

Eastern Express Pty Ltd v General Newspapers Pty Ltd

The decision in *Eastern Express Pty Ltd v General Newspapers Pty Ltd*¹ reinforces the approach to s46 of the *Trade Practices Act 1974* (Cth) ("the Act") adopted by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Ltd*,² emphasising the need to permit legitimate competition. Although the Full Court affirmed the decision of Wilcox J,³ the reasoning of the Court was quite different, focusing on market power rather than proscribed purpose. It is submitted that the approach of Wilcox J is more appropriate, although the result is not altered. The decisions achieve a realistic balance between protecting competition and assisting potential competitors. However, some of the more difficult issues relating to predatory pricing remain unsettled.

The Facts

This was an appeal by Eastern Express Pty Ltd from the judgment of Wilcox J. The dispute concerned the *Wentworth Courier*, published by the respondents as Eastern Suburbs Newspapers (ESN), and *Eastern Express*, first published by the appellant in 1990. Both are circulated free of charge in the eastern suburbs, with real estate advertising their primary source of revenue.

The major shareholders in Eastern Express are local real estate agents, who were required, pursuant to the Articles of Association, to commit themselves to placing a minimum amount of advertising in the *Eastern Express*, based on their previous advertising in the *Wentworth Courier*.

ESN responded to the proposed launch of *Eastern Express* by significantly cutting its rates for display advertising in the *Wentworth Courier*.

Eastern Express alleged that ESN took advantage of its market power to engage in predatory pricing in breach of s46 of the Act. ESN cross-claimed, arguing that Eastern Express and sixteen other cross-respondents were in breach of ss45, 45D and 47, by virtue of the quota provisions for advertising.

Wilcox J dismissed the claim by Eastern Express, but upheld the cross-claim under s45. Eastern Express appealed to the Full Court of the Federal Court in relation to the s46 claim only. The Court rejected the appeal, with the major judgment the joint judgment of Lockhart and Gummow JJ, with a separate concurring judgment from Beaumont J.

1 (1992) ATPR 41-167.

2 (1988) 167 CLR 177 ("*Queensland Wire*").

3 (1991) ATPR 41-128.

Section 46

A corporation

The Full Federal Court rejected the approach of Wilcox J in treating ESN, a partnership, as itself a sufficient entity to attract s46 liability.⁴ However, the concerted cooperation between the various respondents comprising the partnership enabled each to be treated as having substantial market power if the *Wentworth Courier* had such power.

The market

The Full Court followed Wilcox J's finding that the market is for the acquisition of advertisements for real estate by real estate agents from local newspapers in the eastern suburbs. Although ESN argued that the market should be Sydney-wide, both Wilcox J⁵ and the Full Court⁶ recognised that on either definition ESN had a substantial market share, thus little turned on the precise extent of the market.

This supports the approach of the High Court in *Queensland Wire*,⁷ emphasising that defining the market is a part of the process of assessing market power, and the two cannot be separated in practice.

Substantial degree of market power

The issue on which the Full Court reversed the finding of Wilcox J was whether ESN had a substantial degree of market power. Both Courts discussed the *Queensland Wire* approach, with Lockhart and Gummow JJ holding that it established that "market power is concerned with power which enables a corporation to behave independently of competition and of the competitive forces in a relevant market."⁸

Wilcox J found that ESN had a substantial degree of market power before the arrival of *Eastern Express* because of its virtual monopoly of "a desired form of advertising", its reputation, reader loyalty, strong support from advertisers, vertical integration and economies of scale.⁹ Wilcox J also found that even after *Eastern Express* was published in February 1990, ESN had a substantial degree of market power. This finding appears to be based on four factors. Firstly, the *Wentworth Courier* continued to receive more advertising revenue than *Eastern Express*, giving it a market share of more than 50 per cent.¹⁰ Secondly, it continued to enjoy the benefits listed above.¹¹ Thirdly, it retained the ability to damage *Eastern Express* by dropping its prices.¹²

4 Lockhart and Gummow JJ at 40,298f treat the question as one of jurisdictional fact which must be satisfied before considering the substantial application of s46, whereas Beaumont J, provisionally agreeing with their conclusion, at 40,308, leaves the issue until after he considers s46.

