QUEENSLAND WIRE INDUSTRIES: A BREATH OF FRESH AIR

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The passing of the 1988-1989 third financial quarter will probably be viewed by the BHP Group with mixed emotions. On the one hand BHP was recently reported to be "on course for [a] record $1bn profit" for this current financial year, having in the first nine months lifted its profits to $768 million, a 5.8 per cent increase on the $725.8 million for the equivalent period in the 1987-1988 financial year.[1] On the other hand however it was in this third quarter that the High Court, at the expense of BHP, was given its first opportunity to consider s 46 of the Trade Practices Act 1974 (Cth) in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd and Australian Wire Industries Pty Ltd*.[2] In a decision shedding some much needed light on the section, the Court unanimously held that BHP misused its substantial degree of power in the steel products market by refusing to supply Y-bar to Queensland Wire Industries Pty Ltd (QWI), albeit in continued adherence to its policy of committing that product to manufacturing processes within the BHP group.

Not surprisingly the decision has provoked the expression of staunchly held points of view. Reports flourished in the media at the time exalting the virtues of antitrust policy and rejoicing in David's victory over Goliath. But it was also suggested that *Queensland Wire* unduly cut across notions of freedom in commercial decision-making in that a vertically integrated manufacturer, merely by virtue of its size, was denied the right to decide with whom it would deal and was effectively forced to enter into a business in which it had never previously engaged. Certainly the High Court has given s 46 an operation more far reaching than might have been predicted on the basis of existing domestic and overseas authorities, but in analysing the justifiability or otherwise of this 'extension', care must be taken to ensure that emotive or extraneous considerations do not creep into the debate. The sole point of reference must be the terms of the enactment. To take a contrary approach would not do justice to the decisional style adopted by the High Court in this case.

1 FACTS OF THE CASE

QWI made an application under the Trade Practices Act alleging that BHP had taken advantage of its market power by effectively refusing to sell to QWI Y-bar, a steel product used in the manufacture of star picket posts. The evidence was that BHP supplied about 85 per cent of Australia's demand for steel and steel products. Its only substantial domestic competitor was Smorgon Consolidated Industries Pty Ltd ('Smorgon'), which occupied about 3 per cent of the market share in the supply of steel and steel products.

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1 *The Weekend Australian* 1-2 April 1989, 29. The major contributor to these results was said to be the steel division, which commenced its run into the final straight with a nine-month net profit of $320.6 million, as compared with $112.4 million for the same period last year; see also the *Courier Mail* 1 April 1989, 33.

2 (1989) 63 ALJR 181. This decision is hereafter referred to as *Queensland Wire*, and the parties as 'QWI', 'BHP' and 'AWI' respectively.

BHP however was the sole Australian manufacturer of Y-bar. Only 1 per cent of star picket posts used in Australia were imported. The balance were manufactured by the BHP group from its Y-bar. Accordingly this Y-bar was not for general sale. BHP supplied most of it to AWI, a wholly owned subsidiary, which used it in the manufacturing of star picket posts, and exported the balance to associated companies in New Zealand and Papua New Guinea.

QWI commenced operations about twenty years ago by making barbed wire. By the time of the litigation it had expanded its product range so that its principal business was in the rural steel fencing market and in this market it competed reasonably effectively as a second-level rival of BHP. In fact the evidence was that in Queensland and northern New South Wales QWI occupied between 27 and 28 per cent of the market share. BHP occupied virtually all of the remainder of the market share in that region and supplied most of the rural fencing materials in the remainder of Australia, with the exception of South Australia. BHP had supplied QWI with all its steel product needs.

In about 1981 however, QWI sought to move into the star picket posts market because of the demand for this product and because BHP's strength lay in its ability to offer to consumers "the total package of products" — it could supply "every part of the fence — not just the wire".[3] But BHP, wanting to maintain this advantage, agreed to supply Y-bar only at an excessively high price in comparison with other BHP products. At this price QWI would not have been able to compete in the market for the supply of star picket posts to distributors, so it commenced proceedings seeking damages and an injunction on the basis that there had been a breach of s 46(1) of the Trade Practices Act.[4]

2 THE FEDERAL COURT: PINCUS J[5]

Justice Pincus found that all elements of the application were made out except for the 'taking advantage' requirement in s 46(1). His Honour was not overly concerned with defining the market because ". . . it seemed improbable that the relevant market could be so defined as to lead to a conclusion that BHP's position was not dominant in it".[6] His Honour inclined towards the view that the market was for the supply of rural fencing materials in Australia, as distinct from steel and steel products. However on either view the requisite degree of market power was found to exist. Justice Pincus also considered that at least the proscribed purpose in s 46(1)(b) had been made out (namely the purpose of preventing entry of a person into the market in which the monopoly power exists or any other market),[7] but the market

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[3] *Queensland Wire supra* n 2, 182.

[4] At the relevant time, s 46(1) provided that "A corporation that is in a position substantially to control a market for goods and services shall not take advantage of the power in relation to that market it has by virtue of it being in that position for the purpose of (a) eliminating or substantially damaging a [competitor]; (b) preventing the entry of a person into that market or into any other market; or (c) deterring or preventing a person from engaging in competitive conduct in that market or in any other market".

[5] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331.

[6] *Ibid* 337.

[7] Apart from an admission made on behalf of BHP, Pincus J drew a *Jones v Dunkel* (1959) 101 CLR 298 type inference on the basis that no relevant BHP witnesses were called to give evidence on the point; (1987) 75 ALR 331, 338-339.

in respect of which QWI's entry was prevented was the market for star picket posts ("any other market").[8] But Pincus J found that in order to "take advantage of" that market power BHP had to engage in conduct which was predatory, unfair, reprehensible or deserving of criticism as opposed to legitimate commercial practice.[9] This was not so in this case:

> The central point which has impressed me is that it [BHP] is doing no more than declining to sell a product it has not previously sold and which it desires to keep for further processing. It wants to sell only the completed posts, rather than the material from which it makes them.[10]

Accordingly, his Honour dismissed the application.

