The Resolution of Access Disputes Under Section 46 of the Trade Practices Act

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Introduction

Doubts relating to the efficacy of s 46 of the *Trade Practices Act 1974* (Cth)[1] as a stand-alone mechanism for providing access to essential facilities[2] were crystallised in the Hilmer Report.[3] The reluctance and/or inability of the courts to engage in access pricing was the principal misgiving expressed by the Hilmer Committee about using the provision as the primary means of resolving access disputes,[4] although the problem of proving that a monopolist's conduct was engaged in for a purpose proscribed by s 46 was cited as a concern as well.[5] These perceived limitations were such that the 'Committee felt that an administrative solution was preferable to reliance upon s 46'.[6]

The subsequent enactment of Part IIIA of the *Trade Practices Act* has established a statutory mechanism for gaining access to the services pro-

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1 All references in this article to 's 46' are to s 46 of the *Trade Practices Act.*

2 Eg, electricity transmission grids, telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves. Such facilities typically confer substantial market power on their owners. This market power can be exercised to deny potential competitors in upstream or downstream markets access to vital inputs – either by outright refusal or by offering to provide access on terms and conditions that are impractical or uneconomic.

3 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*') 243-244.

4 Ibid.

5 Ibid 243.

6 Explanatory Memorandum, *National Competition Policy Draft Legislative Package* (AGPS, Canberra, 1994) [1.11]. Certainly, the introduction of a codified access regime appeared to offer 'a more comprehensive and immediate set of answers' to access questions in Australia: J Kench, 'Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122, 145.

vided by Australian infrastructure facilities.[7] That outcome is accepted in this article as a reasonable response to the access problem.[8] Accordingly, there is no intention to revisit the threshold question of whether such regulation was necessary at all[9] or whether it would have been preferable to strengthen the existing misuse of market power provision, either by embodying aspects of the 'essential facilities doctrine'[10] within s 46[11] or by other amendment.[12] Instead, given the existence of Part IIIA, this arti-

7 Part IIIA is 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 is on that particular service.

8 See n 2 above.

9 Cf W Pengilley, 'Comment on "Part IIIA: Unleashing a Monster"' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 161, 161-163.

10 In the United States, where the essential facilities doctrine has applied for over ninety years, the four elements necessary to establish liability under the doctrine have been identified as: (i) control of the essential facility by a monopolist; (ii) a competitor's inability practically or reasonably to duplicate the essential facility; (iii) the denial of the use of the facility to a competitor; and (iv) the feasibility of providing the facility: *MCI Communications Corp v American Telegraph & Telephone Co* 708 F 2d 1081 (1983), 1132-1133.

11 Cf W Pengilley, 'Hilmer and "Essential Facilities"' (1994) 17 *University of New South Wales Law Journal* 1, 36, where it is suggested that s 46 should be amended to incorporate the doctrine, by the insertion of 'a criteria based evaluation ... found in American precedent'. The notion that s 46 might incorporate an essential facilities doctrine, based on that developed in the United States, was rejected by the Full Federal Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1988] ATPR 40-841, 49,076-49,077. In the years since that decision, there has been no hint that the doctrine will be resuscitated.

12 There has been considerable debate in Australia as to whether the 'purpose' test in s 46 should be replaced by an 'effects' test. The Hilmer Committee advised against such a change, concluding that it 'would not ... constitute an improvement on the current test': *Hilmer Report*, above n 3, 70. The debate flared again recently, with the Trade Practices Act Review Committee (Dawson Committee) receiving submissions from various august bodies in respect of s 46. Eg, the ACCC's submission argued, inter alia, that the purpose test in s 46 should be supplemented by an effects test: see R Steinwall, 'Dawson Committee review of the Trade Practices Act' (2002) 10 *Competition & Consumer Law Journal* 102, 102. No doubt this proposal was well-received by proponents of an effects test; see, eg: M O'Bryan, 'Access Pricing: Law Before Economics?' (1996) 4 *Competition & Consumer Law Journal* 85, 96; S Hardy, 'Misuse of Market Power – Purpose or Effect?' (1997) 5 *Trade Practices Law Journal* 114, 119; and S Corones, 'The Characterisation of Conduct under Section 46 of the Trade Practices Act' (2002) 30 *Australian Business Law Review* 409, 412-413. Cf M Landigran, A Peters and J Soon, 'An Effects Test under s 46 of the Trade Practices Act: Identifying the Real Effects' (2002) 9 *Competition & Consumer Law Journal* 258, 276, where the authors conclude that the misuse of market power provision in the telecommunications-specific Part XIB of the *Trade Practices Act*, s 151AJ(2), which contains an effects test, has not operated more effectively than would s 46. See, also, B Buffier, 'Shoot First, Ask Questions Later: The Rapid Response Powers of the ACCC

cle addresses the 'residual role'[13] now played by s 46 in the resolution of access disputes.

The ensuing analysis is based on the present wording[14] and current interpretation of s 46 – drawing support, where relevant, from the antitrust jurisprudence of the United States, European Union and New Zealand.[15] The article finds that the Hilmer Committee anticipated correctly the difficulty of establishing a contravention of s 46 and recognised that this would significantly constrain the usefulness of the provision as a means of facilitating access to essential facilities.

In outline, the article proceeds as follows. The next part confirms the continuing relevance of s 46 to essential facilities cases and clarifies the nature of the provision's relationship with Part IIIA of the *Trade Practices Act*. This discussion leads to the comprehensive analysis, of the guiding principles applicable in cases of refusal to supply/denial of access. The article concludes by summing up the current challenges confronting access seekers under s 46.

to Regulate Anticompetitive Conduct in Telecommunications Markets' (2002) 10 *Trade Practices Law Journal* 5, 20, where it is advocated that the effects test in s 151AJ(2) 'be repealed'. The Dawson Committee did not recommend the inclusion of an effects test in s 46, see n 14 below. For the record, this author, concerned about the impact a broader effects test would have on aggressive conduct that is nevertheless efficient, also supports the existing purpose test in s 46.

13 In the access context, this expression derives from the title of the following article: A Abadee, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *Trade Practices Law Journal* 27.

14 This wording was recently approved by the Dawson Committee, which recommended that s 46 not be amended in any way: Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, Canberra, report dated 31 January 2003, released 16 April 2003) Recommendation 3.1. However, the provision remains under review by the Senate Economics References Committee in the context of that Committee's inquiry into the effectiveness of the *Trade Practices Act* in protecting small business.

15 Sections 1 and 2 of the *Sherman Act 1890* (US), art 82 of the *EC Treaty* and s 36 of the *Commerce Act 1986* (NZ) are jurisdictional variations on the misuse of market power theme. It is hardly surprising, therefore, that in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, the High Court's first exegesis of s 46, Mason CJ and Wilson J (188-190), Dawson J (200-202) and Toohey J (210) relied on United States' and European authorities, in particular, in interpreting and applying Australia's misuse of market power provision. The similarity between s 46 and New Zealand's s 36 speaks to the relevance of trans-Tasman cases as well.

Section 46 and Essential Facilities

Continuing Relevance of Section 46

Section 46(1) 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;
>
> (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.[16]

Three critical elements of the provision can be identified. A breach of s 46 is established if:

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

Facility owners will find it reassuring that, under s 46, it is not the possession of market power which offends per se.[17] Rather, it is the conduct of the powerful, or market-dominant, corporation that is subject to scrutiny. In the context of New Zealand antitrust law, the point has been expressed succinctly:

> 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.[18]

Less comforting, however, must be the lawyers' warning that 'as in many sporting encounters, there exists a fine line between good hard play and what can be called "reportable incidents".'[19]

16 Section 46 was amended in significant respects by the *Trade Practices Revision Act 1986* (Cth).

17 As the Explanatory Memorandum to the *Trade Practices Revision Bill* 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': at [17.47].

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

19 D Round, 'Prohibiting the Abuse of Market Power: Rediscovering S 46' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, Sydney, 2000) 102, 121.

Conduct that *may* give rise to a breach of s 46 certainly includes a refusal to supply goods or services.[20] The affirmative authority is no less than *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,[21] the High Court's landmark ruling on the interpretation of s 46, where BHP's refusal to supply a competitor was held to amount to a misuse of market power. Interestingly, at first instance in this case, 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.'[22] However, there is no reason why a 'history of trading' should give rise to a greater obligation to continue to supply,[23] 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 of whether the refusal is a misuse of market power. This view is consistent with United States'[24] and European[25] authorities on point.

Given that the essential facilities problem is 'centrally about refusal to supply',[26] logic dictates the applicability of s 46 to access disputes. The Hilmer Committee itself accepted the potential application of s 46 to essential facility situations.[27] Referring to the three elements of the section, the Committee noted: first, if a facility is truly essential, its owner will always have a substantial degree of market power within the meaning of s 46; second, a refusal to grant access to an essential facility will usually constitute a 'taking advantage' of market power, given that, in the absence of such power, access to the facility would probably be available;

20 The Explanatory Memorandum to the *Trade Practices Revision Bill* lists, without further elaboration, 'refusal to supply' as a type of conduct that could be in breach of s 46: at [17.53]. The expression 'refusal to supply' is simply another way of describing a refusal to deal or a refusal to grant access.

21 (1989) 167 CLR 177 (hereafter, *'Queensland Wire'*).

22 [1987] ATPR 40-810, 48,820. This was before the European Court of Justice, affirming the judgment of the European Court of First Instance, decided *Radio Telefis Eireann and Independent Television Publications Ltd v European Commission* [1995] ECR I-743 (the *Magill* case).

23 See K McMahon, 'Refusals to Supply by Corporations with Substantial Market Power' (1994) 22 *Australian Business Law Review* 7, 7.

24 As the Court of Appeals (Sixth Circuit) explained in *Byars v Bluff City News Co* 609 F 2d 843 (1979), 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.'

25 Eg, the *Magill* case [1995] ECR I-743.

26 O'Bryan, above n 12, 88.

27 *Hilmer Report*, above n 3, 243.

and third, the refusal to deal could conceivably occur for any of the proscribed purposes in s 46(1)(a), (b) or (c).[28]

Academic commentators have endorsed this position as well,[29] pointing to a history of access-type determinations under s 46 prior to the introduction of Part IIIA, notably in *Queensland Wire*,[30] but also in cases such as *MacLean v Shell Chemicals (Australia) Pty Ltd*,[31] *O'Keeffe Nominees Pty Ltd v BP Australia Ltd*,[32] *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*,[33] *Dowling v Dalgety Australia Ltd*[34] and *General Newspapers Pty Ltd v Telstra Corp*.[35] However, very few of these decisions are in fact concerned with 'essential facilities'; rather, they are concerned with the supply of a tangible or intangible product.[36]

In cases where a true 'essential facility' is involved, two points must be borne in mind. First, a denial of access to the essential facility will not automatically result in a contravention of s 46. It must be established that all the elements of the section are satisfied, particularly that the impugned conduct involved a taking advantage of market power for one of the three proscribed purposes. Second, in any event, such cases invariably will be pursued under Part IIIA of the *Trade Practices Act*, the dedicated access regime. There is no suggestion in this article that Part IIIA should be abandoned and reliance placed exclusively on s 46.

In respect of the second point above, however, it must be noted that Part IIIA has limited scope. Accordingly, s 46, and not the access regime, will apply to: services which are not within the Part IIIA definition of 'ser-

28 Ibid.

29 See, eg: Pengilley, above n 11, 58 and above n 9, 163; S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996) 70; O'Bryan, above n 12, 88; P Shafron, 'QWI v BHP: A Flash in the Section 46 Pan?' (1998) 72 *Australian Law Journal* 53, 60; F Zumbo, 'Access to Essential Facilities in Australia' [2000] *New Zealand Law Journal* 13, 14; and Kench (above n 6) 141.

30 (1989) 167 CLR 177 (refusal to supply the product 'Y-bar' on reasonable terms).

31 [1984] ATPR 40-462 (refusal to supply the raw material 'cypermethrin' on reasonable terms).