5 Above n3 at 52,891.

6 Above n1 at 40,298.

7 For example, above n2 at 187 per Mason CJ and Wilson J.

8 Id at 42f.

9 Above n3 at 52,892.

10 Id at 52,891.

11 Id at 52,893.

12 Ibid.

Finally, it operated other newspapers which enabled it to offset any losses it might sustain in operating the *Wentworth Courier*.¹³

However, the Full Court reached the opposite conclusion on the basis of an element "highly relevant" and "critical" to the issue of market power.¹⁴ The Court found that the "potentiality" of the real estate agent customers of the *Wentworth Courier* to combine to form a rival newspaper was an "inherent element in the market forces at all relevant times". They said that this potential became a reality before the conduct alleged to be in breach of s46 occurred. ESN did not therefore have a substantial degree of market power. The Full Court said that it was not rational to say that real estate agents could not enter the market;¹⁵ further, ESN did not have the ability to raise prices above costs or to raise revenue by restricting the quantity of advertising supplied,¹⁶ both factors suggested to be relevant in *Queensland Wire*.¹⁷

There are two difficulties with this approach. Firstly, it focuses on an individual competitor to the extent that it ignores the existence of substantial barriers to entry. Secondly, it seems to answer the allegation of predatory pricing before it is even addressed.

While s46(3)(a) requires the Court to have regard to the extent to which a corporation is constrained by the conduct of competitors or potential competitors in determining market power, it appears that the Full Court concludes that because it was rational for the particular customers of the *Wentworth Courier* to enter the market, there were no barriers to entry. Once *Eastern Express* was competing in the market, ESN did not therefore have a substantial degree of market power. This ignores the approach suggested by the Trade Practices Commission in its Background Paper on s46¹⁸ where it emphasises historical responses to price changes, and the fact that a "history of corporations entering, failing and leaving the market will suggest there are barriers to competitively successful entry to the market".¹⁹ This is particularly important here as the *Wentworth Courier*, first published in 1961, has enjoyed a "virtual monopoly of local advertising" since its establishment, with only sporadic challengers, all of which have failed.²⁰

Furthermore, the Full Court seems to be accepting the view of the "no regulation" proponents,²¹ close to the Chicago School of economists, who argue that predatory pricing is irrational: once it succeeds and the dominant

13 Ibid. This echoes one of the factors the Trade Practices Commission will consider in approaching s46, namely whether a corporation is using its power in one market to sustain low pricing in another market: Trade Practices Commission *Misuse of Market Power — A Background Paper* (1990) at 45. It is also similar to the position identified in *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) ATPR 40-081.

14 Above n1 at 40,301.

15 Id at 40,302.

16 Id at 40,302f.

17 Above n2 at 188 per Mason CJ and Wilson J, at 200 per Dawson J.

18 Above n13.

19 Id para 32.

20 Above n3 at 52,881 per Wilcox J.

21 Nagarajan, V, "The Regulation of Predatory Pricing Within s46 of the *Trade Practices Act 1974*" (1990) 18 *A BLR* 293 at 296f.

firm raises prices, more corporations are encouraged to enter the market, preventing recuperation of losses. But this ignores the deterrent effect of strategic pricing behaviour²² — were Eastern Express to be successfully driven out of the market, surely they at least would be deterred from re-entering, and the Full Court indicated no other likely group of competitors.

Related to this, is the second difficulty with the approach of the Full Court. If the degree of market power is determined by studying only the period in which predatory pricing is alleged to have occurred, the fact that a new corporation had entered or is trying to enter the market, and the fact that the incumbent has lowered its prices in response to its competitor or potential competitor, suggest that the incumbent does not have a substantial degree of market power. This prevents consideration of the factors which compelled Wilcox J to find that ESN did have a substantial degree of market power.

