ARE CORPORATIONS WITH A SUBSTANTIAL DEGREE OF MARKET POWER FREE TO CHOOSE THEIR DISTRIBUTORS AND CUSTOMERS?

By

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1. Introduction

Under what circumstances can a corporation with a substantial degree of market power refuse to supply goods or services to a distributor or customer? This is perhaps the most vexed question in the whole area of Trade Practices Law. It is a question which was not discussed in the Explanatory Memorandum accompanying the Trade Practices Revision Bill 1986 which gave s.46 its current form. It is a question on which the Trade Practices Consultative Committee (the Blunt Committee) made no recommendation in its report because it was not convinced that any workable solution was available.[1] It is a question on which the Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) is now hearing evidence. It is a question that the High Court of Australia is considering at the time of writing, after hearing argument in *Queensland Wire Industries Pty Ltd* v *The Broken Hill Proprietary Co. Ltd & Anor.*[2] on 29 and 30 June 1988. It is a question that the Trade Practices Commission (TPC) has to consider frequently since small businessmen often complain that their position in the market has been adversely affected by their inability to obtain supplies due to others refusing to deal with them.[3] It is not, however, a question to which a complete answer can be given in the present amorphous state of the law.

2. Relevant Statutory Provisions

Section 46(1) provides that 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 a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct. There are three essential elements in s. 46(1).

First, the sub-section applies only to corporations that have "a substantial degree of power in a market". This requirement is referred to as the threshold test. Secondly, s.46(1) requires a "taking advantage" of this market power. Thirdly, the market power must be taken advantage of with one of the proscribed purposes in paras. (a), (b) or (c) in mind. The requirements of "taking advantage" and "purpose" are intended, apparently, to be separate and distinct concepts; however, it may be that once a proscribed purpose is established a court will more readily infer that there has been a "taking advantage" of market power.

The other sub-sections of s.46 either qualify the operation and scope of subs. (1) or provide assistance with the interpretation of certain terms used in subs. (1). Thus, s.46(2) provides that the market power of all "related bodies corporate" to a corporation is attributed

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1. Trade Practices Consultative Committee, *Small Business and the Trade Practices Act, (1979) paras 9.38 to 9.43.*
2. *An appeal from the decision of Pincus J. Queensland Wire Industries Pty Ltd* v. *The Broken Hill Proprietary Co. Ltd & Anor.* (1987) ATPR 40-810 and the Full Court of the Federal Court of Australia reported at (1988) ATPR 40-841.
3. The only TPC publication issued to date is a one page brochure entitled "Refusal to Deal", which was issued in May 1987 and is addressed to small businessmen rather than their legal advisers.

to that corporation for the purposes of the threshold test. The term "related bodies corporate" is defined in s.4A. Section 46(3) provides a guide to the way in which market power is determined for the purposes of subs. (1). It requires that consideration be given to the extent to which the conduct of the body corporate is, or is not, constrained by competition on the part other participants in the market (competitors), potential entrants to the market, suppliers or customers. Section 46(4) states that the word "power" is synonymous with "market power" and makes clear that a corporation may have power in a market for goods or services either as a supplier or as an acquirer of goods or services in that market. For example, Telecom Australia may have a substantial degree of power in some of the markets in which it buys its equipment. Coles Myer and Woolworths may also have a substantial degree of power in some of the wholesale markets in which they acquire goods. Section 46(5) provides that a corporation shall not contravene subs. (1) by reason only that it acquires plant and equipment. There is no provision in s.88 for conduct in breach of s.46(1) to be authorised, but s.46(6) provides that if conduct which would otherwise have been a breach of ss. 45, 45B, 47 and 50 has been authorised, then it ceases to be a breach of s.46. This is important for corporations with a substantial degree of power in a market, because without s.46(6) they might enter into, say, exclusive dealing arrangements, have them authorised, and *still* find themselves attacked on s.46 grounds.

Section 46(7) is quite unnecessary in the writer's view. It provides that the courts are entitled to infer a "taking advantage" of market power for a proscribed purpose from the conduct of the corporation or of any other person or from the surrounding circumstances. The courts have always had this power and have relied upon it where explicit statements and other direct evidence of purpose is not available.

