HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

BORAL BESSER MASONRY LIMITED
(now Boral Masonry Ltd) APPELLANT

AND

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION RESPONDENT

Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission
[2003] HCA 5
7 February 2003
M1/2002

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court dated 27 February 2001, and in place thereof order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

A C Archibald QC with C M Maxwell QC and I B Stewart for the appellant (instructed by Blake Dawson Waldron)

N J Young QC with D Shavin QC, M J Crennan SC and P M Tate for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission

Trade practices – Restrictive trade practices – Misuse of market power – Predatory pricing – Market definition – Concrete masonry products market – Close substitutability – Whether appellant had substantial degree of market power – Recoupment of losses – Analysis of market structure – Market share – Barriers to entry – Whether barriers to entry created by practices and policies of incumbent firms – Pricing behaviour – Increase in supply capacity – Whether taking advantage of a substantial degree of market power for a proscribed purpose – Legislative purpose of *Trade Practices Act* 1974 (Cth) – Relevance of market economic conditions – Relevance of purpose of damaging a competitor – *Trade Practices Act* 1974 (Cth), s 46(1), (3).

Words and phrases – "market power", "predatory pricing", "barriers to entry".

Trade Practices Act 1974 (Cth), s 46(1), (3).

1 GLEESON CJ AND CALLINAN J. This appeal concerns the application of s 46 of the *Trade Practices Act* 1974 (Cth) ("the Act") to the conduct of the appellant in relation to the supply of concrete masonry products ("CMP") in Melbourne between April 1994 and October 1996. The central issues are whether the appellant had a substantial degree of power in a market, and whether it took advantage of that power in contravention of s 46.

2 Section 46 provides, so far as is relevant:

> "(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
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> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
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> (b) preventing the entry of a person into that or any other market; or
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> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
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> …
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> (3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
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> (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
>
> (b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.
>
> (4) In this section:
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> (a) a reference to power is a reference to market power;
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> (b) a reference to a market is a reference to a market for goods or services; and
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> (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either

as a supplier or as an acquirer of goods or services in that market."

3 The provisions of ss 4E and 4F(1)(b) should also be noted. They are as follows:

"4E For the purposes of this Act, unless the contrary intention appears, 'market' means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

4F (1) For the purposes of this Act:

…

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason."

4 The appellant was formerly named Boral Besser Masonry Limited, and has been referred to throughout the proceedings as BBM. It is a subsidiary of Boral Concrete Products Pty Ltd, which in turn is a subsidiary of Boral Limited ("Boral"). Boral was the holding company of a large group operating in the areas of building and construction materials, and energy. Group revenue for the year ended 30 June 1995 was $4.9 billion. BBM operated in New South Wales and Western Australia, as well as Victoria.

5 The respondent, the Australian Competition and Consumer Commission ("the ACCC"), took proceedings in the Federal Court of Australia against Boral and BBM. The proceedings were heard before Heerey J, who found in favour of both Boral and BBM, and dismissed the application[1]. There was an appeal to the Full Court of the Federal Court, but ultimately the appeal was pressed only in relation to BBM. The Full Court (Beaumont, Merkel and Finkelstein JJ) allowed

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1 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410.

the appeal, found that BBM had contravened s 46, and ordered that the matter be remitted to the trial judge for further hearing on the question of relief[2]. BBM now appeals to this Court against that decision.

6 Since the case is about market power, and alleged illegal use of that power, it is necessary to begin by examining the nature of the market, and the detail of the conduct of BBM which is said to have contravened the Act.

Concrete masonry products

7 The concrete masonry products of present relevance are blocks, bricks and pavers. Such products are manufactured from cement, sand, stone aggregate, and water; all raw materials that are readily available in Melbourne. The process of manufacture is relatively simple, and the products are not the subject of patent, copyright, or any other form of intellectual property. With limited exceptions, they are not sold under trade marks or brand names. Heerey J described them as being, in essence, a commodity.

8 Masonry blocks come in a range of sizes, the most common being referred to as 10.01, 15.01, and 20.01. Such blocks are used as a building material for the construction of walls in commercial buildings, or where aesthetic appearance is not important. It was found convenient to take the 15.01 block as a standard basis of comparison of prices.

9 Masonry bricks are made in one size only, which is the same size as a standard clay house brick. Bricks are primarily used as a material for the construction of walls, particularly in residential housing.

10 Pavers are made in a range of sizes. They are designed for use as an external pavement, and are commonly used around domestic residences and commercial buildings.

11 There are also retaining wall products which are used for landscaping external areas around residences, commercial buildings, public parks, and along roadways for retaining earth and stopping erosion.

12 The evidence showed that there were a number of alternative products available to the building and construction industry for use instead of CMP. They included tilt-up and precast panels, plasterboard, and clay bricks. There were also paving alternatives. Heerey J found that BBM and other concrete masonry

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2 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328.

manufacturers regularly monitored products which threatened to take sales away from CMP, and formulated strategies to capture sales from other products. BBM strategic business plans showed an awareness of a constant threat from such competing products. The availability of those products was a significant factor in the pressure which customers for CMP were able to apply to suppliers, as evidenced in the price war referred to below.

Suppliers of concrete masonry products

13 Other significant suppliers of CMP in Melbourne were as follows.

14 Besser Pioneer Pty Ltd ("Pioneer") was a subsidiary of Pioneer International Limited, the holding company of another large Australian group. Pioneer manufactured concrete masonry blocks, bricks and pavers in Victoria at a plant in Melbourne.

15 C & M Brick (Bendigo) Pty Ltd, and a related company, (collectively called "C & M") had for many years manufactured CMP at Bendigo. In 1993, C & M established a concrete masonry plant at Campbellfield on the northern outskirts of Melbourne. It commenced full-scale production of concrete bricks and pavers at Campbellfield in February 1994. It commenced the production of concrete blocks later. C & M was a highly efficient producer, partly because it had a new Hess machine which was said to be state of the art. The commencement by C & M of production at Melbourne was regarded by its competitors (rightly, as things turned out) as a serious threat.

16 Rocla was the trading name of Amatek Ltd, which was part of the large BTR Nylex group. Partly as a result of the price war to which reference will be made below, Rocla ceased to manufacture concrete blocks in Victoria in September 1993 (several months before the commencement of the allegedly contravening conduct of BBM). It ceased the manufacture in Victoria of its remaining concrete masonry products in August 1995.

17 Budget Bricks & Pavers Pty Ltd ("Budget") was a private company which operated a plant for the manufacture of CMP at Springvale. It ceased operations in June 1996.

18 Before 1992, BBM's share of concrete masonry sales had been more than 30 per cent. Heerey J found that in January 1992 BBM's share had fallen to 12 per cent, but by 1993 it had risen again to 30 per cent. From 1994 to 1996 (the period of the alleged contravention) it stayed consistently at 25 to 30 per cent. BBM did not increase its market share over the period of its alleged predatory pricing.

19 Over the whole of the relevant period, Pioneer's share of sales of CMP in Melbourne was assessed by BBM at about 25 per cent. Rocla's share, until it left the market in 1995, was assessed at about 22 per cent. Budget's share at the time it left the market in June 1996 was about 7 per cent. It had been at or below that level for 3 years.

20 The new entrant, C & M built up its market share substantially. Heerey J found that, by late 1995, C & M accounted for about 40 per cent of all Victorian sales. He made no precise finding about Melbourne sales, but, in another part of his reasons, he observed that the population of Melbourne was 3.3 million and the next largest population centre in Victoria had a population of 186,000. His finding as to the consequences for C & M of the activities in the market from 1994 to 1996 was that "it survived and prospered". C & M's success is significant. It was part of the respondent's case that BBM engaged in price-cutting for the purpose of forcing C & M out of the market. If that purpose existed, it was not achieved.

21 There was no evidence, and no finding, of any collusion between BBM and any other firm in the market. In particular, not only was there no collusion between BBM and Pioneer, there was evidence of personal hostility between executives of those companies. Heerey J said that "the competition between BBM and Pioneer was throughout the relevant period, and had been previously, ferocious and relentless."

Customers for concrete masonry products

22 Customers for CMP were mainly blocklayers, builders, and retailers. In most major projects for which concrete blocks were specified, the builder would call for tenders from blocklayers on a supply and lay basis. Blocklayers in turn would call for tenders from concrete masonry manufacturers. Heerey J found that blocklayers were critically important customers for manufacturers.

23 In the domestic segment of the market, large builders often purchased concrete bricks and blocks direct from manufacturers. Retailers of hardware and building products also purchased concrete paving products. Retailers, typically, would display the products of rival paving manufacturers.

24 The evidence showed that BBM attached particular importance to large volume jobs to maintain production volumes and recover fixed costs, and that major projects had an important effect on the market because prices obtained on them became, at least temporarily, a benchmark.

Economic conditions

25 In the early 1990s, the Victorian economy went into a severe recession. The commercial building industry was particularly affected. Building activity was depressed until about 1994, although significant improvements did not become apparent until 1996 or 1997. This decline in building activity had a serious impact on the level of demand for CMP over the whole of the period the subject of these proceedings. Heerey J found that there was substantial excess production capacity throughout the first half of the 1990s, which exacerbated the effect of the low level of demand. He also found that customer acceptance of CMP was at a very low level. Developers and builders were very responsive to the possibility of substituting alternative products and building systems. Over the period, concrete masonry products were competing with, and often losing sales to, other products.

26 Heerey J accepted the following evidence of a senior BBM executive:

> "I believe that the aggressive competition between BBM, Pioneer and Rocla for sales of concrete masonry blocks had started well before C & M Melbourne started production at Campbellfield, although unknown to [BBM] C & M may have already made the decision to set up the new plant. As far as I am aware, the price war between Pioneer, Rocla and BBM Victoria had nothing to do with C & M Melbourne or C & M Bendigo and its commencement of production of masonry products in the Melbourne metropolitan area. Rather, the price war was a product of extreme competition for sales of concrete masonry blocks between the three existing major players in a depressed market, and the combined struggle for market share."

27 That evidence is inconsistent with the proposition that the price war was started by BBM for the purpose of deterring C & M's entry into the market. In fact, the price war began before the period of the allegedly illegal conduct of BBM.

28 The Full Court did not reverse that finding of primary fact. Nor was there any basis upon which it could properly have done so. It was the conduct of BBM during part of the price war that was alleged to be predatory, and in contravention of s 46. It will be necessary to examine in detail the pricing behaviour of BBM, bearing in mind that, although the price war started earlier, the alleged contravening conduct is said to have occurred between April 1994 and October 1996. Before that is done, one other matter of importance in relation to market power should be noted.

Barriers to entry

29 Although Heerey J ultimately concluded that the market was wider than a market for CMP in Melbourne, he also found that, even if there was a market for CMP, barriers to entry were "quite low". There were no relevant intellectual property rights. Product differentiation was minimal (as noted above, he described the product as "a commodity"). Apart from a few specially developed value-added products, CMP were not sold by reference to brand names, and such customer loyalty as existed turned on personal factors, such as reliability of supply. Price was by far the major consideration. There was a relatively low level of technology involved in the manufacture of the product, and there was no shortage of labour with the requisite skills. Raw materials were readily available. Manufacturing plant and equipment was available from manufacturers in the United States or Europe. A capital investment of about $8 million was required to establish a viable plant. Commercial information was readily available. Sales representatives regularly changed from one firm to another.

30 The Full Court did not disagree with any of those primary findings, but added a qualification to the proposition that barriers to entry were low. Finkelstein J, while acknowledging that structural barriers were low, observed that "the strategic behaviour of incumbent firms" may be a deterrent to new entrants. He then pointed to the pricing behaviour of the firms in the market, and postulated that a firm might set out to cultivate a reputation for predatory behaviour as a method of deterring entry. However, even if one were to accept the potential significance of such a "strategic barrier to entry", it needs to be kept in mind that the period in question saw a substantial and successful entrant to the market.

The price war

31 Price competition between the manufacturers of CMP in Melbourne was manifested most clearly in the evidence concerning tendering for major projects. The significance of such projects was explained by the evidence. Heerey J made the following finding, which was not challenged on appeal:

> "The operation of this highly competitive market can be seen in the history of major projects. Blocklayers and builders were able to force masonry manufacturers down and down."

32 The unchallenged finding that customers were "able to force" the price of masonry products "down and down" is of major importance in considering whether BBM, or any other supplier, had, and took advantage of, a substantial degree of power in the market; yet it appears to have played no part in the reasoning of the Full Court. The finding reflects the antithesis of market power on the part of an individual supplier. It is important, therefore, to examine the

detail of the facts upon which Heerey J based his conclusion. He considered each of the major building projects over a period commencing some months before the time when BBM allegedly first engaged in its contravening conduct, and extending for some months after that time. The wider economic context in which the events described below took place has already been mentioned. It includes the economic downturn in the building and construction industry in Victoria, the ready availability of substitute products, and the aggressiveness of blocklayers and builders in playing suppliers off against one another. The evidence was accepted both by Heerey J and by the Full Court.

33 The events were considered by Heerey J in the light of the evidence of a quantity surveyor who said:

> "In 1991, the Victorian building industry suffered a downturn in activity from a peak in early 1990 which was caused by the general economic recession in Victoria at the time, high interest rates, surplus office space and high vacancy rates which drove rental revenue down. The downturn continued for approximately three to four years with overall prices remaining below 1990 levels until about 1998 when the combination of low inflation and interest rates created a favourable climate for investment in building construction. Vacancy rates for premium and secondary commercial space have reduced and there is now ongoing demand for regional retail space. There has also been an increase in construction in the education and health sectors.
>
> During periods of high building activity, a number of factors impact on tender prices. Demand for available skilled labour resources increases and competition for market share between suppliers of materials diminishes. The net result is that building contractors are often prepared to pay a premium for trade labour and materials prices increase. Contractors have a wider range of projects to tender on and so can recover a higher profit margin. In lean times, however, in my experience there is a tendency for contractors to win a tender at or below cost, on the hope that they will recover their overheads, even if no profit is made. The result of this sort of discounting is that many contracting and sub-contracting businesses fail financially, with their losses flowing back through the system to the suppliers of materials."

34 The conduct of BBM the subject of the present proceedings occurred in the middle of the period between 1990 and 1998 referred to by that witness. It is impossible to evaluate that conduct without paying regard to the context in which it occurred.

35 The price war broke out in mid-1993, about nine months before the commencement of the alleged contravention by BBM. In July 1993, a firm of

blocklayers won the blocklaying contract for three major projects: the Royal Melbourne Hospital; St Vincent's Hospital; and Eastland Shopping Centre. BBM was invited to quote. Its quote for 15.01 blocks was: Royal Melbourne – 85 cents; St Vincent's – 86 cents; Eastland – 90 cents. The Eastland price was higher because the site was further from BBM's plant. The blocklayers then requested BBM to put in a revised quote. This time, BBM quoted: Royal Melbourne – 76 cents; St Vincent's – 77 cents; Eastland – 81 cents. The Royal Melbourne project was awarded to Pioneer. In August 1993, an executive of the blocklayers had a meeting with senior executives of BBM, and informed them that BBM's prices were higher than any of the other suppliers. He verified this by producing the Rocla quote. BBM then agreed to match the Rocla prices on the St Vincent's and Eastland project, which were 71.2 cents each. A Rocla witness told Heerey J that Rocla had tendered on a marginal cost basis as a test of the market and, having failed to win contracts on that basis, decided to withdraw from block manufacturing in Victoria. BBM's response, on the other hand, was that it would stay in the market and do what was necessary to preserve and, if possible, increase its market share. It will be necessary to examine later the commercial considerations underlying that decision.

36 Block prices stayed at about the same level for a few months, and BBM continued to quote at that level. However, in October 1993, Pioneer issued a block price list which contained further reduced prices for most block products, and offered to keep prices at that level for six months to customers who would commit to Pioneer for that period. The price for 15.01 was 70 cents. Several blocklayers contacted BBM and said that if it did not match the prices quoted on the Pioneer price list they would commit to Pioneer. BBM was very concerned about the Pioneer prices, but agreed to match them. BBM gave further consideration to the possibility of withdrawing from the Victorian market, but decided to remain.

37 In January 1994, tenders were called for the Greensborough Shopping Centre. The builders sought tenders from blocklayers. One of the blocklayers proposed to BBM that if it dropped its price by $50,000 that blocklayer would give all its upcoming work to BBM. This proposal was accepted, but another blocklayer won the tender. The CMP contract was awarded to BBM. The average price for 15.01 blocks supplied was 63 cents.

38 In February 1994, C & M's Campbellfield plant commenced full-scale manufacture of bricks and pavers, but not blocks. C & M sold blocks into the Melbourne market from its Bendigo plant. Between February and July 1994 there were negotiations between BBM and C & M for the possible acquisition of C & M's Campbellfield plant. It will be necessary to return to that subject. Over the same period, C & M were also in negotiation with Pioneer.

39 In April 1994, a blocklayer selected for the Western Metropolitan College of TAFE project called for tenders. BBM quoted 68 cents for 15.01, but was told that Pioneer had quoted a considerably lower price. BBM refused to match Pioneer's price, and Pioneer won the job. This event is about the time of the commencement of the allegedly contravening conduct.

40 In May 1994, BBM quoted for the supply of blocks to the Dandenong Shopping Centre and Carpark. The quote for the carpark was unsuccessful, but later the quote for the shopping centre was successful. The price for 15.01 blocks was 63 cents.

41 In June 1994, BBM quoted for the supply of blocks to the Melbourne Exhibition Centre. It quoted a price of 62 cents for 15.01. The quote was unsuccessful. Pioneer won the contract. Pioneer's price is not known.

42 In December 1994, BBM quoted to a number of blocklayers who were tendering for the Epping Plaza project. The blocklayer who was selected by the builders contacted BBM and asked for a revised quote. BBM reduced its price because it had developed some other special products also to be supplied for which it was able to charge a higher price. The price for 15.01 was 79 cents. This was substantially higher than the price it had quoted unsuccessfully on the Melbourne Exhibition Centre, when the business went to Pioneer.

43 Between December 1994 and July 1995, BBM was involved in quoting for the Crown Casino project. BBM had a good relationship with the builder, and quoted prices higher than current market prices. It was requested to revise its quotes, and then quoted 80 cents for 15.01. This was significantly higher than the current market price. BBM was awarded the job, and began to supply block. The builder said that for the next stage of the project it intended to contract out to blocklayers. BBM recommended a blocklayer with whom it had a good relationship. That blocklayer was selected by the builder. However, the blocklayer then told BBM that Pioneer had offered to supply at much lower prices. Pioneer quoted 71 cents for 15.01. BBM did not believe that assertion, but was pressed by the blocklayer, who said he would have no choice but to buy the product from Pioneer unless BBM reduced its prices. The builder said it would prefer to use BBM product, and that if BBM would match the Pioneer prices the builder would make sure that BBM product was used. BBM agreed to match Pioneer prices. BBM won the business. It was also found necessary to pay confidential rebates.

44 At about this time, further consideration was given by BBM to withdrawing from the Victorian market, but it was decided to remain. Heerey J accepted the following evidence from a senior executive of BBM as to its process of reasoning at the time:

> "[M]y own view, and my perception of the view of national management was that any closure would suggest that Boral [M]asonry and other Boral companies would give [in] in the face of stiff competition. Further, Boral Masonry was the only national masonry operator. This gave us an advantage in the eyes of our major customers, many of whom preferred dealing with national operators like themselves.
>
> More importantly though, closure would simply give up to our competitors the production volume and market share that we had fought so hard to restore. In my view, it had to be worthwhile to hang [on] for some time even in the face of some big losses, to see which of our competitors would 'break first' and depart from the industry. I thought this was the only possible solution as we had already examined all of the possible options ourselves and did not believe that any of our competitors, except perhaps C & M with its lower costs of production for concrete brick and concrete pavers, would come to a different conclusion than we had. It had been a struggle to re-establish our credibility with customers and I did not believe that it would be possible to re-establish it a second time. My view was that we needed to take a long term decision rather than being unduly concerned about short term losses as I believed that the industry had a bright future with the introduction of new and innovative products which were potentially a source of profitable activity for BBM Victoria."

BBM's expansion of its production capacity in Victoria needs to be considered in the light of that evidence. Heerey J's acceptance of the evidence was not questioned by the Full Court. To "hang on" in the expectation that one or more of the other suppliers would "break first" may have been a rational commercial response in what was hoped to be a period of severe, but temporary, difficulty. It is different from forcing prices down in order to damage or eliminate some competitors.

45 From April 1995 to May 1996, there was a major building project called Beacon Cove, a large residential development at Port Melbourne, which was constructed in two stages. For the first stage, BBM quoted to the developer 72 cents for the supply of 10.01 (there was no 15.01). C & M quoted 4 cents lower and won the contract. The second stage was the construction of high rise residential apartments. BBM won this job over Pioneer because its product had been specified by the architect.

46 In May 1995, tenders were called for the BHP Global Leadership Building. The blocklayer who successfully tendered for the project worked with BBM to produce specially shaped products, and BBM quoted successfully for the job, supplying 15.301 fire rated block at an average price of 71 cents.

47 The next major project provides an example of blocklayers playing suppliers off against one another, and of the intense rivalry between BBM and Pioneer. In June 1995, blocklayers were tendering for the Rockman's Regency Building. BBM gave each of the blocklayers an indicative quote for two of the major block products, 78 cents for 10.31 and 80 cents for 15.83. The blocklayer who was ultimately successful contacted BBM and said that Pioneer had offered much lower prices. He invited BBM to submit another quote. He told BBM what prices had been quoted by Pioneer. BBM decided to reduce its prices to a level at or slightly below Pioneer's prices to win the job. A revised quote was sent in. The quote included 71 cents for 15.01. The blocklayer again contacted BBM and said that Pioneer had offered a further price, and asked whether BBM would be prepared to reduce its prices further in order to win the job. The executives of BBM had heard rumours in the industry that, if Pioneer did not win the project, two of its senior executives would lose their jobs. This was seen as a good thing. BBM then offered the blocklayer a 41 per cent rebate in order to win the project. The net price after rebate for 15.01 was 42 cents.

48 In June 1995, BBM submitted quotes to each of the eight builders who had tendered for the Monash Sports Centre. BBM quoted 84 cents for 15.01. Pioneer won the contract.

49 A prison for women was being constructed on a site very near BBM's production facility. BBM was anxious to supply the job. It quoted prices to three competing builders, which included 15.01 at 88 cents. The builder who tendered successfully told BBM that Pioneer had quoted substantially lower than BBM, and BBM agreed to reduce its prices to match the quotes of Pioneer. BBM supplied 15.01 at 71 cents.

50 At this stage Rocla closed down its remaining Victorian masonry operations, concluding that there was substantial over-capacity in the market.

51 Activity in relation to the next major project, which was the men's prison at Laverton, dragged on over a period of a year. In September 1995, BBM submitted a quote to the builder, quoting for 15.01 at 88 cents. A year passed, and BBM was asked to submit quotes to the tendering blocklayers. BBM quoted, for 15.01, between 92 cents and a dollar, the price varying between blocklayers. In September 1996, one of the blocklayers contacted BBM and said that Pioneer was quoting about five or ten cents less than BBM, and that C & M were quoting less than BBM in respect of some products. BBM did not reduce its prices but it won the job, partly because of a good relationship with the blocklayer, and partly because it had already allowed the blocklayer a rebate in respect of another project.

52 In October 1995, Kraft called for tenders in relation to a plant being constructed near Albury. BBM quoted 88 cents for 15.83. Pioneer won the job.

53 Another project that became active in October 1995 was Smorgons at Laverton. This was near a BBM production plant. BBM quoted 72 cents for 15.01. The response was that Pioneer was quoting a lower price, 66 cents. BBM decided to meet the prices quoted by Pioneer in order to win the project. The proximity to BBM's plant made it attractive. BBM quoted what it understood to be the same price as Pioneer, and won the job.

54 In November 1995, BBM tendered unsuccessfully for a large paving job at Swanston Dock. The successful tenderer was C & M, which had quoted a lower price.

55 In December 1995, BBM quoted to blocklayers tendering for the Park Central St Kilda Road project. BBM's price was higher than Pioneer, but it won the contract because a special product was involved.

56 Tenders were also called for the Deer Park Shopping Centre in December 1995. This was another project close to BBM's production facility, and thus attractive owing to lower transport costs. After BBM tendered, one of the blocklayers asked if BBM would reduce its quotes to match Pioneer's prices, which were considerably less than BBM's. BBM refused. Pioneer won the contract. (Some years later the blocklayer showed BBM Pioneer's invoices, which included a price of 69 cents for 15.01.)

57 In February 1996, BBM tendered for the Flagstaff Gardens project. The blocklayers told BBM that its prices were higher than Pioneer, which was quoting 77 cents for 15.01, as against BBM's 78 cents. BBM declined to reduce its quote.

58 In June 1996, Budget ceased to manufacture CMP because of losses it had sustained over the last five years (ie since 1991).

59 The last of the major projects referred to in the reasons of Heerey J was the Museum of Victoria. BBM bid for this project on 22 October 1996, quoting 90 cents for 15.01. After a lapse of some months, when no response had been received, BBM submitted a revised quote which was generally higher. By this time BBM had increased its prices. In about mid-1997 a blocklayer told BBM that it had been underquoted by C & M. BBM was not prepared to submit a revised quote.

60 Although the above evidence was recorded in the decision of the Full Court, the Full Court appears to have concentrated, in its reasoning, on the supply side of the market, and failed to take account of the dynamics resulting from the powerful position in which customers for CMP found themselves, partly in consequence of the availability of substitute products. There was no reason

given as to why the conclusion of Heerey J that "[b]locklayers and builders were able to force masonry manufacturers down and down", should not be accepted. That fact, once accepted, must be taken into account in considering whether BBM, or any other supplier, at the relevant time, had a substantial degree of power in the market.

61 Heerey J recorded the facts set out above, without attributing to any of the suppliers of CMP credit, or blame, for the intensive price-cutting. He explained what had occurred by reference to the downturn in the building industry, over-capacity among the producers of CMP, the ready availability of substitute products, and aggressive bargaining by blocklayers and builders. In the Full Court, Beaumont J recorded, without expressing agreement, a submission by the ACCC seeking to attribute the price war to BBM's "aggressive marketing campaign, substantially based on price reductions, clawing back what it regarded as its rightful share of sales of CMP in Melbourne". The submission alleged that, as a result, BBM's share of sales increased from 18 per cent in December 1992 to more than 30 per cent in December 1993.

62 The following points may be made as to those submissions. First, the alleged contravention of s 46 was said in the pleadings to have covered a period from April 1994 to October 1996. Over the whole of that period, BBM's market share remained relatively constant. Secondly, there was no finding of Heerey J to support a proposition, if such a proposition be relevant, that the price war that was well under way by April 1994 was begun by BBM. Thirdly, Heerey J found, and his finding is amply supported by the evidence, that the intense competition in the market resulted from a combination of circumstances which were outside the control of any individual supplier, and reflected, not an exercise of market power by suppliers, but a lack of market power.

63 The suggestion that the events described above could be explained by an "aggressive marketing campaign" on the part of BBM is not only unsupported by any findings of Heerey J; it is impossible to reconcile with the established facts. It seems to involve an assumption that at least one of the suppliers of CMP must have had a substantial degree of power in the market, and then it seeks to account for what occurred as an exercise of that power. But that inverts the proper process of consideration. The issue is whether, between April 1994 and October 1996, BBM had a substantial degree of power in the market. Heerey J found it did not. He found that, over the period, no supplier had a substantial degree of market power. The correct approach is to examine the objective facts and consider what light they throw on the question; not to begin with an assumption that some supplier must have had a substantial degree of market power, and then to ask which supplier was to blame for the price war.

64 Reference will be made below to the strategy BBM was pursuing over the period, and, in particular, to its increases in production capacity, and the

alternatives that were open to it. It is established that, on a number of occasions between April 1994 and October 1996, BBM and its parent company gave serious consideration to ceasing to supply CMP in Victoria. An examination, project by project, of BBM's conduct in quoting prices suggests that it was responding to competitive pressures exerted on it by other suppliers and by customers.

65 The selection of the period from April 1994 to October 1996 as that during which BBM's pricing conduct contravened s 46 is tied up with the allegation that, during that period, prices quoted by BBM were often below "avoidable costs". Before turning to that subject, it is important to note the manner and circumstances in which prices were set. The evidence reveals many examples of BBM's prices being undercut by one or other of its competitors. The evidence does not show whether the competitors were pricing below their avoidable or variable costs. But what is shown is that there were numerous examples of BBM tendering unsuccessfully on major projects. And it also shows numerous examples of BBM winning contracts only after lowering its initially quoted prices in response to pressure from customers who could get better prices from other suppliers.

66 The ACCC tendered several graphs, which compared average invoice prices of BBM and other suppliers, and which compared BBM's average prices with BBM's variable costs. Those graphs were prepared on the basis of average prices for all contracts won or supplies made. They do not record quotes from BBM or its competitors that were unsuccessful. It is to the detail of the evidence set out above that it is necessary to turn in order to obtain that information. Furthermore, average prices reflect higher prices charged on small jobs. Heerey J summarised the effect of a number of graphs, in relation to the spread of invoice prices of BBM and Pioneer, as follows:

> "While more often than not the lowest BBM invoice was below the lowest Pioneer invoices, they were fairly close together. But, generally speaking, the Pioneer invoices had a wider spread from lowest to highest. This is consistent with Pioneer having more smaller customers to whom it could charge higher prices."