3 THE FEDERAL COURT: FULL COURT

The Full Court, constituted by Bowen CJ, Morling and Gummow JJ, in a joint judgment dismissed the appeal, although on a different basis to that of Pincus J.[11] Whilst focusing on the functional level ultimately accepted by the High Court, their Honours adopted a narrow market definition,[12] namely a market in the Y-bar, as opposed to a wider definition in favour of steel and steel products.[13]

The Full Court then went on however to reject the appeal on the basis that there was no relevant market in Australia in Y-bar as required by s 4E. In order for s 46 to be attracted there had to be, in their Honours' opinion, some trade or traffic between buyers and sellers of Y-bar as an article of commerce — potential markets were not enough.[14] The Court's conclusion that there was no such trade or commerce flowed from their Honours' acceptance of the submission that the respondents constituted a "vertically integrated manufacturer" and were to be treated as one for the purposes of market identification and definition. No contrary submission on this latter point was made either before the Full Court or Pincus J.[15] The Full Court also thought that the market for the sole purpose of considering s 46(1)(b) was that for star picket posts, relying on the words "any other market". Their Honours did not find it necessary to express a view on Pincus J's interpretation of the words "take advantage of".

4 HIGH COURT OF AUSTRALIA[16]

The Court — the Chief Justice Sir Anthony Mason, Wilson, Deane, Dawson and Toohey JJ — unanimously allowed QWI's appeal and remitted the matter to the Federal Court for a determination of the question of relief. It is convenient to segregate the issues in the following manner.

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8 *Ibid* 343.

9 *Ibid* 345-346.

10 *Ibid* 349.

11 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1988) 78 ALR 407.

12 *Cf Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465.

13 Whatever view was taken as to market definition BHP was always going to have a substantial degree of market power (*cf* cases such as *Europemballage Corp and Continental Can Co Inc v E C Commission* [1973] CMLR 199). The Full Court might have taken the opportunity to confirm the approach to market definition adopted by the European Court in that case as being apposite in Australia.

14 (1988) 78 ALR 407, 415.

15 *Ibid* 410, 414.

16 *Queensland Wire supra* n 2.

A Market Definition

Section 46(1) speaks of "a market for goods and services . . .". The confusion surrounding market definition in this case is attributable to the fact that it was not regarded as decisive to the outcome. This atmosphere was conducive to differences of opinion on how the market should be defined. Thankfully the High Court justices approached the question with some degree of uniformity.

(1) Functional Level

It is convenient to consider this dimension first. The determination of the functional level at which traders operate can be a crucial factor in defining the relevant market. The much criticised decision of *Top Performance Motors*[17] bears this out.[18] Whilst the facts of the present case did not lend themselves to the type of difficulties which arose in *Top Performance Motors*[19] or in say *Application of Southern Cross Beverages Pty Ltd*,[20] they were attended with sufficient complexity to justify a more emphatic treatment of the functional level aspects of the situation. That is to say that the market for the purpose of assessing BHP's market power existed between the functional levels of successive stages in the manufacturing of star picket posts,[21] whereas for the purpose of considering s 46(1)(b) or (c), the relevant market existed between the downstream functional levels of manufacturing and distributing star picket posts or rural fencing materials.

(2) Product Market

As Toohey J pointed out, Pincus J made no express finding that the product market was for the supply of steel and steel products.[22] Indeed Pincus J said that it was the market for the supply of rural fencing materials in Australia which "better accords with commercial ideas of the meaning of the word 'market'".[23] But Pincus J expressed no firm view on the question, being content to find that the requisite degree of market power existed either way.[24] But in his summary of conclusions Pincus J seems to have assumed the existence of a market for steel and steel products by his finding that "BHP is dominant in the relevant markets".[25] This implicit finding by Pincus J was the peg on which their Honours could hang their conclusion that the relevant market was for steel and steel products, a conclusion which they were able to adopt after having rejected the reasoning behind Pincus J's preference for a market for rural fencing materials.

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[17] (1975) 5 ALR 465.

[18] See the discussion of the case in B G Donald and J D Heydon, *Trade Practices Law* 1978) Vol 1 95.

[19] (1975) 5 ALR 465.

[20] (1981) 6 TPC 596.

[21] As was pointed out by Mason CJ and Wilson J, the questions of market definition and evaluating market power are all part of the one process and are merely separated for simplicity's sake: "Accordingly, if the defendant is vertically integrated, the relevant market for determining degree of market power will be at the product level which is the source of that power" (*Queensland Wire supra* n 2, 184).

[22] *Ibid* 192-193.

[23] (1987) 75 ALR 331, 337.

[24] *Id.*

[25] *Ibid* 349.

Because s 4E provides that the term "market . . . when used in relation to any goods . . . includes a market for those goods . . . and other goods . . . that are substitutable for, or otherwise competitive with, the first-mentioned goods . . .", Pincus J regarded the legislature as intending that in defining the relevant product market, one should have regard to cross-elasticity of demand as between products alleged to be in the same market, but not cross-elasticity of supply in relation to those products.[26] He did however find that once a rolling mill was in operation it was relatively easy to convert production from one shape of steel to another, and Mason CJ and Wilson J relied on this finding in overturning the Full Court's conclusion that the relevant product market was for the supply of Y-bar.[27] Their Honours did not find it necessary to deal with the Full Court's view that there was no market.[28]

Justice Deane disagreed with the Full Court's conclusion that there was no market in Australia for Y-bar, rejecting the proposition that BHP and AWI ought to be treated as a single entity for the purpose of market identification. But even if they were to be regarded as one, a market could exist if there was a potential for close competition even though none in fact existed:

> While BHP does not sell to other than AWI, it is a potential seller to purchasers other than AWI in that market in that it is prepared to sell Y-bar albeit at an excessive price. That being so, there is a local market for Y-bar in the relevant sense in that there is an arm's length potential purchaser (QWI) and potential vendor. The fact that there are no local arm's length sales is only because the potential vendor's price is unrealistically high.[29]

In view however of the fact that no reliance had been placed below on the separate identity of the two respondents, Deane J thought it was preferable to disregard the market for Y-bar, and regard the relevant product market as being the market for steel and steel products.[30] Whilst justifying his rejection of a market in Y-bar, Deane J did not offer any positive reasons for his finding of a market in steel and steel products.

