

REFUSALS TO SUPPLY UNDER SECTION 46  
OF THE TRADE PRACTICES ACT: MISUSE OF MARKET POWER  
OR LEGITIMATE BUSINESS CONDUCT?

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### Introduction

In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,<sup>1</sup> the High Court's landmark ruling on the interpretation of s 46 of the Trade Practices Act 1974 (Cth), BHP's refusal to supply a competitor was held to amount to a misuse of market power. Still surprisingly controversial,<sup>2</sup> the decision remains the High Court's only exegesis of s 46 to date, a fact no doubt contributing to the extensive academic commentary and criticism it has engendered.<sup>3</sup>

Of course, prior to *Queensland Wire*, commentators had lamented the lack of legal principle governing refusals to supply. As Corones remarked:

Under what circumstances can a corporation with a substantial degree of market power refuse to supply goods or services to a distributor or customer? This is perhaps the most vexed question in the whole area of Trade Practices Law.<sup>4</sup>

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\* I would like to thank Roger Gibson of the University of New South Wales for helpful comments on an earlier draft. The usual caveat applies.

1 (1989) 167 CLR 177; Mason CJ, Wilson, Deane, Dawson and Toohey JJ. The case is referred to as *Queensland Wire* throughout this article.

2 The decision is 'much referenced, frequently applied, much discussed, and still quite significantly criticised': Welsman SJ, 'In *Queensland Wire*, The High Court has Provided an Elegant Backstop to "Use" of Market Power' (1995) 2 CCLJ 280 at 280.

3 Articles supportive of the High Court's decision in *Queensland Wire*, above n 1, include, for example: Alexiadis P, 'Refusal to Deal and Misuse of Market Power Under Australia's Competition Law' (1989) ECLR 436; Lee SJ, 'Queensland Wire Industries: A Breath of Fresh Air' (1990) 18 FLR 212; Welsman SJ, see above n 2. Those expressing concern include, for example: O'Bryan M, 'Section 46: Law or Economics?' (1993) 1 CCLJ 64; Hay G and McMahon K, 'Duty to Deal under Section 46: Panacea or Pandora's Box?' (1994) 17 UNSWLJ 54; Pengilley W, 'Misuse of Market Power: Present Difficulties - Future Problems' (1994) 2 TPLJ 27.

4 Corones SG, 'Are Corporations with a Substantial Degree of Market Power Free to Choose their Distributors and Customers?' (1988) 4 QUTLJ 21 at 21. In the United States, the issue has been similarly described as 'one of the most unsettled and vexatious in the antitrust field': *Byars v Bluff City News Co Inc* 609 F 2d 843 (1979) at 846.

However, in light of the High Court's determination in *Queensland Wire* and subsequent Federal Court decisions, it has become clear that the critical factor in refusal to supply cases is whether the defendant company can justify its conduct. As this article demonstrates, a refusal to supply will be excused by the courts provided there is some legitimate business explanation for it. Of necessity, this approach requires a case-by-case examination of the relevant factual matrix, but within the parameters established by judicial pronouncement.

This article contends, therefore, that critics who assert the lack of 'any coherent framework'<sup>5</sup> for the application of s 46 in refusal to supply cases have overlooked the significance of legitimate business reasons offered (or omitted) by the defendant corporation in justification of its conduct. To provide context for this discussion, the article first reflects on the internationally-recognised importance of proscribing misuses of market power. It then re-examines the elements of s 46 of the *Trade Practices Act* in terms of the seminal principles articulated by the High Court in *Queensland Wire* (where, it should be emphasised, BHP failed to provide a legitimate business reason for its behaviour) and applied by the Federal Court in subsequent decisions.

As a point of comparison for the emerging body of Australian law on refusals to supply, the antitrust jurisprudence of the European Community and United States is referenced frequently throughout the article. The choice of comparative focus may be traced to the judgments of Mason CJ and Wilson J, and Dawson and Toohey JJ in *Queensland Wire*,<sup>6</sup> where their Honours relied heavily on European and United States' authorities in interpreting and applying s 46 of the *Trade Practices Act*.<sup>7</sup>

One issue not considered further in this article is the relationship between s 46 and the recently implemented Part IIIA of the *Trade Practices Act*.<sup>8</sup> Entitled 'Access to Services', Part IIIA represents, for all intents and purposes, a statutory codification of the essential facilities doctrine in Australia. This doctrine, which is well-established in both European Community and United States' competition law,<sup>9</sup> places a special obligation on a dominant corporation to give its competitors access to 'essential facilities'<sup>10</sup> under its control.<sup>11</sup>

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5 McMahon K, 'Refusals to Supply by Corporations with Substantial Market Power' (1994) 22 ABLR 7 at 19.

6 See above n 1 at 188-190 per Mason CJ and Wilson J; 200-202 per Dawson J; 210 per Toohey J.

7 In fact, three of the European cases cited - *Europemballage Corp and Continental Can Co Inc v Commission of the European Communities* [1973] CMLR 199, *United Brands Co v Commission of the European Communities* [1978] 1 CMLR 429 and *Hoffman-La Roche & Co v Commission of the European Communities* [1979] 3 CMLR 211 - feature expressly in the Explanatory Memorandum (cl 17, par 46) accompanying the *Trade Practices Revision Act* 1986 (Cth).

8 Part IIIA commenced on 6 November 1995.

9 See generally: Glasl D, 'Essential Facilities Doctrine in EC Antitrust Law: A Contribution to the Current Debate' [1994] ECLR 306; Areeda P, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 Antitrust Law Journal 841.

