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# "Why Can't a Woman Be More Like a Man?" American and Australian Approaches to Exclusionary Conduct

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# ‘WHY CAN’T A WOMAN BE MORE LIKE A MAN?’\* — AMERICAN AND AUSTRALIAN APPROACHES TO EXCLUSIONARY CONDUCT

GEORGE A HAY† AND RHONDA L SMITH‡

*[Much of antitrust law (in the United States) or trade practices law (in Australia) is about ‘exclusionary conduct’: things that large firms do to acquire an even larger share of the market or preserve their large market share from being eroded by smaller rivals or new entrants. The object of antitrust or trade practices law is to separate the kind of exclusionary conduct that is applauded and approved from that which is condemned and penalised. The main purpose of this article is to discuss, in broad terms, how § 2 of the Sherman Act deals with exclusionary conduct and to compare that with the approach taken by s 46 of the Trade Practices Act 1974 (Cth). This article will explore whether there are deficiencies in the Trade Practices Act 1974 (Cth) s 46 approach that can (and should) be ‘cured’ by making it resemble § 2 of the Sherman Act more closely.]*

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## I INTRODUCTION

Much of antitrust law (in the United States) or trade practices law (in Australia) is about ‘exclusionary conduct’: things that large firms do to acquire an even

\* Song title from *My Fair Lady* (Directed by George Cukor, Warner Bros-First National Pictures, 1964).

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larger share of the market or preserve their large market share from being eroded by smaller rivals or new entrants. Of course, not everything that bigger firms do to disadvantage smaller rivals is unlawful. Indeed, at the heart of a competitive economy is the notion that firms should compete aggressively to win the hearts and minds (and pocketbooks) of consumers (thereby 'excluding' others) and, when they succeed, they are entitled to the profits that come with that success. So the object of antitrust or trade practices law is to separate the kind of exclusionary conduct that is applauded and approved from that which is condemned and penalised.

In the US, the main vehicle for policing inappropriate exclusionary conduct by large firms against smaller competitors is § 2 of the *Sherman Act*,<sup>1</sup> which prohibits monopolisation or attempted monopolisation, although § 1 (dealing with agreements in restraint of trade) occasionally plays a role as well. In Australia, the main vehicle is s 46 of the *Trade Practices Act 1974* (Cth) ('*TPA*') which, generally speaking, prohibits the misuse of market power, although ss 45 (dealing with agreements and understandings) and 47 (dealing with certain kinds of exclusive arrangements for distribution or sale) of the *TPA* are occasionally used for this purpose.

The main purpose of this article is to discuss, in broad terms, how § 2 of the *Sherman Act* deals with exclusionary conduct and to compare that with the approach taken by s 46 of the *TPA*. Those who are dissatisfied with the outcome of certain individual cases in Australia, or those interested in reform generally, are occasionally heard to muse about whether s 46 of the *TPA* should be 'fixed' in some way. One possible way that is sometimes discussed is to make it resemble § 2 of the *Sherman Act* more closely. One of the issues that this article will explore is whether there are deficiencies in the *TPA* s 46 approach that can (and should) be 'cured' by making it resemble § 2 of the *Sherman Act* more closely.

Unfortunately for a neat comparative analysis, the law with respect to § 2 of the *Sherman Act* is a rapidly moving target. In the past several years, there have been a number of significant decisions on § 2 of the *Sherman Act* that have altered the landscape substantially.<sup>2</sup> Further, the *TPA* s 46 approach to some problems may change as a result of the so-called 'Birdsville Amendment' and other amendments introduced by the *Trade Practices Amendment Act [No 1] 2007* (Cth).<sup>3</sup> Therefore, to set up the comparison of § 2 of the *Sherman Act* and

<sup>1</sup> *Sherman Act*, c 647, 26 Stat 209 (1890). For the current version: see 15 USC §§ 1–7 (2000 & Supp IV, 2004).

<sup>2</sup> See, eg, *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004) ('*Trinko*'); *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co, Inc*, 127 S Ct 1069 (2007); *United States v Microsoft Corporation*, 253 F 3d 34, 70 (Edwards CJ, Williams, Ginsburg, Sentelle, Randolph, Rogers and Tatel JJ) (DC Cir, 2001) ('*Microsoft*'); *LePage's Inc v 3M (Minnesota Mining & Manufacturing Co)*, 324 F 3d 141 (3<sup>rd</sup> Cir, 2003); *United States v AMR Corporation*, 335 F 3d 1109 (10<sup>th</sup> Cir, 2003); *United States v Dentsply International, Inc*, 399 F 3d 181 (3<sup>rd</sup> Cir, 2005).

<sup>3</sup> See below Part IV(B). The Birdsville Amendment to s 46 of the *TPA* — purportedly formulated by Senator Barnaby Joyce at a pub in Birdsville — is a new provision dealing with predatory pricing: see *TPA* ss 46(1AA)–(1AB). The *Trade Practices Amendment Act [No 1] 2007* (Cth) sch 2 pt 1 also introduced a number of important amendments relevant to the meaning and assessment of market power: see *TPA* ss 46(3A)–(3D), (4A).

s 46 of the *TPA*, this article must first describe recent trends in § 2 monopolisation law. Indeed, to some extent, the main point of this article is that the US law dealing with exclusionary conduct has gone through something of a ‘quiet revolution’ in recent years, with further changes yet to come.<sup>4</sup> Those contemplating the importation of the US approach into the Australian legal landscape should be sure of what they are getting.

## II PRELIMINARY CONSIDERATION: THE DEFINITION OF MONOPOLY POWER

Except possibly in cases where the only claim is an attempt to monopolise,<sup>5</sup> the threshold issue in a *Sherman Act* § 2 case is whether the defendant has monopoly power. While, literally, monopoly means ‘single seller’, it is a rare case where there is only one firm in the market. So we need a working definition of monopoly and monopoly power that allows for the possibility of some degree of competition. The most often quoted definition is from *United States v EI du Pont de Nemours & Co* (‘*Cellophane Case*’),<sup>6</sup> where the US Supreme Court defined monopoly power as ‘the power to control prices or exclude competition.’<sup>7</sup> This phrase, particularly because of the disjunctive ‘or’, suggests that there are two possible tests for monopoly power, and that a firm will be found to have monopoly power if either is satisfied. However, as has been stated elsewhere,<sup>8</sup> for an economist, the power to control prices in any meaningful way depends on the absence of competition. Therefore, the ‘power to exclude competition’<sup>9</sup> is what permits ‘the power to control prices’.<sup>10</sup> They are simply two sides of the same coin.<sup>11</sup>

While plaintiff lawyers will prefer the ‘power to exclude’ language,<sup>12</sup> the standard definition of monopoly power today ‘is the ability [of a firm] profitably to maintain prices above [the] competitive levels for a significant period of time’, as derived from the US Department of Justice and the Federal Trade Commission’s *Horizontal Merger Guidelines* (‘*Merger Guidelines*’).<sup>13</sup> While the *Merger Guidelines* actually refer to market power,<sup>14</sup> economists acknowledge that, as a matter of economic theory, there is no real distinction between market

<sup>4</sup> See generally George A Hay, ‘The Quiet Revolution in US Antitrust Law’ (2007) 26 *University of Queensland Law Journal* 27.

<sup>5</sup> See below n 91 and accompanying text.

<sup>6</sup> 351 US 377 (1956).

<sup>7</sup> *Ibid* 391 (Reed J for the Court) (citations omitted).

<sup>8</sup> George A Hay, ‘Market Power in Antitrust’ (1992) 60 *Antitrust Law Journal* 807, 820.

<sup>9</sup> *Cellophane Case*, 351 US 377, 403 (Reed J for the Court) (1956).

<sup>10</sup> *Ibid* 391 (Reed J for the Court) (1956).

<sup>11</sup> In fact, just a few sentences after the oft-quoted phrase, the US Supreme Court makes this clear when it says that ‘[p]rice and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa’: *Cellophane Case*, 351 US 377, 392 (Reed J for the Court) (1956).

<sup>12</sup> *Ibid* 403 (Reed J for the Court) (1956).

<sup>13</sup> Department of Justice and Federal Trade Commission, United States, *Horizontal Merger Guidelines* (1997) 2 (citations omitted).

<sup>14</sup> *Ibid*.

power and monopoly power.<sup>15</sup> Where the law requires such a distinction, the standard response is that monopoly power is simply ‘a high degree of market power.’<sup>16</sup> In practice, courts are routinely willing to infer market power from a significant market share<sup>17</sup> and monopoly power from an even higher market share.<sup>18</sup> In any event, the important point is that the ability to exclude one or more individual competitors will not normally be seen as sufficient to establish monopoly power.

It should also be noted at this point that the possession of monopoly power in and of itself does not constitute a violation of § 2 of the *Sherman Act* — monopoly is not a status offence.<sup>19</sup> Moreover, while monopoly power is the ability to profitably charge prices above the competitive level,<sup>20</sup> it is also now clear that charging monopoly prices does not convert the possession of monopoly power into a violation. While the policy reasons for this basic principle were set out as early as 1945 in the landmark case of *United States v Aluminum Co of America* (‘*Alcoa*’),<sup>21</sup> the clearest statement of the principle is to be found in the recent case of *Trinko*, which is discussed below.<sup>22</sup>

<sup>15</sup> See, eg, Hay, ‘Market Power in Antitrust’, above n 8, 817–19; Thomas G Krattenmaker, Robert H Lande and Steven C Salop, ‘Monopoly Power and Market Power in Antitrust Law’ (1987) 76 *Georgetown Law Journal* 241, 246–7. For a slightly different approach: see Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (4<sup>th</sup> ed, 2005) 93.

<sup>16</sup> William M Landes and Richard A Posner, ‘Market Power in Antitrust Cases’ (1981) 94 *Harvard Law Review* 937, 937. In tying cases, vertical non-price restraint cases and certain boycott cases brought under § 1 of the *Sherman Act*, courts have indicated that a finding of market power may be an essential first step in finding a violation: see, eg, *Jefferson Parish Hospital District No 2 v Hyde*, 466 US 2 (1984) (tying case); *Morrison v Murray Biscuit Co*, 797 F 2d 1430 (7<sup>th</sup> Cir, 1986) (vertical non-price restraint case); *Northwest Wholesale Stationers, Inc v Pacific Stationary & Printing Co*, 472 US 284 (1985) (boycott case); see also Hay, ‘Market Power in Antitrust’, above n 8, 807–8.

<sup>17</sup> Thirty per cent is often cited although this is merely an arbitrary court-determined threshold: see, eg, Section of Antitrust Law, American Bar Association, *Intellectual Property and Antitrust Handbook* (2007) 190; *Brokerage Concepts, Inc v US Healthcare, Inc*, 140 F 3d 494, 517 (Becker CJ for Becker CJ, Mansmann and Rosenn JJ) (3<sup>rd</sup> Cir, 1998) (‘since *Jefferson Parish* no court has inferred substantial market power from a market share below 30 percent’). For an economist, market power is a question of degree and ceteris paribus, the higher the market share, the greater the degree of market power.

<sup>18</sup> The minimum market share needed to create a presumption of monopoly power is an arbitrary court-imposed threshold: see generally Hay, ‘Market Power in Antitrust’, above n 8, 825–7. Most courts that have mentioned a specific market share have used a figure in the 50–70 per cent range: see *Image Technical Services, Inc v Eastman Kodak Co*, 125 F 3d 1195, 1206 (Beezer CJ for Beezer CJ and Thompson J) (9<sup>th</sup> Cir, 1997) (65 per cent); *Domed Stadium Hotel, Inc v Holiday Inns, Inc*, 732 F 2d 480, 489 (Jolly J for Politz, Randall and Jolly JJ) (5<sup>th</sup> Cir, 1984) (50 per cent); *Exxon Corporation v Berwick Bay Real Estate Partners*, 748 F 2d 937, 940 (Williams, Jolly and Hill JJ) (5<sup>th</sup> Cir, 1984) (70 per cent). Others have indicated even higher shares: see *Colorado Interstate Gas Co v Natural Gas Pipeline Co of America*, 885 F 2d 683, 694 fn 18 (Moore J for Moore, Anderson and Baldock JJ) (10<sup>th</sup> Cir, 1989) (70–80 per cent). Of course, other factors, especially high barriers to entry, must also be present: see George A Hay, ‘*Boral* — Free at Last’ (2003) 10 *Competition & Consumer Law Journal* 323, 329.

<sup>19</sup> *Trinko*, 540 US 398, 407 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ) (2004), citing *United States v Grinnell Corporation*, 384 US 563, 570–1 (Douglas J for the Court) (1966).

<sup>20</sup> See above n 13 and accompanying text.

<sup>21</sup> 148 F 2d 416, 429–30 (Learned Hand J) (2<sup>nd</sup> Cir, 1945).

<sup>22</sup> 540 US 398, 407 (Scalia J) (2004). For a discussion of the case: see below Part III(B).

### III TAXONOMY OF EXCLUSIONARY CONDUCT

It is frequently said that the US antitrust laws are intended to preserve ‘*competition*, not *competitors*’.<sup>23</sup> As consumers, we like it when firms, even already large firms, strive for our spending dollar by charging lower prices and/or building a better product, even if that has the consequence of taking business away from smaller rivals. Hence, the antitrust laws try to prevent only certain ways of ‘excluding’ rivals, and the 100-plus year struggle under § 2 of the *Sherman Act* has been to sort out the prohibited from the permitted ways.<sup>24</sup> While attempts to categorise conduct inevitably risk oversimplification, categorisation also has some benefits. In that spirit, the four principal ways of excluding rivals that the antitrust laws seek to scrutinise carefully can be described as the following:

- 1 predatory pricing and predatory buying;
- 2 refusal to sell to or cooperate with rivals;
- 3 exclusive dealing contracts and comparable arrangements; and
- 4 a catch-all category we label ‘dirty tricks’.

