RECENT DEVELOPMENTS IN EUROPEAN MONOPOLISATION AND MERGERS LAW — LESSONS FOR AUSTRALIA?

By

Valentine Korah*

I am not so sure that Europe has many lessons for Australia, except as to mistakes it may avoid. I wish we had in our jurisprudence some of the statements about the importance of entry conditions made by your Tribunal in *Re Queensland Co-operative Milling Association*.[1] Possibilities of entry lead to a far more dynamic analysis of market structure than is commonly made in the EEC. I intend to consider the experience in the EEC and, occasionally, in the United Kingdom and United States in the light of problems that seem to be giving rise to interest here.

1. Objectives of Trade Practices Law

The EEC competition rules are not intended only to enable the efficient to expand at the expense of firms and industries less efficient at providing what buyers want. The institutions are pre-occupied with the integration of national markets kept separate by such measures as maximum price control in some member states. The preamble to the EEC Treaty refers to social objectives such as constantly improving working and living conditions, fair competition, peace and liberty. Efficiency is protected by potential competition, but the protection of competitors and liberty requires actual access to markets, even if this does not enhance efficiency. The pursuit of aims other than efficiency may result in important European firms hesitating to compete aggressively with the rest of the world and may cause considerable loss of efficiency. I hope that your law is more firmly based on objectives of efficiency. Certainly, the integration of Australia has been achieved by other measures, but s.46 can be interpreted to favour would-be competitors and not merely the competitive process.

2. Monopolisation

(a) "a substantial degree of power in a market"

If I might go through the words of s.46: the first question seems to be the interpretation of "a substantial degree of power in a market". In *Re Queensland Co-operative Milling Association*,[2] the Tribunal defined "undue market power" as "the power to raise price and exclude entry". To ascertain its existence, it said that one should define the relevant market in terms of substitutes in both the supply and demand side of the market. One should analyse what would happen if the firm whose market power is in question were to raise price above a competitive level: what other firms would start supplying similar products and to what other products would customers switch. Potential competitors are part of the market, but it is very important also to consider the possibility of entry by firms outside the relevant market as defined. I suppose the degree of market power is as long as the judge's foot.[3]

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* Barrister, Professor of Competition Law, University College London, Visitor, Faculty of Law, Queensland University of Technology

1. (1976) 1 ATPR 40,012.
2. *Ibid.* at 17,246.
3. See S.G. Corones, "The New Threshold Test for the Application of Section 46 of the Trade Practices Act" (1987) 15 ABLR 31; and W. Pengilley, "Lowering the Monopoly Power Threshold: an Evaluation of the Australian Monopolization Amendments and their Likely Results" (1987) 11 *Sydney Law Review* 196.

The Explanatory Memorandum accompanying the Trade Practices Revision Bill 1986 refers to the EEC cases, and states that "substantial power in a market" indicates a lower threshold than dominance. This does concern me. The threshold in the EEC has been reduced substantially since *Continental Can.*[4] I hope that you do not treat as having substantial power in a market a firm such as United Brands[5] which was fighting a price war in Denmark, making losses (at least on accounting conventions) for four out of the last five years and losing market share; or Hoffmann-La Roche[6] which was supplying vitamins, when there was world over-capacity of 100 per cent. It could not raise prices by reducing capacity — it seems that its competitors had sufficient capacity to supply the whole of world demand.[7]

Terms like "power in a market" and "market power" should direct the minds of the judges to a market definition that reflects the cross elasticities of supply and demand, since it is only if these are both low that there can be power in the market. It is not cross elasticity at the price the firm is charging that is relevant, however, but the cross elasticities at the level at which a normally efficient firm would be able to sell.[8] Cross elasticities at that level may not be easy to estimate. So, it is as well that the law is not defined directly in terms of cross elasticity.[9]

