Developments in Trade Practices Law in Australia 1999-2001, 
An Analysis of Part IV of the Trade Practices Act 1974

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Abstract

This paper examines developments in Trade Practices Act law during the period 1999-2001 with specific references to Part IV of that Act which deals with Restrictive Trade Practices. The analysis focuses attention upon whether a finality of amendments to the Act has been attained and a consideration is made whether the case law principles yield certainty and predictability when applied to given factual situations. Attention is also given to whether the decisions have involved a proper utilisation of time.

Introduction

Historically, the common law regarded all contracts containing restraint of trade provisions as void.1 However during the nineteenth century in England public policy considerations - in particular laissez faire economic theory - resulted in the courts treating the freedom to contract as the prime public interest.2 The English courts - as evidenced by the decision in Mogul Steamship Co Ltd v McGregor, Gow & Co3 - endorsed contractual marketing freedom in preference to ‘fair competition’ as prime public policy. In Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co4 a man had sold his business on the condition that he would not compete with the buyer in that type of business anywhere in the world for a period of twenty-five years. Despite the fact that the restraint was unlimited to area and strongly prejudicial to competition the covenant was upheld by the courts.

Given judicial attitude it is not surprising that developments to preserve competition in Australian markets and to protect consumers against unfair practices by businesses have originated in State5 and Federal Parliament.6

The current Federal legislation in this field is the Trade Practices Act ('the Act') which subject to exceptions7, commenced on 1 October 1974. This statute had been preceded by the Australian Industries Preservation Act 19068, the Trade Practices Act 19659 and the Restrictive Trade Practices Act 197110. The current Act was introduced by the then Attorney-General, Senator L Murphy. The Act relies upon various constitutional bases for support, viz the corporations power11, the trade and commerce power12 and the postal and telephonic power.13

Given the fact that by the close of 1998 the Act was in its twenty-fifth year of operation one may have expected that any refinement to the legislation would have been fully achieved and that case law would have reduced - or indeed eliminated - issues of legal controversy in the interpretation of the statute. Instead in the period 1999-2001 there have been at least eighteen amending statutes,14 eleven cases on Part IV (dealing with Restrictive Trade Practices),15 three cases dealing with Part IVA (dealing with Unconscionability),16 twenty-four cases on Part V and Part VI dealing with Consumer Protection and Remedies17 and one case each on Part VA (dealing with Manufacturers Liability),18 Part XIC (dealing with the Telecommunications Access Regime)19 and Part XII (dealing inter alia with the Australian Competition and Consumer Commissioner’s power to obtain documents).20

The legislative amendments and insertions have been voluminous. This has been matched by the abundance of case decisions, their busy nature (many cases going on appeal) and the fact that varied wide-ranging areas of the Act were still being litigated.

In this context it is appropriate to review the abovementioned developments and assess whether finality of legislative change is likely and whether case law decisions have sufficient legal principles to yield, at last, certainty in the law in this area.

The aim of this paper is to perform the abovementioned task with respect to Part IV of the Act, which deals with Restrictive Trade Practices. The other developments will be the subject of a separate paper.

Part IV - Overview

The broad policy aim of Part IV is to preserve competition. The term ‘competition’ is not a term of art - and so cannot be examined in vacuo. That term must be explored in the context of a given market. In other words persons are usually regarded as competitors when they operate in a market. It becomes manifest that the definition of ‘market’ is a necessary prime step in determining the potential application of the provisions of Part IV. The term ‘market’ itself is defined in Section 4E to mean ‘a market in Australia’. The definition includes a market for goods or services that are substitutable for or otherwise competitive with other goods or services.21

Part IV provides a wide range of restrictive trade practices in a market including:

- contracts, arrangements and understandings (including price fixing) if the purpose or effect or likely effect
is to substantially lessen competition (Section 45 and 45A)\(^{21}\)

- misuse of market power (Section 46)
- exclusive dealing if the purpose or effect or likely effect is to substantially lessen competition (Section 47)\(^ {21}\)
- resale price maintenance (Section 48)\(^ {24}\)
- mergers if the acquisition would have the effect or likely effect of substantially lessening competition (Sections 50 and 50A).\(^ {25}\)

Section 49 - which dealt with Price Discrimination - was repealed in 1995\(^{26}\) on the basis that that practice could be regulated by the other provisions of Part IV. Moreover there has been a dearth of case law on Section 48 and Sections 50 and 50A during 1999-2001. This is in stark contrast to the considerable case disputes on the first three practices above. Attention will now be focussed upon these practices in turn, to determine the efficacy of the legislation in its goal to discourage and remove unfair business practices which inhibit competition.