10 Classic examples include electricity transmission grids and major gas pipelines, rail-beds and ports.

11 The four elements necessary to establish liability under the essential facilities doctrine have been identified as: control of the essential facility by a monopolist; a competitor's inability practically or reasonably to duplicate the essential facility; the denial of the use of the facility to a competitor;

In Australia, judicial reluctance to embrace the essential facilities doctrine<sup>12</sup> led to the introduction of Part IIIA, while leaving open the parallel operation of s 46. This would appear to be a sensible outcome as not every case involving a refusal to supply will be concerned with essential facilities.<sup>13</sup> Indeed, the cases discussed in this article fall exclusively within the terms of s 46,<sup>14</sup> demonstrating the continuing relevance of the provision.

## Controlling Misuses Of Market Power

The importance of provisions prohibiting the misuse of market power,<sup>15</sup> or jurisdictional variations on that theme,<sup>16</sup> as a key component of antitrust legislation has been recognised as follows:

One way of fostering competition in the economy is to ensure that established corporations are not allowed to misuse their market power in order to retain their market share by deterring new entrants or preventing effective competition in the market.<sup>17</sup>

Thus, in Australia, s 46(1)<sup>18</sup> of the *Trade Practices Act* provides:

A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

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and the feasibility of providing the facility. See *MCI Communications Corp v American Telegraph & Telephone Co* 708 F 2d 1081 (1983) at 1132-1133.

- 12 In *Queensland Wire* (1988) ATPR 40-841 at 50,006, the Full Federal Court (Bowen CJ, Morling and Gummow JJ) noted that the essential facilities doctrine 'is not readily accommodated to the terms of s 46 itself'. On appeal, the High Court did not discuss the essential facilities doctrine at all. Subsequent academic consideration of the extent to which s 46 implicitly includes the essential facilities doctrine concluded that 'incorporating the essential facilities doctrine into s 46 does require considerable flexibility and imagination': see Kewalram RP, 'The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy' (1994) 2 TPLJ 188 at 202.
- 13 Part IIIA is in fact concerned with essential 'services' rather than 'facilities'. This recognises that while one facility may provide a range of services, only one of those services may be essential to enable competition in an upstream or downstream market. Under Part IIIA, the focus will be on that particular service.
- 14 The definition of 'service' in s 44B (the definitions section in Part IIIA) specifically excludes 'the supply of goods', 'the use of intellectual property' and 'the use of a production process'. These are the very activities at issue in the cases discussed in this article, rendering the provisions of Part IIIA inapplicable.
- 15 Although the term is not used in the section itself, the marginal note to s 46 reads 'Misuse of market power'.
- 16 For example, art 86 of the Treaty of Rome 1958 (EC), s 2 of the Sherman Act 1890 (US) and s 36 of the Commerce Act 1986 (NZ).
- 17 Nagarajan V, 'The Regulation of Competition by Section 46 of the Trade Practices Act' (1993) 1 CCLJ 127 at 127.
- 18 In 1986, s 46 was amended in significant respects by the Trade Practices Revision Act. The Hilmer Committee recommended no change to its current wording: see Independent Committee of Inquiry (Hilmer Committee), National Competition Policy, AGPS (1993) at 74.

- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.<sup>19</sup>

The 'abuse of dominant position' and 'monopolisation' provisions of the European Community and United States, respectively, mirror s 46 in that both require substantial market power (referred to as a 'dominant position' in the European Community and 'monopoly' power in the United States) and anti-competitive behaviour (identified as 'abuse' in the European Community and 'monopolising' conduct in the United States).<sup>20</sup>

Article 86 of the *Treaty of Rome* 1958 (EC),<sup>21</sup> unique for its specification of examples of abusive conduct,<sup>22</sup> closely resembles s 46 in that it does not prohibit the acquisition or possession of market power but, rather, seeks to limit the exercise of that power.<sup>23</sup> However, s 2 of the *Sherman Act* 1890 (US),<sup>24</sup> which also has been held not to prohibit the mere possession of monopoly power,<sup>25</sup> goes further than s 46 by requiring commercially reprehensible conduct on the part of a monopolist.<sup>26</sup>

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19 In identifying kinds of conduct which could be in breach of s 46, the Explanatory Memorandum (cl 17, par 53) to the Trade Practices Revision Act lists, without further elaboration, 'refusal to supply'. It may be noted that such conduct could also constitute a breach of ss 45, 47 and 48 of the Trade Practices Act.

20 For detailed discussion of the European and United States' provisions, see Hawk BE, 'European Economic Community and United States Antitrust Law: Contrasts and Convergences' (1988) 16 ABLR 282. A more recent exposition of the European jurisprudence may be found in Law L, 'Regulation of Market Dominance: A Comparative Study of the Law and Policies Under the Treaty of Rome and the Australian Trade Practices Act', *Unpublished LLM Thesis*, University of Queensland (1992).

21 Article 86 of the *Treaty of Rome* provides: 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:  
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;  
(b) limiting production, markets or technical development to the prejudice of consumers;  
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;  
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

22 In *Europemballage Corp and Continental Can Co Inc v Commission of the European Communities* [1973] CMLR 199, the European Court of Justice indicated that the list in art 86 was not exhaustive as to the kinds of 'abuse' prohibited. Thus, in *Commercial Solvents Corp v Commission of the European Communities* [1974] 1 CMLR 309, refusal to supply was recognised as a form of abusive conduct even though it is not listed in art 86.

