the section. It is not necessarily an answer for a monopolist to say, in such a case as the present: 'under the general law, I am the proprietor of these goods and may do with them as I please'. Insofar as BHP relied on that simple contention, the Court rejected it.[30A]

Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd

55. Queensland Wire appealed to the Full Court of the Federal Court against the decision at first instance. The Full Court's judgement was delivered on 24 December 1987. The decision was unanimous.

56. As to market definition the Court held there was a market for star picket fencing and that BHP acted with the purpose of preventing Queensland Wire competing within that market. BHP did so by denying Y bar to Queensland Wire. The question whether it was done for the purposes of section 46 then becomes whether, in so denying supply, BHP was taking advantage of power in relation to a market for Y bar. Without Y bar star picket fencing could not be produced. But the question was whether there was a market in Australia for Y bar. If there were such a market then it would not matter that Queensland Wire was not a competitor in it, if the conduct of BHP had the necessary purpose in relation to the star picket fencing market. But there was no evidence in the sense of the authorities of a trade or traffic between buyers and sellers or indeed between any buyer or arms length seller of Y bar as an article of commerce. In the view of the Full Court there had never been a market for Y bar so as to attract section 46.

57. As to "taking advantage" the Full Court did not see the need to make a ruling on that issue even though it was the principal reason for dismissal of the action at first instance. However, the Court did make an interesting comment in stating, "We (dismiss the appeal) and do so without finding it necessary to embark upon the issue upon which his Honour dismissed the proceedings namely whether there is relevant taking advantage of, only if the conduct complained of, warrants some epithet such as "predatory" or "unfair". Another view would be . . . the presence of the necessary "purpose" of acting to the detriment of the interest of the other corporation, gives, on the face of the section itself, sufficient content and force to the concept of the respondent corporation taking advantage of its power[31].

Carlton and United Breweries v Bond Brewing New South Wales Ltd[32]

58. This judgement was delivered on 19 October 1987. Carlton sought a continuation of an interlocutory injunction restraining Bond from giving effect to an agreement made between Bond and others in May 1985. Bond was then named Tooheys and with Tooth and Co. Ltd was a major brewer in New South Wales. In 1983 Tooth sold its brewery business to Carlton. But Tooth continued to own freehold, 266 hotels in New South Wales. In May 1985 Tooth agreed to give Tooheys head leases over most of the 266 hotels. Carlton brought an action to prevent the sale of the leases partly on the grounds of section 46 as it was before the 1986 amendments. The only relevant point here, is the Courts consideration of 'taking advantage'. It held that both Tooth and Tooheys were in a position substantially to control all the market for lease of hotels. The Court held in entering into an agreement in 1985 neither Tooth nor Tooheys took advantage of its power in relation to the market. Tooth sought to obtain benefits from Tooheys in respect of hotels which it still owned but which it no longer supplied with beer. From Tooth's point of view, the arrangement was simply an advantageous commercial dealing. There was no taking advantage of market power. Tooth was apparently interested in obtaining control of a company involved in the wine trade which Tooheys then controlled. Tooth sold something for which it had little continuing use, the right to control hotels which it no longer supplied with liquor in return of an asset which it wished to exploit, a cash payment and a promise of future rentals.

Midland Milk Pty Ltd & Ors v Victorian Dairy Industry Authority[33]

59. Midland was a Victorian supplier of processed milk and carried on business in Victoria under licence granted by the Victorian Dairy Authority. In 1987 Midland began to supply milk in Sydney to retailers who re-sold it at discount prices. Midland entered into an agreement with the Authority. By Condition 1 of the agreement the Authority agreed to supply milk to Midland for sale on the Sydney market for a price determined by the Authority less an allowance for transport and promotion costs. By Condition 6, Midland agreed not to supply milk to the Sydney market unless it was acquired from the Authority. Subsequently the Authority and the New South Wales Dairy Corporation came to an agreement, that if the Authority terminated its agreement with Midland, the Authority would be granted a percentage of the New South Wales market. The Authority then terminated the agreement with Midland alleging a breach of Condition 6. Midland sued alleging a breach 46 in that the Authority refused to allow Midland a discount or pay an allowance in respect of milk purchased by it from the Dairy Authority and the imposition of Condition 6 which prevented Midland acquiring milk for sale to the Sydney market unless the milk was purchased from the Authority in accordance with the agreement.