67 Heerey J regarded the evidence of pricing on major projects as the best evidence of BBM's pricing behaviour between April 1994 and October 1996, and the Full Court did not disagree with that. When the detail of that evidence is considered, it is difficult to reconcile with the case the ACCC seeks to establish.

Pricing below avoidable cost

68 There was an argument of principle at the trial as to the method to be employed in comparing prices and costs. Heerey J was urged by BBM, in

considering a contention that its behaviour was predatory, (a contention that required some refinement in order to relate it to the terms of s 46), to take account of the commercial context, including BBM's relationship with the wider Boral group. For example, BBM argued that, in assessing its costs, the transfer prices of raw materials that it purchased from other companies in the group should be adjusted by removing the profit element recovered by those other companies. There is merit in such an argument, although it needs to be considered in the wider context of the significance, for purposes of s 46, of so-called predatory pricing. The evidence made it clear that the decisions that BBM would remain in the business of manufacturing CMP in Victoria were made on a group basis, and short-term losses to BBM were regarded as being offset by longer-term benefits to the group as a whole. Even so, Heerey J was prepared to approach the price/cost analysis on the narrower basis urged by the ACCC.

69 Heerey J explained what he meant by avoidable or variable costs, by giving the following example. If a producer of an article incurs fixed costs of $4 and has to pay $6 for raw materials, the amount of $6 is a cost that could be avoided by not making the article. The term variable cost was used by Heerey J as a synonym for avoidable cost. A sale at $8 would result in a loss; but would make some contribution to fixed costs. A sale at less than $6 might suggest that the firm would be better off not making the article.

70 That, it should be observed, involves a considerable risk of over-simplification. To conclude that, in the example just given, BBM would be better off not to make the article than to supply it at $6, may leave out of account many legitimate business considerations. First, as already noted, there were benefits to the wider Boral group, both tangible and intangible, from BBM continuing to supply CMP. Secondly, even limiting consideration to BBM, it could make business sense to bear short-term losses in the hope that market conditions would improve. Thirdly, the alternative considered in BBM's strategic planning, as will appear, was to withdraw from the market. The costs involved in that are not taken into account in the comparison urged by the ACCC. The appropriate method of paying regard to so-called sunk or historic costs of investment is a fourth matter which does not here, but may, at some future time, call for consideration.

71 Heerey J made the following findings:

> "(1) The monthly sales revenue from sales of all [CMP] by BBM exceeded the variable costs of manufacture and supply for all months during the relevant period (April 1994 - October 1996) except for May, July, August, September and December 1994, January and November 1995 and October 1996.

(2) The total sales revenue exceeded variable costs of manufacture and supply by about $1.3 million and by the following amounts in the following respective years:

1993-1994	$732,220
1994-1995	$124,413
1995-1996	$373,086
1996-1997	$770,420"

72 It may be noted that the first and fourth of those years were mostly outside the relevant period. It is the second and third years that are of particular significance.

Production capacity

73 BBM produced CMP at Deer Park, using a Besser machine. The plant adjoined a quarry operated by a related company. BBM also had a production plant at Sunshine, but it did not produce CMP except for a period of brick production from 1994 to 1996.

74 Reference has earlier been made to C & M's construction of a new plant at Campbellfield commencing in 1992. The Hess machine used at this plant was recognised in the industry as more efficient than BBM's machine. It was anticipated by BBM that C & M would be a lower-cost producer. In February 1994, BBM and C & M entered negotiations with a view to the possible acquisition by BBM of C & M's Campbellfield plant, or, perhaps, of all the shares in C & M. Ultimately, BBM offered to purchase the Hess machine for $3.8 million. It had cost C & M around $760,000. The negotiations came to nothing.

75 In late 1994, senior executives of BBM and Boral considered whether to close down BBM's Victorian operations. They decided to stay in business. BBM was making substantial contributions to Boral by its purchases of supplies from Boral. Furthermore, Boral wanted to retain a national presence and did not want its competitors to think it could be forced out of a market. The chief executive of Boral instructed BBM to shut down its inefficient Sunshine plant and duplicate the plant at the Deer Park production facility. He told BBM he knew this would lead to further capacity in the industry, but that if BBM was to remain in business it had to reduce its costs by producing more efficiently. His aim was to reduce BBM's costs of production to the same level as C & M. In January 1995, BBM began the first stage of upgrading its Deer Park plant, replacing the existing equipment with more efficient equipment brought in from interstate. The Sunshine plant was closed.

76 In December 1995, C & M again approached both BBM and Pioneer about the possibility of a sale of the Campbellfield plant, but nothing resulted.

77 In June 1996, BBM commissioned the first stage of the new plant at Deer Park. Heerey J found that the Deer Park upgrade was an understandable business decision that would reduce overall costs of production and signal BBM's intention to remain in the market as a long-term participant.

Business strategy

78 There were tendered in evidence internal BBM and Boral documents, including reports from BBM executives to Boral, and "strategic business plans".

79 The major decision that had to be faced was whether BBM would close down its CMP operations in Victoria. As to that, Heerey J made the following finding:

> "BBM gave active consideration in late 1993, and again some twelve months later, as to whether it should quit concrete manufacturing in Victoria. It decided to stay in, cut prices to win business, and upgrade its plant to improve efficiency, all in the hope of better times to come. Pioneer also decided to stay in. Rocla decided to quit. All these were firms with deep pockets. C & M decided to stay in. It did not have a particularly deep pocket, but nevertheless it survived and prospered. Budget did not have a deep pocket at all. It failed and its proprietor Mr Coghill lost his home, lost everything.
>
> All these competitors were faced with the same hard conditions as BBM and also had to make hard decisions. What BBM did was to make legitimate business decisions, consistent with it being in a very competitive market and consistent with it not having any degree of market power or taking advantage of such power.
>
> The alternative of closing down temporarily was not seen as a realistic alternative by BBM (or by Budget). It was not an option Pioneer took, notwithstanding that it also was making heavy losses."

80 An implication of a decision not to withdraw from the market was that BBM would compete vigorously in pricing, attempt to win business from its competitors, and seek to reduce its production costs. Market conditions were such that failure to compete on prices would be tantamount to withdrawal.

81 There are repeated references in the business plans to the entry of C & M, the efficiency of its plant, and the negotiations for possible purchase of the plant, the business, or the company. There are also surveys of market conditions and

close consideration of the position of competitors. Reference is made to the high level of threat from substitute products. It is clear that, in the economic circumstances applying, BBM could only hope to increase its sales at the expense of its competitors, and that it hoped that one or more of its competitors would be forced to withdraw from the market.

82 In one internal assessment of the price war it was said:

> "The long term solution to the market decline in Melbourne is for C & M to fail as a producer and one of the major producers to pick up the assets."

83 In a strategic plan, the following reference was made to the withdrawal of Rocla (which began in 1993, and was completed in 1995):

> "Part of our plan has been realised with Rocla and BTR Nylex withdrawing from the market by the end of September 1995."

84 In March 1995, an update of BBM's strategic business plan was prepared upon the following assumptions:

> "1. We will buy honing and polishing equipment to gain a competitive advantage and increase the average selling price of blocks. (Cost allowed $500K)
>
> 2. We will buy the Besser equipment at Moss Vale and install at Deer Park at a total cost of $4M.
>
> 3. We believe our current share of the total market is 30%, which will increase to 50% on installation of new plant.
>
> Our ability to supply the market has been constrained in recent months by our lack of capacity.
>
> Our marketing efforts have been successful to the extent that our customers are prepared to buy from us even though our prices may be slightly higher.
>
> Our aim through 1996/97 and 1997/98 is to drive at least one competitor out of the market. The new plant gives us the ability to do this."

85 After referring to the new Besser plant, the update continued:

> "From a long term view this development presents the opportunity to break out of the cycle which has prevailed in Victoria over many years. Boral Masonry needs the capacity to supply the market through highs &

> lows (at a high market share 40%+) to remove the ability of minor players to survive when the market turns up thus allowing them to play another day always at the expense of gross margins and market share. The coup-de-grace could have been delivered to 2 minor players in 1994 had Boral had sufficient productive capacity.
>
> …
>
> At the present time no Victorian masonry manufacturer is believed to be trading profitably.
>
> Because we have reached the limit of productive capacity we have had to reduce the level of discounting which we had been using to build market share and weaken the opposition. Our projections are that the market will downturn slightly in 95/96 & 96/97 and then recover strongly.
>
> To take advantage of the downturn which will put pricing and volume pressure on the market prior to the recovery is the rationale for additional production capacity.
>
> When the market turns down our volume capability will enable us to apply pressure to our competition.
>
> Feedback from the market indicates that C & M and Budget are awed at the prospect of Boral doubling its capacity.
>
> This is vindicated by recent evidence of vicious price cutting and intense customer targeting by C & M including attempted exclusivity supply arrangements.
>
> In addition we believe that Budget is in a precarious financial position only alleviated by our recent decision to increase prices and [Pioneer] and Rocla have tenuous commitment to the Victoria market …".

86 As will appear, Heerey J concluded, on the basis of the above material, that BBM acted with one or more of the purposes set out in s 46. He did not find it necessary to be more specific. Presumably he had principally in mind s 46(1)(a). But he rejected the argument that BBM had a substantial degree of power in a market, or was taking advantage of that power. Over the whole of the period from April 1994 to October 1996, BBM was engaged in price competition so intense that it was called a price war. BBM gave serious and repeated consideration to surrendering. But it decided, for what Heerey J regarded as sound business reasons, to stay in and fight. That one or more of its competitors would be damaged was obvious: that is the necessary consequence of intensive price competition. The point of price competition is to win customers from a competitor. In that sense, the purpose of competitive conduct is to damage a

competitor. That one or more of its competitors would respond to the damage by leaving the market was likely. That is what BBM itself considered doing. It is also important to keep in mind, particularly with respect to businesses which operate in a cyclical industry such as the building industry, that they may have to weather periodic storms, and cannot take a short-term view of their activities.

87 The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations[3]. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor. The critical question in the present case is whether BBM's behaviour involved the taking advantage of a substantial degree of power in a market. If it did, then acting with one or more of the purposes set out in s 46(1) was illegal. If it did not, then BBM's conduct amounted to lawful, vigorous, competitive behaviour.

88 The danger of confusing aggressive intent with anti-competitive behaviour, in the context of alleged predatory pricing behaviour, was pointed out by the United States Court of Appeals, Seventh Circuit, in *AA Poultry Farms Inc v Rose Acre Farms Inc*[4]. The Court said:

> "Firms 'intend' to do all the business they can, to crush their rivals if they can … Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it …
>
> Almost all evidence bearing on 'intent' tends to show both greed-driven desire to succeed and glee at a rival's predicament … [T]ake [a witness's] statement that [his firm's] prices were unrelated to its costs. Plaintiffs treat this as a smoking gun. Far from it, such a statement reveals [the firm] to be a price taker. In perfect competition, firms must sell at the going price, no matter what their own costs are. High costs do not translate to the ability to collect a high price; someone else will sell for less. Monopolists set price by reference to their costs …; competitors set price by reference to the market."

89 It emerges clearly from the evidence in the present case that BBM set its prices by reference to the market.

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3 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13 [17].

4 881 F 2d 1396 at 1401-1402 (1989).

The case against BBM

90 In its Statement of Claim the ACCC alleged that both Boral and BBM had contravened s 46. By the time argument in the Full Court was completed, the case against Boral was no longer pursued. Argument in this Court has been confined to the case against BBM.

91 The relevant market was identified in the Statement of Claim as the market for concrete masonry products in Melbourne. There was an issue concerning market definition. The ACCC alleged that BBM had a substantial degree of power in the market so defined.

92 In asserting that BBM illegally took advantage of its alleged market power, the ACCC appeared to suggest, amongst other things, that there was collusion, or at least conscious parallelism, between BBM and Pioneer. In its pleading it referred to "an ability for Boral/BBM to communicate with Pioneer by market signals". Heerey J recorded that, at the beginning of the hearing, senior counsel for the ACCC disavowed any suggestion of collusion between BBM and Pioneer, but in final address contended that BBM "believed that once the market had been [rationalised] by the removal of two or three competitors during the price war, Pioneer would not prevent prices then rising to profitable levels". Heerey J was prepared to accept that BBM hoped and expected that, at the end of the price war, it could operate at a profitable level, but he rejected any hope or expectation of either collusion or conscious parallelism; and he found that, throughout the relevant period, the competition between both firms was "ferocious and relentless". Those findings were not challenged on appeal.

93 Another allegation that was rejected by Heerey J, and not pursued on appeal, was that there was something sinister about BBM's attempts to purchase C & M's Hess plant. The Statement of Claim alleged that the price offered by BBM was a price that would not recoup C & M's costs. However, Heerey J found that the offer was made in good faith for sound business reasons and that no adverse inference or conclusion could be drawn from it.

94 Putting those two allegations to one side, the central allegations against BBM came down to the following:

> "11 (a) between at least in or about April 1994 and at least in or about October 1996 [BBM] reduced the prices at which it offered to supply and supplied concrete masonry products in Melbourne, generally, alternatively to current or identified potential customers of C & M Bricks, Rocla and Budget Bricks, to levels at or below its cost of the manufacture and supply of those products.

…

(c) in or about May 1995 to October 1996 increased substantially the production capacity of the plant owned and operated by it at Deer Park in Melbourne for the manufacture of concrete masonry products by installing an older surplus plant acquired in Moss Vale, New South Wales."

95 Paragraphs 16 and 17 of the Statement of Claim alleged that the conduct of BBM described in par 11 constituted the use of power in the Melbourne market for the purpose of eliminating or substantially damaging C & M and other competitors including Rocla and Budget, preventing the entry of C & M and others into the market, or deterring or preventing C & M and others including Rocla and Budget from engaging in competitive conduct in the market or other CMP markets in Australia. This was said to be in contravention of s 46.

96 The reference to other markets in Australia dropped out of the case, and it was agreed in this Court that the only aspect of s 46 with which we are concerned is taking advantage of power in a market for a proscribed purpose relating to that same market.

97 Thus, the case with which the Full Court had to deal, and which confronts this Court, is one stripped of any allegation of illegal conduct on the part of Boral, and of any allegation of collusion or conscious parallelism, past or anticipated, between BBM and Pioneer, and of any suggestion that BBM's offer to buy C & M's plant was other than in good faith. It is based mainly upon BBM's pricing behaviour between April 1994 and October 1996, and also upon its upgrade of its Deer Park plant.

98 Fundamental to the case, and strongly contested, is the proposition that, at the time of the conduct in question, BBM had a substantial degree of power in a market, and that the conduct complained of constituted a taking advantage of that power.

The reasons of Heerey J

99 Heerey J commenced his consideration of the critical questions of market definition and market power by quoting from the reasons of the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd*[5]:

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5 (1976) 25 FLR 169 at 190.

> "We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.
>
> It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply?"

100 The reference in that passage to "a firm's ability to 'give less and charge more'" is an expression of the central idea involved in the concept of market power. An aspect of the explanation of the concept of a market to which it will be necessary to return is the need to pay attention to the demand side as well as to the supply side.

101 The ACCC contended that there was a market for CMP in Melbourne. BBM contended that the market was wider, and embraced walling and paving products generally. It was accepted, at least by implication, that, if BBM's contention was correct, then that was an end of the matter: no one suggested BBM had a substantial degree of power in the wider market.

102 Although Heerey J accepted that geographically the market was limited to Melbourne, he agreed with BBM as to the product market. He found that the evidence as to substitution was all one way. There was abundant evidence of actual substitution between CMP and other walling and paving products, rising and falling with the influence of factors such as price, labour costs, aesthetics and

building fashions. BBM and other CMP suppliers closely monitored other walling and paving products and developed strategies to take sales away from them or to avoid losing sales to them. For example, there was specific evidence that Pioneer's October 1993 price list was designed to win back sales from tilt-up. He asked himself whether manufacturers of concrete masonry block could have significantly increased prices without fear of a reaction from tilt-up. He answered: plainly not.

103 Although that finding decided the case, Heerey J went on to consider the question whether BBM, at the time of its allegedly contravening conduct, had a substantial degree of market power either in the market for which the ACCC contended or in the wider market. He answered that question in the negative. He referred to the matter of barriers to entry, the shares of CMP sales of BBM and other suppliers, and what he described as competition dynamics, including the economic conditions affecting the building industry, over-capacity, and the conduct of customers, with their ability "to force masonry manufacturers down and down". He expressed his conclusion by saying:

> "The low barriers to entry and the existence of strong competitors, in particular Pioneer and, as time passed, C & M meant that BBM did not have power to behave independently of competition and of competitive forces, either in the market I have found or in the narrower market for which the Commission contended. BBM did not have market power in these markets, and certainly not a substantial degree of market power."

104 The findings of Heerey J as to market power, if correct, meant that the case against BBM must fail. However, he went on to express his views on the question whether the conduct on the part of BBM complained of by the ACCC (pricing behaviour and increasing production capacity at Deer Park) amounted to "taking advantage" of market power. The discussion of those subjects bears upon the question of the existence of market power. The ACCC argued that BBM's pricing behaviour, in particular, was an exercise or manifestation of market power, especially when regard was had to the purpose for which it was undertaken. Although both parties recognised that the term "predatory pricing" should be used with some caution, because it may carry overtones imported from other legislative contexts that are not directly comparable, it was treated as a convenient expression to use as a focus for part of the argument. Conscious of the different legislative framework in the United States, Heerey J nevertheless examined the American authorities on the subject, with particular reference to the concept of recoupment, in the medium or long term, of losses incurred in short-term pricing "below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long

run"[6]. Both sides called, as witnesses, economists who dealt with the concept. Heerey J made the following finding:

> "Whether or not BBM charged below avoidable cost, it had no prospect of being able to recoup its losses by charging supra-competitive prices. And, importantly, it never thought that it could … Certainly BBM hoped one day to return to profitable operations; there would be no point in it staying in business if that were not so. Yet all it hoped for, or could hope for, was profit in a competitive market."

105 He also found that, in BBM's case, selling below avoidable cost, even for a prolonged period, was a rational business decision, for reasons already discussed, without any hope of ultimately being in a position to charge supra-competitive prices.

106 As to the complaint about the Deer Park upgrade, Heerey J found:

> "The Deer Park upgrade was an understandable decision, especially in the light of the closure of Sunshine. The upgrade would enable the production of more value added products and reduce overall costs of production. The availability of the Moss Vale plant was a fortuitous opportunity.
>
> In part the Deer Park upgrade was a signal of BBM's commitment to be a long term manufacturer of concrete masonry in Melbourne. This is not inconsistent with BBM being a participant in a competitive market. But at bottom BBM's motive in upgrading Deer Park was to achieve efficiency, just as efficiency drove C & M's decision to enter the market with the Hess machine."

107 Having found that BBM did not have a substantial degree of power in a market, and that its pricing behaviour and expansion of production capacity did not involve a taking advantage of market power, but constituted a rational and legitimate business response to conditions of intense competition, it was unnecessary for Heerey J to consider purpose. He did so only briefly. Plainly, he thought, BBM at least intended to damage its competitors and, if possible, eliminate one or more of them. This appeared from the internal company documents to which reference has already been made. But without a finding of taking advantage of a substantial degree of power in a market, such a competitive purpose was lawful.

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6 *Cargill Inc v Monfort of Colorado Inc* 479 US 104 at 117 (1986) per Brennan J.

The reasons of the Full Court

108 The Full Court did not reject any of the findings of primary fact made by Heerey J. There was, however, one finding, of central importance to the case against BBM, that was not dealt with in the reasons of the Full Court. It was the finding that the purchasers of CMP in Melbourne, throughout the period in question, were "able to force" the prices charged by suppliers of CMP "down and down". The case against BBM was that its behaviour, and in particular its pricing behaviour, was an exercise of market power. The finding suggests the opposite.

109 On the subject of market definition, Beaumont J (with whose reasoning on the point Merkel and Finkelstein JJ agreed) made a careful examination of the detail of the evidence concerning CMP and potentially substitutable products, including the evidence of architects and builders, details of prices and sales, changes in industry fashion, and the way in which BBM itself viewed the area of rivalry as shown by its internal documents. He concluded, contrary to the opinion of Heerey J, that it was only in respect of the supply of CMP that there was an area of close competition. He found[7]:

> "It is true that there were, to a degree, alternative products available, and that, on occasions, some measure of substitution occurred. But given the discontinuities of substitution previously mentioned, and the price differentials involved, it ought not, in my view, to be inferred that the relevant market was the wider walling products market advocated by BBM. A critical factor, I think, is that BBM itself treated the relevant market as that for the supply of CMP, as its own planning documents stated. The distinction drawn between competition, on the one hand, and close competition on the other, is crucial in the present context."

110 As to market power, Beaumont J reasoned as follows[8]. He said that BBM's strategy achieved an increase in its market share to more than 30 per cent by December 1993 and this was maintained through to 1996, at the end of the relevant period. (In this regard, it may be noted that the relevant period began in April 1994. Another way of looking at what Beaumont J said is that, over the whole of the relevant period, BBM's strategy failed to achieve any increase in market share.) He said that, during the relevant period, BBM had some degree of market power. This he inferred from its significant share of the market, its standing as part of a large well-funded national operation, and its reputation for

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7 (2001) 106 FCR 328 at 377.

8 (2001) 106 FCR 328 at 377-378.

good service and loyalty to its customers. However, it was not "a monopolist or near monopolist". He acknowledged that structural barriers to entry were low, as illustrated by the relative ease with which C & M entered the market. But there were disincentives to remaining in the market, as the departure of Rocla and Budget showed. BBM was pricing below avoidable cost and it was to be inferred that it was "prepared to use its power in the market so as to provide a disincentive to other competitors … to remain in the market". Beaumont J concluded that BBM had market power which was "considerable or large, that is to say, 'substantial'". (The meaning of "substantial" was not in contest[9].)

111 Beaumont J dealt briefly with the issues of taking advantage, and purpose, which he resolved in favour of the ACCC.

112 Merkel J, after reviewing the history of s 46, and noting that it was amended in 1986 by replacing the concept of being in a position substantially to control a market with that of having a substantial degree of power in a market, began by criticising Heerey J's acceptance of United States notions of recoupment in relation to the application of s 46 to predatory pricing. He agreed with Beaumont J on market definition, and then turned to the question whether BBM's conduct involved use of a substantial degree of power in a market.

113 He began his consideration of this question by considering BBM's purpose – to eliminate or damage one or more of its competitors[10]. It will be necessary to return to the appropriateness of this as a starting point for analysis of the issue. He pointed out that BBM achieved the objective, stated in its strategic plan, of placing pressure on its competition, by low pricing and expansion of production capacity, and that two rivals (Rocla and Budget) were forced out of the market. BBM had the financial capacity to last out a price war, and used it. Merkel J referred to BBM's "power" to engage in below cost pricing to exclude competition, which he said resulted from four related elements:

1. BBM's financial and production strength which, he said, enabled it to more than double its market share. (In fact, its market share remained constant from April 1994 to October 1996; the "doubling", which was a recovery of previously lost market share, occurred before the start of the allegedly contravening conduct, and before C & M became established in the Melbourne market.)

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9 See *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 62-63.

10 (2001) 106 FCR 328 at 388.

2. The upgrade of Deer Park and the pressure that exerted on rivals.

3. BBM's capacity, as a member of a vertically integrated group, to sell at less than cost while the group made a profit. (This appears to be an aspect of 1 above.)

4. BBM's election to price lower in the expectation that there would be some recoupment later as the market became less highly competitive.

114 Merkel J also considered that, while structural barriers to entry were low, there were strategic barriers. This was a point taken further by Finkelstein J.

115 Merkel J considered that BBM's strategic objectives of damaging or eliminating one or more competitors, that is to say, its exclusionary purpose, and the actual departure of two competitors, revealed the substantiality of its market power. He did not express a view about what was revealed by the entry and success of C & M.

116 Finkelstein J examined the United States learning on predatory pricing. Like Merkel J, for reasons he explained in detail, he rejected the idea that predatory pricing could contravene s 46 only if there was a likelihood, at the end of the price-cutting, of recoupment of losses by supra-competitive pricing. In this connection, he also examined authorities on European legislation.

117 On market definition, he analysed the evidence, and came to the same conclusion as Beaumont J. He then turned to the question whether, in the market for CMP in Melbourne, BBM had a substantial degree of power. Such power, he said, does not necessarily involve a capacity to raise prices above a competitive level without losing sales. It can also exist when a firm has power to exclude competition. He cited a holding of the Supreme Court of the United States that "[m]onopoly power is the power to control prices or exclude competition"[11].

118 Referring to the relevant form of market power in this case as the ability to exclude competition, Finkelstein J said that the questions of taking advantage of market power and exclusionary purpose are not two questions, but one. The evaluation of market power and the abuse of that power is part of the one analysis. In considering exclusionary behaviour, he examined barriers to entry, and emphasised strategic barriers, in the form of the behaviour of incumbent firms. Such behaviour might include the creation of excess capacity, as with the upgrading of Deer Park.

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11 *United States v E I du Pont de Nemours & Co* 351 US 377 at 391 (1956).

119 Finkelstein J concluded that BBM had substantial power in the CMP market "and it misused that power for a relevant purpose when it engaged in a predatory pricing scheme".

Section 46

120 It was pointed out by this Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[12] that s 46 requires, not merely the co-existence of market power, conduct, and proscribed purpose, but a connection such that the firm whose conduct is in question can be said to be taking advantage of its power. It was also observed that an absence of a substantial degree of market power only requires a sufficient level of competition to deny a substantial degree of power to any competitor in the market.

121 The essence of power is absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers. This is reflected in the terms of s 46(3). Matters of degree are involved, but when a question of the degree of market power enjoyed by a supplier arises, the statute directs attention to the extent to which the conduct of the firm is constrained by the conduct of its competitors or its customers. The main aspect of the conduct of BBM in question in the present case was its pricing behaviour. Therefore, the Federal Court was required by the statute to have regard to the extent to which BBM's pricing behaviour was constrained by the conduct of other CMP suppliers, or by purchasers of CMP. The reasoning of Heerey J followed that statutory direction.

122 The purposes proscribed by s 46 include the purpose of eliminating or damaging a competitor. Where the conduct that is alleged to contravene s 46 is price-cutting, the objective will ordinarily be to take business away from competitors. If the objective is achieved, competitors will necessarily be damaged. If it is achieved to a sufficient extent, one or more of them may be eliminated. That is inherent in the competitive process. The purpose of the statute is to promote competition; and successful competition is bound to cause damage to some competitors.

123 It follows that, where the conduct alleged to contravene s 46 is competitive pricing, it is especially dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage of market power[13].

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12 (2001) 205 CLR 1 at 21 [44].

13 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 18-19 [31]; *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 at 402.

Indeed, in such a case, a process of reasoning that commences with a finding of a purpose of eliminating or damaging a competitor, and then draws the inference that a firm with that objective must have, and be exercising, a substantial degree of power in a market, is likely to be flawed. Firms do not need market power in order to put their prices down; and firms that engage in price-cutting, with or without market power, cause damage to their competitors. Where, as in the present case, a firm accused of contravening s 46 asserts that it is operating in an intensely competitive market, and that its pricing behaviour is explained by its response to the competitive environment, including the conduct of its customers, an observation that it intends to damage its competitors, and to do so to such a degree that one or more of them may leave the market, is not helpful in deciding whether the firm has, and is taking advantage of, a substantial degree of market power.

124 Section 46 does not refer specifically to predatory pricing, or recoupment, or selling below variable or avoidable cost. These are concepts that may, or may not, be useful tools of analysis in a particular case where pricing behaviour is alleged to contravene s 46. Care needs to be exercised in their importation from different legislative contexts. In the United States, for example, predatory pricing is often discussed in the context of monopolisation, or attempts to monopolise, in contravention of the Sherman Act 1890. In Europe, Art 86 of the Treaty of Rome prohibits conduct which amounts to an abuse of a dominant position in a market. We are concerned with the language of s 46. We are principally concerned with whether BBM had a substantial degree of power in a market, and whether, in its pricing behaviour, and its upgrading of its production facilities, it took advantage of that power.

125 Predatory pricing is a concept that was examined in the evidence of economists, and in the judgments in the Federal Court. Ultimately, however, it is the language of the Act that must be construed and applied. The expression was used by Dawson J in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[14] as an example of a practice that may manifest market power, but his Honour had no occasion to explain what he meant by it. One of the most important features of the decision in that case was a rejection of the argument that the concept of "taking advantage" in s 46 involves some form of predatory behaviour or abuse of power going beyond that which follows from the terms of the statute itself.

126 There 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. There is also a danger that principles relevant to the laws of other countries

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14 (1989) 167 CLR 177 at 200.

may be adopted uncritically and without regard to the context in which they were developed.

127 Finkelstein J, in his reasons for judgment, pointed out that the context in which predatory pricing has been considered in the United States is materially different from that of s 46, and that an expectation of recoupment of monopoly prices at the end of a period of illegal pricing behaviour is not a statutory requirement for the application of s 46.