23 In *Nederlandsche Banden-Industrie Michelin NV v Commission of the European Communities* [1985] 1 CMLR 282, the European Court of Justice held that because the very presence of a dominant corporation weakens the market, that corporation has a special responsibility not to allow its conduct to impair or hinder the maintenance or development of a competitive environment.

24 Section 2 of the *Sherman Act* provides (in part): 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.'

25 *United States v Grinnell Corp* 384 US 563 (1966).

26 Commercially reprehensible conduct involves the use of non-legitimate tactics by business entities in seeking to advance their competitive position in the market. See, for example, *United States v Klearflax Linen Looms Inc* 63 F Supp 32 (1945) and *Lorain Journal Co v United States* 342 US

Nevertheless, it is clear that under the respective legislative provisions prohibiting misuse of market power, it is not the possession of power, or dominance, which offends per se.<sup>27</sup> Rather, it is the conduct of the powerful, or dominant, corporation which is subject to scrutiny. In the context of New Zealand antitrust law,<sup>28</sup> the point has been expressed neatly:

A firm ... may have a dominant position in a market. That is not unlawful. The firm, in that dominant position, may trade in a competitive fashion. That is not unlawful ... It is only when the dominant firm oversteps that mark and 'uses' its dominant position for anti-competitive purposes ... that the law steps in.<sup>29</sup>

Whether or not a firm has crossed the dividing line between the legitimate and illegitimate uses of its market power is the very issue explored in the balance of this article.

### Elements Of Section 46: *Queensland Wire* Revisited

A breach of s 46 of the *Trade Practices Act* is established if:

- (1) a corporation possessing a substantial degree of market power;
- (2) takes advantage of that power;
- (3) for one or more of the prohibited purposes in s 46(1)(a), (b) or (c).

A brief recital of the facts of *Queensland Wire* provides contextual background for analysis of the above elements. BHP, responsible for approximately 97 per cent of Australia's steel output, produced Y-bar<sup>30</sup> which it sold exclusively to its wholly owned subsidiary Australian Wire Industries (AWI). AWI produced fence posts from the Y-bar and sold these as a producer. Queensland Wire Industries (QWI) sought supply of the Y-bar produced by BHP in order to produce fence posts and compete against AWI in the rural fencing market. BHP offered to supply the Y-bar at prices which were so high that its conduct amounted to a constructive refusal to supply.<sup>31</sup>

Before the High Court, QWI successfully claimed that BHP had misused its market power in contravention of s 46 of the *Trade Practices*

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143 (1951).

27 As the Explanatory Memorandum (cl 17, par 47) to the *Trade Practices Revision Act* points out: 'The section is not directed at size as such, nor at competitive behaviour as such. What is prohibited, rather, is the misuse by a corporation of its market power.'

28 The wording of s 36 of New Zealand's *Commerce Act* is closely based on s 46 of the *Trade Practices Act*.

29 *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 49-352 at 103,789 per McGechan J.

30 Y-bar is used to produce star picket posts by cutting the Y-shaped steel into fence post lengths and drilling holes through which wire will pass. Star picket fencing is the most popular form of rural fencing in Australia.

31 The High Court's decision in *Queensland Wire*, above n 1, makes clear that supply on unreasonable or restrictive terms amounts to constructive refusal to supply. According to Mason CJ and Wilson J, at 185, the offer by BHP was at 'an excessively high price relative to other BHP products'; Deane J, at 197, described it as an 'unrealistically high' price; and Toohey J, at 204, identified a refusal to supply at a 'competitive price'.

Act. The parties then settled their dispute out of court in confidential negotiations.<sup>32</sup>

Interestingly, at first instance, Pincus J observed that he had been referred 'to no authority in the United States or in Europe, in support of the view that ... a vendor of property may be forced to accept a new customer except where there was a history of trading enabling one to conclude that the would be customer was being discriminated against.'<sup>33</sup>

However, it is 'not at all clear why a "history of trading" should give rise to a greater obligation to continue to supply'<sup>34</sup> and the High Court's decision on appeal implicitly recognises that the distinction between a refusal to supply an existing customer and a refusal to supply a new customer is irrelevant to the question whether the refusal is a misuse of market power. This view is consistent with European<sup>35</sup> and United States<sup>36</sup> authorities on point.

### Market Power

Whether or not a corporation in fact possesses substantial market power is an issue inextricably linked to the way in which the relevant market is defined.<sup>37</sup> For present purposes, suffice it to say that market definition is often an extremely controversial matter in restrictive trade practices cases,<sup>38</sup> as highlighted by recent publicity<sup>39</sup> surrounding Burchett J's decision in *News Ltd v Australian Rugby Football League Ltd*<sup>40</sup> (the *Super League* case).

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32 On the question of the appropriate relief to be granted by a court where a contravention of s 46 is established, see generally: Wright R, 'Injunctive Relief in Cases of Refusal to Supply' (1991) 19 *ABLR* 65; Cormack D, 'Are Current Statutory Remedies for Section 46 of the Trade Practices Act Adequate?' (1993) 23 *QLSJ* 471; Corones SG, 'Remedies under the Trade Practices Act for Refusal to Supply' (1993) 10 *Aust Bar Rev* 259.

33 (1987) ATPR 40-810 at 48,820. Since then, however, the European Court of Justice has upheld the decision of the European Court of First Instance in *Radio Telefis Eireann and Independent Television Publications Ltd v Commission of the European Communities* [1995] ECR I-743 (the *Magill TV Guide* case).