The purpose of this Part of the article is to describe each category and detail, where relevant, how the law dealing with it has evolved in recent years.

#### *A Predatory Pricing and Predatory Buying*

As mentioned earlier, one way that a large firm can seek to gain market share at the expense of smaller rivals is to sell its products at a very low price. While it would appear that this should be good for consumers, antitrust has always wrestled with the question of whether there can be too much of a good thing. If the (temporary) low prices result in the elimination of all the remaining competitors, the large firm may be in a position to charge supra-competitive prices for a sustained period. Of course, the mere fact that one or more individual competitors cannot survive at such low prices and wind up dropping by the wayside, should not, in isolation, be enough to give pause. However, one can certainly imagine the structure of the market changing so dramatically in response to a period of intense price-cutting that, when the dust has settled, consumers overall are worse off.<sup>25</sup> In such a situation — in an ideal world — one would want to be

<sup>23</sup> *Brown Shoe Co v United States*, 370 US 294, 320 (Warren CJ for the Court) (1962) (emphasis in original).

<sup>24</sup> Occasionally it is said that the antitrust laws should prohibit only those tactics that would exclude an ‘equally efficient’ competitor. For example, in discussing how courts should treat bundled discounts, the recent report of the Antitrust Modernization Commission argued for standards that would find a defendant engaging in bundled discounting liable only if that discounting would exclude an equally efficient competitor: see Antitrust Modernization Commission, United States, *Report and Recommendations* (2007) 100. Whatever the wisdom of this description as a broad guiding principle, it does not readily yield easily applied rules of thumb in many circumstances.

<sup>25</sup> That is, the intense price-cutting leads eventually to a monopoly and the monopoly endures long enough that the consumer harm from the period of monopoly pricing outweighs the short-term benefit from the period of low prices.

able to label the episode as constituting ‘predatory pricing’ and subject it to condemnation under the provisions of the *Sherman Act*.

One can imagine a rule that says something to this effect — if a period of temporary low pricing turns out to transform the market in such a way as to make consumers worse off, then the low pricing constitutes unlawful monopolisation. However, there are a number of difficulties with such an approach. A basic practical problem is that the alleged perpetrator may not intend or even be aware that its actions will lead to a major change in the structure of the market. This will especially be the case where the rivals turn out to be significantly less efficient than the dominant firm. Hence the rule would discourage any dominant firm from pricing aggressively.<sup>26</sup>

In 1993, the US Supreme Court decided *Brooke Group Ltd v Brown & Williamson Tobacco Corporation* (‘*Brooke Group*’),<sup>27</sup> a case that articulated the modern two-part test for establishing unlawful predatory pricing: (1) pricing below some measure of cost (‘cost test’);<sup>28</sup> and (2) a significant likelihood of recouping any profit sacrifice that occurred during the period of the alleged predation (‘recoupment test’).<sup>29</sup> It is clearly recognised today, and was acknowledged by the Court at the time, that this test sets a high hurdle for plaintiffs.<sup>30</sup> However, an important theme of the Court’s decision was that trial court judges and juries make mistakes, and that mistakes of the Type I or false positive variety<sup>31</sup> in a predatory pricing case run a significant risk of deterring perfectly legitimate, pro-competitive and pro-consumer price-cutting.<sup>32</sup> Hence, the high hurdle represented a conscious effort to minimise the incidence of Type I errors by allowing a plaintiff to succeed only when there was almost no chance that the

<sup>26</sup> One might also contemplate the possibility of an approach that would permit firms, when engaging in lowering prices or improving products, to gain market share at the expense of smaller rivals as long as that did not drive them out of the market completely, but one quickly realises that such an approach would pose immense practical difficulties. Should all actual and prospective rivals be preserved or just certain ones: those, for example, who are reasonably efficient? How is a dominant firm to know whether its conduct will merely take away market share from smaller rivals or actually push one or more into bankruptcy? One of the consequences of such an attempt to finetune the law dealing with exclusionary conduct will be discussed further below in terms of the risk of so-called ‘Type I error’: see below n 31 and accompanying text. However, one can appreciate more generally why such finetuning would create great difficulties.

<sup>27</sup> 509 US 209 (1993).

<sup>28</sup> *Ibid* 222–3 (Kennedy J for Rehnquist CJ, O’Connor, Scalia, Souter and Thomas JJ).

<sup>29</sup> *Ibid* 224 (Kennedy J for Rehnquist CJ, O’Connor, Scalia, Souter and Thomas JJ).

<sup>30</sup> *Ibid* 226 (Kennedy J for Rehnquist CJ, O’Connor, Scalia, Souter and Thomas JJ).

<sup>31</sup> A Type I error, also known as a false positive, would be finding a defendant liable for predation when there was no real risk of successful monopolisation or harm to competition. More generally, a Type I error arises when a hypothesis that should be accepted and is actually true, is rejected or nullified: see, eg, Michael O Finkelstein and Bruce Levin, *Statistics for Lawyers* (2<sup>nd</sup> ed, 2001) 120–2; Michael O Finkelstein, *Quantitative Methods in Law: Studies in the Application of Mathematical Probability and Statistics to Legal Problems* (1978) 42–3; Joseph L Gastwirth, *Statistical Reasoning in Law and Public Policy* (1988) vol 1, 139–40. In the example given above, the absence of risk of successful monopolisation or harm to competition constitutes the hypothesis that is in fact true. The finding of liability falsely rejects this hypothesis and a concomitant Type I error emerges.

<sup>32</sup> *Brooke Group*, 509 US 209, 223–4, 226–7 (Kennedy J for Rehnquist CJ, O’Connor, Scalia, Souter and Thomas JJ) (1993).

defendant's conduct was competitively benign. The following passage, one of several echoing the same theme, is worth quoting:

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.<sup>33</sup>

Moreover, while most predatory pricing cases are brought by private plaintiffs, usually a competitor, the government is subject to the same hurdles when it brings a case seeking injunctive relief and, possibly, divestiture.<sup>34</sup>

More recently, the US Supreme Court in *Weyerhaeuser*<sup>35</sup> decided a case involving predatory buying or, as it is also known, predatory bidding.<sup>36</sup> Predatory buying, which is rarely discussed in the literature, is on the buying side what predatory pricing is on the selling side. A buyer of inputs buys more inputs than it would if it were maximising short-term profits and, if the supply curve slopes upward, will wind up paying a higher price for those inputs as a consequence.<sup>37</sup> The object of the exercise is to drive competing purchasers of inputs from the market and, ultimately, become the sole buyer. When, and if, that time comes, the predator expects to be able to buy inputs at a monopsonistically low price.

In *Weyerhaeuser*, the US Supreme Court, in deciding that the *Brooke Group* predatory pricing standards should apply to predatory buying as well,<sup>38</sup> stressed the symmetry of predatory pricing and predatory buying,<sup>39</sup> repeated the rationale for a conservative approach to predatory pricing — successful attempts to engage in predatory pricing are rare, failed attempts are good for consumers and Type I errors in prosecution will deter socially desirable aggressive price competition<sup>40</sup> — and determined that the same conservative approach should apply to alleged predatory buying.<sup>41</sup>

So, the bottom line on these cases is that the US Supreme Court has moved to an extremely conservative position, making it very difficult for a plaintiff to succeed in a predatory pricing or predatory buying case. It has done so quite deliberately, over a concern that any effort to enhance deterrence of predation by

<sup>33</sup> Ibid 223 (Kennedy J for Rehnquist CJ, O'Connor, Scalia, Souter and Thomas JJ) (citations omitted).

<sup>34</sup> See, eg, *United States v AMR Corporation*, 335 F 3d 1109 (10<sup>th</sup> Cir, 2003).

<sup>35</sup> 127 S Ct 1069 (2007).

<sup>36</sup> For a discussion of the economics of predatory buying and the decision in *Weyerhaeuser*, 127 S Ct 1069 (2007): see George A Hay, Rhonda L Smith and Alexandra Merrett, 'Predatory Buying: The *Weyerhaeuser* Decision and Its Implications for Australia' (2007) 15 *Competition & Consumer Law Journal* 199. That and other recent decisions from the US Supreme Court are discussed in more detail in Hay, 'The Quiet Revolution in US Antitrust Law', above n 4.

<sup>37</sup> It can also be characterised in such a way as to reverse the causation: a buyer offers to pay more than it needs to in order to acquire the amount of inputs it requires for short run profit maximisation, and suppliers will therefore seek to sell more than they would at lower prices. It doesn't really matter which way the causation is expressed, since the higher prices paid and the greater quantities purchased are two sides of the same predatory coin.

<sup>38</sup> *Weyerhaeuser*, 127 S Ct 1069, 1078 (Thomas J for the Court) (2007).

<sup>39</sup> Ibid 1076–7 (Thomas J for the Court).

<sup>40</sup> Ibid 1075, 1077 (Thomas J for the Court).

<sup>41</sup> Ibid 1078 (Thomas J for the Court).



large firms against small ones will actually have the effect of deterring a large firm from reducing its selling prices<sup>42</sup> (or increasing the quantity of inputs it purchases)<sup>43</sup> and that, overall, consumers will be worse off. Hence, the interests of consumers are given complete priority over any concerns about the difficulties faced by smaller competitors when matched up against large firms. Contrast this with the outcry that ensued following the High Court of Australia's decision in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* ('*Boral*')<sup>44</sup> based on a concern about small businesses and the call for legislative efforts to 'fix' the *TPA* to deal with the alleged problem that resulted in the Birdsville Amendment.<sup>45</sup>

### B *Refusal to Deal or Cooperate with Rivals*

This issue typically arises when a vertically integrated firm — one that is active in both upstream and downstream markets — has little or no competition upstream but faces actual or potential competition in the downstream market. If the output from the upstream production is necessary to the production of the downstream product, the downstream competitors will want to obtain supply from the monopolist upstream producer. If it refuses to supply, or refuses to supply at a reasonable price, the unintegrated downstream firms will be at a significant disadvantage. The claim will be made that, by refusing to deal, the upstream monopolist has used its upstream advantage to achieve a monopoly in the downstream market as well. Therefore, even if the integrated firm did nothing unlawful to achieve or maintain its monopoly in the upstream market, the use of leverage to achieve or maintain a monopoly downstream is alleged to be anti-competitive and unlawful.

The oft-cited US case involving refusal to deal is *Otter Tail Power Co v United States* ('*Otter Tail*').<sup>46</sup> The Otter Tail Power Company ('*Otter Tail Co*'), a vertically integrated supplier of electric power, refused to sell or transmit power to four municipal cooperative organisations, each of which wished to displace the Otter Tail Co as the retail supplier of electricity to their town, but needed to obtain their power by purchasing from the Otter Tail Co on a wholesale basis.<sup>47</sup> Thus the upstream product was wholesale power supply and the downstream product was the retail distribution of electricity to homes and businesses in the four towns. The US Supreme Court held that, even though the Otter Tail Co had presumably obtained its upstream monopoly lawfully, it was a violation of § 2 of the *Sherman Act* for a monopolist in the upstream market to refuse to deal where the purpose and effect of that refusal was to allow it to maintain its monopoly in the downstream market where there was at least the potential for competition.<sup>48</sup>

<sup>42</sup> *Brooke Group*, 509 US 209, 226 (Kennedy J for Rehnquist CJ, O'Connor, Scalia, Souter and Thomas JJ) (1993).

<sup>43</sup> *Weyerhaeuser*, 127 S Ct 1069, 1077 (Thomas J for the Court) (2007).

<sup>44</sup> (2003) 215 CLR 374.

<sup>45</sup> See below Part IV(B).

<sup>46</sup> 410 US 366 (1973).

<sup>47</sup> *Ibid* 370–2 (Douglas J for the Court).

<sup>48</sup> *Ibid* 377–8 (Douglas J for the Court).

It is worth noting that commentators, especially foreign commentators, frequently cite *Otter Tail* as illustrating the so-called ‘essential facility’ doctrine as if that were some special branch of, or exception to, traditional *Sherman Act* § 2 jurisprudence.<sup>49</sup> The US Supreme Court, however, never used that term, and decided the case on what it believed to be quite traditional *Sherman Act* § 2 grounds.

