LOWERING THE MONOPOLY POWER THRESHOLD: AN EVALUATION OF THE AUSTRALIAN MONOPOLIZATION AMENDMENTS AND THEIR LIKELY RESULTS

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I MONOPOLIZATION 1974-1985: THE LEGISLATIVE FORMAT

Section 46 of the Australian Trade Practices Act was enacted in 1974 with effect from 1 October 1974. It was entitled "Monopolization" and provided that a corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position:

(a) to eliminate or substantially to damage a competitor in that market or in another market;
(b) to prevent the entry of a person into that market or into another market; or
(c) to deter or prevent a person from engaging in competitive behaviour in that market or in another market.[1]

Section 46(3) provided that a reference to a corporation in a position substantially to control a market for goods or services

> . . . includes a reference to a corporation which, by reason of its share of the market, or of its share of the market combined with

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[1] There are various other provisions of s. 46 which, for purposes of simplifying the main text, are not referred to in such text. Section 46(2) provides that market control shall be assessed not only by reference to the control exercised by any particular company but by reference to the control exercised by that company and any other company associated with it. Section 46(4) gives exemptions in relation to a company engaging in conduct not in breach of s. 45 (relating, in general terms to horizontal agreements between competitors); s. 47 (relating to exclusive dealing) and s. 50 (relating to company mergers) if the Trade Practices Commission has authorized the practice on public benefit grounds or if (pre 1 July 1977) the practice had been cleared by the Commission as not being anti-competitive (clearance was abolished with effect from 1 July 1977).

availability of technical knowledge, raw materials or capital, has the power to determine the prices, or control the production or distribution of a substantial part of the goods or services in that market.

In all relevant major respects s. 46 survived the somewhat drastic surgery performed on other areas of the Trade Practices Act with effect from 1 July 1977. The only relevant amendment to s. 46 for present purposes was the insertion in 1977 of a "purpose" test. Thus illegality followed post 1 July 1977 only if the relevant conduct was taking advantage of the market power held "*for the purpose of*" achieving one or more of the prohibited ends stated above.[2] "Purpose", however, did not bear its common law meaning of "dominant purpose". Section 4F of the Act was inserted to state that conduct is engaged in for a particular purpose if the conduct includes a particular purpose and the included purpose is a substantial purpose of the conduct.

Some immediate observations can be made on the legislative format adopted in the 1974 to 1985 period.

(a) The offence is a *per se* offence. If proven, a substantial lessening of competition does not have to be shown. Competition assessments are relevant only to the extent that competition is a component part of demonstrating the offence – for example, in relation to preventing or deterring competitive behaviour [see (c) above]. An assessment of the effect of certain actions *on competitive behaviour* is, however, a quite different assessment from that involved in assessing a substantial lessening of competition *in a market overall.*

(b) Monopolization conduct was incapable of being authorized by the Trade Practices Commission. The question, therefore, of whether the conduct had redeeming public benefit was thus irrelevant to whether there was a breach of the legislation.[3]

(c) The Australian legislature has rejected the "Enquiry Type" approach to monopolization adopted in many other countries, such as the United Kingdom from which Australia draws a great deal of its legislative precedent. Since 1974, there has been no articulated demand for an "Enquiry Type" approach to monopolization activities in a trade practices sense though there are many precedents in other areas such as the Prices Surveillance

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[2] There were other consequential drafting amendments to ss. 46(1) and 46(2) involving associated companies. Section 46(3) was amended in minor ways, as were other subsections of s. 46. None of these amendments are of significant relevance to the gist of the present discussion.

[3] The Trade Practices Commission in Australia is empowered to authorize most horizontal agreements between competitors (other than price fixing of prices for goods), all exclusive dealing arrangements and mergers if (in general terms) there is public benefit sufficient to outweigh any anti-competitive detriment. Pre-1 July 1977, the Commission could also clear the above arrangements if they did not have significant anticompetitive effect. The clearance procedure was abolished with effect from 1 July 1977. Rates of authorization have, however, not been high. For an evaluation of the authorization procedure see W. J. Pengilley: "Public Benefit in Anticompetitive Arrangements: Australian Experience since 1974", (1978) 13 *Antitrust Bulletin* 187. Neither the Authorization or Clearance Procedures has ever been available to protect Monopolization conduct from breach of the legislation.

Act [dealt with later in this paper—see Part VI] and in relation to statutory monopolies such as those conferred by the Australian "two airline" policy.[4]

(d) The legislative sanctions for a breach of s. 46 were as follows:
- —A maximum pecuniary penalty of $250,000 upon a corporation. Individuals may be "knowingly concerned" or "aid and abet" a breach. The penalty imposed on individuals is a maximum of $50,000. Proceedings for pecuniary penalties may be brought only by the Attorney-General or the Trade Practices Commission.
- —Any person damaged by an action in breach of s. 46 may recover damages. Single damages only are recoverable.
- —The Attorney-General, the Trade Practices Commission or "any other person" may seek an injunction restraining a breach of the section.
- —All procedures for injunction, damages or pecuniary penalty were to be brought in the Federal Court of Australia which court's jurisdiction was exclusive.

Except in relation to remedies (see (d) above), the monopolization provisions have been dramatically altered by the 1985 amendments. These amendments are discussed in Parts IV and V of this paper. Prior to discussing the amendments, however, it is necessary to look at the Australian experience of monopolization as it happened or, in many cases, as Australian business persons and lawyers thought the law impacted on commercial activity. This discussion is in Parts II and III of this Paper. Part II is a discussion of relevant United States decisions. This is because so many of these decisions are, or are thought to be, applicable to Australian monopolization law.

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[4] A variety of legislative enactments give rise to the "two airline policy". In many ways the best layperson's description of the policy is set out in *The Submission of the Government of Western Australia to the Independent Review of Economic Regulation of Domestic Aviation* (November 1985). This submission strongly criticises the two airline policy and, in the writer's view, repays study for the points it makes on both a theoretical and practical basis. The submission describes (at p. 16) the "two airline policy" in the following words:

> "The two airline policy is a disarmingly simple concept. The Commonwealth Government decides that it is in Australia's best interests to have only two major domestic airlines. It then agrees to licence only TAA and Ansett to operate on major trunk routes.
>
> The reality is more complicated because the Commonwealth Government lacks the constitutional power to implement such a licensing policy. In fact, it is the Commonwealth's ability to control the importation of aircraft under the trade and commerce powers of the Constitution which underpins the two airlines policy. Under the Airlines Agreement, the Commonwealth agrees not to issue an import permit for aircraft capable of competing on trunk routes unless the operator agrees to be bound by the rules of the two airlines policy (without, of course, gaining any of the benefits). If Australia had an aircraft manufacturing industry capable of producing trunk route equipment, the two airline policy would collapse virtually overnight".

At the time of writing the future of the two airline policy is subject to review by the Independent Review Committee referred to above. Further, both East-West Airlines Limited and Mr. Bob Ansett of Budget Rent-A-Car have announced their intentions to challenge the constitutionality of the arrangements. It is understood that about 60 submissions have been received by the Independent Review Committee only three of which favour the retention of the arrangements. These submissions were from Ansett Airlines, Trans Australia Airlines and the airline employees section of the Transport Workers Union. Such parties are the obvious beneficiaries of the "two airline policy".

II SOME GUIDANCE ON WHAT MONOPOLIZATION IS ALL ABOUT: UNITED STATES DECISIONS

At the time of enactment of s. 46, there was only overseas experience upon which to attempt to assess what the Australian law was likely to mean. The Federal Court of Australia has frequently cited United States cases in its judgments and, in some cases, has staunchly advocated the view that Australia should follow the United States experience.[5] It is, therefore, of great practical Australian relevance to know what the United States courts have said on the subject of monopolization.

Section 2 of the United States *Sherman Act* is generalistic in the extreme. It merely prohibits monopolization or attempts to monopolize without defining the offence further. Unlike the Australian provisions, it also specifically covers combinations and conspiracies to monopolize.

Whilst this paper does not purport to be a treatise on United States monopoly law, the salient holdings should be noted because of their direct Australian relevance.

1. *The amount of market power required to trigger s. 2 of the United States Sherman Act*

The first question to which United States courts have directed their attention is the amount of market power required in order to come within the *prima facie* ambit of s. 2 of the *Sherman Act*.

The relevant power has been said to be the power either to set prices or to exclude competition in the relevant market.[6] The outer boundaries of the relevant market are ascertained by a consideration of geographic and product markets taking into account reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it and taking into account the cross-elasticity of production facilities.[7]

Given that the relevant market can be ascertained (a not simple task and one which is frequently determinative of the whole issue being litigated) the question of market power has primarily been assessed by reference to market share. In this regard:

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[5] See, in particular, for example, the judgment of Sheppard J. in *O'Brien Glass Industries Ltd* v. *Cool & Sons Pty. Ltd.* 1983 ATPR 40-376 (Full Court of the Federal Court of Australia). This decision relates to price discrimination. The Full Court found the United States Supreme Court decision in *FTC* v. *Anheuser Busch Inc.* 363 US 536 (1960) totally applicable to s. 49 of the Australian *Trade Practices Act*. The reasons were variously expressed in the judgments but, in essence, amounted to a view that the Australian legislation was enacted having the United States legislation in mind and the Australian legislature must be taken to have known of the United States holdings and their effect.

[6] *U.S.* v. *E. I. du Pont De Nemours* 1956 Trade Cases ¶68369 (U.S. Supreme Court); *U.S.* v. *Grinnell Corp.* 1966 Trade Cases ¶71,789 (U.S. Supreme Court).

[7] See *Brown Shoe Inc* v. *U.S.* 1962 Trade Cases ¶70,366 (U.S. Supreme Court). Submarkets may exist for antitrust purposes (see *U.S.* v. *Grinnell supra* n. 6). For an analysis of the market and submarket concepts utilising *Brown Shoe* see the determination of the Australian Trade Practices Tribunal in *QCMA and Defiance Holdings* 1976 ATPR ¶40-012. The U.S. *Brown Shoe* and the Australian *QCMA* analysis has also been adopted in New Zealand (see *Nathan/McKenzie Merger Decision of the New Zealand Commerce Commission*: Decision 42A of 15 July 1980).

(a) Monopoly cannot be shown by proving a manufacturer's control of his own product because a manufacturer cannot monopolize his own product. The relevant question is whether there is control of a relevant *market.*[8]

(b) In his landmark 1945 *Alcoa* decision,[9] Judge Learned Hand said that ninety per cent of control of output "is enough to constitute a monopoly; it is doubtful whether sixty to sixty four per cent would be enough; and certainly thirty-three per cent is not". More recent cases seem to have reached the benchmark position that less than a 50% share of the relevant market is not enough to demonstrate a monopoly position.[9a] A showing of a 25%-30% market share has been, without equivocation, stated to be inadequate market power for monopoly purposes.[10]

2. *Conduct constituting monopolization*

Set out below are some of the more prominent United States holdings where a monopolization breach of the *Sherman Act* has been found. The list is by no means meant to be exhaustive but it does illustrate the type of conduct sought to be controlled by a monopolization provision of a competition statute.