60. The Court found there was no question that the Victorian Authority was a corporation under the Act and by virtue of its monopoly position in Victoria in respect of the sale of milk to be processed into market milk had a substantial degree of market power.

61. As to "take advantage" the Court adopted the Queensland Wire case approach that the expression is pejorative rather than neutral and there can be no taking advantage of without misuse of power. If the real reason for the imposition of Condition 6 of the agreement and withdrawal of the discount, transport and promotion assistance was to bring pressure to bear on Midland to cease supplying the Sydney market, then there would be a compelling case of taking advantage of a monopoly market power. The close relationship between the market activity of imposing a condition upon supply and the proscribed anti-competitive purpose would most arguably endow its use of market power with the necessary predatory character.

Some Concluding Comments

62. The controversial issues arising from the section and the cases, so far, appear to be, the way market power should be determined (the extent to which economic evidence is necessary to give meaning to the concept), the definition of the market in which market power is held, the market in which its effect is felt and "taking advantage" for a proscribed purpose.

Market Power

63. Some economic evidence is clearly relevant and admissable, but query whether the degree of reliance of economic evidence of market power implied in the Explanatory Memorandum, namely, that market power is a recognised economic concept which has been the subject of considerable economic literature[34] should or will be adopted. The cases suggest that the Court will make its determination of market power on the language of the section and relevant precedent. In none of the cases discussed was it found to be necessary to refer to the Explanatory Memorandum to determine market power issues.

64. The Court must, of course, define the market in which market power is held and the market in which the effect of its exercise is felt and in so doing will undoubtedly continue to use the economic parameters set out in cases such as QCMA[14] and Re Tooth[18].

65. In the cases discussed the Court took a fairly direct and limited approach to the issue of market power, namely, market share and, presumably, the lack of constraints on the corporation which necessarily follows from the size of the market and the influence in the market of the corporation. Apart from market definition and the concomittant issue of competition it is arguable that economic theory is of limited application in determining whether section 46 has been contravened. Further, the cases suggest that although substantiality of

market power may be reached at levels below the dominance level it is unlikely that serious cases will be mounted unles the corporation is in, or is near to, a dominant position. In the cases so far the corporations have been the significant players in their markets, namely, statutory or other monopolies or near monopolies or corporations holding 60% or more of the relevant market.

66. Section 46(3) provides some assistance for determining the degree of market power held by a corporation. The section requires consideration to be given to the extent to which the corporation's conduct is, or is not, constrained by competition from other participants in the market, potential entrants to the market, suppliers or buyers. "Constraint" may mean "forced, restrained, compelled, obliged" and such expressions suggest that competitors or others must be in a position, actually or potentially, to exercise a significant degree of countervailing power to reach the level of exercising a constraining influence on a corporation with a substantial degree of market power. Clearly the less the constraining influence the greater the market power.

67. The incidents of market power may include market share, monopoly or near monopoly power (statutory or otherwise), Government licences, ownership of intellectual property, rights, ownership of essential goods, technology, access to capital, control of raw materials and vertical integration. However, the cases show that the Court has held in particular circumstances that such things as legal rights and the possession of information are not incidents of market power e.g. cancellation of a dealership agreement[35], exercise of a legal right to institute proceedings to recover intellectual property[36], taking advantage of information about the availability of a lease which had been sought by another[37], and acting on the basis of an advantageous commercial opportunity[38].

68. There is an argument that, in considering section 46, one should not get too involved with the detailed market analysis necessary for consideration of "dominance" and "substantial lessening of competition" in other sections of the Act. There seems to be two reasons for this. The first is that it will probably be the rare case where a serious allegation is made against a corporation which does not have substantial market power such that could not be measured conclusively or inferentially by reference to the ordinary meaning of "substantial" and the constraint provisions of section 46(3). Secondly, the test in section 46 is different from the tests for dominance and substantially lessening competition because the aims of the relevant sections are different. In section 46 establishing market power is simply a threshold issue — the heart of the contravention is "taking advantage" of that power for a proscribed purpose — and the advantage so taken contravenes the Act whether the desired effect is achieved or not. This is very different from the issues of substantially lessening competition and dominance in sections 45, 47, 49 and 50 where medium to long run adverse effect on competition in a market is the very heart of contraventions. In those cases it is only when that effect on competition is shown that a contravention will be established.