There are two more sections that should be considered before turning to the case law. They are not contained in s.46 itself. The first is s.4F which provides that where conduct is engaged in with more than one purpose in mind, it is sufficient if a requisite purpose (i.e. one directed to s.46(1)(a)(b) or (c)) is one among other purposes, so long as the requisite purpose was a substantial one. In other words, the requisite purpose need not be the sole or dominant purpose; it need only be an "operative" purpose.

The other relevant section is s.84 which relates to proof of purpose of a corporation. It provides that the "state of mind" of a corporation (which by s.84(6) includes purpose) can be imputed, not only from its board of directors or top management, but also from a servant or agent acting within the scope of his actual or apparent authority. Thus, in seeking to establish whether a corporation has engaged in conduct for one of the proscribed purposes in s.46(1), it may be sufficient that, say, a salesman has made a statement that the conduct in question is intended to damage a competitor.

3. Refusal to Supply — The General Rule

All suppliers, whether they possess a substantial degree of market power or not, are prohibited from refusing to supply a trader on the grounds that he is, or may be, a price discounter. Such conduct is prohibited by s.48. The only exception is where it can be demonstrated that the supplier's products are being used as "loss leader" items.[4]

Similarly, all suppliers, whether they possess a substantial degree of market power or not, are prohibited from refusing to deal with others if the refusal involves conduct that may be categorised as exclusive dealing,[5] or an exclusionary provision,[6] or pursuant to an

4. S.98(2).
5. S.47(1).
6. S.45(2)(a) or (b)(i) and s.4D.

agreement that is substantially anti-competitive.[7] Apart from exclusive dealing which will be considered under a separate heading, this article is not concerned with refusals to supply involving any of these matters.

A distinction can be drawn between a situtation where there have been no previous dealings between the parties and there is an outright refusal to deal by a corporation with substantial market power, and a situation where a co-operative relationship between a supplier with substantial market power and another person or firm, whether a competitor or not, is severed. That co-operative relationship may take any number of different forms but it generally involves some degree of dependence by the customer or distributor on the supplier with substantial market power.

The former situation, where there have been no previous dealings between the parties, can be dealt with shortly. It is not reasonable to expect a supplier with substantial market power to supply each and every newcomer if it would not be to its commercial advantage to do so, and with one possible exception, it seems s.46 does not require this. It is understandable that a supplier should take an interest in the circumstances and types of outlets in which his products are resold by distributors. The particular characteristics of some products may require a policy that restricts distribution to a limited number of outlets. This may reflect the perishable nature of the product and the need to ensure that sales occur under special conditions. Or it may be justified by the technically sophisticated nature of the product which requires special skills and facilities for pre-sales and post-sales servicing. As a general rule, a corporation that adopts a restrictive distribution policy because it helps to keep the cost of production or distribution down, or because it offers a beneficial strengthening of the product's brand image, will not act in breach of s.46 if it refuses to supply a newcomer. Thus, for example, in *Tavernstock Pty Ltd* v. *John Walker & Sons Ltd*[8] the applicant was refused supplies of Johnny Walker Red Label Whisky by the respondent. An interlocutory injunction was refused, Franki J. stating that: "I do not read s.46 as requiring a trader to supply goods to a purchaser, that is provided there is no breach of that section."[9]

4. **The Essential Facility Doctrine**

To this general rule there may be one exception and that is where, even though there have been no prior dealings between the parties, there is, in effect, no alternative supplier and the product concerned is an essential facility. An essential facility involves a natural monopoly market. Such a market exists where demand is so limited that it will support only one supplier operating at maximum technical efficiency. The most important natural monopolies are public utilities such as electricity provision and distribution, water and natural gas distribution, telephones and telegraphs which are subject to regulation by statutory authorities; however, not all natural monopolies in Australia are regulated.

In the United States an essential facility doctrine is well established. The United States case law sets forth four elements necessary to establish liability under the essential facilities doctrine. They are:

(a) control of the essential facility by a monopolist;
(b) a competitor's inability practically or reasonably to duplicate the essential facility;
(c) the denial of the use of the facility to a competitor; and
(d) the feasibility of providing the facility.[10]

7. S.45(2)(a) or (b)(ii).
8. (1980) ATPR 40-184.
9. *Ibid.* at 42,525.
10. *MCI Communications Corp.* v. *American Telegraph and Telephone Co.* (1983) 708 F.2d 1081 at 1132-1133.