Justice Dawson limited his discussion of market definition to a rejection of Pincus J's conclusions about supply substitutability:

> In setting the limits of a market the emphasis has historically been placed upon what is referred to as the 'demand side', but more recently the 'supply side' has also come to be regarded as significant. The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or demand for a product responds to a change in price of another product. Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, and an important consideration in any definition of a market. This is reflected in s 4E of the Trade Practices Act.[31]

Justice Dawson reached no express conclusion as to the relevant product market. His Honour thought that the question cut no ice and that even if the widest market definition were adopted (steel and steel products), BHP

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[26] *Ibid* 337.
[27] *Queensland Wire supra* n 2, 186.
[28] Although their Honours did not seem to regard the fact of vertical integration as precluding such a holding: see passage cited supra n 21.
[29] *Queensland Wire supra* n 2, 188.
[30] *Id.*
[31] *Ibid* 189.

would still have a substantial degree of power in it.[32] His Honour did however commence his reasons by saying that he agreed generally with the reasons for judgment of Deane J.[33]

Justice Toohey was also of the view that the relevant product market was for the supply of steel and steel products.[34] His Honour rejected Pincus J's interpretation of s 4E and thought that the mere mention in s.4E of substitution on the demand side did not mean that supply substitutability is to be ignored for the purposes of market definition.[35] In support of this proposition his Honour cited the recommendation of the Swanson Committee[36] which led to the introduction of s 4E[37] and noted that the relevance of supply substitutability has been recognised both in Australia and in other jurisdictions.[38] This view is in line with the landmark decision of a United States Court of Appeals, not referred to by Toohey J, in *Telex Corporation v IBM Corporation*,[39] where it was held that the product market should not be limited to peripherals which were able to be plugged into IBM computers, but should extend to all peripheral devices irrespective of whether they were IBM compatible or not. The reason for this was that suppliers could at minimal expense convert their peripherals so that they were able to be used with IBM CPUs.[40] Consequently, had Pincus J taken supply substitutability into account, the market clearly would have been drawn according to the wider formulation.[41]

Furthermore, Toohey J thought that QWI could succeed even assuming the market to be one for Y-bar. Whilst implicitly disapproving of the contention that the respondents BHP and AWI were to be treated as one entity for the immediate purpose, his Honour also felt constrained by the fact that the case had been conducted below on this footing.[42] However his Honour thought that the absence of existing sales did not mean that there was no market and accordingly this constraint was not fatal to QWI.[43]

As nothing terribly much seemed to hang on the definition of the product market, their Honours were not concerned with canvassing the sort of factors which a court might take into account in assessing substitutability between products on the demand side.[44] But there can be little doubt that the same

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32 *Ibid* 190.

33 *Ibid* 189. Dawson J also raised the single entity point, but thought it not conclusive to the question of whether there was a market for Y-bar. A market could exist as long as there was a product for exchange, irrespective of whether any sales had taken place: *id.*

34 *Ibid* 194-195.

35 *Ibid* 194.

36 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) 17, para 4.22.

37 *Queensland Wire supra* n 2, 194.

38 *Id.* See *Re: Queensland Co-operative Milling Association; Re: Defiance Holdings Ltd* (1976) 8 ALR 481, 517; *Re: Tooth & Co Ltd and Tooheys Ltd* (1979) 39 FLR 1, 38; and *United States v du Pont & Co* 351 US 377 (1956); and *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] CMLR 199.

39 510 F 2d 894 (1975).

40 G de Q Walker's analysis of this decision in "Product Market Definition in Competition Law" (1980) 11 F L Rev 386, 407.

41 *Queensland Wire supra* n 2, 194-195.

42 *Ibid* 193-195.

43 *Id.*

44 G Q Taperell, R B Vermeesch and D J Harland, *Trade Practices and Consumer Protection,* (3rd ed 1983) 147-152; B G Donald and J D Heydon, *supra* n 18, 98-103.

criteria acknowledged as relevant by United States and European Economic Community courts apply in the appropriate case.[45]

(3) Geographic Market

This was not in issue and the market was clearly Australia.

B Substantial Degree of Power to Control the Market

Section 46(1) speaks of the corporation being in a position to "substantially control a market. . .". There was no real issue as to this element. The evidence was that BHP supplied 85 per cent of the domestic market for steel and steel products. Its only substantial domestic competitor (Smorgon) supplied about 3 per cent of the same market and there was no real threat from imports. Deane and Toohey JJ referred to little apart from this factor in reaching their conclusion.[46] However Mason CJ and Wilson J,[47] as well as Dawson J,[48] pointed to the evidence of market share, to the fact that Smorgon appeared to adopt prices at the level set by BHP, and to Pincus J's finding that "[there] are significant barriers to the entry of a new domestic rod and bar manufacturer, including very high cost of setting up a rod and bar mill".[49]

In relation to ease of entry, Mason CJ and Wilson J observed:

> A large market share may well be evidence of market power . . ., but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power . . . . There must be barriers to entry. As Professor F M Scherer has written, "significant entry barriers are the sine qua non of monopoly and oligopoly, for . . . sellers have little or no enduring power over price when entry barriers are nonexistent . . .".[50]

Their Honours considered barriers to entry to include legal barriers such as patent rights, exclusive government licences, tariffs and large economies of scale, but queried whether high capital costs would be sufficient:

> it may be that the high capital costs of the steel industry, the presence of an established and overwhelmingly large producer in a protected market, and large economies of scale may together be sufficient to constitute effective barriers to entry.[51]

Justice Dawson also highlighted the importance of ease of market entry and noted the differing schools of thought in economic circles as to whether high cost of market entry constituted such a barrier. His Honour however attached weight to the finding of Pincus J without being concerned with definitional niceties:

> it is less important to arrive at a precise meaning than to recognize the assistance given by the identification of conditions, in the nature of barriers to entry, for

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[45] *Queensland Wire supra* n 2, 184 *per* Mason CJ and Wilson J, 188 *per* Deane J, 189 *per* Dawson J, and 194 *per* Toohey J. This seems in any case to have been lately recognised by the Federal Court: *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Limited* (1987) 75 ALR 581 (Wilcox J).