(a) *Obtaining a patent by fraud and then defending the patent groundlessly in patent interference proceedings*[11] *where the patent dominates the real market.* There are also various other patent abuses which may constitute monopolization.

(b) *Predatory pricing conduct.* This conduct is conduct which seeks to eliminate competition and, therefore, enhance a firm's long term benefits of monopoly power. Such conduct is not true competition. It makes sense only because it eliminates competition. A United States *prima facie* test is the so-called *Areeda-Turner* test.[12] This test states that if the pricing of a company is below

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[8] *U.S.* v. *Grinnell Corp supra* n. 6.

[9] *U.S.* v. *Aluminium Co. of America* 148 F.2d 416 (the *Alcoa* Case). Fifty percent market share of the market held inadequate in *Mowery* v. *Standard Oil of Ohio* 463 F. Supp 762 (N.D. Ohio 1976) affd. 590 F.2d (6th Cir 1978); *Cliff Food Stores* v. *Kronger Inc.* 1969 Trade Cases ¶72,923 (5th Cir 1969).

[9a] *Supra* n. 9.

[10] See *Advisory Information and Management Systems* v. *Prime Computer Inc.* 1984–2 Trade Cases ¶66237 (D.C. Tenn) and the numerous cases cited at p. 67,017 of that decision. A thirty per cent market share was held insufficient in *Richter Concrete* v. *Hill Top Concrete* 1982–3 Trade Cases ¶65503 (6 Cir. 1982).

[11] See *Brunswick Corp.* v. *Riegel Textile Corp* 1985 1 Trade Cases ¶66333 (7th Cir). For a general summary of the U.S. position see P. Areeda and D. F. Turner *Antitrust Law*, Vol. III, ¶707. It is not here relevant to discuss all forms of misuse of a patent which may constitute monopolization. One of the main practices held in violation of the *Sherman Act* is to use the patent to coerce the sale of the non patented articles [see *Morton Salt* v. *Suppiger* 314 US 488 (1942).] For a general summary of the U.S. Patent position see *Hull* v. *Brunswick Corp.* 1983–1 Trade Cases ¶65329 (D.C. Oklahoma) and *Westinghouse & Mitsui* v. *U.S.*, *infra* n. 41.

[12] See P. Areeda & D. F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", 88 *Harv. L. Rev.* 697 (1975); see also the various discussions in Scherer, "Predatory Pricing and the Sherman Act: A Comment", 89 *Harv. L. Rev.* 869 (1976); Areeda & Turner, "Scherer on Predatory Pricing: A Reply", 89 *Harv. L. Rev.* 891 (1976); Scherer, "Some Last Words on Predatory Pricing", 89 *Harv. L. Rev.* 901 (1976); Williamson, "Predatory Pricing: A Strategic and Welfare Analysis",

marginal cost or average variable costs, the onus shifts to the defendant company to demonstrate absence of predation. This can be demonstrated in various cases involving commercial justification. For example, promotional activity below cost pricing may be a valid method of entry by a firm into a market.

A predatory action is one in which a "firm seeks to impose itself on other firms not garner gains for itself".[13] Another test is whether the action is "what a rational firm would find it prudent to do".[14] The so-called *Areeda-Turner* test of pricing predation referred to above has received general, but not unqualified, United States court support.[15]

In particular, there will be predation where there is cost cutting in one particular area the intent being to drive a particular local entity out of business. Indeed it has been said that this is the "main evil" at which laws against predation are aimed.[16]

(c) *Cases in which there is an intent to monopolize which can be gleaned from the nature of the conduct, the history of the relationships between the parties or by surrounding circumstances.* This paper does not intend to discuss at length the doctrine of "intent" as that doctrine has been interpreted by United States courts. However, in a number of cases, United

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[12] *continued*
87 *Yale L.J.* 284 (1977); Areeda & Turner, "Williamson on Predatory Pricing", 87 *Yale L.J.* 1337 (1978); Williamson, "Williamson on Predatory Pricing II", 88 *Yale L.J.* 1183 (1979); Baumol, "Quasi-Performance of Price Reductions: A Policy for Prevention of Predatory Pricing", 89 *Yale L.J.* 1 (1979); R. Bork, *The Antitrust Paradox* 149-55 (1978); Posner: *Antitrust Law: An Economic Perspective* (1976) at 188; Areeda & Turner: *Antitrust Law* (1978) at 711-712.

[13] *Richter Concrete supra* n. 10.

[14] *William Inglis & Sons Baking Co.* 1982–1 Trade Cases ¶64545.

[15] See *William Inglis supra* n. 14 above for detailed citation of criticisms of the Areeda-Turner test and citation of cases where the Courts have qualified their acceptance of such test. For an excellent discussion of predatory pricing see *Transmedia Computer Co.* v. *IBM* 1982–3 Trade Cases ¶65218 (9th Cir) and *D. E. Rogers Associates* v. *Garner Denver Co.* 1983–2 Trade Cases ¶65668 (6th Cir). See also *O'Hommel* v. *Ferro Corp.* 1981–2 Trade Cases ¶64264 (3rd Cir). Note also that Areeda and Turner have somewhat modified their original theory [Areeda & Turner: *Antitrust Law* (1978)]. See also the various discussions cited in n. 12 above.

[16] *Moore* v. *Meads Fine Bread Co.* 1954 Trade Cases ¶67906 (U.S. Sup Ct); 348 US 115 (1954); *Maryland Baking Co.* v. *FTC* 1957 Trade Cases ¶68681 (4th Cir); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.* 1959 Trade Cases ¶69448 (10th Cir); *E. B. Muller & Co.* v. *FTC* 1944 Trade Cases ¶57231 (6th Cir); *Hardwick* v. *Nu Way Oil Co.* 1978–1 Trade Cases ¶61909 (D.C. Tex). (Subsidising price cutting in one service station from profits in another described as "a classic claim of discriminatory price cutting"). In *O'Hommel* v. *Ferro Corp.* 1981–2 Trade Cases ¶64264 (3rd Cir) geographic price discrimination was said to be "the main evil" at which price discrimination was aimed. Although various cases relating to predatory conduct have arisen in the context of price discrimination, it has been held that "the principles behind proof of predatory intent in *Sherman Act* claims are 'equally applicable' to proof of predatory intent in a Robinson Patman suit" and that the two statutes "are directed at the same economic evil and have the same substantive content". [*D. E. Rogers Associates* v. *Gardner Denver Co.* 1983 Trade Cases ¶65668 (6th Cir) at 69299-113 and cases there cited.]

The Australian Trade Practices Consultative Committee [The Blunt Committee] in its report on *Small Business and the Trade Practices Act* (Vol. 1: Dec. 1979, 100-101) largely endorses the view put in *D. E. Rogers Associates (supra).* It states that " . . . price discrimination is but one manifestation of abuse of market power and should be regulated under the general provision section 46 (monopolization) . . ." It recommended repeal of the Australian price discrimination law. This recommendation has not been adopted. In a governmental policy document [*Trade Practices Act–Proposals for Change* (February 1984)] the government proposed a strengthening of the price discrimination legislation but these proposals were abandoned in the 1985 amendments to the *Trade Practices Act.*

States courts have drawn inferences from one or more of the above factors. Some more prominent holdings in this regard are:

(i) *Eastman Kodak* v. *Southern Photo* (1927)[17]

Southern Photo Materials was a wholesaler of photographic materials in Georgia. For a long time, it dealt in Kodak goods at "trade" prices. Kodak acquired control of competing wholesalers in Georgia and attempted, unsuccessfully, to buy out Southern Photo. Kodak then refused to deal except at retail prices.

Held monopolization.

(ii) *Klearflax* (1945)[18]

Klearflax was the only supplier of a particular type of linen rug. One of its distributors successfully underbid it for a government contract. When Klearflax found out about this, it refused to supply the rugs needed to fulfil the contract. It also reduced the discounter to the level of a jobber this involving a lower discount level.

Held monopolization.

(iii) *Lorain Journal* (1951)[19]

A newspaper reached 90% of the families in Lorain, Ohio, even though it had a circulation of only 20,000. The town could not support a rival paper. It could, however, support a radio station. One was set up in 1948. As soon as the station was set up, the newspaper made it a condition of acceptance of advertisements that the advertiser should not advertise by radio. The newspaper monitored radio advertising to ensure compliance.

Held monopolization.

(d) *Cases in which the relevant monopoly power has been obtained by combination or conspiracy.*

In some of these cases, the relevant monopoly power has been achieved by combination or conspiracy. In other cases, a separate legal entity has been incorporated. The formalities are of little relevance to United States law because the concept of

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[17] *Eastman Kodak* v. *Southern Photo Materials* 273 US 359 (1927). The United States Supreme Court believed that "the circumstances disclosed in the evidence sufficiently tended to indicate (monopolistic) purpose" in the refusal to deal involved (at 375).

[18] *U.S.* v. *Klearflax Linen* 1944-47 Trade Cases ¶57,407 (E. D. Minn)—"Not only did (Klearflax) set out to prevent floor products from competing with it, but it also successfully dissuaded other distributors, jobbers etc. from bidding on this government contract. Klearflax having a monopoly in the manufacture of linen rugs, had the power, and exercised it, so as to restrain any competition between itself and the distributors for this government business".

[19] *Lorain Journal* v. *U.S.* 1950-51 Trade Cases ¶62957 (U.S. Sup. Ct.). The trial court found execution of a plan "conceived to eliminate the threat of competition from the (radio) station". The court found expressly that the purpose and intent of the procedure was "to destroy the broadcasting company". Note the somewhat divergent reasoning in *Times Picayune Co.* v. *U.S.* 1953 Trade Cases ¶67494 (U.S. Sup. Ct.). To the extent that there is a conflict in the cases the *Lorain Journal* reasoning is clearly preferable—see Dirlam & Kahm *Fair Competition: The Law & Economics of Antitrust Policy* (Cornell Uni Press 1954).

combination or conspiracy is specifically built into the statutory definition of monopolization under s. 2 of the *Sherman Act*. They are however, of relevance to Australian law because no concept of combination or conspiracy is built into s. 46 of the Australian Trade Practices Act. If there is a separate incorporated entity, then such entity can monopolize under s. 46 of the Australian Trade Practices Act. If there is no such separate incorporated entity, then it appears as if proceedings have to be taken under other sections of the Trade Practices Act which specifically deal with the question of combinations and conspiracies.[20]

More prominent United States holdings in this field are:

(i) *Terminal Railroad Association of St. Louis* (1912)[21]—in which case various railroad companies together bought up terminal facilities on the Mississippi River at St. Louis thus denying competing companies the only access across such river. This conduct was held to be monopolization and the case is the judicial birth of the "bottleneck" monopoly theory.