The decision of the Full Court effectively means that wherever allegations of predatory pricing arise in relation to an established virtual monopoly and a new entrant who stands to take a substantial market share, the very conduct which is alleged to be predatory pricing (price cuts in response to the new entrant), will prove that the established corporation does not have a substantial degree of market power. If the incumbent is engaging in predatory pricing to ensure its market share by driving the entrant out, it would not be acting outside competitive constraints.

This approach was rejected by the European Court of Justice in *Hoffman La Roche v Commission*,²³ where the Court refused to accept price cuts as conclusive evidence of competitive pressure.²⁴ Instead Roche's price cuts showed that it was able to forestall such pressure via its price policy by virtue of its dominant market position.²⁵

By its very nature, predatory pricing at first appears to increase competition by lowering price.²⁶ This suggests that it is not enough to point to price cuts to show that the incumbent is constrained by competition. The only particular factors indicated by the Full Court here, were firstly, that it was rational for the real estate agents to enter the market, as discussed above, and secondly, the quota clause which tied up a large part of the market for Eastern Express.²⁷ It seems curious that the Full Court relies in part upon the quota provision which Wilcox J had already found to offend s45.²⁸ As Wilcox J ordered that the quota clause be removed within 60 days of judgment, it was no longer guaranteeing *Eastern Express* a share of the market at the time of the appeal.

It is submitted that the preferable approach to the issue of market power is that taken by Wilcox J. As Corones argues, the s46 test of substantial market

22 Id at 295, 297.

23 [1979] 3 CMLR 211.

24 Id at 255.

25 Ibid.

26 Johns, J, "Identifying Predatory Conduct — The Role of Economic Evidence" (1990) 56/57 *ATPC Bull* 10 at 10f.

27 Above n1 at 40,302.

28 Above n3 at 52,903.

power is merely a threshold test which still requires proof of proscribed purpose to take effect.²⁹ Adopting a low threshold in the discretion of the Court would allow s46 to achieve the purpose for which it was intended, namely to prevent the use of market power for anti-competitive purposes.

It is a relative concept; the real issue should be the anti-competitive purpose of the conduct and not the vagaries of judicial definition. Indeed, the comment by Dawson J in *Queensland Wire* that ". . . market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as . . . predatory pricing . . ." ³⁰ suggests that it may be necessary to consider whether predatory pricing has occurred in order to determine whether a corporation has a substantial degree of market power. This is implicit in Wilcox J's reference to the continuing ability of ESN to damage Eastern Express by dropping its prices.³¹

The effect of the decision of the Full Court is that no matter how predatory the conduct of ESN, it could not be challenged under s46 as ESN does not have a substantial degree of market power.

The proscribed purpose

The proscribed purpose for s46 in relation to predatory pricing can be established by express admission, inference from facts other than the extent of the price cuts themselves, or on analysis of the price cuts.

The Full Court endorsed Wilcox J's finding that there was no express admission of predatory pricing — this requires more than the presentation of a "strong" image — nor any conduct other than the price cuts which would support the inference of predatory purpose.³²

Wilcox J did not find the proscribed purpose in the price cuts either, because on any measure of costs the *Wentworth Courier* was not operating at a loss.³³ Wilcox J observed that the only two Australian authorities on predatory pricing were not conclusive on the issue of how low price must be compared to cost before predation is inferred, but he did suggest that the approach adopted in the United States might be useful.³⁴ The relevant factors there were held to be pricing below cost, the sporadic element, the purpose behind selling at a loss and finally, prices below average total cost but above average variable cost must be demonstrated to be predatory by the plaintiff, whereas prices below average variable costs must be justified by the defendant.³⁵

However, the Full Court warned against following the United States decisions, stressing that ". . . no pre-ordained and fixed categories as to the level of pricing or economic theory or practice of costing necessarily controls

29 Corones, S G, *Competition Law and Policy in Australia* (1990) at 73.

30 Above n2 at 200.

31 Above n3 at 52,893.

32 Above n1 at 40,305.

33 Above n3 at 52,902.

34 *Id* at 52,897ff.