128 It may equally be said that there is nothing in s 46 that, as a matter of law, requires a distinction to be drawn between pricing below or above variable or avoidable costs. As has already been observed, the distinction is in some respects unsatisfactory. Furthermore, in the present case it is of limited utility. For some, but not all, of the relevant period, prices charged by BBM were below BBM's variable costs if no adjustment or allowance is made for the position of the wider Boral group. But we are not in a position to compare BBM's prices with Pioneer's variable costs; and, because C & M were substantially more efficient, it may be inferred that their variable costs were significantly lower than BBM's costs and they may well have been lower than BBM's prices. The process, outlined in the evidence as to pricing on major projects, by which BBM set its prices, clearly involved competitive pressure from Pioneer and C & M, and pressure from customers. In none of those cases is there any evidence that BBM set its prices lower than was necessary to win the business it was seeking. In some cases, BBM refused to reduce its quotes to match its competitors. To observe, as a matter of objective fact, that BBM's prices were often lower than BBM's variable costs is inconclusive if the prices were fixed as a result of competitive market pressure.

129 If one begins with the fact that a firm is a monopolist, or is in a controlling or dominant position in a market, then, by hypothesis, such a firm has an ability to raise prices without fear of losing business. If such a firm reduces its prices, especially if it reduces them below variable cost, then it may be easy to attribute to the firm an anti-competitive objective, and to characterise its behaviour as predatory. But if one finds a firm that is operating in an intensely competitive environment, and a close examination of its pricing behaviour shows that it is responding to competitive pressure, then its conduct will bear a different character. That is the present case.

130 While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of s 46, it may be of factual importance. The fact, as found by Heerey J, that BBM had no expectation of being in a position to charge supra-competitive prices even if Rocla and Budget left the market, leaving it facing Pioneer and C & M, was material to an evaluation of its conduct. The inability to raise prices above competitive levels reflected a lack of market strength. A finding that BBM expected to be in a position, at the end of the price

war, to recoup its losses by charging prices above a competitive level may have assisted a conclusion that it had a substantial degree of market power, depending on the other evidence. But no such finding was made.

131 In this connection, it should be remembered that the ACCC originally endeavoured to make out a case involving at least conscious parallelism between BBM and Pioneer. That attempt failed. If it had succeeded, the case may have taken on a different complexion.

Market power

132 The questions whether BBM had a substantial degree of power in a market between April 1994 and October 1996, and whether its behaviour, and in particular its pricing behaviour, during that period involved taking advantage of, that is, using[15], that power, are closely related. But, as the decision in *Melway* shows, they are two questions, not one. The appellant in that case conceded that it had a substantial degree of power, but it was held that its conduct did not involve taking advantage of that power. In the present case, both questions are in issue.

133 There is a threshold problem of market definition. A market is an area of close competition; a field of rivalry. As the passage from *Re Queensland Co-operative Milling Association Ltd* quoted above indicates, and as s 46(3) recognises, both the supply side and the demand side are relevant to an assessment of the market. It does not solve, but merely re-states, the problem to speak of sub-markets. There may be a wider, and a narrower, area of rivalry; but, if the narrower area itself constitutes a market, then it is power and conduct in that area that must be examined. That is not to say, however, that an evaluation of power and conduct in the narrower area can be undertaken in isolation. It may be, in a given case, that the dynamics of rivalry in the narrower area are influenced by what goes on in the wider area.

134 The Full Court rejected the conclusion of Heerey J that there was no market for CMP in Melbourne but only, relevantly, a market for wall and paving products. The reasons given by the Full Court, and in particular by Beaumont J, for deciding that the trial judge erred in that respect are cogent. It may be accepted for present purposes that there was a market in CMP in Melbourne.

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15 See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 17 [26].

135 Definitions, or explanations of the concept, of market power normally address the market as an area of rivalrous behaviour in which there are suppliers and acquirers of goods or services. That is consistent with s 46(3), which requires consideration of constraint, by reason of the conduct of competitors or customers, or both.

136 In *Queensland Wire*[16], 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.

137 Power, that is, the capacity to act without constraint, may result from a variety of circumstances. A large market share may, or may not, give power[17]. The presence or absence of barriers to entry into a market will ordinarily be vital[18]. Vertical integration may be a factor[19].

138 Financial strength is not market power, although if a firm has market power, its financial resources might be part of the explanation of that power. The financial ability to survive a price war is not market power, or a manifestation of characteristics that give market power, if, when the price war is over, the market is still highly competitive. Power in a supplier ordinarily means the ability to put prices up, not down. But if a market is not competitive, and a firm puts prices down, seeking to eliminate a potential rival, in the expectation that it will thereafter be in a position to raise prices without competitive constraint, its ability to act in that manner may reflect the existence of market power. An example of such conduct is *Compagnie Maritime Belge Transports SA v Commission of the European Communities*[20] in which a liner conference, whose

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16 (1989) 167 CLR 177 at 188.

17 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 189 per Mason CJ and Wilson J.

18 (1989) 167 CLR 177 at 189-190.

19 (1989) 167 CLR 177 at 190.

20 [2000] ECR I - 1365.

members were collectively in a dominant market position, used fighting ships and offered selective price reductions to force an entrant out of business. Ordinarily, where the members of a shipping conference agree between themselves not to engage in price competition, their agreement not to compete on prices will be a source of market power. If an outsider enters the trade, and they make the outsider a target, their conference agreement means they need not fear price competition from each other. Shippers cannot play them off against one another. They may then take advantage of the market power that results from their agreement to force the outsider from the trade, knowing that they can withdraw their offers of reduced prices when the outsider leaves, because the market will then be uncompetitive.

139 Such a case is far removed from the present. There can be circumstances in which price-cutting may be undertaken by a powerful firm, or combination of firms. But the ability to cut prices is not market power. The power lies in the ability to target an outsider without fear of competitive reprisals from an established firm, and to raise prices again later.

140 In the present case, Heerey J, consistently with the requirements of s 46(3), approached the question whether BBM had a substantial degree of power in the CMP market, by examining the actual conduct of BBM, case by case, over the whole of the relevant period (and beyond), in respect of each of the major contracts on which it bid, in the light of the evidence that those major contracts represented the business to which it attached most importance, and on the basis that what went on in relation to those contracts was the best evidence of the state of the market and the best indication of the extent of BBM's power. That was the correct approach. As Heerey J held, a conclusion that BBM had a substantial degree of power in the market would be inconsistent with the detailed evidence as to exactly how BBM, other suppliers, and their customers, behaved.

141 To a substantial extent, the reasoning of the Full Court appears to have been affected by an error of the same kind as was corrected by this Court in *Melway*. The Full Court began with the purpose of eliminating or damaging a competitor, and reasoned inferentially from that. The dangers involved in such a process have already been mentioned.

142 The evidence of the conduct of suppliers and customers showed that the market for CMP was intensely competitive. This was partly due to the existence of the wider market; a factor the Full Court appears to have left out of account after identifying the narrower market. It was also partly due to the related matter of the aggressive behaviour of those on the demand side of the CMP market. BBM's market share was the same at the end of the period of the pricing behaviour complained of as it was at the beginning. Two firms left the market over the period; a successful new firm entered the market. BBM contemplated leaving the market itself; but decided to stay in and compete aggressively. Its

decision to upgrade its Deer Park plant was found to be rational, and explicable by reference to a desire to become more efficient. BBM had no expectation that, when the price war ended, it would be faced with anything other than a competitive market.

143 In the Full Court, both Merkel and Finkelstein JJ treated BBM's alleged capacity to eliminate rivals from the market as being the critical aspect of its supposed market power. Merkel J referred to BBM's "capacity to persistently drive down and maintain prices at below avoidable cost to drive rivals out of the market"[21]. (He made no reference to the trial judge's finding that it was the customers who were forcing prices down and down.) Finkelstein J said that when the existence of market power is defined by reference to a firm's ability to exclude competition it is not necessary first to determine whether the firm has market power and then to examine whether the power has been abused. "It is the exclusionary conduct that establishes market power"[22].

144 Two comments may be made: one as to a matter of fact; the other as to a matter of principle.

145 In its Statement of Claim, the ACCC identified C & M as the primary target of BBM's exclusionary purpose. Let it be assumed that BBM hoped that C & M would be eliminated as a competitor. The fact is that C & M was not eliminated. How does an unsuccessful attempt to exclude a competitor establish market power? If BBM's primary objective was as alleged by the ACCC, and the objective failed, the failure indicates an absence, rather than a presence, of market power.

146 Further, there is an ambiguity in the concept of exclusionary conduct, which is of particular significance in a case such as the present. Paragraphs 11, 16 and 17 of the Statement of Claim are referred to above. The conduct on the part of BBM identified in par 11(a), and said in pars 16 and 17 to amount to a taking advantage of its market power, was pricing below cost. As the case was framed, the contravening conduct was price-cutting. If the manner in which BBM set its prices was an exercise of market power, the relevant kind of power lay in its supposed ability to set prices free from constraint resulting from the conduct of its competitors or its customers.

147 If the ACCC had alleged that BBM had the ability to eliminate a competitor at will, then BBM's failure to eliminate C & M would have been an

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21 (2001) 106 FCR 328 at 389.

22 (2001) 106 FCR 328 at 413.

embarrassing fact. But in any event, eliminating a competitor, unless it is done out of pure malice, is ordinarily only a means to the end of being able to raise prices. If, after one or two firms leave a market in the course of a price war, the remaining firms are in strong competition, then their departure does not achieve, or evidence, market power. In October 1996, BBM faced Pioneer and C & M. And its market share was about the same as it had been in April 1994. It had demonstrated that it had the financial strength to stay in the market. But it had not demonstrated, or achieved, a substantial degree of power in the market.

148 The reasoning of Heerey J on the question of market power, and taking advantage of market power, was in accordance with the evidence and the statute. The Full Court was in error in reversing his findings.

The Deer Park upgrade

149 The second aspect of the conduct of BBM relied upon by the ACCC, which was the expansion of production capacity, did not play a large part in the case. It demonstrated BBM's financial strength, but as already observed, financial strength is not the same thing as market power. If one were to conclude that BBM's pricing behaviour was predatory, then its expansion of production capacity may also take on a more sinister aspect. And it was a matter to be considered in evaluating BBM's market strength. But the finding of fact made by Heerey J, recorded above, as to the reason for the expansion, and the business purpose it served, takes away the significance the ACCC sought to attach to it.

Conclusion

150 The decision of Heerey J was correct. The appeal should be allowed with costs. The orders of the Full Court of the Federal Court should be set aside and, in place of those orders, the appeal to that Court should be dismissed with costs.

GAUDRON, GUMMOW AND HAYNE JJ.

The application by the ACCC

151 Sections 76 and 77 of the Act[23] provide for the institution by the ACCC of proceedings in the Federal Court for the recovery on behalf of the Commonwealth of pecuniary penalties for contravention of a provision of Pt IV of the Act (ss 45-51AAA). By application dated 5 March 1998, the ACCC instituted such a proceeding against BBM and Boral. In the events which have happened, it is BBM which is the material party and that company is the appellant in this Court.

152 In addition to seeking payment of pecuniary penalties, the ACCC sought a declaration that BBM contravened s 46 of the Act by engaging in the conduct described in par 11 of the Statement of Claim for the purposes, or any of the purposes, described in par 16 thereof. An order also was sought that there be findings of fact for the purposes of s 83 of the Act. Section 83 would render findings of fact made in a successful proceeding for the recovery of pecuniary penalties for contravention of s 46 prima facie evidence of those facts in a proceeding against BBM by a person suffering loss or damage by conduct done in contravention of s 46.

153 The central allegation in par 11 of the Statement of Claim was that in sub-par (a)[24]. This stated that BBM "between at least in or about April 1994 and at least in or about October 1996 reduced the prices at which it offered to supply and supplied [CMP] in Melbourne, generally, [or] alternatively to current or identified potential customers of [C&M], Rocla and [Budget], to levels at or below its cost of the manufacture and supply of those products".

154 The critical allegations in par 16 were that the conduct of BBM described in par 11 constituted the use of power in the Melbourne market for the supply of CMP for purposes which included the substantial purpose of:

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23 Unless otherwise indicated, the abbreviations used herein are those used in the joint judgment of the Chief Justice and Callinan J.

24 The allegation in sub-par (b) was not pressed at the trial and, for present purposes, the allegations in sub-par (c) respecting the Deer Park upgrade may be put to one side.

"(a) eliminating or substantially damaging [C&M] a competitor in the Melbourne market (and other competitors in that market including Rocla and [Budget]);

(b) preventing the entry of [C&M] and others into the Melbourne market".

These allegations tracked the terms of pars (a) and (b) of s 46(1) of the Act.

155 As the Chief Justice and Callinan J explain in their reasons for judgment, it is to be accepted for present purposes that, as alleged, there was a market for CMP in Melbourne, and that it is this, not a more widely defined market for walling and paving products generally, which is the relevant market for the purposes of s 46.

The Federal Court

156 The trial judge (Heerey J) dismissed the application[25]. The Full Court (Beaumont, Merkel and Finkelstein JJ) allowed the appeal by the ACCC against the dismissal of its application brought against BBM and remitted the proceeding to the primary judge for further hearing and determination in relation to the relief sought by the ACCC[26]. The Full Court itself made no declaration respecting contravention of s 46 by BBM. However, it appears, at least from the reasons of Merkel J[27], that the particular proscribed purposes which were found against BBM were those in pars (a) and (b) of s 46(1). It will be recalled that allegations to this effect had been made in sub-pars (a) and (b) of par 16 of the Statement of Claim. Those contraventions were said to arise by reason of the reduction of prices to levels at or below cost of manufacture and supply, in the manner alleged in par 11(a).

157 It is as well at the outset to say that measuring costs is seldom free from difficulty. Dividing costs between the fixed and the variable can be a matter of arbitrary assignment. Identifying, quantifying and attributing costs incurred, often many years ago, in obtaining the plant and equipment used in a manufacturing process is beset with problems. Those problems are magnified

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25 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410.

26 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 379-380.

27 (2001) 106 FCR 328 at 388.

and multiplied when the vendor whose costs are to be measured, such as BBM, is one entity in a vertically integrated corporate group. It follows that identifying the "cost" of goods manufactured by BBM required the making of many assumptions and decisions about which there could be different views. However, it is unnecessary to explore these matters. At trial the parties agreed about what were said to be the relevant costs.

Price-cutting

158 Part IV of the Act proscribes various practices in respect of pricing which merit the epithet "restrictive" in the heading for that Part. For example, s 45A deems certain horizontal price-fixing arrangements between competitors to be likely substantially to lessen competition and therefore to be unlawful under s 45; s 45C makes absolute, in the case of price-fixing covenants, the general prohibition in s 45B respecting anti-competitive covenants; s 48 forbids engagement in resale price maintenance. Such provisions, to put it broadly, manifest legislative concern with the injury to competition by practices apt to keep up prices.

159 However the Act has never contained any specific and comprehensive prohibition of a practice of cutting prices to below cost. That is not surprising. It is true that injury to a trade rival by price-cutting in some circumstances may attract liability in tort, under one or more of the intentional economic torts as they are, so far, understood in Australia[28]. Further, if contravention of Pt IV by one firm be established, another firm may, for example, recover under s 82 its loss or damage suffered by that conduct; standing in respect of injunctive relief under s 80 is conferred in broad terms[29]. The prima facie evidence provision in s 83 may assist in that regard. Nevertheless, such remedies, in respect of what in the United States may be identified as "antitrust injury"[30], are dependent upon the existence or apprehended existence of contravention of one or more of the norms of conduct laid down in Pt IV[31]. The provisions of Pt IV are to be interpreted in

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28 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 244-247 [175]-[183], 305-307 [346]-[348].

29 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

30 *Cargill Inc v Monfort of Colorado Inc* 479 US 104 at 109-113 (1986).

31 See *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 509 [33], 528-529 [100]-[101]; *Henville v Walker* (2001) 206 CLR 459 at 489-490 [96], 503-504 [135].

accordance with the subject, scope and purpose of the legislation, in particular the object stated in s 2 of enhancing the welfare of Australians through the promotion of competition.

160 The structure of Pt IV of the Act does, despite the considerable textual differences, reflect three propositions found in the United States antitrust decisions. The first is that these laws are concerned with "the protection of *competition*, not *competitors*"[32]. The second, stated in *Brooke Group Ltd v Brown & Williamson Tobacco Corp*[33], is that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'."[34] The third, which appears from *Cargill Inc v Monfort of Colorado Inc*[35], is that it is in the interest of competition to permit firms with substantial degrees of power in the market (or, in the United States, a dominant position) to engage in vigorous price competition and that it would be a perverse result to render illegal the cutting of prices in order to maintain or increase market share.

161 Nevertheless, there has appeared in the United States decisions, accompanied by a great deal of writing by lawyers and economists, a significant caveat to these propositions. The caveat is a recent manifestation of a tendency to construe broadly drawn proscriptions in laws such as the Sherman Act and the *Australian Industries Preservation Act* 1906 (Cth) for the repression of monopolies, with a criterion to distinguish beneficial from deleterious competitive practices. The predator is distinguished from the efficient competitor. In the *Coal Vend Case*[36], Isaacs J put the beneficial effects to the public from efficient competition at odds with the activities of "an engrosser". The tripartite structure of s 46, to which further reference will be necessary, teases out such notions and gives them specific form.

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32 *Brown Shoe Co v United States* 370 US 294 at 320 (1962); *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209 at 224 (1993).

33 509 US 209 at 225 (1993).

34 *Hunt v Crumboch* 325 US 821 at 826 (1945).

35 479 US 104 at 116 (1986).

36 *R and the Attorney-General of the Commonwealth v Associated Northern Collieries* (1911) 14 CLR 387 at 653 (revd (1912) 15 CLR 65, and affd [1913] AC 781). Isaacs J referred at length in his judgment ((1911) 14 CLR 387 at 396-667) to the decisions upon the Sherman Act.

162 In the modern predatory pricing cases, reference is made by the United States Supreme Court to pricing "above predatory levels", and to "competition on the merits"; the Court has said that low prices benefit consumers and do not threaten competition "so long as they are above predatory levels"[37]. Again, in *Brooke Group*, the Supreme Court stated[38]:

> "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."

Further, in *Brooke Group*, it was determined that price-cutting would be "predatory"[39] if (a) the complainant seeking recovery proved that the prices complained of were below "an appropriate measure of its rival's costs" and (b) the competitor had a reasonable prospect (under the Robinson-Patman Act) or a dangerous probability (under the Sherman Act) of recovering the losses suffered by later monopoly profits, recoupment being the ultimate object of an unlawful predatory pricing scheme[40].

Section 46 of the Act

163 Until its repeal in 1995[41], s 49 of the Act (inspired by the Robinson-Patman Act[42]) may have proscribed predatory pricing when practised along with discrimination in pricing by the charging of two or more prices for the same

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37 See *Atlantic Richfield Co v USA Petroleum Co* 495 US 328 at 340 (1990).

38 509 US 209 at 223 (1993).

39 Whether under §2 of the Sherman Act or as primary-line price discrimination under the Robinson-Patman Act.

40 509 US 209 at 222-224 (1993). Areeda and Hovenkamp write that "monopoly recoupment … exists when the seller is able to reduce marketwide output and for that reason raise price to monopoly levels": *Antitrust Law*, (2001 Supp) at 162.

41 By s 14 of the *Competition Policy Reform Act* 1995 (Cth).

42 Donald and Heydon, *Trade Practices Law*, (1978), vol 1 at §8.1.1; Heydon, *Trade Practices Law*, (1989), vol 1 at §§8.900-8.930.

product[43]. So also s 46. It will be recalled that, as first enacted in 1974, s 46(1) spoke of a corporation that was in a position "substantially to control a market". Speaking of the provision in that form, Professor Breyer (as Justice Breyer then was) wrote[44]:

> "Section 46 apparently prohibits predatory pricing, whether or not accompanied by price differences, when it prohibits a firm from taking 'advantage of the power' that it derives from being 'in a position substantially to control a market for goods or services' in order 'to eliminate … a competitor'. This prohibition would apply when the predator already possesses significant market power. As a practical matter, also, this prohibition, together with that of s 49, may prove sufficient to stop almost all instances of predatory conduct. Nonetheless, it should be noted that the Act does *not* prohibit predatory pricing when carried out by a firm with a comparatively small share of the market into which it is entering – a firm that may have large financial resources behind it. If such a firm engages in predatory pricing before it obtains control of the market, but then ceases its practice once it succeeds, it may remain free of s 46. As long as it charges only one price at any one time, it will remain outside s 49."[45]

The reference to firms with large financial resources has a significance for this litigation to which it will be necessary to return.

164 In their joint judgment in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[46], Mason CJ and Wilson J emphasised that the purpose

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43 Breyer, "Five Questions about Australian Anti-Trust Law", (1977) 51 *Australian Law Journal* 63 at 69.

44 "Five Questions about Australian Anti-Trust Law", (1977) 51 *Australian Law Journal* 63 at 69.

45 cf Heydon, *Trade Practices Law*, (1989), vol 1 at §5.40; Edwards, "The Perennial Problem of Predatory Pricing", (2002) 30 *Australian Business Law Review* 170 at 196-197. The former author makes the point that:

> "Section 2 [of the Sherman Act] deals with both building up monopoly power and use of monopoly power. Section 46 deals only with use of power with a certain purpose; though the degree of power required is less than monopoly power."

46 (1989) 167 CLR 177 at 191. See also *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13 [17].

of s 46 is not "the economic well-being of competitors", but the protection of the interests of consumers, "the operation of the section being predicated on the assumption that competition is a means to that end". They continued by posing the relevant question as being whether a firm with a substantial degree of market power has used that power for a purpose proscribed in s 46, thereby undermining competition[47].

165 It is here that the critical matter arises. We were referred in submissions to many decisions and commentaries in a number of jurisdictions which touch upon the practice of "predatory pricing". However, the question whether the Full Court erred in overruling the dismissal by Heerey J of the ACCC's case against BBM is to be considered not by looking to what has been said respecting the practice of "predatory pricing" and then reviewing the factual findings made by Heerey J. It is necessary to look first to the text and structure of the Act, particularly s 46. The point is made as follows in par 53 of the Explanatory Memorandum accompanying the bill for what became the *Trade Practices Revision Act* 1986 (Cth), which introduced the "substantial degree of power in a market" test:

> "Kinds of conduct which in certain circumstances could be in breach of the provision would include inducing price discrimination, refusal to supply and predatory pricing. These instances are indicative only and, in each case, it would be necessary to establish the requisite degree of market power and that advantage had been taken of the power for one of the specified purposes."

166 The Act contains several limitations upon what otherwise would be the operation of s 46. Division 1 of Pt VII (ss 87D-91C) establishes a system of authorisations. Section 46(6) provides that that section does not prevent a corporation from engaging in conduct which does not constitute a contravention of s 45 (contracts, arrangements or understandings that restrict dealings or affect competition), s 45B (covenants affecting competition), s 47 (exclusive dealing) or s 50 (acquisitions that would result in a substantial lessening of competition) by reason of a current authorisation. Thus, if conduct is authorised and hence made lawful, s 46 does not render it unlawful. Further, s 93, which is in Div 2 of Pt VII, provides that certain conduct or proposed conduct notified to the ACCC is not unlawful under s 47. The effect of s 46(6) is that such conduct is not rendered unlawful by s 46. In addition, s 46(5) states that a corporation should not be taken to contravene s 46(1) "by reason only that it acquires plant or

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47 (1989) 167 CLR 177 at 191.

equipment". This provision was included in the 1977 amendments[48] on the advice of the Swanson Committee[49] because:

> "[c]oncern was expressed in the submissions that a monopolist who invested in new capital plant and equipment might be regarded as contravening the section. Cases of predatory investment will inevitably be rare. However, we consider it desirable to ensure that the section is not used as an excuse for failure to invest."

None of these exemptions or qualifications is applicable in the present case.

The issues

167 Reference has been made above to the importance of an analysis of the issues which has as its focus the structure of s 46. That structure perhaps represents different legislative drafting techniques to those which produced the broadly cast United States antitrust provisions. It provides answers to questions posed, for the United States, by Chief Judge Posner and Judge Easterbrook when they wrote in 1981 as Professors at the University of Chicago. They asked whether "a purely cost-based standard of predatory pricing is desirable" and continued[50]:

> "Specifically, should sales below marginal cost, or perhaps below average cost with exclusionary intent, be unlawful per se? *Or should there be some threshold condition, relating to market share, or number of markets in which the defendant operates, that the plaintiff must satisfy before the question of below-cost selling is even reached?* What conditions might these be? What are the arguments for such an approach?" (emphasis added)

168 For this litigation, s 46(1) has three relevant elements. First, the subject of its operation is "[a] corporation that has a substantial degree of power in a market". In determining the degree of power that BBM had in the Melbourne CMP market, s 46(3) obliged the Federal Court to have regard to the extent to which the conduct of BBM in that market was constrained by the conduct of (i) competitors of BBM in that market, or (ii) persons to whom BBM supplied

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48 By s 25 of the *Trade Practices Amendment Act* 1977 (Cth).

49 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, (1976), par 6.11.

50 Posner and Easterbrook, *Antitrust*, 2nd ed (1981) at 688.

goods or services in that market, or (iii) persons from whom BBM acquired goods or services in that market. Section 46(3) does not stipulate that regard be had only to these matters. Other matters which might be thought relevant, such as the number of competitors, their strength and size, the height of barriers to entry and the stability or volatility of demand usually will, at the evidentiary level, properly be considered in reaching conclusions as to the extent of the constraints stipulated in s 46(3).

169 Secondly, on the assumption that BBM had the necessary substantial degree of market power, the conduct of BBM which was proscribed was the taking advantage of that power for a specified purpose. Although these two steps are expressed sequentially, conclusions drawn from the evidence as a whole may bear upon both of them. So, if the evidence, which Heerey J found "bared the corporate soul of BBM"[51], established that BBM had responded to its major customers who had forced down prices and that BBM had been attempting to survive a price war, those conclusions would bear upon the issues of both a substantial degree of market power and the taking advantage of that power. Again, in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[52], although there was no argument against the finding that the appellant had a substantial degree of power in the market, it was said that the dispute as to the taking advantage of that power required attention to the meaning of the concept of market power.

170 What is involved in the sufficiency of the connection between the market power and the conduct complained of, expressed in the notion of taking advantage, was considered in *Melway*. In the present case, Heerey J observed[53]:

> "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."

171 This observation may illustrate the point made by Justice Heydon that predatory price-cutting is commonly distinguished from defensive price-cutting, such as the cutting of prices in response to changed market circumstances including a drop in demand, which requires some new strategy if the firm in

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51 (1999) 166 ALR 410 at 442.

52 (2001) 205 CLR 1 at 20-21 [40].

53 (1999) 166 ALR 410 at 440.

question is to survive; "[t]he latter is usually assumed to be lawful, simply because it is a competitive response"[54].

172 The third requirement is that advantage be taken of the substantial degree of market power for one or more of the purposes proscribed. However, what is involved is not an isolated corporate state of mind; it is not to the point that a firm had in mind one or more of the proscribed purposes, if, on the evidence, the anterior sequential steps for the operation of s 46 cannot be taken.

173 There is no real controversy about what BBM did and why it behaved in that fashion. For 30 months BBM cut its prices for some of the goods it made and sold, in the expectation that one or more of its competitors would leave the market for those goods. But, in engaging in this pricing behaviour, did BBM act as a firm with a substantial degree of power in that market and take advantage of that power?

The judgment at trial

174 Heerey J concluded, after a detailed review of the evidence, particularly that respecting tenders for major projects, that the customers had been able to force masonry manufacturers "down and down"[55]. He concluded that low barriers to entry and the existence of strong competitors meant that BBM did not have the power to behave independently of competition and of competitive forces in the CMP market in Melbourne, so that it did not have a substantial degree of market power[56]. His Honour went on to make further findings[57]:

> "The conditions, actual and prospective, which BBM faced in 1992 were very difficult. They included:
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> - a market share which had fallen from more than 30% to 12-15%, partly at least as a result of poor local management;
> - a deep recession in Victoria with consequent decline in building activity;

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54 Heydon, *Trade Practices Law*, (1989), vol 1 at §5.760.

55 (1999) 166 ALR 410 at 439.

56 (1999) 166 ALR 410 at 440.

57 (1999) 166 ALR 410 at 444.

- growth in popularity of competing products, in particular tilt-up; and

- excess capacity in the industry, exacerbated by the new C&M plant.

BBM gave active consideration in late 1993, and again some 12 months later, as to whether it should quit concrete manufacturing in Victoria. It decided to stay in, cut prices to win business, and upgrade its plant to improve efficiency, all in the hope of better times to come. Pioneer also decided to stay in. Rocla decided to quit. All these were firms with deep pockets. C&M decided to stay in. It did not have a particularly deep pocket, but nevertheless it survived and prospered. Budget did not have a deep pocket at all. It failed and its proprietor Mr Coghill lost his home, lost everything.

All these competitors were faced with the same hard conditions as BBM and also had to make hard decisions. What BBM did was to make legitimate business decisions, consistent with it being in a very competitive market and consistent with it not having any degree of market power or taking advantage of such power."

175 It is emphasised in *Melway* that, in the determination of questions such as the existence of a substantial degree of market power and the taking advantage thereof, much turns upon evidence given at trial and the inferences that can be drawn from that evidence[58]. The Chief Justice and Callinan J have demonstrated in their reasons that the conclusions reached by Heerey J were well founded in the evidence. That being so, one asks how it came to pass that in the Full Court the ACCC succeeded in outflanking the grounds upon which BBM had succeeded at trial.

The Full Court

176 It is appropriate to note several matters which were not part of the case put by the ACCC. First, while there were only a few participants on the supply side of the market, the ACCC did not contend that the CMP market in Melbourne was an oligopoly; it disavowed any case that there had been an agreement, arrangement or understanding between those participants concerning any relevant market conduct. Rather, there was rivalry between them which, on the evidence, was manifested in their pricing behaviour.