32 [1990] ATPR 41-057 (refusal to supply petroleum products on reasonable terms).

33 [1991] ATPR 41-109 (refusal to supply electronic stock exchange information on reasonable terms).

34 [1992] ATPR 41-165 (denial of access to saleyards in Goondiwindi). As Pengilley notes, this was the first Australian case directly related to the exclusion of a competitor from a 'facility': W Pengilley, 'Denying a Competitor Access to Facilities' (1992) 8 *Australian & New Zealand Trade Practices Law Bulletin* 11, 11.

35 [1993] ATPR 41-274 (imposition of restrictive conditions in printing contracts denying alternative publishers the use of certain sophisticated printing equipment).

36 See ns 30-35 above.

vice';[37] and services that do not meet the criteria for declaration under Part IIIA,[38] such as services provided by infrastructure which may be uneconomical to duplicate, but which are not of 'national significance'.[39] Thus, s 46 is 'properly available as a fall-back mechanism'[40] to deal with cases not covered by the access regime. This is its 'residual' role.

Interrelationship with Part IIIA

The parallel application of s 46 was anticipated when the access regime was introduced. Section 44ZZNA of the *Trade Practices Act* specifically states that Part IIIA does not affect the operation of Part IV (which contains s 46) of the Act. This does not mean that parties seeking access to essential facilities may use the access regime, or s 46, or both, although several commentators have expressed alarm in considering the possibility that this might be so.[41] Hood, for example, has argued that s 46 could become a negotiating tool for access seekers,[42] who will threaten s 46 litigation against access providers in order to create advantages for themselves.[43]

37 The definition of 'service' in s 44B of the *Trade Practices Act* (the definitions section in Part IIIA) specifically excludes 'the supply of goods', 'the use of intellectual property' and 'the use of a production process'.

38 The declaration criteria are listed in s 44G(2) of the *Trade Practices Act*.

39 See, further, A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at *Access Symposium*, Business Law Section of the Law Council of Australia, Melbourne, 28 July 2000, 105; and W Pengilley, 'The Access Regime in the 1995 National Competition Policy Package' (1995) 9 *Commercial Law Quarterly* 12, 14. Abadee's analysis of the 'residual role' of s 46 concludes by predicting that the provision will play 'a sweeping role in picking up local facilities': Abadee (above n 13) 47.

40 Law Council of Australia, 'Submission to the Productivity Commission's Review of the National Access Regime' (sub 37, January 2001) 9.

41 See, eg: Pengilley, above n 39, 13; S King, 'National Competition Policy' (1997) *Economic Record* 270, 278; A Hood, 'Third Party Access in Queensland: Lessons for all Australian States' (1999) 7 *Trade Practices Law Journal* 4, 15; and N Calleja, 'Access to Essential Services – Have the Hilmer Reforms Been Successfully Implemented?' (2000) 8 *Trade Practices Law Journal* 206, 222.

42 Pengilley has also argued that s 46 could be used by the ACCC to obtain access undertakings from access providers, constructing the following scenario: The ACCC may prosecute for breach of s 46 and could then 'suggest' that an undertaking be given to it – so that s 46 prosecutions will become a 'backdoor method of compelling undertakings'. Alternatively, the ACCC, 'in order to settle a s 46 prosecution or in substitution for it, may suggest that the access regime be utilised.' See Pengilley, above n 39, 16; reiterated in W Pengilley, 'Access to Essential Facilities: A Unique Antitrust Experiment in Australia' (1998) 43 *Antitrust Bulletin* 519, 542.

43 Hood, above n 41, 15. More generally, Dammery has warned that s 46 'should not be permitted to become a "trump card" to be played when it becomes commercially advantageous. Allegations of misuse of market power are readily made but difficult to

Such concerns are not shared by this author. Of the three scenarios hypothesised by Pengilley to explain the interaction of s 46 and the access regime – (i) s 46 and the access regime are both applicable in essential facilities cases; (ii) the access regime is a complete access code making s 46 inapplicable where the access regime applies; and (iii) s 46 and the access regime are each applicable where they do not overlap[44] – it is submitted that the second scenario is correct. This interpretation is consistent with the author's previous explanation of the residual role left for s 46 in access matters – that is, as a 'fall-back mechanism'[45] for cases not covered by Part IIIA. It finds further support in two sources.

First, the Hilmer Committee recommended that upon declaration of a facility, the access regime should provide 'an exhaustive statement of access rights',[46] excluding any claims under s 46, 'to the extent that they relate to allegations of a refusal to provide access to a declared facility'.[47] The Committee also noted that the regime 'should be applied sparingly, focusing on key sectors of strategic significance to the nation. Concerns over access to facilities that do not share these features should continue to be addressed under the general conduct rules.'[48] The clear implication from these recommendations is that the regime was intended to be exclusive, but limited.[49]

Second, the Explanatory Memorandum to the *National Competition Policy Draft Legislative Package* distinguishes between the proposed access regime and restrictive trade practices provisions such as s 46 as follows:

> ... [s 46] is proscriptive by nature, providing for potentially heavy penalties where corporations engage in prohibited conduct. By contrast a legislative access regime would largely operate in a non-proscriptive manner, seeking to facilitate agreement between the parties on access, and where such agreement cannot be reached, providing an arbitration mechanism to settle the issues in dispute. Such a regime should be able to deal with access dis-

refute': R Dammery, 'Section 46 of the Trade Practices Act: The Need for Prospective Certainty' (1998) 6 *Competition & Consumer Law Journal* 246, 257. W Pengilley, 'Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management' (2000) 8 *Trade Practices Law Journal* 56, 56 also makes this point.

44 See W Pengilley, 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 *Competition & Consumer Law Journal* 244, 251. He favours the first scenario.

45 See n 40 above.

46 *Hilmer Report*, above n 3, 260.

47 Ibid.

48 Ibid.

49 See also Abadee, above n 13, 37.

> putes in a more timely manner than through court action for a purported contravention of s 46.[50]

In the author's opinion, Abadee correctly inferred from the above passage that the intention of Parliament is plain: in cases falling within the ambit of Part IIIA, 'the administrative regime is ascendant, and reliance upon s 46 is jettisoned'.[51]

Recent support for the 'ascendancy' of Part IIIA can be found in the Full Federal Court's decision in *NT Power Generation v Power & Water Authority*.[52] The respondent in this case, PAWA, a statutory authority established as a body corporate by the *Power and Water Authority Act* 1987 (NT), generated electricity and distributed it, across its own power transmission lines, for sale to consumers in the Northern Territory. The appellant, NT Power, wished to sell electricity, produced by its own generation facilities, to persons in the Northern Territory, in competition with PAWA. NT Power sought access to PAWA's electricity distribution infrastructure, as the cost of constructing its own transmission lines and associated facilities was prohibitive. After months of negotiations, PAWA refused to grant the access which had been sought. NT Power claimed that this refusal amounted to a misuse by PAWA of its market power.

The case turned on the interpretation of s 2B of the *Trade Practices Act*, which confirms that the provisions of Part IV of the Act (including s 46) bind the Crown 'so far as the Crown carries on a business'. In addressing this issue, it was the unanimous conclusion of the Full Federal Court that PAWA was an emanation of the Crown.[53] However, in what must now be regarded as a major obstacle to dealing with denials of access by public utilities under s 46, a majority of judges held that PAWA merely used its infrastructure as the means by which it carried on its business of generating and supplying electricity; it did not trade in the service of providing access to its infrastructure.[54] Since PAWA's conduct in refusing access was not undertaken in the course of carrying on a business, s 46 could have no application to that conduct.[55]

50 Explanatory Memorandum, *National Competition Policy Draft Legislative Package* (AGPS, Canberra, 1994) [1.11]. These comments are not limited to any of the particular paths to access, such as declaration.

51 Abadee, above n 13, 38.

52 [2003] ATPR 41-909.

53 Ibid 46,548 (Lee J); 46,560 (Branson J); and 46,570 (Finkelstein J).

54 Ibid 46,549 (Lee J); and 46,562 (Branson J); Finkelstein J dissenting (46,571).

55 Ibid. Mansfield J's decision in *NT Power Generation v Power & Water Authority* [2001] ATPR 41-814 was thereby affirmed.

Most interesting to the present discussion are the observations of the majority judges, Lee and Branson JJ, that Part IIIA provides the regime that should have been followed in the circumstances of the instant case. As Lee J remarked, it 'should not be assumed that it was the intention of the legislature that the scheme introduced in Part IIIA is a mere alternative to the provisions of s 46.'[56] In a similar vein, Branson J noted that there was no discernible legislative intention that s 2B, together with s 46, should provide 'an alternative means to the complex process established by Part IIIA'.[57]

Of course, an amendment to the *Trade Practices Act* to the effect that s 46 should not apply to cases falling within the ambit of Part IIIA would put the matter beyond doubt.[58] Based on the preceding discussion, such an amendment is not strictly necessary.[59] Nevertheless, its usefulness would lie in eliminating further conjecture on the interface between Part IIIA and s 46.

Elements of Section 46

As mentioned previously, three elements must be satisfied before a contravention of s 46 of the *Trade Practices Act* will arise: (i) a corporation with a substantial degree of *market power*; (ii) must *take advantage* of that power; (iii) for a *purpose* proscribed by s 46(1)(a), (b) or (c).[60] In the context of refusal to supply (and, by logical extension, refusal to grant access), two substantive expositions on the three elements of s 46 have been handed down by the High Court to date: *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[61] in 1989 and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[62] in 2001.[63] Brief recitals of the facts of

56 [2003] ATPR 41-909, 46,550.

57 Ibid 46,563.

58 See also Hood and Corones, above n 39, 100.

59 Indeed, in its recent review of the national access regime, the Productivity Commission did not find it necessary to address this matter.

60 These elements should be considered sequentially. If the first element is not satisfied, there is, strictly speaking, no need to consider the other two. Likewise, if the first element is satisfied, but the second not, it is, again strictly speaking, unnecessary to consider the third.

61 (1989) 167 CLR 177. The Full Federal Court's decision is *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1988] ATPR 40-841; and the Federal Court's is *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1987] ATPR 40-810.

62 [2001] ATPR 41-805. The Full Federal Court's decision is *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] ATPR 41-693; and the Federal Court's is *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* [1999] ATPR 41-668. (Hereafter, the case is *'Melway'*.) Note that Robert Hicks Pty Ltd traded as Auto Fashions Australia.

these cases provide contextual background to the discussion that follows in this part of the article and the next:

Queensland Wire

BHP, responsible for approximately 97 per cent of Australia's steel output, produced Y-bar,[64] which it sold exclusively to its wholly owned subsidiary Australian Wire Industries (AWI). When Queensland Wire Industries (QWI) sought to purchase Y-bar, BHP offered the product for sale at prices which were so high that its conduct amounted to a constructive refusal to supply.[65] Before the High Court, QWI successfully claimed that BHP had misused its market power in contravention of s 46 of the *Trade Practices Act*.[66] The parties then settled their dispute out of court in confidential negotiations.

Melway

Melway published a Melbourne street directory that had achieved an 80-90 per cent market share. The company attributed its success to its wholesale distribution system, under which it supplied directories to a limited number of distributors who were authorised to sell those directories only in the particular market segments allocated exclusively to them. After terminating the distributorship of Auto Fashions, Melway was informed by Auto Fashions that it nevertheless wished to obtain copies of the directory (30,000-50,000 per annum) for sale to the retail market. On appeal to the High Court, Melway's refusal to supply Auto Fashions was found not to breach s 46.[67]

63 The High Court's third s 46 decision, *Boral Besser Masonry Ltd v ACCC* [2003] ATPR 41-915 (hereafter, '*Boral*'), concerns predatory pricing. (Boral Besser Masonry Ltd was referred to throughout the proceedings as BBM. That convention is maintained in this article.)

64 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.