34 McMahan, see above n 5 at 7.

35 For example, the *Magill TV Guide* case, see above n 33.

36 As explained in *Byars v Bluff City News Co* 609 F 2d 843 (1979) at 864: 'There exists no theoretical distinction between ordering a monopolist to deal with a former customer and ordering the monopolist to deal with anyone who comes along.'

37 In the following cases, for example, actions based on s 46 were defeated due to the adoption of relatively wide market definitions which led to findings of insufficient market power on the part of the defendant corporation: *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd* (1992) ATPR 41-155; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) ATPR 41-167; *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159; *News Ltd v Australian Rugby Football League Ltd* (1996) ATPR 41-466.

38 For further discussion of the issues involved in defining a market and establishing the power of a corporation therein, see generally: Corones SG, 'The New Threshold Test for the Application of Section 46 of the Trade Practices Act' (1987) 15 *ABLR* 31; Hay G, 'Market Power in Australasian Antitrust: An American Perspective' (1994) 1 *CCLJ* 215; Smith RL, 'The Practical Problems of Market Definition Revisited' (1995) 23 *ABLR* 52.

39 For example, 'Line ball for broad approach', *The Australian Financial Review*, 17 May 1996 at 22.

40 (1996) ATPR 41-466. On appeal, the Full Federal Court did not address the issue of market definition (the respondent's conduct was found to be prohibited per se, rendering it unnecessary to consider the impact of that conduct on competition in the relevant market): see *News Ltd v*

However, on the facts of *Queensland Wire*, the High Court had little difficulty in establishing the threshold requirement for the operation of s 46.<sup>41</sup> Their Honours were unanimous in the view that BHP possessed a substantial degree of market power in the market for steel and steel products.<sup>42</sup>

### Taking Advantage

In *Queensland Wire* at first instance, Pincus J held that for a corporation to 'take advantage' of its power in a market, there must be some misuse of that power in an unfair or predatory manner.<sup>43</sup> In his Honour's view, a proper construction of the section required those words to be read in a pejorative sense.<sup>44</sup> In contrast, however, the High Court unanimously held that 'taking advantage' is a neutral concept and so does not require proof of hostile intent.<sup>45</sup>

The test discernible from the High Court judgments is that a firm's conduct will amount to a use of market power when that conduct is possible, in a commercial sense, only because of its market power.<sup>46</sup> A firm should be regarded as having taken advantage of market power when it has behaved differently from the manner in which it would have behaved were it operating in a competitive market.<sup>47</sup> In the words of Mason CJ and Wilson J:

It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power - in other words, if it were operating in a competitive market - it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.<sup>48</sup>

In drawing the inference of taking advantage, the High Court took account of the following factors: BHP supplied Y-bar to AWI but not QWI;

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*Australian Rugby Football League Ltd* (1996) ATPR 41-521. However, as a general rule, there is no doubt that the way in which the relevant market is defined impacts significantly on the operation of the *Trade Practices Act*.

41 Compare the joint judgment of the Full Federal Court in *Queensland Wire*, see above n 12, in which Bowen CJ, Morling and Gummow JJ held that the action failed on the point that there was no market for Y-bar and hence there could be no possibility of market power.

42 *Queensland Wire*, see above n 1 at 192 per Mason CJ and Wilson J; 197 per Deane J; 201 per Dawson J; 211 per Toohey J. In this respect, their Honours upheld the decision of Pincus J at first instance in *Queensland Wire* (1987) ATPR 40-810.

43 (1987) ATPR 40-810 at 48,819.

44 Ibid.

45 *Queensland Wire*, see above n 1 at 191 per Mason CJ and Wilson J; 194 per Deane J; 202 per Dawson J; 213 per Toohey J. As mentioned previously (above n 40), the appeal from Pincus J to the Full Federal Court failed on the point that there was no market for Y-bar.

46 *Queensland Wire*, see above n 1 at 192 per Mason CJ and Wilson J; 197-198 per Deane J; 202-203 per Dawson J; 216 per Toohey J.

47 In *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263 (1979) at 291, it was held that s 2 of the *Sherman Act* similarly prohibits 'an action that a firm would have found less effective, or even counterproductive, if it lacked market power.'

48 *Queensland Wire*, see above n 1 at 192. Similar views were expressed by Dawson J, at 202, and Toohey J, at 216.

BHP made available for general sale at competitive prices all the other steel products from its rolling mills so that BHP's conduct with respect to Y-bar was not in accordance with the general terms of its commercial behaviour; in every other steel product line in which BHP experienced some competition, it supplied that product.<sup>49</sup>

It follows from the High Court's reasoning in *Queensland Wire* that a corporation would not have taken advantage of its market power if it would have been likely to act in the same way in a competitive market.<sup>50</sup> Thus, it is necessary to demonstrate that the conduct in question is attributable to market power. A dramatic illustration of the need for a causal link between a firm's market power and its conduct was provided by French J in *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*:<sup>51</sup>

If a corporation with substantial market power were to engage an arsonist to burn down its competitor's factory and thus deter or prevent its competitor from engaging in competitive activity, it would not thereby contravene s 46. There must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power.<sup>52</sup>

Although the requirement of causality may appear relatively straightforward, certain s 46 decisions have accepted the proposition that if a corporation with substantial market power exercises a contractual or statutory right, it necessarily takes advantage of a power it has by virtue of the contract or statute and not by virtue of its control of a market.<sup>53</sup> In this way, market power has been treated as severable from contractual or statutory power. However, other decisions have recognised that there is no foundation for such reasoning.<sup>54</sup> It is submitted that the latter view, which accords with the approach of the European Court of Justice,<sup>55</sup> is correct. Contractual or statutory power should therefore be treated as a factor relating to the degree of market power held by a corporation instead of a factor potentially weakening the causal connection between a corporation's market power and its conduct.<sup>56</sup>

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49 Ibid at 192 per Mason CJ and Wilson J; 197-198 per Deane J; 202-203 per Dawson J; 216 per Toohey J.