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58 (2001) 205 CLR 1 at 28 [69].

177 Secondly, the ACCC did not contend that BBM, or any of the other participants in the market for CMP, was unconstrained by its competitors, or by the acquirers of its goods, in the level to which it could *raise* its prices. Indeed, the evidence plainly demonstrated that, for larger projects, acquirers of CMP could and did play suppliers off against each other and, although prices to other customers were not subject to that kind of constraint, competition between BBM and the other manufacturers in the market did prevent BBM and the other participants from raising prices above certain levels.

178 Rather, the ACCC complained that BBM charged too little to its customers for CMP. The conundrum this presented is whether s 46, which is designed to enhance the interests of such customers, prohibited BBM from cutting its prices as it did. Hence the rhetorical questions which were reflected in many of the submissions by BBM in this Court. What is anti-competitive about cutting prices? Is not price rivalry the essence of competition? On the other side, countervailing considerations concerned with price predation and competition which was not on the merits were advanced.

179 In the Federal Court, and on appeal in this Court, the ACCC emphasised the evidence which revealed that BBM set its prices for some goods below what was calculated to be the avoidable cost incurred by BBM in producing the goods. It was submitted that, to sell goods at a price so low that each sale diminished the value of the net assets of the seller, showed, at least when this behaviour was maintained for as long as 30 months, that the seller had a substantial degree of power in the market for sale of those goods.

180 That approach to the issues in the case enjoyed some success in the Full Court. This appears particularly from the critical passage in the reasoning of Finkelstein J. This is as follows[59]:

> "Generally, an analysis of abuse of market power involves a two-stage process: first, it is necessary to determine whether a firm has market power, second it is necessary to examine whether that power has been abused. However, when the existence of market power is defined by reference to a firm's ability to exclude competition, the two step investigation is not appropriate. The evaluation of market power and the abuse of that power is part of one analysis. The existence of market power based on this approach cannot be examined independent of the alleged exclusionary conduct. *It is the exclusionary conduct that establishes market power, not the reverse*." (emphasis added)

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59 (2001) 106 FCR 328 at 413.

181 In *Melway*[60], reference is made to the danger in proceeding too quickly from a finding about purpose to a conclusion about taking advantage. It has been emphasised in the submissions of BBM in this Court, and elsewhere[61], that the reasoning of Finkelstein J treats evidence concerning the exclusion of rivals as indicative both of the existence of a substantial degree of market power and the taking of advantage of that power for a proscribed purpose; thereby, it is said, there is impermissible conflation in the consideration of the various elements stipulated in s 46(1).

182 Finkelstein J had referred to a paper by United States authors versed both in law and economics[62] where the view was put that, in some circumstances, the existence of market power could not be evaluated independently of and prior to analysis of the alleged abuse of power; it was the exclusionary conduct which created the market power in question not the other way around. However that is but one view in a range of American opinion. For example, in his oral evidence, Professor George Hay[63] said of the adaptation of this reasoning in the case put by the ACCC:

> "Rather, it's based on a very simple theory. All we need to know is that there was a period of time when BBM priced some of its products below average variable cost. They say the reason that's all we need to know is because that's irrational … unless the firm believed that it would eventually be able to charge higher prices, or put another way, a firm might do this if it believed it would be able to achieve the power to give less and charge more in the future."

183 After referring to the question whether such an interpretation could be accommodated to the requirements of the Australian statute, Professor Hay continued:

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60 (2001) 205 CLR 1 at 18 [31].

61 Edwards, "The Perennial Problem of Predatory Pricing", (2002) 30 *Australian Business Law Review* 170 at 181-182.

62 Krattenmaker, Lande and Salop, "Monopoly Power and Market Power in Antitrust Law", (1987) 76 *Georgetown Law Journal* 241 at 254-255.

63 Edward Cornell Professor of Law and Professor of Economics at Cornell University, previously Director of Economics for the Antitrust Division of the United States Department of Justice.

> "In any event, independent of statutory interpretation, I think with the wisdom of 20 years of analysis in the United States of predatory pricing cases, starting with the Areeda Turner article in 1975[64], the idea that one could comfortably infer market power simply from observing that prices were for a period of time allegedly below the average variable cost is very uncertain economics and more important, very bad policy."

The witness went on to refer to United States authority, in particular *Brooke Group*, as rejecting "the notion that you could bootstrap your way from below cost pricing to the conclusion that monopoly pricing would necessarily occur later on".

184 In any event, as s 46 is framed and has been interpreted in this Court, what is required first is an assessment of whether the firm in question possessed a substantial degree of market power, having regard to considerations such as those referred to by Heerey J and, if so, then asking whether the firm has taken advantage of that power for a proscribed purpose and in that way abused the power.

185 Merkel J[65] reasoned substantially in similar fashion to Finkelstein J. His Honour referred to various matters which he said were "closely related to or form part of BBM's exclusionary conduct" and said that, when they were considered cumulatively, it was clear that to a significant extent BBM was able to behave independently of competition and of the competitive forces in the market. He added[66]:

> "Each of the elements of BBM's exclusionary conduct demonstrate[s] that during the relevant period it persistently behaved in a manner that was significantly different from the behaviour that a competitive market would *enforce* on a firm facing otherwise similar cost and demand conditions. The factors to which I have referred indicate that during the relevant period BBM's market power was substantial."

186 This concentration upon the significance of exclusionary conduct tended to colour the result with notions of disapproval of competitive behaviour which was seen as unfair. But, as has been pointed out, the object of s 46 is not the

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64 Areeda and Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", (1975) 88 *Harvard Law Review* 697.

65 (2001) 106 FCR 328 at 389.

66 (2001) 106 FCR 328 at 389.

protection of the economic well-being of competitors; if the behaviour which excludes or damages rivals is low pricing, it is customers who stand to benefit.

187 Finkelstein J also concluded[67] that, "because intent is at the heart of the offence", there was no need to have recourse to notions of recoupment of losses by later extraction of high prices as an element of a claim that advantage has been taken of a substantial degree of market power by the setting of prices below cost to drive existing competitors out or deter entry of new competitors.

188 Both Merkel J and Finkelstein J[68] relied upon the statement by Dawson J in *Queensland Wire*[69]:

> "[M]arket power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal … The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices."

Some indication of what Dawson J had in mind may be seen in his reference to the observation by the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd*[70]:

> "In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers."

In any event, Dawson J concluded the passage in question by setting out the text of s 46(3) with its reference to constraint by the conduct of competitors, suppliers or customers. What was said by Dawson J does not supply any adequate foundation for the approach taken in this case in the Full Court.

189 Beaumont J, the other member of the Full Court, regarded "[t]he real question" in the appeal as whether there had been established purposes

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67 (2001) 106 FCR 328 at 398.

68 (2001) 106 FCR 328 at 388, 413 respectively.

69 (1989) 167 CLR 177 at 200.

70 (1976) 25 FLR 169 at 188-189.

proscribed by s 46(1)[71]. His Honour had concluded that BBM's conduct in the market to a large or considerable degree had not been constrained by the conduct of its competitors[72]. However, as is demonstrated by the analysis of the evidence undertaken by the Chief Justice and Callinan J in their judgment, there was significant restriction upon the freedom of BBM in its pricing behaviour by reason of the conduct of customers in driving down prices for large contracts. The conduct of customers as well as of competitors was a matter to which attention is directed by s 46(3).

190 Beaumont J also referred to the increase by BBM in its market share as an indicator of the exercise of its economic strength. That strength, to his Honour, was attributable not only to the capacity of BBM but also "to its willingness to forego profits in the short or even medium term, in the expectation that other players (albeit not Pioneer) would probably decide to depart"[73].

191 On that view of the matter, it would, at least at an evidentiary level, be appropriate to consider what in the United States decisions is treated as "recoupment"[74]. However, the trial judge had found that BBM had no prospect of being able to recoup its losses by charging supra-competitive prices[75]. After observing that BBM's intimate and confidential documents had been exposed to the most critical scrutiny in the course of the litigation, Heerey J continued[76]:

> "Yet nowhere is there any suggestion, hope or expectation of BBM being able to recover its losses by supra-competitive prices. Certainly BBM hoped one day to return to profitable operations; there would be no point in it staying in business if that were not so. Yet all it hoped for, or could hope for, was profit in a competitive market. The ever present threat of

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71 (2001) 106 FCR 328 at 378.

72 (2001) 106 FCR 328 at 378.

73 (2001) 106 FCR 328 at 378.

74 cf *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209 at 224 (1993), which treats a reasonable prospect of recoupment as a prerequisite to recovery in a claim of antitrust injury by predatory pricing. The position in the European decisions appears to differ: Corones, *Competition Law in Australia*, 2nd ed (1999) at 353-356.

75 (1999) 166 ALR 410 at 442.

76 (1999) 166 ALR 410 at 442-443.

> Pioneer, and the low barriers to new entrants, would prevent anything more. BBM did not take into account recovering past losses, still less recovery by charging monopoly prices."

192 These findings of fact by the primary judge were well based. To the extent that Beaumont J's reasoning treats as indicative of the possession of a substantial degree of market power the ability of a firm to exclude competitors by it foregoing profits in the short or medium term, these findings by the trial judge stood in the way.

Conclusions

193 The significance for the Full Court in placing emphasis upon BBM's resources as enabling it to sustain its price-cutting and upon the existence of proscribed purposes for the conclusions with respect to market power is not clear. The Full Court was either or both adopting a particular construction of s 46 as a matter of law, or drawing evidentiary inferences to support a finding of substantial degree of market power. The ambiguity involved is illustrated by Merkel J's statement that the ability of BBM "to persistently engage in predatory pricing to exclude competition is an *indication* of its market power"[77].

194 At the evidentiary level, the matters relied upon were not probative of the conclusion derived from them. They lacked the necessary rational probative value referred to in *Smith v The Queen*[78]. The persistence of its pricing conduct demonstrates that BBM had access to sufficient financial resources to enable it to persist in setting its prices at the levels it did for as long as it did. It may also suggest that the alternatives of continuing to produce but not sell CMP in the Melbourne market, or to cease production of some or all of the CMP lines, were alternatives that were seen as being even less palatable than sustaining losses in the amount and for the time which BBM did. Neither producing without selling, nor ceasing production, is cost free. But to appreciate these considerations does not found any conclusion as to the existence of a substantial degree of market power. Further, to reason, as a matter of permissible statutory construction, from purpose to existence of substantial market power, is to invert the reasoning process which, consistently with the object of the provisions in s 46, is mandated by the decisions in *Queensland Wire* and *Melway*.

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77 (2001) 106 FCR 328 at 388 (emphasis added).

78 (2001) 206 CLR 650 at 653-654 [6]-[7].

195 Comparison may be drawn with the conclusions of Judge Easterbrook, in the Court of Appeals for the Seventh Circuit, expressed with a view to the conduct of jury trials in predatory pricing cases under the Sherman Act. His Honour determined[79] that to fix upon intent does not assist in separating beneficial aggressive competition (where prices are set by reference to the market) from attempted monopolisation, that it invites juries to penalise hard competition, and that a "greed-driven desire to succeed" over rival firms is neither a basis of liability nor a ground for the inferring of the existence of such a basis.

196 The reasoning of the trial judge with respect to the question of substantial degree of market power was in accordance with the evidence, the statute and the decisions of this Court. So also, to the extent that it truly arose, was his Honour's conclusion with respect to the question of the taking advantage of that power. The Full Court was in error in taking the path it took to allow the appeal by the ACCC.

197 The appeal to this Court by BBM should be allowed and orders made as proposed by the Chief Justice and Callinan J.

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79 *AA Poultry Farms Inc v Rose Acre Farms Inc* 881 F 2d 1396 at 1402 (1989).

198 McHUGH J. The issue in this appeal is whether Boral Besser Masonry Ltd ("BBM") contravened s 46 of the *Trade Practices Act* 1974 (Cth) ("the Act") by taking advantage of a substantial degree of market power and engaging in "predatory pricing" for the purpose of eliminating or damaging competitors and preventing them from engaging in competitive conduct in the relevant market.

199 In my opinion, BBM did not have a substantial degree of power in the relevant market – the sale of concrete masonry products – because it was not able to raise prices to supra-competitive levels without its rivals taking away customers. Nor was it in a position to recover the losses it made by pricing below relevant cost when and if the price-cutting finished. Accordingly, irrespective of the purpose of its pricing, it did not have a substantial degree of market power of which it could take advantage.

Statement of the case

200 The respondent ("the ACCC") sued BBM and its parent company Boral Ltd ("Boral") in the Federal Court of Australia for a declaration that BBM and Boral had contravened s 46 of the Act. The ACCC alleged that, between April 1994 and October 1996, BBM and Boral had a substantial degree of power in the market for concrete masonry products and had contravened the Act by:

- selling its concrete masonry products at less than the avoidable cost of production;
- offering to buy the plant of a competitor, C&M Brick (Melbourne) Pty Ltd ("C&M"); and
- increasing capacity at its existing plant when there was a surplus of capacity in the market.

201 The action was heard by Heerey J[80]. His Honour held that the relevant market was a wider one than that for which the ACCC contended. Heerey J found that the relevant market was confined to the metropolitan area of Melbourne and consisted of the supply to builders of materials for use in the construction of walls and paving. His Honour also found that BBM did not have a substantial degree of power in that market and, if it had, had not taken advantage of its market power for the purpose of eliminating or substantially damaging a competitor. Heerey J[81] dismissed the action against Boral because the evidence did not suggest that any conduct of Boral had contravened s 46.

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80 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410.

81 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 447 [199]-[200].

202 The Full Court of the Federal Court (Beaumont, Merkel and Finkelstein JJ)[82] allowed an appeal from the judgment of Heerey J dismissing the action against BBM. The Full Court held that the relevant market was the supply of concrete masonry products, that BBM had a substantial degree of power in that market and had taken advantage of it for a purpose proscribed by s 46 of the Act.

203 This Court granted BBM special leave to appeal against the order of the Full Court. The issues in the appeal are:

- whether the relevant market was confined to concrete masonry products;
- whether BBM had a substantial degree of power in that market; and
- whether BBM took advantage of its market power for a purpose proscribed by s 46 of the Act.

204 Also involved in the appeal are a number of sub-issues. Does a firm breach s 46 of the Act by selling below avoidable cost for the purpose of damaging competitors if it will be unable to recoup the losses resulting from that conduct? Does s 46 of the Act distinguish between vigorous competition through pricing and anti-competitive pricing? If so, on what basis does s 46 distinguish between the two types of conduct? Can a firm deny taking advantage of market power by showing that it priced below avoidable cost only to maintain its market share or for some other legitimate business reason?

Factual background

The products

205 Concrete masonry products are manufactured by mixing and injecting cement, sand, stone aggregate, water and (sometimes) a colouring ingredient into moulds in the form of a block, a brick or a paver. These raw materials were readily available to manufacturers in Melbourne in the relevant period. Both BBM and its largest competitor, Besser Pioneer Pty Ltd ("Pioneer"), obtained some of their raw materials from upstream suppliers within their own corporate groups, generally at market prices. After compression, the products are moved into a kiln for drying, then placed on a pallet and wrapped in plastic covering. As the process is not continuous, the more units a machine can produce in one batch, and the quicker it can be done, the more efficient is the process.

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82 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328.

206 Masonry blocks are commonly used as building material for the construction of walls, both internally and externally, especially in commercial buildings or where aesthetic appearance is not important. Masonry bricks are used in the construction of walls as well, but more particularly in residential housing. Paver bricks are designed for use as an external pavement and are commonly used around domestic residences and commercial buildings. Pavers are made for either light or heavy-duty applications. Heavy-duty pavers are used in commercial situations that are subject to heavy load bearing weight, such as roadways and wharves. Retaining wall products are used for landscaping external areas around residences, commercial buildings, public parks and along roadways for retaining earth and stopping erosion. In essence, concrete masonry products are a commodity.

207 The building industry uses a number of products as alternatives to concrete masonry products. Two of them are tilt-up and precast panels. They are essentially the same products: sections of wall that are cast in concrete and then placed in position. The terms are occasionally used interchangeably. Sometimes, the term tilt-up is applied to the product when made offsite. At the trial, Mr Peter Slattery, an experienced quantity surveyor, gave evidence as to the reasons that might induce a builder to choose tilt-up or precast instead of concrete masonry. He said that in the early 1990s the market position of concrete masonry had weakened except in relation to housing construction. There were two reasons for this weakening. First, building owners became more aware of the alternative products and building systems that were available and were willing to move away from traditional masonry products. Second, in multi-unit developments, precast wall panels were seen as a good alternative to masonry. They were modestly priced and their use resulted in reduced construction times. Another witness testified that, within a few years, tilt-up had reduced the block market by 65-75 per cent and brought the masonry commercial walling industry "to its knees". The labour cost of concrete masonry increased during the late 1980s boom with the result that tilt-up was a cost-effective alternative. Subsequently, the substitution of tilt-up for block was reversed by a fall in the cost of block from the mid-1990s.

208 The choice between concrete block or stud and plasterboard involves a number of complex factors that Mr Slattery described. Where a structural wall was required, or where there were noise or fire rating concerns, concrete masonry products were preferable because they had good sound transmission and fire resistant characteristics, they were robust, and were relatively easy to reinforce and maintain. However, they were heavy, and in many high-rise constructions their use had increased structural costs because floor slabs had to be designed to bear the extra weight. By contrast, stud and plasterboard partitions were built off the floor, and installation was quicker. However, they were of lower quality, a factor that was important for developers, especially those building luxury apartments.

209 Clay bricks are physically interchangeable with masonry bricks and perform the same function. Clay commons – clay bricks of a second grade quality not suitable for use on the uncovered face of an external wall – are used in commercial applications where appearance is not a priority. They are also used in buildings and walls that are to be rendered, bagged or finished in some way. Concrete bricks are a direct alternative for such use. Mr Vella, the Victorian Sales and Marketing Manager of BBM, testified that the decreasing prices for masonry render bricks along with their market acceptance took away sales from clay commons and clay face bricks (first grade bricks suitable for external walls). The market for concrete rendered bricks in Victoria grew substantially, with an increased demand of 30 per cent between 1993 and 1995. In situ concrete, clay pavers or asphalt could also perform the same function as concrete pavers.

Industry competitors

210 BBM was a subsidiary of Boral Concrete Products Pty Ltd which was itself a subsidiary of Boral. Boral was the holding company of a large group, operating throughout Australia and internationally. Supplying building and construction materials and energy products constituted the group's core business activities. The group's revenues for the year ended 30 June 1995 were $4.9 billion. BBM operated in New South Wales and Western Australia as well as in Victoria. In Victoria, BBM had one plant at Deer Park with a Besser machine. The plant adjoined a quarry run by another company in the Boral group. BBM also had a plant at Sunshine that was inefficient and worn out and produced products from silica rather than concrete masonry.

211 In the Victorian market for concrete masonry products, BBM competed with a small number of other companies. One of them, Pioneer, was a subsidiary of Pioneer International Ltd, the holding company of another large Australian group. Pioneer manufactured concrete masonry blocks, bricks and pavers in Victoria. Rocla was another large competitor. That was the trading name used by Amatek Ltd which was part of the BTR Nylex group. Rocla also manufactured bricks and concrete masonry products in Victoria. It ceased manufacture of blocks in Victoria in September 1993 and other concrete masonry products in August 1995. Another competitor, Budget Bricks & Pavers Pty Ltd, a private company, operated a plant manufacturing concrete masonry products until it left the market in June 1996. The other major players were C&M and C&M Brick (Bendigo) Pty Ltd ("C&M Bendigo"). They were private companies. For many years C&M Bendigo manufactured concrete masonry products at Bendigo. In 1993, however, C&M established a concrete masonry plant on the outskirts of Melbourne, employing a highly efficient, state-of-the-art German made "Hess" machine that commenced full scale production of concrete bricks and pavers in February 1994 – production of blocks did not commence

until much later. There were also a number of relatively small firms manufacturing concrete masonry products in Melbourne and country Victoria.

212 The most significant source of demand for concrete masonry products were blocklayers who were critically important customers of manufacturers. In the relevant period, where concrete blocks were specified for major projects, the builder would call for tenders from blocklayers on a supply and lay basis. Blocklayers would in turn call for tenders from concrete masonry manufacturers. Another source of demand came from large domestic builders who often purchased concrete bricks and blocks direct from the manufacturer. Retailers of hardware and building products also purchased concrete paving products and would often present displays of rival paving manufacturers.

Monitoring of competition

213 Concrete manufacturers, including BBM, regularly monitored products that threatened their concrete masonry sales. They formulated defensive and offensive strategies to defend and capture sales from alternative products. BBM's strategic business plans showed an awareness of the constant threat of competing products and the opportunity to take sales from them. At one stage, BBM prepared a document comparing the price of alternative products such as plasterboard, clay, tilt-up, asphalt and concrete with the price of concrete masonry. In February 1995, it prepared an analysis that indicated that the shares of the total walling market of clay, masonry, tilt-up panels and timber were 77 per cent, 11 per cent, 10 per cent and two per cent respectively.

214 A significant event in the fight for market share was the preparation of Pioneer's October 1993 pricing list. According to Mr Griffin, Pioneer's Victorian State Manager, this pricing list was designed to win back sales from tilt-up. Pioneer approached those concerned with projects that had been specified in precast and tilt-up and tried to win them back to block. Pioneer also lobbied builders and architects about the relative merits of block. The evidence of Mr Steele of Rocla also referred to the efforts of concrete manufacturers to persuade architects to use their product rather than tilt-up. Mr Ullner of C&M said that, when setting up its operation in Melbourne, it sought to take away sales from clay bricks and pavers amounting to 5.44 per cent of total sales of clay products in Victoria.

Major events in the industry between 1992 and 1996 – development of a price war

215 In the early 1990s, the Victorian economy went into a severe recession that significantly affected the commercial building industry. Building activity remained depressed until about 1994. Real improvement did not occur until 1996 or 1997. This decline in activity had a consequential effect on demand levels for concrete masonry products. Excess production capacity through the

first half of the 1990s exacerbated the effect of the low demand. Customer acceptance of concrete masonry products was at a very low level during the early 1990s. Developers and builders searched for more economical outcomes and were receptive to suggested shifts to alternative products and building systems. In addition to these industry wide considerations, BBM suffered from poor management and had to dismiss its Victorian Manager in 1992.

216 In June 1992, C&M commenced construction of its new plant and purchased the new Hess production machine. The machine began production in November 1993. Existing manufacturers viewed this move into Melbourne with apprehension. The Chief General Manager of the Masonry and Road Services Division of BBM, Mr Cormack, had the production capacity of the Hess machine researched. He was very impressed with its potential and believed that its efficiency would give C&M a technical and cost advantage over BBM in Victoria.

217 In mid-1993, a price war developed initially between BBM, Pioneer, Rocla and Budget. Heerey J accepted[83] Mr Cormack's evidence that the price war had nothing to do with C&M's entry into the market. His Honour found that the price war resulted from the extreme competition for sales of concrete masonry blocks between the existing major players in a depressed market and the associated battle for market share. The effect of the price war was evident in tenders for major projects that involved the supply of 15.01 block, the most common block. They show that BBM's prices ranged widely depending on what other suppliers quoted. Sometimes, BBM got the job; sometimes it did not. Often it quoted below other suppliers after being informed of their quotes. Sometimes it refused to go below those quotes. But three facts stand out: (1) again and again the blocklayers were able to drive prices down by playing one supplier off against another; (2) BBM's attempts to quote above the market price invariably led to it being forced to revise its quote downward or to the loss of the job; and (3) BBM's prices were set by reference to the market.

218 In July 1993, Bradys, a blocklayer, won the block laying contracts for the Royal Melbourne Hospital, St Vincent's Hospital and Eastland Shopping Centre. After initially tendering for block at 85 cents for Royal Melbourne, 86 cents for St Vincent's and 90 cents for Eastland (because it was further away from its plant), BBM revised its tenders at the request of Bradys. It quoted 76 cents for Royal Melbourne, 77 cents for St Vincent's and 81 cents for Eastland. Despite the reduction, Pioneer obtained the Royal Melbourne project. In late August, Bradys informed BBM that its prices were higher than any other supplier. After being shown a Rocla quote, BBM agreed to match the Rocla price of 71.2 cents

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83 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 420 [47].

for each project and was awarded the remaining two projects. Rocla, having failed to succeed in gaining these projects, concluded that it could not compete in the block manufacturing market in Victoria and withdrew from that market.

219 Prices for concrete masonry products stayed at constant levels for a few months until October 1993 when Pioneer issued its block price list containing further reduced prices for most block products. It also offered to maintain prices at those levels for six months to customers who would use Pioneer products for that period. The price for 15.01 was 70 cents. Several blocklayers informed BBM that, unless it would match those prices, they would commit themselves to Pioneer. Concerned about the potential loss of clients, BBM agreed to match the Pioneer prices for all projects including those that had commenced.

220 In late 1993, Boral and BBM's management discussed shutting down the Victorian business. However, Boral decided that the plant could not be shut down temporarily during the price war because market share would be lost and BBM would have to build market share all over again. Boral's Managing Director told Mr Cormack that, if BBM was to be a long-term player, it had to improve its efficiency and wear the short-term losses.

221 In January 1994, BBM tendered to the blocklayers – Bradys, Mulgrave and Deca – for the Greensborough Shopping Centre. In March, Bradys told BBM that, if it dropped its price by $50,000, Bradys would give all its upcoming work to BBM and pay an extra two cents per block, a proposal BBM accepted. However, Mulgrave won the contract, and BBM's tender was accepted without the discount of $50,000. The average price for the 15.01 block was 63 cents.

222 Between February 1994 and July 1994, C&M negotiated with both BBM and Pioneer concerning the sale of C&M's plants. However, none of the discussions resulted in a sale of any of C&M's plants, despite BBM's interest in acquiring the Hess plant.

223 In April 1994 BBM wanted to secure the Western Metro College of TAFE project because it was close to its Deer Park plant and transport costs would be lower. Furthermore, the blocklayer who was doing the project was a regular customer of Pioneer and BBM wanted to get some of its business. BBM quoted 68 cents for the 15.01 but was informed that Pioneer had made a substantially lower quote. BBM refused to match the price, Pioneer got the contract.

224 In May 1994, BBM submitted quotes for the Dandenong Shopping Centre and car park to three blocklayers but another blocklayer, Glover, was awarded the project. BBM had not tendered to Glover because it was a customer of Pioneer. BBM did not think it could capture the business without further reducing its prices, a course that it did not want to take. Nevertheless, BBM got the job for the shopping centre from Glover because a particular block, made by BBM, was specified for the outside of the centre. BBM supplied the 15.01 block

at 63 cents. As a result, relations between Glover and BBM improved. Glover became a regular customer of BBM.

225 In June 1994, BBM quoted 62 cents for the Melbourne Exhibition Centre job, but Pioneer was awarded the project at an undisclosed price.

226 In December 1994, BBM quoted to several blocklayers, including Bradys which was ultimately awarded the Epping Plaza project. Bradys contacted BBM and asked for a revised quote. BBM revised the quote because it had developed other special products for which it was able to charge a higher price. The price for 15.01 was 79 cents.

227 In December 1994, BBM gave a quote to Grocon, a builder with whom it had a very good relationship, for the first stage of the very large Crown Casino project. BBM tendered higher than market prices because it had made a decision to try to move prices upward. In March 1995, BBM submitted a revised quote of 80 cents for 15.01 block. It was further revised down before BBM was awarded the job. In June 1995, Grocon decided to contract out blocklaying for the next stage. In response to Grocon's request for a recommendation, BBM provided three names but nominated Bradys, believing that, because of its good relationship with that firm, Bradys would buy from BBM at the same price as Grocon. However, once selected by Grocon, Bradys informed BBM that Pioneer had quoted a much lower price and that it would go with Pioneer unless BBM lowered its price. BBM spoke with Grocon which indicated that it did not want to work with Pioneer and that, if BBM matched the Pioneer price of 71 cents, it would guarantee BBM the job. BBM agreed to match the Pioneer price and also to pay confidentiality rebates to Grocon (four per cent of all products supplied) and to Bradys ($1,000 per month) for the duration of the project.

228 Towards the end of 1994, high level discussions again took place at BBM concerning the closing down of its Victorian operations. But BBM decided to remain in the market for several reasons. First, BBM in Victoria made a substantial contribution to the profits of the Boral upstream organisations – lower profits on masonry were acceptable as masonry was an important consumer of quarry tines and cement. Second, Boral was a national producer and would benefit nationally by remaining in Victoria. Third, being forced to close its operations by the entry of C&M would produce a negative image. Consequently, BBM decided to meet the competitive threat posed by C&M and its lower costs of production by engaging in cost rationalisation. It determined to shut down the inefficient Sunshine plant and duplicate the plant at the Deer Park facility by acquiring a second Besser machine at a total cost of $3.2 million. The aim was to make BBM's costs of production equivalent to those estimated for C&M so that it could compete on a level costs field. BBM also sought to put pressure on its competitors through creating supply pressure by increasing its volume of production and production capacity.

229 In April 1995, BBM tendered for the first stage of the Beacon Cove residential development to the developer Mirvac. It quoted 72 cents for 10.01 block and C&M quoted 68 cents. Mirvac declined BBM's offer to match C&M's price. In May 1996, BBM succeeded in getting the second stage ahead of Pioneer because the architect had specified a BBM product for the job.