65 The High Court's decision in *Queensland Wire* (1989) 167 CLR 177 confirms that supply on unreasonable or restrictive terms amounts to constructive refusal to supply. According to Mason CJ and Wilson J (185), the offer by BHP was at 'an excessively high price relative to other BHP products'; Deane J (197) described it as an 'unrealistically high' price; and Toohey J (204) identified a refusal to supply at a 'competitive' price.

66 For case note discussion of the High Court's decision, see K MacDonald, 'Queensland Wire Industries v BHP' (1989) 19 *Queensland Law Society Journal* 131.

67 For case note discussion of the High Court's decision, see P Williams, 'Melway Publishing Pty Ltd v Robert Hicks Pty Ltd' (2001) 25 *Melbourne University Law Review* 831.

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.[68]

Now, the decisions in *Queensland Wire* and *Melway* have established an authoritative framework for the interpretation and application of s 46. In light of these determinations, it has become clear that the critical factor in refusal to supply cases under s 46 is whether the respondent company can justify its conduct.[69] Indeed, this author contends that critics who assert a 'lack of certainty'[70] in the application of s 46 in such cases[71] have overlooked the significance of legitimate business reasons offered (or omitted) by the respondent corporation in justification of its conduct.[72] As the s 46 cases repeatedly demonstrate, 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 rele-

68 S Corones, 'Are Corporations with a Substantial Degree of Market Power Free to Choose their Distributors and Customers?' (1988) 4 *Queensland University of Technology Law Journal* 21, 21.

69 Cf Pengilly's nomination of *Queensland Wire* as one of Australia's ten worst trade practices decisions and his claim that 'it created in business an impression that there was an obligation to supply in virtually all circumstances': W Pengilley, 'The Ten Most Disastrous Decisions made Relating to the Trade Practices Act' (2002) 30 *Australian Business Law Review* 331, 340.

70 D Clough, 'Misuse of Market Power – "Would" or "Could" in a Competitive Market?' (2001) 29 *Australian Business Law Review* 311, 312.

71 For further complaints relating to the application of s 46, see: M O'Bryan, 'Section 46: Law or Economics?' (1993) 1 *Competition & Consumer Law Journal* 64, 64 ('unpredictable outcomes'); McMahon, above n 23, 19 (no 'coherent framework'); W Seah, 'Fair Competition or Unfair Predation: Identifying the Misuse of Market Power under Section 46 (2001) 9 *Trade Practices Law Journal* 236, 267 ('practical difficulties'); Pengilley, above n 43, 56 (it is 'impossible ... to make managerial decisions in certain conformity with the law'); and D Meltz, '"Market Entry – See Adjoining Map": Melway and the Right Not To Supply' (2002) 10 *Trade Practices Law Journal* 96, 109 ('the hoped for clarity ... has not transpired'). Cf S Welsman, 'In Queensland Wire, The High Court has Provided an Elegant Backstop to "Use" of Market Power' (1995) 2 *Competition & Consumer Law Journal* 280, 312 (there are 'evidence outcome "certainties"'); and R Smith and D Round, 'The Puberty Blues of Competition Analysis: Section 46' (2001) 9 *Competition & Consumer Law Journal* 189, 192 (firms 'do have certainty given the legal framework and existing precedent').

72 The author articulated a similar view, pre-*Melway*, in B Marshall, 'Refusals to Supply under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?' (1996) 8 *Bond Law Review* 182.

vant factual matrix, but within the parameters established by judicial pronouncement.

These comments apply equally to those 'residual' essential facilities cases that fall for determination under s 46. There, again, the pivotal issue relates to the legitimacy of reasons for refusing access. As Kench has explained:

> Section 46 is capable of applying to an outright or constructive or discriminatory refusal by the owner of an essential facility to supply services using that facility ... A non-integrated facility owner will be dealing with third party suppliers and customers, and ... faces serious issues about *proper business justifications* for refusing to deal. A vertically integrated essential facility owner, by virtue of its ownership interest, needs to take even greater care about the formulation of a *legitimate business reason* for its refusal to deal.[73]

The balance of this article examines the seminal principles articulated by the High Court in *Queensland Wire* (where, it should be emphasised, BHP failed to offer a legitimate business reason for its behaviour) and *Melway* (where, it is important to note, Melway did provide a legitimate business rationale),[74] and applied by the Federal Court in subsequent decisions. This analysis, which begins below by focusing on the three elements of s 46 and continues in Part IV by considering the mitigating impact of legitimate business reasons, is intended to clarify the application of the misuse of market power provision in refusal to supply/denial of access cases.

Market power

As a threshold requirement to the operation of s 46, a corporation must have a 'substantial degree of power in a market'.[75] Acknowledged by the courts as an economic concept,[76] 'market power' refers to the ability of a firm to raise prices with no loss of sales to existing competitors, or new entrants, such as would render the price rises unprofitable.[77] This expla-

[73] Kench, above n 6, 141 (emphasis added). The access problem is regarded as potentially more severe where the essential facility is vertically integrated into upstream or downstream markets than where it is not.

[74] Arguably, the *Boral* case sustains this theme (in that BBM did offer a legitimate business rationale for its conduct), although the case involved predatory pricing, not refusal to supply: see the discussion of *Boral* below.

[75] See generally S Corones, 'The New Threshold Test for the Application of Section 46 of the Trade Practices Act' (1987) 15 *Australian Business Law Review* 31.

[76] See eg, *Plume v Federal Airports Corp* [1997] ATPR 41-589, 44,131.

[77] See F Scherer, *Industrial Market Structure and Economic Performance* (Rand McNally, Chicago, 1980) 10-11.

nation was specifically adopted by Mason CJ and Wilson J in their Honours' joint judgment in *Queensland Wire*.[78]

It is not anticipated that the first element of s 46 will be difficult to satisfy in essential facility cases.[79] As the Hilmer Committee observed, if a facility 'is truly essential, its owner will always have a substantial degree of market power within the meaning of s 46'.[80]

Generally speaking, whether a corporation in fact possesses substantial market power is an issue inextricably linked to the way in which the relevant market is defined.[81] In light of the Hilmer Committee's conclusion above, it is not considered necessary to elaborate on the complex process of defining a market and establishing the power of a corporation therein.[82] For present purposes, suffice it to say that this is often a complicated, and controversial, matter in restrictive trade practices cases.[83]

However, this is not always the case. In *Queensland Wire*, the High Court had little difficulty in establishing the threshold requirement under s 46.[84]

78 Their Honours said, 'Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product.': (1989) 167 CLR 177, 188. See, also, the judgment of Dawson J: ibid 200.

79 See, further: O'Bryan, above n 12, 88; and R Smith, 'Competition Law and Policy – Theoretical Underpinnings' in M Arblaster and P Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 16, 23.

80 *Hilmer Report*, above n 3, 243.

81 Eg, actions based on s 46 were defeated in the following 'refusal to supply' cases, due to the adoption of relatively wide market definitions which led to findings of insufficient market power on the part of the respondent corporation: *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd* [1992] ATPR 41-155; *Dowling v Dalgety Australia Ltd* [1992] ATPR 41-165; *Helicruise Air Services Pty Ltd v Rotorway Australia Pty Ltd* (1996) ATPR 41-510; and *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647.

82 Beyond saying that M Brunt, 'Market Definition Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 *Australian Business Law Review* 86 remains particularly instructive. See also G Hay, 'Market Power in Australasian Antitrust: An American Perspective' (1994) 1 *Competition & Consumer Law Journal* 215.

83 See, further: R Smith, 'The Practical Problems of Market Definition Revisited' (1995) 23 *Australian Business Law Review* 52; and B Marshall, 'The Dilemma of Market Definition' (1996) 31 *Australian Lawyer* 7. Most recently, there has been criticism of the High Court's findings in respect of market power in the *Boral* case: see eg R Smith and R Trindade, 'The High Court on Boral: A Return to the Past?' (2003) 10 *Competition & Consumer Law Journal* 336. Cf the positive critique in G Hay, 'Boral – Free at Last' (2003) 10 *Competition & Consumer Law Journal* 323.

84 Compare the joint judgment of the Full Federal Court in *Queensland Wire* [1988] ATPR 40-841, 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.

Their Honours were unanimous in holding that BHP possessed a substantial degree of market power in the Australian market for steel and steel products.[85] In *Melway*, it was not even disputed in the High Court that Melway had a substantial degree of market power in the wholesale and retail market for street directories in Melbourne.[86] In contrast, in *Boral Besser Masonry Ltd v ACCC*,[87] the appellant's successful appeal turned on the finding, by six of the seven High Court justices,[88] that the company did not have a substantial degree of market power in Melbourne's concrete masonry products market.[89] The decision in *Boral* provides a useful reminder of the primacy of the 'market power' element in establishing a breach of s 46.

Taking Advantage of Market Power

Competitive Market Test

The Hilmer Committee considered that that there would be 'little difficulty'[90] in establishing that a refusal to deal in an essential facility context constitutes a taking advantage of the facility owner's market power because, it said simply, 'in the absence of such market power access to the facility would be available'.[91] The author agrees with that conclusion,[92] but acknowledges that the Committee's statement does not elucidate the test of taking advantage adopted by the High Court in *Queensland Wire*, and confirmed in *Melway*.[93] The discussion here, and below, explains the test and illustrates its practical application, both generally and in relation to essential facilities.

85 *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J); 197 (Deane J); 201 (Dawson J); and 211 (Toohey J). In this respect, their Honours upheld the decision of Pincus J at first instance in *Queensland Wire* [1987] ATPR 40-810.

86 *Melway* [2001] ATPR 41-805, 42,750. The conclusion of the trial judge, Merkel J, on this point in *Melway* [1999] ATPR 41-668, 42,520-42,521 was not challenged.

87 [2003] ATPR 41-915.

88 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting.

89 [2003] ATPR 41-915, 46,686 (Gleeson CJ and Callinan J); 46,695 (Gaudron, Gummow and Hayne JJ); 46,717 (McHugh J); Kirby J dissenting (46,721).

90 *Hilmer Report*, above n 3, 243.

91 Ibid.

92 For reasons encapsulated in Finkelstein J's judgment in the *NT Power* case. See the discussion in this article above under 'Elements of Section 46'.

93 Cf F Hanks, 'The Competition Law Framework for Deregulation of Public Utilities in Australia' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 2, 6, where it is contended that the Hilmer Committee 'did not understand the nature of the inquiry required by the test of 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.[94] In his Honour's view, a proper construction of the section required those words to be read in a pejorative sense.[95] On final appeal to the High Court, however, it was unanimously held that 'take advantage' is a neutral concept, meaning nothing materially different to 'use', and so does not require proof of hostile intent.[96]

As to whether market power has been 'used', the test discernible from the High Court judgments in *Queensland Wire* is that a corporation's conduct will amount to a use, or taking advantage, of market power when that conduct is possible, in a commercial sense, only because of its market power.[97] In other words, a firm should be regarded as having taken advantage of market power when it has behaved differently from the manner in which it would be likely to behave if it were operating in a competitive market.[98] This approach may conveniently be described as the 'competitive market' test, to borrow from the judgment of Mason CJ and Wilson J in *Queensland Wire*.[99] In applying the test in that case, their Honours stated:

> 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.[100]

In drawing the inference that BHP had taken advantage of its market power, the High Court took account of the following factors: BHP supplied Y-bar to AWI but not QWI; BHP made available for general sale at competitive prices all the other steel products from its rolling mills, so

94 [1987] ATPR 40-810, 48,819.

95 Ibid.

96 *Queensland Wire* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J); 194 (Deane J); 202 (Dawson J); and 213 (Toohey J). This point was expressly confirmed by the High Court in *Melway* [2001] ATPR 41-805, 42,754 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

97 *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J); 197-198 (Deane J); 202-203 (Dawson J); and 216 (Toohey J).

98 Ibid.

99 Steinwall does likewise: see R Steinwall, 'Melway and Monopolisation – Some Observations on the High Court's Decision' (2001) 9 *Competition & Consumer Law Journal* 93, 97.