50 See Hanks F and Williams P, 'Implications of the Decision of the High Court in *Queensland Wire*' (1990) 17 *Melb Univ L Rev* 437 at 445-446, for possible explanations of a firm's refusal to supply in competitive conditions.

51 (1992) ATPR 41-196.

52 Ibid at 40,644.

53 For example: *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) ATPR 40-714; *Williams v Papersave Pty Ltd* (1987) ATPR 40-818; *Dowling v Dalgety Australia Ltd* (1992) ATPR 41-165; *Aut 6 Pty Ltd v Wellington Place Pty Ltd* (1993) ATPR 41-202.

54 For example: *Australasian Performing Rights Association v Ceridale Pty Ltd* (1990) ATPR 41-042; *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd* (1992) ATPR 41-155; *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd* (1994) ATPR 41-318.

55 See the *Magill TV Guide* case, above n 33.

56 For further discussion of this issue, see Law L and Marshall B, 'Misuse of Market Power: The Degree of "Causal Connection" Required Under Australian and European Law' (1997) 3 *International Trade and Business Law Annual*, forthcoming.



### Purposive Action

Although the High Court in *Queensland Wire* eliminated any notion that the concept of 'taking advantage' requires conscious predatory activity, it is nevertheless necessary for the party seeking to establish a contravention of s 46 to prove that one or more of the relevant purposes in s 46(1) is present on the facts of the case. As Mason CJ and Wilson J explained:

... it is significant that s 46(1) already contains an anti-competitive purpose element. It stipulates that an infringement may be found only where the market power is taken advantage of for a purpose proscribed in par (a), (b) or (c). It is these purpose provisions which define what uses of market power constitute misuses.<sup>57</sup>

An unavoidable element of intention<sup>58</sup> is thereby incorporated into s 46, in the sense that the section requires purposive action undertaken with the express aim of substantially damaging a competitor, preventing the entry of a competitor into a market or preventing a person from engaging in competitive conduct in a market.<sup>59</sup> In this way, s 46 expressly requires the anti-competitive purpose which must be read into art 86 of the *Treaty of Rome* and s 2 of the *Sherman Act*.

On the question of whether s 46 requires proof of an anti-competitive purpose or mere injury to a competitor, the High Court in *Queensland Wire* denied that the protection of individual traders is an objective of s 46. In contrast to European decisions upholding a view of art 86 of the *Treaty of Rome* which protects the individual traders in the market rather than competition in the market,<sup>60</sup> Mason CJ and Wilson J said:

... the object of s 46 is to protect the *interests of consumers*, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away ... and these injuries are the inevitable consequence of the competition s 46 is designed to foster.<sup>61</sup>

Although it is not clear what the 'interests of consumers' means when used in relation to s 46, it may be argued that because the consumer is primarily concerned with obtaining goods and services at the lowest possible price, the welfare of consumers depends on a competitive market in which corporations compete against each other in order to produce goods

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57 *Queensland Wire*, see above n 1 at 191.

58 In relation to intention, see also ss 46(7), 4F and 84 of the *Trade Practices Act*.

59 It has been argued that s 46(1) has its own built-in standard of predation on the basis that conduct fulfilling the requirements of pars (a), (b) or (c) cannot be anything but predatory: see Alexiadis, above n 3 at 452.

60 For example, *Commercial Solvents Corp v Commission of the European Communities* [1974] 1 CMLR 309 and *United Brands Co v Commission of the European Communities* [1978] 1 CMLR 429. In both cases, the European Court of Justice stated that the objectives of art 86 dictated that the elimination of a competitor from the market was a relevant concern. In *United Brands*, the Court also considered injury to consumers as a relevant objective.

61 *Queensland Wire*, see above n 1 at 191 (emphasis added).

and services as cheaply and efficiently as possible. Section 46 is aimed therefore at preventing corporations with substantial market power from using this power to deter or prevent competition.<sup>62</sup>

Deane J certainly spoke of s 46 in terms which suggest he was of the view that it is designed to protect and advance competition per se. In his Honour's words:

... the essential notions with which s 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones ... The objective is the protection and advancement of a competitive environment and competitive conduct ...<sup>63</sup>

However, the wording of s 46 does not literally accord with either of the objects suggested in *Queensland Wire*. This is because the section is 'expressed in terms of protecting firms who wish to engage in competitive conduct, rather than in terms of protecting competition itself or the interests of consumers.'<sup>64</sup> Moreover, s 46(1A), inserted by the Trade Practices Amendment Act 1992 (Cth), provides that the reference to a competitor or person in the proscribed purposes in s 46(1) includes a reference to particular classes of persons or classes of competitors. Relatedly, the Explanatory Memorandum to the *Trade Practices Amendment Act* (Cth) states: 'For the avoidance of doubt, this amendment makes it clear that s 46 does not only apply where those proscribed purposes are aimed at a particular competitor or competitors or a particular person or persons.' Thus, the amendment appears to confirm that the legislative intention of s46, contrary to the opinion of the High Court in *Queensland Wire*, is to include conduct which harms a particular competitor.