A first cousin of *Otter Tail* occurred a decade or so later in *Aspen Skiing Co v Aspen Highlands Skiing Corporation* (‘*Aspen Skiing*’).<sup>50</sup> The case differed from *Otter Tail* in that, at least in the ordinary sense of the term, there were no separate upstream and downstream markets and therefore the defendant was not vertically integrated. The defendant controlled three of the four mountains suitable for skiing in Aspen, Colorado.<sup>51</sup> The owner of the fourth mountain — the plaintiff — wanted to be able to offer patrons a four-mountain weekly pass, whereby the patron would purchase the pass at the beginning of the week and then be free to ski any one of the four mountains on any given day without engaging in any further transactions.<sup>52</sup> To offer such a pass, the owner of the fourth mountain obviously needed the cooperation of the owner of the other three and, for a few years, there was such cooperation.<sup>53</sup> However, there were ongoing disputes about various matters, especially about how the revenues would be divided, and eventually the owner of the three mountains withdrew its cooperation and instead offered a three-mountain pass, involving only its own three mountains.<sup>54</sup> Relations between the plaintiff and the defendant deteriorated quickly and, suffice it to say, the defendant did several other things to frustrate the plaintiff’s ongoing effort to put together a four-mountain pass.<sup>55</sup> The plaintiff claimed that the defendant had monopoly power and that, by refusing to cooperate, was using that power to prevent or eliminate any competition whatsoever.<sup>56</sup>

The US Supreme Court emphasised the fact that the defendant had once cooperated but had suddenly ceased to do so, and drew from the fact of the original, voluntary cooperation that it had been profitable for the defendant.<sup>57</sup> This,

<sup>49</sup> The ‘essential facility’ doctrine refers to the notion that, under certain conditions, a firm or group of firms that controls an ‘essential facility’ (that is, some infrastructure that is critical to a firm’s being able to compete in some market), must make that infrastructure available to potential competitors in that market: see Robert Pitofsky, Donna Patterson and Jonathan Hooks, ‘The Essential Facilities Doctrine under US Antitrust Law’ (2002) 70 *Antitrust Law Journal* 443. In short, ‘a firm that controls an essential facility [must] make that facility available to competitors on reasonable, nondiscriminatory terms’: Section of Antitrust Law, American Bar Association, *Energy Antitrust Handbook: A Guide to the Electric and Gas Industries* (2002) 176 (citations omitted). For a more sceptical view of the validity or coherence of the doctrine: see Phillip Areeda, ‘Essential Facilities: An Epithet in Need of Limiting Principles’ (1990) 58 *Antitrust Law Journal* 841.

<sup>50</sup> 472 US 585 (1985).

<sup>51</sup> *Ibid* 587–90 (Stevens J for the Court). Whether the geographic market could be limited to the town of Aspen is a serious question, but one the US Supreme Court did not need to address for the purposes of the appeal.

<sup>52</sup> *Ibid* 589–90 (Stevens J for the Court).

<sup>53</sup> *Ibid* 590–2 (Stevens J for the Court).

<sup>54</sup> *Ibid* 592–3 (Stevens J for the Court).

<sup>55</sup> See, eg, *ibid* 593–4 (Stevens J for the Court).

<sup>56</sup> *Ibid* 595 (Stevens J for the Court).

<sup>57</sup> *Ibid* 608, 610–11 (Stevens J for the Court).

according to the Court, along with the other dirty tricks that seemed to have no innocent explanation, was enough to allow the jury to infer that the sudden cessation of cooperation did not have a legitimate business motive but was instead part of a scheme to eliminate a rival.<sup>58</sup> Again, while subsequent commentators have occasionally referred to this as an example of the essential facility doctrine, that phrase was not used in the opinion.<sup>59</sup>

Both cases are used to support the proposition that a firm with monopoly power may have a duty to deal with or cooperate with competitors, especially if there is no legitimate business reason not to do so. If such a general duty exists, however, the cases do not provide much guidance either on what counts as a legitimate business reason or, closely related, on what the terms of such a compelled interaction would have to be to avoid liability. In *Otter Tail*,<sup>60</sup> this was not a significant issue because there was an existing regulatory body — then the Federal Power Commission — that had ongoing regulatory jurisdiction over the wholesale price of electric power sold in interstate transactions, so all the Court was really saying was that the defendant — or other upstream electric power monopolists — was required to make wholesale sales (if asked) at the prevailing (regulatory-constrained) rate. In *Aspen Skiing*,<sup>61</sup> the Court never addressed the question, so the issue of what the dominant incumbent firm could try to extract as the price of cooperation (or below what price the incumbent could lawfully refuse to deal or cooperate) was left unanswered.

Why is this issue of the price below which dealing or cooperation is not required so important? First, would-be competitors will want supply or cooperation at the lowest price possible — something akin to a ‘competitive price’ — a price based essentially on the incremental cost of supply or cooperation. If the competitor is required to pay a much higher price, for example, the profit-maximising monopoly price, there will be far fewer demands for access and therefore far fewer cases involving allegations of refusal to deal. Secondly, if the monopolist is allowed to charge the profit-maximising monopoly price, that is, the price that it would charge if it were not vertically integrated, there will be less incentive to refuse to deal or cooperate and therefore, again, fewer cases alleging refusal to deal.

More generally, as indicated above, it is clear, at least in the US, that an unintegrated monopolist — one that sells only the upstream product — can charge whatever it wants without running foul of § 2 of the *Sherman Act* so long as it achieved and maintains its monopoly position lawfully. If § 2 of the *Sherman Act* required an integrated monopolist to sell at a price less than the freestanding profit-maximising monopoly price, this would create distorted incentives on whether or not to be vertically integrated. Firms might eschew integration, even where integration would lower overall costs. There are also administrative issues. If courts will not allow the integrated monopolist to decline to sell at anything less than the profit-maximising monopoly price, how will a court

<sup>58</sup> Ibid 605–11 (Stevens J for the Court).

<sup>59</sup> Pitofsky, Patterson and Hooks, above n 49, 448 fn 50.

<sup>60</sup> 410 US 366 (1973).

<sup>61</sup> 472 US 585 (1985).

determine exactly what price is high enough to trigger liability for refusing to supply or cooperate?

While these problems have been around for some time, they have lain primarily beneath the surface. Courts talked about the duty to deal on ‘reasonable’ terms, but the exact issue of the criterion for deciding what was reasonable was rarely mentioned.<sup>62</sup> However, the recent decision in *Trinko*<sup>63</sup> has changed the landscape considerably.

*Trinko* involved a scenario that will resonate with an Australian audience,<sup>64</sup> namely a fight about whether the breach by the owner of a local exchange telephony structure of a statutory obligation<sup>65</sup> to make parts of its network available to new entrants or smaller competitors constituted an antitrust claim under § 2 of the *Sherman Act*. The plaintiff, however, was not the disappointed would-be competitor but the representative of the members of a class action consisting essentially of telephone service customers of a rival local exchange carrier who claimed they could have enjoyed a less expensive telephone service had the incumbent local exchange carrier been more cooperative.<sup>66</sup> In the meantime, the rival, essentially a new entrant to the market and a would-be competitor to the incumbent, had successfully complained to the Federal Communications Commission under a federal statute specifically governing the right of access to the incumbent’s telephone network infrastructure and the terms on which such access should be granted.<sup>67</sup> So, from a ‘logical’ perspective, one could have imagined the case being thrown out because a regulatory agency, not the federal courts, really had jurisdiction; because this was not the proper complainant; and because the would-be competitor eventually got what it wanted under the access statute.

For reasons that are not relevant for the present purpose, the US Supreme Court decided that the plaintiff was entitled to seek compensation under the antitrust laws, so long as the plaintiff could establish liability.<sup>68</sup> But the Court then decided, taking into account the telephony-specific legislation as part of the

<sup>62</sup> See, eg, *Alaska Airlines, Inc v United Airlines, Inc*, 948 F 2d 536, 542 (Hall J for Norris, Hall and Trott JJ) (emphasis added) (9<sup>th</sup> Cir, 1991): ‘the essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm *reasonable* access to a product or service that the second firm must obtain in order to compete with the first’; *Byars v Bluff City News Co, Inc*, 609 F 2d 843, 856 (Keith J for Keith, Merritt and Green JJ) (emphasis added) (6<sup>th</sup> Cir, 1979): ‘a business or group of businesses which controls a scarce facility has an obligation to give competitors *reasonable* access to it’; *Hecht v Pro-Football, Inc*, 570 F 2d 982, 992 (Wilkey J for McGowan, Winter and Wilkey JJ) (citations omitted) (emphasis added) (DC Cir, 1977): ‘where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on *fair* terms.’

<sup>63</sup> 540 US 398 (2004).

<sup>64</sup> *Ibid* 401 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ).

<sup>65</sup> Under *Telecommunications Act of 1996*, Pub L No 104-104, 110 Stat 56 (codified in scattered sections of 47 USC).

<sup>66</sup> *Trinko* 540 US 398, 404 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ) (2004).

<sup>67</sup> This would be somewhat similar to pts IIIA or XIB of the *TPA* except that there was an industry-specific regulatory agency — the Federal Communications Commission — charged with enforcing the statute — the *Telecommunications Act of 1996*, Pub L 104-104, 110 Stat 56 (codified in scattered sections of 47 USC) — and ensuring access on reasonable terms.

<sup>68</sup> *Trinko*, 540 US 398, 405–7 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ) (2004).

background, that the plaintiff had not established liability.<sup>69</sup> This could have been done in a few short sentences that focused on the narrow facts and special circumstances of the case. Instead, the Court, in a unanimous decision with an opinion by Scalia J,<sup>70</sup> let loose with a few broad swipes against the notion that a monopolist had some special duty to deal with a would-be competitor.<sup>71</sup> The Court, without overruling it, essentially buried the earlier *Aspen Skiing*<sup>72</sup> decision normally relied on in such refusal to deal cases, describing it as ‘at or near the outer boundary of § 2 liability.’<sup>73</sup> The opinion also effectively disowned the so-called ‘essential facilities’ doctrine, another frequent vehicle for plaintiffs in refusal cases, saying simply, ‘[w]e have never recognized such a doctrine’.<sup>74</sup> The opinion suggested, without saying so explicitly, that there could never be liability under § 2 of the *Sherman Act* when the defendant has never sold the intermediate product or service at arms-length, and that, in the absence of a specific regulatory requirement to the contrary, an incumbent is not required to sell at less than the short run profit-maximising price.<sup>75</sup> Finally, as in *Brooke Group*,<sup>76</sup> the opinion raised the spectre of false positives, counselling that ‘[m]istaken inferences and the resulting false condemnations “are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”’<sup>77</sup> As argued elsewhere,<sup>78</sup> the opinion could be read as signalling the end of a monopolist’s duty to deal except where a specific regulatory statute suggests otherwise.<sup>79</sup> The decision was unanimous although the three justices who concurred would have decided the case on much simpler grounds.<sup>80</sup>

### C *Exclusive Dealing Contracts and Comparable Arrangements*

A firm in a dominant position can seek to ‘lock out’ competition altogether by requiring dealers not to carry any competing products or by requiring purchasers not to buy from anyone else. If this works with enough dealers or enough final purchasers, there may not be enough business left over for competitors to survive

<sup>69</sup> Ibid 407–16 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ).

<sup>70</sup> Three justices — Stevens J joined by Souter and Thomas JJ — concurred in the result but would have resolved the matter simply on grounds that the plaintiff lacked standing: ibid 416.

<sup>71</sup> Ibid 407–8 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ).

<sup>72</sup> 472 US 585 (1985).

<sup>73</sup> *Trinko*, 540 US 398, 409 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ) (2004).

<sup>74</sup> Ibid 411 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ), citing *Aspen Skiing*, 472 US 585, 611 (Stevens J for the Court) (1985).

<sup>75</sup> See, eg, *Trinko*, 540 US 398, 409–10 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ) (2004).

<sup>76</sup> See above n 32 and accompanying text.

<sup>77</sup> *Trinko*, 540 US 398, 414 (Scalia J for Rehnquist CJ, O’Connor, Kennedy, Ginsburg and Breyer JJ) (2004), quoting *Matsushita Electric Industrial Co Ltd v Zenith Radio Corporation*, 475 US 574, 594 (Powell J for Burger CJ, Marshall, Rehnquist and O’Connor JJ) (1986).

<sup>78</sup> See George A Hay, ‘*Trinko*: Going All the Way’ (2005) 50 *Antitrust Bulletin* 527.

<sup>79</sup> Since *Trinko*, 540 US 398 (2004), plaintiffs have had some success in lower courts: see Edward D Cavanagh, ‘*Trinko*: A Kinder, Gentler Approach to Dominant Firms under the Anti-trust Laws?’ (2007) 59 *Maine Law Review* 111. Apparently, incumbents have not yet figured out that a blanket refusal is a lot more risky than simply picking a price that renders it a matter of indifference whether the applicant gains access or not.

<sup>80</sup> See above n 70.

or achieve enough size to be effective competitors. For each individual dealer or purchaser, this 'all or nothing' offer may be the only viable option even though, when many dealers or purchasers accept the offer, they may be collectively worse off in the long run. US courts have had a fair amount of experience dealing with such restrictive contracts, which can be attacked, because they are contracts, under either § 1 of the *Sherman Act* (dealing with agreements in restraint of trade) or under § 2 of the *Sherman Act* (dealing with monopolisation).

Typically, US courts focus on the degree of foreclosure — what percentage of the potential market is locked up by the purported restrictive contract? Some courts also consider the duration of the contracts and will be more sympathetic to contracts that are for periods of less than a year on the grounds that this permits regular 'competition for the contract'.<sup>81</sup> A figure of 40 per cent is commonly used as a benchmark for the portion of the market that has to be foreclosed by the contracts to trigger an antitrust violation, although that percentage may vary depending on other characteristics of the market.<sup>82</sup> Moreover, in the recent *Microsoft* decision, the US Court of Appeals for the District of Columbia Circuit suggested that the benchmark might be different — in fact, higher — for a case brought under § 1, than for a case brought under § 2, of the *Sherman Act*.<sup>83</sup> In any event, while there are some issues that need to be resolved in these cases, the formal exclusive dealing or exclusive purchasing agreements are not where the major controversies arise.