35 *Id* at 52,898f.

the drawing of that inference . . ." of proscribed purpose.³⁶ Instead, the price cuts must be considered in the light of "general human experience".³⁷

Although a definite price-cost standard may be preferred for certainty, the approach of the Full Court appears to be more in keeping with the decisions in *Queensland Wire* and in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd*,³⁸ where the emphasis was on market structure in addition to price. In addition, the *Parliamentary Explanatory Memorandum* to the amended s46 introduced in 1986 specifically noted that no particular price standard must be proved to constitute predatory pricing.³⁹

It does however seem reasonable to assume that, in the absence of express admission of predatory purpose, pricing above "cost" on the measure most favourable to the person alleging predation will not breach s46. Price reductions in response to new or potential entrants are the "very stuff of competition",⁴⁰ and s46 should only defeat conduct which undermines competition, as where a substantial degree of market power enables a corporation to price below cost.

In the event, however, it was unnecessary for either Wilcox J or the Full Court to determine the standard — if any — conclusively.

Remedies

Eastern Express once again raised difficulties in determining appropriate relief under s46 of the Act. *Eastern Express* sought an order to prevent ESN publishing advertisements in the *Wentworth Courier* at prices below cost, equivalent to cost, or below a rate which returns less profit than a per centage return determined by the Court.⁴¹

On appeal, Beaumont J particularly expressed reservations about the remedies being sought, saying ". . . it is difficult to justify the grant of an injunction which . . . seeks to regulate on-going commercial transactions in very specific terms".⁴²

This echoes the difficulties experienced in *Pont Data (No 2)*.⁴³ The Court there recognised that s46 does not strike against monopoly, nor does it aim to achieve a "reasonable" result, thus ". . . the Court must be slow to impose upon the parties a regime which could not represent a bargain they would

36 Above n1 at 40,307. This appears to be somewhat similar to the United States "rule of reason" approach. See Nagarajan, above n21 at 308ff.

37 Ibid.

38 (1991) ATPR 41-069.

39 Pengilly, W, "Predatory Pricing and Price Wars" (1991) 7 ANZTPL Bull 37 at 39. While the proof of purpose under s46 is difficult, if the recommendation of the Cooney Committee to reverse the onus of proof somewhat, is adopted, it may make breach of s46 easier to prove, at least for the Trade Practices Commission, even without a definite standard for predatory pricing: Senate Standing Committee on Legal and Constitutional Affairs Report: *Mergers Monopolies and Acquisitions* (1991) rec 5.67.

40 Above n3 at 52,897.

41 Above n1 at 40,308.

42 Ibid.

43 (1991) 27 FCR 492.

have struck between them".⁴⁴ This leaves unanswered the questions of what result the Courts are seeking to achieve in awarding damages, and on what basis they are to be calculated.⁴⁵ Unfortunately the High Court did not settle the issue in *Queensland Wire*,⁴⁶ remitting the determination of relief to Pincus J, at which point the parties settled.

Conclusion

The decision in *Eastern Express*, while adopting the approach of the High Court in *Queensland Wire*, is difficult to accept in regard to the determination of a substantial degree of market power. Although the result on appeal remained as at first instance, and appears to be commercially realistic, the approach of Wilcox J is preferable in that it allows consideration of the primary issue in s46 — proscribed purpose — rather than foundering on the threshold of market power.

The decision leaves unsettled the issues of what degree of price cutting will be prima facie evidence of predatory pricing, and is of little assistance in resolving the ongoing difficulties relating to remedies for breach of s46 of the Act.

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44 Id at 502.

45 Are the courts seeking to compensate the "victim" or punish the offender; and is the price intended to be that which a competitive market would set, or that which a monopoly would fix without misusing its market power? See Hanks, F and Williams, P L, "Implications of the Decision of the High Court in *Queensland Wire*" (1990) 17 *MULR* 437 at 459ff.

46 For example, above n2 at 193 per Mason CJ and Wilson J.