[46] *Queensland Wire supra* n 2, 188 *per* Deane J and 191, 195 *per* Toohey J.

[47] *Ibid* 182, 186. Mason CJ and Wilson J also pointed to vertical integration as another *indicium* of market power relevant to the case at hand: *ibid* 185.

[48] *Ibid* 190.

[49] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 335-336.

[50] *Queensland Wire supra* n 2, 185.

[51] *Ibid* 186.

> the purpose of defining the relevant market, measuring the extent of market power and determining whether that power has been exercised.[52]

An important feature of the decision is then that there is confirmation that the indicia which have been considered relevant by United States and European courts are also relevant in Australia. Indeed the Chief Justice and Wilson J noted that s 46(3) was inserted in 1986 with a view to ensuring that the approach adopted by the European Court in *Europemballage Corp and Continental Can Co Inc*[53] was achieved in Australia, and referred to a passage in the *Trade Practices Revision Bill 1986 Explanatory Memorandum* to that effect.[54]

It is interesting furthermore to note the extent to which the High Court had regard to factors other than market share. Justice Deane and Toohey J rested on this factor alone. The Chief Justice and Wilson J, whilst conceding on the basis of dicta in cases such as *United States v Aluminium Co of America*[55] (the *Alcoa* case) that market power can be inferred from a large market share alone,[56] added that this inference does not necessarily follow: "[t]he relative effect of percentage command of a market varies with the setting in which that factor is placed".[57]

Certainly, this qualification accurately reflects the position in the United States and the European Economic Community. The point is however that it appeared to be accorded a status higher than obiter. The Chief Justice and Wilson J, as well as Dawson J, regarded it necessary, (despite BHP's significant market share and the absence of any real threat from imports), to consider other factors including barriers to entry, vertical integration and capacity to control prices without constant inhibition.

One wonders from all of this whether market share is ever enough. And if 85 per cent of is not enough, what is? Learned Hand J in the *Alcoa* case[58] thought that a market share "reckoned at over ninety percent" was ordinarily sufficient to constitute a monopoly, although it was not *ipso facto* determinative on the facts because of the real threat from imports. On the facts in that case, a practically unlimited supply of virgin ingot could have been injected into United States if Alcoa raised its prices, which threat was cushioned only by tariff protection and transportation costs.[59] As Learned Hand J put it:

> [i]f the fraction which it did not supply were the produce of domestic manufacture there could be no doubt that this percentage gave it a monopoly . . . .[60]

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[52] *Ibid* 190.
[53] [1973] CMLR 199.
[54] *Queensland Wire supra* n 2, 184-185.
[55] 148 F 2d 416 (1945).
[56] *Queensland Wire supra* n 2, 185.
[57] *United States v Columbia Steel Co* 334 US 495 (1948) 528 *per* Reed J, cited at *Queensland Wire supra* n 2, 185.
[58] 148 F 2d 416 (1945).
[59] *Ibid* 425-426.
[60] *Ibid* 425.

It should be noted that Pincus J found that BHP accounted for about 97 per cent of Australia's total steel output, that it supplied about 85 per cent of Australia's demand for steel and steel products, that its only substantial domestic competitor was Smorgon (with a 3 per cent market share), and that "there has never been any substantial importation of star pickets" or star picket feed.[61] In view of the High Court's analysis, the relevance of Learned Hand J's dicta to the Australian legislation must now be considered open to doubt.

When one takes into account Pincus J's observations attributing (*inter alia*) the absence of competition from imports to BHP's market strength as well as to the devalued state of the Australian dollar,[62] it becomes apparent that the number of future cases where a greater degree of market power exists will be few. It is accordingly difficult to conceive of a case where the Federal Court will be at liberty to infer market power from market share alone.[63] Certainly *Williams v Papersave Pty Ltd*,[64] *OD Transport Pty Ltd v Western Australian Government Railways Commission*,[65] and *Warman International & Ors v Envirotech Australia Pty Ltd*,[66] do not come within that category. To the extent that these decisions saw the inferring of monopoly power solely from market shares of 60 per cent, 73 per cent and 84 per cent, they must be regarded as implicitly disapproved of by the High Court.

A related question as to which *Queensland Wire* offers no guidance is where exactly the threshold degree of market power lies. In view of the High Court's attitude to market share, it seems that there is no short answer to this question. All that can be said is that it is a matter for the primary judge, after considering all the evidence on the market structural level (including but not limited to market share), as well as any available evidence as to market conduct and market performance, to determine whether there exists a degree of market power which is more than trivial or minimal or which is real or of substance.[67]

Otherwise the treatment of the issue of market power by Mason CJ and Wilson J, as well as by Dawson J, is instructive as it implicitly approves as applicable to Australian law the approach taken by Learned Hand J in *Alcoa*[68] insofar as his Honour in that case considered various factors relevant to the enquiry — such as market share over a number of years, capacity to determine prices without constant inhibition, substitution between goods offered and which may be offered, ease of market entry or expansion, profitability, consumer tastes, and technology. Their Honours' reasons also implicitly approve of the approach taken by Northrop J in the s 50 case of *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd*.[69]

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61 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 341.
62 *Id.*
63 Statutory monopolies would be the most obvious exception.
64 (1987) 73 ALR 475.
65 (1986) 71 ALR 190.
66 (1986) 67 ALR 253.
67 *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Limited* (1987) 75 ALR 581, 591-592. In relation to the relevance of market conduct to the analysis, see *Queensland Wire supra* n 2, 190 *per* Dawson J.
68 148 F 2d 416 (1945).
69 (1978) 20 ALR 31, 48-61.

C Taking Advantage of Market Power

Section 46(1) provides that the corporation "shall not take advantage of" its power to control the market.