In so doing it should not be forgotten that protection of competition in a market also serves to enforce the protection of the interests of consumers.\(^ {27}\) It must equally not be forgotten that under Section 51AAA it is Parliament’s intention that any law of a State or Territory should operate concurrently with Part IV unless the law is directly inconsistent with it.

Sections 45 and 45A

The thrust of Section 45 - as particularly stated in Section 45(2) is that a corporation\(^ {28}\) shall not make a contract, arrangement or arrive at an understanding if the purpose, effect or likely effect would be to substantially lessen competition. Section 45(3) prescribes that competition refers to competition in a market in which the corporation supplies or acquires goods or services or indeed is likely to do so. Pursuant to Section 45A(1) price fixing between or amongst competitors is deemed to be an infringement of Section 45(2). Section 45 will not operate where the conduct would contravene Section 47 (Section 45(6)) or Section 48 (Section 45(5)). Nor does it apply where the parties are related bodies corporate (Section 45(8)).

During 1999-2001 the following issues have arisen in the context of these provisions:-

(A) Does Section 45 operate independently of the common law doctrine of Restraint of Trade?

This issue was expressly considered by the High Court of Australia in Peters (WA) Ltd v Petersville Ltd and Another\(^{29}\). This is so despite the fact that Section 4M(a) states clearly that the Act does not affect the operation of the law relating to restraint of trade insofar as that law is capable of operating concurrently with the Act. In that case the first respondent (‘Petersville’) in 1980 formed a partnership with a body called ‘QUF’ and manufactured ice cream products under the ‘Peters’ brand name nationally and under the ‘Peters’ brand name in every state except Western Australia.

The appellant, Peters (WA) Ltd sold its ice cream and frozen confectionary under the ‘Peters’ trademark in Western Australia. In 1983 the appellant made a contractual agreement for the acquisition of the Western Australian ice cream business of QUF and Petersville. The partnership sold under this agreement the exclusive right to use the ‘Peters’ trademark in Western Australia. It was also covenanted that QUF and Petersville would not sell, supply or distribute to any person in Western Australia ice cream or frozen confectionary manufactured by them or distributed by them during the period of the agreement.

The respondents subsequently sought a declaration that the contractual restraint was unenforceable on the basis that it was in restraint of trade. At first instance Carr, J. made a declaration that the provision was void as being in restraint of trade. An appeal by the appellant (Peters (WA) Ltd) to the Full Federal Court was dismissed. The appellant then appealed to the High Court and claimed that the common law doctrine of restraint of trade was overridden by the Trade Practices Act so that no ruling could be made under that common law doctrine.\(^ {30}\)

According to Gleeson, CJ, Gummow, Kirby and Hayne, JJ,\(^ {31}\) the common law is free to develop independently of the Trade Practices Act provided always that the common law is capable of operating concurrently with it. Thus, according to their Honours\(^ {32}\) the common law may well strike down a restraint of trade even if it falls outside the operation of Part IV of the Act. In a separate judgment Callinan, J. adopted the approach that the application of the Trade Practices Act did not have to be decided\(^ {33}\) and noted that the appellant had not made out a case that the restraint of trade in this instance fell outside of the hitherto accepted categories of the doctrine.\(^ {34}\)

The High Court of Australia then explored the potential application of the doctrine of restraint of trade to the instant facts. That coverage is not directly relevant for present purposes. What is relevant is that in 2001 the High Court was being required to determine the co-existence of that common law doctrine\(^ {35}\) with Part IV despite the very clear presence of Section 4M(a). In the preceding year in Australian Rugby Union Ltd v Hospitality Group Pty Ltd\(^ {26}\) (examined in detail later in the analysis), Gyles, J.\(^ {36}\) had, in the course of his ruling to state clearly that the common law restraint of trade doctrine is not the equivalent of developed anti-trust legislation.