100 *Queensland Wire* (1989) 167 CLR 177, 192 (emphasis added). Similar views were expressed by Dawson J (202) and Toohey J (216).

that BHP's conduct with respect to Y-bar was not in accordance with the general terms of it commercial behaviour; in every other steel product line in which BHP experienced some competition, it supplied that product.[101]

As the High Court's decision in *Queensland Wire* demonstrates, the practical application of the competitive market test generally involves an examination of the counter-factual. That is to say, whether a corporation has taken advantage of its market power is determined by asking whether the corporation would be likely to engage in the same conduct in a competitive market. The corollary is to ask whether the conduct depends on the possession of market power and is an exercise of that market power. Whichever way the question is phrased, the inquiry seeks to ascertain whether the conduct at issue is attributable to market power.[102] In *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*,[103] French J explained very clearly the need for a causal nexus between a corporation's market power and its conduct:

> 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.[104]

This requirement has been confirmed by the High Court's recent decision in *Melway*. In a joint majority judgment, Gleeson CJ, Gummow, Hayne and Callinan JJ affirmed the competitive market test from *Queensland Wire*,[105] expressly pointing out that as between a corporation's market

[101] Ibid 192 (Mason CJ and Wilson J); 197-198 (Deane J); 202-203 (Dawson J); and 216 (Toohey J).

[102] Section 46(4)(a) provides that the reference to 'power' in s 46(1) is a reference to market power. Thus, the power taken advantage of by the respondent corporation must in fact be market power.

[103] [1992] ATPR 41-196, where French J held that there was no evidence of a use of 'market power': at 40,644.

[104] Ibid. French J's approach in *Natwest* was expressly applied by Wilcox J in *General Newspapers Pty Ltd v Australian and Overseas Telecommunications Corp Ltd* [1993] ATPR 41-215, 40,956 to conclude that, even without substantial market power, the respondent company would have acted in the same way. For similar reasoning, see, more recently: *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] ATPR (Digest) 46-212; *Rural Press Ltd v ACCC* [2002] ATPR 41-883; and *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2002] ATPR (Digest) 46-215.

[105] [2001] ATPR 41-805, 42,758. In dissent, Kirby J maintained that *Queensland Wire* stood for the proposition that to 'take advantage' of market power for a proscribed purpose, a corporation must simply 'use' that power (eg, by refusing supply) for a prohibited reason, and that it 'was unnecessary to pose hypothetical questions

power and its impugned conduct there must be 'a *connection* such that the firm whose conduct is in question can be said to be taking advantage of its power'.[106]

The majority viewed Melway's refusal to supply Auto Fashions as a manifestation of its distribution system, so that the 'real question'[107] in the case was whether, without its market power, Melway could have maintained that system.[108] Their Honours noted that Melway had adopted its segmented distribution system before it secured its position of market dominance, and there was no reason to believe it would not have been both willing and able to continue that system in a competitive market.[109] They reasoned that the creation and maintenance of the distribution system by Melway 'at a time when it did not have a substantial degree of market power, shows that its maintenance, when the appellant had market power, was not *necessarily* an exercise of that power.'[110] The majority therefore concluded:

> ... it does not follow that because a firm in fact enjoys freedom from competitive constraint, and in fact refuses to supply a particular person, there is a *relevant connection* between the freedom and the refusal. Presence of competitive constraint might be compatible with a similar refusal, especially if it is done to secure business advantages which would exist in a competitive environment.[111]

Thus, at the root of the majority's finding that Melway had not taken advantage of its market power lay the lack of any causal link between Melway's dominant market position and its refusal to supply Auto Fashions.[112]

(sometimes difficult to resolve) as to whether such corporation could or would, acting rationally, have engaged in the forbidden conduct if it were subject to effective competition': ibid 42,769. With respect, Kirby J's view is directly contrary to the competitive market test espoused by the High Court in *Queensland Wire*.

106 Ibid 42,757.

107 Ibid 42,760.

108 Ibid. Note that here their Honours are asking the 'corollary' question under the competitive market test.

109 Ibid, citing with approval Heerey J's dissenting judgment in *Melway* in the Full Federal Court.

110 Ibid 42,761 (emphasis in original).

111 Ibid (emphasis added).

112 The majority did not disturb the finding of the trial judge, Merkel J, that the refusal to supply the respondent was for an exclusionary purpose, namely, to deter or prevent competition at the wholesale level, but warned of the danger of proceeding 'too quickly from a finding about proscribed purpose to a conclusion about taking advantage': ibid 42,755.

On the question of how high the threshold of causation is under the competitive market test, the High Court majority in *Melway* said, albeit by way of obiter comments:

> ... in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is *materially facilitated* by the existence of the power, even though it may not have been absolutely impossible without the power.[113]

That a corporation's market power has 'materially facilitated' its conduct implies a lower threshold of causation than does the present requirement that the conduct is only possible because the corporation possesses substantial market power.[114] In the author's view, lowering the threshold of causation in respect of the 'take advantage' element will do little to increase certainty in the application of s 46. As Corones notes, 'materially' is a relative concept and its application to particular fact situations 'is bound to produce a divergence of views'.[115] Moreover, to the extent that it broadens the scope of s 46, the lower threshold may indirectly lead to the error of focusing on the sources of a corporation's market power, rather than its conduct. This misapplication of the competitive market test of taking advantage is discussed immediately below.

Market Power or Other Power?

There is a series of Federal Court judgments in which conduct characterised as resulting from a corporation's exercise of extraneous sources of power (such as contractual, property, statutory or other legal rights) has been excluded from the ambit of s 46.[116] The proposition accepted in these judgments is that if a corporation with substantial market power exercises, for example, a contractual or statutory right, it necessarily takes advantage of power it has by virtue of the contract or statute, and not by virtue of its control of a market.[117]

It is submitted, however, that the adoption by the High Court in *Queensland Wire* of a broad economic concept of market power indicates that s 46 is intended to catch the taking advantage of all types of market power

[113] Ibid 42,758.

[114] See also Corones, above n 12, 420.

[115] Corones, ibid.

[116] For background discussion, see L Law and B Marshall, 'Misuse of Market Power: The Degree of "Causal Connection" Required under Australian and European Law' (1997) 3 *International Trade and Business Law Annual* 197.

[117] In discussing these judgments, it is not suggested that the conclusion in respect of the 'take advantage' element is 'wrong' in every instance, merely that the underlying process of reasoning is flawed.

irrespective of their source.[118] Economists do not dispute that market power can arise from the existence of contracts with distributors, or from the existence of patents or other statutory monopolies.[119]

The High Court's reasoning in *Melway* confirms that it is erroneous to focus on the source of market power in determining whether there has been a taking advantage of market power.[120] Correctly applied, the competitive market test involves a comparative assessment of the corporation's *behaviour* in the presence or absence of competitive conditions – with a change in conduct suggesting that the test has been satisfied[121] – not a classification of its sources of market power. The two should not be confused.[122] The point may have been implicit in the High Court's decision in *Queensland Wire*, but only Dawson J directly touched on the issue in that case.[123] His Honour acknowledged that although there is a need to distinguish between monopolistic practices and vigorous competition, it was not helpful 'to categorise conduct ... by determining whether it is the exercise of some contractual or other right.'[124]

Earlier cases in which such categorisation occurred include *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd*,[125] *Warman International v Envirotech Australia Pty Ltd*[126] and *Williams v Papersave Pty Ltd*.[127] While the specific factual matrix varied, each case involved a corporation with a substantial degree of market power[128] engaging in conduct allegedly in breach of s 46. However, in each instance the contravention was

[118] See also Law and Marshall, above n 116, 199; and P Clarke and S Corones, *Competition Law & Policy: Cases and Materials* (Oxford University Press, Melbourne, 1999) 346.

[119] Indeed, the Explanatory Memorandum to the *Trade Practices Act Revision Bill* states that 'market power can be derived from statutory limitations on competition (eg, through the creation of statutory monopolies) in the same way as any other constraints on competition can affect the operation of the market': at [17.44].

[120] See also M O'Bryan, 'Section 46: Legal and Economic Principles and Reasoning in Melway and Boral' (2001) 8 *Competition & Consumer Law Journal* 203, 211.

[121] See also Meltz, above n 71, 109.

[122] See also O'Bryan, above n 120, 212.

[123] Although Pincus J at first instance in *Queensland Wire* [1987] ATPR 40-810, 48,818-48,819 had also said, 'I cannot (with respect) accept that characterising the acts complained of as merely an exercise of legal rights, whether contractual or otherwise, can be an answer to a claim based on s 46.'

[124] (1989) 167 CLR 177, 202.

[125] [1975] ATPR 40-004.

[126] [1986] ATPR 40-714.

[127] [1987] ATPR 40-781.

[128] Noting that, prior to 1986, s 46 required a corporation to be in a position 'substantially to control a market'.

not established, as the conduct was held by the Federal Court to result not from the exercise of corporation's market power, but from the exercise of some other power or right.

In the *Ira Berk* case, for example, Joske J decided that the exercise by a corporation with substantial market power of a contractual right to terminate a contract amounted to the corporation taking advantage of the terms of the relevant contract and not taking advantage of its market power.[129] This reasoning was relied on by Wilcox J in *Warman*, where his Honour concluded that, 'To exercise in good faith an extraneous legal right, though the effect may be to lessen, or even eliminate, competition, is to take advantage of that right, not of market power.'[130] Similarly, in *Williams v Papersave Pty Ltd*, Sheppard J accepted that the respondent corporation was merely taking advantage of certain commercial information it had received and not its market power.[131]

In the aftermath of *Queensland Wire*, the Full Federal Court indicated, in *Australasian Performing Rights Association Ltd v Ceridale Pty Ltd*,[132] that it was no answer to an alleged contravention of s 46 for a market-dominant supplier to assert that it was merely exercising an 'extraneous legal right'.[133] Similarly, in *John Hayes and Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd*,[134] Hill J opined that 'there is no necessary incompatibility between a party exercising a right available to it and that conduct constituting a breach of s 46.'[135]

Useful support is also found in the jurisprudence of the European Union. In that jurisdiction, 'abuse' of market power is recognised as an objective concept relating to the behaviour of a dominant corporation, whose very presence in the market weakens competition.[136] Accordingly, anti-competitive conduct by a dominant corporation is not readily excused un-

[129] [1975] ATPR 40-004, 17,115. Smithers and Hely JJ concurred in separate judgments.

[130] [1986] ATPR 40-714, 47,827.

[131] [1987] ATPR 40-781, 48,525. Confirmed by the Full Federal Court on appeal: *Williams v Papersave Pty Ltd* [1987] ATPR 40-818.

[132] [1990] ATPR 41-042.

[133] Ibid 52,129 (Wilcox, Spender and Pincus JJ).

[134] [1994] ATPR 41-318.

[135] Ibid 42,236. Although, subsequently, in *Helicruise Air Services Pty Ltd v Rotorway Australia Pty Ltd* [1996] ATPR 41-510, 42,399, Hill J described the question of whether the exercise of a contractual right could constitute a contravention of s 46 as an 'open one'.

[136] See, eg, *Hoffman-La Roche & Co AG v European Commission* [1979] 3 CMLR 211, [91].

der art 82[137] of the *EC Treaty* on the argument that the corporation was making use of a right or power separate from its market power.[138]

Take, for example, intellectual property rights. On the facts of the *Magill* case, the refusal by broadcasters to supply their copyright information as to weekly program lists to an independent publisher amounted to a contravention of art 82. The reasoning of the European Court of First Instance, affirmed by the European Court of Justice on appeal,[139] was that the broadcasters, by reserving the exclusive right to publish their copyright information, were preventing the emergence of a new product and hence securing their monopoly in the derivative market for weekly television guides.[140] Significantly, the existence of the intellectual property rights was factored into the finding of market dominance and, in the circumstances, the exercise of those rights was contrary to art 82.[141]

Magill was distinguished by Beaumont J in *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd*[142] on the ground that it had not been established that ownership of copyright conferred market power on the Broderbund corporation.[143] However, it has been argued that, by implication, Beaumont J accepted the relevance of the reasoning in *Magill* to actions under s 46, leading to the conclusion that 'if copyright confers substantial market power in one market and the owner seeks to use that power as "leverage" to prevent new entry or deter or prevent a person from engaging in competitive conduct in relation to another down-

[137] The provision was previously numbered art 86.