In some situations, the consequences of an exclusive dealing contract can be achieved by a refusal to deal. This involves situations where there are two products of which one is typically a long-lived piece of equipment and the second is spare parts for the equipment or its analytical equivalent. Consider, for example, a manufacturer of a photocopy machine that wishes to exclude others from providing service on that equipment. One way to do this is to sign the purchaser to an exclusive dealing contract regarding service. But another is to refuse to provide spare parts to any independent service organisation. There were a number of these cases prior to *Trinko*.<sup>84</sup>

Another way to accomplish the same result would be through a tying arrangement, such that the purchaser of the original equipment is required to buy the service from the original equipment manufacturer as well. Because they are agreements, tying arrangements are governed by § 1 of the *Sherman Act* but can

<sup>81</sup> See, eg, *US Healthcare, Inc v Healthsource, Inc*, 986 F 2d 589 (1<sup>st</sup> Cir, 1993) where the Court found that the foreclosure of rivals was not demonstrated because, among other things, the clause was terminable on 30 days' notice; *Omega Environmental, Inc v Gilbarco, Inc*, 127 F 3d 1157 (9<sup>th</sup> Cir, 1997), cert denied 525 US 812 (1998), where the Court found that there was no violation in part because the defendants' contracts were short-term. However, if it is the market power of the dominant firm that effectively coerces the dealer or purchaser to accept the arrangement, it does not matter much to the competitive analysis whether it is a single long-term — say, five years — contract or a series of shorter contracts, since the outcome will be the same.

<sup>82</sup> See, eg, *Microsoft*, 253 F 3d 34, 70 (Edwards CJ, Williams, Ginsburg, Sentelle, Randolph, Rogers and Tatel JJ) (DC Cir, 2001).

<sup>83</sup> *Ibid*.

<sup>84</sup> See, eg, *Image Technical Services, Inc v Eastman Kodak Co*, 125 F 3d 1195 (9<sup>th</sup> Cir, 1997); *Re Independent Service Organizations Antitrust Litigation v Xerox Corporation*, 203 F 3d 1322 (Fed Cir, 2000).

also be dealt with under § 2. Like exclusive dealing contracts, the perceived harm is that competing providers of the tied product — for example, service of the tying product — will be foreclosed from substantial portions of the market and, as a result, will not be able to compete effectively. However, while the analytical concerns are essentially the same as those for exclusive dealing contracts, in the US, tying is governed by a different set of standards. A tying arrangement is said to be ‘per se unlawful’ if:<sup>85</sup>

- (1) the tying and tied goods are two separate products;
- (2) the defendant has market power in the tying product market;
- (3) the defendant affords consumers no choice but to purchase the tied product from it; and
- (4) the tying arrangement forecloses a substantial volume of commerce.

However, how long the per se rule will last is in question.<sup>86</sup>

Finally, a dominant manufacturer can engage in some form of bundled discounting. As an example, assume the firm produces two distinct products and is a monopolist in one product but faces competition in the other. The firm offers a significant discount on a customer’s overall purchases if the customer purchases most or all of its requirements for both products from that firm. The customer is going to purchase all of its requirements for the first product from the monopolist anyway but might wish to consider purchasing some or all of its requirements for the second product from one or more of several alternative suppliers. However, if the customer falls short of its quota on the second product purchased from the first product monopolist, it forgoes the discount not only on the second product (which competitors might be willing and able to meet) but also on the first product (which competitors cannot meet because they do not sell the first product). Therefore, if competitors in the second product want to get a piece of the business, they must doubly discount the price of the second product to compensate the customer for the loss of discount on both products. This may be impossible to do and still make a profit.

There are many economic issues with respect to bundled discounts. For the courts, the primary challenge is to see which, if any, of the traditional exclusion pigeonholes to put bundled discounts into, each with its own criteria for illegality. Should it be thought of as de facto predatory pricing on the second product (although the second product, even with the discount, is being sold above cost); as de facto exclusive dealing or exclusive purchasing, since the customer is economically compelled to take all of its needs of the second product from the monopolist; as a de facto tying arrangement since, to get the best price on the first product, the customer must buy the second product from the monopolist as

<sup>85</sup> *Microsoft*, 253 F 3d 34, 85 (Edwards CJ, Williams, Ginsburg, Sentelle, Randolph, Rogers and Tatel JJ) (DC Cir, 2001).

<sup>86</sup> These standards are discussed in: *ibid.* However, the Court’s judgment was ‘confined to the [specific] tying arrangement before [them] ... , where the tying product [wa]s software whose major purpose [wa]s to serve as a platform for third-party applications and the tied product [wa]s complementary software functionality’ and the judgment did not have ‘broader force’ to apply to ‘facts outside the record’: at 95 (Edwards CJ, Williams, Ginsburg, Sentelle, Randolph, Rogers and Tatel JJ). Therefore, the judgment stands for the narrow proposition that the per se rule was inappropriate for the specific facts as found in *Microsoft*, 253 F 3d 34 (DC Cir, 2001), and cannot be interpreted as suggesting the abandonment of the per se rule for high technology products generally.

well; or none of the above? Moreover, things get messier when the number of products involved increases and the discount formula becomes more complex, such as increasing discounts as the percentage of the second product bought from the monopolist increases. Courts are still working out how to handle such bundled discounts.<sup>87</sup> Obviously, the problem arises in part because there are different legal standards for conduct with substantially the same economic effect depending on which, if any, pigeonhole the court decides to use.

#### D *Dirty Tricks*

This is to some extent a catch-all category designed to pick up anything not included under the preceding headings. But more analytically, the conduct discussed under the heading ‘dirty tricks’ would involve conduct that is unilateral, so it is clearly not covered under § 1 of the *Sherman Act* (whereas, for example, exclusive dealing or tying might be), and would not normally be regarded as leveraging or otherwise misusing existing monopoly power. It brings to mind French J’s hypothetical of the firm that hires an arsonist to burn down its competitor’s factory and his Honour’s opinion that such conduct would not contravene s 46 of the *TPA* because it would not constitute misuse of market power.<sup>88</sup> In the US, this would often involve business torts of the sort normally covered by state law, such as false advertising, tortious interference with contractual relations and misappropriation of trade secrets. Another category of conduct (that may or may not be covered under state law) involves so-called ‘sham litigation’ — litigation initiated not because the defendant necessarily expects to succeed in the courtroom, but because, regardless of the eventual outcome, the defendant hopes to drown its competitor in litigation so that the costs drive it from the marketplace or otherwise impede its ability to compete effectively.<sup>89</sup>

<sup>87</sup> The most notorious example is the recent case of *LePage’s Inc v 3M (Minnesota Mining & Manufacturing Co)*, 324 F 3d 141 (3<sup>rd</sup> Cir, 2003), in which the US Court of Appeals for the Third Circuit, by a 7:3 majority, declined to use any of the traditional pigeonholes, concluding basically that LePage’s Incorporated and LePage’s Management Company, Limited Liability Company, even if they were reasonably efficient as producers of the product they sold, could not realistically compete against the ‘bundled rebate’ pricing scheme used by the Minnesota Mining and Manufacturing Company: at 152–64 (Sloviter J for Becker CJ, Nygaard, McKee, Ambro, Fuentes and Smith JJ). The recent report of the Antitrust Modernization Commission has recommended an approach that most closely resembles a *Brooke Group*, 509 US 209, 223 (Kennedy J for Rehnquist CJ, O’Connor, Scalia, Souter and Thomas JJ) (1993) predation standard after allocating some or all of the overall discount to the competitive product: see Antitrust Modernization Commission, above n 24, 99.

<sup>88</sup> *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) 111 ALR 631, 637.

<sup>89</sup> Plaintiffs’ chances of success in such sham litigation cases were reduced substantially as a result of the US Supreme Court’s decision in *Professional Real Estate Investors, Inc v Columbia Pictures Industries, Inc*, 508 US 49 (1993), in which the Court ruled that the plaintiff, in addition to showing that the defendant had the subjective intent to injure the plaintiff through the litigation process, must also prove that the litigation was ‘objectively baseless’: at 59 (Thomas J for Rehnquist CJ, White, Blackmun, Scalia, Kennedy and Souter JJ). Such a standard is a very generous one from the perspective of the defendant and equates approximately with no ‘probable cause’: at 60 (Thomas J for Rehnquist CJ, White, Blackmun, Scalia, Kennedy and Souter JJ).



There are two aspects of US antitrust law that make these kinds of claims feasible. First, US law permits claims based on ‘attempt[s] to monopolize’<sup>90</sup> so that the plaintiff does not have to establish that the defendant actually has monopoly power at the time of the alleged anti-competitive conduct so long as there is a ‘dangerous probability’ that monopoly will be achieved as a result of the conduct.<sup>91</sup> Secondly, US law prohibits monopolisation or attempted monopolisation by any anti-competitive means,<sup>92</sup> and therefore does not require that the conduct constitute a ‘[m]isuse of market power’.<sup>93</sup> In any event, claims of monopolisation or attempted monopolisation based primarily on dirty tricks are relatively rare.<sup>94</sup>

#### IV SECTION 46 OF THE *TRADE PRACTICES ACT 1974* (CTH)

The life of s 46 of the *TPA* is short by comparison to that of § 2 of the *Sherman Act* and, until recently, there were comparatively few s 46 decisions from the courts. However, in the period since 1998, not only has there been a number of *TPA* s 46 cases but most have been appealed to the Full Federal Court and a significant number have then proceeded to the High Court. Thus, in a relatively short period, a distinctive Australian jurisprudence has begun to emerge. To see these developments it may be appropriate to consider the cases chronologically, but for consistency they are examined under the same headings as the *Sherman Act* § 2 cases discussed in Part III above.

To set the scene for what follows, some general observations are made concerning the differences of approach under *TPA* s 46 compared with § 2 of the *Sherman Act* when determining whether a firm’s conduct has crossed the line from aggressive but fair competition to anti-competitive conduct. These differences are partly due to differences between the statutes — s 46 of the *TPA* is more prescriptive than § 2 of the *Sherman Act*. As a threshold issue, s 46(1) of the *TPA* requires that a firm must possess substantial market power before its conduct can violate that section. Next, there must be a nexus or causal relationship between the firm’s market power and the alleged conduct and, finally, the firm’s purpose for the alleged conduct must be at least one of three anti-competitive purposes specified in the section, namely:

<sup>90</sup> *Sherman Act*, 15 USC § 2 (2000 & Supp IV, 2004).

<sup>91</sup> *Spectrum Sports, Inc v McQuillan*, 506 US 447, 456 (White J for the Court) (1993). See also *Times-Picayune Pub Co v United States*, 345 US 594, 626 (Clark J for the Court) (1953); *Lorain Journal Co v United States*, 342 US 143, 153–5 (Burton J for the Court) (1951).

<sup>92</sup> *Sherman Act*, 15 USC § 2 (2000 & Supp IV, 2004).

<sup>93</sup> *TPA* s 46.

<sup>94</sup> One example worth mentioning, in part because it produced the largest damage award ever achieved in an antitrust case — a jury award of US\$350 million trebled by operation of § 4 of the *Clayton Act* to US\$1.05 billion — is *Conwood Co, LP v United States Tobacco Co*, 290 F 3d 768, 780, 795 (Clay J for Edgar CJ and Gilman J) (6<sup>th</sup> Cir, 2002). One of the claims was that the defendant’s sales representatives, in their role as category managers advising retailers which products should be on racks and how they should be grouped or categorised, removed the plaintiff’s display racks and advertising from retail stores without the retailers’ consent: at 778–80 (Clay J for Edgar CJ and Gilman J). The case is not a perfect example, however, because the very fact that the defendant was able to act as the category manager was based, at least in part, on its dominant market position: see, eg, at 776 (Clay J for Edgar CJ and Gilman J).

- 1 eliminating or substantially damaging a competitor;<sup>95</sup>
- 2 preventing entry of a competitor into a market;<sup>96</sup> and/or
- 3 deterring or preventing competitive conduct in a market.<sup>97</sup>

As recently confirmed by the High Court, each of these issues must be established sequentially.<sup>98</sup>

*Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* ('*Queensland Wire*')<sup>99</sup> was the first trade practices case to be heard on appeal by the High Court and it laid the foundations for the interpretation and analysis of the three elements to be considered in *TPA* s 46 cases. The Broken Hill Proprietary Company Limited ('BHP') produced Y-bar, a steel product commonly used in the manufacture of star picket fencing posts, and marketed a bundled product consisting of star pickets and fencing wire.<sup>100</sup> Queensland Wire Industries Proprietary Limited ('QWI') requested supply of Y-bar from Australian Wire Industries Proprietary Limited ('AWI'), a BHP subsidiary, in order to make its own star pickets.<sup>101</sup> Although supply was not refused, the price was commercially unrealistic — an effective refusal to deal.<sup>102</sup> As a consequence, QWI claimed that AWI and BHP had breached s 46 of the *TPA*.<sup>103</sup> The High Court took the opportunity to explain the relevant meaning of competition and market power, but of particular significance in the present context is its approach to '[m]isuse of market power'.<sup>104</sup> First, it was made clear that the term had no moral overtones, it simply meant use.<sup>105</sup> Secondly, the Court identified the requirement for a causal link to be established between market power and the alleged conduct.<sup>106</sup> This was to be done by assessing whether in an otherwise competitive market the firm would have been likely to engage in the conduct, such as a refusal to deal ('competition test').<sup>107</sup> At trial, Pincus J commented that s 46 of the *TPA* 'does not make it unlawful simply to have a monopoly, although a characteristic of a monopoly may well be to keep consumer prices up.'<sup>108</sup> Although the High Court ultimately found that AWI and BHP had contravened s 46 of the *TPA*,<sup>109</sup> this view has been reaffirmed on various occasions. Indeed, the statement by the High Court that competition was ruthless and that competi-

<sup>95</sup> *TPA* s 46(1)(a).

<sup>96</sup> *TPA* s 46(1)(b).

<sup>97</sup> *TPA* s 46(1)(c).

<sup>98</sup> *Boral* (2003) 215 CLR 374, 419 (Gleeson CJ and Callinan J), 459 (McHugh J).

<sup>99</sup> (1989) 167 CLR 177.