Both cases convincingly settle the issue. One may however inquire why, in the presence of Section 4M(a), was there any issue at all. Matters pertaining to expenditure and costs in litigation and utilisation of court time should, it is submitted, not be overlooked.
(B) What is a ‘market’?

The definition of ‘market’ under Section 4E was examined earlier in this paper. For present purposes it will suffice to say that it is a market in Australia and consists of a ring of buyers and sellers dealing in similar or substitutable products or services, that is products or services with a high cross elasticity of demand or of supply.

Despite the advent of the Act in 1974, the term ‘market’ was still being litigated in 2000 in *Australian Rugby Union Ltd v Hospitality Group Pty Ltd and Others*. It will be instructive to examine this decision and glean the complexities of market definition still present.

In this case the first and second defendants were companies engaged in the provision of corporate hospitality services at major sporting events. In May 1998 the first respondent entered into contracts with clients for the provision of hospitality packages to international rugby union tests to be played in 1999. The packages allegedly offered guaranteed premium seats to the tests.

The applicant was responsible for the issue of the tickets. The applicant had prescribed certain conditions on issue of tickets, viz, that they could not be re-sold at a premium nor re-sold for commercial purposes without prior consent. In December 1998 the applicant wrote to the first respondent reminding that body of these conditions. In early 1999 the first respondent continued to enter into the abovementioned rules packages. The second respondent also entered into an agreement for the provision of ‘travel packages’ to rugby tests.

The applicant brought an action against the two respondents and alleged that the latter were bound by the above conditions of sale. The respondents cross-claimed that the ticket terms and conditions were in breach of Section 45(2) of the Act.

The key issue was what was the ‘market’. The market contended for by the respondents was a market in Australia for the supply to business organisations of corporate hospitality packages in conjunction with national representative level rugby matches played in New South Wales, that is, the alleged ‘Hospitality Market’. The geographic market contended for was within New South Wales or alternatively within metropolitan Sydney. Under this contention the primary consumers are substantial commercial entities with expenditure on corporate hospitality being part of much larger marketing budgets.

The immediate issue for determination by Gyles, J. in the Federal Court was whether there was substitutability of product to enlarge the size of the market. Initially, his Honour found that there is no inter-changeability between different recognised sports, as each is distinct.

However, his Honour ruled that this was not determinative of the issue. The prime question was whether hospitality packages offering different sports were interchangeable. According to Gyles, J. although there may be some substitutability the issue is always whether the packages were sufficiently close to qualify.

Gyles, J. ruled that it would prima facie appear that there was no close substitute for rugby union test match hospitality. However his Honour dismissed the cross-claim on the basis of a lack of documented evidence supporting the contended definition of ‘market’. Under the restraint of trade doctrine, Gyles, J. ruled that the conditions were reasonable and legitimate.

One may observe in passing that for a case not to proceed on the basis of a lack of proper documented evidence on so basic a term as ‘market’ gives one pause. Twenty-five years worth of litigation has not necessarily inspired concentration on and attention to key statutory concepts in the presentation of cases and to the basic necessity for evidence. As the analysis later reveals such a defect in presentation is not isolated.

(C) What is a ‘contract’, ‘arrangement’ or ‘understanding’ for a proscribed purpose or effect?

Past cases have revealed that parallel conduct is insufficient to contravene the section. Furthermore, the two or more parties must engage in trading activities. To take an example if one party is a trader and the other party is a Traders Association, doubt has been expressed as to the applicability of Section 45(2).

Given the case law precedent in this area the outcome in *Australian Competition and Consumer Commission v CC (New South Wales) Pty Ltd* is rendered rather predictable.

In that case, a body called ACS invited various tenderers to tender for a major Commonwealth Government construction project. The ‘AFCC’ was an association of employers of which each relevant tendering company was a member. The AFCC notified the tenderers that a ‘special fee’ or levy of one million dollars would apply to the successful tenderer. The AFCC did not provide services in return for this fee (the ‘AFCC fee’).

Quite separately each of the tenderers made an arrangement with each other that the successful tenderer would pay to the other tenderers an ‘unsuccessful tenderers fee’ (‘UTF’) of seven hundred and fifty thousand dollars. A firm called ‘Hollands’ was the successful tenderer. It paid both the AFCC fee and the UTF fee. Each tenderer had agreed to take both fees into account when preparing a tender.