Thus, for example, in *Otter Tail Power Co.* v. *United States*[11] there were three markets: the market for the generation of electric power, the market for its transmission and the market for its retail distribution. Four towns including Elbow Lake wanted to get into the retailing business. The market for power generation was highly competitive and Elbow Lake wanted to shop among the generating firms to get the best price. Otter Tail generated power and sold power in the retail market. It also owned almost all the transmission lines which were essential for moving power to local distribution points. It refused to transmit power for Elbow Lake thereby prohibiting it from shopping among the generators for the lowest price and selling power at retail for less than Otter Tail. It also refused to sell power to Elbow Lake at wholesale prices. The Supreme Court enjoined Otter Tail from using its bottleneck in transmission lines to prevent Elbow Lake from receiving the benefit of competition at the generating level. It rejected Otter Tail's defence that municipalities like Elbow Lake would undermine its profitability in the retail market if it were forced to transmit power on their behalf. The Court held that the Sherman Act assumes that an "...enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency."[12]

It can be seen from *Otter Tail* that the harm which the essential facility doctrine is designed to overcome is the problem of leveraging. A firm controlling an essential facility such as electricity transmission is able to use its power in that market to eliminate or reduce competition in the "upstream" market for electricity generation or "downstream" market for the retail supply of electricity. The essential facility is used to suppress horizontal competition in another market that might be of benefit to consumers.

In the United States, the essential facility doctrine is not confined to cases where a monopoly of say, electric power, transport, communications or some other essential service is involved. In *Fishman* v. *Wirtz*,[13] for example, the Seventh Circuit of the Court of Appeals (Easterbrook J. dissenting) upheld a decision of the District Court that refusal to lease the Chicago Stadium violated s.2 of the Sherman Act. The case arose out of bidding to acquire a professional basketball team, the Chicago Bulls. One group of buyers put together by the plaintiff, Fishman, was unsuccessful because it was unable to obtain a satisfactory lease commitment from the defendant Wirtz, the President and owner of the Chicago Stadium Corporation. The Chicago Stadium was regarded by the National Basketball Association as the only arena acceptable for the presentation of professional basketball in Chicago. Wirtz's refusal to lease the Chicago Stadium was motivated by a desire to ensure that the Chicago Bulls franchise would be acquired by a group of buyers of which he was a member. The Court observed:

> The so-called 'essential facilities doctrine' imposes upon a firm controlling an essential facility — that is, a facility that cannot reasonably be duplicated and to which access is necessary if one wishes to compete — the obligation to make that facility available on non-discriminatory terms. A refusal to deal in the context of an essential facility violates section 2 because control of an essential facility can 'extend monopoly power from one stage of production to another, and from one market to another'.[14]

It may be that a similar doctrine applies in Australia. Some early support for its existence is to be found in *MacLean and Anor* v. *Shell Chemicals (Australia) Pty Ltd*.[15] The relevant

11. (1973) 410 U.S. 366.
12. *Ibid.* at 380.
13. (1986) 51 BNA, *Antitrust and Trade Regulation Report* 838.
14. *Ibid.* at 846.
15. (1984) ATPR 40-462.

product market was that for the raw material cypermethrin used in the production of an insect-killing chemical product for use on sheep, and the only effective source of supply was through the respondent. The respondent was prepared to supply the raw material but only on the basis that the applicants enter into a joint venture. The joint venture negotiations broke down and thereafter the respondent was only prepared to supply on new conditions which, the applicants alleged, were not commercially viable and would have effectively destroyed or substantially damaged their ability to compete in the "downstream" market. On the basis of this evidence, Toohey J. was prepared to grant an interlocutory injunction restraining the respondent from failing to supply the raw material in accordance with the terms of the joint venture agreement.