In Europe, as sometimes in Australia, Court and Commission tend to look in less abstract terms to substitutes on the demand side, and forget the Court's statement in *Continental Can* and *Michelin*[10] that if suppliers of quite different products can easily switch to making competing products, they can rapidly undermine the market of a monopolist that is exploiting its power. Section 4E of the Trade Practices Act 1974 (Cth) refers not only to "goods or services that are substitutable" but also to those "otherwise competitive with" the goods or services in issue. Substitutes on the supply side may well come within the first phrase as suggested by the Tribunal in *Re Queensland Co-operative Milling Association* but, even if they do not, they must come within the second. Market power also pre-supposes barriers to new entry. In *Michelin* the Community Court confirmed, as a relevant market, the supply of replacement tyres for heavy vehicles to tyre dealers in the Netherlands: an incredibly narrow market! The possibility of a new factory being built by a competitor was irrelevant because it would take too long. I believe that there was excess capacity world wide, although this was not stated, so it may be that the creation of new capacity to supply world demand at current prices does not give the incumbent power to restrict production and raise price. The Community Court does not seem to be concerned with power over price. One of the reasons for omitting retreads was wrong — the Court said that retreading was a service not a good — hardly a relevant consideration. A better reason was that one may pay for the chance to have a tyre retreaded when one buys the original tyre.

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4. Case 6/72, *Europemballage Corporation and Continental Can Co. Inc.* v. *Commission* [1973] ECR 215; [1973] CMLR 199.
5. See Case 27/76, *United Brands Co.* v. *Commission* [1978] ECR 207; [1978] 1 CMLR 429.
6. See Case 45/76, *Hoffmann-La Roche* v. *Commission* [1979] ECR 461; [1979] 3 CMLR 211.
7. We are not told whether price levels exceeded any specific measure of costs. Prices may well have been below fully allocated cost at the depressed level of production. So there is no reason to think that demand would have been greater had prices equalled cost.
8. I refer to what is sometimes called the *Cellophane* fallacy after the case cited in n.12 *post*. A firm with market power may already be selling at price above the competitive level to the point where the demand becomes more elastic. In relation to mergers, the U.S. Department of Justice argues that there is no fallacy as concern relates to the increase in market power rather than its existence. Consequently, the U.S. merger guidelines, which measure cross elasticity at the level of prices before the merger may not be flawed, but should be applied with circumspection to monopolistation.
9. For a perceptive discussion of the concept of a market, see M. Brunt "Market Definition Issues in Australia and New Zealand", a paper given at the Commerce Act Workshop, organised by the Centre for Commercial Law & Applied Legal Research, Monash University at Wellington, in May 1988.
10. Case 322/81, *Nederlandsche Baden — Industrie Michelin NV* v. *Commission* [1983] ECR 3461; [1985] 1 CMLR 282.

The geographic market was also defined narrowly. Michelin would have had no power to impose harsh terms on retailers if the customers of the dealers could have picked up new tyres on a trip outside the Netherlands, unless Michelin had market power there too. The definition of the relevant market seems to have no function in the later European cases. The definition may be arbitrary, which does not help at the difficult stage when market power is assessed and competitive pressures from outside as well as within the market as defined are relevant.

There are two ways of taking competitive pressures into account. First, one may use the cross elasticities of supply and demand to define the market,[11] in which case, they must be examined realistically in terms of what would happen if the incumbent firm were to price above the level of a normally efficient firm — would sufficent other firms expand production or would enough customers switch to other products to deter excessive pricing? The other possibility is not to bother with a definition of the market, or to define it arbitrarily, but to take into account competitive pressures from outside the market as defined. Since the market is not defined realistically, one cannot establish market shares when this method is used, so one cannot usefully determine concentration ratios or the Herfindahl-Hirschman Index. Moreover, the analysis required to indicate the relevant market is required at the second stage, and lawyers could well ignore this.

The second methodology is used by the Monopolies and Mergers Commission in the United Kingdom. It starts from the definition of the products specified in the reference to it, which may well be arbitrary and narrow, but then considers the competitive pressures on the firm(s) with a market share exceeding 25%. This prevents the result depending on a definition — is the relevant market cellophane or flexible packaging?[12] Supply of both products exercised some pressures on Du Pont. It is as wrong to exclude other packaging materials altogether as it is to give to the supply of them the same weight as to that of cellophane. I would hope that even if cellophane were the relevant market, Du Pont's power in that market would be treated as diminished by the availability of other materials. Where, however, the law prohibits the misuse of market power, and provides remedies that are not merely prospective such an approach makes it difficult to advise businessmen as to what they may lawfully do.