The Australian Competition and Consumer Commission (‘the ACCC’) alleged that both arrangements infringed Section 45(2) of the Act. In particular it was alleged that the special fee understanding and the UTF fee understanding were likely to have the effect of controlling the tender pricing process.

With respect to the UTF fee, Lindgren, J. found that this arrangement was likely to have the effect of controlling the price that would be charged for the project and therefore contravened Section 45(2). His Honour ruled that each party assumed an obligation or gave an assurance or understanding. The key to this decision was the trading character of each relevant party.

With respect to the AFCC special levy fee there was no understanding at all, according to Lindgren, J. Is this outcome predictable? It is submitted that the answer is affirmative. One party to the alleged ‘contract’, ‘arrangement’ or ‘understanding’ never operated in a market. The outcome based on precedent, follows logically. What is questionable therefore is the quality of the legal advice (if any) given to the parties with respect to the UTF fee. The legal advice given to the parties vis-à-vis the special fee levy, in contrast, is clearly sound.

Another decision of the Federal Court is by no means as predictable as the decision in *ACCC v CC (New South..."
agreed with the judgment of Hely, J. at first instance. 54 His Honour ruled it under Section 45(2) an entitlement to restrain News Ltd from clubs in excess of the fourteen teams selected to be in the term was to limit the supply or acquisition of services to or services since the immediate purpose of the fourteen team to be a restriction or limiting of the supply or acquisition of Moore, J. agreed with the relief proposed by Merkel, J. 58 It In his Honour's judgment there would have the purpose of restricting or limiting the acquisition of According to Moore, J. there was an 'arrangement' and it did not exist.59

On appeal to the Full Federal Court, Heerey, J. (dissenting) agreed with the judgment of Hely, J. (at first instance).54 However the two other appellate judges allowed the appeal. According to Moore, J. there was an 'arrangement' and it did have the purpose of restricting or limiting the acquisition of team services.55 In his Honour's judgment there would have to be a restriction or limiting of the supply or acquisition of services since the immediate purpose of the fourteen team term was to limit the supply or acquisition of services to or from clubs in excess of the fourteen teams selected to be in the competition.

In a separate judgment Merkel, J. ruled that Souths had, under Section 45(2) an entitlement to restrain News Ltd from giving effect to the fourteen team term.56 His Honour ruled it appropriate to grant injunctive relief to restrain News Ltd and N and ARL from giving effect to the fourteen team term.57 Moore, J. agreed with the relief proposed by Merkel, J.58 It was further ruled that Souths was also entitled to damages to be assessed in respect of any loss or damage suffered by it through the conduct of the respondents.59

The ruling raises the issue of 'purpose' and whether bona fides on the part of the respondents could be a valid defence. This had been the case in Wayde v NSW Rugby League Ltd 60 a decision in the area of corporations law.

In Souths Case, both Moore, J. and Merkel, J. rejected any public benefit argument in having a fourteen team term. According to Merkel, J. whilst it may be accepted that there is a public benefit in a unified competition, it does not follow that such a competition could only be viable or sustainable at the fourteen team level.

In review the decision in CC Case61 was predictable in terms of whether there was a contract, arrangement or understanding. Equally in the Souths Case62 there was a contract, arrangement or understanding. The difficulty stemmed from determining its purpose or effect. Clearly bona fides or public benefit is, not necessarily a defence. Nor would administrative convenience necessarily exonerate the parties to the arrangement. The onus is now clearly on such parties to show administrative convenience and public benefit with respect to the conduct chosen coupled with evidence that alternative arrangements were not viable. This new test may indeed prove difficult to satisfy in future cases. The degree of difficulty in discharging that onus is uncertain - and this, it is submitted, could lead to a lack of predictability of case outcomes well into the future. The prospect would be further litigation in this area.

(D) Does Section 45 apply to 'vertical conduct'?

Section 47 which covers 'Exclusive Dealing' relates to anti-competitive conduct amongst or between parties at different levels of the distributive chain, that is, to vertical conduct. Section 45(3) specifies that the competition examined must be 'in any market in which a corporation ... or party to the contract, arrangement or understanding ... supplies or acquires or is likely to supply or acquire, goods or services'.