<sup>100</sup> *Ibid* 183–4 (Mason CJ and Wilson J).

<sup>101</sup> *Ibid* 184–5 (Mason CJ and Wilson J).

<sup>102</sup> *Ibid* 184 (Mason CJ and Wilson J).

<sup>103</sup> *Ibid* 185 (Mason CJ and Wilson J).

<sup>104</sup> *TPA* s 46.

<sup>105</sup> *Queensland Wire* (1989) 167 CLR 177, 190–1 (Mason CJ and Wilson J), 193–4 (Deane J), 202 (Dawson J), 212–14 (Toohey J).

<sup>106</sup> *Ibid* 192 (Mason CJ and Wilson J), 197–8 (Deane J), 202–3 (Dawson J), 216–17 (Toohey J).

<sup>107</sup> *Ibid* 192 (Mason CJ and Wilson J).

<sup>108</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 16 FCR 50, 68.

<sup>109</sup> *Queensland Wire* (1989) 167 CLR 177, 193 (Mason CJ and Wilson J), 198 (Deane J), 203 (Dawson J), 217 (Toohey J).

tors were likely to be injured, was expanded in *Boral* with the statement that '[a] rational business firm seeks to maximise profit and to increase its share of the market.'<sup>110</sup> The import of this seems to be that a finding of 'tak[ing] advantage' of 'a substantial degree of power in a market' requires more than a firm with market power maximising its profits.<sup>111</sup>

Another point of difference between s 46 of the *TPA* and § 2 of the *Sherman Act* is that, at first instance, trade practices cases in Australia are tried before a judge, who is the sole decision-maker regarding both issues of law and issues of fact, unlike many antitrust cases in the US that are tried before a jury. This has considerable significance for the way that cases under § 2 of the *Sherman Act* are tried. A significant problem is how a jury can be made to understand the complex commercial, economic and legal issues generally associated with these cases. At least in part, this has been addressed by substituting filters or rules of thumb for economic analysis of business conduct in litigation. As noted above, *Brooke Group* introduced cost and recoupment tests as a means of identifying predatory conduct.<sup>112</sup> Moreover, the business rationale test may be used to justify conduct on efficiency grounds,<sup>113</sup> and, in relation to exclusive dealing, the likely anti-competitive consequences may be tested against arbitrary foreclosure thresholds.<sup>114</sup> This 'characterisation' of conduct — for example, as predatory — is not particularly helpful given the structure of s 46 of the *TPA*, and the High Court has warned that '[t]here is a danger that a term such as predatory pricing may take on a life of its own, independent of the statute, and distract attention from the language of s 46.'<sup>115</sup> Nevertheless, as is apparent from the discussion of the cases below, the Court clearly accepts that tests such as those derived from *Brooke Group* may be adopted when they fit within the law and if they assist the analytical process. An additional problem associated with jury trials is that jurors may tend to identify with consumers or smaller competitors, and so their concern to avoid harm to this group increases the risk of false positives in their findings. To reduce this risk, the rules or filters employed have tended to be relatively conservative.

#### A Meaning of 'Substantial Degree of Power in a Market'

Establishing that the firm whose conduct raises competition concerns has a 'substantial degree of power in a market' is a threshold issue for s 46(1) of the *TPA*. Unlike § 2 of the *Sherman Act*, which prohibits both attempts to monopolise and actual monopolisation, s 46 of the *TPA* requires that the firm concerned possess substantial market power prior to, or at the time of, the conduct. Consequently, conduct that is intended to confer market power on the firm concerned

<sup>110</sup> (2003) 215 CLR 374, 458 (McHugh J).

<sup>111</sup> *TPA* s 46(1).

<sup>112</sup> See above nn 28–9 and accompanying text.

<sup>113</sup> See, eg, below n 141 and accompanying text.

<sup>114</sup> See above Part III(C).

<sup>115</sup> *Boral* (2003) 215 CLR 374, 421 (Gleeson CJ and Callinan J).

— that is, an attempt to monopolise — does not violate s 46 of the *TPA*,<sup>116</sup> a state of affairs subsequently described as ‘a predator shaped hole’ by Geoff Edwards.<sup>117</sup>

As in the US, Australian courts have defined or identified market power based on the ability of the relevant firm to raise prices above competitive levels. In *Boral*, Gleeson CJ and Callinan J stated:

In *Queensland Wire*, Mason CJ and Wilson J defined market power as the ability of a firm to raise prices above 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. Each side in the present case called an economist as a witness. They both defined or described the market power of a supplier in terms of its ability to raise prices above supply cost without losing business to another supplier. Pricing may not be the only aspect of market behaviour that manifests power. Other aspects may be the capacity to withhold supply; or to decide the terms and conditions, apart from price, upon which supply will take place. But pricing is ordinarily regarded as the critical test; and it is pricing behaviour that is the relevant conduct in the present case.<sup>118</sup>

Their Honours specifically referred to a firm with substantial market power having the ability to *control* prices,<sup>119</sup> however, the more usual reference is to the ability to *influence* prices or the ability of a firm to make decisions in relation to its production and selling policies *somewhat* independently of market pressures.<sup>120</sup> The latter recognises that in oligopolistic markets a firm may not control prices, but nevertheless may have sufficient market power to be of concern in a competition context. Thus, market power has been defined in terms of prices and, in *Boral*, the High Court rejected any suggestion that market power could be inferred from conduct.<sup>121</sup> This may explain why the ability to exclude has not been a central element in considering whether a particular firm possesses substantial market power, although *Pacific National (ACT) Ltd v Queensland Rail* did consider this aspect of market power.<sup>122</sup>

As noted above, in the US, a finding of market power may be based primarily on market share.<sup>123</sup> However, at least until recent amendments to s 46 of the *TPA* become effective, in Australia, much less emphasis is placed on market share. The primary consideration is the height of barriers to entry,<sup>124</sup> although other

<sup>116</sup> *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410, 437 (Heerey J) (*‘Boral First Instance’*). This point was also addressed by Kirby J on appeal in the High Court: see *ibid* 480–1. For a discussion: see Geoff Edwards, ‘The Hole in the Section 46 Net: The *Boral* Case, Recoupment Analysis, the Problem of Predation and What to Do about It’ (2003) 31 *Australian Business Law Review* 151, 165.

<sup>117</sup> Edwards, above n 116, 151–2.

<sup>118</sup> *Boral* (2003) 215 CLR 374, 423 (citations omitted).

<sup>119</sup> *Ibid*.

<sup>120</sup> See especially Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law* (2003) 194.

<sup>121</sup> (2003) 215 CLR 374, 459 (McHugh J).

<sup>122</sup> (2006) 28 ATPR (Digest) ¶46-268.

<sup>123</sup> See above Part II.

<sup>124</sup> See, eg, *Boral* (2003) 215 CLR 374, 398–9, 415, 417–19, 423 (Gleeson CJ and Callinan J), 433 (Gaudron, Gummow and Hayne JJ), 469–71, 474–80 (McHugh J), 491–2, 503 (Kirby J); *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, 542–3, 561, 564, 577 (Wilcox, French and Gyles JJ); *Sita Qld Pty Ltd v Queensland*

factors — including product differentiation,<sup>125</sup> the extent of vertical integration,<sup>126</sup> the existence of long-term agreements and strategic alliances,<sup>127</sup> and the extent of countervailing power on the part of buyers<sup>128</sup> — are also considered.

### B *Predatory Pricing*

Although there have been a number of predatory pricing cases (but no predatory buying cases comparable to *Weyerhaeuser*)<sup>129</sup> before the courts in Australia, they have generally failed. The *Boral*<sup>130</sup> case was no exception. However, it added significantly to the understanding of the operation of TPA s 46 and, more generally, it has altered the enquiry process, spurring legislative efforts to make it (allegedly) more commercially realistic by emphasising the significance of the strategic behaviour of firms.

In *Boral*, Boral Besser Masonry Limited ('BBM Ltd'), a subsidiary of Boral Limited, was a supplier of concrete masonry products including concrete masonry blocks, concrete bricks and concrete pavers.<sup>131</sup> At the time of the alleged conduct, industry participants included BBM Ltd and Besser Pioneer Proprietary Limited, each with a national presence, as well as several medium and smaller firms.<sup>132</sup> In 1992, despite the recession which caused the building and construction market in Melbourne to be severely depressed, creating significant excess capacity, a regional producer, C & M Brick (Bendigo) Proprietary Limited ('C & M Ltd'), decided to invest in new technology — a Hess machine — and, in 1993, established a plant in Melbourne that had the capacity to supply a significant proportion of total metropolitan sales.<sup>133</sup> Production began in February 1994 and the fall in prices, already underway,

(1999) 164 ALR 18, 29, 31–3 (Dowsett J); *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158, 178–9, 183 (French J).

<sup>125</sup> See, eg, *Boral* (2003) 215 CLR 374, 398 (Gleeson CJ and Callinan J); *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, 542, 567 (Wilcox, French and Gyles JJ); *Sita Qld Pty Ltd v Queensland* (1999) 164 ALR 18, 31 (Dowsett J); *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158, 170, 179, 181 (French J).

<sup>126</sup> See, eg, *Boral* (2003) 215 CLR 374, 423 (Gleeson CJ and Callinan J), 471 (McHugh J), 493–4, 513 (Kirby J); *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, 561 (Wilcox, French and Gyles JJ); *Sita Qld Pty Ltd v Queensland* (1999) 164 ALR 18, 31 (Dowsett J); *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158, 179 (French J).

<sup>127</sup> See generally *Seven Network Ltd v News Ltd* (2007) ATPR (Digest) ¶46-274.

<sup>128</sup> See, eg, *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442, 528, 530, 538 (Hill J); *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, 542, 561 (Wilcox, French and Gyles JJ); *Boral* (2003) 215 CLR 374, 496 (Kirby J); *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236, 263 (Whitlam, Sackville and Gyles JJ).

<sup>129</sup> 127 S Ct 1069 (2007).

<sup>130</sup> (2003) 215 CLR 374.

<sup>131</sup> *Boral First Instance* (1999) 166 ALR 410, 415–16 (Heerey J). See also *ibid* 395 (Gleeson CJ and Callinan J), 443–4 (McHugh J).

<sup>132</sup> *Boral First Instance* (1999) 166 ALR 410, 413–14 (Heerey J). See also *Boral* (2003) 215 CLR 374, 396–7 (Gleeson CJ and Callinan J), 444–5 (McHugh J).

<sup>133</sup> *Boral First Instance* (1999) 166 ALR 410, 419–20 (Heerey J). See also *Boral* (2003) 215 CLR 374, 446 (McHugh J).

accelerated.<sup>134</sup> Subsequently, BBM Ltd's average price fell below its average avoidable cost and remained there for a period of approximately 23 months.<sup>135</sup> The Australian Competition and Consumer Commission ('ACCC') alleged that this was predatory pricing and was a breach of s 46 of the *TPA*. At first instance, Heerey J found that BBM Ltd did not possess the requisite degree of market power to breach s 46 of the *TPA*,<sup>136</sup> based on a broadly delineated product market.<sup>137</sup> Although on appeal the Full Federal Court overturned this decision,<sup>138</sup> it was subsequently reinstated by the High Court (except in relation to market definition).

There are two interesting features of the judgment for the present purpose. The first relates to establishing the 'tak[ing] advantage' of market power.<sup>139</sup> The competition test proposed by the High Court in *Queensland Wire* as a means of establishing the nexus between market power and its use in engaging in the alleged conduct has the limitation that,<sup>140</sup> without more information, it may be ambiguous. Even in a competitive market, a firm may refuse supply to a customer whose creditworthiness is in doubt. Likewise, cutting prices may be highly competitive or anti-competitive. In *Boral First Instance*, Heerey J imported the business rationale test to address this ambiguity, stating that:

If the impugned conduct has a business rationale, that is a factor pointing against any finding that 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.<sup>141</sup>

This test was further refined in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* on appeal to the Full Federal Court.<sup>142</sup>

Secondly, Heerey J, and later the High Court, accepted the use of the *Brooke Group* tests, although they were not used to determine whether the alleged conduct was predatory so as to make it anti-competitive. Instead, the requirement for recoupment (by raising prices) was used to support findings in relation to market power,<sup>143</sup> and the cost test was used as part of an assessment of whether the alleged conduct was economically rational.<sup>144</sup> In relation to the former, McHugh J stated:

<sup>134</sup> *Boral First Instance* (1999) 166 ALR 410, 422 (Heerey J).

<sup>135</sup> *Ibid* 433 (Heerey J).

<sup>136</sup> *Ibid* 436–40.

<sup>137</sup> *Ibid* 436.

<sup>138</sup> *Australian Competition and Consumer Commission v Boral Ltd* (2000) 106 FCR 328, 379–80 (Beaumont J), 390 (Merkel J), 417 (Finkelstein J).

<sup>139</sup> *TPA* s 46(1).

<sup>140</sup> See above n 107 and accompanying text.

<sup>141</sup> (1999) 166 ALR 410, 440.

<sup>142</sup> (2003) 129 FCR 339, 408–9 (Heerey and Sackville JJ).

<sup>143</sup> *Boral* (2003) 215 CLR 374, 440 (Gaudron, Gummow and Hayne JJ), 462–70 (McHugh J), 502–6 (Kirby J).

<sup>144</sup> *Boral First Instance* (1999) 166 ALR 410, 441–2 (Heerey J).