230 In May 1995, BBM successfully tendered against Pioneer for the BHP Global Leadership building. A Pioneer product was specified for the job that was similar to a BBM product. BBM worked with Bradys, the successful blocklayer, and the builder to produce special shaped products. BBM supplied the 15.301 fire rated block at an average price of 71 cents.

231 In June 1995, BBM gave indicative quotes to several blocklayers tendering for the Rockman's Regency project. It quoted 78 cents for 10.31 block and 80 cents for 15.83 block. Mulgrave, one of the blocklayers, then informed BBM that Pioneer had quoted much lower prices. In August 1995, it invited BBM to requote. As Pioneer had quoted 69.2 cents for 10.31, BBM decided to reduce its price to 68 cents for 10.31 and 66 cents for 15.83 in order to win the job. The quote for 15.01 was 71 cents. Mulgrave then informed BBM that Pioneer had further reduced its prices and asked it whether it would further discount the price. Mulgrave had indicated that it wanted a 41 per cent rebate in order for BBM to get the job. BBM acceded to the request because it was frustrated with Pioneer's conduct over the Casino project when BBM had been trying to raise prices. BBM also believed that, if Pioneer lost this project, it would lose its Sales Manager and Victorian General Manager, a step that BBM believed would be in its interests. The net price for 15.01 after the rebate was 42 cents and the key product, 10.31, was 40 cents.

232 In June 1995, in an attempt to raise prices, BBM submitted quotes to the eight builders tendering for the Monash Sports Centre at prices similar to the Casino project. BBM quoted 84 cents for the 15.01. Pioneer won the project.

233 In July 1995, BBM tendered for the Women's Prison project, a job that it was keen to secure because it was close to its Deer Park facility. BBM quoted 88 cents for 15.01, but was informed that Pioneer's prices were substantially lower. BBM agreed to match the Pioneer prices. BBM was awarded the project with a price of 71 cents for 15.01.

234 In 1994 Rocla, after assessing the Melbourne concrete masonry market, found that the market had substantial over capacity. In its view, the over capacity had driven prices down. At the end of 1994, Rocla decided to concentrate on its production strengths – faced bricks for domestic housing and coloured paving products. However, after the decline in the demand in the housing market in 1995, Rocla closed down its operations in Victoria because it did not consider profitable levels were likely to be achieved in the foreseeable future.

235 In September 1995, BBM tendered to the builder for the Laverton Men's Prison project at 88 cents for 15.01 blocks. About one year later BBM was asked to submit quotes to the tendering blocklayers. The price varied from 92 cents to one dollar depending on the relationship BBM had with the blocklayer. In September 1996 Bradys informed BBM that Pioneer was quoting about five to ten cents less for 10.01 and C&M was quoting slightly lower, in respect of some products, than BBM and higher for others. BBM won the job because its relationship with Bradys was good and Bradys was prepared to pay slightly more for BBM's customer service and reliability. BBM was also still paying Bradys the rebate from the Casino project so the net price paid by Bradys was slightly lower than the invoice price.

236 In October 1995, BBM tendered to five tendering builders for the Kraft Leitchville project at a price of 88 cents for 15.83. Pioneer won the tender. In October, BBM also quoted for the Smorgons Laverton project, near Deer Park, at a price of 72 cents for 15.01. The blocklayer informed BBM that Pioneer had quoted 66 cents. BBM decided to match the Pioneer quote to win the project. In November 1995, BBM tendered for a large paving job at Swanston Dock but lost to C&M, who quoted 90 cents per square metre less. In December 1995, BBM tendered for its "Quickbrick" product for the Park Central St Kilda Road project. Although Pioneer had a lower price it could not supply a product equivalent to the "Quickbrick" and BBM secured the project. The Deer Park Shopping Centre project was another attractive project for BBM because of its closeness to its Deer Park facility. After BBM tendered, Mulgrave asked if BBM would match Pioneer's considerably lower prices. BBM refused on the basis that it was contrary to its policy of seeking to lift industry prices. This caused "major tension" between BBM and Mulgrave. It resulted in Mulgrave ceasing to purchase from BBM for some months.

237 In December 1995, C&M made separate approaches to BBM and Pioneer about the possible sale of C&M's Campbellfield plant. This was after C&M had lodged a complaint with the ACCC about BBM and Pioneer, but before either was aware of the complaint. Nothing eventuated from the approach by C&M.

238 In February 1996, BBM tendered for the Flagstaff Gardens project, but was informed by the blocklayer that its prices were higher than Pioneer. Pioneer had quoted 77 cents for 15.01 against BBM's 78 cents, but there were larger differences on some of the other products. BBM declined to match the Pioneer prices because it did not have a well-established relationship with the blocklayer.

239 In June 1996, Budget withdrew from the manufacture of masonry products. It had been sustaining heavy financial losses and was no longer breaking even on raw materials, labour and cartage. The continual downward pressure on prices forced Budget out of the industry with huge losses.

240 By early October 1996, both BBM's old and new plants were fully functional. It had sufficient capacity at Deer Park to manufacture render bricks as well as other products. This enabled BBM to close the old and inefficient Sunshine plant in October 1996.

241 In October 1996, BBM tendered for the Museum of Victoria project. It quoted 90 cents for 15.01. After receiving no response, BBM submitted a revised quote that was higher across the board. It quoted $1.05 for 15.01 blocks because it had raised its prices generally. The blocklayer informed BBM that C&M had quoted $20,000 less but that, if BBM would match Pioneer, it would get the job because the blocklayer preferred to deal with BBM. BBM was not prepared to match Pioneer's prices, which it considered too low. C&M won its first major block project.

Pricing policies

242 The monthly sales revenue of all concrete masonry products by BBM exceeded the variable costs of manufacture and supply during the relevant period by $1.3 million. The breakdown for the relevant financial years was:

1993-94	–	$732,220
1994-95	–	$124,413
1995-96	–	$373,086
1996-97	–	$770,420

243 Heerey J found[84] that BBM's monthly unit prices for 15.01 block were below Pioneer's monthly figure by about 10 to 20 cents for almost all the period. However, between April and July 1994 and in February 1996 when it won the Flagstaff Gardens project, Pioneer won a number of major projects with prices well below those of BBM. His Honour found[85] that, while more often than not the lowest BBM invoice was below the lowest Pioneer invoice, the gap was minor. Heerey J said[86]:

> "In strict terms of price against avoidable cost, the latter exceeded the former for important parts of BBM's product range for a significant

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84 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 433 [115].

85 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 433 [116].

86 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 434 [119].

part of the relevant period. Moreover, since competent businessmen are usually aware of their costs I infer that BBM management knew that prices were below variable costs for much of the time. However, there is no ground for thinking that they believed or suspected that their pricing might contravene the TPA."

The legislation

244 The purpose of the Act "is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"[87]. Part IV entitled "Restrictive Trade Practices" contains the relevant provisions of the Act. Section 46 enacts:

"(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

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

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1A) For the purposes of subsection (1):

(a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

(b) the reference in paragraphs (1)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.

…

(3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

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87 Section 2.

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(4) In this section:

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market."

Sections 4E and 4F are also relevant to this appeal. They provide:

"4E. **Market**

For the purposes of this Act, unless the contrary intention appears, ***market*** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

4F. **References to purpose or reason**

(1) For the purposes of this Act:

…

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason."

Defining the market

245 Defining the market is the first step in determining whether a firm has contravened s 46. Heerey J identified the market as the general market for walling and paving products rather than the smaller concrete masonry products market where most of BBM's sales occurred. His Honour said[88]:

> "The evidence leads to the conclusion that there was a market in which builders (either directly or through sub-contractors such as blocklayers) acquired materials for use in the construction of walls and paving. Within that market there was not only the ever present threat (or promise) of potential substitution but actual substitution over the time with which this case is concerned.
>
> The matter can be tested simply. Could manufacturers of concrete masonry block have significantly increased prices without any fear that there would be, in the words of QCMA[89], 'much of a reaction' from tilt-up? Plainly not."

246 The Full Court held[90] that the relevant market was the supply of concrete masonry products because this was the only area in which there was truly close competition. Accordingly, the Full Court found that Heerey J had erred in defining the market so widely.

247 Section 4E does not define what a market is for the purposes of the Act. But it makes clear that the parameters of the market are governed by the concepts of substitution and competition. The inclusion of the terms "substitutable" and "competitive with" in s 4E also means that market definition must be determined in accordance with economic principles[91]. The terms of the Act have economic content and their application to the facts of a case combines legal and economic

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88 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 436 [131]-[132].

89 *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at 190.

90 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 377 [179] per Beaumont J, 384 [201] per Merkel J, 410 [320] per Finkelstein J.

91 See *Miller's Annotated Trade Practices Act 1974*, 23rd ed (2002) at 89. See also Walker, "Product Market Definition in Competition Law", (1980) 11 *Federal Law Review* 386 at 399.

analysis. Their effect can only be understood if economic theory and writings are considered[92].

248 In economic terms, a market describes the transactions between sellers and buyers in respect of particular products that buyers see as close or reasonable substitutes for each other given the respective prices and conditions of sale of those products. In *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*[93], the Trade Practices Tribunal said:

> "A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. … Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. … Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.
>
> … [I]n determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction?"

249 In *Hoffmann-La Roche AG v EC Commission*[94], the Court of Justice of the European Community gave a similar explanation of a market:

> "The concept of the relevant market … implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned."

250 The concepts of substitution and competition to which s 4E of the Act refers require an analysis of the nature and characteristics of each product alleged to compete in the one market. This analysis is a necessary step in determining whether consumers or producers can replace one product with another without a great deal of difficulty in response to price or condition changes. This is termed

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92 Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation", (1990) 18 *Australian Business Law Review* 86 at 108.

93 (1976) 25 FLR 169 at 190.

94 [1979] 3 CMLR 211 at 272.

the cross-elasticity of demand or supply respectively. A high cross-elasticity of demand indicates close substitutability. Two products that are perfect substitutes would have an infinite cross-elasticity of demand: an increase in the price of one would result in a total consumer shift to the other product. Products that are not interchangeable have a cross-elasticity of zero: the price of one has no effect on sales of the other product.

251 In determining the ambit of the market, the cross-elasticities of both supply and demand are relevant. In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[95], Dawson J said:

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

252 Thus, the market is the area of actual and potential, and not purely theoretical, interaction between producers and consumers where given the right incentive – a change in price or terms of sale – substitution will occur. That is to say, either producers will produce another similar product or consumers will purchase an alternative but similar product. Section 4E should be taken to require *close* substitutability because in one way most products are substitutes for one another, meaning that market power would always be understated. Professor Chamberlin stated[96] that "the only perfect monopoly conceivable would be one embracing the supply of everything, since all things are more or less imperfect substitutes for each other". Close substitutability and competition are evident when more than a few consumers switch from one product to another on some occasions[97].

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95 (1989) 167 CLR 177 at 199.

96 Chamberlin, *The Theory of Monopolistic Competition*, 8th ed (1962) at 65.

97 See *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 332 per Lockhart, Wilcox and Gummow JJ, citing *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 188 per Mason CJ and Wilson J. See also *United Brands Co v EC Commission* [1978] 1 CMLR 429 at 483-484; *Hoffmann-La Roche AG v EC Commission* [1979] 3 CMLR 211 at 272.

253 Professor Corones[98] has identified a number of factors that are relevant in considering the substitutability of products and whether they are in competition. They are:

- The final use to which the product is put;
- The physical and technical characteristics of the product and its potential substitutes;
- The views and past behaviour of consumers regarding the potential for substitution between products;
- The relative price levels and price variations of the product and its potential substitutes;
- The views and past behaviour of producers regarding the impact of price and marketing decisions by producers of potential substitutes on their own pricing and marketing decisions; and
- The cost to consumers and/or producers of switching from one product to another.

254 Another factor of cardinal importance is the geographic relationship of other producers to the firm alleged to have breached s 46 of the Act. The further away a producer is from the firm, the more difficult it will be for that other producer to be in competition with that firm.

255 There is an inverse relationship between market definition and market power. If the relevant market is defined widely, it will ordinarily result in a finding that a firm has less market power than if the market is defined narrowly. Accordingly, correct identification of the market is fundamental to the analysis of the issues in a s 46 action. In the end, however, market definition involves a value judgment upon which reasonable minds may differ. Because that is so, an appellate court should be slow to interfere with a trial judge's finding as to what constitutes the market.

256 In these proceedings the question of market definition centred on the product. Was the market limited to concrete masonry products? Or did it include walling and paving products? The Full Court correctly emphasised the need for close competition of products. There was no error in the manner in which it determined that the market was the one for concrete masonry products. Heerey J had emphasised the function to which the products were put. But, with respect, this was too simplistic. While it is true that "[a] wall is a wall", as

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98 Corones, *Competition Law in Australia*, 2nd ed (1999) at 94.

Heerey J said[99], and while, to a degree, substitution is possible between all walling products, his Honour failed to address the need for close substitutability and competition. The characteristics of block are different from those of pavers or tilt-ups. Moreover, the Full Court found, correctly in my opinion, that truly close competition occurred only amongst concrete masonry products. In fact, the evidence indicated that BBM was successful in its tender for some of the major projects because it had a certain type of block which no other block producer could provide a substitute for, let alone non-block products. While cost was a major factor that determined what product was used, builders were limited in their ability to substitute one product for another because of the specific needs of each project. As Finkelstein J said[100], each walling product had its own characteristics determining its suitability for any particular project.

257 The views and practices of those within the industry are often most instructive on the question of achieving a realistic definition of the market[101]. The internal documents and papers of firms within the industry and who they perceive to be their competitors and whose conduct they seek to counter is always relevant to the question of market definition. BBM looked mainly at its competition within the concrete masonry products market. In its internal plans, management focussed on that market although, as I have indicated, it did keep close watch on products other than concrete masonry products.

258 Products such as tilt-up panels and precast concrete entered the market in the 1980s and took away a share of the demand for concrete masonry products. But thereafter they did not compete to any significant extent with the products they originally displaced. There was some degree of competition between walling and paving products generally and there was some substitution for concrete masonry products by other products. But in my opinion, the Full Court correctly found that this substitution was insufficient to establish the sort of close competition and long-term degree of substitutability to warrant a finding that the relevant market went beyond concrete masonry products. If the Full Court had adopted the definition propounded by BBM, the market for walling and paving products in Melbourne would include asphalt, concrete paving, stone paving, terracotta paving, clay paving, plasterboard, timber, tilt-up, clay brick and other walling systems. There was simply no evidence that substitution across this wide

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99 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 436 [130].

100 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 408 [311].

101 *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 334 per Lockhart, Wilcox and Gummow JJ. See also Heydon, *Trade Practices Law*, vol 1 at [3.245].

variety of products occurred or was possible in the view of those in the industry from either a demand or supply perspective. That goods have some interchangeability with other goods is insufficient to establish that they are in the same market, as the United States Supreme Court recognised in *United States v E I du Pont de Nemours & Co*[102].

259 If the market were as broad as BBM suggested, concrete masonry products would have been substituted for other walling and paving products during the price war because they were relatively cheaper than those other products. If they were truly substitutable, one would have expected BBM to tender evidence that consumers of alternate walling and paving products had moved to concrete masonry products or producers of concrete masonry products had moved to producing other walling and paving products. BBM failed to put such evidence before Heerey J. That is a powerful indicator that other walling and paving products were not in the same market as concrete masonry products.

Section 46 of the Act

260 Section 2 of the Act declares that its object "is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". The Parliament has determined that it is in the interests of consumers that firms be required to compete because competition results in lower prices, better goods and services and increased efficiency. In *Queensland Wire*[103], Mason CJ and Wilson J said that the object of s 46 – the protection of consumer interests – is to be achieved through the promotion of competition, even though competition by its nature is deliberate and ruthless and competitors injure each other by seeking to take sales from one another. A rational business firm seeks to maximise profit and to increase its share of the market. However, the very nature of such conduct is detrimental to other competitors in the market and may cause some of those competitors to leave the market. As the United States Court of Appeals, Seventh Circuit, pointed out in *Ball Memorial Hospital Inc v Mutual Hospital Insurance Inc*[104]:

> "Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust

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102 351 US 377 at 393 (1956) per Reed J delivering the opinion of the Court.

103 (1989) 167 CLR 177 at 191.

104 784 F 2d 1325 at 1338 (1986).

> laws are not balms for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors."

261 When a court applies the provisions of s 46 it must do so with the legislative object of the section in mind. While conduct must be examined by its effect on the competitive process, it is the flow-on result that is the key – the effect on consumers, not the effect on other competitors. Competition policy suggests that it is only when consumers will suffer as a result of the practices of a business firm that s 46 is likely to require courts to intervene and deal with the conduct of that firm. As Mason CJ and Wilson J pointed out in *Queensland Wire*[105]:

> "[T]he object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end."

262 Section 46 of the Act poses four issues for determination. First, the court must identify the relevant market in which the conduct occurred. Second, the court must determine whether the alleged offender had a substantial degree of market power. Third, the court must determine whether the alleged offender has taken advantage of that market power. Finally, the alleged offender must have engaged in the conduct for one of the proscribed purposes. This is the way in which s 46 is structured, and that is the way courts should apply it. In *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[106], this Court warned of the danger of moving too readily from a finding about proscribed purpose to a conclusion of taking advantage of substantial market power.

263 In my opinion, the Full Court erred in finding that BBM had breached s 46. Its error was the result of placing too great an emphasis on BBM's purpose of removing competitors and its desire of holding or increasing its market share and raising prices to profitable levels. To some extent, this was the consequence of the ACCC presenting the case as one of "predatory pricing". Much economic literature on "predatory pricing" focuses on the purpose of such conduct with an underlying assumption that it is a strategy pursued by firms with a large degree of market power. In the literature, "predatory pricing" is generally understood as being anti-competitive because of the reasons for which firms engage in the practice. While this is so, for the purposes of a claim under s 46, courts must focus on the wording of the section. Assuming that "predatory pricing" is a useful term in the context of s 46 even though the section does not refer to it, "predatory pricing" must be given its legal content by reference to the section.

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105 (1989) 167 CLR 177 at 191.

106 (2001) 205 CLR 1 at 18 [31] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

Market power and "predatory pricing"

264 The case brought by the ACCC must fail unless the evidence established that BBM had a substantial degree of power in the market for concrete masonry products. A firm, in the position of BBM, possesses market power when it has the ability to sustain a pricing policy or the terms on which it supplies its product without regard to market forces of supply or demand.

265 In *Queensland Wire*[107] Dawson J said:

> "The term 'market power' is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner … But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal … The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices."

266 His Honour then referred to the definition of market power given by Kaysen and Turner[108], who said:

> "A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions."

267 In *Melway*[109] a majority of this Court said:

> "The notion of market power as the capacity to act in a manner unconstrained by the conduct of competitors is reflected in the terms of s 46(3). Such capacity may be absolute or relative. Market power may or may not be total; what is required for the purposes of s 46 is that it be substantial."

268 The ACCC contended that BBM had a substantial degree of market power because of its ability to engage in "predatory pricing" and that the nature of the market allowed it to take advantage of that market power. Central to the argument is the claim that BBM "persistently sold important parts of its [concrete masonry products] range at prices that were below avoidable cost". Underlying the claim of the ACCC is the proposition that "predatory pricing" is itself a

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107 (1989) 167 CLR 177 at 200.

108 Kaysen and Turner, *Antitrust Policy*, (1959) at 75.

109 (2001) 205 CLR 1 at 21 [43] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

manifestation of market power, a proposition that gains support from a *dictum* in the judgment of Dawson J in *Queensland Wire*. But what is "predatory pricing"? Dawson J did not explain it. All that he said was that market power may be evidenced by a firm's capacity to engage in "predatory pricing". Is it pricing below some level of costs such as marginal cost[110] or average variable cost[111]? If so, how does it fit into the terms of s 46? How is "predatory pricing" distinguished from ruthless price-cutting that is the hallmark of the competitive market? Even a firm with a substantial degree of market power "has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches"[112]. If "predatory pricing" can be defined in legal or economic terms, is its existence conclusive evidence of market power and the taking advantage of market power within the meaning of s 46 of the Act?

269 As I have indicated, neither s 46 nor any other provision of the Act defines or even uses the term "predatory pricing". And the terms and structure of s 46 suggest that it is not well suited for dealing with claims of "predatory pricing". In the context of a "predatory pricing" claim, s 46 seems under- and may be over-inclusive. Conduct that is predatory in economic terms and anti-competitive may not be captured by s 46 simply because the predator does not have substantial market power when it sets out on its course to deter or injure competitors[113]. That may be because until it achieves its object it has no substantial degree of market power. Or it may be that it is a firm in a cyclical industry which has had, but does not have a substantial degree of market power at the time of the predatory conduct. In cyclical industries such as construction and building materials, firms may have no substantial degree of market power at the bottom of the economic cycle when competition is fierce and margins slender. As demand increases, however, some firms may acquire a substantial degree of market

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110 Marginal cost is the change in total costs brought about by a one-unit change in output. It is the cost that would be avoided by producing one unit less.

111 Variable costs are those costs that increase with production or supply such as power, labour and materials in contrast to fixed costs that the firm incurs whatever its level of production or supply, such as rent, land tax and the capital invested in land, buildings and plant. The average variable cost of a product is the total of the variable costs divided by the units of production or supply.

112 *Olympia Equipment Leasing Company v Western Union Telegraph Company* 797 F 2d 370 (7th Cir, 1986) at 375 per Posner J.

113 This point was made by Professor Breyer, now a Justice of the United States Supreme Court, in a paper discussing s 46 in the form in which it was first enacted: Breyer, "Five Questions About Australian Anti-Trust Law – Part II", (1977) 51 *Australian Law Journal* 63 at 69.

power. Section 46 is ill drawn to deal with claims of predatory pricing under these conditions.

270 On the other hand, on the ACCC's arguments, pricing below marginal or average variable cost with the intention of taking business from competitors is caught by the section even though it makes economic and business sense to do so. In the present case, for example, BBM was fighting to retain its market share at a time when the industry's capacity to supply outstripped demand and the consumer ruled the market. Yet the Full Court dismissed commercial reasons as a justification for BBM's behaviour. BBM's pricing policies benefited consumers while the price war lasted. And Heerey J found that BBM would not be able to recover its losses by charging supra-competitive prices. That is to say, the pricing policies of BBM benefited consumers in the short run and could not harm them in the long run. It would be a curious result if, despite these benefits to consumers, BBM's conduct constituted a breach of s 46.

271 The difficulty of applying s 46 to a claim of "predatory pricing" is seen in the ACCC's rejection of BBM's contention that to determine substantial market power the test is the traditional one: "is the firm able to produce less and charge more?" The ACCC conceded that this test "may be unobjectionable as a matter of theory". But the ACCC argued that in a case "involving price cutting below avoidable cost coupled with capacity expansions, the test for which [BBM] contends has no practical utility". This comes close to conceding that the term "market power" in s 46 cannot always capture "predatory pricing" if the traditional tests for determining market power are used.

272 Richard A Posner, a Judge and former Chief Judge of the United States Court of Appeals for the Seventh Circuit, has said that there are two conventional approaches to the identification of "predatory pricing", one through intent and the other through costs, neither of which is adequate. To forbid pricing targeted at weakening or destroying a competitor forbids too much. That is because even if a seller wants to remove a competitor from the market, there is no rational antitrust objection to such conduct if the seller is able to undersell by reason of its lower costs. But too little may be forbidden also because intent may be impossible to prove and inadvertent below-cost pricing may be as damaging as intentional below-cost pricing. Posner defined "predatory pricing" as "pricing at a level calculated to exclude from the market an equally or more efficient competitor"[**114**].

273 In my view, what is required is not a bright line rule about costs but a more sophisticated analysis of the firm, its conduct, the firm's competitors, and

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114 Posner, *Antitrust Law*, (1976) at 188.

the structure of the market not only at the time in which the firm has engaged in conduct allegedly in breach of the Act but also before and after that conduct.

Recoupment of losses – a necessary element of a successful claim of "predatory pricing"

274 United States jurisprudence holds that a claim of "predatory pricing" will not succeed under its antitrust laws unless there is a real probability that the alleged predator will be able to recover the losses resulting from the price-cutting. In *Brooke Group Ltd v Brown & Williamson Tobacco Corp*[115], a majority of the United States Supreme Court said:

> "Accordingly, [where] the claim alleges predatory pricing ... two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. ...
>
> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."

275 Justice Kennedy, who delivered the opinion of the Court, explained why below cost pricing without recoupment is not harmful to competition or consumers. He said[116]:

> "Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers."

276 In an earlier decision of the United States Supreme Court, *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp*[117], Powell J, delivering the opinion of the Court, said:

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115 509 US 209 at 222-224 (1993) per Kennedy J delivering the opinion of the Court in which Rehnquist CJ, O'Connor, Scalia, Souter and Thomas JJ joined.

116 509 US 209 at 224 (1993).

117 475 US 574 at 588-589 (1986), Burger CJ, Marshall, Rehnquist and O'Connor JJ joining.

> "A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."

277 The United Kingdom Office of Fair Trading defined predatory behaviour, and accordingly "predatory pricing", as[118]:

> "the acceptance of losses in a particular market which are deliberately incurred in order to eliminate a specific competitor, so that supra-normal profits can be earned in the future, either in the same or in other markets".

278 Courts in the United States and the United Kingdom Office of Fair Trading regard the concept of recoupment as a fundamental element of a successful "predatory pricing" claim. Sound economic reasoning justifies the policy of the Office of Fair Trading and the United States jurisprudence. As Lockhart and Gummow JJ warned in *Eastern Express Pty Ltd v General Newspapers Pty Ltd*[119], however, care must be taken in translating the United States decisions on "predatory pricing" into s 46 at the expense of an independent examination of the terms of the Act. Nevertheless, to require recoupment as a necessary element of a "predatory pricing" claim fits in with the terms of s 46. Although s 46 does not use the term "predatory pricing", two of its key components are "a substantial degree of [market] power" and a taking "advantage of that power". A firm does not possess "substantial market power" if it does not have the power to recoup all or a substantial part of the losses caused by price-cutting by later charging supra-competitive prices. If it cannot successfully raise prices to supra-competitive levels after deterring or damaging or attempting to deter or damage competitors by price-cutting, the conclusion is irresistible that it did not have substantial market power at the time it engaged in the price-cutting. As Mr Geoff Edwards has argued[120], "it is a contortion to find that a firm possesses substantial market power if the firm cannot use that power to obtain economic profits".

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118 Quoted in Myers, *Predatory Behaviour in UK Competition Policy*, Office of Fair Trading Research Paper 5, November 1994 at 9.

119 (1992) 35 FCR 43 at 71-72.

120 Edwards, "The Perennial Problem of Predatory Pricing", (2002) 30 *Australian Business Law Review* 170 at 180.

279 Nor if a firm has substantial market power can it be said that it "take[s] advantage of that power" if it has no intention of recouping its losses. In *Queensland Wire*[121], this Court held that "take advantage of" market power did not require proof of a hostile intent or use of that power. The Court equated "take advantage" with "use". But the term "use" does not capture the full meaning of "take advantage of", as the later decision in *Melway* shows. There must be a causal connection between the "market power" and the conduct alleged to have breached s 46[122]. Moreover, that conduct must have given the firm with market power some advantage that it would not have had in the absence of its substantial degree of market power. *Melway* could not have been decided as it was unless these propositions were correct.

280 How then can price-cutting *per se* – even price-cutting below marginal or average variable cost – constitute a "taking advantage of" market power? Section 46 would be a vehicle for anti-competitive conduct if the most efficient firm in the market had substantial market power and by reason of its efficiency could not take market share from its rivals without contravening the section. This makes little sense from the perspective of achieving an efficient economy with efficient resource allocation or for the benefit of consumers who can be provided with quality goods or services at lower prices. In a competitive market, the more efficient firms can produce more (because their average costs are lower) and obtain a greater share of the market with the result that they substantially damage their less efficient competitors. Such firms can expand their production until their marginal cost equals the market price. No one would suggest that an efficient firm with market power breaches the section because it increases its output to the level of its marginal cost. Yet the firm has market power, has substantially damaged its competitors and by intentionally increasing its output must have acted for a proscribed purpose. It does not breach s 46, however, because it has not "taken advantage of" its market power. It has not sought to act in a manner "free from the constraints of competition"[123]. Its market power is irrelevant. Similarly, when a firm cuts prices, it does not act "free from the constraints of competition". Its market power, if it has any, is not connected with its conduct. On the other hand, if it has substantial market power and cuts prices below cost for a proscribed purpose with the intention of later recouping its losses by using its market power to charge supra-competitive prices, it has taken advantage of its market power to cut prices below cost to damage competitors.

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121 (1989) 167 CLR 177 at 191 per Mason CJ and Wilson J, 194 per Deane J, 202 per Dawson J, 213-214 per Toohey J.

122 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 21 [44], 27 [67] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

123 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 27 [67] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

281 For these reasons, although significant differences exist between s 46 and its analogues in other jurisdictions, the United States jurisprudence is helpful in determining whether in any particular case the pejorative term "predatory pricing" indicates that the "predator" has market power and has taken advantage of it. Even when one allows for the differences between the Australian Act and the United States legislation, no valid reason justifies rejecting the United States jurisprudence as an aid in developing the law relating to "predatory pricing" in this country.