Subsection (3) of your Act — both the new and old versions — might have been taken from the EEC precedent, *Continental Can* — the idea of a dominant firm not being constrained by competitors, suppliers and customers. My own view is that the constraints come from competitors, potential competitors or new entrants and prevent the firm from gouging suppliers or customers. Since *Continental Can,* however, in cases such as *United Brands* and *Hoffmann-La Roche,* we Europeans have turned away from examining only the competitive pressures on the dominant firm, to enquiring whether it can elbow out its competitors. In *Hoffmann-La Roche*, the Community Court echoed the definition of dominance it had given in *United Brands*:

> 65. The dominant position referred to in [article 86] relates to a position of economic strength enjoyed by an undertaking — which enables it to prevent effective competition being maintained on the relevant market — by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. (dashes inserted)

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11. The merger guidelines published by the U.S. Department of Justice do this. The cross elasticity of supply does not, however, take into account completely new entry. See Maureen Brunt, *supra* n.9 at 12 and 18. She explains that it is preferable to define the market realistically as an aid to analysis.
12. Taking my analogy from the *Cellophane Case - U.S.* v. *E.I. Du Pont de Nemours* 351 US 377 (1956).

I have difficulty with this definition. If the central section about being able to prevent effective competition has any meaning at all, it seems to include anyone who can profitably restrict competition, whether or not he has done so, and this gives a very wide ambit to article 86.[13] Our case law has focussed on the indications of a dominant position, without much analysis of what it is. Some of our cases seem to be more concerned to protect small competitors — even those who want to take a free ride on the innovations of a larger firm. The EEC concept of competition is often static. The possibility of building a new plant is irrelevant because it takes too long (*Michelin*)! Barriers to entry are perceived to be pervasive, because only actual entry will help the small firms that want to enter the market. Firms like United Brands that have no power over price are being treated as dominant.

You have had cases like *Top Performance Motors* v. *Ira Berk*, [14] where the market was defined as Datsun cars on the Gold Coast, and evidence of the commercial categories of vehicles was excluded as irrelevant. Nevertheless, that absurdity was altered by legislation. In Europe, we have not treated a single brand of product as the relevant market save in relation to firms peculiarly dependent on the brand owner.[15] Markets are usually defined in terms of the substitutes to which customers can turn easily, without modifying their business much.

(b) **"take advantage of that power"**

Article 86 condemns the abusive exploitation of a dominant position and the examples given all relate to gouging customers or suppliers, which does amount to taking advantage of the market power. Despite this literal argument for restricting article 86 of the EEC Treaty to exploitative abuses, the Community Court in *Continental Can* denied that there need be a causal link between the conduct and the market power. Vogelenzang[16] has suggested, however, that there is a kind of causal link. The Commission was concerned by Continental Can's bid for Thomassen, only because Continental Can's other subsidiary, Schmalbach was dominant in North Western Germany over some of the products made and supplied in the Netherlands by Thomassen. Any firm, able to raise the capital, could bid for the Thomassen shares, but the bid was anticompetitive only because the bidder and target companies were strong potential competitors.

Such an argument is stronger in the Australian context, since it is only conduct with the purpose of excluding, that is forbidden by s.46. Article 86 is drafted in terms of gouging customers and suppliers, not of restricting competition. A slightly different concept of causation, shortly to be described, was submitted to the High Court by the Trade Practices Commission in *Queensland Wire*.

Paragraph 48 of the Explanatory Memorandum that accompanied the Trade Practices Revision Bill 1986 stated that taking advantage of market power for the purpose of eliminating competitors is intended to be prohibited only when the power is being misused.

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13. In *Re Queensland Co-operative Milling Association, supra* n.1 at 17,246, the Tribunal said:

    Or again, as is often said in the U.S. antitrust cases, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. That power may or may not be exercised.

    I have no difficulty with that definition if it means the power of a firm to give less good value for money than it would if the market was more competitive while not attracting entry or the expansion of existing firms to an extent that charging a monopoly price becomes unprofitable. That is what is often called "power over price". I am concerned that the middle limb of the definition now repeated in case after case in the EEC may be something other than power over price.
14. (1975) 5 ALR 465.
15. See, e.g. Case 22/78, *Hugin* v. *Commission* [1979] ECR 1869; [1979] 3 CMLR 345.
16. Vogelenzang, "Abuse of a dominant position in Article 86: the problem of causality and some applications", (1976) CML Rev 31 at 66.