(ii) *U.S.* v. *Associated Press* (1945)[22] in which the United States Supreme Court held that a trade association is not entitled to charge discriminatory high entry fees for association membership where such membership is basic to conducting business. In this case, a new entrant newspaper was unable to conduct business without access to Associated Press wire service facilities. These were *de facto* denied because of the high membership fees on entry to Associated Press coupled with an absolute right to deny such entry.

(iii) *Gamco* v. *Providence Fruit and Produce Building* (1952)[23]—held that the discriminatory exclusion of a party from warehousing facilities with specific market attributes in terms of buyer attraction and economical transport delivery facilities constituted monopolization.

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[20] For example, s. 45 relating to anticompetitive arrangements and understandings and to collective boycotts and s. 45A(1) relating to arrangements and understandings fixing, controlling or maintaining price.

[21] *U.S.* v. *Terminal Railroad Association of St. Louis* 224 U.S. 383 (1912). Note the distinction drawn between this case and trade fair "essential facilities" in *Interface Group* v. *Gordon Publications Inc.* 1983–1 Trade Cases ¶65466 (D.C. Mass).

[22] 326 U.S. 10 (1945). The trial court stated that the restrictive provisions involved "would act as a deterrent" and might "prove as a complete bar to the admission (of membership)" (see n. 6 to decision). A further finding was that "it is practicably impossible for any one newspaper alone to establish or maintain the organisation requisite for collecting all the news of the world or any substantial part thereof" (see n. 9 to decision).

[23] 194 F 2d 484 (1st Cir. 1952) The court said "where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantages over competitors prohibits one previously acceptable from hawking his wares beside them . . . they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately justifiable by reasonable business requirements establishes a prima facie case for the purpose of monopolization". Note contrast of this case with *Interface Group* decision (*supra* n. 21).

(iv) *Silver* v. *The New York Stock Exchange* (1963)[24]—held that a stock exchange with a monopoly of telephone communications to the floor of the exchange was not entitled to disconnect member services without first giving a fair procedural hearing to such member.

(v) *California Motor Transport Co* v. *Trucking Unlimited* (1972)[25]—where it was held that road carriers could infringe s. 2 of the *Sherman Act* if they combined to harass and deter competitors from having free and unlimited access to agencies and courts, and to defeat that right by massive, concerted, and purposeful activities. This is so notwithstanding the fact that it is the right of citizens to petition government. In essence monopolization occurs if there is a use of administrative and judicial tribunals which constitutes a sham and the intent in using such tribunals is to foreclose market access by resort to litigation to defeat or delay competitor entry.

3. *Conduct held not to constitute monopolization*

There have been a number of United States cases in which monopolization has been alleged but not found by the courts. Courts have utilised a type of "rule of reason" to allow legitimate conduct and thus allow a defendant to invoke "business justification" for what he has done.

Some of the more relevant principles which have been established in this area are as follows:

(a) A party does not have to pre-disclose technology to a competitor. This appears to have been definitively decided in the *Berkey-Kodak Case*[26] in which the Second Circuit Court of Appeals said:

> Withholding from others advance knowledge of one's new products . . . ordinarily constitutes valid competitive conduct. Because . . . a monopolist is permitted, and indeed encouraged . . . to complete aggressively on the merits, any success that it may achieve through the process of invention and innovation is clearly tolerated by the antitrust laws.

(b) Similarly a monopolist has the right to redesign its equipment and has no duty to help peripheral equipment manufacturers survive or expand.[27]

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[24] 373 U.S. 341 reh den. 375 U.S. 870 (1963). Note contrast between this case and *Interface Group Decision* (*supra* n. 21).

[25] 1972 Trade Cases ¶73,795 (U.S. Sup. Ct.). For a more recent analysis see *Assn. of Retail Travel Agents* v. *Air Transport Assn.* 1985—1 Trade Cases ¶66632 (D.C. Distr. of Columbia).

[26] *Berkey Photo* v. *Eastman Kodak* 1979—1 Trade Cases ¶62718 (2nd Cir); see also *Foremost Pro Colour* v. *Eastman Kodak* 1983—1 Trade Cases ¶65239 (9th Cir).

[27] *Cal Computer Products* v. *Intern. Business Machines* 1979—1 Trade Cases ¶62713 (9th Cir); *Transmedia Computer Co.* v. *IBM supra* n. 15.

(c) Price reductions to meet competition do not of themselves constitute predatory pricing and are entirely proper. Direct evidence of intent to vanquish a rival in an honest competitive struggle does not show an antitrust violation in the absence of predation.[28] Indeed, non-predatory price reductions do not violate the *Sherman Act* because this "is, in fact, the result which the antitrust laws were designed to accomplish".[29]

(d) The act of refusing credit is not monopolization conduct if it constitutes an act of ordinary commercial conduct based on *bona fide* business judgment.[30]

(e) Section 2 of the *Sherman Act* does not forbid a monopolist from setting profit maximising prices. Such conduct does not violate the antitrust laws but rather is "the normal rational response of a business . . . seeking to maximise profits sales or revenues". Setting a high price is not in itself anti-competitive.[31]

(f) "Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2. The exercise of business judgment cannot be found to be anti-competitive. To be labelled anti-competitive the conduct must be such that its anticipated benefits were dependent upon its tendency to eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power".[32]

(g) Section 2 does not give "purchasers the exclusive right to dictate the terms on which they will deal . . . nor does it require a monopolist to accede to every demand of its competitors or customers".[33]

(h) Generally speaking, a party has the right to determine those with whom it will deal so long as such decision is made unilaterally.[34] It is not a breach of the law that a refused entity is adversely affected where the refusal is for business reasons sufficient to the supplier.[34a] In some cases, however, a monopolist which has control of a facility essential for a competitor to enter the market may be under a duty to make the facility available. This is the principle behind the *Terminal*

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[28] *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co* 1981-2 2 Trade Cases ¶64229. (9th Cir); *Airweld Inc.* v. *Airco Inc.* 1984 2 Trade Cases ¶66197 (9th Cir); *Trace X Chemical* (*infra* n. 30).

[29] *Berry Wright Corp* v. *Pacific Scientific Corp.* 1982-83 Trade Cases ¶65189 (D.C. Mass).

[30] *Trace X Chemicals* v. *Canadian Industries* 1984–2 Trade Cases ¶66089 (8th Cir). "The exercise of business judgment cannot be found to be anticompetitive . . . we conclude . . . that CIL's refusals to extend credit . . . were not invalid uses of monopoly power, but were, under the circumstances, ordinary business practices". The court also held that the credit evaluation was done in good faith.

[31] *Trace X Chemicals* [*supra* n. 30] at 66076 and cases there cited. See also discussion in *Berkey Photo* v. *Eastman Kodak* [*supra* n. 26] at 78020.

[32] Trace X Chemicals [n. 30] and cases there cited (at 66075).

[33] *Trace X Chemicals* [*supra* n. 30] and cases there were cited (at 66076).

[34] *Interface Group supra* n. 21 and cases there cited; *J. H. Westerbeke Corp.* v. *Onan Corp* 1984–1 Trade Cases ¶65,886 (D.C. Mass).

[34a] *Ibid.*

Railroad,[35] *Associated Press*,[36] *Gamco*,[37] and *Silver*[38] decisions previously discussed. Some cases generally involve arrangements between more than one entity.

The somewhat surprising 1985 decision of the U.S. Supreme Court in the *Aspen Skiing* case[39] may mean that a change in a pattern of distribution that has existed for many years can be evidence of an intent to monopolize when there is no business justification for such change. In *Aspen* there was, however, more than a mere refusal to deal and the decision appears to be limited to very narrow circumstances not likely to be found too frequently. The general United States law still remains that refusals to deal, without more, do not violate the *Sherman Act*. "It is the right of one engaged in private business to deal or discontinue dealing, with anyone, for any reason, unless the dealer combines with others in a concerted effort to hinder free trade".[40]

(i) Just as a party has a discretion as to parties with which he will deal, a patent holder has a similar discretion in relation to patent licensing. In the 1981 *Westinghouse-Mitsubishi* litigation[41] the United States government alleged, amongst other things, that Westinghouse licensed certain overseas patents to Mitsubishi thus making it a potential United States competitor. Westinghouse, however, refused to license its United States patents to Mitsubishi thus preventing Mitsubishi entering the United States market. The Ninth Circuit Court of Appeals held that no court has determined that a patentee must grant further licenses to potential competitors merely because he has granted licenses to some. Further no court has determined that the antitrust laws require a patent holder to forfeit the exclusionary power inherent in his patent. To determine otherwise, thought the court, would be to undermine the whole patent system. In yet another *Kodak Case*[42] a New York District Court held in 1981 that "Kodak's unilateral refusal to license internally developed patents may not trigger liability under the antitrust laws".[43] These holdings appear clearly to state the United States law on the interface between patent licensing obligations and antitrust law.

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[35] *Supra* n. 21.
[36] *Supra* n. 22.
[37] *Supra* n. 23.
[38] *Supra* n. 24.
[39] *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.* 1985–2 Trade Cases ¶66653 (U.S. Sup. Ct.). The operator of three of the four ski facilities in Aspen declined to "interticket" with the fourth operator even though such an arrangement had been in place for some time (about 15 years). As a result the fourth operator lost considerable patronage.
[40] *Interface Group supra* n. 21 and cases there cited.
[41] *Westinghouse Electric Corporation & Mitsubishi Electrical Corporation* v. *U.S.* 1981 Antitrust & Trade Regulation Reporter No. 1024 p. G1 (9th Cir).
[42] *GAF Corp* v. *Eastman Kodak Co.* 1981–2 Trade Cases ¶64,205 (D.C. N.Y.).
[43] *Id.* at 73767 following prior cases there cited.

Just as important as the holdings of United States courts as encapsulated above are some of the broad principles stated in a number of United States antitrust cases. Thus various decisions have spelt out that antitrust laws are for the protection of "competition" not "competitors",[44] that "the successful competitor, having been urged to compete, must not be turned upon when he wins",[45] that the antitrust laws were never meant to be a panacea for all wrongs[46] and neither are they a panacea for all business affronts which seem to fit nowhere else.[47] Courts have warned that the antitrust laws do not grant the government a roving commission to reform the economy at will[48] and that the courts have long resisted the temptation to use the antitrust law "to create a federal common law of unfair competition".[49]

In *Berkey* v. *Eastman Kodak* (1979) the observation was made that:

> The purpose of the *Sherman Act* is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful.[50]

In short, competition and monopolization laws are not, in any general sense, about morality, fairness or the furthering of better business relationships.