McMahon has complained that the proscribed purposes in s 46(1) cloud the distinction between competitive and predatory conduct because they are 'so widely drawn and ill-defined'<sup>65</sup> and deal exclusively with injury to competitors, which is the very nature of competitive conduct.<sup>66</sup> However, in countering this criticism, it is submitted that what distinguishes predatory from competitive conduct is the use of market power for one of the purposes prohibited by s 46(1) in circumstances where no legitimate business explanation justifies the conduct.

In identifying the necessary 'anti-competitive' purpose under s 46, it is further submitted that primary consideration should be given to an analysis of the impugned conduct and the inferences which can be drawn

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62 See further, Nagarajan, above n 17 at 128.

63 *Queensland Wire*, see above n 1 at 194. Toohey J, at 213, expressed a similar approach and Dawson J, at 198, noted his general agreement with the judgment of Deane J. In embracing the view of Deane J, O'Bryan, see above n 3 at 84, has asserted: 'If conduct of a corporation (which has substantial market power) harms a competitor but is nevertheless efficiency promoting, we ought not to be concerned about the conduct; if it is not efficiency promoting, we ought to be concerned ... [T]his is the central issue over which s 46 cases should be fought.'

64 Clarke P, 'Misuse of Market Power and the Trade Practices Commission' (1990) 18 ABLR 355 at 356.

65 McMahon, see above n 5 at 18.

66 Ibid.

from that conduct. Clearly, both objective and subjective elements will be important. That is to say, s 46 requires an objective test,<sup>67</sup> to which subjective evidence may be relevant.

It must be appreciated, however, that if conduct is not objectively anti-competitive, the fact that it was motivated by hostility to competitors is irrelevant. In other words, while hostile intent may be relevant to proving the conduct, it does not constitute some overriding prerequisite to a contravention of s 46.

## The Importance Of Legitimate Business Reasons

In *Queensland Wire*, Mason CJ and Wilson J held that their conclusion that 'the effective refusal to sell was for an impermissible purpose was supported by the fact that BHP did not offer a legitimate reason for the effective refusal to sell.'<sup>68</sup> Recent support for this approach is to be found in Kiefel J's decision in *Photo-Continental Pty Ltd v Sony (Aust) Pty Ltd*,<sup>69</sup> where her Honour stated that a finding of a breach of s 46 should be 'subject to other explanations offered or appearing from the circumstances.'<sup>70</sup> Such comments reflect the similar approaches adopted in the European Community and United States.

In *United Brands Co v Commission of the European Communities*,<sup>71</sup> for example, the European Court of Justice explained that in determining whether a refusal by a dominant undertaking to supply a customer is inconsistent with art 86 of the *Treaty of Rome*, it is 'necessary to ascertain whether discontinuance of supplies ... was justified.'<sup>72</sup> Similarly, in *Aspen Skiing Co v Aspen Highlands Skiing Corp*,<sup>73</sup> the Supreme Court of the United States held that 'a company which possesses monopoly power and which ... refuses to deal with a competitor in some manner does not violate s 2 [of the *Sherman Act*] if *valid business reasons* exist for that refusal.'<sup>74</sup>

It is reasonable to assert, therefore, that the impugned conduct of a corporation constitutes a taking advantage of market power for one of the proscribed purposes in s 46(1) when there is no legitimate business reason justifying the corporation's behaviour.<sup>75</sup> On the other hand, if a legitimate

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67 In *General Newspapers Pty Ltd v Telstra Corp* (1993) ATPR 41-274 at 41,697, the Full Federal Court confirmed that 'the ultimate test is an *objective* test which ... involves notions of markets, market power, competitors in a market and competition' (emphasis added). In *Hoffman-La Roche & Co v Commission of the European Communities* [1979] 3 CMLR 211 at 217, the European Court of Justice had similarly defined the concept of abuse as 'an *objective* concept relating to the behaviour of an undertaking in a dominant position' (emphasis added).

68 *Queensland Wire*, see above n 1 at 193.

69 (1995) ATPR 41-372.

70 *Ibid* at 40,123.

71 [1978] 1 CMLR 429.

72 *Ibid* at 445 (emphasis added).

73 472 US 585 (1985).

74 *Ibid* at 597 (emphasis added).

75 See also, Welsman, above n 2 at 291.

business reason substantially explains the corporation's ostensibly anti-competitive conduct, then there is no misuse of market power.<sup>76</sup>

There are many legitimate purposes which can motivate a refusal to deal.<sup>77</sup> Past unsatisfactory dealings with a customer, a customer's poor credit record, a lack of confidence in a customer's business ethics, concerns about the quality of a customer's after sales service or other matters affecting the commercial reputation of the supplier, are factors which may impact upon the decision.<sup>78</sup> The Australian Competition and Consumer Commission (ACCC)<sup>79</sup> also has recognised that:

The particular characteristics of some products may require a policy that restricts distribution to a limited number of outlets. For example, the technically sophisticated nature of some products may require technical skills and facilities for pre-sales and post-sales servicing.<sup>80</sup>

A bona fide attempt to protect legitimate trade and business interests justified the refusal to deal in *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd*.<sup>81</sup> Likewise, in *Australasian Performing Rights Association v Ceridale Pty Ltd*,<sup>82</sup> it was accepted that APRA's real purpose in refusing to grant a licence to Ceridale was to prevent the unauthorised use of its material and to maintain the integrity of its licensing system. In a similar vein, inappropriate product labelling and rationalisation of distribution were identified as potentially legitimate business reasons in *Berlaz Pty Ltd v Fine Leather Care Products Ltd*.<sup>83</sup>

More recently, in *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd*,<sup>84</sup> it was held that the respondent's termination of

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76 Pursuant to s 4F of the *Trade Practices Act*, it is sufficient to constitute a breach of s 46 if a proscribed purpose in s 46(1) was one among other purposes, so long as the proscribed purpose was a substantial one. It follows, therefore, that if a corporation can establish that it was motivated substantially by some 'legitimate' purpose, there will be no contravention of s 46.