[138] See further, Law and Marshall, above n 116, 201-202.

[139] *Radio Telefis Eireann and Independent Television Publications Ltd v European Commission* [1995] ECR I-743.

[140] *Radio Telefis Eireann v European Commission* [1991] CEC 114, [72]-[73]; *British Broadcasting Corp v European Commission* [1991] CEC 147, [59]-[60]; *Independent Television Publications Ltd (ITP) v European Commission* [1991] CEC 174, [57]-[58].

[141] As van Melle has explained, 'The principle is simple enough. A monopolist that competes in a derivative market cannot refuse to deal with another firm in order to prevent or deter competition in that market. By refusing to deal in the component essential for competition in another market the monopolist uses the market power in respect of the essential component as leverage to gain power in the derivative market. *Queensland Wire* applies this principle to the supply of tangible property, US cases apply it to access to "essential facilities" ... and *Magill* applies it to the licensing of intellectual property': A van Melle, 'Refusals to License Intellectual Property Rights: The Impact of RTE v EC Commission (Magill) on Australian and New Zealand Competition Law' (1997) 25 *Australian Business Law Review* 4, 16.

[142] [1992] ATPR 41-155.

[143] Ibid 40,113-40,114.

stream market, the owner will have misused the market power conferred by its copyright.'[144]

In *Dowling v Dalgety Australia Ltd*,[145] Lockhart J demonstrated divergent reasoning. In this case, the applicant was refused permission to auction at the Goondiwindi sale yards owned by three pastoral companies, Dalgety, Elders and Primac. Although finding that the threshold requirement of a substantial degree of market power was not established on the facts,[146] Lockhart J proceeded to consider the application of s 46. Ostensibly adhering to the test formulated by the High Court in *Queensland Wire*, his Honour asked whether any of the corporations had exercised a right it would be unlikely to exercise in a competitive market.[147] However, in reverting to the approach of categorising the source of the power enabling the conduct, Lockhart J took the view that, in declining to make available to a competitor a valuable asset, the respondents were exercising rights flowing from the ownership of property, which could not be construed as conduct in which they would not engage in a competitive market.[148]

Lockhart J's approach in *Dowling v Dalgety Australia Ltd* was cited with approval by Lee J in *NT Power Generation v Power & Water Authority*.[149] As discussed previously, a majority of the Full Federal Court, comprised of Lee and Branson JJ, determined that s 46 had no application in that case. This was the outcome of their Honours' finding that PAWA's refusal to make its infrastructure available for use by NT Power was not

144 S Corones, 'Parallel Importing Computer Software: Consumer Welfare Considerations' (1992) 3 *Australian Intellectual Property Journal* 188, 195. '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. The High Court's decision in *Queensland Wire* – where BHP, by refusing to supply QWI with Y-bar, used its power in the Australian steel market to deter or prevent QWI from engaging in competitive conduct in the rural fencing market – may be taken as confirming, in Australia, judicial opposition to market leverage.

145 [1992] ATPR 41-165.

146 Ibid 40,276.

147 Ibid 40,277.

148 Ibid 40,278. In criticising Lockhart J's reasoning in this case, Pengilley has said, 'If this is the trend of the law, it seems as if access to facilities owned by others will rarely be ordered in Australia ... In respect of the denial of access by the owner of the facility, the owner's argument is always that he is merely exploiting what he owns': W Pengilley, 'Denying a Competitor Access to Facilities' (1992) 8 *Australian & New Zealand Trade Practices Law Bulletin* 11, 14. For similar criticism, see P Prince, 'Queensland Wire and Efficiency – What Can Australia Learn from US and New Zealand Refusal to Deal Cases?' (1998) 5 *Competition & Consumer Law Journal* 237, 251.

149 [2003] ATPR 41-909, 46,549.

conduct by PAWA in the course of carrying on its business.[150] However, had s 46 been relevant, Lee and Branson JJ would have applied the provision very differently. Despite having the benefit of the High Court's decision in *Melway*, Lee J relied on Lockhart J's reasoning in *Dowling* to conclude that the 'take advantage' element of s 46 would not have been satisfied in the instant case, since the section 'does not purport to interfere with the due rights of property per se'.[151] Conversely, Branson J's view, shared by Finkelstein J, was that PAWA clearly had taken advantage of its monopoly power to prevent NT Power from becoming a supplier of electricity.[152] Their Honours dismissed the suggestion that, in refusing access to its infrastructure, PAWA was merely exercising a regulatory function or its ownership rights.[153] Expressing particular incredulity at the latter claim, Finkelstein J said:

> It would ... be an extraordinary result if a monopolist could successfully defeat a s 46 claim with the proposition that the monopolist's ownership of the property in question entitles it to do as it pleases, even if its conduct is anti-competitive or predatory.[154]

Indeed, Finkelstein J's treatment in this case of the 'take advantage' element of s 46 is particularly deft. His Honour's judgment contains a very useful application of the competitive market test in an essential facilities context. Invoking the counter-factual, Finkelstein J asked how PAWA would behave in a 'hypothetical competitive market' for the supply of electricity distribution and transmission facilities[155] if PAWA were asked to make its infrastructure available to a third party who wished to compete with PAWA in the downstream electricity supply market.[156] His Honour's answer was that a profit-maximising firm would not stand by and allow a competitor to supply the third party with distribution and

[150] Ibid 46,549 (Lee J); and 46,562 (Branson J); Finkelstein J dissenting (46,571).

[151] Ibid 46,549.

[152] Ibid 46,566 (Branson J); and 46,586 (Finkelstein J).

[153] Ibid 46,566 (Branson J); and 46,582 (Finkelstein J).

[154] Ibid 46,582.

[155] In constructing the relevant hypothetical market (which, his Honour noted, following *Melway*, was not required to be a perfectly competitive market), Finkelstein J made the following reasonable assumptions: that PAWA had the capacity to allow its infrastructure to be used by third parties who intended to supply electricity to customers in the geographic area in which PAWA sold electricity; that PAWA had at least one competitor who was equally able to satisfy the demands of third parties; and that PAWA and its hypothetical competitor were willing to make their infrastructure available to third parties on reasonable terms and conditions. Ibid 46,584.

[156] Ibid 46,585.

transmission facilities, without at least bidding for that business.[157] In other words, PAWA would not simply refuse to grant access to its infrastructure.[158] His Honour explained:

> In a competitive market for the supply of distribution and transmission facilities PAWA could not prevent the third party from competing for PAWA's customers with the potential that it would lose business. This is because in our hypothetical competitive market there is an organisation that can provide distribution and transmission facilities to the third party. So it is impossible for PAWA to keep the third party away from its customers. How would a rational firm act in that situation? ... [A] rational firm would act pragmatically and make its infrastructure available. It would do so to get what it could from the difficult situation in which it found itself. The only thing it could get by way of recompense for the loss of business that it would be likely to suffer in a competitive market is a, perhaps smaller, return from letting out its infrastructure.[159]

This explanation confirms the Hilmer Committee's view that that it would be a straightforward matter to satisfy the 'take advantage' element of s 46 in essential facilities cases.[160]

Nevertheless, the preoccupation of Lockhart J in *Dowling v Dalgety Australia Ltd*, and Lee J in *NT Power*, with categorising the source of the corporation's power suggests an ongoing measure of judicial uncertainty in the application of the competitive market test, even post-*Melway*. In particular, whenever 'extraneous powers' are raised in relation to the question of whether a corporation has taken advantage of its market power, the risk of confused reasoning appears to increase.

A qualification to the preceding comment relates to 'regulatory power', now acknowledged appropriately as a different type of power to market power. In the *NT Power* case, PAWA's claim that it was exercising a regulatory function was dismissed on the basis that its conduct was 'not designed to achieve by regulation any specific public purpose of the legislature'.[161] This contrasts with the genuinely regulatory nature of the li-

[157] Ibid. This conclusion would hold if PAWA had been an unintegrated, rather than a vertically integrated, monopolist. In those circumstances, PAWA would lack any incentive to deny access to its facilities.

[158] This would include a constructive refusal to supply as well.

[159] [2003] ATPR 41-909, 46,585.

[160] See above n 90.

[161] [2003] ATPR 41-909, 46,582 (Finkelstein J). See, also, Branson J's judgment : ibid 46,566.

censing power at issue in *Plume v Federal Airport Corp*[162] and *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*.[163]

In *Plume*, the applicant, an operator of a shuttle bus service, applied to the Federal Airports Corporation (FAC) for a licence to operate such a service between Alice Springs airport and the city centre. The FAC refused and the applicant alleged that the refusal contravened s 46. O'Loughlin J held that the exercise of the power to grant a licence could not be described as the exercise of an economic market power.[164] Rather, it was the use of a regulatory power designed for the benefit of the members of the public who used the facilities of the airport.[165]

Similarly, in *Stirling*, French J distinguished between the exercise of a statutory power in the public interest (not a use of market power) and the exercise of market power derived from a statutory monopoly (potentially a use of that power).[166] His Honour acknowledged that Bunbury Port Authority (BPA) had exclusive control over the Port of Bunbury pursuant to the *Port Authorities Act* 1999 (WA).[167] However, in granting a licence for the provision of towage services in that port, French J held that BPA was discharging a regulatory function under an express power granted by Parliament and was not exercising market power.[168]

Leaving regulatory function to one side (on the ground that it is distinguishable from market power), the principle remains that if a corporation with market power claims merely to have exercised an 'extraneous right', this will not remove its conduct from the purview of s 46. Any misapprehension of this point, in the courts or elsewhere, would be remedied by a closer reading of the High Court's decision in *Melway*. As the majority explained in that case, market power means the freedom to act without competitive constraint.[169] Accordingly, in assessing whether a corporation has taken advantage of its market power, the competitive market test dictates that the only pertinent question to ask is whether the corporation would be likely to engage in the conduct in the presence of competitive constraint.[170] Categorising the particular sources of a corporation's mar-

[162] [1997] ATPR 41-589.

[163] [2000] ATPR 41-752.

[164] [1997] ATPR 41-589, 44,132.

[165] Ibid.

[166] [2000] ATPR 41-752, 40,734.

[167] Ibid 40,699.

[168] Ibid 40,734. Confirmed by the Full Federal Court on appeal: *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783.

[169] [2001] ATPR 41-805, 42,761.

[170] See also O'Bryan, above n 120, 209.

ket power is not the answer to that inquiry. What will be relevant, though, is whether the corporation can advance a 'legitimate business rationale' in respect of its conduct. This matter, contended earlier in this article to be the linchpin of s 46 analysis, and as relevant to a denial of access to an essential facility as to any other refusal to supply,[171] is discussed below.

Anti-competitive Purpose

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 proscribed purposes in s 46(1) is present on the facts of the case.[172] 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.[173]

An unavoidable element of intention is thereby incorporated into the section, in the sense that s 46(1) requires purposive action undertaken with the express aim of: (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; or (c) deterring or preventing a person from engaging in competitive conduct in a market.[174]

McMahon has complained that the proscribed purposes in s 46(1) are 'widely drawn and ill-defined',[175] and deal exclusively with injury to competitors which is the very nature of competitive conduct.[176] Certainly, the section is expressed in terms of protecting firms who wish to compete with the dominant corporation, rather than in terms of protecting competition itself or the interests of consumers.[177]

[171] Refer to Kench's comments: see text accompanying n 73 above.

[172] In fact, a proscribed purpose need only be one of the purposes motivating the respondent corporation, provided it is a 'substantial' purpose: s 4F of the *Trade Practices Act*.

[173] (1989) 167 CLR 177, 191.

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

[175] McMahon, above n 23, 18.