III THE AUSTRALIAN EXPERIENCE 1974-1985

1. *Some General Comments*

In view of what has been previously said about Australian use of United States antitrust precedents,[51] it is generally assumed that the basic thrust of the United States holdings outlined in Part II of this Paper is applicable to Australian monopolization law.

Australian court experience has not been abundant. In assessing the litigation record in Australia and in matching this against that in the United States, it should be noted that matters far removed from antitrust law have a vital influence on court proceedings. In particular, the absence in Australia of contingent fee and class action litigation tends to inhibit the rush to the Court House door. The fact that in Australia single damages, rather than treble damages as in the United States, are recoverable makes the cookie jar not quite so attractive even in the event of a win. A positive disincentive to plaintiffs in Australia, compared with their United States counterparts is that an Australian losing plaintiff is called upon to pay a victorious defendant's costs. In the United States, a plaintiff litigates

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[44] *Brunswick Corp.* v. *Pueblo Bowl O Mat Inc.* 429, US 477, 488 (1977).
[45] *Alcoa supra* n. 9. See also *Berkey* v. *Eastman Kodak* (*supra* n. 26) at 78022 *et seq.*
[46] *Parmalee Transport Co.* v. *Keeshim* 1961 Trade Cases ¶70,061 (7th Cir).
[47] *Scranton Construction Co.* v. *Litton Industries Corp.* 1974 1 Trade Cases ¶75,087 (5th Cir).
[48] *Westinghouse & Mitsubishi* v. *U.S.* (*supra* n. 41).
[49] *Interface Group* (*supra* n. 21) at 70681.
[50] *Berkey* v. *Eastman Kodak supra* n. 26.
[51] See n. 5 and related text.

without such threat in the event of an adverse verdict. All these factors must be looked at in any evaluation of the comparable use made of anti-trust laws in each country.

The Australian legislation when enacted in 1974 was specifically stated by the Attorney-General not "to prevent normal competition by enterprises that are big by, for example, taking advantage of economies of scale or making full use of such skills as they have".[52] The provisions were stated not to apply by virtue of size or market power alone. In the 1974 Parliamentary Second Reading Speech it was stated:

> It will be necessary for the application (of s. 46) that, in engaging in (monopolization) conduct, the person is taking advantage of the power that he has by virtue of being in a position to control the market. For example, a person in a position to control a market might use his power as a dominant purchaser of goods to cause a supplier of goods to refuse to supply them to a competitor of the first mentioned person—thereby excluding him from competing effectively. In such circumstances, the dominant person has improperly taken advantage of his power.[52a]

These political statements are totally consistent with United States precedent.

2. *The litigation record in decided cases 1974-1985*

(a) *Ira Berk*

Hardly before the ink was dry on the legislation Top Performance Motors was suing Ira Berk.[53]

As the case was the first decision under the *Trade Practices Act* it was not surprising that it was a disaster in many ways. Ira Berk was sued for monopolization because it terminated its dealership with Top Performance Motors and appointed another distributor. The court was handed the chance to establish the principles enshrined in United States monopolization law that a refusal to deal and a mere change of distributorship does not monopolization make.

The court having found the narrowest of possible markets (Datsun Cars on the Gold Coast) proceeded to say that there was no "taking advantage" of market power. This principle constituted the ratio of the decision. The respondent was "taking advantage" only of a contractual power.

Probably no knowledgeable adviser would now regard an *inter partes* arrangement as excusing monopolization conduct and the ratio of the case

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[52] *Parliamentary Debates (House of Representatives)* 16 July 1974 p. 229.

[52a] *Ibid.*

[53] *Top Performance Motors* v. *Ira Berk (Queensland) Pty Limited* 1975 ATPR ¶40-004. The Trade Practices Act came into force on 1 October 1974. The *Ira Berk* judgment was handed down on 27 February 1975. The case was subsequently applied to similar result in *Tavernstock Pty. Limited* v. *John Walker & Sons Ltd.* 1980 ATPR ¶40-184.

is perhaps unfortunate in expressing the relevant principle in this manner. Nonetheless, for all its faults, the *Ira Berk* decision did get into judicial interpretation the fact that the "exercise of its contractual right to terminate a contract for the genuine purpose of protecting legitimate trade and business interests is not taking advantage of a power of controlling a market within s. 46."[54] So viewed, the decision established communality with United States decisions to akin effect.[55]

(b) *Parkwood Eggs*

Australia was to wait till 4 August 1978 for its next major reported monopolization case—*Parkwood Eggs.*[56] This was an unsatisfactory decision in relation to an interlocutory injunction. The Victorian Egg Board was alleged to be "dumping" eggs in the Australian Capital Territory where Parkwood operated. This was said to be an *in terrorem* action to convince Parkwood that it should not enter the Victorian market. It was said that there was a misuse of the substantial control which the Victorian Egg Board had in relation to the Victorian market.

The case was determined on "balance of convenience" grounds and an interim injunction against "dumping" eggs in the Australian Capital Territory was granted. In view of the absence of any real argument on the substantive monopolization issue, however, the case is of no precedent value, only one minor point possibly having been decided by it.[56a]

(c) *Ansett-Avis*

Probably the case which was to have the greatest impact on monopolization law was not a monopolization case at all. It was *Ansett-Avis*[57]—a merger case. The Trade Practices Commission sought an injunction under s. 50 of the *Trade Practices Act* (such section dealing with mergers) to prevent Ansett, one of Australia's two protected Airlines under the "two airlines policy"[58] taking over Australia's leading Rent-A-Car company. In order to demonstrate a breach of s. 50 the Trade Practices Commission had to show post-merger "control" or "dominance"—tests akin to s. 46, [s. 46 speaking of a party being in a position "substantially to control" a market]. In relation to "control" the Federal Court held that this meant

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[54] *Ira Berk, ibid.* at 17,115 per Joske, J.

[55] See n. 34 and related text.

[56] *The Victorian Egg Marketing Board* v. *Parkwood Eggs Pty. Ltd.* 1978 ATPR ¶40-071.

[56a] *Ibid.* The one point presumably decided by the case is that preventing competitive conduct in s. 46 may be wide enough to embrace a person who competes with someone other than in the market in which competition is prevented. This point would seem to follow as a matter of grammatical construction of s. 46. In *Ross Payne & Co.* v. *Western Australian Lamb Marketing Board* 1983 ATPR ¶40-382 it was claimed that *Parkwood Eggs* established this proposition.

[57] *Trade Practices Commission* v. *Ansett Transport Industries (Operations) Pty. Ltd. & Ors* 1978 ATPR ¶40-071.

[58] For observations on the "two airline policy" see n. 4, *supra.*

> to exercise restraint or direction upon the price action of; to hold sway over, exercise power or authority over; to dominate or command.

The court, of course, did not have to decide in *Ansett-Avis* any question relevant to s. 46 as monopolization was not the issue before it. The court held, however, that there was no control or dominance (dominance being construed as 'something less than control') created by virtue of the merger in light of existing outside competition in the Rent-A-Car market. In view of the fact that Avis had only a 43-46% market share on an Australia-wide basis, the decision is quite consistent with United States authority as to the percentage of market share required before the applicable market power comes into being.[59] The court found against the Commission in relation to the capacity of Avis to determine prices without being consistently inhibited by competitors (the court found such inhibitions); on the question of the ease of entry to the market (the court found relative ease of entry) and on the extent of product differentiation and sales promotion (the court found such differentiation). Given this, the court decision seems nothing other than reasonable—especially when applied in a monopolization context. The writer, as a Member of the Commission at that time, was always of the view that the case could not be won.[60] The conclusion reached by the Trade Practices Commission as a result of *Ansett-Avis* was, however, somewhat glum. The Commission stated:

> On dominance itself, the court said that to dominate a market meant to have a commanding influence on it and this was a matter to be determined on the evidence. The court's assessment of the evidence in the *Ansett-Avis* case indicates a high test for dominance. For example, if there is a 'tail' in the industry exercising a degree of independence, even though limited as to area or otherwise, that apparently counts against the notion of dominance in the leading firm. In any event, if there is one strong company left outside the merged entity, the leading company is probably not dominant in terms of the merger law, whether or not there is a 'tail' in the industry.[61]

It is difficult not to regard the above conclusions as something of an overreaction—especially in light of the court findings in *Ansett-Avis* on the relevant behavioural factors. But they became the administrative policy in relation both to mergers and monopolization as a result of that case.

(d) *CSBP*

Two years later, the Trade Practices Commission was to suffer

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[59] See n. 9, n. 9a and n. 10 and related text.

[60] The writer dissented from the Commission decision to bring proceedings [see *Trade Practices Commission Fourth Annual Report—Year Ended 30 June 1978* p. 45].

[61] *Commission's Fourth Annual Report* (n. 60) at p. 5.

judicial defeat yet again. In the *CSBP* case[62] the Commission took action against CSBP, a dominant farm fertilizer distributor in Western Australia. The Commission alleged that CSBP took advantage of its market power because it dropped its price to meet pre-announced reduced prices of RTC, a firm trying to establish itself in the Western Australian fertilizer market. The Commission argued that the timing of the price reductions by CSBP was directed at preventing RTC entering the market and was successful in this. The time and quantum of the reduction, the Commission argued, were in the circumstances, proof that CSBP was motivated or inspired by a wish to harm RTC.

CSBP argued that it had acted in accordance with its normal practice of reviewing prices at that time of year for the coming season. It had not priced under cost and neither had it used undercutting of RTC as its starting point in fixing its prices.

The court held that the conduct was none "other than in accordance with the established practices of the company" and was not engaged in for the purpose of damaging RTC. Further "there was nothing out of the ordinary in the manner in which the new price was calculated . . . calculations for a new price had been made on a number of occasions during the preceding year, and the new calculation was made in similar manner and on much the same basis".

Given the above findings of fact by the court, clearly a conviction for monopolization was quite out of the question. The Commission, however, took the view that the "purpose" test introduced in 1977 was a considerable problem in light of *CSBP* and that the "restraints that (s. 46) puts on large companies . . . are really quite limited".[63] It must be stated, however, that the principles of law expressed in the *CSBP* case are totally consistent with United States monopolization holdings.[64] The only complaint the Commission could possibly have with the decision is that the judge, in the Commission's view, found erroneously as to the facts.

The above, with the exception of some interlocutory injunction cases[65] represents the Australian litigation record in the monopolization area over ten years.

(e) *Conclusions from the decided cases 1974-1985*

The court proceedings taken, particularly those taken by the Trade Practices Commission generally turned out to be massive defeats for those instituting them. They were not a good selection of cases with which to test a newly emerging monopolization law. The decisions, on the facts

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[62] *TPC* v. *CSBP & Farmers Ltd.* 1980 ATPR ¶40-151.