Normally this is suggestive that both parties to the arrangement operate in the same market. Yet is it possible that Section 45 has within its ambit vertical conduct? In JC Decaux Pty Ltd v Adshel Street Furniture Pty Ltd and Another63 Weinberg, J. ruled that it was at least arguable that the conduct of the respondents in that case - although 'vertical' and not 'horizontal' between competitors contravened Section 45.64 Since the Federal Court's task was merely to determine whether the Statement of Claim should be struck out as disclosing no cause of action under Section 45 rather than authoritatively deciding the application of vertical conduct to that provision, the matter remains unresolved. One may submit that the issue is far from resolution and is a portent of continual litigation in this area.

(E) Does the doctrine of Crown Immunity apply to Section 45?

One may, yet again, be forgiven for believing that this matter was already legislatively settled in 199765 by Section 2B of the Act. That provision specifies, inter alia that Part IV (including thereby Section 45) binds the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory so far as the Crown carries on business, either directly or by an authority of the State or Territory. Equally, pursuant to Section 2A, the Act binds the Crown in right of Commonwealth so far as the Crown carries on a business, either directly or by an authority of the Commonwealth.

Interestingly the Crown in right of a State or Territory is not liable for a pecuniary penalty nor can it be prosecuted for an offence: Section 2B(2). The same applies to the Crown in right of Commonwealth: Section 2A(3). However no such protection is afforded to an authority of a State or Territory: Section 2B(3). Nor does it apply to an authority of the Commonwealth: Section 2A(3A).

In the light of the above one would have thought that the Crown was bound in civil matters under the Act and, further, that Crown authorities were not immune from prosecution or penalty. Yet the exact opposite ruling was made by the Federal
Court in 2001.

In NT Power Generation Pty Ltd v Power and Water Authority and Others66 Mansfield, J. had to consider claims of Part IV infringements committed by the Power and Water Authority (PAWA), a corporation established by the Power and Water Authority Act 1987 (NT) to generate and sell electricity in the Northern Territory and by Gasco Pty Ltd (‘Gasco’) a wholly owned subsidiary of PAWA which purchased gas from the Northern Territory’s commercial gas fields. This was a civil case not involving prosecution or penalties but rather involving claims for damages and for injunctive relief. Although the claims primarily related to Section 46 it is instructive that the Federal Court did not rule on the substantive aspects of the section.67 Rather Mansfield, J. dealt with the issue of Crown immunity under Part IV.

His Honour ruled that PAWA was subject to the control of the relevant Northern Territory Minister and so ‘enjoyed’ immunity.68 His Honour further ruled that Gasco was not entitled to immunity as an emanation of the Crown but nevertheless had ‘derivative Crown immunity’ as any ruling against it could prejudice the security of PAWA’s gas supply and financial interests.

At the risk of repetition Section 2B(1) specifies that the Crown of the Northern Territory is bound by Part IV. No pecuniary penalty or prosecution was involved. In any event Section 2B(3) specifies that protection is not afforded to a Territory authority - which it is submitted is the correct classification for PAWA and Gasco. It is submitted that Mansfield, J.’s ruling is open to question. It certainly plays havoc with the legislative intent of Section 2B. Accordingly, judicial analysis in this area is far from settled.

Section 46

The thrust of Section 46 is that a corporation that has a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor (Section 46(1)(a))
- preventing the entry of a person into a relevant market (Section 46(1)(b))
- deterring or preventing a person from engaging in competitive conduct in a relevant market (Section 46(1)(c)).

A corporation will not breach this section by reason only that it acquires plant or equipment: Section 46(5).

During 1999-2001, the following issues have arisen in the context of these provisions:

(A) What is a ‘market’?

(B) What is meant by ‘take advantage’?

Each of these issues will now be examined in turn.

(A) What is a ‘market’?

The background analysis of this term was reviewed in the examination of Section 45 and need not be repeated. Nevertheless a disturbing parallel to Australian Rugby Union Ltd v Hospitality Group Pty Ltd and Others69 under Section 45 has emerged under Section 46, viz Sita Queensland Pty Ltd v Queensland.70 In the first case the claim was dismissed owing to a lack of evidence as to the market definition. The same outcome occurred in the latter case. According to Dorsett, J. the Statement of Claim failed to describe the market so as to deprive any realistic assessment of the degree of market power. The Court ordered the Claim to be struck out.