In *Queensland Wire Industries Pty Ltd* v. *The Broken Hill Pty Co. Ltd*,[17] this was confirmed by Pincus J. and the Full Court said there was no need to consider the point. Pincus J. did not specify clearly what he meant by "misuse", although he cited cases referring to a use of the power that is unfair, restrictive or predatory. Despite earlier case law, mainly on interlocutory applications, he clearly thought that the use of legal rights might amount to misuse, and in this, Vogelenzang's explanation of the EEC precedents, such as *Continental Can*, would support him. Pincus J. grappled with the crucial distinction between competing by giving customers better bargains and artificial exclusionary conduct. The difficulty is that effective competition excludes competitors as much as conduct that has no purpose but to exclude them. The Full Court suggested that the reference to the prohibited purposes in (a) to (c) of s.46, enables dominant firms to compete vigorously even if this harms less efficient competitors. I hope so. The Americans, too have had trouble distinguishing competition "on the merits" — increasing market share by providing cheaply and well what buyers want — from artificially excluding competitors.

Let me illustrate the problem by taking an example from the European experience on exclusive purchasing requirements imposed on buyers, or their more attenuated form, loyalty discounts. A large customer can have a half per cent off its total bill for the year if it buys seventy per cent of its requirements from the dominant firm. Even if such discounts do not reflect cost savings, they are intended to encourage large customers to buy most of their requirements from the dominant firm. How does this differ from price competition? The customer's freedom of action is not restricted if it chooses to earn the discount. It is said that competitors of the dominant firm are foreclosed, because they may not be able to supply the total requirements of large customers — they may have insufficient capacity or supply only part of the range of products required. To compete, they would have to buy in the products they cannot supply or give a discount not only on the proportion that they do supply, but also on the proportion that they cannot. Are such competitors equally efficient? Furthermore, Frances Hanks and Philip Williams have demonstrated the very limited circumstances in which exclusive purchasing does exclude equally efficient competitors.[18]

Loyalty discounts and exclusive purchasing arrangements may have commercial justifications. Often the buyer wants to be assured of uninterrupted supplies, even if it does not know how much it will want over the year, and would like to assure its supplies in return for an exclusive purchasing requirement, absolute or attenuated. Loyalty discounts may encourage firms to concentrate their orders on fewer suppliers and this may lead to economies of scale in production. These are not always easy to quantify. Exclusive purchasing may have a further justification. Where services are supplied to the buyer, the seller may have to ensure that competitors do not take a free ride on that service. I do not know whether such discounts amount to competing on the merits.

Hoffmann-La Roche granted such discounts to 22 of its largest customers. The Court confirmed the Commission's finding that this was an abuse of its dominant position. It foreclosed the smaller makers of vitamins and where the discount was calculated over the total supply of all vitamins it had a tying effect.

It is not only exclusive purchasing agreements or loyalty discounts that foreclose and tie, progressive quantity discounts do so too. A buyer may always attempt to achieve an extra discount bracket, and will hesitate to buy elsewhere until he is sure that he will achieve the minimum turnover to qualify for the highest rate of discount. The foreclosure is increased

17. (1987) ATPR 40,810 (Pincus J.); (1988) ATPR 40,841 (Full Court).
18. F. Hanks and P. Williams, "The Treatment of Vertical Restraints under the Australian Trade Practices Act", (1987) 15 ABLR 147.

by uncertainty as to this at the beginning of the period. In *Michelin*, this foreclosing effect was increased because the target turnover for each dealer was not stated in writing at the beginning of the discount period. The system, which is a common one, is good at making dealers run the last mile. It rewarded first, those who sold over 3,000 tyres, all of whom qualified, and secondly, those who sold more than in the previous year. Even a dominant firm has to encourage its dealers to work effectively and such a discount system did just that. Yet, both Hoffmann-La Roche and Michelin were fined for abusing their dominant position.

In *Queensland Wire*, the Trade Practices Commission submitted to the High Court that if a firm enjoying substantial power in a market does something that would not pay it in the absence of market power, it takes advantage of that power.[19] Had there been other suppliers of Y bar, or had other steel manufacturers with capacity to make Y-bar existed, it would not have paid BHP to refuse to supply Queensland Wire, as the latter could have obtained supplies elsewhere and BHP would not have been able to make up for the loss of a customer for Y-bar by selling the improved product downstream. In my view this is a very helpful theory.