Market Definition

69. As mentioned, market definition is likely to follow the basic parameters in the QCMA case[14] and apart from the practical difficulties of defining product, geographic and functional aspects of the market should not cause many problems. However, the Queensland Wire Industries appeal case[22] raised a problem in this area.

70. In the Queensland Wire Industries case[1] the Court at first instance defined the relevant market as the market for the supply of steel and steel products or the supply of rural fencing (but it said the latter description better accorded with commercial ideas of the meaning of the word "market"). The case went on appeal on another issue, namely, whether advantage had been taken of market power. On appeal the Full Court did not find it necessary to determine the question of "taking advantage" because it found that there was no market in which BHP had market power in a relevant sense. It held that the Court at first instance had identified the market in which BHP had the purpose of preventing competition but not the market in which BHP had market power. To manufacture and supply star picket Queensland Wire Industries had to obtain Y-bar from BHP and it was in this area of being the only supplier of Y-bar that BHP had power. The Full Court said there had never been a market for Y-bar so as to attract section 46. There had never been trade or traffic between buyers and sellers, or, indeed, any buyer or arms length seller of Y-bar as an article of commerce[39]. The view of the Full Court was that a corporation cannot have power in a market which does not exist in the legal sense. This issue is currently on appeal to the High Court.

Take Advantage of Market Power for a Proscribed Purpose

71. There is little doubt, on the cases to date, that the position is that "take advantage" should be construed in pejorative sense and therefore there will need to be some evidence from which unfairness or predatory purposes can be inferred before that element will be satisfied. Further, it appears that "take advantage" is to be considered separately from purpose. From the cases it appears that a corporation can "take advantage" of its market power without having a purpose of producing the proscribed effect: Papersave[40]: Queensland Wire Industries[41].

72. There is an argument that "take advantage for the purpose" should be construed as a composite phrase rather than the concepts being treated as separate elements. The argument goes that conduct should properly be categorized as conduct which both constitutes taking advantage of power and conduct engaged in for a purpose, if it is conduct other than competition on the merits or involving the restraints reasonably necessary to competition on the merits being competition that would reasonably appear capable of making a significant contribution to creating or maintaining market power[42].

73. There seems to be some support for the

proposition that "take advantage" and "purpose" should be construed in the composite sense, in the cases of Parkwood Eggs and Queensland Wire Industries. In the former case Bowen CJ said the Board's intended pricing practice could be held to be for a proscribed purpose in that ". . . its intended actions [the pricing practices] 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[43]. In the second case, the Court in dismissing the Appeal on another ground said "We do so without finding it necessary to embark upon the issue upon which His Honour dismissed the proceedings, namely, whether power is relevantly "taken advantage of" only if the conduct complained of warrants some epithet such as "predatory" or "unfair". Another view would be that, whatever was previously in the position, since 1977 amendments to section 46, the presence of the necessary "purpose" of acting to the detriment of the interests of the other corporation, gives, on the face of the section itself, sufficient content and force to the concept of the respondent corporation "taking advantage" of its power[44].

Some Areas of Risk for Corporations With Market Power

74. Clearly businesses cannot stop acting in a vigorously competitive manner because they have market power. It is also clear that the section is not aimed at size but rather the misuse of market power for proscribed purposes. As mentioned earlier any of the conduct in section 45, 47, 49 and 50 which is engaged in by a corporation with a substantial degree of market power for a proscribed purpose may attract section 46. While, acknowledging that, "taking advantage" of things such as intellectual property and legal or other rights e.g. Warman[26]: Papersave[28]: Tops performance Motor case[35] may be in some circumstances constitute a contravention the more likely risks would seem to include the following conduct.

(a) Refusing supply. Unless a corporation refuses supply for a reason which itself is illegal, such as in further in furthermore resale price maintenance, there is no general requirement to supply all comers. But a corporation with market power should closely consider its reasons for refusing supply. There appears to be at least three types of cases to consider:

(i) refusing supply where there has been a history of supply and there are no commercial reasons for refusing: Queensland Wire Industries[45];

(ii) refusing supply where, even though there is no history of prior supply, there is in effect, no alternative supplier: Shell Chemical case[46]. Shell was prepared to sell a chemical to McLean only on the basis of a joint venture being entered into. Shell was the only effective source of supply. When the joint venture negotiations broke down Shell refused to supply except on conditions whichwould not allow McLean to be commercialy viable and would adversely affect its downstream market. The Court granted an interlocutory injunction against Shell. This is somewhat similar to the United States "essential facility" doctrine which provides that a corporation should supply on proper commercial terms products of which it is the only practical source of supply. Note that, that doctrine has not been well received by the Full Court of the Federal Court of Australia. In the Queensland Wire case the Full Court said "the essential facility doctrine is not readily accommodated in terms of section 46"[47].