One of the arguments relied upon by the applicant in the *Queensland Wire Industries* case was that s.46, as presently drafted, is broad enough to include an essential facilities doctrine, similar to the United States doctrine.[16]

In that case the following facts were established:

(a) BHP manufactured a steel fence post known as the "star picket" which was by far the most popular rural fencing post in Australia. BHP was the sole domestic producer of star pickets which it manufactured from an intermediate steel product known as Y-bar. There was no significant import competition.
(b) QWI competed with BHP principally in Queensland and Northern New South Wales in the rural fencing market comprising wire, fence posts and hinges. It manufactured its own wire from wire rods supplied by BHP.
(c) The large pastoral houses purchased their supplies of rural fencing materials from BHP because it was able to deliver a full range of fencing products and there were advantages in having only one supplier.
(d) QWI sought supplies of Y-bar from BHP in order to manufacture its own star picket fence posts, and thereby be in a position to deliver a full range of fencing products to the large pastoral houses.
(e) BHP refused to supply QWI with Y-bar except at a price which would make it unprofitable for QWI to manufacture star picket fence posts and sell them competitively.

Pincus J. considered two markets to be relevant: that for steel and steel products in Australia and that for the supply of rural fencing materials in Australia. His Honour found that "...BHP has, and has had at all material times, a substantial degree of power in the relevant markets..."[17] In addition, Pincus J. had little difficulty in finding that the necessary purpose existed. His Honour held that "... in the circumstances it should be inferred that the purpose of BHP's refusal to supply fell at least within paragraph (b) of s.46(1) — prevention of entry into a market."[18]

Pincus J. was satisfied of the presence of all elements necessary to establish a contravention of s.46(1) except "taking advantage" in the sense in which he construed the term. According to Pincus J., the term "taking advantage" is to be construed in a pejorative sense not a neutral sense. His Honour adopted the wording of Donald and Heydon[19] and held that the expression refers to "...abuse of position, to something unusual, predatory, forceful or deceitful."[20] Having defined the term in this way, his Honour readily admitted that

16. (1987) ATPR 40-810.
17. *Ibid.* at 48,816.
18. *Ibid.* at 48,821.
19. B. Donald and J.D. Heydon, *Trade Practices Law*, Law Book Co. Sydney 1978 at 224.
20. *Supra.* n. 16. at 48,818.

"[w]hether BHP's use of its market power is a misuse is a question on which different minds may well disagree."[21] Pincus J. offered no firm guidance as to how one goes about characterizing conduct as a misuse of market power. His Honour suggested that the matter involves simply a value judgment; that one considers whether the corporation has "... used its monopoly in a way which would ordinarily be regarded as reprehensible..." or "...be regarded in commerce as deserving of criticism."[22]

He concluded that BHP's refusal to supply was not a misuse of its market power. The central point that impressed his Honour was that 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 the completed star picket posts rather than the intermediate material from which it made them.

On appeal,[23] the Full Federal Court construed the term "market" to mean "... a trade or traffic between buyers and sellers, or, indeed between any buyer and arm's length seller..."[24] Since Y-bar had never been sold by BHP to anyone other than its subsidiary, Australian Wire Industries, it could not be said that there was a "market" as defined for Y-bar so as to attract s.46. In the absence of a market for Y-bar it could not be said that BHP had taken advantage of its market power. Accordingly, the Court dismissed the appeal. In so doing, however, it considered the United States cases concerning the essential facility doctrine.

QWI relied on them for the proposition that whilst as a general rule a monopolist may deal or refuse to deal with whom it pleases, this is not so where it controls an essential facility. If it controls such a facility it is, QWI submitted, under a duty to give access to that facility to competitors and BHP's control of Y-bar was claimed to be an essential facility. It was argued that BHP was extending its market power from one stage of production and one market, namely steel products including Y-bar, to another market, namely, the retail sale of rural fencing products including fence posts and wire, and that this form of leveraging was a misuse of market power.