(1) Construing the words "take advantage of" in a pejorative sense

As outlined above Pincus J construed the words "take advantage of" in a pejorative rather than neutral sense. His Honour relied on the words of Donald and Heydon:[70]

> Since the words are inserted, they must do some work, and must refer to something more than causing or achieving a result. They must refer to abuse of position, to something unusual, predatory, forceful or deceitful. A seducer takes advantage of his victim; Hitler took advantage of the disunity and weakness of his enemies; a monopoliser takes advantage of his market power.[71]

On the facts Pincus J found that BHP's "refusal to supply a competitor with Y-bar to enable the latter to compete more effectively would not, I think, be regarded in commerce as deserving of criticism".[72] Merely because it was a monopolist did not make it unlawful for BHP to decline to sell something which it had not previously sold and which it preferred to keep for further processing.[73]

The High Court unanimously rejected this interpretation of s 46. The Chief Justice and Wilson J had

> difficulty in seeing why an additional, unexpressed and ill-defined standard should be implied in the section. The phrase "take advantage" in s.46(1) does not require a hostile intent inquiry — nowhere is such standard specified. And 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.[74]

Justice Toohey referred to a recommendation of the Blunt Committee[75] which, being of the opinion that the words "take advantage of" meant simply to use in a neutral sense, suggested that these words be replaced by "use" to avoid any confusion.[76] His Honour accepted that the Pincus J interpretation may well have been valid prior to 1977, when the Act prohibited the taking advantage of market power to do certain things, but it "could not hold good in regard to the section in its amended form, carrying as it did (and does) a reference to purpose".[77] Justice Toohey noted that Donald and Heydon recognised this possibility in a later passage[78] to which Pincus J did not refer.[79]

Accordingly, conduct which otherwise fulfills the requirement that the corporation "take advantage of" its power will not cease to have that effect

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[70] *Supra* n 18, 224.
[71] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 345.
[72] *Ibid* 348.
[73] *Ibid* 349.
[74] *Queensland Wire supra* n 2, 185; see also 187 *per* Deane J and 191 *per* Dawson J.
[75] Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979), Vol 1 70, para 9.27.
[76] *Queensland Wire supra* n 2, 196.
[77] *Id.*
[78] *Supra* n 18, 230.
[79] *Queensland Wire supra* n 2, 196.

merely because it is not also predatory, reprehensible or not attended with monopolistic intent. This is perfectly sensible in view of the plain terms of s 46 , requiring as it does the question of intent to be considered in the context of its paragraphs (a), (b) and (c). Reading into the words "take advantage of" a condition that the conduct be engaged in for other than legitimate commercial reasons would lead to an approach to s 46 as artificial and illogical as the 'threshold' or 'jurisdictional' approach to Willes J's test in the private international law case of *Phillips v Eyre*,[80] in that what is in essence the same consideration is dealt with at more than one level in the same analysis, often being applied inconsistently at the different levels. The epitome of this is *Carlton and United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd*,[81] a decision of Wilcox J handed down some five weeks after Pincus J's decision in the case under discussion. Wilcox J on the one hand assumed the existence of the requisite purpose, yet on the other hand found that there was no relevant 'taking advantage' because the respondents in entering into the agreement in question merely engaged in advantageous commercial dealing.[82] This reasoning can no longer be regarded as valid.

(2) Use of Market Power

Their Honours were in no doubt that, in the circumstances of the case, BHP had taken advantage of its market power:

> 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.[83]

But if it was a necessary precondition for there to be a 'taking advantage' that there be conduct which could only be engaged in by reason of market power, the High Court did not suggest that it was an exclusive or exhaustive test. Their Honours made this clear by taking into account, in varying degrees, the following factors in drawing the 'taking advantage' inference:

(i) BHP supplied Y-bar to AWI but not to QWI;[84]
(ii) 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 pattern of its commercial behaviour;[85]
(iii) in every other steel product line in which BHP experienced some competition it supplied that product;[86] and

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[80] (1870) LR 6 QB 1 (choice of law in relation to foreign torts).
[81] (1987) ATPR 48, 40-820.
[82] *Ibid* 48,874-48,880.
[83] *Queensland Wire supra* n 2, 186 *per* Mason CJ and Wilson J; see also 188-189 *per* Deane J, 191 *per* Dawson J and 197 *per* Toohey J.
[84] *Ibid* 188 *per* Deane J, 191 *per* Dawson J and 197 *per* Toohey J.
[85] *Ibid* 186 *per* Mason CJ and Wilson J, 188 *per* Deane J, 191 *per* Dawson J and 197 *per* Toohey J.
[86] *Ibid* 186 *per* Mason CJ and Wilson J.

(iv) BHP refused to supply QWI for the purpose of protecting AWI from competition in the manufacture and wholesale sale of star picket posts.[87]

Despite the fact that their Honours did not consider the issue at any real length, it was clear that the refusal to deal in this case had all the hallmarks of a sporadic and discriminatory exercise of monopoly power. It is not however appropriate to take a 'floodgates' approach to the decision and suggest that any failure to deal, including the refusal by the owner of a patent or trade mark to grant a licence in respect thereof, will now constitute a taking advantage for the purposes of s 46. *Queensland Wire* establishes nothing more than the proposition that a refusal to supply can amount to a taking advantage of monopoly power, which proposition holds true irrespective of whether the refusal was reprehensible or associated with monopolistic intent. Whether such refusal amounts in fact to a taking advantage in any particular case will depend upon the existence of evidence from which the court can draw the inference that it was market power which was used, rather than being conduct which could have been engaged in irrespective of market power.[88]

(3) Exercise of Extraneous Legal Rights Doctrine

Their Honours all spoke of BHP's refusal to supply Y-bar to QWI as being something it could only do by virtue of the absence of competitive conditions. The question arises: is this language implicit support for the proposition that if a party exercises a contractual or statutory right it is necessarily taking advantage of a power it has by virtue of the contract or statute, and not by virtue of its control of a market?[89] Justice Pincus, whilst acknowledging that there was much to be said for this interpretation of the taking advantage requirement, ultimately took the view that:

> the expression 'take advantage of', although loose, was probably not intended to require that what has been done was *purely* an exercise of power in the market place, as opposed to an exercise of the power of a owner *qua* owner or a contracting party *qua* contracting party. Powers of these kinds are components of market power.[90]

Not being the basis upon which Pincus J found against QWI, the point does not appear to have been argued before the High Court, and Dawson J was the only judge who directly expressed an opinion in relation to it.