(iii) Refusing supply because of a request to do so by a client's competitors: Mark Lyons[30].

(b) Predatory pricing: CSBP case[21]: Parkwood Eggs[20]. The United States cases suggest that predation occurs only if price is below cost. This may not be adopted in Australia. Thus in Parkwood Eggs, Bowen CJ said ". . . whether in the ordinary course a monopolist can engage predatory price cutting only if the price is below some particular cost and not where the price set, or though it may deter competitors is one which merely does not maximize the monopolists profit . . . (the prohibition in the section may be satisfied) . . . notwithstanding that it is not below marginal average variable cost and does not result in a loss being incurred . . ."[48].

(c) Price discrimination. The Explanatory Memorandum specifically refers to inducing price discrimination as an example of conduct which may be caught by section 46[50]. However, section 49 already prohibits that conduct in erms of anti-competitive price discrimination. Is the suggestion that the price discrimination which will attract section 46 is different from that which attracts section 49? In other words, does the price discrimination in section 46 mean all price discrimination, not limited to anti-competitive price discrimination as is section 49? Taking it a bit further, would horizontal arrangements and exclusive dealing arrangements within sections 45 and 47 mean anti-competitive arrangements only or also include those which are not anti-competitive in terms of the substantial lessening of competition tests in those sections? The Explanatory Memorandum is less than helpful in explaining what is intended to be caught by section 46. Statements such as inducing price discrimination, refusing supply and predatory pricing are of limited help, especially where the conduct envisaged is already subject of substantive provisions of the Act to which specific competition tests apply.

75. In conclusion, it must be recognised that, whatever the conduct under consideration, section 46 is only contravened if a corporation with market power takes advantage of that power for a proscribed purpose. While there will be cases which are borderline, or difficult because of, e.g. questions of the exercise of legal rights, the more obvious areas of risk, such as refusing supply, can probably be tested by an honest answer to the question, "Why is the corporation doing, or intending to do X?" If the answer is, "To get rid of Y, or to prevent Y's entry to a market, or deter or prevent Y engaging in competitive conduct," then the corporation's wisest course may well be not to do X.

Footnotes

1. Trade Practices Act s 46(6).
2 Queensland Wire Industries Pty Ltd v The Broken Hill Co. Ltd & Anor (1987) ATPR 40-810, p.48,809.

3. Od Transport Pty Ltd v The Western Australia Railways Commission (1987) ATPR 40-761, p.48,247.
4. Bradken Consolidated Ltd & Anor v Broken Hill Pty Ltd & Ors (1979) ATPR 40-106.
5. State Superannuation Board of Victoria v TPC (1982) ATPR 40-282. Upheld on appeal (1982) ATPR 40-326.
6. Burgundy Royale Investments Pty Ltd & Ors v Westpac Banking Corps & Ors (1988) ATPR 40-835.
7. S2A Trade Practices Act 1974.
8. Tytel Pty Ltd v Ors v Telecom (1986) ATPR 40-711.
9. Queensland Wire Industries Pty Ltd v BHP Co. Ltd & Anor (1988) ATPR 40-841 p.49,075.
10. Tillmans Butcheries Pty Ltd v The Australasian Meat Industry Employees Union (1979) ATPR 40-138: Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd (1981) ATPR 40-220: Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) ATPR 40-315.
11. Explanatory Memorandum para 40.
12. Explanatory Memorandum para 39.
13. FM Scherer, **Industrial Market Structure and Economic Performance** 1980, Rand McNally, Chicago, pp.10-11.
14. Re Queensland and Co-Operative Milling Association Ltd and Defiance Holdings (1976) ATPR 40-012.
15. U.S. Department of Justice Guidelines 1980.
16. Scherer supra.
17. TPC v Ansett Transport Industries (Operations) Pty Ltd & Ors (1978) ATPR 40-071 p.17,720: TPC v Australia Meat Holdings Pty Ltd & Ors (1988) ATPR 40-876. p
18. Re Howard Smith Industries (1977) ATPR 40-023: Re Tooth & Co. & Tooheys (1979) ATPR 40-113: TPC v Ansett Transport Industries (Operations) Pty Ltd supra: TPC v Australia Meat Holdings Pty Ltd & Ors supra. p49,480-49,481.
19. Explanatory Memorandum para 49.
20. Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd (1978) ATPR 40-081 p.17,788, 17,789.
21. TPC v CSBP & Farmers Ltd (1980) ATPR p.42,162, 42,166.
22. Queensland Wire Industries # 9 supra, p.49,075.
23. Explanatory Memorandum para 50.
24. Ashton v Inland Revenue Commissioner (1975) IWLR 1615, p.1,621.
25. Parkwood Eggs # 20 supra, p.17,889, 17,890.
26. Warman International & Ors v Envirotech Australia Pty Ltd & Ors (1986) ATPR 40-714.
27. Od Transport Pty Ltd # 3 supra.
28. Williams & Anor v Papersave Pty Ltd (1987) ATPR 40-781.
29. Williams & Anor v Papersave Pty Ltd (1987) ATPR 40-818.
30. Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd (1987) ATPR 40-809.