It is clear in the EEC, as in Australia, that to be illegal, the abuse need not be in the same market as the dominance. One case where power over one market was extended to another was *Telemarketing*,[20] where those wanting to place an advertisement with Luxembourg television were not allowed to use their own phone number for viewers to ring for further information. The Court said:

> ...an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking ...[21]

There was no discussion of why tying was bad: no consideration as to why Luxembourg Television did not exploit its full market power in the charge made to advertisers for transmissions. It may have been regulated, but this is not stated. It may have found that

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19. In *United States, Common Market and International Antitrust: a Comparative Guide*, vol II at 603, Barry Hawk analyses the two concepts of causation in a way that could be helpful in Australia too:

> There is considerable confusion under both EEC and U.S. law with respect to the issue whether there must be a connection between the dominant position (monopoly power) and abuse (monopolizing conduct). Much of the confusion results from the fact tha different questions are frequently subsumed under the term "causation". Is the dominant position or market power a necessary condition to engage in the challenged conduct, as in the case of price discrimination? Or is the dominant position a necessary condition to bring about the undesirable or otherwise anticompetitive effects, as in the case of refusals to deal? Did the market power "cause" the abuse because buyers or others were coerced by defendant's market power to accept defendant's practices, as in the case of tie-ins? Is there a "causal" relationship only if the conduct which increases or contributes to market power should be deemed abusive? The very variety of these questions suggests that their resolutions might be better advanced by addressing each one separately without reference to the term "causation".

He goes on to point out that the rejection by the Community Court in *Hoffmann-La Roche* of the submission that "an abuse implies that the use of the economic power bewstowed by the dominant position is the means whereby the abuse has been brought about" is in sharp contrast with *Berkey Photo Inc.* v. *Eastman Kodak Co.*, 6093 F 2d 263 at 274-5 (2d Cir. 1979), where the Court stated that s.2 is violated where "actions are possible or effective only if taken by a firm that dominates its smaller rivals". It distinguished refusals to deal, which may amount to monopolisation because the chances of success are directly related to the market power of the defendant, from the refusal to disclose information about the new format for its film. This would have led to additional lead time for supplying its new miniature camera whether or not the defendant had market power over colour film.

20. Case 311/84, *Centre Belge d'Etudes de Marche-Telemarketing (CBEM)* v. *Compagnie Luxembourgeoise de Telediffusion and another* [1985] ECR 3261; [1986] 2 CMLR 558.
21. [1986] 2 CMLR 558 at 574.

telemarketing was a particularly profitable kind of advertisement and been discriminating in order to maximise its profits. There was no analysis of policy. The Court referred to *Commercial Solvents*,[22] an earlier case of refusal to supply a competitor downstream, and may have noted that tying is an example of an abuse of a dominant position given in article 86. Foreclosure is particularly worrying to authorities concerned to provide easy access to other firms, whether or not they are equally efficient.

Tying, even by non-dominant firms, is black listed in several EEC block exemptions from article 85 (the rough equivalent of your s.45). A tie prevents the other provisions, such as the grant of an exclusive territory, being exempted by the group exemptions for patents and that for exclusive purchasing. Nevertheless, the draft group exemption for know-how licensing is more limited in disapproving ties, and it may be that, in a suitable case, the Commission would find a tie justified not only on technical grounds but also when used to meter royalties etc. It may take longer for this line of thought to spread to article 86.

In the United Kingdom, the Monopolies Commission has disapproved of tying in its reports on particluar industries, but in its general report on, *Full Line Forcing and Tie-in Sales*,[23] it gave various justifications and refused to condemn the practice generally.

In cases on refusal to deal and excessive pricing the Community Court and Commission habitually protect dependent sub-groups, against whom a firm can discriminate. Hugin had no market power over cash registers, but the Commission thought that a firm that had bought some of these to hire out and maintain was dependent on Hugin for spare parts for those machines as these were not compatible with parts for other brands. Consequently, Hugin was dominant over their supply. One might have thought that the repairer should have protected his position by contract before buying machines for this purpose. I am told that after a small drop in profits, the repairer put its engineers to repairing other brands of cash register, and suffered little from its risky conduct in buying machines without assuring by contract future supplies of spare parts. In the absence of regulation and licensing, markets are more dynamic than our officials seem to believe, so I regret the decision that Hugin enjoyed a dominant positon.