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[87] It is clear at least from the judgments of Deane J (*ibid* 188-9), (Dawson J agreeing generally at 189), and Toohey J (at 197), that the evidence by way of admissions and absence of any adequate explanation were relevant also as tending to support a taking advantage finding; furthermore BHP's conduct in offering to supply only at a non-competitive price as opposed to refusing to supply outright also seemed to weigh in their Honours' minds: *ibid* 186 *per* Mason CJ and Wilson J, 188 *per* Deane J, (Dawson J agreeing generally at 189) and 191-192 *per* Toohey J. See also K Randall, "How Baxt sees the TPC's changing role", *Business Review Weekly,* 14 October 1988, 73, 74.

[88] K D MacDonald, *"Queensland Wire Industries Pty Ltd v BHP",* Case Note (1989) 19 Qld L Soc J 131, 132-133.

[89] Smithers J in *Top Performance Motors* (1975) 5 ALR 465, 472. See also Joske J *ibid* at 468, who limits that proposition to the situation where the contractual right is exercised in order to protect legitimate trade interests; and Wilcox J in *Warman International v Envirotech Australia Pty Ltd* (1986) 67 ALR 253, 277-278, who makes a similar point in relation to statutory rights provided they are exercised in good faith.

[90] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 345-346 (emphasis added).

His Honour thought that it was not ". . . helpful to categorise conduct, as has been done, by determining whether it is the exercise of some contractual or other right . . . . The fact that action is taken pursuant to the terms of a contract has no necessary bearing upon whether it is the exercise of market power in contravention of s 46".[91]

The general language employed by their Honours with respect to the taking advantage requirement[92] is admittedly not altogether dissimilar to that of Smithers J in *Top Performance Motors*.[93] It is however unlikely that the way has thereby been opened for an 'exercise of extraneous legal rights' doctrine. This case was not one where a monopolist was purporting to act pursuant to a contractual or statutory right and their Honours, in commenting that it was only by virtue of its market power that BHP could afford to refuse to supply Y-bar, were addressing the issue as to whether the necessary nexus existed between the refusal and BHP's market power. They were not directing their minds to the question of the authority pursuant to which BHP acted. It could hardly have been Parliament's intention that the nature of the 'authority' in the generic sense should be determinative. Not only would such a view severely circumscribe the natural operation of the section, but also it would involve the making of a Hohfeldian type distinction between 'rights' and 'freedoms', a distinction which in the framework of s 46 is supportable neither by logic nor common sense.[94]

(4) No Previous Dealings

Having disposed of the application, Pincus J went on to note the dearth of authority supporting the proposition that s 46 and analogous overseas provisions have the effect of forcing a vendor to supply a new customer "except where there was a history of trading enabling one to conclude that the would-be customer was being discriminated against".[95] His Honour seemed to conclude from this that s 46 did not extend to refusals to supply except in those circumstances. There is also dicta in the Full Court to the effect that a vertically integrated monopolist who refuses to deal in an intermediate product and commits it solely to its only manufacturing processes does not infringe s 46.[96]

In general terms in the United States, subject to the 'essential facilities' doctrine,[97] a party has a right to determine existing relations where it exercises

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[91] *Queensland Wire supra* n 2, 190-191.

[92] See *supra* n 83.

[93] (1975) 5 ALR 465, 472.

[94] *Queensland Wire supra* n 2 at 185 *per* Mason CJ and Wilson J, at 187 *per* Deane J and at 196 *per* Toohey J. These passages indicate that the index of legality is the proscribed purpose, rather than the reprehensibility or otherwise of the conduct.

[95] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 347.

[96] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1988) 78 ALR 407, 415, 418. See also the interlocutory decision of Franki J in *Tavernstock v John Walker & Sons Ltd* (1980) 6 TPC 308 (not referred to by Pincus J), where injunctive relief was not granted in respect of a refusal to deal because there was insufficient evidence that the applicant had previously dealt with the respondent and there was little evidence of inconvenience, because the applicant was able to get supplies from elsewhere.

[97] See *United States v Terminal Railroad Association of St Louis* 224 US 383 (1912); *Byars v Bluff City News Co Inc* 609 F 2d 843 (1979), 855-857; and see the comments of the Full Court in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1988) 78 ALR 407, 417-418.

that right for a legitimate business purpose, for instance for reasons relating to the financial stability of the other party or to efficient second-level performance.[98] The United States reports are filled with illustrations of unlawful refusals to deal. A notable case is *Lorain Journal Co v United States*[99] where the journal, an indispensable means of advertising for businesses in the region, was held to have contravened s 2 of the Sherman Act 1970 (US) by refusing to sell space to pre-existing customers who had placed advertisements with a new radio station. The Common Market reports also have their fair share of 'squeeze' cases within their pages.[100] Yet there are no reported cases on the refusal to supply new customers and no where is this more conspicuous than in Australia, where the farthest the courts had gone prior to Pincus J's decision was *MacLean v Shell Chemical (Australia) Pty Ltd*,[101] a case where supplies to an existing customer were cut off in retaliation to the institution by the customer of legal proceedings against the supplier.

The view might be taken that it was not unreasonable for Pincus J to arrive at the conclusion that there was no taking advantage of market power, drawing as he did implicit support from the lack of Australian and overseas authority in point. Yet it is difficult to see how such considerations have any bearing on the question as to the scope of an enactment. With respect, it is incorrect in point of legal principle to subordinate the plain terms of a statutory provision to considerations relating to the absence of guiding authority, as well as incorrect in point of fact, for this lack of authority probably says more about a reluctance to prosecute claims on account of difficulties associated with proving intent than it does about the scope of s 46 itself. Whilst it is clear that in the United States and also in Australia (s 46(7)) monopolistic intent can be inferred from a defendant's conduct alone,[102] the notion that a monopolist intends the natural and probable consequences of his acts does not apply with the same force in the new customer situation as it does when there is a pre-existing trading relationship in the particular product.

It is clear that the High Court has done nothing more than to give a natural interpretation to s 46, and in particular to its words "take advantage of". The fact that there is no pre-existing trading relationship in a particular product does not mean that as a matter of law there cannot be a taking advantage of market power. Similarly the reasoning adopted supports the proposition that s 46 could in theory be attracted in cases where there is

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98 See *Trace X Chemicals Inc v Canadian Industries Ltd* (1984) 2 Trade Cases para 66089: refusal of credit in the exercise of ordinary business judgment and in good faith held not to be monopolisation; *Gamco Inc v Providence Fruit & Produce Building Inc* 194 F 2d 484 (1952), 487-488; certiorari denied, 344 US 817 (1952).