[63] *Trade Practices Commission: 1979-80 Annual Report* p. 98.

[64] n. 28 and n. 29 and related text.

[65] *Bernadon Investments Pty. Ltd.* v. *Fitroy Island (SA) Pty. Ltd.* 1983 ATPR ¶40-400 (Interlocutory injunction refused on "balance of convenience" grounds); *Maclean & Anor* v. *Shell Chemicals (Australia) Pty. Ltd.* 1984 ATPR ¶40-462 – interlocutory injunction granted. Shell was ordered on an interim basis to supply Maclean with a certain chemical used for delousing sheep. This was done without any real market analysis and from the judgment, it is not possible to ascertain, even on a *prima facie* basis, whether Shell had any substantial market control.

as found by the court in each case, were, however, perfectly consistent with United States monopolization holdings and consistent with the view put in Parliament that size alone should not be penalised. As such, there can be very little complaint in relation to the judgments given. The Trade Practices Commission, however, undoubtedly became a frustrated litigant as a result of it all. It clearly believed the monopolization law was too weak and virtually unenforceable. The writer does not believe that such conclusions follow at all. Indeed, Commission Annual Reports themselves demonstrate that the monopolization provisions had not inconsiderable strength in a number of non-litigated areas. We now turn to a discussion of this aspect.

3. *Monopolization 1974-1985 (other than in relation to decided cases)*

It should be noted that, up to 30 June 1979, sixteen private cases had been instituted alleging monopolization.[66] All but those referred to in this paper, either in text or footnotes, were settled. It is not known how many cases have been brought since 30 June 1979 though the writer compiled a study in 1984 from available 1981 public information relating to private actions, the conclusion from this study being that s. 46 was pleaded in 14% of Part IV private actions.[66a] This can hardly be regarded as an insignificant use of the section. The private use of s. 46 has been far greater than the use of s. 48 (resale price maintenance) which the Trade Practices Commission regards as a success and which it has used in almost 45% of its Part IV proceedings. Private litigants, however, have used s. 48 in but 4.4% of actions under Part IV. It should not be thought that the absence of learned judgments on the law means that the law is ineffective. The short point which must be made, though often it fails to win any political sympathy, is that settled cases often represent a very effective

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[66] *Trade Practices Commission: Fifth Annual Report Year Ended 30 June 1979* par 4.83 in which the figure of sixteen private actions is referred to.

[66a] The writer's study is in W. J. Pengilley—*Price Discrimination: The Present position and the impact of Legislative Proposals* [Business Law Education Centre (Melbourne 1984)] at n.212. Summarising the position there stated private actions have pleaded the various sections in the following percentages:

TABLE OF SECTIONS PLEADED IN PRIVATE PART IV ACTIONS (%)

Section	*45D*	*45*	*46*	*47*	*48*	*49*	*50*
%	25.8	28.9	14.4	16.3	4.4	8.8	1.2

Section 45D cases are mainly cases involving trade unions. When these are eliminated, the percentage use of s. 46 is far higher. The above study was compiled from a detailed statistical review of *Private Actions under the Trade Practices Act* a 1981 publication of the Trade Practices Commission. The Commission litigation record (see n. 214 to the above paper by the writer) was:

TRADE PRACTICES COMMISSION PART 4 ACTIONS TAKEN TILL 30 JUNE 1983

Section	*45*	*46*	*47*	*48*	*49*	*50*
Number of Cases	8	1	2	12	–	1

The various qualifying material to the above Tables should be read if the Tables are to be applied in detail in relation to any particular section.

use of legislation. It cannot be assumed that all cases are settled because the plaintiff cannot win. Every legal adviser reasonably closely involved with trade practices law knows that this simply is not the case.

Given the limited nature of the monopolization remedy, it is interesting to note how effective the section has been in a commercial, but non litigated sense in many cases. A perusal of the Commission's Annual Reports demonstrates the point. Thus:

(a) When new taxi plates were issued in the Australian Capital Territory and Aerial Taxis (a Canberra Cab company monopoly) refused to allow new plate holders access to radio facilities, s. 46 ensured such access.[67]

(b) A number of investigations were conducted in relation to predatory conduct against small local competitors in the ready pre-mix concrete market particularly in smaller country areas.[68]

(c) A complaint was received that a new entrant to the Tasmanian natural gas market was being met by predatory behaviour.[68a] Subsequently Commonwealth Industrial Gases, the company in respect of which the complaint was made, gave undertakings, without admissions, not to take any retaliatory action against the new entrant marketer and undertook not to press to have arrangements with the new entrant's supplier of industrial abrasives terminated.[69]

(d) A taxi co-operative in a New South Wales provincial city refused to receive new members, with the result that an existing member was unable to sell his taxi plate. The Commission took the matter up with the cooperative, bringing to its attention the possible breach of section 46. The cooperative sought legal advice, then passed a resolution that membership would be granted to any taxi plate holder who agreed to abide by its rules.[70]

(e) Alleged conduct by an exporter of fruit was subject to investigation. An Australian exporter is alleged to have told overseas agents that their agency would be jeopardised if they promoted the sale of fruit from other Australian exporters.[70a]

(f) In relation to imports of goods, there was a complaint that an Australian motor vehicle manufacturer had by predatory pricing attempted to inhibit an importer from supplying independently sourced spare parts to panelbeaters for the repair of some models of vehicles made by the manufacturer.[70b]

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[67] *Trade Practices Commission: 1982-3 Annual Report* at 76-77.
[68] *Trade Practices Commission 1983-4 Annual Report* at 107.
[68a] *Ibid.*
[69] *Trade Practices Commission 1984-85 Annual Report* at 38.
[70] *Supra* n. 68.
[70a] *Ibid.*
[70b] *Ibid.*

IV THE AUSTRALIAN 1985 AMENDMENTS AND THE REASONS FOR THEM

1. *A Semantic Re-Christening*

Section 46 is no longer to be called "Monopolization". It is to be called "Misuse of Market Power". This is because of the lowering of the threshold (see 2 hereunder) in that the section, after the amendments, is clearly intended to apply to corporations which are not monopolists. There is also perhaps something to be said for the introduction of the term "misuse" which has the moralistic character of naughtiness about it. Though lawyers generally tend to think that statutes are interpreted by the cool insights of cerebral man, the writer's view is that semantics has an immense, though usually underrated, influence on trade practices law.[71] It is words, not logic or economic equations, which make people act. If we can get the semantics a bit better, then well and good.

2. *Lowering the Threshold*

Prime amongst the substantive 1985 amendments is the lowering of the monopolization threshold. Whereas previously s. 46 could not be triggered unless a corporation was in a position "substantially to control" a market, the amendments provide for a triggering of the section where the corporation has "a substantial degree of power in a market". This is stated by the government to be a lesser degree of market power than "dominance" of it (the test prescribed by s. 50 dealing with mergers).[72] As the government put it in the Explanatory Memorandum to the Bill:

> Whatever the position in regard to 'dominance' more than one firm may have a 'substantial degree of power' in a market.[72a]

The Attorney-General's Second Reading Speech states on the same theme:–

> As well as monopolists, section 46 will now apply to major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market.[73]

The Explanatory Memorandum[74] elaborates upon the concept of what is meant by "a substantial degree of power" stating that it embraces the following concepts:

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[71] See, for example W. J. Pengilley. "Competition Policy and Law Enforcement: Ramblings on Rhetoric and Reality" (1984) 2 *Australian Journal of Law and Society* 1-28; A. A. Ransom & W. J. Pengilley: *Restrictive Trade Practices–Judgments, Materials and Policy* (Legal Books Sydney 1985) at 340-360 which covers various words used in a trade practices context including a glossary of practices described differently in accordance with whether the practice is approved or disapproved.

[72] *Trade Practices Amendment Bill 1985–Parliamentary Explanatory Memorandum* at 12.

[72a] *Ibid.*

[73] Mr Lionel Bowen, Australian Attorney General–*Trade Practices Amendment Bill 1985 Second Reading Speech* [Parliamentary Debates (H of R) 9 October 1985 p. 1725].

[74] *Supra* n. 72 at 14.

- The use of the word "degree" in the expression "degree of power in a market" reflects the fact that "market power" is a relative concept. All participants in a market possess a degree of market power which may range from negligible to very great.
- The word "substantial" is intended to signify "large or weighty" or "considerable, solid or big".
- The word imports "a greater rather than less" degree of power.
- At the same time "substantial" is not intended to require the high degree of market power connoted by the prior s. 46(1) [of being in a position substantially to "control" a market], or by reference to the prior s. 46(3) [having the power to "determine" the prices of a substantial part of the goods in a market].

3. *A new provision inserted to determine the degree of market power which a body corporate has in a market*

Section 46(3) as originally enacted has been set out in detail earlier in this paper.[75] This section is now repealed and inserted in its place is the following:—

> (3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:—
> (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
> (b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.[76]

The Parliamentary Explanatory Memorandum[77] states that the above provisions statutorily implement the approach adopted in the European decision in *Continental Can*;[78] *United Brands*[79] and *Hoffmàn La Roche*,[80] though those cases were deciding a dominance threshold higher than that provided in the amended s. 46.

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[75] See PART I of text.

[76] As previously in this paper (see n. 1) various other provisions of s. 46 are omitted in the text for purposes of simplicity. Section 46(2) covers the position of related corporations. Section 46(4) contains some definitional sections [a reference to power is a reference to market power; a reference to a market is a reference to a market for goods and services; and power or conduct in a market can be determined by activities either as a supplier or an acquirer of goods or services].

[77] *Supra* n. 72.

[78] *Europeanballage and Continental Can* v. *Commission* 1973 CMLR 199.

[79] *United Brands* v. *Commission* 1978 1 CMLR 429.

[80] *Hoffman La Roche* v. *Commission* 1979 3 CMLR 211.

4. *The section still to apply only if a corporation "takes advantage" of its power for a prohibited "purpose".*

The usual political reassurances have been given both in the Parliamentary Explanatory Memorandum[81] and in the Attorney-General's Second Reading Speech[82] that size alone does not an offence create. There is no point in here setting out at length the Attorney's assurance on this point. Someone appears to have gone back to the 1974 Second Reading Speech[83] and replayed the record.

The prohibited purposes remain largely as in s. 46(1) of the 1974 Act which provisions have been set out earlier in this paper.[84] Such prohibited purposes are:—

(a) the elimination or the substantial damaging of a competitor;
(b) the preventing of market entry; and
(c) preventing a person from engaging in competitive conduct.

5. *"Taking advantage" of power and "purpose" may be inferred from circumstances.*

Added to s. 46 is s. 46(7) which reads:—

(7) A corporation may be taken to have taken advantage of its power for a purpose referred to in sub-section (1) notwithstanding that the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

The Explanatory Memorandum of the Attorney[85] states that this enactment is necessary in order to ensure that direct evidence of purpose does not have to be demonstrated.