Although the Commission and Court have condemned a refusal to supply existing customers,[24] neither has been faced with the problem whether to require a dominant firm to supply a new customer, or to supply to third parties goods or services it has been using in-house. The question may be decided by the Community Court in *Volvo*[25] and *Renault*.[26] The makers of spare parts for cars are claiming that the manufacturer is abusing its dominant position by making the spare parts itself and relying on its copyright or design rights to restrict them from manufacturing. If they are right, a dominant firm may be required to grant a cumpulsory licence, which might be treated as the supply of a service. The United States authorities, however, hesitate to mandate supply on licensing for fear of reducing the incentives to the original investment.

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22. Cases 6 and 7/73, *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corporation* v. *Commission* [1974] ECR 223; [1974] 1 CMLR 309.
23. March 1981, HCP 212.
24. Other cases on refusal to supply include: Case 26/75, *General Motors Continental* v. *Commission* [1975] ECR 1367; [1976] 1 CMLR 95; Case 27/76, *United Brands Co.* v. *Commission*, *supra* n.5; Case 77/77, *BP* v. *Commission* [1978] ECR 1513; [1978] 3 CMLR 174; Case 7/82, *GVL* [1983] ECR 483; [1983] 3 CMLR 645 and *Boosey & Hawkes* [1988] 4 CMLR 67.
25. *Volvo* v. *Veng*, case 238/87.
26. *Conzorzio Italiano della componentistica di Recambia per autoveicoli and Mexicar* v. *Regie Nationale Renault*, case 53/87.

Coming from Europe, I am not surprised at *Mark Lyons Pty Ltd* v. *Bursill.*[27] It sounds as if no good retailer of ski equipment could afford not to stock Salomon boots, in which circumstance, the German courts would treat the brand owner as being under a duty to supply without discrimination, and the EEC authorities acting under article 86 tend to follow the German experience. Discouraging other dealers from supplying discounters is not unlike the final words in the judgment in *United Brands* about the refusal to supply Olesen. It would discourage United Brands' other dealers from starting to promote rival brands. Nevertheless, I am not satisfied that the exclusive supplier of Salomon boots had power to give less good value for money than in a competitive market. Little enquiry seems to have been made into the possibility of importing competing brands.

The EEC authorities have not been faced with the refusal to supply an intermediate product that has never been supplied. In *Queensland Wire Industries Pty Ltd* v. *The Broken Hill Proprietary Co. Ltd,*[28] the Full Federal Court turned to a dictionary and held that there is no market where there is no supplier. BHP used all its production of Y-bar internally, and did not supply it, so s.46 did not apply. Perhaps, the Full Court was trying to avoid having to frame a mandatory injunction requiring BHP to supply where it did not want to. It would have to decide at what price and other terms and conditions.

Professor Brunt comments that a market includes potential supply, and BHP would be a potential supplier unless there were efficiencies in vertical integration.[29] This seems unlikely, as BHP obtained the Y-bar for its factory making star pickets in Queensland from a distance. As stated above, the Trade Practices Commission argued in the High Court that BHP had a substantial degree of power in the market for steel products and would not otherwise have refused to supply Y-bar. In *Commercial Solvents* the Community Court confirmed the condemnation of exclusionary conduct by the only firm in the world able to make on a commercial scale the raw materials for an anti-tubercular drug, but Commercial Solvents was selling the raw material for other purposes. This precedent has been followed in several cases, such as *Telemarketing*, where only the Luxembourg television company in fact provided advertising services for Belgium, but it had previously permitted advertisers to insert their own phone number in television advertisements. It does not follow that Community law requires a dominant firm to start supplying a new customer. Only in *GVL*, when there was discrimination on grounds of nationality, a serious offence under EEC law, has the Community Court condemned the refusal to supply new customers. The case involved a refusal to collect royalties for those not resident in Germany if they were not German nationals.

When considering whether advantage is taken of power in a market to deter competition, it is important to consider the justification. The EEC Court has, in principle, accepted justifications for refusing to supply.[30] Even a dominant firm may cut off a dealer who is not taking sufficient care over its product. Nevertheless, the Court has accepted the doctrine

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27. (1987) ATPR 40-809 at first instance, and (1988) ATPR 40-841 before the Full Court. On the facts, the Community Court has gone the other way. Commercial Solvents refused to renew Zoja's contract, after it had terminated it at Zoja's request, when Commercial Solvents had decided itself to make the drug with the raw materials of which it was the only supplier in the world on a commercial scale. The Court upheld the Commission's order to continue supply.
28. *Supra* n.17.
29. *Supra* n.9 at 27.
30. *BP* v. *Commission*, *supra* n.24. When oil production was cut back by OPEC in 1973, BP refused to supply enough to a former customer, who had ceased a year before to buy regularly in order to try the spot market. BP wanted to cut back its regular customers as little as possible. This was held not to be abusive, even if BP was dominant over supplies to its former customers, which was not decided.