282 One difference between the United States legislation and our Act is that §2 of the *Sherman Act* seeks to prevent monopolisation while s 46 is concerned with a substantial degree of market power. In the Full Court, Finkelstein J held that this difference makes the recoupment test inappropriate in Australia. His Honour said[124] that to use the recoupment test "will, for all practical purposes, make it impossible to establish a case of a predatory pricing scheme against a firm that is not a monopolist". But, with respect, Finkelstein J erred in thinking that the differences in legislative wording make the United States jurisprudence inapplicable in Australia. United States cases regard monopoly power and market power as identical concepts[125]. For the purpose of "predatory pricing" jurisprudence at all events, they draw no distinction between a pure monopoly and "a disciplined oligopoly". In *Brooke Group*[126], for example, the Supreme Court rejected a claim of "predatory pricing" but did not see the defendant's 11.4 per cent share of the market as a bar to the claim that it had engaged in "predatory pricing" under the *Clayton Act* as amended by the *Robinson-Patman Act*. The Court said[127]:

> "For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals,

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124 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 398 [262].

125 *United States v Grinnell Corp* 384 US 563 at 577 (1966) (monopoly power), 580 (market power); *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 at 486 (1968) (monopoly power), 486 fn 3 (market power); *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp* 475 US 574 at 590 (1986) per Powell J. See also Krattenmaker, Lande and Salop, "Monopoly Power and Market Power in Antitrust Law", (1987) 76 *Georgetown Law Journal* 241 at 246-247.

126 509 US 209 at 222-224 (1993) per Kennedy J delivering the opinion of the Court, in which Rehnquist CJ, O'Connor, Scalia, Souter and Thomas JJ joined.

127 509 US 209 at 225 (1993) per Kennedy J delivering the opinion of the Court, in which Rehnquist CJ, O'Connor, Scalia, Souter and Thomas JJ joined.

> whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly."

283 Finkelstein J also said[128] that "under s 46 there is no need to have recourse to a test such as 'selling below cost plus recoupment' because intent is at the heart of the offence". But s 46 is concerned with much more than intent. Substantial market power is a key element of s 46. So is the taking advantage of market power. Proof of probable recoupment assists – may in fact establish – proof of those two elements. Market power is a long recognised and well accepted economic concept that a firm either possesses or does not possess, irrespective of what the firm itself may think or believe or intend to do to its competitors. Many a business fails in spite of – perhaps more often because of – its management's belief that it has the financial, commercial or market strength to compete in a market. Sadly in many of these cases, market forces prevent it performing in the manner its management believed it could perform. Section 46 requires much more than "intent".

284 Merkel J expressed views similar to those of Finkelstein J. Merkel J said[129]:

> "[A] firm in a market in which more than one firm has a substantial degree of power is unlikely to ever have the capacity to recoup its losses by subsequently extracting supra competitive or monopoly prices, assuming the absence of complicity."

285 But with great respect to Merkel J this is not so. In a market left with two or three oligopolists after price-cutting has forced some firms from the market, the price-cutter may be able to charge supra-competitive prices and recoup its losses because its rivals are content to allow it do so. This can be done without collusion between the oligopolists. The phenomenon of oligopolists charging supra-competitive prices without collusion is not as rare as Merkel J seems to have thought. In his article[130] on "predatory pricing" that criticises this part of the reasoning of their Honours, Mr Geoff Edwards correctly points out:

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128 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 398 [262].

129 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 383 [196].

130 Edwards, "The Perennial Problem of Predatory Pricing", (2002) 30 *Australian Business Law Review* 170 at 181 fn 56 (original emphasis).

> "[F]irms with less than the pricing discretion of a pure monopolist *can* also achieve prices well above competitive levels, and even if not a pure monopoly, any firm with a *substantial* degree of market power certainly would have such an ability."

286 I would have thought that there was an arguable case that once most of BBM's rivals were driven from the market, Pioneer and BBM would have been able to charge supra-competitive prices. This is particularly so, if the benchmark for supra-competitive prices was a more efficient producer than Pioneer and BBM were, as C&M appears to have been in certain areas of production. However, Heerey J found[131] that BBM would not be able to recover its losses. Given the evidence and the way that the case was conducted in this Court, it would not be proper to reverse this finding of Heerey J, a finding that the Full Court did not seek to overturn.

287 The views of Merkel and Finkelstein JJ also seem to be based on a misunderstanding of what is meant by a substantial degree of market power. Firms only have a substantial degree of market power when they can persistently act in a way over a reasonable time period unconstrained by the market's forces of supply and demand. Firms that do not have "the power to raise price above cost without losing so many sales as to make the price rise unsustainable"[132] do not have market power. Cutting prices is not evidence of market power. Any firm can do that. Market power is an economic concept and should be given its ordinary meaning. As Professors Krattenmaker, Lande and Salop point out[133]:

> "When economists use the terms 'market power' or 'monopoly power,' they usually mean the ability to price at a supracompetitive level."

288 Market power also includes the power to sell less in terms of quality or quantity at the same price or to sell products on terms and conditions which a firm without market power would not be able to enforce – this being an element of market power that arises in conduct other than "predatory pricing". But market power is not equivalent to the mere cutting of prices.

289 To require the prospect of recoupment in a "predatory pricing" claim does not limit the application of s 46 to conduct engaged in solely by monopolists

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131 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 442-443 [169].

132 *In re Brand Name Prescription Drugs Antitrust Litigation* 123 F 3d 599 at 603 (7th Cir, 1997) per Posner CJ.

133 "Monopoly Power and Market Power in Antitrust Law", (1987) 76 *Georgetown Law Journal* 241 at 245.

rather than by firms having a substantial degree of market power, as Merkel and Finkelstein JJ thought. The United States jurisprudence and economic literature speaks of recoupment in the sense of the ability of a firm to extract monopoly rent out of the market because of its ability to gain a monopoly through the removal of competition. But this is not the only way of looking at the concept of recoupment. Recoupment involves the capacity of a firm to price in a manner inconsistent with what a competitive market would dictate in order, at a minimum, to make good the losses sustained during a price war. Although a firm may seek not only to recoup its losses but also to earn monopoly profits, at a minimum a clearing of the losses would be required to make the conduct rational. The greater the degree of recoupment that a firm can achieve, the greater is its market power. But a firm that is unable to recoup any of its losses has no market power. It is the capacity to give less and/or charge more or to act in a manner unconstrained by competitors that enables the price-cutter to recoup all or part of its losses by earning supra-competitive profits. A firm does not have to be a monopolist to have this capacity[134].

290 Merkel J also referred[135] to the fact that the 1986 amendments to the Act lowered the s 46 threshold from a firm in a position "substantially to control a market" to a firm that has "a substantial degree of power in a market". He said[136] that a firm with only a substantial degree of market power is unlikely to ever have the capacity to recoup its losses unless it was a monopolist, rendering the amendments nugatory. His Honour thought that the use of a recoupment test put a gloss on the section. Again, with great respect, his Honour's view appears to be founded on an erroneous view of market power. Section 46 is not breached unless a firm has a substantial degree of market power and takes advantage of that power. As I have indicated a firm that cannot recoup its losses by supra-competitive pricing simply does not have market power and cannot take advantage of that power. Heerey J placed no gloss on s 46 when he applied the United States cases on recoupment. Rather his Honour gave legal content and effect to the terms used by the legislature.

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134 See O'Bryan, "Section 46: Legal and economic principles and reasoning in *Melway* and *Boral*", (2001) 8 *Competition and Consumer Law Journal* 203 at 216; Pengilley, "Misuse of market power: *Australia Post*, *Melway* and *Boral*", (2002) 9 *Competition and Consumer Law Journal* 201 at 235-236.

135 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 381 [188].

136 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 383 [196].

291 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. A firm with a high sales volume suffers a heavy financial burden if it engages in such conduct. 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[137]. Any business – whether it has a one per cent or a 90 per cent market share – can reduce its prices. Reducing prices does not *per se* establish any degree of market power. That is true whether the supplier is pricing at marginal cost or below average variable costs. Price reductions are beneficial to consumers unless the *quid pro quo* is higher prices at a later date. If prices merely rise back to the levels that existed before the price-cutting began, consumers have had the benefit of the reduced prices for the duration of the price-cutting. They are no worse off at the conclusion of the price war when the market returns to its long-run equilibrium. 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.

292 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 – something the courts have had less difficulty with than with cost analysis[138] – and determine the ability of a firm to recoup its losses from its price-cutting. As Easterbrook J said, delivering the opinion of the United States Court of Appeals, Seventh Circuit, in *AA Poultry Farms Inc v Rose Acre Farms Inc*[139]:

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137 See Brodley and Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards", (1981) 66 *Cornell Law Review* 738 at 741; Posner, *Economic Analysis of Law*, 5th ed (1998) at 329-330.

138 See the dispiriting history of the United States courts' attempts to deal with the costs issue as outlined in Brodley and Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards", (1981) 66 *Cornell Law Review* 738 at 765-772.

139 881 F 2d 1396 at 1401 (1989).

> "It is much easier to determine from the structure of the market that recoupment is improbable than it is to find the cost a particular producer experiences in the short, middle, or long run (whichever proves pertinent). Market structure offers a way to cut the inquiry off at the pass, to avoid the imponderable questions that have made antitrust cases among the most drawnout and expensive types of litigation."

It is only when the market structure is such that a firm could recoup, that courts will need to consider the relationship between price and cost.

Relevance of market structure – market share and barriers to entry – in determining market power

293 The concept of "market power" in s 46 shows that the section is not concerned with a one-second snapshot of economic activity. Market power can only be determined by examining what a firm is capable of doing over a reasonable time period. Whether a firm has market power – whether it has the ability to act unconstrained by competition, whether it can raise prices above competitive levels – requires an examination of the existing structure and the likely structure of the market if competitors are removed or prices rise to supra-competitive levels. Such an analysis requires an examination of the business structure and practices of the alleged offender and its competitors, their market shares and the barriers to entry (if any) into the market. In *Queensland Wire*, Mason CJ and Wilson J said[140]:

> "A large market share may well be evidence of market power … but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power … There must be barriers to entry. ... Barriers to entry may be legal barriers – patent rights, exclusive government licences and tariffs for example. Barriers to entry may also be a result of large 'economies of scale'."

Dawson J said[141]:

> "The existence of barriers to entry may be conclusive in determining the relevant market and the degree of market power in it. In the context of s 46, the existence of significant barriers to entry into a market carries with it market power on the part of those operating within

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140 (1989) 167 CLR 177 at 189-190.

141 (1989) 167 CLR 177 at 201-202.

> the market. Market power follows as a natural consequence of barriers to entry … There is, of course, vigorous debate in economic circles about what constitutes a barrier to entry into a market. There are those who would and those who would not accept that the high cost of entry constitutes a barrier. … However, it is less important to arrive at a precise meaning than to recognize the assistance given by the identification of conditions, in the nature of barriers to entry, for the purpose of defining the relevant market, measuring the extent of market power and determining whether that power has been exercised."

294 Professor Corones[142] defines barriers to entry as being:

> "burdens or limitations facing any firm not presently operating in a market from participating therein. They derive from cost-savings accruing to existing firms from their experience and familiarity with the particular industry, as well as any restrictive trade practices that operate as a barrier."

295 As these definitions indicate, a barrier to entry is something that affects a firm, by virtue of its status as an outsider in the market, in a manner that prevents, or acts as a disincentive for, entry into the market. Looked at in this way, barriers to entry are not limited to structural barriers, but also include "strategic" barriers – barriers created by the practices and policies of incumbent firms.

BBM's market power

Findings at trial

296 The market share of a firm and its vertical integration are relevant considerations in determining whether a firm has market power[143]. Heerey J found[144] that in January 1992 BBM's market share had fallen to 12 per cent but this had risen to 30 per cent by 1993. From 1994 to 1996 BBM's market share stayed consistently between 25 and 30 per cent. By contrast, C&M's market share grew rapidly during the same period. By late 1995, C&M had 40 per cent of all Victorian sales. BBM's market share, large though it was, did not establish that it had substantial market power. The economic evidence was unanimous

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142 Corones, *Restrictive Trade Practices Law*, (1994) at 131.

143 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 189-190 per Mason CJ and Wilson J.

144 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 438-439 [149].

that BBM's market share was not so significant as in itself to signify market power, especially in light of the fact that Pioneer and C&M had a market share similar to that of BBM. In *AA Poultry Farms*[145], summarising the United States decisions on market power, the United States Seventh Circuit Court of Appeals said that "as a matter of law single-firm shares of 30% or less cannot establish market power … (even shares exceeding two-thirds do not confer power over price if entry is easy)".

297 Heerey J[146] said that the tendering for major projects showed the existence of a highly competitive market. Blocklayers were able to force masonry manufacturers' prices "down and down". The Full Court did not overturn this finding. Nor could it have done so. It showed conclusively that during the time frame in which the ACCC alleged that BBM had taken advantage of its market power, it had none, despite having a 30 per cent share of the market. If any firm or firms had market power during this period, it was the blocklayers who ruthlessly played off supplier against supplier for the benefit of consumers.

298 Heerey J said[147] that "the single most important factor in assessing the competitiveness of the environment in which BBM operated [was] the role of Pioneer". His Honour accepted that BBM hoped that once there was rationalisation as a result of the price war, Pioneer would not prevent prices rising to profitable levels. But his Honour said that two or more firms operating at profitable levels was not inconsistent with a competitive market. There was no contention that BBM would win supra-competitive or monopoly profits. Heerey J said[148] that the competition between BBM and Pioneer was "ferocious and relentless", and was intensified by personal hostility between the two.

299 Heerey J examined[149] the potential barriers to entry into the market and found them to be quite low. He found that either they did not exist or were readily overcome. Concrete masonry by and large was a generic product – that is

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145 881 F 2d 1396 at 1403 (1989) per Easterbrook J delivering the opinion of the Court, Bauer CJ and Grant SDJ joining.

146 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 439 [151].

147 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 439 [152].

148 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 439-440 [154].

149 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 438 [140]-[148].

to say, a commodity – and price was by far the major consideration in the sale of the product. There was no brand loyalty. Commercial information was readily available. There was no intellectual property that a new entrant might infringe without obtaining a licence from a competitor. A potential entrant not only needed no special technology to enter the market but also would not be hindered by lack of skilled labour. Raw materials and land for plants were readily available. Plant and equipment could easily be purchased in the United States and Europe, and second hand plants became available from time to time in Australia. A competitive plant required a capital investment of only about $8 million.

300 Heerey J concluded[150] that the low barriers to entry and the existence of strong competition meant that BBM did not have power to behave independently of competitive forces, either in the broad market as found by his Honour or the narrower market as submitted by the ACCC. He found that BBM did not have a substantial degree of market power as required by the Act.

The Full Court's findings

301 All three appellate judges disagreed with Heerey J's finding that BBM did not have a substantial degree of market power. Beaumont J noted[151] that BBM's own strategic planning documents referred to BBM's significant share of the market, its standing as a large well-funded national operation and its reputation for good service and loyalty to customers. His Honour said that, while barriers to entry were low, it was proper to examine whether by virtue of the exercise of market forces, existing players and newer entrants had disincentives to remain. Two players, Rocla and Budget, left the market and C&M almost failed and had sought to be bought out on two occasions and had had to raise additional capital when the market had begun to recover from its depressed state. Furthermore, BBM's prices were below its avoidable cost for most of the time. His Honour said the inference was inescapable that BBM was willing to use its market power so as to provide a disincentive to competitors, other than Pioneer, to remain in the market. Beaumont J[152] said:

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150 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 440 [155].

151 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 378 [179].

152 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 378 [179].

> "When regard is then had to the structure of the market and to these activities of BBM, the picture emerges of its domination by two major players (BBM and Pioneer), both well resourced and well connected nationally, both prepared to engage in 'price wars' for extended periods and, in the case of BBM at least, to price below avoidable cost for significant periods. Although BBM was not a near monopolist and whilst it is not open under s 46 to aggregate the respective strengths in the market of BBM and Pioneer, BBM's power in this market should, I think, be described as considerable or large, that is to say, 'substantial'. In the terms of s 46(3), BBM's conduct in the market was, to a large or considerable degree, not constrained by the conduct of its competitors. It is true that, on occasions, BBM's actions were, to an extent, influenced by the activities of both Pioneer and C&M. But the facts that BBM was able to increase its market share by almost doubling that share (from 18 to 35 per cent) and able to double its production capacity in a few years, are a good indicator of the exercise of its economic strength. This was, in my view, attributable not only to its capacity but also to its willingness to forego profits in the short or even medium term, in the expectation that other players (albeit not Pioneer) would probably decide to depart."

302 His Honour's statement that BBM was "not constrained by the conduct of its competitors" is inconsistent with the evidence and the findings of Heerey J. It seems, with respect, to be based on the erroneous notion that the ability to engage in price-cutting or expansion of production capacity is itself evidence of substantial market power. Furthermore, absent a finding of an ability to recoup, nothing of relevance flows from his Honour's conclusion that BBM was willing to forego profits in the expectation that others would leave the market given Heerey J's finding that all BBM desired was a return to profitable competitive pricing.

303 Moreover, as Mason CJ and Wilson J pointed out in *Queensland Wire*[153], although a large market share may be evidence of market power, it is only when it is not rational or possible for new entrants to participate in the market that the market share can translate into substantial market power. The judgment of Beaumont J shows that his Honour was well aware that market share is not conclusive evidence of market power. Moreover, his Honour noted that "the structural barriers to entry to the [concrete masonry products] market were low"[154]. But Beaumont J seems to have equated economic strength with substantial market power without examining whether this strength gave BBM the

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153 (1989) 167 CLR 177 at 189-190.

154 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 378 [179].

capacity to raise prices or restrict supply or impose conditions without regard to its existing or potential competitors.

304 Merkel J also said[155] that the ability of BBM to engage persistently in its low pricing to exclude competition was an indication of its market power. His Honour said[156] that, while it was possible for a new firm to enter during the price war, it would not have been rational to do so. Yet, C&M's entry into the market with a new efficient plant at a reasonable capital cost was proof that entry was not difficult. Merkel J agreed that structural barriers to entry were low. However, his Honour said that during the price war there were dynamic or strategic barriers to entry that gave the major participants in the market some market power. His Honour identified the dynamic barriers as those arising from the prevailing economic conditions in the market and the disincentive to enter arising from the presence, advantages and pricing strategies of the major players. Merkel J said that, in considering the degree of market power, as opposed to whether monopoly power existed, a dynamic or strategic barrier to entry is a relevant factor. His Honour said[157] that BBM's market power was evident from:

- its capacity to push down and maintain prices at below avoidable costs to drive out rivals;
- an expectation of some recoupment from higher prices and better profitability with fewer rivals;
- a capacity to meet supply associated with a growing market share;
- placing pressure on rivals by increasing capacity to a level greater than required;
- and so acting where a net profit was still being reaped by the group.

305 His Honour said[158] that when these "matters, which are closely related to or form part of BBM's exclusionary conduct, are considered cumulatively it is

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155 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 388 [224].

156 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 388-389 [225].

157 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 389 [226].

158 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 389 [227].

clear that to a significant extent BBM was able to behave independently of competition and of the competitive forces in the market". With great respect, I find this finding of his Honour curious. Far from BBM being "able to behave independently of competition and of the competitive forces in the market", BBM was at the mercy of the market. When it attempted to raise prices, it failed. As I have already explained, the ability to cut prices is not *per se* evidence of market power. For that matter, neither is the ability to obtain higher prices for a time conclusive evidence of substantial market power. Even the smallest of firms in a market may be able to charge supra-competitive prices for a short period of time.

306 It is one thing to find that a firm has cut prices below avoidable cost simply to drive out rivals and another to find that the firm has priced below avoidable cost because its competitors or purchasers force it to do so, if it wishes to remain in the market. In most cases, the bare fact of cutting prices to stay competitive is highly unlikely to give rise to an inference that the firm has market power. The very fact that it was unable to sustain its prices at the prior level indicates its lack of market power. It is the power to obtain *supra-competitive* prices that demonstrates market power, not higher or lower prices. And, with great respect to his Honour, the *expectation* of recoupment is altogether irrelevant to whether BBM had market power. Nowhere did his Honour deal with the finding of Heerey J that the blocklayers were able to force the suppliers' prices "down and down". Nor did Merkel J take into account that Heerey J had found that BBM did not have the power to obtain supra-competitive prices. That means it did not have any substantial degree of market power.

307 His Honour's failure to take into account the inability of BBM to disregard its competitors and raise prices or produce less for the same price also led to the erroneous conclusion that there were dynamic barriers to entry that gave the participants market power. If there were dynamic barriers to entry, they were irrelevant because none of the existing players had substantial market power. The market was as competitive as it could be. No player in the market had a substantial degree of market power.

308 Finkelstein J said[159] that generally an analysis of market power abuse involves a two-stage process: the first is determining whether a firm has market power and the second is whether that power has been abused. However, his Honour said that, when the exercise of market power is defined by reference to a firm's ability to exclude competition, the two-stage investigation is inappropriate. The evaluation of market power and the abuse of that power are part of one analysis. Finkelstein J said that the exclusionary conduct establishes market

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159 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 413 [331].

power and not the reverse. Yet inconsistently his Honour immediately said[160] that "any consideration of market power must necessarily take into account barriers to entry" and if there are no barriers to entry there can be no effective market power and no further analysis is required. His Honour identified[161] two types of exclusionary behaviour by BBM, the "predatory pricing" that was carried out in a sustained fashion between 1993 and 1996, and the upgrade of the Deer Park plant to increase BBM's production capacity. However, his Honour's reasons fail to take into account that the blocklayers were able to force prices "down and down" and that BBM could not raise prices to supra-competitive levels. In light of these two factors, what his Honour considered to be BBM's exclusionary conduct could not result in a finding that it had substantial market power.

309 Merkel and Finkelstein JJ both found the market had "dynamic" or "strategic" barriers to entry that were not insubstantial and were relevant in determining market power. As I have indicated, Merkel J identified the strategic barriers as emanating from the prevailing economic circumstances in the market, including a potential entrant's disincentive to enter because of the presence, advantages and pricing strategies being employed by the major incumbents. Finkelstein J, after citing a number of articles defining barriers to entry, said[162] that the behaviour of incumbent firms to exclude rivals by a variety of restrictive or uncompetitive practices is a barrier to entry. Finkelstein J said[163] that the "predatory pricing" was a barrier to entry – a dynamic rather than structural barrier to entry – although he acknowledged that this view was not universally accepted. His Honour also said[164] that the Deer Park upgrade was intended to signal to others in the market that BBM was willing to continue the price war for some time and that it could absorb whatever losses resulted – a strategically erected barrier to entry. Accordingly, his Honour found[165] that BBM had

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160 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 413 [332].

161 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 415 [343], 416 [347].

162 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 414 [341].

163 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 415 [343]-[344].

164 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 416 [347].

165 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 417 [349].

substantial power in the concrete masonry products market that it misused for a proscribed purpose when it engaged in its pricing policy.

310 While not dealing with the issue of strategic barriers to entry in any detail, Heerey J accepted[166] the evidence of Professor Hay, which touched on the question of low prices acting as a barrier to entry:

> "A barrier to entry is a factor that would deter a new firm from entering the market, even though the incumbent firm (or firms) is charging monopoly prices and earning monopoly profits. It is therefore a contradiction in terms to talk about low prices as a barrier. To assert that entry will not occur when prices are low is hardly a radical proposition but it relates only to the attractiveness of entry in those circumstances, and does not go to the question of whether there exists any barrier which might prevent a competitor from entering if the incumbent (or incumbents) is earning monopoly profits. The fact that a firm's low prices have made entry unattractive to potential competitors does not mean that the firm has erected a barrier to entry."

311 The ACCC's expert, Professor Officer, expressed a similar view in his evidence.

312 Nevertheless, Merkel and Finkelstein JJ were correct in saying that a market may have strategic barriers to entry as well as structural barriers to entry. Structural barriers can be assessed objectively by looking to the existence of intellectual property, capital investment, the availability of labour and materials, the nature of technology and similar matters. Strategic barriers to entry include matters such as economies of scale, pricing policies and the expansion of plant to generate excess capacity. The existence of strategic barriers can only be assessed by what is likely to happen in the particular market. While it may be difficult to draw the line between factors that merely make entry difficult because of a firm's superior efficiency and size and those that are properly considered strategic barriers to entry, it is necessary to do so. A failure to make such a distinction leads to a result inconsistent with the consumer oriented policy of s 46. If all matters that make entry difficult are considered barriers to entry, firms are likely to be regarded as having substantial market power when they do not have it. Consequently, they are more likely to be found to be in breach of the Act. Efficiency itself will be a burden on firms and will make it easier to find them guilty of breaches of the Act[167].

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166 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 437-438 [139].

167 See Bork, *The Antitrust Paradox*, (1978) at 195.

313 In assessing strategic barriers to entry, it is necessary to distinguish between the usual practices or conduct of the incumbent firms that act as a barrier and conduct in the circumstances of a period of economic depression or extremely vigorous competition. The Full Court looked to the conduct of BBM when the market was depressed, there was an excess of supply in the market and the major players were all competing for their survival. In such circumstances, it is unattractive for any potential entrant to enter at that point in time. However, unattractiveness to enter at a particular point of time is different from entrenched practices that act as true barriers to entry regardless of what is occurring in the market. Furthermore, the problem of viewing low prices as a significant barrier to entry is that a firm which prices low, below its costs, as in this case, will eventually seek or need to raise those prices – a firm will not go on indefinitely suffering losses. If prices are raised to supra-competitive levels, other firms will see the incumbent making profits and enter the market, provided there are not other barriers to entry, as the only disincentive from entering the market has been removed. Pricing below cost is by its nature generally so transitory that by itself it usually cannot be considered a barrier to entry. It is true that BBM cut its prices and that in some circumstances price-cutting may constitute a signal to potential competitors that entry into the market is not worthwhile – that is to say, the price-cutting may constitute a strategic barrier to entry. However, if pricing below cost is to be considered a strategic barrier to entry through its signalling effect, information asymmetries in the market would need to be considered. Signalling is effective when rivals are not aware of each other's cost structures and are led to believe a rival can produce more efficiently at a lower price. Under those conditions, the signal informs a potential entrant that it should stay out of the market.

314 As I have indicated, the Full Court did not disagree with Heerey J's finding that the structural barriers to entry were low. And this was not a market in which the evidence showed that the strategic barriers, if they existed at all, were high. The evidence concerning major projects indicated that invariably BBM reduced its prices in response to requests – or demands – from the buyers to beat the prices tendered by its competitors. Once BBM determined to stay in the market, it was entirely rational for it to adopt the strategy of bettering its competitors' prices for as long as it could, as Heerey J found[168]. All that a potential entrant would see from BBM's conduct was a firm that was prepared to match or better its rivals' prices at a time when the capacity for supply exceeded demand. A potential competitor would be reading a lot into this conduct to conclude that BBM was prepared to engage at any time in below cost pricing. Moreover, such a strategy could only be effective if BBM's "predatory pricing"

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168 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 444 [180].

was below the competitive costs of an efficient producer. The Act encourages competition because it benefits consumers. Competitive cost cutting cannot be regarded as a strategic barrier to entry and proof of substantial market power. But in any event, here the evidence showed that BBM had no substantial market power. That being so, whether the barriers to entry were high or low is a matter of no importance: BBM simply did not have substantial market power when it engaged in "predatory pricing".

315 No doubt upgrading the Deer Park plant signalled a commitment that BBM was a long-term participant in the market. It may or may not have been a strategic barrier to entry. But assuming that it was, it is irrelevant because BBM had no substantial market power at the relevant time.

316 Accordingly, the Full Court erred in concluding that this was a market in which there were significant strategic barriers to entry that inevitably led to the further conclusion that BBM had substantial market power.

317 Finkelstein J also said[169] that BBM's ability to sustain the trading losses arising from its pricing policy was the result of it being part of a vertically integrated group and was indicative of market power. Similarly, Merkel J referred[170] to the ability to engage in low pricing as indicative of market power. As Gleeson CJ and Callinan J point out in their joint judgment[171], financial strength is not equivalent to market power, although financial resources may go to explaining the reason for a firm's power. In his Second Reading Speech[172], explaining the amendments to s 46, the Attorney-General said that, while the threshold was reduced to substantial market power, the section as amended is not aimed at size or at competitive behaviour as such of *strong* businesses. Given the competitive nature of the market, the fact that BBM was part of a financially strong vertically integrated group has no relevance.

Conclusions

318 The low barriers to entry in this market by themselves were strong indicators that at no relevant time did BBM have substantial market power.

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169 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 405 [298].

170 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 at 389 [226].

171 Reasons of Gleeson CJ and Callinan J at [138].

172 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 March 1986 at 1626.

Given the low barriers to entry, BBM may not have been able to recoup the losses it sustained from its pricing policy even if Pioneer had not remained in the market. But however that may be, BBM was subject to strong competition from Pioneer and later C&M during the period when it is alleged to have breached s 46. A detailed analysis of the evidence regarding the major projects, as undertaken by Heerey J, indicates that BBM competed vigorously on price against the other major player, and not always successfully. Moreover, on many occasions, its customers were able to dictate to it the terms of business. The evidence is inconsistent with the conclusion that BBM had a substantial degree of market power. This was an intensely competitive market in which consumers were reaping the rewards of competition and without any chance of them being subjected to future detriment arising from recoupment. There was no evidence to suggest that the situation would change and that the market would no longer remain competitive.