The reason for the amendments is not clear to this writer as, subject to proper use of it, circumstantial evidence has always been admissible to prove intent and purpose.[86] One possible danger of the amendments

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[81] *Supra* n. 72 at 12-13.
[82] *Supra* n. 73.
[83] *Supra* n. 52 and related text.
[84] *Supra* n. 1 and related text.
[85] *Supra* n. 72 at 13.
[86] "In . . . criminal cases, a jury may convict on purely circumstancial evidence, but to do this they must be satisfied . . . that the circumstances were consistent with the (commission of) . . . the act, . . ." [*Halsbury's Laws of England*: Third Ed. Vol 10 at 722-723].
See also *R.* v. *Van Beelen* (1973) 4 SASR 353,379 [quoting from Wills: *Principles of Circumstantial Evidence* (7th Ed. 1936) at 324] where the charge to the jury was in the following terms:

> In a case in which there is no direct evidence against the prisoner, but only the kind of evidence that is called circumstantial, you have a twofold task: you must first make up your mind as to what portions of the circumstantial evidence have been established and then when you have got that quite clear, you must ask yourselves, 'Is this sufficient proof'?

As with direct evidence, any unacceptable circumstantial evidence may, of course, be discarded. A jury may also be instructed that one circumstance may be added to another to satisfy the required standard of proof. In *R.* v. *Van Beelen* the metaphor of Lord Cairns when he stated that feeble rays of light may converge to produce a body of strong illumination was referred to. See also H. H. Glass: "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 *A.L.J.* 842 esp. at 852-85 under title "A Case to Answer based on Circumstantial Evidence".

(though not relevant to the discussion in this paper) is that the judiciary, by application of the "*expressio unius*" principle of statutory construction, may be led to hold that the express enactment of s. 46(7) indicates a legislative intent to exclude the common law evidentiary rules from the various other provisions of Part IV of the Trade Practices Act.

The test of purpose in s. 4F (detailed above)[87] remains in that a purpose does not have to be a dominant purpose, as required at common law. A substantial purpose, though mixed with other purposes, will be enough.

6. *The State of mind etc. of directors, servants or agents now to be utilised to demonstrate the state of mind etc. of a corporation—s. 84(1)*

The Federal Court of Australia, in relation to the question of a company's "knowledge" of certain facts has held that it should follow the House of Lords decision in *Tesco Supermarkets Limited* v. *Nattrass* on the point.[88] This case established a so-called "organic" theory of company personality by which the "brain" of the company was the board of directors of the company or the company in general meeting.

In *Universal Telecasters*,[89] the Federal Court, following the above line of reasoning, held that a company had no knowledge of certain matters notwithstanding the fact that a senior employee of the company, who was not a director, had been fully advised of them. The case arose in the context of a complaint by a member of the public to a television station that it was engaging in misleading advertising. In such a context, it is difficult to fault the dissenting judgment of Mr. Justice Nimmo[90] to the effect that the company should be held to have the appropriate knowledge.

In *Barton* v. *Westpac Banking Corporation*,[91] the Federal Court subsequently held that Westpac, the defendant corporation, did not have an appropriate intention even though one of its employees did.

The governmental view of the above cases was that:—

> Large corporations with extensive management structures are able to avoid liability in situations where smaller companies and individuals would be held liable under the Act.[92]

The above position has been changed, so far as the present discussion is concerned, by amending s. 84(1) and providing that such amended

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[87] See PART I of text.

[88] [1972] AC 153.

[89] See *Universal Telecasters* v. *Guthrie* 1978 ATPR ¶40-062.

[90] As a matter of logic, it is very hard to fault the dissenting judgment of Nimmo, J. in *Universal Telecasters (ibid.)* when he said in relation to the delegation of authority to the senior employee involved:

> . . . it seems clear . . . that the task of receiving complaints had been delegated to him . . . It follows . . . that receipt by him of a complaint must be regarded as receipt by the company of that complaint . . . If it were otherwise, how could a member of the public . . . who made his complaint to the person designated by the company to receive it and to whom he was directed to make it communicate to the company that it had telecast a misleading advertisement? (at 17641).

[91] 1983 ATPR ¶40-388.

[92] *Supra* n. 72 at 30.

section is to apply to s. 46 conduct. Interestingly enough, the section is not to apply to any of the other restrictive business practices set out in Part IV of the Trade Practices Act and, in all other respects, it is applicable only to the consumer protection provisions (Part V) of the Act.

The application of s. 84 to monopolization conduct means that the "state of mind" of a body corporate can be established by the state of mind of:—

> . . . a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority.[93]
>
> A reference to "the state of mind" of a person includes:—
>
> a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.[94]

V OBSERVATIONS ON THE 1985 AMENDMENTS AND THE REASONS FOR THEM

1. *The need for reform?*

The 1985 amendments have, of course, been enacted to overcome difficulties seen by the government, and complained about by the Trade Practices Commission.[95] The Attorney-General summarized these matters in his Second Reading Speech in the following words:—

> Unfortunately, section 46 as presently drafted has proved of quite limited effectiveness in achieving that result [i.e. the prevention of the use of "enormous market power . . . to the detriment of . . . competitors (of large enterprises) and the competitive process"], principally because the section applies only to monopolists or those with overwhelming market dominance. Even in those cases, it can be extremely difficult for a plaintiff to establish the requisite predatory purpose on the part of the defendant corporation.[96]

On the track record, this would seem a misconceived and unduly fatalistic view of the prior s. 46. The Commission in the period 1974-1985 brought but one case—*CSBP.*[97] Given the finding of the judge in that case that "there was nothing out of the order in the manner in which the price was calculated", very little complaint can be made about the decision unless it is, in fact, desired to penalise a company purely because

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[93] Section 84(1).

[94] Section 84(5).

[95] " . . . only rarely will it be possible to bring a case to court under the Section" [*Trade Practices Commission Submission to Blunt Committee on Small Business* (1979) Ch. 3 para 9—see *Trade Practices Consultative Committee Report* (Dec 1979) Vol. 2 at 504].

[96] *Supra* n. 73 at 1724.

[97] See n. 62 and related text.

of its size—something consistently denied with the same fervour with which motherhood is consistently praised.[98] Of course, the Commission can argue that the facts as found by the judge in *CSBP* were incorrectly determined—as it has done with considerable vigour.[99] But to argue this is a very different matter from arguing that a change in the law is necessary. The Commission lost the case not on bad law but upon (what the Commission would consider at least) bad findings as to facts. One might, in any event, think that the experience of only one case, undoubtedly correctly decided in view of the judge's findings on the facts, is somewhat thin experience on which to make far reaching changes of the nature of the 1985 amendments.

There are other equally plausible conclusions from the 1974-1985 experience and the writer suggests that the following conclusions can equally well be reached:—

(a) That *CSBP* was correctly decided, given the judge's view of the facts in the case.
(b) That s. 46 is a "reserve" section in the Trade Practices Act. It is only able to be used, and was only ever intended to be used, against a very limited number of defendants and in respect of a limited number of practices. When actuality shows such a limited use, this can hardly be grounds for complaint.
(c) At least one plausible explanation of the absence of litigation is that large businesses are not engaging in conduct about which complaint can be made.
(d) That, in a number of non litigated cases, it seems that s. 46 has been quite effective.[100] Even though the Commission has complained about the inadequacies of the section such inadequacies do not appear to have prevented some quite positive administrative use being made of it by the Commission. If the Commission had taken certain of these cases [e.g. *"The Canberra Cabs"* case (see Part III 3(a) above) and the *CIG case* (see Part III 3(c) above)] to court rather than adopted "administrative solutions" to them, then s. 46 might well be seen to be working quite effectively in the courts.
(e) That private litigants have used the section. The fact that a good number of private cases have been settled cannot, by any process

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[98] See n. 52, n. 82 and related text.

[99] *Trade Practices Commission: 1979-80 Annual Report* at 97-99.

[100] See PART III.3 of text and n. 66 for comments on private litigation. To the extent that private litigants failed in decided cases, their cases were rejected largely on the basis that it was quite proper business practice for a party in a position of market power to terminate dealerships and arrange new ones—see n. 53 and related text. To hold otherwise would prevent a corporation with market power ever changing distributors or dealers. Such a change has no effect on completion as a whole. Therefore, these decisions should not concern the Trade Practices Commission [if its policy role in s. 46 terms is the same as that under s. 50 i.e. the thrust of its administration is to preserve competition (see *Mergers: Bare Transfer of Monopoly Power—TPC Information Circular* No. 34: 5 November 1982)]. Those decisions going against Australian private litigants are merely Australian manifestations (worded admittedly in somewhat inappropriate judicial language) of the United States view that even those in a powerful market position are entitled to adopt reasonable business practices—see n. 32 and related text.

of logic, imply that plaintiffs did not use the section successfully. The decided cases where private plaintiffs failed should not be considered as judgments which should give the Trade Practices Commission too much anguish.[100a]

(f) That, in any event, it is far too early to conclude that the section is ineffective. In the United States s. 2 of the *Sherman Act* was not utilised until *Standard Oil of New Jersey*[101] and *American Tobacco*[102]—"the first (trusts) of major importance that antitrust, twenty years after its foundation, managed to strike down".[103] Australia has so far had only slightly more than a decade in which to litigate.

(g) That litigation under Australian monopolization law must be expected to be far less than under United States monopolization law and any attempt to equate the two in terms of litigation is quite misconceived. Australian law has no provisions in s. 46 relating to combinations or conspiracies to effect monopoly. Many United States cases are brought as "conspiracy" rather than "single firm" monopolization cases. Such cases cannot be brought under s. 46 in Australia. Further, the whole question of class actions, contingent fees and the like[104] means that there can necessarily be no realistic comparison made between the quantity of Australian and United States legislation. The comparative lack of Australian cases says nothing about the effectiveness of the drafting of the Australian *Trade Practices Act*.

In short, far from showing that s. 46 was in dramatic need of reform, the track record is equally consistent with a conclusion that it was serving an adequate role in the 1974-1985 period.

2. *Dropping the Threshold*

The necessity to drop the threshold stems totally from the *Ansett-Avis* case. The concern apparently was that 43-46% of the market did not constitute appropriate control or dominance. The decision is completely consistent with United States views.[104a]

In *Ansett-Avis* if dominance or control had been found, it would have been found in the face of behavioural factors completely negativing such a conclusion. The court found as facts that Avis was consistently inhibited by competitors, that there was relative ease of market entry and that there was appropriate product differentiation in promotion and the

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[100a] *Supra* n. 100.

[101] *Standard Oil of New Jersey* v. *U.S.* 221 US 1 (1911).