of proportionality — it may not use a sledgehammer to crack a nut.[31] A dominant firm must warn a dealer before cutting him off for treating the product unsatisfactorily and establish a record. In an informal interim decision, the Commission required Boosey and Hawkes to continue to supply its former dealer when the dealer was about to start competing in the production of brass instruments, but the Commission did not require it to give credit, although the dealer should be entitled to a normal discount for paying cash.[32] The case law seems to be conceived in terms of commercial common sense, rather than of efficiency, but in some situations the two ideas may lead to the same result.

Predatory pricing is now in issue before the Community Court. In *AKZO*[33] the Commission condemned the practice as infringing article 86. AKZO is the leading producer of organic peroxides including benzoyle peroxide, which is used both for bleaching flour and as a catalyst for plastic production. ECS is a far smaller firm that supplies about 35⁄ of the benzoyle peroxide used in the United Kingdom for milling flour. When it started to supply the plastics market in both the United Kingdom and Germany, AKZO responded by threatening to drive ECS out of the business by selling below cost to flour millers unless ECS refrained from selling to the plastics industry.

The Commission did not define what level of prices is predatory. It did not accept a cost based test, although the decision does consider what costs should be considered as variable. It seems to have relied on the selective nature of the discounts actually made — only to ECS' former customers in the market for flour additives — and the threatening letter, which showed intent. It imposed a fine of 10 million ECUs in 1985, and its decision is subject to appeal. The discounts were not likely to benefit consumers in the long run. Nevertheless, a test based on discrimination, or limit pricing, is very uncertain and may deter dominant firms from reducing prices to a level nearer the competitive level, to the detriment not only of consumers, but also of the competitiveness of important firms in international markets.

(c) **"for the purpose of"**

Criteria based on purpose tend to give rise to difficulties. The exclusion of others is the necessary result of competing effectively on the merits so it is not surprising to find internal memoranda written in terms of excluding a competitor. In the EEC the Commission has tended to look for purpose in office memoranda or threats. AKZO's threat to hound ECS out of the flour milling market if it continued to penetrate the larger chemical market resulted in a fine of 10 million ECU's. Hoffmann-La Roche, too was condemned partly because of internal memoranda showing an intention to drive out competitors. But any increase in market share must be at the expense of competitors. Salesmen, in particular, tend to think they have far more market power than in fact they have. It would be sad if the reference to purpose in section 46 were to lead only to compliance systems intended to prevent such letters or memoranda being written or found.

In *Queensland Wire*, the Full Court suggested that the reference to the prohibited purposes enables us to distinguish between competing on the merits — giving better bargains to those with whom the dominant firm deals, which may have the effect but not the purpose of reducing the market shares of competitors — and artificial exclusionary conduct which has such a purpose more directly.

I am not competent to say whether this is the proper construction to be given to the words. Even if it is, it is not easy to draw such a distinction, although it is important that the attempt

31. *United Brands Co.* v. *Commission* [1978] ECR 207 at 293; [1978] 1 CMLR 429 at 497.
32. *Supra* n.24.
33. [1986] 3 CMLR 273, subject to appeal.

should be made. As argued above, competing effectively on the merits does exclude less effective competitors. I cannot make up my mind whether the discriminatory discounts granted by Hoffmann-La Roche and Michelin amounted to competing on the merits. Large or expanding buyers were able to obtain lower net prices in oligopolistic markets, where the only price competition likely is in secret discounts, individually negotiated. Nevertheless the discounts make it harder for competitors to get the business. I am not sure whether Hoffmann-La Roche could have offered significant discounts to the twenty two large buyers had it not overcharged smaller ones. There was 100 per cent over capacity world-wide, so the discounted price might have exceeded marginal costs, even if the price to other buyers did not exceed a competitive price.

I do not like legality to depend on a subjective purpose, but the reference to three purposes may enable Australian courts to hold that the prohibition of s.46 relates to the protection of the competitive process: the protection of equally efficient firms, rather than of less efficient firms who would like to operate in the market. Otherwise, important inefficiencies may arise owing to the hesitation of important firms in Australia to compete aggressively. I prefer the argument submitted to the High Court in *Queensland Wire* that s.46 prohibits only such conduct as would not be profitable in the absence of market power.