[176] Ibid. Cf Alexiadis' claim that conduct fulfilling the requirements of s 46(1)(a), (b) or (c) cannot be anything but predatory: P Alexiadis, 'Refusal to Deal and Misuse of Market Power under Australia's Competition Law' (1989) 10 *European Competition Law Review* 436, 452.

[177] Clarke and Corones have expressed concern that the immediate effect of s 46 is 'to protect individual (and in practice, small) firms from the predatory conduct of large firms, rather than to protect competition as such': above n 118, 110. Cf the argument

However, 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 competitors is an objective of s 46. 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.[178]

Although it is not entirely 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 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.[179]

In *Queensland Wire*, 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. His Honour stated that the objective of s 46 is 'the protection and advancement of a competitive environment and competitive conduct'.[180] Toohey J similarly noted that the objective of Part IV of the *Trade Practices Act* (in which s 46 appears) is 'to promote and preserve competition'.[181] This approach was confirmed in *Melway*, where the High Court majority was emphatic that s 46 'aims to promote competition, not the private interests of particular persons or corporations'.[182]

that competition laws should properly focus on the interests of small business (and consumer) groups: see, generally, V Nagarajan, 'The Accommodating Act: Reflections on Competition Policy and the Trade Practices Act' (2002) 20 *Law in Context* 34.

[178] (1989) 167 CLR 177, 191 (emphasis added). This approach may be contrasted with European decisions upholding a view of art 82 of the *EC Treaty* which protects individual traders in the market rather than competition in the market. See, eg: *Commercial Solvents Corp v European Commission* [1974] 1 CMLR 309; and *United Brands Co v European Commission* [1978] 1 CMLR 429. In both cases, the European Court of Justice stated that the objectives of art 82 dictated that the elimination of a competitor from the market was a relevant concern.

[179] See also V Nagarajan, 'The Regulation of Competition by Section 46 of the Trade Practices Act' (1993) 1 *Competition & Consumer Law Journal* 127, 128.

[180] (1989) 167 CLR 177, 194. Dawson J noted his general agreement with the judgment of Deane J: ibid 198.

[181] Ibid 213.

[182] [2001] ATPR 41-805, 42,752 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

This author endorses the High Court's view of the policy objective of s 46. That view is supported by s 2 of the *Trade Practices Act*, which was amended in 1995 to provide: 'The object of this Act is to enhance the welfare of Australians through the *promotion of competition* and fair trading and provision for consumer protection.'[183]

The Hilmer Committee acknowledged that a refusal to grant access to an essential facility 'could conceivably occur for any of the three proscribed purposes'[184] in s 46, but anticipated considerable difficulty for an applicant in demonstrating that the facility owner had an anti-competitive purpose when it refused access.[185] However, the challenge under s 46 is no greater than that inherent in establishing a party's purpose in any other context. Arguably less so, in fact. While the relevant 'purpose' in s 46 proceedings is the subjective purpose of the respondent corporation,[186] this purpose is determined *objectively*.[187] Accordingly, primary consideration should be given to an analysis of the impugned conduct and the inferences which can be drawn from that conduct.[188] Robertson makes the point neatly:

> The ultimate issue for determination when a court is assessing purpose is: What is the economic actor *really* trying to do in commercial or economic terms? ... In asking this question we are asking for an *explanation* of com-

[183] Emphasis added. The author adopts a macroeconomic perspective in interpreting s 2, equating 'the welfare of Australians' to 'economic growth in Australia'. Competition is the means to this end, as economists widely agree that competition enhances efficiency, efficiency promotes productivity, and productivity drives the rate of economic growth: see, eg, T Makin, 'Prioritising Policies for Prosperity' (1999) 15 *Policy* 19, 20; and D Parham, 'A More Productive Australian Economy' (2000) 7 *Agenda* 3, 13.

[184] *Hilmer Report*, above n 3, 243.

[185] Ibid. The Hilmer Committee supported the purpose test in s 46; its concern was directed to the difficulties of proof the test presented to an access seeker: *Hilmer Report* (above n 3) 70 and 244. Taking issue with this, Hardy has argued that it is 'pointless to question whether the holder of an essential facility has a proscribed purpose under s 46' as, whatever the purpose, the access seeker does not gain access to the essential facility: Hardy, above n 12, 117. Pengilley has similarly described it as a 'barren' inquiry when access claims are being evaluated, contending that the appropriate basis for evaluation involves 'consideration of the circumstances in which ownership rights may be circumscribed in the interests of competition policy': W Pengilley, 'The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?' (1995) 3 *Competition & Consumer Law Journal* 26, 43.

[186] *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* [1991] ATPR 41-069, 52,222.

[187] *General Newspapers Pty Ltd v Telstra Corp* [1993] ATPR 41-274, 41,697.

[188] Pursuant to s 46(7) of the *Trade Practices Act*, the existence of a purpose proscribed by s 46(1) may be inferred from the conduct of the respondent corporation.

> mercial conduct – to make the best sense we can of the conduct – not a psychological analysis of the minds of the economic agents.[189]

Both objective and subjective factors will be important to this inquiry. That is to say, the 'purpose' element of s 46 requires an objective test,[190] to which subjective evidence may be relevant.[191] It must be appreciated, however, that if conduct is not objectively anti-competitive, the fact that it was motivated by hostility to competitors is inconclusive. 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.

Most relevant to countering allegations that its conduct was motivated by one of the proscribed purposes in s 46(1) will be evidence from the respondent corporation of a legitimate business reason that objectively justifies the conduct. This issue is examined in the next part of the article.

Legitimate Business Reasons

Significance

In *Photo-Continental Pty Ltd v Sony (Aust) Pty Ltd*,[192] Kiefel J remarked that a finding of a breach of s 46 should be 'subject to other explanations offered or appearing from the circumstances'.[193] Her Honour's statement highlights the important role of legitimate business reasons in countering an allegation of misuse of market power, a perspective now widely supported in the academic literature on s 46.[194]

[189] D Robertson, 'The Primacy of "Purpose" in Competition Law – Part 1' (2001) 9 *Competition & Consumer Law Journal* 101, 121-122 (emphasis in original).

[190] Prince has similarly stated that the determination of the 'purpose' element of s 46 'should be based largely on an objective test': Prince, above n 148, 250.

[191] Seah agrees that evidence 'of both an objective and subjective nature will ordinarily be considered where available': Seah, above n 71, 248.

[192] [1995] ATPR 41-372.

[193] Ibid 40,123.

[194] See, eg: Welsman, above n 71, 312-313 ('if a legitimate reason substantially explains the conduct, then an entity is not misusing its substantial market power); Prince, above n 148, 243 ('the key factor ... [is] whether the corporation's actions were for a legitimate business purpose'); Shafron, above n 29, 60 ('the focus is ... on the reasons behind the refusal to supply'); C Hodgekiss, 'Section 46 – Some Recent Developments', Paper presented at *Competition Law and Regulation Symposium*, University of New South Wales, Sydney, 24-25 August 2000, 1 ('the answer ... revolves around the reasons for the refusal to supply'); Seah, above n 71, 256-257 ('the existence or otherwise of a legitimate commercial justification for the conduct under scrutiny, is highly probative'); W Pengilley, 'Misuse of Market Power: Australia Post, Melway and Boral (2002) 9 *Competition & Consumer Law Journal* 201, 225 ('the business purpose or reason for which conduct in engaged in is highly relevant'); and W Pengilley, 'The ACCC's submission to the Dawson inquiry urges that we

This view reflects the 'business justification' defence available in the United States and European Union. In those jurisdictions, antitrust law acknowledges that an undertaking which is dominant with regard to the production and supply of certain products or services which are necessary to compete in another market may not, without a legitimate business justification, refuse to supply these products or services and thereby reserve the market for itself.[195]

This defence has also been invoked in that subset of United States' and European refusal to deal cases involving denials of access to essential facilities.[196] In such cases, legitimate business reasons for denying access to the facility have been held to include: that sharing will result in a reduction in the quality of the owner's product; that excess capacity is not available; that the owner will be prevented from serving its own clients adequately; that the proposed use is inconsistent with the safety or technical standards of the facility; that the applicant is not of good standing, or creditworthy, or financially independent; and that the applicant does not possess the technical skills and capacity required for the operation and security of the facility.[197] It is reasonable to expect that such reasons[198] would also be accepted by Australian courts in essential facilities cases brought under s 46.[199]

Two points of possible confusion regarding legitimate business reasons should be clarified immediately. First, is there any difference between a 'legitimate' (or 'rational' or 'proper' or 'valid') business 'reason' or 'explanation' or 'justification' or 'criterion' or 'rationale'? The author submits that whichever combination of terms is preferred, the concept remains the same – and that is, in the context of refusal to supply, that there is some reasonable excuse for the refusal.

should bring our law into line with that of other countries' (2002) 10 *Competition & Consumer Law Journal* 110, 116 ('[t]he business purpose or reason for which conduct is engaged in must be regarded as of crucial importance').

195 See, eg: *United States v Aluminum Co of America* 148 F 2d 416 (1945); and *Commercial Solvents Corp v European Commission* [1974] 1 CMLR 309.

196 See, eg: *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985); and *B&I Line Plc v Sealink Harbours Ltd* [1992] 5 CMLR 255.

197 For further discussion, see: P Ahern, 'Refusals to Deal after Aspen' (1994) 63 *Antitrust Law Journal* 155, 173-182; Kench, above n 6, 142-144; D Glasl, 'Essential Facilities Doctrine in EC Anti-trust Law: A Contribution to the Current Debate' (1994) 15 *European Competition Law Review* 306, 314; and Organisation for Economic Co-operation and Development, 'The Essential Facilities Concept', OCDE/GD(96)113, Roundtables on Competition Policy, Paris, 1996, 34.

198 For reasons explained below, these sort of reasons impact on the 'purpose', rather than the 'take advantage', element of s 46.

199 This represents a small step in Australia, where the relevance of legitimate business reasons is already entrenched in refusal to supply cases.

Second, are legitimate business reasons relevant to the 'purpose' element or to the 'take advantage' element of s 46? It is a matter of record that in the twelve year period between the final decisions in *Queensland Wire* and *Melway*, s 46 judgments treated legitimate business reasons as going to 'purpose' rather than anything else.[200] However, the clear implication of the High Court's ruling in *Melway* is that the notion of legitimate conduct applies to the 'take advantage' element of s 46 just as much as it does to the 'purpose' element of that provision.[201]

In the author's view, neither the 'take advantage' element nor the 'purpose' element has exclusive claim to the ameliorating effect of legitimate business reasons. Thus, depending on the circumstances, a corporation may seek to justify its conduct under either or both elements.[202] *ACCC v Universal Music Australia Pty Ltd*[203] exemplifies this new approach. There, where the allegation against the respondent company was that it had threatened to withdraw supplies from retailers who stocked parallel imports of its products, Universal sought to show that its conduct was guided by the legitimate business justification of preventing 'free-riding'.[204] Hill J indicated his willingness to consider this 'business rationale' in relation to both the 'take advantage' and 'purpose' elements of s 46,[205] but did not proceed to do so on finding that there was no evidence to support the claimed rationale.[206]

200 As Clough has similarly observed, in the post-*Queensland Wire* cases, 'the focus has been on addressing the legitimacy of the conduct under the purpose test': above n 70, 319. The same point is made in Meltz, above n 71, 108.

201 See also Meltz, ibid, 109.

202 Cf Corones' preference for a corporation's business rationale to be considered as part of the 'take advantage' element of s 46: Corones, above n 12, 415. Cf also, Kirby J's remarks in dissent in *Melway* that it is in identifying the 'purpose' of the respondent corporation, 'and not in characterising the acts as "tak[ing] advantage", that the debates about proscribed, or permissible, conduct by a dominant market player arise': [2001] ATPR 41-805, 42,768.

203 [2002] ATPR 41-855.

204 Universal's argument was that in the 'hit-driven' music industry, large amounts of money are spent by record companies on the promotion of titles, only a few of which will actually become 'hits'. Persons importing titles from overseas are more likely to import hit recordings than non-hit recordings, thereby 'free-riding' on the investment of the record companies: ibid 44,685.