30A Queensland Wire # 9 supra, p.48,817.

31. Queensland Wire # 9 supra, p.49,075.
32. Carlton and United Breweries (NSW) Pty Ltd v Bond Brewery New South Wales Ltd & Ors (1987) ATPR 40-820.
33. Midland Milk Pty Ltd v Victorian Dairy Industry Authority (1988) ATPR 40-857.
34. Explanatory Memorandum, para 39.
35. Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd (1975) ATPR 40-004.
36. Warman International # 26 supra.
37. Papersave # 28 supra.
38. Carlton & United # 32 supra.
39. Queensland Wire # 8 supra p.49,075.
40. Papersave # 28 supra p.48,526.
41. Queensland Wire # 2 supra 48,821.
42. Areeda & Turner, **Anti-Trust Law Vol III (1978)** pp 73-83.
43. Parkwood Eggs # 20 supra p.17,789.
44. Queensland Wire # 9 supra, p.49,075.
45. Queensland Wire # 2, p.48,821.
46. McLean & Anor v Shell Chemicals (Australia) Pty Ltd (1984) ATPR 40-462.
47. Queensland Wire # 9 supra 40,076, 49,077.
48. Parkwood Eggs # 20 supra, p.17,789.
49. Explanatory Memorandum, para 53.
50. Explanatory Memorandum, para 53.

Authorisation

by W. J. Coad
Deputy Chairman
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1. Authorisation gives exemption

1. Authorisation (and a related facility — 'notification') granted by the TPC on public benefit grounds, is the most common way by which exemption is obtained from the restrictive practices provisions of the Act.

2. In passing it is worth noting there are two other ways by which exemption from the Act has been obtained — but these are special:

- Section 51 makes legislative exceptions primarily in respect of matters specifically allowed for by Federal or State law; matters relating to remuneration etc. of employees; standards approved by the SAA; certain clauses concerning termination of partnerships, goodwill, as well as certain contracts of service; and certain export and patent and trade mark arrangements.

- There is also provision for special government regulation under section 172 of the Act; these have been mainly for the marketing of primary products by various primary industry groups and more recently for certain Telecom practices. It is expected that all these regulations will phase out over time.

3. Whilst the practices of most corporations in Australia are subject to the Act, unincorporated firms and many State Government business enterprises may not always be so because of lack of constitutional reach.

4. The authorisation process grants immunity from court action for some restrictive trade practices that could otherwise be in breach of the Act.

5. The Commission cannot initiate the process — the parties to the arrangement must apply to the Commission.

6. Immunity operates only once authorisation has been granted.

7. The Commission's function in considering an application for authorisation is to apply one of two tests depending on the conduct in question.

- For arrangements that may substantially lessen competition, the applicant must satisfy the Commission that the provisions of the arrangement result in a benefit to the public that outweighs any anticompetitive effect.

- For primary and secondary boycotts, third-line forcing, mergers and acquisitions, the applicant must satisfy the Commission that the conduct results in a benefit to the public such that it should be allowed to occur.

The onus is on the applicant to satisfy the appropriate test.

2. There are real limitations as to the matters that can, or are likely to