[102] *U.S.* v. *American Tobacco* 221 U.S. 106 (1911).

[103] A. D. Neale: *The Antitrust Laws of the U.S.A.* (Cambridge University Press—4th Ed. 1968) at 101.

[104] See PART III.1 of text.

[104a] See PART II.1 of text.

like.[105] In view of these findings of fact and in view of the spirited defence which the Commission put up in its *Second Annual Report*[106] as to the importance of conduct and performance matters in making competition assessments, it would be strange if the Commission believed, in light of the behavioural factors found in the *Ansett-Avis* case, that dominance or control should have been found in that case.

The major difficulty in assessing the government's case for a reduction of the s. 46 threshold is that concepts are paraded very freely to support the need for the amendment. However, no concrete examples have yet been put forward as to where certain improper conduct is covered by the amended, but not the prior, s. 46. The only relevant area which the writer sees as ripe for amendment is that which the government has not discussed at all. This is the amendment of s. 46 to cover aggregations of power by combination or conspiracy. Just as surely as a single firm can unilaterally hold power, such power can be held by combination. An amendment of s. 46 to recognise this fact would be welcome.

At discussions it has been suggested to the writer by various governmental spokespersons that one major way in which the lower threshold test could have beneficial effect is that it may inhibit actions which constitute "arrangements" between oligopolists to engage in certain improper conduct. The present law in this regard is argued as being difficult to enforce in the courts. Presumably a drop in the threshold test will make enforcement easier—or so the argument runs. Two points follow from this:—

(a) The onus of proof in such cases will be no easier than proof of an "arrangement" between oligopolists under other present sections of Part IV of the Act; and
(b) it would be a far more certain and a far more justifiable amendment of the law expressly to provide that s. 46 is breached in the event of such arrangements.

In other discussions, it has also been suggested to the writer by various governmental spokespersons that the lessening of the threshold may give control over improper "consciously parallel" behaviour of oligopolists. There is, however, nothing in the Parliamentary Debates or Explanatory Memorandum which indicates that the government regards this as an aim of the amendments. The United States experience would indicate that attempts to control consciously parallel oligopolistic behaviour have been dramatically unsuccessful. For example, in 1978 the Antitrust Division Staff circulated a staff memo on "Shared Monopolies" and set out how certain conduct "facilitated" oligopolistic conduct.[107] In this memo, various practices assisting price fixing, reduction of output,

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[105] See PART III.2(c) of text.
[106] *Trade Practices Commission Second Annual Report*—[Year Ended 30 June 1976] Chapter 4.
[107] Reprinted in 874 *Antitrust and Trade Regulation Reporter* F-1 (July 27, 1978); *Trade Regulation Reports* No. 345, *Part III* (Aug 8, 1978).

information exchange systems, product standardization systems and devices to punish deviants from non competitive price levels were singled out. Yet, despite intensive investigation of several industries by the Division, no case testing the theory has been brought.[108] The Federal Trade Commission brought a 1972 complaint against four firms pleading monopolization of the ready to eat market and alleging a "monopoly overcharge" on 1970 sales of "$740 million". After nine years of manoeuvering, an administrative law judge dismissed the case, amongst other things, on the basis that the respondents were not realizing monopoly profits.[109] Proposals have also been put before the U.S. Congress to control parallel behaviour[110] but none of these proposals have been enacted.

In discussions with the writer, some parties have expressed the view that the reason for the lowering of the threshold is a concern that s. 46 does not run in the case of localised markets (e.g. country towns). Whilst this is nowhere expressed in the governmental literature on s. 46, credibility is given to the view because it was (quite wrongly) claimed in the government's *Green Book* to be a major reason for "strengthening" s. 49 relating to price discrimination.[111] If this is the problem involved, then it is not corrected by the amendments in any relevant way. The market definition is simply not addressed in the amendments. In any event, there is no reason to believe that localised markets will not be found by the court where a locality is genuinely an independent geographic market. Perhaps the one thing right about the Federal Court decision in *O'Brien* v. *Cool*[111a] was that the market was held to be the area of Wagga and environs. United States monopolization cases have also expressed a prime concern in preserving local markets.[111b]

All in all, the attempt to control the behaviour of oligopolists by means other than prohibitions on arrangements and arrangements between them, has been somewhat disastrous. The present drop in the threshold test is likely to be similarly ineffectual. The sadness of it all is that the need to drop the threshold is conceptually misplaced to the extent it is based on *Ansett-Avis.* To the extent that the drop is based on some other

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[108] L. Schwartz, J. Flynn & H. First—*Free Enterprise and Economic Organisation: Antitrust* [Foundation Press Inc. 1983 (6th Ed.)] at 176.

[109] *Re Kellogg* CCH Trade Reg Rep. No. 557 Part II (Sept 14, 1981). An order denying appeal was entered by the FTC on Jan 15, 1982 (3 CCH Trade Reg. Rep. ¶21,899 (FTC 1982)).

[110] Summarized in L. Sullivan *Antitrust* 367-73 (1977).

[111] *O'Brien Glass Industries Ltd* v. *Cool & Sons Pty Ltd* 1983 ATPR ¶40-376 is the classic example of a finding that the market was local in nature. Note also the United States view that the local market is the "classic case" where predatory pricing practices should be viewed as monopolistic (*supra* n. 16 and related text). See also *Lorain Journal* (*supra* n. 19 and attached text) as an example of monopolization in a local market. The government has nowhere expressed the view that monopolization in small markets has been regarded as a problem. However, in its 1984 *Green Book* [*The Trade Practices Act: Proposals for Change*: Canberra February 1984], the government stated its view that price discrimination laws were not effective in country towns and the laws needed amendment for this reason [see *Green Book* p. 9]. The government was wrong in this view (as witnessed by the market definition in *O'Brien Glass* (*supra*)] and, in any event, no amendment to the price discrimination law was made in 1985. For a general criticism of the proposals in the *Green Book* relating to the strengthening of s. 49 see W. J. Pengilley—*Price Discrimination: The Present Position and the impact of Legislative Proposals* [Business Law Education Centre (Melbourne 1984)].

[111a] *Supra* n. 111.

[111b] *Ibid.* See also supra n. 16 and related text.

belief of necessity, this belief has not been articulated and no concrete examples of just what the government wishes to achieve have been given.

3. *"Taking Advantage" of market power*

So far as the writer can evaluate the United States cases referred to earlier in this paper,[112] nearly all (if not all) of them in which monopolization has been found depend upon the existence of market dominance. Without such dominance the conduct involved could not have taken place. This dominance may, of course, be a dominance in a local market—as in *Lorain Journal.*[113]

An inherent inconsistency immediately occurs as to how a corporation can realistically take advantage of market power when such power is not of the order of domination. If there is not such dominance, then competitive checks would, in all but the exceptional case (which case does not readily come to mind) curb the abuse of any power involved.

Some will argue that a significant exception to the above generality is when there is some improper conduct engaged in by oligopolists. We have referred to this assertion in Part V.2 above. The difficulty of course is to pinpoint the conduct complained of (i.e. that conduct whereby the firm is improperly "taking advantage" of such power as it has) and then construct a law which will effectively deal with the conduct so identified. As we have noted in Part V.2 above, such attempts as have been made in either of these endeavours have been dramatically unsuccessful as a method of controlling oligopolies. The field is a very complex one. One thing which can, however, be said with reasonable certainty is that tinkering with a few words in a monopolization statute will not solve the problem. In particular, such tinkering will not solve the problem when no-one has clearly articulated what the problem is.

In the *Parliamentary Explanatory Memorandum*[114] some examples of "taking advantage" of market power are given. Unfortunately these examples are couched in a generalistic, and in some cases, a quite misleading manner. The examples given are:—

(a) *"Inducing price discrimination"*

Hopefully a court will not take price "discrimination" in this context to equate to price "differences". This is how the term "discrimination" has been interpreted to date.[115] Does the government mean inducing an *anticompetitive* price discrimination? It is already illegal under s. 49 to induce an illegal price discrimination. Is s. 46 to be identical to s. 49 in this regard or different? If different, what is the nature of the difference? A bald statement to the effect that "inducing price discrimination" breaches

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[112] See PART II.2 of text.

[113] *Supra* n. 19 and attached text. See also the observations relating to local markets set out in n. 16 and n. 111, *supra.*

[114] *Supra* n. 72 at 14.

[115] *O'Brien* v. *Cool*, supra n. 111.

s. 46 is disturbing to business, which already has enough hang-ups about the substantive price discrimination law. The comment should be amplified as to what is intended. In its present form, the Explanatory Memorandum is so inadequate that some attempt to correct its generality should be made lest the Memorandum be used by a judge in its present form to seek guidance as to what is intended by the legislation.

(b) *"Refusal to supply"*

Again, the statement in such bald terms surely cannot be what is aimed at by s. 46. A powerful trader, like everybody else, surely is to retain a freedom to deal. Yet nothing is said to give examples of the nature of the refusal intended to be covered.

(c) *"Predatory pricing"*

Such conduct may well be regarded as a misuse of market power. One would think that the United States views on the pricing and costing interrelationship required to establish predation[116] could well be imported into the Australian governmental intent. The United States views command reasonable acceptance and have been born after labor pains of considerable trial and error experience. In essence, predation does not occur unless pricing is below cost.

However, the Australian government has not adopted the United States views. The governmental view is that the prohibition in s. 46 may be satisfied "notwithstanding that (pricing) is not below marginal or average variable cost and does not result in a loss being incurred".[117] If this is the approach legislatively intended, it is to be deplored that the amended s. 46 aims to inhibit pricing conduct in cases where the vendor is still making a profit on trading. The United States tests of predation, which involve below cost selling, are far preferable.[118]

The examples given do not assist in a comprehension of what is intended by the amended s. 46. Worse than this, now that the *Parliamentary Explanatory Memorandum* is evidence to the courts of Parliamentary intent, the judiciary may be persuaded to adopt the views expressed in it rather than look to the economic and business logic involved in individual cases.

Again, the government has spoken in conceptual terms. The pity of the matter is that it has failed to articulate concrete examples of what the law aims to achieve. Unfortunately, those examples given in the *Explanatory Memorandum* are ill considered. If s. 46 is interpreted by the courts in accordance with the text of the *Explanatory Memorandum*

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[116] See PART II.2(b) of text.
[117] n. 72 p. 14.
[118] n. 116.

such interpretation will give a highly non commercial result which could be a considerable set back for competition policy overall.

4. *"Taking advantage" of market "power" may be inferred from circumstances—s. 46(7)*

This has always been the law.[119] The difficulty in the amendments [see Part IV.5 above] is that there may be sad ramifications caused by them in the interpretation of other sections of Part IV of the Act.[119a]

5. *The state of mind etc. of directors, servants or agents now to be utilised to demonstrate the state of mind etc. of a corporation—s. 84(1)*

One can have quite real sympathy with the problems caused in *Universal Telecasters* v. *Guthrie.*[120] But this case arose in a consumer protection context.