205 Ibid.

206 Ibid. On appeal, Hill J's finding that Universal had contravened s 46 was set aside by the Full Federal Court on the basis that the company did not possess a substantial degree of power in the Australian wholesale recorded music market: *Universal Music Australia Pty Ltd v ACCC* [2003] ATPR 41-947, 47,368 (Wilcox, French and Gyles JJ).

However, the author further submits that since the 'take advantage' and 'purpose' elements of s 46 raise different enquiries, legitimate business reasons proffered in connection with the 'take advantage' element should be based on 'efficiency' arguments, while a broader range of justifications (somewhat difficult to classify, but most conveniently described as 'quality control/consumer welfare' and/or 'reputation/bottom-line' considerations)[207] are potentially relevant to the 'purpose' element. On this basis, the business justification put forward in the *Universal Music* case at first instance,[208] for example, should have been considered only in connection with the 'purpose' element of s 46.

Legitimate Business Purpose, not an Anti-competitive Purpose

Justifying a Refusal to Deal

As mentioned previously, it is in seeking to refute the finding of an anti-competitive purpose under s 46 that a corporation typically offers a legitimate business explanation for its conduct.[209] Thus, 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.'[210] No doubt their Honours were cognisant of the wide range of legitimate purposes that may motivate a refusal to deal.[211] Past unsatisfactory dealings with a customer, a customer's poor credit record, a lack of confidence in a customer's business ethics, a customer's inability to maintain accurate records or propensity to engage in deceptive advertising or unfair practices, concerns about the quality of a customer's after-

[207] Cf Ahern, above n 196, 173-182.

[208] Free-riding represents a loss on investment made, and reduces the incentive for further investment, with negative implications for a firm's 'bottom-line'.

[209] The objective will be achieved if the legitimate business reason *substantially* explains the respondent corporation's ostensibly anti-competitive conduct. As mentioned previously, pursuant to s 4F *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.

[210] (1989) 167 CLR 177, 193 (emphasis added).

[211] See, generally: S Corones, 'The Proposed Amendments to Section 46 of the Trade Practices Act: Some Problems of Interpretation and Application' (1985) 13 *Australian Business Law Review* 138, 149; MacDonald, above n 66, 133; M Williams, 'Section 46 of the Trade Practices Act: Misuse of Market Power – A Modern Day Catch 22?' (1992) 22 *Queensland Law Society Journal* 377, 384; McMahon, above n 23, 11-12; Welsman, above n 71, 303; Abadee, above n 13, 35; and Meltz, above n 71, 104-108.

sales service or other matters affecting the commercial reputation of the supplier, are all factors which may impact upon the decision.[212]

In *Australasian Performing Rights Association v Ceridale Pty Ltd*,[213] 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.[214] In a similar vein, a supplier's genuine interest in maintaining and enhancing the prestige of its products was identified in *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd*[215] as a potentially legitimate business reason justifying a refusal to deal.[216]

In *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd*,[217] it was held that the respondent's termination of 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'.[218] 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.[219] Unsatisfactory performance by the applicant was specifically recognised in *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd*,[220] *J Ah Toy Pty Ltd v Thiess Toyota Pty Ltd* [221] and *Regents Pty Ltd v Subaru (Aust) Pty Ltd*[222] as providing sufficient justification for the respondent's termination of its dealership agreement with the applicant.[223] Similarly, in *Petty v Penfold Wines Pty Ltd*,[224] it was accepted that the respondent's refusal to supply was reasonably based on

[212] Ibid. All these factors fall into the 'quality control/consumer welfare' and/or 'reputation/bottom-line' categories identified previously.

[213] [1990] ATPR 41-042.

[214] Ibid 52,129.

[215] [1987] ATPR 40-809, 48,800. Although, in this case, the respondent's contention that it was refusing supply because the applicant's conduct could bring the product into market disrepute was rejected on the facts.

[216] See, also, *Berlaz Pty Ltd v Fine Leather Care Products Ltd* [1991] ATPR 41-118.

[217] [1994] ATPR 41-318.

[218] Ibid 42,236 (Hill J).

[219] Hodgekiss has said of this case that it 'illustrates that so much depends upon whether the court is satisfied with the explanation as to the purposes of the respondent engaging in the particular conduct': Hodgekiss, above n 194, 27.

[220] [1975] ATPR 40-004.

[221] [1980] ATPR 40-155.

[222] [1996] ATPR 41-463.

[223] Unsatisfactory performance was also the legitimate business reason relied on in *Venning v Suburban Taxi Services Pty Ltd* [1996] ATPR 41-468.

[224] [1993] ATPR 41-263.

the applicant's poor payment history and was not motivated by the applicant's practice of excessive price discounting.[225]

More recently, in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*,[226] BPA's proposal to grant an exclusive licence for towing services in the Port of Bunbury for five years was held by French J to be an exercise of regulatory power and not market power.[227] Nevertheless, had it been necessary to consider s 46 further, his Honour would have decided that BPA was not acting within one of the proscribed purposes in s 46(1), but was endeavouring to encourage a range of competitive responses from tenderers who would otherwise be reluctant to enter the market.[228]

Similar reasoning is evident in *ACCC v Australian Safeway Stores Pty Ltd*,[229] where the ACCC alleged that Safeway had misused its market power in nine separate incidents by 'deleting' the products of wholesale bakers who had supplied bread to independent retailers at prices that enabled those retailers to undercut Safeway's prices. In dismissing each of the s 46 claims at first instance, Goldberg J agreed with the respondent that the purpose of its 'bread policy' was to ensure that it remained competitive on the price of bread, rather than to punish bakers and prevent or deter competition.[230] In reaching this conclusion, his Honour relied heavily on evidence that Safeway usually sought, before any deletion of products, a 'case deal' from the wholesale baker allowing it to sell bread at prices that competed with those of the independent retailers.[231] The ACCC's appeal from Goldberg J's decision was partly allowed by a majority of the Full Federal Court. Heerey and Sackville JJ held that in four of the nine incidents, where the respondent had not sought a 'case deal' from the wholesaler concerned, Safeway had contravened s 46.[232]

225 Ibid 41,553. Confirmed by the Full Federal Court on appeal: *Petty v Penfold Wines Pty Ltd* [1994] ATPR 41-320. See, also, *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* [1992] ATPR 41-196, where the respondent's legitimate business justification for refusing supply was to secure payment of a debt.

226 [2000] ATPR 41-752.

227 Ibid 40,734.

228 Ibid. Confirmed by the Full Federal Court on appeal: *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783.

229 [2003] ATPR 41-935.

230 *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2002] ATPR (Digest) 46-215, 53,363.

231 Ibid 53,346-53,347. Goldberg J's decision is discussed at length in J Carmichael, 'Tip Top Result Goes Stale: ACCC v Australian Safeway Stores Pty Ltd (No 2)' (2002) 7 *Deakin Law Review* 387.

232 [2003] ATPR 41-935, 47,034-47,035. In dissent, Emmett J maintained that Safeway lacked a substantial degree of power in the relevant market, rendering any breach of s 46 impossible: ibid 47,064.

Some commentators claim that it cannot be said that the mere existence of an explanation consistent with a legitimate commercial purpose establishes that the conduct was actually engaged in for that purpose.[233] The response to this is simply to issue a reminder that the 'purpose' element of s 46 requires an *objective* test.[234] If business reasons are advanced by the respondent corporation to explain the motivation for its conduct, the court must determine, objectively, whether such reasons are valid, or 'legitimate', in the circumstances of the case.[235] However, even if the reasons are accepted as valid,[236] it will always be impossible to know whether the corporation has succeeded in masking a hidden or secret anti-competitive purpose. On the other hand, an objective test means that proffered business reasons will not be upheld merely because the corporation's conduct was motivated, subjectively, by such reasons.

Monopoly Pricing

Returning to the facts of *Queensland Wire*, McMahon has raised the interesting argument, especially relevant in the essential facility context, 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.[237] However, a letter from BHP, quoted in the joint judgment of Mason CJ and Wilson J,[238] 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',[239] 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. In

233 See, eg: Seah, above n 71, 257; and T Gilbertson, 'New Zealand's Commerce Act Reforms: An Australian and International Perspective' (2002) 10 *Trade Practices Law Journal* 150, 156, where it is contended that 'anti-competitive purpose can easily be concealed by a strategically created trail of documents designed to show legitimate business reasons for conduct actually engaged in for an anti-competitive purpose.'

234 Refer to Robertson's comments on establishing 'purpose': see text accompanying n 189 above.

235 Whether, in the particular circumstances, the conduct is a 'normal' response, or consistent with industry practice, would be a relevant consideration: see, further, Corones (above n 12) 417.

236 Such as those explained in the text accompanying ns 197 and 212 above.

237 McMahon, above n 23, 18.

238 (1989) 167 CLR 177, 184-185.

239 Ibid.

short, this was not a situation in which BHP was prepared to supply, even at a monopoly price. Rather, BHP did not wish to supply at all.[240]

No issue is taken with McMahon's point regarding the defensibility of monopoly pricing under s 46.[241] Indeed, in *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*,[242] the Full Federal Court plainly stated:

> ... s 46 does not strike at 'monopolists' or those in a 'monopolistic position'. Nor does it look to the attainment of a commercially 'reasonable' result. It asks whether a corporation has a substantial degree of power in a market and then proscribes the taking advantage of that power for certain purposes. Therefore, there is no contravention of that provision by a corporation with a substantial degree of power in a market which uses that power to attain a particular price, provided that in doing so the corporation has not taken advantage of that power for a proscribed purpose.[243]

It follows that a corporation with a substantial degree of market power may charge what might be described as 'monopoly prices' (that is, prices above the level that would be charged in a competitive market), unless it puts itself in breach of s 46 by taking advantage of that power for a proscribed purpose.[244]

Does this analysis alter when an essential facility is involved? In other words, if access is sought to an essential facility, does s 46 require the facility owner to cease charging monopoly prices? As O'Bryan has explained, the answer to this question depends on the answer to a further question: presuming that an 'excessive' price[245] manifests at least one of the proscribed anti-competitive purposes in s 46(1),[246] at what price does

[240] As McMahon 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': above n 23, 21.

[241] Cf G Hay, 'Reflections on Clear' (1996) 3 *Competition & Consumer Law Journal* 231, 235, where it is argued that if monopoly profits 'are immune from scrutiny ... consumers will not have been well served'.

[242] [1991] ATPR 41-109.

[243] Ibid 52,666 (Lockhart, Gummow and von Doussa JJ). Bednall has similarly remarked that 's 46 does not prohibit monopolies, it does not take away the fruits of success that accrue to the "winning" competitor': T Bednall, 'Catch 46: Recent Developments in the Law of Exercise of Market Power', Paper presented at *Trade Practices Workshop*, Business Law Section of the Law Council of Australia, Melbourne, 7-9 August 1998, 7.

[244] See, also: Welsman, above n 71, 288; and O'Bryan, above n 12, 90.

[245] See n 65 above.

[246] Smith has criticised the 'inability of s 46 to deal directly with monopoly pricing that is not for a proscribed purpose': Smith, above n 79, 23. However, O'Bryan's analysis overcomes this perceived limitation by assuming that at some (extremely high) price, a

the facility owner *cease* to have such a purpose?[247] At that price, the facility owner may still be taking advantage of its market power; but is no longer contravening s 46. The answer to the latter question has to be the price at which the competitor in the dependent market is able to compete effectively.[248] That price may or may not be a monopoly price, thereby providing the answer to the former question. Ahdar helps to put the matter in perspective with this comment:

> The real question is not the issue of monopoly rents at all but whether the charge ... (which contains an unqualified monopoly rent component) is sufficiently high to substantially restrict or deter competition.[249]

Legitimate Business Conduct, not Taking Advantage of Market Power

Current willingness to consider legitimate business reasons in connection with the 'take advantage' element of s 46, in addition to the 'purpose' element, owes much to Heerey J's dissenting judgment in *Melway* in the Full Federal Court.[250] There, his Honour said:

> ... the existence of a *legitimate business reason* which would explain the impugned conduct irrespective of the degree of market power necessarily points against a conclusion that such conduct in fact involved taking advantage of that power.[251]

In the course of his judgment, Heerey J closely examined Melway's business rationale for adopting its segmented distribution system, concluding that the system constituted 'a reasonable commercial regulation ... in order to maximise sales of its directories'.[252]

purpose of eliminating competition will be discerned. This is consistent with McMahon's reasoning, cited previously: see n 240 above.