99 342 US 143 (1951). See also *United States v Klearfax Linen Looms Inc* 63 F Supp 32 (1945), where a linen rug manufacturer, upon discovering that one of its distributors was vying for Government contracts which it had always secured, refused to continue supplying goods to that distributor to persuade it to withdraw its bid. See the discussion of this case and *Lorain Journal* in "Refusals to Deal by Vertically Integrated Monopolists" (1974) 87 Harv L Rev 1720, 1734-1735.

100 See *eg United Brands Co v European Economic Commission* [1978] 1 CMLR 429.

101 (1984) ATPR 40-462.

102 See *Eastman Kodak Co v Southern Photo Materials Co* 273 US 359 (1927) and the discussion thereof in "Refusals to Deal by Vertically Integrated Monopolists" (1974) 87 Harv L Rev 1720, 1732-1737.

an absence of any pre-existing trading relationship between the parties. However it is difficult to imagine a successful case being made out on the evidence in this latter situation. In *Queensland Wire* some important inferences were drawn from the fact that QWI was a second-level rival of BHP in the market for rural fencing materials, a market in which QWI could not compete without obtaining its steel product needs from BHP. In a case where no admissions are made and where relevant defence witnesses are prepared to get into the box to give some commercial reason for their conduct, it would be fanciful to suggest that a monopolist who has refused to deal with a totally new customer would be found to have contravened s 46.

D Proscribed Purpose

Justice Pincus had no difficulty in finding that the case fell at least within s 46(1)(b), the market in relation to which entry was prevented being the market for star picket posts. Factors which weighed heavily in that finding included admissions to the effect that BHP refused to supply Y-bar in order to preserve its monopoly in the manufacture and wholesale sale of star picket posts; BHP's inconsistent conduct in that Y-bar was the only product it did not offer for general sale; and the failure of BHP to call relevant witnesses to give evidence on the point.[103] This element was not an issue on the appeal, but Mason CJ and Wilson J,[104] as well as Deane J[105] (Dawson J agreeing generally[106]), were of the view that an infringement of s 46 could be based on both s 46(1)(b) and (c), relying in the latter case on Pincus J's finding that a market existed for the supply of rural fencing materials. Indeed Mason CJ and Wilson J thought it desirable to focus on s 46(1)(c), because of Pincus J's finding that "[t]here are great advantages accruing to BHP as a participant in the rural fencing market, by virtue of its being the sole domestic supplier of star pickets" and that "[t]hose advantages . . . extend well beyond being relatively free from price competition in selling star pickets".[107] Justice Toohey thought that s 46(1)(b) was applicable and that s 46(1)(c) "may be applicable".[108]

5 ESSENTIAL LINK BETWEEN COMPETITIVENESS AND A DECISION TO SUPPLY?

The view has been expressed that *Queensland Wire Industries* unduly cuts across commercial decision-making in that as a result of the decision, the freedom to refuse to supply a competitor is only a freedom for suppliers in a competitive market:

> the thrust of the conclusions reached by the High Court were: [t]here was a "taking advantage" by BHP because it was by virtue of its control in the absence of other suppliers that BHP could afford, in a commercial sense, to withhold Y-Bar. The court concluded that if BHP did not have the market power then it would not

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[103] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 348-349.

[104] *Queensland Wire supra* n 2, 186.

[105] *Ibid* 189.

[106] *Id.*

[107] *Ibid* 186; see *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 338.

[108] *Queensland Wire supra* n 2, 196.

refuse to supply because, in these circumstances, Queensland Wire would be able to obtain supply from a competitor.

At this point, it is appropriate to note that there is nothing in the High Court judgement which considers this point in detail. It can only be concluded that the High Court justices all made a subjective moral evaluation on the point. In fact, there are many companies — particularly integrated companies — which refuse to supply outsiders and do this even though they have plenty of competitors . . . In other words, there is no essential link between competitiveness and a decision to supply only within one's group although the High Court seems to believe that one necessarily involves the other.[109]

Queensland Wire does not, with respect, mean that a monopolist has a duty to help its competitors, nor does it mean that a supplier cannot refuse to supply merely because there are no alternative suppliers.[110] Their Honours' finding in that respect was expressed to be an inference drawn from evidence characterising BHP's conduct as sporadic and discriminatory, as well as from admissions by BHP that it refused to supply Y-bar to QWI for the purpose of protecting its downstream trade interests in the manufacture and wholesale sale of star picket posts. Whilst Mason CJ and Wilson J did not explicitly canvass this evidence in the context of the taking advantage requirement, they did consider such matters elsewhere in their joint judgment and arguably not in such a way as to indicate that they considered this evidence to be irrelevant to the taking advantage question.[111] In short there is nothing in the decision inconsistent with the proposition that a complainant's burden of proving that market power was in fact used and that the requisite intent existed will be well nigh impossible to discharge in a case where the hallmarks of sporadic or 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.

6 NUTS AND BOLTS

Queensland Wire has also been criticised because it overlooks the difficulties associated with 'refusal to deal' cases of this nature at the remedial level. If injunctive relief is granted, the problem is framing an appropriate order imposing a duty to deal:

> If supply is to be ordered by BHP to Queensland Wire, the necessary nuts and bolts of supply have to be sorted out as well. For example, what is the supply price? If two or more people want supply, are they both entitled to it? If there is not enough product to go round, does the Court administer a rationing scheme? Alternatively to rationing, does the Court order BHP to increase its production capacity?

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[109] W Pengilley, "Yet another layer of regulation", *Financial Review*, 17 February 1989, 15. See also by the same author: "Denial of supply and misuse of market power in Australia: What follows from the High Court decision in Queensland Wire?", *Australian Trade Practices Reporter, Special Report* 16 March 1989, 1.