After twenty five years of case law lack of proper presentation was ever present. As earlier indicated, legal expenses and proper utilisation of court time yet again appear to have been sacrificed.71 In contrast in Australian Competition and Consumer Commissioner v Boral Ltd,72 Heerey, J. ruled on the evidence that the relevant market was the one in which builders acquired materials for use in the construction of walls and pavings in Melbourne.

(B) What is meant by ‘take advantage’?

As long ago as 1989 in Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd73 the High Court indicated that the expression ‘take advantage’ does not require a hostile intent.74 In more recent times in 1999, Heerey, J. in Australian Competition and Consumer Commissioner v Boral Ltd75 indicated that if at the same time two firms engaged in certain conduct, one firm with no substantial degree of market power and the other firm with such power then it would normally follow that the latter firm was not taking advantage of its power.76 In that case the ACCC claimed that “B” had a substantial degree of market power in the market for concrete masonry products in the Melbourne area and took advantage of that power by selling at less than the avoidable costs of production.

The ACCC alleged that the purpose of this conduct was to eliminate or to substantially damage other competitors. Heerey, J. found that low barriers to entry and the existence of strong competitors meant that B did not have power to behave independently of competitive forces and did not have substantial market power.

It becomes manifest that conduct by a corporation with a substantial degree of market power which is similar to conduct by a corporation which lacks such power is telling against an infringement of Section 46. The immediate issue to be explored is whether Section 46 will not apply if a corporation engages in conduct when it has a substantial degree of market power which is familiar to the conduct it engaged in when it lacked such power. The recent landmark High Court decision in Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (Trading as Auto Fashions Australia)77 answered that issue in the affirmative. In effect the majority of the High Court78 indicated that taking advantage could not occur in those circumstances.79 Given the hitherto silence on this matter by the High Court it is appropriate to consider this decision at length, precisely because both the Federal Court decision and the Full Federal Court decision - which followed hitherto accepted reasoning - were reversed.

In that case the appellant published the Melway Street directory which accounted for eighty five per cent of all street directories sold in Melbourne. The appellant distributed its directory through distributors each of which was allocated one segment of the retail market. In February 1995 the respondent requested the supply of thirty thousand to fifty thousand Melway Street directories per annum with the intention to supply without regard to the allocated market segment. The
The appellant refused to supply the respondent and the latter brought an action in the Federal Court alleging a breach of Section 46. The Court found in favour of the respondent and the appellant appealed to the Full Federal Court. By a majority of two to one the Full Federal Court ruled that the appellant had taken advantage of its market power by refusing to supply Melway directories to the respondent. The Full Federal Court further ruled that the appellant had done so for the purpose of preventing the respondent from competing with existing distributors in the market for Melway directories. This ruling was reversed on appeal by the majority of the High Court - Gleeson, C.J., Gummow, Hayne and Callinan JJ (in a joint judgment).

Their Honours stressed that a refusal to supply was not determinative of an infringement of Section 46 nor of 'taking advantage'. Rather one needed to look at the particular distributorship system. The real question according to their Honours was whether without its market power the appellant could have maintained its distributorship system or at least that part of it which gave distributors exclusive rights in relation to specified segments of the retail market. Their Honours ruled that the creation and maintenance of the distributorship system by the appellant at a time when it did not have a substantial degree of market power showed that its maintenance of that system at a time when it did have substantial market power was not an exercise of that power. The majority stressed that any hypothesis concerning how the appellant would have acted if it had not a substantial degree of market power would be flawed and should be rejected.

It becomes manifest that at present under Section 46 there is a difficult issue as to whether the section will not be applicable if a party which engages in predatory pricing when it does not have a substantial degree of market power continues to do so if it gains such power. It is submitted that the majority's interpretation of 'taking advantage' involves a literal and semantic approach to a key section on anti-competitive conduct. One solution would be to amend Section 46 to specifically oust the majority's approach to 'taking advantage'. It is worth the effort to examine, albeit briefly, the dissenting judgment of Kirby, J. His Honour ruled that the appropriate test is not to compare the corporation's conduct when it did not have a substantial degree of market power with its conduct when it did have such power. His Honour indicated that the test is:

What would the corporation have done in a competitive market as opposed to what it did when it possessed a substantial degree of market power?