77 According to Hanks and Williams, see above n 50 at 157, 'any refusal which is explained as a means of avoiding unnecessary costs or improving the quality of the product or service' would not amount to a taking advantage of market power. See also: Corones SG, 'The Proposed Amendments to Section 46 of the Trade Practices Act: Some Problems of Interpretation and Application' (1985) 13 ABLR 138 at 149; MacDonald K, 'Queensland Wire Industries Pty Ltd v BHP' (1989) 19 QLSJ 131 at 133.

78 In the United States, valid business reasons for refusing to deal also have been held to include: the abandonment of an unprofitable and uncomfortable operation, see *Clark v United Bank of Denver National Association* 480 F 2d 235 (1973); inability to maintain accurate records, see *Byars v Bluff City News Co* 609 F 2d 843 (1979); and reluctance to deal with firms which engage in deceptive advertising or unfair practices, see *Homefinders of America Inc v Providence Journal Co* 621 F 2d 441 (1980).

79 Formerly the Trade Practices Commission (TPC).

80 Trade Practices Commission, *Misuse of Market Power: Background Paper and Guidelines on Section 46 of the Trade Practices Act 1974*, AGPS (1990) at 36. The policy may reflect the limited shelf life of the product and the need to ensure that sales are achieved under particular conditions.

81 (1975) ATPR 40-004. However, compare *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) ATPR 40-809, where the respondent's contention that the refusal to supply was for the legitimate business reason that the applicant's conduct could bring the product into market disrepute was rejected on the facts.

82 (1990) ATPR 41-042.

83 (1991) ATPR 41-118.

84 (1994) ATPR 41-318.

the applicant's distributorship agreement was not conduct which involved the respondent 'taking advantage of its market power for a purpose of the kind referred to in s 46.'<sup>85</sup> Although no express reasons were given for the decision, presumably it was due to the applicant's persistent breaches of the terms of the agreement.

Returning to the facts of *Queensland Wire*, McMahon has raised the interesting argument that BHP merely set a monopolistic price for its Y-bar and that this amounts to a legitimate business reason for its conduct, since the charging of a monopoly price is a defensible use of monopoly power.<sup>86</sup>

In a subsequent article on related s 46 themes, Hay and McMahon extended the argument by stating:

... there is a fundamental incompatibility between the general principle that an unintegrated monopolist can charge a monopoly price but an integrated monopolist must sell to its potential downstream competitors at some price other than what it would unilaterally choose.<sup>87</sup>

Hay and McMahon's primary assertion is that so long as a monopolist is free to charge the monopoly price for its product, it has no reason not to sell to independent downstream producers even though this may cause the monopolist itself to lose sales in the downstream market.<sup>88</sup>

However, this assertion provides the very basis for justifying the High Court's conclusion in *Queensland Wire* that there was a constructive refusal to supply. BHP's letter, quoted in the joint judgment of Mason CJ and Wilson J,<sup>89</sup> establishes that BHP's purpose in offering to supply at the prices in question was to achieve the same result as an outright refusal to supply at any price. BHP described its conduct as 'either to refuse supply of steel Y-bar or to offer to supply steel Y-bar at an uncompetitive price',<sup>90</sup> treating these alternatives as equivalent. In the absence of any explanation from BHP, the High Court was entitled to treat the prices at which BHP was prepared to supply as tantamount to an outright refusal to supply.

This was not a situation in which BHP was prepared to supply, even at a monopoly price. Rather, BHP did not want to supply at all.<sup>91</sup> According to Hay and McMahon's own arguments, there is no economic justification for this behaviour.

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85 Ibid at 42,236 per Hill J.

86 McMahon, see above n 5 at 18. Support for the economic principles underpinning this argument may be found in the recent decision of the Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1995) 1 NZLR 385.

87 Hay and McMahon, see above n 3 at 61.

88 Ibid at 58.

89 *Queensland Wire*, see above n 1 at 184-185.

90 Ibid.

91 As McMahon, see above n 5 at 21, expressly acknowledged: 'A purpose of eliminating competition must be discerned from the excessively high price. It is this purpose, similar to leverage, which distinguishes this situation from merely the collection of monopoly profits or the efficiencies to be gained by vertical integration.'

