

Review of the Competition Provisions of the Trade Practices Act 1974

Supplementary Submission to the Committee of Inquiry

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The Question.

During the writer's discussion with the Committee on 9 August, the Committee asked why section 46 differed from other sections of Part IV of the Trade Practices Act 1974 in proscribing conduct to which it is directed. This supplementary submission provides the writer's answer to that question.

Section 46 - Some Background

For the first twelve years of its operation, the annotation to section 46 of the *Trade Practices Act 1974* ("the Act") described the section as dealing with "**Monopolisation**".

In so describing the section, the Act continued to reflect the special interest shown by Federal legislation in the conduct of monopolies since the *Australian Industries Preservation Act 1906* proscribed monopolisation in the following terms:-

"Any person who monopolises or attempts to monopolise, or combines or conspires with any other person to monopolise, any part of the trade or commerce with other countries or among the States with intent to control to the detriment of the public the supply or price of any service merchandise or commodity is guilty of an offence" (sub section 7(1)).

This section appeared in Part II of the Australian Industries Preservation Act which was entitled "Repression of Monopolies".

The wording of section 7 and other sections in Part II make it clear that their treatment of the subject was influenced by but did not copy the provisions of the United States Sherman Act. As the Privy Council observed in *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Company Limited* (1913) A.C. 781 at 801, U.S. authorities dealing with "the analogous statute known as the

Sherman Act", whilst valuable in certain respects, were not of any particular assistance in that case because the Sherman Act went further than the Australian Act in declaring illegal every contract or combination in restraint of trade.

In that case, the Privy Council accepted a monopoly as:-

"contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals"
(supra at p.795).

The special attention given to monopolies and the practice of monopolisation was continued in the Trade Practices Act 1965 which, whilst repealing the Australian Industries Preservation Act, provided for the surveillance of monopolization by declaring it to be "an examinable practice" (sub-section 37(1)), that is, one which could be taken by the Commissioner of Trade Practices to the Trade Practices Tribunal if he formed the opinion that the practice was contrary to the public interest (section 47). If the Tribunal determined that to be the case it could make such orders as it thought proper for restraining the person concerned or the combination concerned from continuing the practice. (section 52).

A corporation "in a dominant position in the trade in goods of a particular description...." engaged in monopolization "if it took advantage of that position so as to (bring about certain consequences) (sub-section 37(2) and a corporation was regarded as being in a dominant position if it was "the supplier of not less than one-third, by quantity or value" of relevant goods or services (sub-section 37(5)).

In 1972 the then Attorney General (the late Senator the Honourable R J Greenwood QC) proposed a Bill for amendment to the successor 1971 Act (not relevantly different from the 1965 Act), and in his Ministerial Statement (reported in Parliamentary Debates 24 May 1972) he contemplated the creation of a Monopolies Commission as an administrative body to advise the Government on whether monopoly conduct in any particular case was operating contrary to the public interest.

The proposal did not proceed due to a change in Government at the end of 1972 and proposals to deal with restrictive trade practices under the new Government emerged with the Trade Practices Bill 1973 (No. 2), the Second Reading Speech for which is recorded in the Senate Hansard of 15 November 1973.

The Second Reading Speech dealt with the proposed section 46 in the following terms:-

"Monopolisation is defined in clause 46 so as to cover various forms of conduct by a monopolist against his competitors of would be competitors. A monopolist for this purpose is a person who substantially controls a market. The application of this provision will be a matter for the Court. An arithmetical test such as one third of the market - as in the existing legislation - is unsatisfactory. The certainty which it appears to give is illusory. Sub clause (1) of clause 46 applies where the conduct takes place in the market controlled by the monopolist. In such a case the sub clause applies so long as the conduct is directed to eliminating or substantially damaging a competitor; preventing the entry of a person into the market; or deterring or preventing a person from engaging in competitive conduct. Sub clause (2) applies where the conduct is in another market. In such a case it is necessary that the anti-competitive conduct of the monopolist involves taking advantage of his monopoly position."

(Senate Hansard 15 November 1973 page 1875).