His Honour ruled that the appellant 'took advantage' of its power and its purpose was anti-competitive.

If legislative reform is deemed appropriate it is forcefully submitted that the starting point would be the above remarks of Kirby, J.

The majority decision casts doubt on earlier decisions. To take an example the obiter dicta remarks of Mansfield, J. in *NT Power Generation Pty Ltd v Power and Water Authority and Others* are now open to doubt.

In that case Mansfield, J. observed, obiter dicta, that PAWA's conduct in refusing access to its infrastructure was not the exercise of a regulatory function but was the exercise of market power. In the same way his Honour noted that there was sufficient direct evidence to conclude that PAWA took advantage of its power in the relevant market. With respect this approach is akin to that of Kirby, J. in *Melway* - not of the majority judges in the latter case.

Finally the decision in *Aerial Taxi Cabs Co-operative Society (Trading as Canberra Cabs) v Lee* does not conflict with *Melway*. In that case a taxi co-operative society had at all relevant times disciplinary provisions in its by-laws. Only members of the society were entitled to be members of the body which administered society discipline. The Full Federal Court found that the society did not thereby take advantage of its powers and that the disciplinary powers were not unreasonable.

However it must not be forgotten that consistency between *Melway* and *Aerial Taxi Cabs* does not detract from the submitted need for legislative reform in this area. Indeed consistency of these two decisions acts as the very impetus for parliamentary involvement.

**Section 47**

Section 47 applies to vertical arrangements between corporations at different levels in the distributive chain. Pursuant to Section 45(6), Section 45 does not apply to most conduct caught by Section 47. Exclusive dealing contravenes the legislation where its purpose or effect or likely effect is to lessen competition: Section 47(10). The competition itself must be examined in the context of a market: Section 47(13).

Three main types of vertical restrictions are regulated:

- product restrictions
- customer restrictions
- territorial restrictions.

In addition 'third line forcing' is regulated under Section 47(6) and Section 47(7).

During the period 1999-2001 the key issue raised under this Section is as follows:

(A) Does Section 47 operate independently of the common law with respect to the doctrine of restraint of trade?

At the outset one's immediate reaction is that such an issue was clearly resolved in *Peter's Case* as examined exhaustively above. The problem was that that case was not determined by the High Court until 2001. At the same time the Federal Court was involved in an examination of the relationship between Section 47 and the common law doctrine of restraint of trade.

In *ACT v Munday* the appellant owned a salvage tip. It had an agreement with a recycling business known as Revolve. The respondent had made frequent visits to the tip where he scavenged for discarded items. The appellant erected a sign prohibiting scavenging on its property. It attempted to stop the respondent from both coming to the tip and from dealing with other persons at the tip. The respondent alleged that the appellant was engaged in exclusive dealing contrary to Section 47 of the Act. The Full Federal Court ruled that the common law relating to restraint of trade was expressly preserved by Section 4M. However the Court further ruled that the doctrine of restraint of trade did not apply to the instant case on the
basis that the acquisition of a right in relation to land may be outside of the ambit of that common law doctrine. The Court further noted obiter that the restraints of trade were not unreasonable.

As with the Peters Case, Munday’s Case underscores the problem of expensive litigation and proper utilisation of court time in the presence of the clearest statutory language.

Assessment

In final analysis one may glean that the abundant, busied and various case disputes evidence no sign of abating. Indeed the principles and problems raised by them promote certainty of future litigation.

In his Deakin Memorial Lecture of 1971, J.M. Fraser said:

*There is within me some part of the metaphysic and thus I would add that life is not meant to be easy.*

In the light of the above review, it certainly will not be easy if litigation continues to contest clear statutory language such as Section 4M of the Act as in the Peters Case\(^\text{100}\) and the Munday Case\(^\text{101}\) or indeed Section 2B as in the PAWA Case\(^\text{102}\). It equally will not be easy if parties fail to properly identify market definition as in Hospitality Group Case\(^\text{103}\) and Sita Case\(^\text{104}\). The decision in Boral\(^\text{105}\) which neatly examined and defined the relevant market was pleasing.