The Full Court did not accept this submission and gave the following reasons:

(a) The essential facility doctrine could not be readily accommodated to the terms of s.46.
(b) The doctrine is simply a gloss on the terms of s.2 of the Sherman Act.
(c) It is difficult to see the limits of the concept of "essential facility". Perhaps electric power is an essential service but not a sports stadium.
(d) If there is such a doctrine how are the courts to regulate the terms upon which supply of the essential facility is to be made available? In *Otter Tail* the existence of a federal regulatory authority may have made all the difference.
(e) The essential facility doctrine should not apply where conduct is engaged in for a legitimate business purpose.
(f) The essential facility doctrine only applies in cases involving discriminatory refusals to deal rather than cases involving a vertically integrated monpolist which had refused to deal at all in an intermediate product and committed it solely to its own manufacturing operations.[25]

On a further appeal to the High Court, the Trade Practices Commission (TPC) made a written submission in support of its application for leave to intervene.[26] The TPC supported

21. *Ibid.* at 48,821.
22. *Ibid.*
23. (1988) ATPR 40,841.
24. *Ibid.* at 49,075.
25. *Ibid.* at 49,076-49,077.
26. The full text of the TPC's Submission is reported in *Trade Practices Commission Bulletin* No.42 May-June 1988 at 6-8.

the appellant's argument that "taking advantage" does not need to be construed in a pejorative sense and by construing the term in that way, Pincus J. added a gloss which was not justified by the context. The TPC argued in favour of a test which is similar to that found in *Berkey Photo Inc.* v. *Eastman Kodak Co.,*[27] namely, whether BHP engaged in conduct which it could not have engaged in a competitive environment. In a competitive market, BHP would not have refused to supply QWI with Y-bar because QWI would have been able to obtain supplies elsewhere. Given that BHP had excess capacity in its steel rolling mills, it would have supplied QWI in a competitive market rather than lose the business to a competitor. Only by supplying QWI could it maximise sales and profits.

The judgment of the High Court in the *Queensland Wire Industries* case is awaited with great interest. It is to be hoped that the Court will take the opportunity to state clearly whether s.46, as presently drafted, is broad enough to include an essential facility doctrine similar to the United States doctrine. Assuming for the moment that the steel products market in Australia is a natural monopoly market, an argument in favour of an essential facility doctrine is that it does not make economic sense to require QWI to build its own production facilities for Y-bar if it wants to make star picket fence posts. If the steel market in Australia will only support one producer the absence of an essential facility provision encourages wasteful duplication and the result is inefficient.

5. **Termination of Dealerships**

The position would appear to be quite different once a distributor has been appointed and supplies have been made available by a corporation with a substantial degree of market power. Section 46 may, in such circumstances, prohibit a refusal to supply based on a proscribed purpose. In *Top Performance Motors Pty Ltd* v. *Ira Berk (Qld) Pty Ltd*[28] and *J. Ah Toy Pty Ltd* v. *Thiess Toyota Pty Ltd,*[29] motor vehicle dealers were cut off for failing to perform satisfactorily. It was held that the termination in each case was to protect the supplier's legitimate business interests and was not a contravention of s.46, since it was not for a proscribed purpose.

By way of contrast, in *Mark Lyons Pty Limited* v. *Bursill Sportsgear Pty Limited,*[30] a dealer who had been engaging in price discounting and whose dealership was terminated for that reason, was successful under s.46. The following facts were established:

(a) Mark Lyons was a Sydney-based ski equipment retailer which operated retail ski shops and also organized warehouse sales of discounted ski equipment.

(b) Bursill was the only Australian supplier of Salomon Alpine Ski Boots. Salomon was a market leader in the field of ski equipment and almost all retail ski shops had to stock Salomon Ski Boots.

(c) Bursill received complaints from other retailers about Mark Lyons' discount warehouse sales and subsequently it refused to supply Mark Lyons with Salomon boots.

Wilcox J. thought that the relevant market could be established by the records kept by the parties which showed figures being kept of competitors, the price movement of other suppliers, delivery schedules and so on. Since the witnesses who gave evidence spoke of the share of the ski boot market enjoyed by Salomon and of its major competitors in Australia, his Honour concluded that the relevant market should be described as the Australian ski boot market.

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27. 603 F 2d 727 (9th Cir. 1979).
28. (1975) ATPR 40-004.
29. (1980) ATPR 40-155.
30. (1987) ATPR 40-809.