247 O'Bryan, above n 12, 91.

248 Ibid.

249 R Ahdar, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23 *Australian Business Law Review* 77, 104.

250 [1999] ATPR 41-693.

251 Ibid 42,863 (emphasis added). Heerey J also quoted from the judgment of the Court of Appeals (Sixth Circuit) in *Byars v Bluff City News* 609 F 2d 843 (1979), 862 as follows, 'A finding of antitrust liability in a case of a refusal to deal should not be made without examining reasons which justify the refusal to deal': ibid.

252 [1999] ATPR 41-693, 42,863. Commenting on the Full Federal Court's decision in *Melway*, Robertson said that, in contrast to Heerey J, the majority judges (Sundberg and Finkelstein JJ) failed to appreciate 'the economic and commercial reasons for efficient distribution networks': Robertson, above n 189, 126. For further criticism of *Melway* in the lower courts, see W Pengilley, 'Can an Entity with Substantial Market Power Change its Distributor?' (1999) 14 *Australian & New Zealand Trade Practices Law Bulletin* 139.

In the High Court, the majority justices did not expressly embrace a business rationale approach. Nevertheless, their Honours plainly accepted that, while Melway could have supplied retailers directly or relied on a single wholesale distributor to do so,[253] the appointment of exclusive distributors in respect of particular segments of the market for Melbourne street directories enabled Melway to maximise sales of its street directories.[254]

Given this 'rational business explanation' for Melway's wholesale distribution system, it was logical for the High Court majority to infer that the company would have adopted the same system in a competitive market as well.[255] In other words, since Melway's adoption of the distribution system did not depend on its dominant position, it could not be said that the company had taken advantage of its market power. The clear implication of the High Court's reasoning in *Melway* is that in assessing whether a corporation's conduct amounts to a taking advantage of its market power, it is helpful to consider whether a legitimate business rationale objectively justifies the conduct.[256]

As with the 'purpose' element of s 46, the relevant test here is again an objective one, but pertaining this time to *efficiency* considerations.[257] Thus, even if the corporation genuinely believes in its reason, the court must assess whether, objectively, that reason represents a valid efficiency (that is, cost-minimising/profit-maximising)[258] argument, on the basis of economic theory and/or 'best' business practice.[259] If the efficiency ex-

253 [2001] ATPR 41-805, 42,752.

254 Ibid 42,753.

255 Ibid 42,761. As O'Bryan points out, once the High Court accepted that Melway's distribution system maximised its sales, it was 'relatively straightforward to reach the conclusion that the corporation would be likely to engage in the same conduct in a competitive market': O'Bryan, above n 120, 229.

256 See also Corones, above n 12, 417.

257 In his dissenting judgment in *Melway* in the Full Federal Court, Heerey J reasoned that 'the concept of taking advantage of market power has to be seen in terms of *efficiency*. If the conduct complained of would have been engaged in irrespective of degree of market power but rather to conduct the corporation's business more *efficiently*, there will be no taking advantage of market power': [1999] ATPR 41-693, 42,862 (emphasis added). His Honour credits F Hanks and P Williams, 'Implications of the Decision of the High Court in Queensland Wire' (1990) 17 *Melbourne University Law Review* 437, 445 with the genesis of this view. The paramountcy of efficiency arguments in assessing the 'take advantage' element of s 46 was also recognised, pre-*Melway*, in O'Bryan, above n 71, 84.

258 In the language of economics, this is productive efficiency.

259 See Corones, above n 12, 419. According to Corones, the question to ask is, 'Would a rational actor acting under competitive conditions engage in the same conduct?': ibid.

planation is found to be valid,[260] then it is reasonable for the court to infer that the corporation would have engaged in the same conduct without market power, and, therefore, that the corporation has not taken advantage of its market power.[261] Obviously, the converse applies as well.

The decision in *General Newspapers Pty Ltd v Telstra Corp*[262] provides an early example of this line of reasoning. The appellant in that case operated a printing business and approached the respondent to express interest in printing the respondent's telephone directories. After telling the appellant it had been placed on a tender list, but never calling for tenders, the respondent awarded contracts for the printing of its White and Yellow Pages to its two existing printers. These contracts included clauses requiring that the relevant printing equipment not be used for other work, except in limited circumstances and with the respondent's approval. In dismissing the appellant's allegation that the terms of the contracts disclosed a misuse by the respondent of its market power, the Full Federal Court held that the 'dedication clauses' were justified by reference to a legitimate commercial explanation.[263] Specifically, Davies and Einfeld JJ accepted the respondent's evidence that 'dedicated' printing equipment was necessary for the efficient printing of the telephone directories given time, scale and configuration considerations.[264]

In *ACCC v Boral Ltd*,[265] Heerey J, as the trial judge, followed the approach he had advocated in *Melway* in the Full Federal Court. This time the allegation was that Boral Besser Masonry Ltd (BBM) had misused its market power by engaging in predatory pricing.[266] Once again, Heerey J

[260] Eg, Edwards applies a transaction cost economics framework to the High Court's decision in *Melway* [2001] ATPR 41-805 and concludes that 'efficiency arguments ... support Melway's desire to maintain its exclusive distribution system': G Edwards, 'Melway – a TCE Perspective' (2002) 10 *Trade Practices Law Journal* 77, 84. Edwards explains that in order 'to encourage distributors to specialise and devote optimal effort to distributing the manufacturer's product, it may be of benefit for the manufacturer to provide distributors with some protection from erosion of their geographic or customer segments by the activities of other distributors': ibid 83. For similar 'economic' analysis of the *Melway* case, see: D Clough, 'Law and Economics of Vertical Restraints in Australia' (2001) 25 *Melbourne University Law Review* 20; and S Corones, 'Non-price Vertical Restraints after Melway' (2001) 75 *Australian Law Journal* 437.

[261] Refer to O'Bryan's comments: see n 255 above.

[262] [1993] ATPR 41-274.

[263] Ibid 41,701.

[264] Ibid 41,700.

[265] [1999] ATPR 41-715.

[266] The ACCC instituted proceedings against BBM and its holding company, Boral Ltd. However, the trial judgment focuses on BBM, and the subsequent appeals were pressed only in relation to that company.

closely examined the corporation's business reasons for its conduct as part of the 'take advantage' element of s 46. His Honour said:

> If the impugned conduct has a business rationale, that is a factor pointing against any finding that the conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power.[267]

Heerey J concluded that the threshold requirement for the application of s 46 was not satisfied in this case, as BBM did not have a substantial degree of market power in Melbourne's concrete masonry products market.[268] However, even if BBM had possessed market power, his Honour would have found that the respondent had not taken advantage of that power because, in the circumstances of the case, its conduct in pricing below variable cost represented a 'rational' business decision.[269]

The Full Federal Court disagreed with Heerey J on both issues,[270] but on further appeal, the High Court effectively reinstated the decision of the trial judge. Six of the seven members of the High Court upheld Heerey J's conclusion that BBM lacked market power,[271] thereby disposing of the possibility of any s 46 contravention on the company's part. Nevertheless, hypothesising that BBM had possessed market power, these justices also expressed agreement with Heerey J as to the importance of a legitimate business rationale in deciding whether the company had taken advantage of such power. Gleeson CJ and Callinan J observed that the reasoning of Heerey J on the question of taking advantage of market power was correct,[272] quoting his Honour's opinion at first instance that BBM's conduct was based on 'sound business reasons';[273] Gaudron, Gummow and Hayne JJ cited with approval the passage quoted above

[267] Ibid 43,231.

[268] Ibid.

[269] Ibid 43,234. Even though, in his Honour's view, BBM did have the proscribed purpose of driving at least one competitor out of the market: ibid 43,236. Corones has criticised Heerey J for not attempting to 'weigh or rationalise the interplay between legitimate business reason and the proscribed purpose': Corones, above n 12, 412. However, as mentioned previously, and reiterated now in Heerey J's defence, the elements of s 46 require sequential analysis. Thus, having found that the 'take advantage' element was not satisfied, there strictly was no need for his Honour to consider the 'purpose' element at all.

[270] See *ACCC v Boral Ltd* [2001] ATPR 41-803.

[271] See n 89 above.

[272] *Boral Besser Masonry Ltd v ACCC* [2003] ATPR 41-915, 46,687.

[273] Ibid 46,678.

from Heerey J's judgment at trial;[274] and McHugh J accepted that the 'commercial reasons'[275] for BBM's conduct would have been a relevant factor in determining whether the company had taken advantage of market power.[276] In this way, the High Court has confirmed the relevance of legitimate business reasons in mitigating against a finding that a corporation's conduct constitutes a taking advantage of its market power.[277]

Conclusion

The concept 'misuse of market power' represents the combined effect, legally and economically, of the elements of s 46.[278] Under the statute, the respondent corporation must first possess market power; second, because of this market power, it must act in a way in which it would not be likely to act under competitive conditions; and, third, its conduct must be directed towards achieving one of the proscribed anti-competitive purposes. Impinging on the second and third elements is the additional factor, distilled from s 46 jurisprudence, that the corporation's conduct is not excused by legitimate business reasons. In all cases where a contravention of s 46 is alleged, including those involving a denial of access to an essential facility, each of these requirements must be satisfied.

In light of the discussion in this article, there can be little doubt that a breach of s 46 'will *always* be difficult to prove'[279] – except perhaps in the most obvious of cases.[280] Certainly, the years since the High Court's decision in *Queensland Wire* have seen a marked lack of successful s 46 actions. In refusal to supply cases, this repeatedly has been due to respondent corporations advancing various legitimate business reasons in justification of their conduct.[281] In essential facilities cases, the business

[274] Ibid 46,691.

[275] Ibid 46,717.

[276] Ibid.

[277] While simultaneously accepting that such reasons extend beyond the domain of refusal to supply cases.

[278] See McMahon, above n 23, 28.

[279] Alexiadis, above n 176, 467 (emphasis in original). Moreover, where the respondent corporation is a statutory authority, as in *NT Power Generation v Power & Water Authority* [2003] ATPR 41-909, it may not be possible to bring the corporation's conduct within the ambit of the *Trade Practices Act* at all.

[280] Or where the respondent corporation admits its misuse of market power: see, eg, *TPC v CSR Ltd* [1991] ATPR 41-076.

[281] Indeed, Lee 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': S Lee, 'Queensland Wire Industries: A Breath of Fresh Air' (1990) 18 *Federal Law Review* 212, 227.

reason that a facility owner puts forward is also likely to be determinative of the issue. As Corones anticipated, '[T]he 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.'[282]

The difficulties of establishing a contravention of s 46 were well-understood by the Hilmer Committee and informed its recommendation that a dedicated access regime be introduced to deal with essential facilities cases.[283] In the majority of situations where access is sought by a third party to the services of essential infrastructure, reliance is now placed on the provisions of Part IIIA of the *Trade Practices Act*. However, 'residual' access disputes, falling outside the ambit of the regime enacted by Part IIIA, remain justiciable under s 46. The present terms of that provision appear embedded in Australian competition law, at least for the foreseeable future.[284] Thus, the question whether a denial of access constitutes a misuse of market power will continue to be determined in accordance with the current principles, as set out in this article, governing the interpretation and application of s 46 in refusal to supply cases.

[282] Corones, above n 68, 29.

[283] *Hilmer Report*, above n 3, 266-268.

[284] See n 14 above.