[110] It is certainly clear from the decision that in order for there to be a taking advantage there must be conduct which the monopolist could only have engaged in by virtue of its market power. However it is also abundantly clear, at least from the judgments of Deane, Dawson and Toohey JJ, that an absence of competitive conditions alone would not necessarily justify the conclusion that market power was in fact used.

[111] *Queensland Wire supra* n 2, 186.

> All of these are decisions which involve the judiciary in commercial regulation as if the Federal Court of Australia were a combination of the Steel Industry Authority and the Prices Surveillance Authority. . . .
>
> Whatever the wisdom of the judiciary, one wonders at its capacity to make commercial decisions in the steel market. One might be forgiven for thinking that judges are particularly inappropriately trained to make decisions of this nature.[112]

There is much force in this criticism. In a case such as the present, assessment of the terms of supply, especially of what is a 'fair price', may be largely arbitrary and may ignore the possibility of existing economies of vertical integration — ironically to the detriment of the ultimate consumer.[113] That arbitrariness might be alleviated but not totally removed in cases where there is a pre-existing trading relationship in the particular product, where the vertically integrated manufacturer continues to deal with outsiders, or where prices set by a regulatory authority are able to be hinged upon.[114]

But does the court have to actually fix a price? Cannot it simply order that the vertically integrated manufacturer deal with the second-level competitor on a non-discriminatory basis or at reasonable rates? It seems not. First, the vertically integrated manufacturer can evade the non-discrimination requirement by raising its prices to a level sufficient to 'squeeze' out the second-level rival without any detriment to the group — profits are merely shifted from one level to the other.[115] Secondly, leaving so much to the uncontrolled discretion of the vertically integrated manufacturer might necessitate the courts becoming involved in price supervision, a role which they are loathe to accept:

> It [a competitive bidding system] would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the Defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective.[116]

Certainly, the matter of remedies is problematic and will have to be resolved on a case by case basis. It may be that in some cases the court will refuse

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[112] W Pengilley, *Financial Review* 17 February 1989, 15. See the comments of Pincus J concerning the assessment of damages in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 75 ALR 331, 347-348.

[113] See "Refusals to Deal by Vertically Integrated Monopolists" (1974) 87 Harv L Rev 1720, 1752-1761. But, if the monopolist's refusal to deal is cost justified, then would that not pose a barrier to liability in the first place? The author implicitly denies that suggestion because of the effect of decisions such as *Eastman Kodak* 273 US 359 (1927). The author concludes at 1761: "unless the courts require the Plaintiff to demonstrate that the monopolist refuses to deal although outsiders are more efficient, the monopolist could be deterred from undertaking socially desirable integration because it could result in extensive treble-damage liability". Whether the existence of a discrete purpose requirement in s 46 distinguishes Australian law on the point (assuming that statement to accurately represent the US position) remains to be seen.

[114] In *Otto Tail Power Co v United States* 410 US 366 (1973), 375 a duty to deal was imposed on a vertically integrated manufacturer in respect of second-level rivals but only "at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission".

[115] "Refusals to Deal by Vertically Integrated Monopolists" (1974) 87 Harv L Rev 1720, 1758.

[116] *United States v Paramount Pictures Inc* 334 US 131 (1948), 163.

injunctive relief in the exercise of its discretion because to do otherwise might commit it to the exercise of functions inappropriate to its nature as an independent judicial arbiter. In many cases it may well be that the question will not arise because the plaintiff is no longer in business.[117] In others the court might be invited to fix a fair price after considering all the evidence placed before it. The courts are every day faced with difficult decisions, and ones which might be seen as arbitrary, but they do not and indeed should not shrink from the task merely because it is difficult. What could for instance be more arbitrary than a determination of damages for pain and suffering or for loss of future earning capacity in a personal injuries case? Furthermore the clear meaning of s 46 should not be read down because of practical difficulties associated with the separate question of remedies. This proposition is underscored by the existence of a discrete and all encompassing Part VI dealing with "Enforcement and Remedies". This makes it even harder to argue that one provision to which Part VI applies (namely s 46) should be construed so as to ease difficulties experienced by the court in the exercise of its powers pursuant to that Part. If there are perceived to be difficulties or injustices in the application of s 46 in refusal to deal cases, surely that is a matter for the legislature to address rather than the courts.

7 CONCLUSION

Notwithstanding the fact that the High Court has left some questions unanswered, its first excursion on s 46 has been a significant one. This is so not only because the High Court has in general terms ratified the approach adopted by the Trade Practices Tribunal to market definition and market power analysis, but also because it has given flesh and blood to a skeletal s 46 by according the section a natural and unrestricted construction. At the very least *Queensland Wire* establishes that a relevant 'taking advantage' for the purposes of s 46 can be constituted by the refusal of a vertically integrated monopolist, which is accustomed to supplying a 'feed' to a second-level rival, to extend the supplied product range to include a product which it had up until that time kept for further processing within the group and never offered for general sale. But it is submitted that the decision is authority for the further proposition that a refusal to deal in general can amount to a 'taking advantage', whether or not there is any pre-existing relationship between the parties, whether or not the refusal is on the part of a vertically integrated monopolist concerned with "protecting trade at a downstream functional level",[118] and whether or not the refusal is reprehensible or engaged in for other than commercial reasons. What *Queensland Wire* does not however do is to inexorably link the above to positive findings of fact both in terms of misuse of market power and proscribed purpose.

Rather than regarding the decision as heralding a new era of judicial regulation in commercial decision-making, one should see it as a triumph for traditional notions of the judicial method insofar as the full and clear intention of Parliament was the only relevant consideration in the case. In times such as these when the High Court seems to be constantly labouring under allegations of judicial creativity, *Queensland Wire* comes as a breath

[117] "Refusals to Deal by Vertically Integrated Monopolists" (1974) 87 Harv L Rev 1720, 1755.

[118] *Cf* "Denial of supply and misuse of market power in Australia", *Australian Trade Practices Reporter, Special Report* (16 March 1989) 1, 19.

of fresh air. It is to be hoped that the High Court continues in this mould and adopts as its cornerstone the words of Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* where his Lordship stated:

> a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction.[119]

[119] [1913] AC 107, 118, cited by Knox CJ, Isaacs, Rich and Starke JJ in *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others* (1920) 28 CLR 129, 142-143.