319 The findings of Heerey J make it plain that, while Pioneer remained in the market, the market would remain competitive. Without a finding that the removal of other players – particularly C&M – would lead to a non-competitive market allowing BBM to charge supra-competitive prices, the claim against BBM had to fail. It would fail because it would show that BBM had no substantial degree of market power leading to the conclusion that it had none when it engaged in price-cutting. Even if the removal of other players would lead to a non-competitive market, the ACCC's case faced the difficulty of establishing that BBM had substantial market power *at the time* that it engaged in its price-cutting. As I have already indicated, one of the difficulties in forcing a "predatory pricing" claim into the straightjacket of s 46 is that its terms may fail to catch conduct that ultimately has anti-competitive consequences.

320 As other members of the Court point out in their judgments, the Full Court erred by approaching the issue of market power in an inverted manner, looking to the stated purpose of BBM – the removal of some of its competitors from the market – and examining the conduct of BBM, coloured by that purpose. Even though BBM drove down its prices in order to remove competition, this does not mean that it had the substantial degree of market power that must be proved before there is a breach of s 46 of the Act. "Predatory pricing" without a substantial degree of market power cannot result in a breach of s 46.

321 This disposes of the appeal and avoids any need to get into the more complicated question of price-cost analysis. If the structure of the market was one that would lend itself to a finding that BBM had a substantial degree of market power, it would be necessary to examine BBM's prices against its costs. This would include the difficult question of what is the appropriate measure of avoidable cost against which BBM's prices had to be examined. If BBM did have a substantial degree of market power, it would also be necessary to determine whether it had taken advantage of that power. A firm with substantial market power does not take advantage of that power by selling at prices that are

competitive having regard to its costs. Even if it intends to harm its competitors – which it almost certainly will – it does not breach s 46. Thus, even if BBM had a substantial degree of market power, a finding may have been open that it had not taken advantage of that power. Contrary to views expressed in the Full Court, the commercial reasons that led to its participation in the price war might also have required a finding that it had not taken advantage of a substantial degree of market power[173]. As I have already said, despite what was said in *Queensland Wire*, I am not convinced that the term "uses" captures the full meaning of "take advantage of that power".

Orders

322 The appeal should be allowed with costs. The orders of the Full Court of the Federal Court dated 27 February 2001 should be set aside. In lieu thereof, the appeal to that Court should be dismissed with costs.

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173 See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 27 [67] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

323 KIRBY J. This appeal from a judgment of the Full Court of the Federal Court of Australia[174] concerns the meaning and application of a key provision in the *Trade Practices Act* 1974 (Cth) ("the Act"). The provision is s 46. It deals with restrictive trade practices. Once again, in my opinion, this Court takes an overly narrow view of the Act[175]. The result frustrates the proper operation of the section and the achievement of the purposes for which it was enacted by the Parliament. The appeal should be dismissed.

The facts, legislation and issues

324 In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[176], Deane J remarked that the issues involved in that case represented "a kaleidoscope of law and fact: the effect of the relevant statutory provisions and the inferences to be drawn from largely uncontested facts". As in that case, so in this. The factual background is explained in the reasons of the other members of the Court. The applicable statutory provisions are set out there. I will avoid unnecessary repetition.

325 In the Full Court, Beaumont J, correctly in my view, categorised the primary facts as "largely uncontested"[177]. This was so mainly because those facts emerged (as is common in such cases) substantially from the analysis of a mass of evidence emanating from the corporation alleged to be in breach of the Act. In this way, the applicant, the Australian Competition and Consumer Commission ("the ACCC"), effectively stripped bare the corporate soul of the companies said to be in breach of the Act. At trial, those companies were Boral Limited ("Boral") and its subsidiary, Boral Besser Masonry Limited ("BBM"). As other members of the Court have explained[178], this Court's only concern is with the conduct of BBM and whether the Full Court erred in concluding that such conduct amounted to a breach of s 46.

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174 *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 ("*Boral*").

175 cf *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 ("*Melway*").

176 (1989) 167 CLR 177 ("*Queensland Wire*") at 194-195.

177 *Boral* (2001) 106 FCR 328 at 371 [155].

178 Reasons of Gleeson CJ and Callinan J at [5]; reasons of Gaudron, Gummow and Hayne JJ at [153]-[154]; reasons of McHugh J at [203].

326 At trial, the primary judge (Heerey J) rejected the ACCC's case[179]. When the ACCC appealed, it was the duty of the Full Court to decide the appeal (and the notice of contention that BBM filed defensively[180]) in accordance with established appellate principles. These required the Full Court to determine whether error had been shown that unlocked the door to appellate reconsideration. It would then be the duty of the Full Court[181] to reach its own conclusions on the facts, deriving its own inferences from the evidence, including that which was uncontested or found by any determinations of the primary judge that were not disturbed on appeal.

327 Save for two respects that will be mentioned, this was not a case where findings about the credibility of witnesses loomed large[182]. Nevertheless, in reviewing such a large mass of evidence, it was essential for the Full Court to keep in mind the general advantages that the trial judge enjoyed, particularly in a case involving a prolonged hearing, substantial written material and an ultimate judgment reached by applying the provisions of the Act, properly construed, to the evidence as a whole[183].

328 In my opinion, each of the judges of the Full Court approached the appellate task in the correct and orthodox way. Unanimously, they rejected BBM's notice of contention and upheld the ACCC's appeal.

329 The error which each of the judges found in the approach of the primary judge concerned the way in which his Honour had determined the question of whether BBM had, within the terms of s 46(1) of the Act, a substantial degree of power in the market of which it took advantage. Each of the judges of the Full Court recognised that, so expressed, s 46(1) of the Act operated in circumstances where the alleged corporate transgressor was not necessarily a monopolist or near

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179 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410.

180 *Boral* (2001) 106 FCR 328 at 334 [6].

181 *Federal Court of Australia Act* 1976 (Cth), ss 24, 25, 27, 28; *Warren v Coombes* (1979) 142 CLR 531 at 551-553.

182 cf *Warren v Coombes* (1979) 142 CLR 531 at 551-553; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 321 [64], 331-332 [93], 338 [139]; 160 ALR 588 at 607, 620-621, 630.

183 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 330 [89]-[91]; 160 ALR 588 at 619-620.

monopolist[184]. The mere fact that the actions of an impugned corporation might be considered as commercial responses that were rational in the circumstances does not exempt it from the application of s 46 if the preconditions stated in that section are satisfied[185].

330 The Full Court concluded that the relevant "market" was for the supply of concrete masonry products ("CMP") in the metropolitan area of the city of Melbourne. Although BBM advanced substantial arguments in favour of a wider definition of the relevant "market", it is appropriate (for the reasons given by other members of this Court[186]) to accept the definition of the market adopted by the Full Court.

331 Once that definition of the market was adopted, each of the judges in the Full Court, although for somewhat different reasons, decided that, in the relevant period, BBM had a substantial degree of power in that market and took advantage of that power in what it did[187].

332 At trial, the primary judge had concluded that[188]:

> "[T]here is evidence which establishes that BBM did act with one or more of the purposes proscribed by s 46(1)."

BBM urged the Full Court to treat the statements relied upon by the primary judge in reaching that conclusion as no more than "boasting". However, this was one portion of the evidence where the oral testimony of witnesses was significant. Deriving conclusions about the "degree of power in a market" and on whether a corporation had "taken advantage of that power" involved deciding substantially objective questions. But identifying the corporate "purpose" of any such conduct, necessarily involved (to some degree at least) estimates of the subjective will of the officers of the impugned corporation who acted on its behalf in the context of an objective analysis of the state of the market and the level of competition within it.

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184 *Boral* (2001) 106 FCR 328 at 369 [148], 381 [188], 398 [262].

185 *Boral* (2001) 106 FCR 328 at 370-371 [154].

186 Reasons of Gleeson CJ and Callinan J at [134]; reasons of Gaudron, Gummow and Hayne JJ at [155]; reasons of McHugh J at [245]-[259].

187 *Boral* (2001) 106 FCR 328 at 377-378 [179], 389-390 [229], 417 [349].

188 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 445 [190].

333 The Full Court was therefore correct to reject the challenge to the primary judge's identification of the relevant "purpose". As Beaumont J put it[189]:

> "[T]he … question, a subjective one, was very much a matter of impression for the trial judge gathered from the whole of the evidence, including his Honour's assessment of the credibility of the testimony of BBM's witnesses on the point. In this area, essentially one of credit, we should be reluctant to depart from his Honour's impressions. Moreover, high-level planning documents of a strategic kind should provide the best evidence of the subjective intent (as distinct from 'effects') required by s 46. In any event, the judge's finding of a proscribed purpose was corroborated by the uncontrovertible fact that some competitors did actually quit the market. This was at least consistent with the existence of BBM's purpose, to eliminate or substantially damage a competitor, or to prevent the entry of a person into this market, or to deter or prevent a person from engaging in competitive conduct, as found by his Honour."

334 In this Court, it is BBM that must establish appealable error on the part of the Full Court. On this footing, the conclusion of the primary judge on the third issue (the proscribed purpose) is impregnable. The question for this Court is thus whether error has been demonstrated on the part of the Full Court in substituting its conclusions on the first two issues ("substantial degree of power in a market"; and "tak[ing] advantage of that power"). In answering that question, this Court must observe the same constraints in reviewing the factual decisions of the Full Court as it demands of other appellate courts. It may only intervene if it finds an error that vitiates the Full Court's unanimous conclusion[190].

335 The third issue (purpose) being put aside, the appeal does not turn on any advantages of the courts below having regard to estimations of credibility or the like. Nonetheless, there remain other considerations which this Court must keep in mind in performing its function. These include the considerable specialised experience of the Federal Court in the application of the Act. The Parliament has assigned the primary responsibility of doing so to that Court. The Full Court undertook a hearing of twice the length that could be afforded by this Court. In the hearing it had twice the time to analyse the extensive documentary materials constituting the primary facts. Ultimately, it is from those materials that the conclusions on the two remaining issues in the appeal had to be drawn. Where complex facts, and legislation expressing significant economic concepts, are in contest, this Court should recognise that judgment and evaluation play an

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189 *Boral* (2001) 106 FCR 328 at 379 [181].

190 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879 [65]; 179 ALR 321 at 336-337.

important part in the decision. Absent an established legal error, it will be a rare thing for this Court to substitute its own fact-finding and evidentiary conclusions for those reached below, with the advantages respectively enjoyed there[191].

"Substantial degree of power" not "control"

336 Save for his conclusion that there was no "basis for implying a recoupment theory into the working of s 46"[192] – a matter not ultimately critical to my analysis – I agree substantially with the approach adopted in the Full Court by Beaumont J. Addressing myself to the two issues upon which this appeal turns (namely BBM's degree of market power and whether BBM took advantage of it), a number of comments may be made of a semantic or textual kind. These can be offered before any larger endeavour is embarked upon to understand, and give effect to, the national economic objectives of s 46.

337 The first point to note is that the section is addressed to the conduct of a "corporation". For historical reasons it is common in this area of discourse to refer to the corporate players as "firms". I will not do this. In my view, it is highly desirable to remain with the statutory language. It expresses the law governing the Australian decision-maker. In recent times, in other areas of the law, this Court has repeatedly insisted upon the primacy of adherence to the statutory text[193]. This is no exception.

338 Secondly, it must be recognised that it is not every corporation that is subject to the obligations expressed in s 46(1). There is an adjectival clause that qualifies the corporation concerned. It must be a corporation "that has a substantial degree of power in a market". As so stated, the adjectival clause describes a subclassification of corporations that qualify for the applicable statutory restraints. Unless that clause is satisfied, an impugned "corporation" need worry no further. Section 46 of the Act has no application to it. This

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191 cf *Aktiebolaget Hässle v Alphapharm Pty Ltd* [2002] HCA 59 at [90], [95].

192 *Boral* (2001) 106 FCR 328 at 371 [154].

193 eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 38-39 [14]-[15], 111-112 [249]; *Western Australia v Ward* (2002) 76 ALJR 1098 at 1105 [2], 1108-1109 [16], 1110 [25], 1216 [588]; 191 ALR 1 at 11-12, 16, 19, 164; *Wilson v Anderson* (2002) 76 ALJR 1306 at 1315-1316 [47], 1331 [137], 1332-1333 [144]-[146]; 190 ALR 313 at 326, 347, 350; *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 76 ALJR 1502 at 1523 [113]; 192 ALR 129 at 157; *MFA v The Queen* (2002) 77 ALJR 139 at 147-148 [46]; 193 ALR 184 at 195.

structure of the section gives some textual support to the submission of BBM that the first step on the part of the decision-maker must be to determine whether the corporation is of the identified kind. To some extent, the statutory language supports the notion that the degree of "power" in the "market" should be judged at the threshold, and separately from other considerations, before deciding whether, in the case of the propounded corporation, s 46 bites.

339 Thirdly, it is relevant to remember the history of s 46. As originally enacted, the section was concerned with whether the impugned corporation was in a position "substantially to *control* a market"[194]. The verb "control" postulates a degree of dominance in the market. It contemplates a degree of "power" that is quantitatively more than "substantial". The original section envisaged a corporation that was effectively able to take charge of a market so as, if necessary, unilaterally to determine its direction and even to eliminate a competitor from it[195]. So expressed, s 46 was thus concerned with the position of a monopolist or near monopolist.

340 In *Queensland Wire* the corporation in question was the Broken Hill Proprietary Co Ltd ("BHP"). In the reasons of the members of this Court it was repeatedly described as being a "monopolist" or "near monopolist" for the supply of the product there in question. Accordingly, BHP was in a position to "control" the relevant market for steel and steel product. It therefore necessarily possessed a substantial degree of power in that market[196]. The main issue in *Queensland Wire* was whether BHP had or had not "taken advantage" of its market power[197]. Further, the impugned conduct in that case involved a refusal to supply to the appellant corporation wishing to enter the relevant market. Given the different market context and conduct involved in *Queensland Wire*, care should be exercised in applying some of the analysis from that case to the issues raised by this appeal.

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194 *Trade Practices Act* 1974 (Cth), s 46 (emphasis added). The section was amended by the *Trade Practices Revision Act* 1986 (Cth) with effect from 1 June 1986. See *Queensland Wire* (1989) 167 CLR 177 at 186-187.

195 See Breyer, "Five Questions About Australian Anti-Trust Law – Part II", (1977) 51 *Australian Law Journal* 63 cited by Gaudron, Gummow and Hayne JJ at [163].

196 *Queensland Wire* (1989) 167 CLR 177 at 192.

197 *Queensland Wire* (1989) 167 CLR 177 at 192. The same could be said of the impugned corporation considered in *Melway*. On the evidence in that case, that corporation was also in the position of a near monopolist in its market in Melbourne street directories for which it held in excess of 80-90 per cent of the retail market share: (2001) 205 CLR 1 at 11 [10], 29 [72].

341 Fourthly, the reference in the current language of the Act to "degrees" of power indicates that a distinction is drawn between "substantial" and non-substantial degrees[198]. Even a small player in a market could, on this analysis, have *some* "degree of power". What is envisaged by the adjectival clause is that the corporation subjected to s 46 requirements must be one that has a significant or large or big degree of power in the designated market. Nothing more is required. The statute has retreated from the concept of "control". Instead, it envisages that there might be a number of corporations with a "substantial degree of power". Any notion (that could have arisen from the original language of s 46) that the only corporations addressed by the section are those that enjoy monopoly or near monopoly power has now been abandoned. In the light of the present statutory language and the history of its amendment, it is a mistake to reinsert notions of market "control" by puffing up the contents of the adjectival clause in a way that would restrict the type or number of corporations that qualify for the application of s 46. The Act does not do this. On the contrary, to the extent that it originally did, s 46 has been changed and refocussed.

342 Fifthly, the word "substantial" is obviously a comparative or relative concept[199]. The only clue as to its meaning is provided by the context of s 46, namely the surrounding provisions and their purposes. These are concerned with the protection of competition in the Australian economy. This, in turn, is treated, as such, as being of advantage to consumers and to the Australian people generally[200]. In such a context, any corporation will be likely to enjoy a "substantial degree of power in a market" if it has the capacity, through its decisions, substantially to affect market outcomes. To say this is not to overlook the fact that the adjectival phrase qualifies the "corporation" to which s 46 is addressed. It is simply to read that phrase in the context in which s 46 of the Act is expressed to apply and for its purposes.

343 Sixthly, reinforcement for this approach can be derived from the explanatory memorandum issued with the 1986 Bill that substituted the present

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198 cf *Peter Williamson Pty Ltd v Capitol Motors Ltd* (1982) 41 ALR 613 at 620-621; *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 134, 137-140; *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447 at 521-523; *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 519 [252].

199 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 478; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 63 per Lockhart and Gummow JJ.

200 The Act, s 2.

language for the original notion of "control" of the market[201]. In *Dowling v Dalgety Australia Ltd*[202], Lockhart J noticed that the memorandum had explained that the new word "substantial" was intended to signify "large or weighty" or "considerable, solid or big". Obviously, it did not envisage such a high degree of market power that would require that the corporation was necessarily in a position to "control" the market[203]. Otherwise, the whole point of amending the section to remove the requirement of "control" would have miscarried.

Market power

344 *BBM's market share*: It follows that bigness is enough if it is combined, as it commonly will be, with "power" in the market. The starting point for determining the degree of market power of a corporation is an examination of its market share[204]. There is no magical level of market share that prima facie establishes the possession of a "substantial degree of power". The question is whether the corporation has the capacity, through its decisions, to affect and alter market outcomes. The answer will depend on the context and the characteristics of the market in which the corporation operates[205]. This includes an examination of the position and market shares of the corporation's rivals.

345 Applying this criterion it is my view, on the uncontested primary facts, that the Full Court was correct to hold that BBM, in the designated market, was relevantly "big". Moreover, on the evidence, it enjoyed "a substantial degree of power" in that market. I agree with the analysis of Beaumont J[206]. It is not necessary to go into a mass of evidence to bear out the foregoing conclusions[207]. For present purposes, it is enough to note the following.

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201 Explanatory Memorandum, Trade Practices Revision Bill 1986 at [40]-[42], [45]-[46].

202 (1992) 34 FCR 109 at 139.

203 cf (1992) 34 FCR 109 at 142.

204 *Queensland Wire* (1989) 167 CLR 177 at 189.

205 cf *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442 at 529-530 [380]-[381] per Hill J.

206 *Boral* (2001) 106 FCR 328 at 377-378 [179].

207 Most of the facts necessary to my conclusions are stated in the reasons of Gleeson CJ and Callinan J at [7]-[85]; see also reasons of McHugh J at [205]-[243].

346 In 1992, the percentage shares in the market for CMP in Melbourne were estimated as follows[208]:

Pioneer	26 per cent
Rocla	21 per cent
Budget	15 per cent
C & M	9 per cent
Boscato	3 per cent
Shepbrick	2 per cent
Stratblox	3 per cent
BBM	21 per cent

347 By mid-1994, after the exit of some smaller players and at the time the impugned conduct was said to have commenced, BBM's Strategic Business Plan stated that the market shares were as follows[209]:

BBM	28 per cent
Rocla	23 per cent
Pioneer	26 per cent
Budget	7 per cent
C & M	11 per cent
Other	5 per cent

348 The market was therefore characterised by three main players, including BBM, each of approximately equal market share, and two much smaller players (one of which – C & M – was a recent entrant). It was therefore a concentrated market. In addition, given the nature of the product it was a market conducive to anti-competitive pricing, particularly if some of the smaller players were eliminated. In that sense, there existed an incentive for one or more of the more powerful players to engage in exclusionary conduct. BBM was one of those significant players. In *Brooke Group Ltd v Brown & Williamson Tobacco Corp*[210], the corporation that was alleged to have set out on a course of exclusionary conduct had a market share of less than 12 per cent. This, in itself, was not fatal to the claim that its conduct could result in damage to the competitive process.

349 An update of BBM's Strategic Business Plan in March 1995 expressed the belief that its current share of the total market was 30 per cent; but that this

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208 *Boral* (2001) 106 FCR 328 at 371 [157].

209 *Boral* (2001) 106 FCR 328 at 372 [169].

210 509 US 209 at 213 (1993) ("*Brooke Group*").

would increase to 50 per cent on the installation of the new plant[211]. The new plant would certainly have given BBM even more spare capacity. As a result, its own output and price decisions would have had an even greater influence on the direction of those outcomes for the market as a whole.

350 In a presentation to Boral executives in August or September 1995, Mr Vella (BBM's Victorian Sales and Marketing Manager[212]), with the agreement of Mr Rawnsley (BBM's Victorian General Manager[213]), remarked on the rise of BBM's market share over the previous three years from 17 per cent to 32 per cent[214].

351 Later figures suggested that by mid-1997 BBM's market share rose to 42 per cent[215]. It may be that, historically, BBM had a high market share, which was at a level similar to that resulting at the conclusion of the period of impugned conduct. This only strengthens the conclusion that, being able to supply over a third of the relevant market, BBM was a large player that had a significant capacity to influence market outcomes. This would strengthen its ability to engage in exclusionary conduct. Thus, it was likely to fall within the ambit of s 46 of the Act.

352 The reasoning of Beaumont J is compelling[216]:

> "[T]he fact is that during the relevant period two players, Rocla and Budget elected to quit the market. C & M almost failed and sought to be bought out …
>
> When regard is then had to the structure of the market and to these activities of BBM, the picture emerges of its domination by two major players (BBM and Pioneer), both well resourced and well connected nationally, both prepared to engage in 'price wars' for extended periods and, in the case of BBM at least, to price below avoidable cost for significant periods. Although BBM was not a near monopolist … BBM's

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211 *Boral* (2001) 106 FCR 328 at 373 [172].

212 *Boral* (2001) 106 FCR 328 at 338 [32].

213 *Boral* (2001) 106 FCR 328 at 338 [36].

214 *Boral* (2001) 106 FCR 328 at 376 [177].

215 *Boral* (2001) 106 FCR 328 at 353 [115]. This was some time after the period of the impugned conduct.

216 *Boral* (2001) 106 FCR 328 at 378 [179].

> power in this market should, I think, be described as considerable or large, that is to say, 'substantial'. In the terms of s 46(3), BBM's conduct in the market was, to a large or considerable degree, not constrained by the conduct of its competitors … [T]he facts that BBM was able to increase its market share by almost doubling that share (from 18 to 35 per cent) and able to double its production capacity in a few years, are a good indicator of the exercise of its economic strength."

353 With respect, the mistake of the primary judge, and of those who hold a view contrary to that taken by Beaumont J, is to construe the phrase "power in a market" in way that drastically reduces the effectiveness of s 46 of the Act. It is to read the section, in effect, as confined to monopolists and near monopolists. In substance, the notion of "control" of the market is thereby restored. But, as a matter of law, that is erroneous for the reasons that I have given.

354 I accept, as Mason CJ and Wilson J did in *Queensland Wire*[217], that market share is not the only relevant criterion by which the presence of a substantial degree of power is to be judged. Other elements of the structure and conduct of the market may also strengthen, or weaken, the conclusion that the corporation had the requisite degree of market power. Such elements include an analysis of barriers to entry to the relevant market, the characteristics of the product, and the relationships between the corporations, including the presence of both vertical and horizontal arrangements[218].

355 *Barriers to entry*: If entry to a given "market" is unrestricted and easy, the emergence of new competitors tends to erode the "power" to influence the price of the product even of big players in the market. It is in this sense that it is relevant to consider the barriers to entry that existed in the designated market when determining whether a corporation has a "substantial degree" of power in that market.

356 The primary judge found that barriers to entry in the market for CMP in Melbourne were low during the period in question in these proceedings. As a matter of commonsense, it seems most unlikely that this particular market would be characterised by significant new entrants. A number of uncontested elements in the evidence support that assessment. These include the structural characteristics of the market for CMP in Melbourne; the need for any new entry to be on a significant scale (especially given the size of the existing incumbents and the vertically integrated nature of the two main players); the requirement for substantial investments in plant and equipment that would probably not be

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217 (1989) 167 CLR 177 at 189.

218 *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 189.

recoverable on exit from the market; the comparative instability of demand for CMP; the presence of significant levels of excess capacity; and the availability of other substitute products. The experience of C & M as a late entrant is to some extent illustrative. Although more efficient than the incumbents, it experienced significant difficulties in surviving in the market. Indeed, it nearly failed in its operations. On a number of occasions it came close to selling out either to BBM or to Pioneer.

357 Two of the members of the Full Court (Merkel and Finkelstein JJ[219]) placed emphasis on what their Honours referred to as dynamic or strategic entry barriers. These refer to decisions or conduct by market incumbents having the object of deterring the entry of further competitors, in order to protect their existing market power and to increase profitability[220].

358 Pricing is only one example of strategic conduct that a corporation with market power can manipulate to make entry more difficult. In its submissions, the ACCC drew attention to some other policies commonly adopted by participants in the industry to prevent the emergence of operators that would compete by lowering prices. The Commission pointed to practices relating to spare and second hand plant and equipment. It was common to use or even export any surplus plant and equipment rather than sell it, so that it would not become available to competitors who might then undercut prices. For the same reason BBM would destroy surplus plant or equipment.

359 The predatory market strategy upon which BBM had embarked, and to which it had committed itself, was also relevant. It had the specific object of deterring the entry, not only of C & M, but also of any other potential competitors. The knowledge of that strategy within the market and the consequence that it had for at least two of the less powerful competitors that were forced to quit would have gone some way towards ensuring that BBM's conduct would have its desired effect. In that context, the decision by BBM to increase its capacity, at a time of considerable excess productive capacity in the industry and a price war in the market, was also of significance.

360 Therefore, even if one accepts the primary judge's conclusion that the structural barriers to entry in the market were low, a court should be slow to jump from that point immediately to a conclusion that the impugned corporation did not have the requisite market "power" to enliven the operation of s 46. This is particularly so where the allegedly offending conduct was aimed at inducing exit, or deterring entry, of competitors. In a market where the structural barriers

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219 *Boral* (2001) 106 FCR 328 at 388-389 [225]-[227], 416 [346].

220 *Boral* (2001) 106 FCR 328 at 414-415 [340]-[342].

to entry are high, the market power and profitability of incumbents is, to some extent, protected by such barriers. In those circumstances, an incumbent corporation would have less incentive, or need, to engage in exclusionary conduct of the kind proscribed by s 46.

361 It is precisely in the context of a market where such structural barriers are not particularly high, that an incumbent corporation which has the capacity to do so, would have a greater incentive to invest in building up a predatory reputation in order to deter competitive conduct or entry[221]. To absolve such conduct from the operation of s 46 simply by saying that (structural) barriers to entry in the market were low, is effectively to render the section inoperative in contexts where it was designed to have application. This would be an intolerable construction to adopt. The strengthening of the predatory reputation of BBM had a tendency to increase the concentration of the market and to chill the competitive conduct of rivals, including the entry of potential new competitors. Such conduct invariably harms consumers. This was precisely the type of conduct that s 46 was designed to prevent and, when it occurred, to sanction.

362 *Financial power*: In the reasons of Gleeson CJ and Callinan J[222], a distinction is drawn between "market power" and "financial power". It is suggested that the latter cannot be used as evidence of the former. Financial power is sometimes referred to as the capacity of those enjoying it to have access to "deep pockets" or "a long purse"[223]. Certainly, such a facility can help a corporation, including one acting in breach of s 46 of the Act, to engage for a longer period in a "war of attrition"[224].

363 Access to significant financial resources can enable a corporation to act in ways that are not dictated by short-term market considerations. The corporation can then persist with longer-term strategic objectives. Thus, if it has access to significant financial resources, the corporation may withstand pricing or output decisions that, in the short term, are not consistent with the discipline of the market or the conduct of its rivals.

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221 On the link between the issues of power and exclusionary conduct and the inability to treat market power entirely as a threshold question see Krattenmaker, Lande and Salop, "Monopoly Power and Market Power in Antitrust Law", (1987) 76 *Georgetown Law Journal* 241 at 254-255.

222 Reasons of Gleeson CJ and Callinan J at [138].

223 eg *Queensland Wire* (1989) 167 CLR 177 at 189-190, 200-202.

224 *Boral* (2001) 106 FCR 328 at 405 [298].

364 I accept that having access to financial resources is not the same as having "a substantial degree of power in a market". Nevertheless, the link between the two concepts cannot, and should not, be overlooked. In some circumstances, financial power can indeed be an indicator of the ability of a corporation to set supra-competitive prices in the past and to maintain in the future conduct with strategic objectives, the pursuit of which would otherwise be ruinous. It follows that access to financial power is by no means irrelevant to the possession by a corporation of a substantial degree of power in a given market[225]. In a particular case, of which this was one, access to financial resources may be a marker for the existence of a substantial degree of power in the market as that expression is used in s 46 of the Act.

365 *Vertical integration*: The primary judge erred in not considering this factor as one important determinant of market power[226]. In particular, the vertical integration of BBM within the Boral group, and the ability of BBM to sustain prolonged losses in the CMP market, undoubtedly enabled BBM to maintain its below cost pricing strategy for a longer period that competitors (except perhaps Pioneer) might not, from a strictly financial point of view, have been able to withstand. Knowing and relying on this, BBM would have been entitled to expect that minor competitors would be forced to retreat; which is what happened in two cases.

366 To that extent, it is not to the point to say that BBM's conduct was not exclusionary because the Boral group as a whole may have made some profit out of it[227]. It was its vertical integration into that group, when combined with its market share, access to finance and the structure of the relevant market, that enabled BBM to embark upon conduct that was predatory and exclusionary, in order to strengthen its own market power.

367 The counter-position of Rocla is illuminating in this context. Rocla was another participant in the CMP market that was part of a vertically integrated group. However, as the ACCC pointed out, Rocla had to conduct its business activities as an operation independent of the group[228]. It was therefore unable to

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225 *Brooke Group* 509 US 209 at 225 (1993).