Although the Second Reading speech did not say so in express terms, it is clear that, as section 46 was finally enacted, it drew for its influence more upon the consideration given to the concept of dominance as found in Articles 85 and 86 of the Treaty of Rome in sharp distinction to sections 45, 47, 49 and 50 of the Act which, it is notorious, drew heavily upon United States Anti-Trust Legislation.

The identification of section 46 in its final form in 1974 with European rather than United States legislation and jurisprudence is evident from the non exhaustive definition of when a corporation might be in a position substantially to control a market in sub section 46(3).

That sub section described a corporation being in a position substantially to control a market for goods or services as including:-

"...a reference to a corporation or other body corporate, as the case may be, having, by reason of its share of the market, or its share of the market combined with the availability to it of technical knowledge, raw materials or capital, the power to determine the prices, or control the production or distribution, of a substantial part of the goods or services in that market."

Whilst not precise, those words (which were added during Committee stages of the 1973 Bill) reflected the observations of the European Court of Justice in *Europemballage and Continental Can v Commission* (1973 CMLR 199).

Section 46, substantially in its present form (save for sub section (1A)), was adopted by amendments in 1986 and in his Second Reading Speech relating to the Trade Practices Revision Bill 1986 the then Attorney General said:-

"A competitive economy requires an approximate mix of efficient businesses, both large and small. Whilst large enterprises may frequently have advantages of economies of scale, there are many occasions when large size does not of itself mean greater efficiency. However, a large enterprise may be able to exercise enormous market power, either as a buyer or seller, to the detriment of its competitors and the competitive process. Accordingly an effective provision controlling misuse of market power is most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors."

Having then commented upon the limited effectiveness of the section due to its application only to monopolists, the Speech went on:-

"The test for the application of the section is to be reduced from that of a corporation being in a position substantially to control a market to a test of whether a corporation has a substantial degree of market power. 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. The amendment will also make it clear that the Court can infer the requisite predatory purpose from the conduct of the corporation or from the surrounding circumstances. Section 46 in its proposed form, which will be described as misuse of market power rather than monopolisation, is not aimed at size or at competitive behaviour as such of strong businesses. What is being aimed at is the misuse by a business of its market power. Examples of misuse of market power may include in certain circumstances, predatory pricing or refusal to supply."

There has been a continuum of statutory disapproval of certain conduct by powerful market forces since competition legislation has existed at the Federal level in Australia (and in certain States)

The Committee's question.

A question posed by the Review Committee has been directed to the reason for section 46 of the Act departing from the "substantial lessening of competition" test in most other sections of Part IV.

First it must be observed that (subject to suggestions made by the writer in his principal submission about sub-section 46(1A)), section 46 is concerned with conduct directed to **competitors**, not **competition**. The acceptance of the fact that horizontal and vertical restraints upon competition were adequately covered by sections 45, 47 and 48 (also initially section 49 - price discrimination - repealed in 1995) was expressed by Donald and Heydon in volume 1 of Trade Practices Law at page 205 (paragraph 5.1.1) thus:-

"In any coherent body of law regulating free trade, a section prohibiting a corporation from taking advantage of market power to eliminate rivals or competition is a necessary complement to prohibitions of cartel agreements and vertical restrictions. There is little point in proscribing the fixing of price levels or the limiting of production by agreement between competitors if the purpose of achieving like results by one in a monopoly position (and hence, often, their achievement) is not controlled". This fundamental point was recognised early in the history of the Sherman Act..."

Donald and Heydon reconciled the use of the marginal note "*Monopolization*" as it then was by saying that "this is the usual description given to the conduct proscribed by (the section) though the word does not appear in the body of the section."

Conclusion

The conclusion, which the writer respectfully invites the Committee to adopt, is that section 46 recognises the special attention which needs to be given to conduct of a corporation possessing substantial market power and that in focussing its attention on the (anti) competitive impact of conduct proscribed in sub sections (1) and (1A), upon competitors, the section performs a particular function not elsewhere covered

in the Act so that there is nothing inconsistent in the principles of section 46 with those of the remainder of Part IV.

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