There is one huge difference between article 86 and s.46: your law does not attempt to protect directly those dealing with the dominant firm, by making it illegal for a dominant firm to charge too much, or pay too little. In this I rejoice. The search since the Middle Ages for a just price in the absence of a competitive market has been fruitless. The Community Court has extended the prohibition of article 86 to include exclusionary practices, but it has not read out of the EEC Treaty the prohibition on imposing harsh terms by contract and this gives rise to grave difficulties. There is a grain of truth in the witticisim that if a dominant firm charges less than other firms, it is engaging in a predatory pricing, if more, it is overcharging and if the same, there must be a cartel!

3. Merger Control

The mergers legislation is drafted in very broad terms about the activities of businesses ceasing to be distinct or coming under common control. Since there is no duty on the merging firms to notify, it does not matter if the definition is over-inclusive. Control may be obtained in three stages: power materially to influence policy, control, or becoming inter-connected bodies corporate. Within six months of any of these events becoming public, the Secretary of State has power to refer a qualifying merger for investigation by the Monopolies and Mergers Commission. A merger qualifies when the assets taken over are worth 30 million pounds in the companies' books or where, as a result of the merger, a single firm supplies or exports a quarter of the products specified in the reference in or from the United Kingdom. The assets test includes vertical or conglomerate mergers, but they are less likely to be referred than large horizontal ones, and the Commission focusses on the effects on competition, although the expected anticompetitive efects may be outweighed by other public interest considerations.[34] We have had no difficulty about applying the provisions to individuals, nor to the acquisition of shares, assets etc. When a merger is not illegal, but merely gives rise to a discretionary power to investigate, one can afford to have a wide definition of a merger. The legislation merely provides for investigations to be made. Unless the Secretary

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34. E.g., see its report on the proposed merger: *Weidmann & Whitely; A Report on the Proposed Merger,* 1975, Cmnd. 6208, para 126. Where the Commission considered that the merger would probably lead to somewhat higher prices, but concluded that it was not expected to operate against the public interest as it would be efficiently managed, and this would improve employment in the United Kingdom and its balance of payments.

of State makes an order forbidding the merger and the order is infringed, there is no scope for private remedies.

The main action takes place when the Office of Fair Trading decides whether to advise the Minister to refer a proposed merger to the Commission. Less that 4% of the mergers that qualify for investigations are, in fact, referred.[35] The main criterion is the likely competitive effect, but the Commission is required also to consider other matters, such as the effect on employment. I have noticed no trend in recent years to approve proposed mergers in tightly oligopolistic markets. Indeed, in its *Report on Parallel Pricing*,[36] the Commission stated that one of the most appropriate remedies for oligopolistic inter-dependence was to watch fairly concentrated industries and prevent their becoming more concentrated through merger.

Merger control in the EEC is in its infancy and will not be discussed here.

In my view, Australians have nothing to learn from us. Nevertheless, some of the reports of the Monopolies and Mergers Commission in the United Kingdom have analysed helpfully the likely effects of mergers on competition, and these may be of interest. The Monopolies and Mergers Commission in the United Kingdom is required to consider the public interest generally and not only competitive factors. This includes anything that the Commission considers relevant and, in particular, the matters specified in a list. Usually it focusses on the competitive issues, but has also taken into account other matters that should not be relevant under s.50, such as regional policy, unemployment and even the way in which the shares are to be paid for.[37] In its *Report on Parallel Pricing* in 1973, one of the remedies it suggested was to watch carefully horizontal mergers in concentrated markets. Consequently, there is no view, as in your *Merger Guidelines*,[38] that it is only when a single firm has a very large share of a market the mergers will be controlled.

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35. See A. Paines and M. Reynolds in *Merger Control in the EEC* Kluwer 1988, a book prepared by several firms of lawyers that have offices at 1 Avenue de la Joyeuse Entree in Brussels, at 195.
36. *A Report on the General Effect on the Public Interest of the Practice of Parallel Pricing* July 1973 Cmnd 5300.
37. See, e.g., *Weidmann and Whitely, supra* n.34.
38. Trade Practices Commission, *Merger Guidelines*, Oct. 1986.