Engaging in ‘predatory pricing’ is costly to any firm that engages in it, more so to a dominant firm because the loss incurred is the sales volume multiplied by the loss per sale. ... Unless the firm has the power to recoup that loss, it gains no benefit by reducing the number of competitors, and consumers suffer no harm. ... Reducing prices does not per se establish any degree of market power. ... Price reductions are beneficial to consumers unless the quid pro quo is higher prices at a later date. ... Detriment to consumers arises only where competitors are removed *and* prices rise above the competitive equilibrium to levels that allow those remaining to earn supra-competitive profits that enable them to recoup the losses sustained during the price war. Thus, it is the predator’s ability to recoup losses because its price-cutting has removed competition and allowed it and perhaps others to charge supra-competitive prices that harms consumers. Even the removal of competitors is unlikely to have long-term effects on the competition process if the barriers to entry are low. Supra-competitive prices will bring in other suppliers resulting in competition which will force prices down to competitive levels.

Treating recoupment as a fundamental element in determining a claim of ‘predatory pricing’ provides a simple means of applying s 46 without affecting the object of protecting consumer interests. It enables a court to avoid getting into the messy area of cost analysis, examination of various accounting figures and competing expert evidence on the question of what are the relevant costs. A recoupment test requires the court to examine the market structure ...<sup>145</sup>

This implies that it may be unlikely that a violation of s 46 of the *TPA* will be found if the target survives and so prices are not raised, or if there is no prospect of likely recoupment. Of course, the appellant in *Boral* had a market share that varied between 12 and 30 per cent during the relevant period, and was not close to being dominant.<sup>146</sup> One assumes, but cannot be certain, that the Court would have required a showing of likely recoupment in situations where the defendant has a more substantial share, or perhaps the Court would have at least taken that large pre-existing share into account in assessing the likelihood of recoupment.

Right now, the role of recoupment is less certain under the amendments introduced by the *Trade Practices Legislation Amendment Act [No 1] 2007* (Cth). Notwithstanding that the Trade Practices Act Review Committee’s report<sup>147</sup> into the provisions of the *TPA* recommended that no change be made to s 46, on 20 June 2007, a Bill to amend the *TPA* — the Trade Practices Legislation Amendment Bill [No 1] 2007 (Cth) — was tabled in the House of Representatives and from there moved to the Senate. That Bill was subsequently amended to include what has become known as the Birdsville Amendment. One objective of the amendments introduced by the Bill was to provide greater certainty for businesses by specifying factors that could be taken into account in assessing conduct alleged to contravene s 46 of the *TPA*. Consequently, the changes included:<sup>148</sup>

<sup>145</sup> *Boral* (2003) 215 CLR 374, 469–70 (emphasis in original) (citations omitted).

<sup>146</sup> *Boral First Instance* (1999) 166 ALR 410, 438–9 (Heerey J).

<sup>147</sup> Trade Practices Act Review Committee, Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) 88 (‘Dawson Committee’).

<sup>148</sup> See generally Explanatory Memorandum, Trade Practices Legislation Amendment Bill [No 1] 2007 (Cth) 3–4.

- a specific statement to the effect that a firm cannot use its market power for an anti-competitive purpose in the market in which it possesses that power or in any other market;<sup>149</sup>
- a provision that in assessing market power, a court may take account of market power derived from contracts, arrangements or understandings with others;<sup>150</sup>
- a specific recognition that more than one firm in a market may possess substantial market power;<sup>151</sup> and
- a provision that a firm may be found to possess substantial market power even though it is not in a position to control a market.<sup>152</sup>

In relation to predatory pricing, originally, the amendment was to require the courts to have regard to sustained periods of below cost pricing and the reason for the conduct in determining whether a firm with substantial market power has taken advantage of its power. However, due to the addition of the Birdsville Amendment part way through Parliament's consideration of the Bill, the final outcome was rather different. For the first time, the new s 46(1AA) of the *TPA* introduces a specific prohibition of predatory pricing. It prohibits a firm with 'a substantial *share* of a market' from pricing below the cost of supply for 'a sustained period' for an anti-competitive purpose.<sup>153</sup> The changes are significant. The term 'sustained period' is not defined and, unlike the *Brooke Group* tests,<sup>154</sup> there is no requirement to establish the likelihood of recoupment. More significantly, the provision refers to substantial market *share* rather than substantial market power, which suggests an emphasis on market definition and the calculation of market shares.

Arguably, the Birdsville Amendment picks up some of the less attractive features of § 2 of the *Sherman Act* without the checks that make them workable. It appears to change, quite fundamentally, the enquiries that must now be made in relation to predatory pricing and makes irrelevant the learning that came from *Boral*. Worst of all, consumers may be the losers if firms with a large market share respond by withdrawing discounts, such as end-of-season sales and promotional offers, because they are concerned about their exposure.

Section 46 of the *TPA* is starting to look as though it is being held together with sticking plaster — the question of whether this is sustainable may depend on the extent to which Australian courts look to US jurisprudence in deciding how to adapt to the amendments. While recoupment has been eliminated as a

<sup>149</sup> *TPA* s 46(1), as amended by *Trade Practices Legislation Amendment Act [No 1] 2007* (Cth) sch 2 pt 1 cl 1.

<sup>150</sup> *TPA* s 46(3A), inserted by *Trade Practices Legislation Amendment Act [No 1] 2007* (Cth) sch 2 pt 1 cl 2.

<sup>151</sup> *TPA* s 46(3D), inserted by *Trade Practices Legislation Amendment Act [No 1] 2007* (Cth) sch 2 pt 1 cl 2.

<sup>152</sup> *TPA* s 46(3C)(a), inserted by *Trade Practices Legislation Amendment Act [No 1] 2007* (Cth) sch 2 pt 1 cl 2.

<sup>153</sup> *TPA* s 46(1AA) (emphasis added). An anti-competitive purpose includes, and is identical to, the three proscribed purposes under s 46(1): see *TPA* ss 46(1AA)(a)–(c); see also above nn 95–6 and accompanying text.

<sup>154</sup> See above nn 28–9 and accompanying text.



required element of the analysis, it is still possible that it will come back in, perhaps as an element of the purpose analysis. It is simply too soon to tell.

### C Refusal to Deal

Several *TPA* s 46 cases can be portrayed as arising from a refusal to deal. The best known of these is *Queensland Wire*.<sup>155</sup> Others include *Pont Data Australia Pty Ltd v Operations Pty Ltd* ('*Pont Data*'),<sup>156</sup> *NT Power Generation Pty Ltd v Power and Water Authority* ('*NT Power*'),<sup>157</sup> and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* ('*Melway Publishing*').<sup>158</sup> The last of these concerned a publisher of street directories in Melbourne that had a share of around 90 per cent of retail sales in circumstances where barriers to entry were found to be high.<sup>159</sup> Consequently, there was little debate about whether Melway Publishing Proprietary Limited ('Melway') satisfied the threshold test of possessing substantial market power. For many years it had had a policy of segmenting the retail market for street directories, offering, except in the service station segment where there were two competitors, an exclusive supply contract to one wholesale distributor in each segment.<sup>160</sup> For various reasons, a shareholder in one of the exclusive distributors, Robert Hicks Proprietary Limited ('RHP'), sold his shares to the other major shareholder and left that firm to establish an independent business, Beyond Auto Pty Ltd ('Beyond Auto'), wholesaling motor vehicle parts and accessories.<sup>161</sup> For a short period thereafter, the exclusive distributorship to the automotive parts segment of the retail market remained with RHP, but Melway soon terminated that arrangement and appointed Beyond Auto as the new exclusive distributor to the automotive parts segment.<sup>162</sup> Subsequently, when RHP sought a distributorship from Melway, it was refused.<sup>163</sup> It was claimed that in refusing the distributorship Melway had misused its market power for an anti-competitive purpose, forgoing sales of 30 000 to 50 000 directories, something that it would be unlikely to do in a competitive market.<sup>164</sup> At trial, a key consideration in determining whether the necessary nexus between market power and the alleged conduct existed was the claim that the existing distribution arrangements were efficient and that providing the additional dealership would be inefficient because it would damage those arrangements and would result in a mere redistribution of, rather than a net increase in, sales.<sup>165</sup>

<sup>155</sup> (1989) 167 CLR 177. For a discussion of the case: see above Part IV.

<sup>156</sup> (1990) 21 FCR 385.

<sup>157</sup> (2004) 219 CLR 90.

<sup>158</sup> (2001) 205 CLR 1.

<sup>159</sup> *Ibid* 11 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>160</sup> *Ibid* 11–12 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>161</sup> *Robert Hicks Pty Ltd (t/a Auto Fashions Australia) v Melway Publishing Pty Ltd* (1999) 21 ATPR ¶41-668, 42 516–17 (Merkel J).

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid* 42 517–18 (Merkel J).

<sup>164</sup> *Ibid*.

<sup>165</sup> *Ibid*. Merkel J eventually held that Melway's refusal to supply was taking advantage of a substantial degree of market power for a proscribed purpose under s 46(1) of the *TPA*, notwithstanding Melway's claim that it was only implementing its distribution system: *ibid* 42 523–5.

Under ss 45 and 47 of the *TPA* — sections that prohibit anti-competitive contracts, arrangements or understandings, and exclusive dealing — a claimed efficiency objective for the arrangements may overcome a claimed anti-competitive purpose but not effect. Rather, efficiency claims relating to effects would be considered in relation to an application for exemption (an authorisation<sup>166</sup> or notification).<sup>167</sup> This contrasts with the position in relation to § 2 of the *Sherman Act* where efficiency benefits would be used to establish that the alleged conduct was pro-competitive rather than anti-competitive. However, under s 46 of the *TPA*, efficiency benefits from the alleged conduct may be part of the consideration of business rationale.<sup>168</sup> Thus, critical to Heerey J's finding that Melway, in refusing supply and maintaining its exclusive distribution system, had not breached s 46 of the *TPA* was evidence that even when Melway did not possess substantial market power, it had operated the same distribution system early in its history in Melbourne and, more recently, in Sydney where its *Sydney* directory has only a small market share.<sup>169</sup>

Although the plaintiff was successful at first instance, and again by a majority on appeal to the Full Federal Court,<sup>170</sup> the decision was subsequently reversed by a 4:1 majority of the High Court<sup>171</sup> that further clarified the interpretation of s 46 of the *TPA*. First, it reaffirmed that '[i]f Melway was otherwise entitled to maintain its distribution system without contravention of the Act, it is not the purpose of s 46 to dictate to Melway how to choose its distributors.'<sup>172</sup>

Secondly, and more specifically, in relation to 'take advantage',<sup>173</sup> Gleeson CJ, Gummow, Hayne and Callinan JJ stated:

Freedom from competitive constraint might make it possible, or easier, to refuse supply and, if it does, refusal to supply would constitute taking advantage of market power. But 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.<sup>174</sup>

This warning that market power cannot be inferred from conduct is a forerunner to a discussion of this issue in the High Court's majority judgments in *Boral*.<sup>175</sup>

<sup>166</sup> See generally *TPA* pt VII div 1.

<sup>167</sup> See generally *TPA* pt VII div 2.

<sup>168</sup> See, eg, above n 141 and accompanying text.

<sup>169</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128, 134 (Heerey J). A majority of the High Court 'preferred' the reasoning of Heerey J: see *Melway Publishing* (2001) 205 CLR 1, 26 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>170</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128, 142 (Sundberg J), 147 (Finkelstein J). Heerey J dissented: at 137.

<sup>171</sup> *Melway Publishing* (2001) 205 CLR 1, 29 (Gleeson CJ, Gummow, Hayne, Callinan JJ). Kirby J dissented: at 48–9.

<sup>172</sup> *Ibid* 13 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>173</sup> *TPA* s 46(1).

<sup>174</sup> *Melway Publishing* (2001) 205 CLR 1, 27.

<sup>175</sup> See above n 121 and accompanying text.

Thirdly, the High Court did not reject in principle the ACCC's submission that 'there would be a breach of [TPA] s 46 if the market power which a corporation had, made it easier to act for the proscribed purpose than otherwise would be the case.'<sup>176</sup> Rather, it concluded that this was not relevant given the facts of the case, but it left the door open for the adoption of such an approach in the future.<sup>177</sup>

Fourthly, in one important respect the High Court in *Melway Publishing* again created uncertainty about the competition test. Gleeson CJ, Gummow, Hayne and Callinan JJ stated:

Bearing in mind that the refusal to supply the respondent was only a manifestation of Melway's distributorship system, the real question was whether, without its market power, Melway *could* have maintained its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market.<sup>178</sup>

Similarly, in *Rural Press Ltd v Australian Competition and Consumer Commission* ('*Rural Press*'), the High Court again assessed the alleged taking advantage in terms of what a firm *could* do in a *competitive* market.<sup>179</sup> As a firm in a competitive market could engage in irrational conduct, this suggests a very high hurdle for establishing when a firm has used its market power to engage in particular conduct. However, if this is qualified by the requirement that the firm aims to maximise profits, that is, it is rational, then *could* and *would* conflate.

Refusal of access to the services of a natural monopoly facility could be found to violate s 46 of the *TPA* because the facility owner has the purpose of preventing competition with its downstream operations. This was the case in *NT Power*.<sup>180</sup> However, redress via s 46 of the *TPA* is problematic — arguably, the purpose is to maximise profits rather than directly being anti-competitive; lengthy litigation may 'kill' the potential competition; and the orders sought from the court are likely to require the setting of the price of access, as was the case in *Pont Data*.<sup>181</sup> However, these problems may be avoided by seeking a declared right to negotiate access under Part IIIA of the *TPA*, introduced in 1995 following the report delivered by the Independent Committee of Inquiry into National Competition Policy.<sup>182</sup> This grants, subject to certain conditions, a firm seeking access to the services of a facility which it is not economic to duplicate — essentially a natural monopoly — a right to negotiate access to the service of the facility. Following declaration of such a right, failure to successfully negotiate terms of access may result in those terms being arbitrated.<sup>183</sup> Under Part IIIA of the *TPA*, the aim is to promote competition in adjacent markets to the market in

<sup>176</sup> *Melway Publishing* (2001) 205 CLR 1, 28 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid* 26 (emphasis added).