Both Salomon and another manufacturer Nordica, each accounted for over 30% of Australian sales. In this case it was held that a one third share of the market was sufficient to satisfy the threshold test because Salomon was widely regarded as the market leader in terms of innovative ideas and because 90% of Australian ski retailers found it necessary to stock Salomon ski boots.

Wilcox J. held that there could be no doubt Bursill acted with one of the proscribed purposes in mind, namely to deter or prevent Mark Lyons from engaging in competitive conduct. Having established this, his Honour appears to have held that it automatically followed Bursill had taken advantage of its market power.

It is interesting to note that Bursill received complaints from other retailers about warehouse sales by Mark Lyons. These other retailers regarded this competition as "unfair"[31] given their overhead costs in maintaining pre-sales and after-sales service to customers. It would seem Bursill acted unilaterally in cutting off Mark Lyons. If Bursill had acted pursuant to an agreement, arrangement or understanding with the other retailers, this would have been an exclusionary provision or group boycott as defined in s.4D and prohibited *per se* pursuant to s.45(2)(a) or (b)(i).

The facts of this case would appear at first glance to fall within the resale price maintenance provisions of the Act, namely s.48 and Part VIII. Mark Lyons was unable to rely on a contravention of s.48, however, because Bursill did not specifiy a price for its ski boots. The specific acts of resale price maintenance set out in s.96(3) provide that a "price specified by the supplier" is an essential requirement.

6. **Exclusive Distribution**

Another recent case involving refusal to supply is the TPC's draft notice revoking the notification of certain exclusive dealing arrangements with the distributors in *Tubemakers of Australia Limited.*[32] In this case Palmer Tube Mills (Palmer) asked the TPC to revoke the notification after Tubemakers had cut off its independent Queensland distributor, Steelmark (Qld) Ltd, for purchasing substantial quantities of tube from Palmer. The relevant market was found to be that for the supply of small diameter thin walled steel pipe and tubing in Australia.[33] Tubemakers' market share was estimated to be 67.8% with Hills, 25.6% and Palmer, only 2.0%. The remainder of the market was supplied by imports. It would appear from this evidence of market share that Tubemakers had a substantial degree of market power sufficient to satisfy the threshold test of s. 46. By revoking the notification in respect of Tubemakers exclusive distribution agreements, Tubemakers lost its interim protection provided by s.93, and was at risk to proceedings being instituted either by the TPC for pecuniary penalties,[34] or to proceedings by Steelmark or Palmer or some other aggrieved party for damages,[35] and other relief provided by Part VI for a contravention of either ss.46, 47 or both.

As regards the effect of Tubemakers exclusive dealing arrangements on competition, it was argued that there were other alternative distributors which Palmer could utilise. Without commenting on whether these alternative distributors would be suitable or not the TPC concluded:

> ... it would be possible for [Palmer] to bring the suggested distributors up to an acceptable standard (if they are not already at that standard), through training and

31. *Ibid.* at 48,793.
32. Decision dated 21 April 1988, as yet unreported.
33. *Ibid.* at para. 6.7.
34. S.76.
35. S.82.

> assistance in investment in extra storage space and handling equipment. This however would be at a cost and given the small capacity of the market for thin walled pipe and tubing compared to other products handled by the distributors (such as structural pipe and tube and steel plate), there may not be sufficient capacity for the alternative distributors to efficiently service the market. Alternatively a distributor may prefer to concentrate on the more frequently used product sizes and ignore the less popular lines, which would be detrimental to [Palmer's] long term plans to expand its production range.[36]

Tubemakers also argued that it was possible for Palmer to supply end users directly, by-passing the distribution chain, since a large segment of the market was composed of end users who purchased their annual requirements in bulk. The TPC observed that:

> ... this avenue of supply is only one segment of the market. By being forced to restrict its supply options, a manufacturer would be impeded in its growth in the market through a restricted production range (servicing a few buyers) and would be subject to a tenuous existence reliant on being successful in a small number of tenders.
>
> Raising the cost of entry to a market is a most effective way of stopping a rival from growing. To be an effective competitor a new entrant such as [Palmer] needs to get a leg or legs into the market and the above alternatives which [Tubemakers] proposes do effectively raise the costs of entry.[37]