As s. 46 cases involve questions of dominance and abuse of market power, it seems appropriate that the "brain" test of *Tesco Supermarket* v. *Nattrass*[121] be utilised, notwithstanding the difficulties involved in such concept in consumer protection cases.

The difficulties which can be foreseen in the amendments to s. 84 [see Part IV.6 above] are:—

(a) That the statement of a quite junior employee may be regarded as representing the policy of the company involved.
(b) That over enthusiastic statements made at marketing and sales meetings may be interpreted quite differently in the more cerebral context of a trade practices trial. It would be strange indeed if an enthusiastic salesman saying at a sales meeting "Let's kill X" were regarded as binding the corporation to conduct with the purpose of eliminating a competitor. Yet this must be a real possibility.
(c) That probably the amendments will not assist very much anyway. No doubt defendant corporations will parade a host of witnesses who will each testify as to individual intents and the court will have to resolve between witnesses in making its factual findings.

The amendments would be far more practical if worded to the effect that the "state of mind" of the body corporate may be established by the state of mind of a director, servant or agent whose conduct was engaged in within the scope of his actual authority or by the state of mind of a person who had general supervision or control over the conduct in

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[119] See n. 86 and see PART IV.5 of text.
[119a] See PART IV.5 of text.
[120] *Supra* n. 89. See also discussion in PART IV.6 of text and the observations in n. 90, *supra.*
[121] *Supra* n. 88.

question. A test along these lines captures the essence of Mr. Justice Nimmo's dissent in *Universal Telecaster*[122] whilst at the same time not exposing corporations to the risk that they can be bound by the conduct of a vast battery of junior employees acting, in many cases, without the knowledge or sanction of their employer.

The difficulty with the section is that corporations may curtail aggressive behaviour, and particularly aggressive sales behaviour for fear of a breach of the amended s. 46. To quote the Trade Practices Commission:—

> . . . It is necessary to bear in mind that the perception of the law among businessmen is often the decisive factor because of its effect on their conduct long before any questions of litigation arose.[123]

The amendment to s. 84(1) coupled with the lower threshold in s. 46 may lead many companies to believe that they can no longer adopt a sales policy of "killing" their rivals, though this, in all but the exceptional case, is merely the salesman's method of expressing an obviously highly pro-competitive policy.

VI THE PRICES SURVEILLANCE AUTHORITY

A brief word should be said on the role of the Prices Surveillance Authority. This Authority is set up under the Price Surveillance Act 1983. It is intended to implement an undertaking by the government to the trade union movement as part of the government's prices and incomes accord.

It is not an abuse of market power under the Trade Practices Act for a company to set profit maximising prices because this is "the normal rational response of business seeking to maximise profits".[124]

The Prices Surveillance Authority can, however, monitor prices in particular industries. It is highly selective and monitors both private enterprise and governmental entities.[125] In August 1985 the Authority issued a document entitled *Guidelines for Pricing Restraints*[126] which states fifteen principles which guide it and gives amplification in respect of each principles. If one is a petrol company,[127] a fruit juice supplier[128] or a

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[122] See dissent judgment of Nimmo, J. in *United Telecasters, supra*, n. 90. A suitable limitation as to people whose "state of mind" binds a corporation might be drafted to read:—

> The state of mind of a body corporate may be established by establishing the state of mind of a managing director, manager or other governing officer, by whatever name called, or any member of the governing body of the corporation or, where relevant to any part of the corporation's activities over which an officer or employee exercises superintendence or control, by establishing the state of mind of the officer or employee so exercising such superintendence or control.

The above drafting should overcome the difficulties pointed out by Nimmo, J. in his dissent in *United Telecasters* (see n. 90) whilst, at the same time, ensuring that corporations are not bound by the actions of employees acting totally outside their authority.

[123] *Trade Practices Commission: Fifth Annual Report* [Year Ended 30 June 1979 Par. 4.83].

[124] *Supra* n. 31.

[125] As regards governmental entities see, for example, *Inquiry into the Supply of Telecommunications Services* 23 October 1984; *Inquiry in Relation to the Supply of Certain Postal Services*, 12 December 1984.

[126] Prices Surveillance Authority *Guidelines for Pricing Restraint*, 8 August 1985.

[127] *Inquiry in Relation to the Supply of Petroleum Products* 20 June 1984; 25 July 1984.

[128] *Inquiry in Relation to the Supply of Fruit Juices* 13 June 1985.

cigarette manufacturer[129] the activities of the Authority are relevant. Other oligopolistic industries will, no doubt, be added to this presently short list in the fullness of time.

The Prices Surveillance Authority is a far cry from the Prices Justification Tribunal of the 1970s at which time real questions of the Trade practices and price control interface were continually faced. The Prices Surveillance Authority recognises that competition amongst business is usually an effective way of restraining prices.[130] The one factor common to both s. 46 of the Trade Practices Act and the activities of the Prices Surveillance Authority is that the Authority in making its assessments bears in mind:—

> The need to discourage a person who is in a position substantially to influence a market for goods or services from taking advantage of that power in setting prices.[130a]

It may be that even if the Trade Practices Commission cannot sheet home an abuse of market power under s. 46 of the Trade Practices Act, a Prices Surveillance Authority enquiry may follow on from the information gathered by the Commission. This is something which could well be borne in mind when facing pricing decisions.

Whilst philosophically opposed to price regulation by government authority, the writer nonetheless recognises that one has to live in the world of real politics. This world spawns demands for price control of some industries. It is far better to have the odd industry so regulated in the public interest than to drop the s. 46 threshold in all industries in the manner done by the 1985 Amendments. Any check on oligopolies, therefore, is better taken, in the writer's view, under the Prices Surveillance Act than by an attempt to bring them in some unspecified manner under s. 46 of the Trade Practices Act.

VII HOW AGGRESSIVE CAN BUSINESS NOW BE?

The writer's belief is that, generally speaking, it will still be actions where both market dominance and clear intention are apparent that will attract either private litigation or Trade Practices Commission attention. This is purely because, in uncharted waters, one needs to have a reasonably sound case before approaching the Federal Court.

The reduction in the threshold test will, nonetheless, cause uncertainty to business and at least initially, may cause some not inconsiderable caution in business conduct.

As a matter of reality, the writer believes, despite the philosophical principles stated by the government as to what the s. 46 amendments are aimed at achieving, not many businesses will be able to take advantage of market power unless they have dominance. Even though they may

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[129] *Inquiry in Relation to the Supply of Cigarettes* 26 November 1985.
[130] *Supra* n. 126.
[130a] *Ibid.*

appear to be the very corporations at which the amendments are aimed, entities with less than a 50% market share should, in the writer's view, not panic to change their marketing practices because of the amendments. This view is taken purely because it is immensely difficult to "take advantage" of market power unless something in the order of a 50% market share is held. Obviously, however it would be wise for corporations having strong market positions to take a market practices audit and seek legal advice in cases where potential difficulties may be thought to be present.

In this paper, the United States position has been discussed in some detail.[131] This is because it is a guide to probable Australian rulings on abuse of market power—even under the new amendments. The best general guidance which can be given, although it involves certain risk taking factors, is to apply those holdings to business decision making. There is the caveat which should be added that in Australia possibly business might have to be a little more conservative than in the United States on the question of predatory pricing.[132]

Beyond the above advice, it is impossible to go. There is no precedent law for the interpretation of the s. 46 amendments. It will be a question of seeing how it all works out in the fullness of time and after a new round of cases has come before the courts.

VIII OVERALL OBSERVATIONS ON THE AMENDMENTS

No case has been made out for the amendments. The major premises on which they are based are not borne out by empirical study. It is perhaps ironic that the amendments have been spawned by the parade of horribles which the Trade Practices Commission perceives as flowing from the *Ansett-Avis* and *CSBP* cases yet the amendments will not change the principles of either decision one jot.

The government has spoken a good deal on matters of philosophical principle but has given no specific examples of what it wants to achieve "on the ground". To the extent that examples are given, they are badly expressed and create the distinct possibility of unrealistic court interpretation.

The empirical evidence leads this writer to the conclusion that, in the first decade of its life, s. 46 was serving its purpose quite adequately. The government, having failed to make a convincing case to the contrary and having failed to explain clearly what it is trying to achieve by the amendments, would have been wise to have kept its hands off the section.

It is unfortunate that one amendment to s. 46 which could be beneficial has not been considered by the government. This amendment is to provide that monopoly power can be acquired by agreement or

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[131] See PART II.

[132] For United States position on predatory pricing see PART II.2(b). Note the observations in relation to the s. 46 amendments set out in PART V.3.(c).

arrangement as well as by the possession of unilateral power. The United States and EEC law both recognise this concept and the principle has marketing and economic logic on its side.

Whilst the writer's view is that business can survive the amendments, it has to do this largely by regarding them as the enactment of philosophical principles which will achieve little in fact. If this view is correct, then the amendments have been an elaborate and wasteful exercise upon which government should never have embarked.

To date it can fairly be said that no-one really knows, in any pragmatic sense, what the new law sets out to achieve or what changes it will, in fact, make to business conduct. Perhaps nothing at all will happen. If the writer's analysis in this paper is correct, such a result is the most likely one and, indeed, a not undesirable one.

The future of s. 46 probably depends primarily upon two things.

Firstly, much will depend upon how seriously the courts regard the *Parliamentary Explanatory Memorandum*, inadequate in many ways as it is, as expressing a rational view of what monopolization is all about.

Secondly, and very importantly, the future of the section will significantly depend upon whether the courts in Australia adopt a moralistic rather than a economic approach to monopolization. It will be a sad day for competition law should the courts adopt the moralistic view that the Trade Practices Act is a panacea for all wrongs or is a statute aimed at promoting friendly business relations.[133] Much is expressed in the Parliamentary Debates to the effect that monopolization law has a great deal to do with how people should ethically act and why they should be kind to each other. However, as Macauley once observed: "We know of no spectacle so ridiculous as the British public in one of its periodic fits of morality".[134]

In similar vein, this writer believes that no spectacle could be more ridiculous for the Trade Practices Act than that of courts having periodic fits of morality. For the future of competition law, it must be hoped that such fits do not occur. Hopefully, s. 46 will be interpreted as a section protecting the future of competition, not as a section protecting the position of competitors. Hopefully, also the court benches will not become pulpits from which sermons on ethics and morality, based on the alleged commandments of s. 46, will issue forth. In this regard, Australia can learn much from the United States experience where such moralism has been eschewed.[135]

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[133] See generally notes 44-49 and related text.
[134] Baron T. B. Macauley: *Moore's Life of Lord Byron.*
[135] *Supra* n. 133.