<sup>179</sup> (2003) 216 CLR 53, 76 (Gummow, Hayne and Heydon JJ).

<sup>180</sup> (2004) 219 CLR 90. For a discussion of the case: see below Part IV(E)(2).

<sup>181</sup> (1990) 21 FCR 385.

<sup>182</sup> See generally Independent Committee of Inquiry into National Competition Policy, Australia, *National Competition Policy* (1993) 239–68.

<sup>183</sup> See generally *TPA* pt IIIA div 3.

which the bottleneck facility is located, and monopolistic pricing or discriminatory pricing may prevent this.

#### D *Exclusive Dealing Contracts*

As with the *Sherman Act*, exclusionary conduct may be considered under more than one section of the *TPA*. Instead of assessing the conduct under s 46 of the *TPA*, if it can be established that there was a contract, arrangement or understanding in relation to the alleged conduct, that conduct may be assessed under ss 45 or 47 of the *TPA* with the result that the relevant competition test is whether the alleged conduct ‘has the purpose, or has or is likely to have the effect, of substantially lessening competition’.<sup>184</sup> Alternatively, even where parties have entered into a contract, arrangement or understanding, if one party has acted unilaterally, the conduct may still be assessed under s 46 of the *TPA*. Thus, *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (‘*Stirling Harbour*’)<sup>185</sup> and *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (‘*Baxter Healthcare*’)<sup>186</sup> were each assessed under ss 46 and 47 of the *TPA*, while Melway’s arrangements with its distributors were exclusive and, as noted earlier, could have been assessed under s 47 of the *TPA*, but were actually assessed under s 46.<sup>187</sup>

##### 1 *Stirling Harbour*<sup>188</sup>

*Stirling Harbour* concerned the award of an exclusive licence by the Bunbury Port Authority (‘BPA’) to supply harbour towage services to the regional Port of Bunbury. From 1986, Stirling Harbour Services Proprietary Limited (‘SHS’) supplied towage services in the Port of Bunbury under a licence which had a term of 14 years.<sup>189</sup> The licence was non-exclusive but there had been no other supplier of towage services in the port for at least 10 years.<sup>190</sup> In July 1999, the BPA called for tenders for an *exclusive* supply contract for towage services for a period of five years (extendable by a further two years on the exercise of an option).<sup>191</sup> SHS failed to secure the contract and subsequently claimed that the granting of an exclusive contract for the supply of towage services was anti-competitive — first, because it involved a misuse of the BPA’s substantial market power,<sup>192</sup> and secondly, because the contract had the purpose or likely effect of substantially lessening competition.<sup>193</sup> The primary focus at trial was on

<sup>184</sup> *TPA* ss 45(2)(a)(ii), 47(10)(a).

<sup>185</sup> (2000) 22 ATPR ¶41-752.

<sup>186</sup> (2005) 27 ATPR ¶42-066.

<sup>187</sup> See above Part IV(C).

<sup>188</sup> (2000) 22 ATPR ¶41-752.

<sup>189</sup> *Ibid* 40 700–1 (French J).

<sup>190</sup> *Stirling Harbour Services Pty Ltd (ACN 008 767 600) v Bunbury Port Authority* (2000) 22 ATPR ¶41-783, 41 266 (Burchett and Hely JJ).

<sup>191</sup> *Stirling Harbour* (2000) 22 ATPR ¶41-752, 40 704 (French J).

<sup>192</sup> SHS claimed that the BPA’s misuse of market power was in contravention of s 46 of the *TPA* (which prohibits a corporation with substantial power in a market from taking advantage of that power for any one of three proscribed purposes): see *ibid* 40 710–11 (French J).

<sup>193</sup> SHS claimed that the exclusive towage agreement was in contravention of s 45 of the *TPA* (which prohibits contracts, arrangements or understandings which have the purpose or likely

the latter. However, French J did consider whether the exercise of statutory market power in the public interest could be a breach of s 46 of the *TPA*. First, his Honour accepted that:

the BPA contention is correct that the exercise by it of a statutory power to licence the provision of towage services in the Port of Bunbury is not an exercise of market power but rather the discharge of a regulatory function conferred upon it by the legislature in the public interest.<sup>194</sup>

His Honour went on:

the fact that the conduct of a statutory body is supported by statutory authority will not necessarily take it out of the scope of s 46. Without exploring the limits of the exempting characteristic it is sufficient in my opinion to say that the grant of a statutory licence under an express power granted by the Parliament is well within it.<sup>195</sup>

Furthermore, French J found that the BPA did not have an anti-competitive purpose for its conduct.<sup>196</sup> These views of the trial judge were upheld by a majority on appeal to the Full Federal Court.<sup>197</sup> The matter was not considered by the High Court.

## 2 Baxter Healthcare<sup>198</sup>

*Baxter Healthcare* also involved exclusive supply arrangements, although the primary focus was on bundling. In the early 1990s, Baxter Healthcare Proprietary Limited ('Baxter') had emerged as the only Australian supplier of large volume parenteral ('LVP') fluids, a product essential to hospitals.<sup>199</sup> It produced and supplied a number of other products, including peritoneal dialysis ('PD') fluids used for kidney dialysis, and in relation to these products faced competition from domestic and imported products.<sup>200</sup> Baxter entered into a number of long-term contracts with various state and territory authorities. In the proceedings these authorities were collectively described as State Purchasing Authorities ('SPAs'). Baxter contracted with such authorities in New South Wales, the Australian Capital Territory, Western Australia, South Australia and Queensland.

effect of substantially lessening competition) or s 47 of the *TPA* (which prohibits the imposition of certain conditions — essentially of a vertical nature — where to do so has the purpose or likely effect of substantially lessening competition): see *Stirling Harbour* (2000) 22 ATPR ¶41-752, 40 710 (French J).

<sup>194</sup> *Stirling Harbour* (2000) 22 ATPR ¶41-752, 40 734 (French J).

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Stirling Harbour Services Pty Ltd (ACN 008 767 600) v Bunbury Port Authority* (2000) 22 ATPR ¶41-783, 41 276-7 (Burchett and Hely JJ). Carr J decided that the BPA, in granting the exclusive licence, was exercising market rather than regulatory power but agreed with Burchett and Hely JJ that there was no breach of s 46 of the *TPA*: at 41 282-3.

<sup>198</sup> (2005) 27 ATPR ¶42-066.

<sup>199</sup> *Ibid.* 42 977, 42 986-7 (Allsop J).

<sup>200</sup> *Ibid.* 42 978, 42 987 (Allsop J). Gambro Proprietary Limited, an Australian subsidiary of a Swedish company, initially operated a plant in Australia but later entered into a tolling arrangement with Baxter for some products and imported the balance: at 43 012 (Allsop J). Fresenius Medical Corporation Proprietary Limited, an Australian subsidiary of a German company, had planned an Australian plant but did not proceed with this, instead importing product: at 43 013-14 (Allsop J).

Although the SPAs required those tendering to submit item-by-item offers, there was provision for non-conforming offers. The latter enabled Baxter to submit offers for joint or bundled supply of a group of products, including LVP and PD fluids, at what appeared to be very substantial discounts, discounts that increased for longer contracts, on condition that they became exclusive suppliers.<sup>201</sup> Over the period from 1998, Baxter won the supply contracts offered by the various SPAs based on its bundled offer, leaving its competitors in PD with a very small share of PD sales.<sup>202</sup>

The ACCC claimed that Baxter had substantial market power as a consequence of its monopoly in the supply of LVP fluids. Then, by bundling LVP and other fluids, competing suppliers of PD fluids were excluded from the market because to win a contract to supply PD they would not only have to match the discounts offered by Baxter on PD, they would have to compensate the SPA for the loss of the discounts applicable to LVP fluids that they would still have to source from Baxter. Thus, Baxter was alleged to have contravened s 46 of the *TPA* by using its market power in the supply of LVP fluids to harm competitors in the market for, and damage competition in, the supply of PD fluids.<sup>203</sup>

At first instance, Allsop J found that Baxter did possess substantial market power in the Australian market for sterile fluids.<sup>204</sup> However, with the exception of one particular offer made in South Australia ('Offer 1A'), his Honour did not find that Baxter had taken advantage of its market power in tendering for SPA supply contracts. In relation to Offer 1A, his Honour found that Baxter in effect had supplied PD free of charge and that this was conduct that a firm without substantial market power could not have engaged in.<sup>205</sup> Accordingly, a misuse of market power was found because his Honour concluded that the 'point blank refusal to give a discount for volume in Offer 1A on sterile fluids' when the South Australian authorities requested it would not have occurred had the market been competitive.<sup>206</sup>

Critical to Allsop J's decision concerning 'take advantage' seems to be the statement that 'the bids were structured in a way that conformed to what was requested by the controllers of the tender (save for Offer 1A in [South Australia]).'<sup>207</sup> His Honour identified two evidentiary impediments to a finding that Baxter had taken advantage of its market power. The first was the lack of evidence to establish that Baxter did not take seriously the threat of competition from imported sterile fluids to be produced by B Braun Australia Proprietary Limited in Penang, Malaysia and for which regulatory approval for sale in

<sup>201</sup> Some contracts were awarded with an allowance of up to 10 per cent of PD products to be purchased from other suppliers: see *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2006) 153 FCR 574, 582–3 (Mansfield, Dowsett and Gyles JJ).

<sup>202</sup> *Baxter Healthcare* (2005) 27 ATPR ¶42-066, 42 998–43 010 (Allsop J).

<sup>203</sup> *Ibid* 42 974–80 (Allsop J). The same conduct was claimed by the ACCC to contravene s 47 of the *TPA*: at 42 980–2 (Allsop J).

<sup>204</sup> *Ibid* 43 047–9 (Allsop J). 'Sterile fluids' was used throughout the proceedings to refer to LVP fluids together with parenteral nutrition ('PN') fluids and irrigating solutions ('IS') fluids: at 42 974 (Allsop J).

<sup>205</sup> *Ibid* 43 049–51 (Allsop J).

<sup>206</sup> *Ibid* 43 050 (Allsop J).

<sup>207</sup> *Ibid*.

Australia had been obtained for 80 per cent of the range.<sup>208</sup> In other words, the market was competitive and nevertheless, Baxter chose to engage in bundling. As such, it failed the competition test. The second evidentiary deficiency was the ‘absence of analysis of the item-by-item prices as monopoly prices, not being ones capable of being charged in a market in which Baxter did not have a substantial degree of market power.’<sup>209</sup> This led Allsop J to the conclusion that ‘it is therefore difficult to conclude that those prices could not have been offered as an alternative in circumstances where Baxter did not have a substantial degree of power in the sterile fluid market prices.’<sup>210</sup> Indeed, it was unclear from the evidence whether the item-by-item prices were inflated or the bundled offers were discounted — the former would imply no profit sacrifice; had the latter been the case, the *Brooke Group* cost and recoupment tests could have been applied.

The grounds for appeal to the Full Federal Court were limited to consideration of whether Baxter’s dealings with the SPAs were protected by the shield of the Crown.<sup>211</sup> This same question was subsequently taken on appeal to the High Court which found that Baxter’s conduct was amenable to ss 46 and 47 of the *TPA* even though the corresponding conduct of each of the SPAs, which were either state or territory manifestations of the Crown,<sup>212</sup> was not so amenable because their conduct was not in the course of carrying on a business.<sup>213</sup>

### E *Dirty Tricks*

There do not appear to be any Australian cases that clearly fit this category. As observed above, this may reflect differences in the statutory requirements compared with the US — in particular, the failure of s 46 of the *TPA* to extend to an attempt to monopolise and the need for a causal link between market power and the alleged conduct. However, *Rural Press* and *NT Power* are cases that do not fit comfortably into the previous categories and so are discussed below.

#### 1 *Rural Press*<sup>214</sup>

Rural areas, essentially divided by municipal boundaries, tend to have one regional newspaper. This reflects the limited number of businesses seeking advertising space and the limited readership. The two relevant regions in South Australia were: the Murray Bridge area, which included the township of Mannum, and was the prime circulation area for the *Murray Valley Standard* (‘*Standard*’), published by Bridge Printing Office Proprietary Limited (‘Bridge Pty

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2006) 153 FCR 574, 586–99 (Mansfield, Dowsett and Gyles JJ).

<sup>212</sup> The Crown in right of the states and territories is only bound by pt IV of the *TPA* ‘so far as [it] carries on a business’: see *TPA* s 2B(1)(a).

<sup>213</sup> *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 237 ALR 512, 533 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Kirby J agreed with this conclusion: at 550–1. Callinan J dissented, finding that Baxter had a derivative immunity stemming from the SPAs’ exclusion from the provisions of the *TPA*: at 556–8.

<sup>214</sup> (2003) 216 CLR 53.