A case involving a refusal to supply chocolate and other confectionery by Cadbury Schweppes Ltd to a former distributor, Network Foods Internationals Pty Ltd, is being heard in the Federal Court at the time of writing.[38]

7. Conclusion

It is difficult to give advice, with any degree of confidence, to a corporation with substantial market power on the subject of refusal to supply. It seems that for there to be a "taking advantage" of market power, the corporation's refusal to supply must be characterised as being unusual, predatory, forceful or deceitful. It is likely therefore that the courts and the TPC will look carefully at the reasons given for refusing supplies and where they are not satisfied that they involve some legitimate business reason, the refusal will be condemned. Thus, unless the reason is a strong one, it may be wiser to give no reason. If the test of "taking advantage" of market power adopted by Pincus J. in the *Queensland Wire Industries* case is confirmed by the High Court, it will involve the courts "...exercising a fairly broad supervisory jurisdiction, not one dependent upon precise criteria."[39] According to that test, it now becomes necessary to show not only that the respondent's conduct was motivated by one of the proscribed purposes, but also that it was unusual, predatory, forceful or deceitful according to ordinary commercial principles.

This test bears some similarity to that adopted by Lord Wilberforce in *Esso Petroleum Ltd* v. *Harper's Garage (Stourport) Ltd*[40] where, in relation to the common law doctrine of restraint of trade, his Lordship expressed the view that:

> No exhaustive test can be stated ... The development of the law does seem to show, however, that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts

36. *Supra* n.32 at para. 6.18.
37. *Supra* n.32 at paras. 6.20-6.21
38. *Australian Financial Review, 12 August 1988, 34.*
39. *The Hon. C.W. Pincus, "Trade Practices 1988" Commercial Law Association Bulletin, June 1988, 15 at 17.*
40. *[1967] 1 All ER 699.*

> as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations.[41]

To say that agreements do not restrain trade or are not predatory if they have passed into the accepted, normal currency of ordinary commercial transactions, disregards the foreclosure argument. Consider for example, the care of exclusive distribution agreements for the retail sale of petroleum products. When the first few exclusive dealing agreements are made, competition is hardly affected. Competing suppliers of petroleum products will have no difficulty finding other outlets through which to distribute their products. But what happens when most petrol stations are subject to such a tie? A new entrant will be compelled to acquire its own sites, apply for planning approval and employ its own staff to operate the stations, or be excluded from the market. When such exclusive distribution agreements are in widespread use and regarded as a normal commercial transaction they pose a considerable barrier to new entrants. They are likely to restrain trade and lessen competition substantially.

In the writer's view, such a test is unworkable, and the test of what is a misue of market power should be gauged, not by reference to ordinary commercial principles or usual business practices, but rather by reference to the actual or potential effect the conduct has on competition in the relevant market. Accordingly, s.46 should be redrafted and the courts required to measure and predict the likely effects that the impugned conduct will have on competition. Where the likely effect is a substantial lessening of competition, the conduct should be characterised as a misuse of market power.[42]

Under the current state of the law, where an existing distributor is providing unsatisfactory service, it must be justifiable to warn him and if this is ineffective, to cut him off. It should be remembered, however, that where conduct is engaged in with more than one purpose in mind, s.4F(b) provides that it is sufficient if a requisite purpose (i.e. one directed to s.46(1)(a), (b) or (c)) is one among other purposes, so long as the requisite purpose was a substantial one.[43] If, however, the respondent can establish that it was motivated *entirely* by some other purpose, such as poor performance, then there will be no "taking advantage" of market power for one of the proscribed purposes.

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41. *Ibid.* at 729.
42. For a perceptive discussion of such a test, see P. Clarke, "Recent Developments in the Australian Law of Monopolisation", a paper presented at the Commerce Act Workshop conducted by the Faculty of Law, Monash University, 21-22 May 1988, in Wellington.
43. See *Ron Hodgson (Holdings) Pty Ltd* v. *Westco Motors (Distributors) Pty Ltd & Ors* (1980) ATPR 40-143 and *Williams and Anor* v. *Paperware Pty Limited* (1987) ATPR 40-871.