It follows, therefore, that the High Court's decision in *Queensland Wire* may be taken as confirming, in Australia, judicial opposition to market leverage.<sup>92</sup> In simple terms, market leverage refers to 'the situation in which a firm controls the supply of an input that is critical in the production of another 'downstream' product, but refuses to supply that input to certain potential suppliers of the downstream product or does so only on terms that render it impossible for those downstream firms to be effective competitors.'<sup>93</sup>

European and United States case-law has long acknowledged that an undertaking which is dominant with regard to the production and supply of certain products which are necessary to compete in another market may not, without a legitimate business justification, refuse to supply these products and thereby reserve the market for itself.<sup>94</sup>

For example, in *Commercial Solvents Corp v Commission of the European Communities*,<sup>95</sup> a leading European case on refusal to supply, the dominant manufacturer of nitroparaffin products (used in the production of tuberculosis drugs) decided that it would no longer supply nitroparaffin to other drug producers. A former customer complained that the refusal to supply amounted to a breach of art 86 of the *Treaty of Rome*. In upholding the complaint, the European Court of Justice held that a dominant corporation in the market for the supply of a raw material cannot, without legitimate business justification, refuse to supply the raw material when such refusal would lead to the elimination of competition in the downstream market for derivative products.<sup>96</sup>

A similar result was achieved in *United States v Aluminum Co of America*.<sup>97</sup> There, the refusal by a monopolist aluminum manufacturer to sell aluminum ingot to other producers of consumer goods prevented competition in the downstream market for pots and pans. In the absence of

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92 For a general discussion of market leverage, see 'Refusals to Deal by Vertically Integrated Monopolies' (1974) 87 Harv L Rev 1720 at 1725-1732.

93 Hay and McMahon, see above n 3 at 54. In other words, leverage occurs when a monopolist attempts to gain a competitive advantage in or protect a downstream market through its control of the primary market rather than through superior downstream performance. It will be appreciated that the facts of *Queensland Wire*, see above n 1, disclose precisely this situation: by refusing to supply QWI with Y-bar, BHP used its power in the Australian steel market to deter or prevent QWI from engaging in competitive conduct in the rural fencing market.

94 As explained in *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263 (1979) at 291: '... it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolised goods or services he needs to compete effectively in the second market.' However, market leverage theory is not without its critics. Bork, for example, complains that it involves a double counting of the same degree of market power. In his view, there is only one monopoly profit to be made in a chain of production, so that a firm which monopolises one market cannot increase its profits by extending or leveraging into a vertically adjacent market. See Bork R, *The Antitrust Paradox: A Policy at War with Itself*, Basic Books (1978) at 141.

95 [1974] 1 CMLR 309.

96 The principle now extends beyond the context of raw materials. See *Hugin Kassaregister and Hugin Cash Registers Ltd v Commission of the European Communities* [1979] 3 CMLR 345 (refusal to supply spare parts to a product distributor) and *Centre Belge d'Etude de Marche-Telemarketing SA v Compagnie Luxembourgeoise de Telediffusion SA & Information Publicite Benelux SA* [1986] 2 CMLR 558 (refusal to supply broadcasting time).

97 148 F 2d 416 (1945).

valid business reasons for its conduct, the manufacturer was held to have infringed of s 2 of the *Sherman Act*.

## Conclusion

The concept 'misuse of market power' represents the combined effect, legally and economically,<sup>98</sup> of the three elements of s 46. The corporation must first possess market power. Then, because of this market power, it must act in a way in which it would not be able to act under competitive conditions. In addition, its conduct must be directed towards achieving one of the proscribed anti-competitive purposes (and not be excused by legitimate business reasons). Except in the most obvious of cases, there can be little doubt that the requirements of s 46 'will *always* be difficult to prove'.<sup>99</sup>

Not surprisingly, therefore, the prediction that 'it is unlikely that there will be a flood of successful s 46 actions'<sup>100</sup> in the wake of *Queensland Wire* has been borne out in the years since the High Court's decision. This is mainly due to firms being able to rely on various legitimate business reasons as justifying their refusals to supply.<sup>101</sup> As Corones anticipated, 'the courts ... will look carefully at the reasons given for refusing supplies and [only] where they are not satisfied that they involve some legitimate business reason, the refusal will be condemned'.<sup>102</sup>

Clearly, then, the answer to the question whether a refusal to supply constitutes a breach of s 46 turns on whether the refusal is 'justified'. To briefly summarise (assuming market power and a taking advantage of that power): if the corporation refusing to supply is manifesting one of the anti-competitive purposes in s 46(1), and is unable to justify its conduct by reference to some legitimate business explanation, then there is a clear breach of s 46.

It has been argued that the purpose element of s 46 'presents us with a paradox',<sup>103</sup> since both competitive conduct and monopolistic conduct are potentially harmful to a competitor. However, distinguishing between harmful monopolistic conduct and beneficial competitive conduct is simply a question of fact to be determined in light of the relevant circumstances of a given case and, in particular, an assessment of the legitimate business

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98 As McMahon, see above n 5 at 28, has recognised: '... it is obvious that the correct application of s 46 to a 'refusal to supply' is not dependent on the mere interpretation of 'take advantage' or the literal application of the proscribed purposes, but an understanding of the economic effect of the particular conduct.'

99 Alexiadis, see above n 3 at 467 (emphasis in original).

100 MacDonald, see above n 77 at 133.

101 Indeed, Lee, see above n 3 at 227, warned of the difficulty of establishing a contravention of s 46 in cases 'where the hallmarks of sporadic and discriminatory conduct are absent, where there are no damaging admissions and where relevant witnesses are prepared to testify as to some legitimate commercial reason for their conduct.' Nevertheless, there are cases in which conduct blatantly in breach of s 46 has occurred; see for example, *TPC v CSR Ltd* (1991) ATPR 41-076, in which the defendant company admitted its misuse of market power.

102 Corones, see above n 4 at 29.

103 O'Bryan, see above n 3 at 81.

reasons offered in justification of the conduct.<sup>104</sup> It may be hoped that this approach will encourage corporate behaviour based on efficiency and public interest considerations,<sup>105</sup> since these are legitimate business reasons readily accepted by the courts.

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104 Refer to case examples discussed in Part 4 of this article.

105 See also, Welsman, above n 2 at 310.