The predictability of the outcome in the CC Case\(^\text{106}\) is matched by the unpredictability of the literalistic semantic decision in Melway\(^\text{107}\) and by the decision in the South Sydney Case\(^\text{108}\) - equally lacking in judicial unanimity. The consistency between Melway and Aerial Taxi Cabs\(^\text{109}\) compounds the problem.

Admittedly the decision in Decaux\(^\text{110}\) raises the novel issue of vertical conduct under Section 45. A detailed judicial analysis of this novel concept is clearly welcome. Expensive (and pointless) litigation and lack of proper utilisation of court time is not.

The ACCC Guidelines on Mergers under Section 50 in 1996 have been followed by relative stability in that area. Equivalent detailed Guidelines may well prove very useful for Section 46 and Section 47. Legislative amendment, in the light of Melway, may be inevitable.

Guidelines and legislative amendments may well prove lofty goals. In their absence the prospect of complicated and continuous litigation looms before us. This is the legacy of predictability for the years ahead.§
Endnotes

3. ACCC News Releases
29. ABC News, 2 July 2002
30. Sunday Age, 28 July 2002
Additonal References

The statutes are:

- Telecommunications Legislation Amendment Act 1999 No 52
- A New Tax System (Trade Practices Amendment Act) 1999 No 61
- Public Employment (Consequential and Transitional) Amendment Act 1999 No 146
- A New Tax System (Indirect Tax and Consequential Amendments) Act 1999 No 176
- Federal Magistrates (Consequential Amendments) Act 1999 No 194
- Jurisdiction of Courts Legislation Amendment Act 2000 No 57
- A New Tax System (Trade Practices Amendment) Act 2000 No 69
- Trade Practices Amendment (International Liner Cargo Shipping) Act 2000 No 123
- Corporations (Repeals, Consequentials and Transitionals) Act 2001
- Trade Practices Amendment Act (No 1) 2001 No 63 Sections 1-3
- SR 40 of 2001 - Trade Practices Amendment Regulations 2001 (No 1)
- Pt 2 of Sch 1 of Trade Practices Amendment (International Liner Cargo)
- SR 57 of 2001 - Trade Practices Amendment Regulations 2001 (No 2)
- SR 74 of 2001 - Trade Practices Amendment Regulations 2001 (No 3)
- Communications and the Arts Legislation Amendment Act 2001 No 46
- SR 149 of 2001 - Trade Practices Amendment Regulations 2001 (No 4)
- SR 226 of 2001 - Trade Practices Amendment Regulations 2001 (No 5)

Cases on Part IV

- Aerial Taxi Cabs Co-operative Society Ltd (trading as Canberra Cabs) v Lee (2000) 178 ALR 73.
- JC Decaux Pty Ltd v Adshel Street Furniture Pty Ltd and

Cases on Part IVA


Cases on Part V

- Campomar Sociedad Limitada and Another v Nike International Pty Ltd and Another (2000) 169 ALR 677.
- Effem Foods Pty Ltd v Lake Cumberline Pty Ltd (1999) 161 ALR 599.
- Hi-Fert Ltd and Another v Kiukiang Maritime Carriers Inc and Another (2000) 173 ALR 263.
- Hunt Australia Pty Ltd v Davidson’s Arnhemland Safaris (2000) 179 ALR 738.
- Kenny & Good Pty Ltd v MGICA Ltd (1999) 163 ALR 611.
- King v GIO Australia Holdings Ltd and Others (2001) 184 ALR 98.
- Koninklijke Philips Electronics NV and Another v


Mark Foys Pty Ltd v TVSN (Pacific) Ltd (2000) 181 ALR 90.

Martin v Tasmania Development and Resources (1999) 163 ALR 79.

Murphy and Another v Overton Investments Pty Ltd (2001) 182 ALR 138.


Robin Pty Ltd v Canberra International Airport Pty Ltd (1999) 179 ALR 449.

South Sydney District Rugby League Football Club Ltd v News Ltd and Others (2000) 177 ALR 611.


Case on Part VA

Graham Barclay Oysters Pty Ltd and Another v Ryan and Others (2000) 177 ALR 18.

Case on Part XIC

Foxtel Management Pty Ltd and Others v Seven Cables Television Pty Ltd and Others (2000) 175 ALR 433.

Case on Part XII

Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd and Another (2001) 182 ALR 114.

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