Ltd'), a subsidiary owned by Rural Press Limited; and the Riverland area, which was the circulation area for the *River News*, published by Waikerie Printing House Pty Ltd ('Waikerie Pty Ltd').<sup>215</sup> Following a rearrangement in local district council boundaries in 1997, the Mid Murray Council was established.<sup>216</sup> As a result, the district council of Mannum and other adjacent areas serviced by their own district councils were subsumed within the Mid Murray Council. The vast majority of the area of the Mid Murray Council included areas that were in the prime circulation area for the *River News*.<sup>217</sup> The exception was Mannum which, although now part of the Mid Murray Council area, was part of the main circulation area for the *Standard*. Waikerie Pty Ltd, which thought it prudent to begin publishing news, local government notices and advertisements for the entire Mid Murray Council area, decided to expand its circulation into Mannum.<sup>218</sup> For a period, Bridge Pty Ltd encouraged Waikerie Pty Ltd to withdraw from what it saw as its circulation area in Mannum, but ultimately issued a threat that it would enter Waikerie Pty Ltd's primary distribution area with a free newspaper — the *Standard* and *River News* were both subscription papers — if Waikerie Pty Ltd did not withdraw from Mannum.<sup>219</sup> Following this, it was alleged that Waikerie Pty Ltd entered into an agreement with Bridge Pty Ltd that it would withdraw from — not compete in — Mannum.<sup>220</sup>

Although Mansfield J concluded that Rural Press Limited and Bridge Pty Ltd had contravened s 46 of the *TPA* by making conditional threats,<sup>221</sup> on appeal, the Full Federal Court reversed this on the grounds that Rural Press Limited and Bridge Pty Ltd could have credibly threatened to enter the Riverland market, and could actually have entered it without substantial market power.<sup>222</sup> The High Court, by majority, upheld the Full Court's decision on s 46 of the *TPA* largely, it seems, because of the failure to successfully establish the causal relationship between market power and the alleged conduct.<sup>223</sup> Of some significance, however, was the statement that:

The words 'take advantage of' ... do not encompass conduct which has the purpose of protecting market power, but has no other connection with that market power. ... The conduct of 'taking advantage of' a thing is not identical with the conduct of protecting that thing. To reason that Rural Press and Bridge took advantage of market power because they would have been unlikely to have engaged in the conduct without the 'commercial rationale' — the purpose — of

<sup>215</sup> Ibid 64–5 (Gummow, Hayne and Heydon JJ).

<sup>216</sup> *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) 23 ATPR ¶41-804, 42 719 (Mansfield J).

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid 42 720–6 (Mansfield J). See also *Rural Press* (2003) 216 CLR 53, 66–7 (Gummow, Hayne and Heydon JJ).

<sup>220</sup> *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) 23 ATPR ¶41-804, 42 728 (Mansfield J).

<sup>221</sup> Ibid 42 739–43.

<sup>222</sup> *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236, 279 (Whitlam, Sackville and Gyles JJ).

<sup>223</sup> *Rural Press* (2003) 216 CLR 53, 76–8 (Gummow, Hayne and Heydon JJ). Gleeson CJ and Callinan JJ agreed with the joint reasons of Gummow, Hayne and Heydon JJ: at 60. Kirby J dissented: at 98–105.



protecting their market power is to confound purpose and taking advantage. If a firm with market power has a purpose of protecting it, and a choice of methods by which to do so, one of which involves power distinct from the market power and one of which does not, choice of the method distinct from the market power will prevent a contravention of s 46(1) from occurring even if choice of the other method will entail it.<sup>224</sup>

This highlights the fact that protecting market power will not offend the 'take advantage' provision of s 46(1) of the *TPA* if a firm does so by competing vigorously, for example, by improving the firm's offering and/or reducing costs and passing the savings on to consumers. As noted above, *Rural Press* further raised uncertainty in relation to the meaning of 'take advantage'.<sup>225</sup>

## 2 NT Power<sup>226</sup>

NT Power Generation Proprietary Limited ('NTPG') tried to gain access to the services provided by certain infrastructure assets — the electricity transmission grid — operated by the Power and Water Authority ('PAWA') so that it could compete in the retail electricity market in the Northern Territory.<sup>227</sup> No access regime existed at the time of the conduct, although such a regime was supposed to come into operation from April 2000.<sup>228</sup> Access was refused, forcing NTPG to delay entry into the electricity market until the access regime came into operation. PAWA claimed that in refusing access it was exercising a statutory power rather than market power, and was constrained by knowledge that an access regime would soon come into effect. The trial judge, Mansfield J, found that at the relevant time, PAWA was unconstrained by the prospect of an access regime and that it was exercising market power rather than statutory power because the refusal of access

is not designed to achieve, by regulation, any specific public purpose of the legislature identified in the legislation. The maintenance and operation of PAWA's infrastructure is clearly one of its functions, and its conduct in doing so clearly serves the public interest. But the issue of access to PAWA's infrastructure for the purpose of enabling third parties to participate in the electricity supply market is not one which is dealt with by an express licensing power. ... PAWA is not merely the monopoly supplier of infrastructure services but is a participant in the electricity supply market. ... It was in a position to charge for those services. ... In making the decision whether to grant access, it was a commercial judgment rather than a regulatory judgment which was being made.<sup>229</sup>

Nevertheless, Mansfield J at trial,<sup>230</sup> and later a majority of the Full Federal Court,<sup>231</sup> found that PAWA was protected by the shield of the Crown, a view that was rejected on appeal to the High Court.<sup>232</sup>

<sup>224</sup> *Ibid* 76 (Gummow, Hayne and Heydon JJ).

<sup>225</sup> *TPA* s 46(1).

<sup>226</sup> (2004) 219 CLR 90.

<sup>227</sup> *Ibid* 97–8 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>228</sup> *Ibid* 107–8 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>229</sup> *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481, 555–6 (Mansfield J).

<sup>230</sup> *Ibid* 544–9.

On appeal to the Full Federal Court, Finkelstein J addressed the issue of the hypothetical competitive market used to assess 'tak[ing] advantage'.<sup>233</sup> His Honour constructed a hypothetical competitive market on the assumptions that:

- 1 PAWA had the capacity to allow its infrastructure to be used by third parties;
- 2 there was at least one firm which had similar infrastructure and was located in the relevant geographic region and this firm had the capacity on its infrastructure that could be made available to third parties; and
- 3 there was a high risk that PAWA would lose business to an effective competitor.<sup>234</sup>

From this his Honour concluded:

A profit maximising firm in a competitive market (we are now speaking of the transmission and distribution markets) would not stand by and allow a competitor to supply the third party with distribution and transmission facilities. At least it would make a bid for that business. PAWA, however, is faced with this difficulty. If it were to permit access to its facilities it would open the door for the third party to become its competitor in the electricity supply market where it could take business from PAWA. Would that be a reason why a rational firm would deny access to its infrastructure as a means of protecting its downstream business? The answer must be no. 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? In my view 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.<sup>235</sup>

A majority of the High Court rejected PAWA's claim that it was exercising a property right rather than market power, stating that property rights, including intellectual property rights, can be a source of market power.<sup>236</sup> PAWA also claimed that Finkelstein J's hypothetical market was flawed because it was based on unrealistic assumptions. The High Court's response was robust:

It can be necessary, in assessing what would happen in competitive conditions, to make assumptions which are not only contrary to the present fact of uncompetitive conditions, but which would be unlikely to be realised if the monopo-

<sup>231</sup> *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399, 403–5 (Lee J), 414–22 (Bowen J). Finkelstein J dissented on this point: at 430–5.

<sup>232</sup> *NT Power* (2004) 219 CLR 90, 108–23 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>233</sup> *TPA* s 46(1).

<sup>234</sup> *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399, 449 (Finkelstein J).

<sup>235</sup> *Ibid* 450.

<sup>236</sup> *NT Power* (2004) 219 CLR 90, 136 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

list were left free to operate as it wished. But s 46 and other provisions of pt IV were introduced in order to stop monopolists being entirely free to act as they wish. If the difficulties in making assumptions were to prevent them from being made, possessors of market power that was hard to erode would be shielded from the Act. That would defeat its purpose.

If, as PAWA urges, the assumption that an alternative infrastructure was available is not made, the most realistic assumption to be made about a market in which PAWA would not have a substantial degree of power is a market in which PAWA was subject to a legislatively created duty to give immediate access. On that assumption, PAWA would not have refused access, which demonstrates that in the actual world of 1998 it took advantage of market power, since it was only the assumed legislation that forestalled the existence of market power.<sup>237</sup>

## V CONCLUSIONS

At least on the surface, § 2 of the *Sherman Act* and s 46 of the *TPA* are very different statutory provisions. The US statute prohibits monopolisation and attempted monopolisation whereas the Australian statute deals with the use of market power for a proscribed purpose. Therefore, in the US, at least in principle, one need not have significant market power at the time of the alleged anti-competitive acts to be found liable so long as the acts do, or are likely to, result in monopoly. Similarly, while the acts need to be anti-competitive — something other than competition on the merits — they do not need to involve the use or misuse of market power.

For refusals to deal and exclusionary contracts or similar arrangements, such as bundling, the distinctions are probably not significant. It would be rare that refusals to deal or exclusionary contracts or similar arrangements would have any significant consequences in the absence of existing substantial market power. Moreover, it would not be hard to characterise either category as a use of market power. Hence, so long as the conduct is not treated as competition on the merits, and so long as it has the requisite effect of suppressing competition and, therefore, reinforcing or enhancing existing monopoly power, it should be actionable under either statute. While Australian case law (especially *Queensland Wire*)<sup>238</sup> may at the moment be more plaintiff-friendly, this is more the result of the evolution of US jurisprudence (for better or worse) than a consequence of different statutory language.

For dirty tricks, there is clearly some potential for disparate treatment as illustrated by French J's hypothetical of the arsonist that is not using its existing market power when it sets fire to its competitors' factories (and indeed may not even have substantial market power when it sets out on its quest to eliminate its competitors).<sup>239</sup> In any event, the history of the application of § 2 of the *Sherman Act* suggests few cases of bad behaviour by a large firm that, perhaps with some stretching, could not be fitted into the '[m]isuse of market power' pigeonhole.<sup>240</sup>

<sup>237</sup> Ibid 144 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>238</sup> (1989) 167 CLR 177.

<sup>239</sup> See above n 88 and accompanying text.

<sup>240</sup> *TPA* s 46.

For predatory pricing, the potential for disparate treatment under the two statutes was significant prior to *Boral*.<sup>241</sup> As one of the authors testified at the time, if the test for the existence of substantial market power is whether BBM Ltd was constrained by its competitors from acting independently with respect to price, BBM Ltd clearly did not have market power.<sup>242</sup> The period leading up to the alleged predatory episode was one in which BBM Ltd was beset by competition. It had tried several times to restore prices to previous (presumably profitable) levels but its efforts were unsuccessful due to the intense competition brought about by C & M Ltd's entry into the market. Indeed, even if we assume BBM Ltd's purpose was impure and that that purpose was to achieve market power, that is precisely because it did not have it (in the conventional sense of being able to profitably sustain prices above the competitive level) at the time.

As discussed, the High Court neatly finessed the problem by taking a long run view of the meaning of market power and declaring that the existence of a reasonable prospect of BBM Ltd recouping its short-term losses with subsequent monopoly profits could be used to establish the requisite market power to trigger the application of s 46 of the *TPA*. Perhaps not pretty, but effective. So, before the Birdsville Amendment, it was not at all certain that there was any significant difference in the approach to predatory pricing. This will not satisfy all of those who are concerned about the potential fate of small (and presumably higher cost) businesses when the big firms get caught up in a price war, but that is a cause that the US courts have quite intentionally abandoned for reasons having little to do with the language of the statute. The Birdsville Amendment, however, has the potential to recreate a significant difference in the two jurisdictions' approach to predatory pricing (and, possibly, predatory buying as well).

Aside from the possible differences in the approach to predatory pricing that may be created by the Birdsville Amendment, what are the significant differences between § 2 of the *Sherman Act* and s 46 of the *TPA*? We suggest that the differences are more in the nature of process than substance. A glance at a typical *Sherman Act* § 2 opinion in the US, once markets have been defined, indicates that the almost sole focus of the analysis is on whether the alleged acts of monopolisation (or attempted monopolisation) should be characterised as 'competition on the merits' on the one hand or 'anti-competitive' on the other. That is done in the context of the specific industry in which the alleged conduct occurs but there is scant reference to the language of the Act. Australian courts, in contrast, are seemingly required to analyse the conduct with constant reference to the words of the statute — does the firm have substantial market power, has it used its market power and was the power used for a proscribed purpose? How much easier it would be to simply decide whether the defendant acted in an anti-competitive way to achieve or enhance its market power. And not only would opinions be simpler, the potential for mistakes would be substantially less, perhaps as evidenced by the frequency with which decisions of the Federal Court of Australia are overturned by the Full Court of the Federal Court of Australia

<sup>241</sup> (2003) 215 CLR 374.

<sup>242</sup> Hay, '*Boral* — Free at Last', above n 18, 327.

and, further still, decisions of the Full Court are overturned by the High Court of Australia.<sup>243</sup>

Having said that, we are not prepared to suggest a redrafting of the *TPA* along US lines (except possibly to reject the Birdsville Amendment). While, if we could write the legislation and guarantee that it would be enacted exactly as drafted, there is some potential for improvement (even if only shorter and clearer opinions), the political reality is that once one cranks up the legislative sausage machinery, there is no guarantee of what might come out the other end. Moreover, Australian courts are clearly alert to the substantial shift of US courts to the right — that is, defendant-friendly — and have shown themselves adept at working within the statutory framework to obtain desirable outcomes. Professor Higgins may have succeeded in effecting significant changes in *Eliza Doolittle*, but not without cost to his own way of life. Perhaps it is better to let well enough alone.

<sup>243</sup> This is not to suggest that US courts never make mistakes. There are many trial court or appellate court decisions that are overturned, but this is very likely due largely to the system of trial by jury. When a trial court decision is overturned it is normally because the appellate court thinks that the trial judge did not do enough to limit the discretion of the jury to find in favour of the plaintiff.