226 cf *Queensland Wire* (1989) 167 CLR 177 at 190 with reference to *United Brands Co v EC Commission* [1978] 1 ECR 207 at 278-279; [1978] 1 CMLR 429 at 487-488.

227 cf Pengilley, "The Ten Most Disastrous Decisions made Relating to the Trade Practices Act", (2002) 30 *Australian Business Law Review* 331 at 346.

228 *Boral* (2001) 106 FCR 328 at 352 [114].

quote prices below cost once the price war ensued[229]. While it might have had a market share historically comparable to BBM, it may not have had the requisite degree of market power. It could not use its vertically integrated position to act independently of demand or cost constraints and engage in exclusionary conduct.

368 *Competitive constraint*: The competitive conduct and interaction of the competitors in a market is also relevant to the question whether a corporation has a substantial degree of power in the market in order to fall within the scope of s 46. The Act specifically refers to the foregoing as a relevant factor (s 46(3)). However, great care should be exercised concerning the inferences that are drawn from conduct or outcomes observed out of context, and in particular, without reference to the structure of the market or the conduct that is said to violate the section. The present case is an illustration.

369 In other reasons it is suggested that market power is the "absence of constraint from the conduct of competitors or customers"[230]. With all respect, limiting attention only to that consideration would unnecessarily confine the field of operation of s 46. Such confinement is unnecessary, inconsistent with the section's history, incompatible with its language, conflicting with its stated and apparent legislative objects and out of line with its international counterparts as well as economic theory which informs this area of the law.

370 It has been said by this Court, as by others, that in the determination of the presence of market power or subsidiary issues such as the identification of a market (steps that need to be performed in the context of a number of the provisions in the Act) a purposive approach should be adopted[231]. This means that such determinations should be made by reference to the issues contested in the proceedings. In particular, different factors may be relevant depending on the section that is said to be applicable[232], as well as the conduct that is alleged to constitute a contravention[233]. That approach should be followed in the present appeal.

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229 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 421 [53].

230 Reasons of Gleeson CJ and Callinan J at [121].

231 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 174 per French J; *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442 at 524 [358] per Hill J.

232 cf *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 175 per French J referring to Breyer, "Five Questions About Australian Anti-Trust Law – Part I", (1977) 51 *Australian Law Journal* 28 at 34.

233 *Queensland Wire* (1989) 167 CLR 177 at 195 per Deane J.

371 The approach to the determination of market "power" propounded by other members of this Court is therefore too narrow. It may result in misleading inferences at least in cases where a violation of s 46 is alleged in the context of a concentrated market, or where the offending conduct is alleged to involve predatory pricing. It may be especially problematic in circumstances like the present, where both of these elements exist. In a predatory pricing case, the reason a corporation engages in this type of conduct is, as in the case of BBM, to discipline, force out or deter entry of, competitors. Also, in a concentrated market, decisions are inevitably interactive and to some degree interdependent. The output/price decision of one corporation, certainly where it is a "big" player, necessarily affects market outcomes. Acting rationally, such a corporation will always be mindful of its rivals' reactions. To this extent, the conduct of the participants in a relatively confined market such as that in question in this appeal, could not be totally independent of the conduct of their competitors. Nonetheless, such participants could still possess varying "degrees of power in a market"[234]. Some of them might enjoy "a substantial degree" of such power.

372 In the context of anti-trust legislation (of which the Act is an instance), the notion of "market power" has ordinarily been taken to refer to the "power" to raise prices, by restricting output in a sustainable manner[235]. If one asks the question whether a corporation that sells or has the capacity to produce somewhere between a third and a half of the product of a given market, could raise the market price by restricting its own output, the answer will mainly depend on the market size, and the conduct and responses of its rivals.

373 In *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd*[236], in a discussion with which I agree, Hill J of the Federal Court pointed out that the meaning of market power "will need to take consideration of the context in which the expression is used"[237]. His Honour referred[238] to the following analysis as very persuasive[239]:

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234 See Schmidt and Rittaler, *A Critical Evaluation of the Chicago School of Antitrust Analysis*, (1989) at 83-84.

235 *Queensland Wire* (1989) 167 CLR 177 at 200.

236 (2001) 115 FCR 442.

237 (2001) 115 FCR 442 at 523 [356].

238 (2001) 115 FCR 442 at 524 [360].

239 (2001) 115 FCR 442 at 523-524 [357] with reference to Salop, "The First Principles Approach to Antitrust, *Kodak*, and Antitrust at the Millennium", (2000) 68 *Antitrust Law Journal* 187.

> "[A] 'principled approach' to antitrust law is to approach the question of market power not by considering it (or for that matter the question of market definition) as threshold tests divorced from the conduct and allegations about the effect of that conduct which are made … [I]t is impossible to evaluate market power accurately without understanding the anti-competitive conduct and anti-competitive effect claims at issue and analysing market power in the context of those claims."

374 In the context of a price war in the market, it is clear that a corporation with a substantial degree of market power (whatever that term means) would not be able to raise the market price by restricting its own output. Yet one way it could engineer a rise in prices would be by rapidly expanding its own output in the short run, in order to depress prices further and discipline or punish rivals that engage in price-cutting. This would be done with the aim of either chilling competitive conduct or inducing the exit of operators, and securing an ultimate desired result of an increase in market price.

375 This brings me to the second problem with the analysis of the elements of market power adopted by other members of this Court. That approach does not answer the question of market power by reference to the conduct that is said to constitute the contravention of s 46. Whenever a contravention of the section is alleged to involve the charging of low prices in order to damage competitors, induce their exit or deter future entry, during the period of such conduct the market will inevitably be characterised by vigorous price-undercutting. The impugned corporation will be cutting its own prices in order to match the prices of the targeted rivals. Its decisions will necessarily be influenced by the conduct of its rivals. Such a market situation could also provide opportunities for customers in the market to seek further price reductions. And yet these observations, in themselves, should not be sufficient to warrant an inference that the impugned corporation did not have a substantial degree of market power.

376 Test it this way. Suppose that a market is characterised by a monopolist or near monopolist, controlling virtually the entire market share. If an existing, or a new, competitor decides to undercut the price in order to take away some of that market share, the monopolist may decide to punish its rival or to induce its exit in order to prevent further price competition and maintain profitability. One way it could attempt to do so would be by consistently responding to, and matching, the rival's prices in order to starve it of sales. Such price-undercutting, especially if it also occurs in the context of a decline in demand, will give the customers in that market countervailing power to seek price reductions. And yet this does not necessarily mean that the monopolist lacks a substantial degree of power in the market. A more careful analysis of the structure of the market and the strategic objectives of the conduct involved is necessary.

377 *Conclusion: market power existed*: It is true that the ability to offer a price reduction is not in itself evidence that a corporation possesses market power. But it is also true that the ability to price below avoidable cost for extended periods of time, in pursuit of strategic market objectives (including the elimination of competitors from the market), is simply not consistent with the conduct of a corporation that lacks a substantial degree of market power. Such conduct would be impossible or ruinous for a corporation having no market power.

378 In context, the "power" referred to in s 46 is obviously power of an economic kind, relevant to the "market", as defined. It relates specifically to the types of behaviour, identified in pars (a), (b) and (c) of s 46(1), to the prevention or sanctioning of which the sub-section is addressed. That this is the meaning of "power" in s 46(1) is made even more clear by s 46(4)(a).

379 Market "power" may be manifested by practices directed at excluding competition. Essentially such power involves the capacity of an impugned corporation, over a sustained period, to do any of the things mentioned in s 46(1) for perceived long-term benefits even if, in the short term, the conduct may appear irrational and contrary to the corporate duty to act reasonably so as to maximise profits for the shareholders.

380 It is a mistake to import uncritically into the notion of "market power", as appearing in s 46 of the Act, either overseas case law or pure economic theory. True, these sources may sometimes assist the Australian decision-maker. But in the end, the duty of that decision-maker is to give meaning to the words of the local statute. Although there may be doubts about the purposes of the section if the search is confined to the opening words of s 46(1) broken down into pieces, such doubts are eliminated when the "power" question is considered in its context. That context reveals a legislative concern about the abuse of power to achieve the anti-competitive consequences mentioned in the paragraphs of s 46(1). The sub-section as a whole thus provides the means to prevent and sanction such an outcome.

Taking advantage of market power

381 *An integrated concept*: The members of the Full Court unanimously concluded that BBM had "taken advantage" of its power for a proscribed purpose[240]. This was a correct, and certainly an available, conclusion having regard to the meaning of that expression, as it appears in the context of s 46; the state of legal authority explaining that expression; and the uncontested evidence and the findings of the primary judge, upheld in the Full Court, concerning the conduct of BBM and the proscribed purposes that it had at the relevant times.

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240 *Boral* (2001) 106 FCR 328 at 379 [181], 388 [220], 417 [349].

382 There are those who want to dissect the concepts in s 46. However, to attack s 46 with scissors is not only to offend the orthodox approach to the interpretation of legislation. It is also to defy three particular rules upon which this Court has insisted concerning the approach that is to be taken to that task.

383 First, the decision-maker must seek to understand the meaning of the statutory language, and to give content to that meaning, having regard to the purpose of the legislation and not simply its bare words[241]. The old days of adopting a purely textual or verbal construction of legislation have given way, in this country and in others[242], to a purposive approach. By this I mean that courts seek to ascertain, and give effect to, the object of the legislature. They do so within the terms of the statutory text[243]. But they attempt, so far as that text permits, to give effect to the legislative purpose that can be ascertained, including from sources outside the text. They do not simply analyse the statute, taking its words in isolation. Too often, that former method of statutory construction had the consequence of frustrating the achievement of the statutory purposes. It led to the retaliatory enactment of legislation of intolerable detail and complexity. Section 46 of the Act, on the contrary, is stated in very broad terms. It should be construed, as its language permits, to achieve the purposes for which it was enacted. Such purposes include the prevention and sanctioning of restrictive trade practices by big players using their "power" to harm the process of competition in particular markets. The object of the section is the protection of competition and the promotion thereby of the best interests of consumers and of the Australian public. This is not an approach to legislative interpretation to be adopted or neglected at judicial whim. It is a basic rule for the consistent ascertainment of meaning in all legislation.

384 Secondly, where, as here, the identified statutory purposes are beneficial, in the sense of promoting the public good of competition and preventing and sanctioning practices that inhibit or restrict those ends, courts will give such

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241 *Acts Interpretation Act* 1901 (Cth), s 15AA; *Bropho v Western Australia* (1990) 171 CLR 1 at 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70].

242 *Pepper v Hart* [1993] AC 593 at 617-618; cf *Director of Public Prosecutions (Ivers) v Murphy* [1999] 1 ILRM 46.

243 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Mills v Meeking* (1990) 169 CLR 214 at 235.

legislative provisions a beneficial construction[244]. At least, they will do so to the extent that the language enacted by the Parliament so permits[245]. Where that language is expressed in general terms, reflecting large concepts of economic theory, it is appropriate for courts, so far as the language allows, to inform themselves about the considerations that sustain the beneficial purposes of the statute. So far as possible within the text, decision-makers will construe the legislation to advance and achieve those beneficial purposes – not to frustrate their attainment.

385 Thirdly, courts today (including this Court) insist upon a contextual approach[246]. It is a serious mistake to take a word or sentence in isolation from its legislative surroundings. This is why the adjectival clause in s 46(1), qualifying the "corporation", cannot be taken in isolation from the rest of the language of the sub-section. It is an equally serious mistake to assume that the degree of "power" which the "corporation" enjoys "in a market" is to be divorced from the impugned results that can follow from "taking advantage" of such "power". Not only would that approach be in conflict with the reference in the second phrase to "*that*" power. It would also conflict with the repeated instruction of this[247] and other courts[248] that the normal unit of communication of meaning in the English language is the sentence. It is not a phrase, or an isolated word, within a sentence.

386 The words of s 46(1) of the Act (being a continuously expressed sentence) must therefore be read as a whole. Moreover, in keeping with the foregoing rules, those words must also be read with the other sub-sections of s 46. They must be read together with the other provisions of Pt IV of the Act. They must be read, so far as possible, to further the achievement of the purposes of the Parliament. Relevantly, those purposes can be found in the suppression of the

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244 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 537-538 [124]; cf *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503-504 per Lockhart and Gummow JJ approved in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

245 *Melway* (2001) 205 CLR 1 at 10-11 [8] applying *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 at 403, 406 (PC).

246 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

247 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 76 ALJR 667 at 685-686 [109]; 187 ALR 574 at 600; *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 797 [88]; 188 ALR 241 at 265.

248 *R v Brown* [1996] AC 543 at 561.

specified restrictive trade practices and the elimination of the anti-competitive conduct identified in pars (a), (b) and (c) of s 46(1). This is basic interpretive doctrine.

387 Once this approach is adopted, the mind of the decision-maker is released from the artificial categorisation which the splitting of s 46(1) into separate ideas involves. No longer is it appropriate to think separately of a "corporation" of the qualifying kind; of a "market" for the particular purposes; of "taking advantage" of "power"; and of the "purposes" of such conduct and whether they are proscribed. Instead, the ideas interrelate. Each helps to inform the meaning of the others.

388 I agree that it is not appropriate to jump from a finding of the existence of a proscribed purpose on the part of the impugned corporation, to a conclusion that the corporation had the requisite degree of market power and took advantage of that power. At the same time I do not think that a finding as to proscribed purposes is completely irrelevant to those preliminary issues. If there are other indicators that point towards a conclusion that the corporation possessed a substantial degree of market power, that conclusion can be fortified by a finding that the corporation formulated anti-competitive purposes that it could only pursue or attain if, in fact, it possessed such power.

389 *Link of power and purposes*: It follows that the primary judge's finding (upheld by the Full Court and in this Court) that BBM had proscribed purposes of the kind that the Act forbids, cannot be regarded as entirely separate from, and irrelevant to, the earlier ideas contained in s 46(1). Commonsense indicates why this is so. A small player in a market, with an insubstantial degree of power, is much less likely to waste its time on the formulation of proscribed purposes than a big player, with a "substantial degree of power". Moreover, such a "big" player, having gone to the trouble of formulating detailed anti-competitive strategies of the kind proscribed by the paragraphs of s 46(1), will, as a matter of evidentiary inference, more readily be accepted to have "taken advantage" of such "power" when the evidence shows that, to some extent, the "purposes" have been achieved following deliberate conduct of that corporation. In those circumstances, protestations of mere coincidence, alternative explanations, chance happenings and unconnected events are much less likely to be persuasive. Instead, the decision-maker will more easily be brought to the conclusion that those who had both the *power* and the *purpose* did what they could rationally ("took advantage") in order to *use* their power to achieve such purpose.

390 To say that the impugned conduct was a rational business response is simply to beg the question. Corporate conduct may ordinarily be assumed to be rational, in the sense of being designed by officers of the corporation to maximise the benefits for the corporation as they see them. Alas, in many situations anti-competitive conduct is the best way to pursue higher profits.

391 Here, the corporation in question was a major player in the relevant market with a considerable capacity to affect market outcomes. It was shown that it had formulated the proscribed purposes of damaging and forcing out its competitors and deterring entry of potential ones. It embarked on a strategy of pricing below avoidable cost and selectively matching the lower prices offered by some of its rivals[249]. The conclusion is inescapable that such a strategy amounted to a taking advantage of its market power in order to achieve the formulated purposes.

392 This process of reasoning is further reinforced by the reminder, expressed several times by this Court, that the essential concepts with which s 46 of the Act is concerned are economic and not moral ones. It was for that reason that Deane J in *Queensland Wire* stressed that the words "take advantage" do not, as such, reflect a moral judgment of disapprobation[250]. Dawson J wrote in the same case to like effect[251]. What is involved is no more than a characterisation of the facts.

393 *Evidence sustains proscribed purposes*: As evidence to support his conclusion that BBM acted with one or more of the proscribed purposes in s 46(1), the primary judge instanced the terms of BBM's Strategic Business Plan Update 1994-2000, prepared in about May 1995. That document stated[252]:

> "Our aim through 1996/97 and 1997/98 is to drive at least one competitor out of the market. The new plant [at Deer Park] gives us the ability to do this."

There could hardly have been a clearer proclamation of the intended use of BBM's market power.

394 The primary judge found that, throughout the period in question, BBM's view was that it was "necessary in order to stabilise prices that two or more players should leave the market"[253]. In the result, Rocla and Budget quit the

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249 *Boral* (2001) 106 FCR 328 at 371 [158] where Beaumont J describes BBM's pricing policy.

250 (1989) 167 CLR 177 at 194-196. See also *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 55; *Melway* (2001) 205 CLR 1 at 17 [26].

251 (1989) 167 CLR 177 at 202-203.

252 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 446 [190].

253 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 446 [191].

market. In its strategic plan, BBM, manifesting understandable satisfaction with the deployment of its market power, said[254]:

> "We will continue strategic plan to reduce the number of masonry manufacturers in Victoria. Part of our plan has been realised with Rocla BTR Nylex withdrawing from the market by the end of September '95."

395 As the primary judge pointed out, another internal document described BBM's strategy of predatory pricing and asked[255]:

> "So, one of the requirements was to make it more difficult for new entrants to gain a foothold. How can Boral do that? … The long term solution to the market decline in Melbourne is for C&M to fail as a producer and one of the major producers to pick up the assets."

396 Against the background of this trail of objective evidence of the "aim", "plan" and market strategy of BBM, found at trial and unshaken on appeal, the parallels between BBM's "aims", "plans" and strategies and their outcomes made the inference virtually irresistible that BBM took advantage of its power in the market for the purpose of achieving the proscribed objectives, as found. As Beaumont J concluded[256]:

> "[T]he facts that BBM was able to increase its market share by almost doubling that share (from 18 to 35 per cent) and able to double its production capacity in a few years, are a good indicator of the exercise of its economic strength. This was, in my view, attributable not only to its capacity but also to its willingness to forego profits in the short or even medium term, in the expectation that other players (albeit not Pioneer) would probably decide to depart. In short, BBM was able to sell below cost for long periods, and double its production capacity because, as Mason CJ and Wilson J put it in *Queensland Wire*[257], BBM could afford it in a commercial sense.

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254 *Boral* (2001) 106 FCR 328 at 376 [177]; cf *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 446 [191].

255 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 446 [192]-[193]. This passage was cited in the Full Court by Beaumont J: *Boral* (2001) 106 FCR 328 at 378-379 [180].

256 *Boral* (2001) 106 FCR 328 at 378 [179].

257 (1989) 167 CLR 177 at 192.

> … 'Taking advantage' here means, as each member of the High Court held in *Queensland Wire*, that the power was 'used'. It is not a pejorative expression."

397 Those corporations that have, and have so carefully recorded, "purposes" forbidden by the Parliament of Australia as inimical to market competition should not be surprised when later a court of three experienced judges, viewing the facts and reflecting on the recorded "purposes", concludes that market "power" has been "used" to achieve the recorded purposes. At least, they should not be surprised when, with respect to the designated "market", the corporation in question is relevantly a "big" player and enjoys a "substantial degree of power", even if one falling short of "control" of the market in question.

398 *Power was used for anti-competitive purposes*: The conclusions reached by Beaumont J in the Full Court were therefore fully sustained by the evidence to which his Honour referred. I would draw the same inferences from the largely uncontested facts. I would also reach the same conclusion on the issue of "purposes" as his Honour did. I would therefore reach the same orders as his Honour favoured.

Market analysis and recoupment

399 *Economic theory supports legal analysis*: What I have said to this point is based substantially on an understanding of the requirements of the applicable legislation, viewed in the light of an analysis of the language of s 46 of the Act and a consideration of such authority as is available to elucidate its meaning and intended operation. However, in deference to the full argument of the parties, the reasoning of the judges of the Federal Court and the importance of the issues, I would make it clear that my conclusion is strongly reinforced by an examination of this case taking into account the economic purposes of s 46 and an analysis of the subject market.

400 *Recoupment and market power*: In the United States of America, where many of the applicable legal concepts were originally developed, judicial analysis has assigned importance to the concept of recoupment as an explanation that reconciles apparently self-damaging conduct of significant market players in price-cutting below cost that is maintained over a prolonged period. Recoupment analysis can also serve the purpose of distinguishing conduct that is likely to harm consumers from that which is not.

401 The question that the decision-maker faced in a case such as the present was how offering lower prices for consumers could ever be inimical to the purposes of competition (and thus within the proscriptions of anti-trust legislation). As Judge Easterbrook pointed out in *AA Poultry Farms Inc v Rose*

Acre Farms Inc[258], recoupment analysis can offer an answer to that question. The alleged "predator" may have had in contemplation an opportunity to recoup its losses through higher prices in the future, that is in the longer term. An analysis of the state of the market might suggest that such an opportunity could eventuate.

402 The likelihood of such recoupment would primarily depend on the market power of the corporation whose conduct is impugned. If the alleged predator has market power (whether as a near monopolist or something less than that) it is more likely that it will be able to recoup its short-term losses in the form of higher prices at a later date. On the other hand, if the market is characterised by very high competition and low barriers to entry, the corporation, even if large, may not enjoy relevant "market power" in the first place. In such circumstances, it may be unlikely ever to be able to recoup by charging higher prices, even in the medium to long term.

403 *History of recoupment analysis*: Just as with s 46 of the Australian Act, the corresponding anti-trust laws in the United States or the European Union, make no specific reference to the notion of "predatory pricing" as such. Yet, this is a recognised form of exclusionary conduct, engaged in by corporations with market power that can, in given circumstances, harm consumers[259].

404 In an influential early article on the subject of predatory pricing, Professors P Areeda and D Turner of Harvard University suggested[260] that United States courts should move away from the emphasis on the subjective intention of the impugned corporation (including boasting or "smoking gun" type evidence of purposes to "drive out competitors") in favour of a more objective way of identifying harmful predatory conduct in anti-trust cases. The reason for such a proposal was the complaint by economists and anti-trust lawyers in the United States that juries (which in that country decide many such cases) and primary judges sitting without juries inappropriately placed excessive emphasis on such evidence, including in circumstances where, objectively, the facts did not reveal a real possibility or danger of harm to consumers and thus (despite the rhetoric) did not warrant the conclusion that the corporation's conduct was within the proscription of the statute.

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258 881 F 2d 1396 at 1401 (1989) ("*AA Poultry Farms*").

259 See Sullivan and Grimes, *The Law of Antitrust: An Integrated Handbook*, (2000) at 144-146.

260 Areeda and Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act", (1975) 88 *Harvard Law Review* 697. See *Boral* (2001) 106 FCR 328 at 393-397 [248]-[256].

405 For anti-trust sanctions in cases of predatory pricing, Areeda and Turner proposed that it should be necessary (and sufficient) to demonstrate that the impugned corporation had set prices below its own average variable cost of production. This criterion was postulated on the assumption that such pricing behaviour, at least if available and engaged in over an extended period, would indicate that the corporation involved was acting in pursuit of a real but different market strategy. In such circumstances, Areeda and Turner argued that predatory or exclusionary purposes, which are contrary to the anti-trust legislation, could be inferred[261]. The ordinary expectations of rational conduct to maximise profit on the part of the corporation would suggest that the corporation expected an ability to recoup short-term losses by charging higher prices in the future in contingencies to which it hoped that its short-term strategy would contribute. The history of the Areeda-Turner analysis and the controversy that has attended it in the United States is explained by Finkelstein J in the Full Court[262].

406 The difficulties of the approach proposed by Areeda and Turner are two-fold. First, it enlivens controversy over what is the appropriate definition of costs as the relevant comparator. Secondly, even if agreement could be reached on this first point, the actual measurement of such costs remains a highly imprecise and disputable question. To some extent, the measurement may reflect methods of accounting rather than any objective standard upon which consensus about costs could be reached[263].

407 Thus, the United States caselaw has moved towards analysing the prospects for recoupment in the form of higher prices as a threshold issue in a case such as the present[264]. If the state of the given market is such that the impugned corporation has little or no prospect of recoupment in the form of higher prices, then no inquiry would be necessary into whether or not the prices charged were below cost, or in some other sense too low and therefore exclusionary. If, on the other hand, recoupment in the form of higher prices (or some other outcome injurious to the interests of consumers) appeared likely, then further inquiry would be necessary into whether the prices charged were too low.

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261 Areeda and Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act", (1975) 88 *Harvard Law Review* 697 at 733; cf Phlips, *Predatory Pricing*, (1987) at 56-60.

262 *Boral* (2001) 106 FCR 328 at 393-397 [248]-[256].

263 *AA Poultry Farms* is a good illustration of the issues that can arise: 881 F 2d 1396 at 1397, 1400 (1989).

264 See *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp* 475 US 574 at 588-589 (1986); *Brooke Group* 509 US 209 at 225 (1993).

408 *Recoupment and s 46*: Even more than in the equivalent United States legislation, the Act, applicable to Australian corporations, does not spell out in detail the economic concepts that it seeks to uphold. This fact affords the Australian statute flexibility to adapt to changing economic conditions, altered corporate strategies inimical to competition and the interests of consumers, changing practices of recording internal corporate strategies and growing knowledge about economic science.

409 There was disagreement in the present proceedings between the primary judge on the one hand, and the members of the Full Court on the other, as to whether recoupment type analysis could play any role in establishing a contravention of s 46 of the Act. With respect to the judges of the Full Court, I am unconvinced that considerations affecting the ability of a corporation to recoup losses from prolonged periods of below cost pricing form no part of the Australian legislation. In a given case, an inquiry into the existence of a plausible recoupment hypothesis might be helpful in determining whether a corporation took advantage of its substantial market power in violation of s 46 where the offending conduct involves the charging of low prices. This is so for at least four reasons. The first reason is obvious – s 46 of the Act is directed only to the conduct of corporations with "substantial" market power.

410 Secondly, the chief object of s 46 of the Act is the protection of the competitive process in order to further the welfare of consumers and the Australian public generally. As this Court has said, the provision is not aimed merely or primarily at protecting the interests of competitors[265]. If the charging of low prices constitutes the alleged contravening conduct, it will usually be appropriate, as a threshold question, to ask whether it would be possible for consumers to suffer harm as a result of such conduct.

411 Thirdly, recoupment analysis provides an opportunity for the decision-maker to examine the structure and the dynamics of the competitive forces in a particular market over time. The recoupment issue may not constitute an alternative to analysis of whether or not pricing is below cost for the purpose of showing that a corporation has taken advantage of market power for a proscribed purpose. But what is required is that the decision-maker should look beyond the short term to focus not only on the period of alleged predatory pricing behaviour by the impugned corporation. Such examination involves an assessment of whether, as a consequence of the conduct of the impugned corporation, the resulting structure and competitive interaction in the market are more conducive to supra-competitive pricing that would harm consumers. An analysis of the

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265 *Queensland Wire* (1989) 167 CLR 177 at 191.

characteristics and structure of the market would be relevant, as would be the *purpose* and *design* of the exclusionary conduct.

412 Fourthly, taking into account the market dynamics recognises the fact that the competitive interaction in markets with a small number of rivals may occur in stages. A major player in a concentrated market may try to use the situation of a price war to discipline or punish those that engage in price-undercutting in order to discourage such conduct in the future. Viewing price competition in isolation as sufficient evidence of the absence of a substantial degree of power may discourage price-undercutting by smaller players in such markets. The appearance of competition would mean that a major player could engage in predatory conduct with impunity.

413 The foregoing approach is in line with observations, in my view correct, that competition is not a state, but a dynamic process[266]. The presence or absence of competitive forces should not be judged simply by the observation of pricing behaviour in a limited period of time. The "recoupment" that the impugned corporation may expect to (and in fact) gain may occur later, even much later. It may involve a concept of "recoupment" that contemplates substantial, and even prolonged, short-term losses in the expectation, reasonable or otherwise, of long-term gains.

414 *Recoupment in the present case*: One way of analysing the answer to the question whether BBM's conduct of charging low prices was contrary to s 46(1) of the Act is therefore to consider the ability of BBM to secure long-term recoupment of any losses that it stood to make by the short-term strategy upon which the evidence showed that it had embarked. Having regard to the structure of the applicable market, and importantly the presence of at least one other large vertically integrated rival, it is clear enough that BBM was not in a position to monopolise the market. Accordingly, it could not recoup any losses later by acting as a monopolist or even a near monopolist. Its position was quite different from that of BHP in *Queensland Wire* and Melway Publishing Pty Ltd in *Melway*. So much may be accepted. But this conclusion is far from determinative of the issue of recoupment as it throws light on the ACCC's assertion that BBM "took advantage" of its substantial degree of market power for proscribed purposes.

415 It is here that it is important to notice one critical difference between the language of s 46 of the Australian Act and §2 of the Sherman Act in the United States[267]. The local provision does not refer to, or postulate, monopolisation. In

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266 *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 188-189.

267 15 USC §§1 to 7.

fact it makes no reference to any particular outcome as a consequence of the exclusionary conduct. It contemplates, as was the case in the supply of CMP in Melbourne during the relevant period, the existence of a number of competing corporations. More than one of these might, as here, enjoy a "substantial degree of power in a market". To this extent, the present case is more akin to the recoupment hypothesis of a coordinated or disciplined oligopoly of the kind that was considered by the Supreme Court of the United States in *Brooke Group*[268] than it is to cases involving monopoly or near monopoly power.

416 In a designated "market" in which a corporation cannot hope to become the sole supplier (a monopolist) or even nearly so (a near monopolist) there will remain other ways by which predatory pricing strategies, even pursued over an extended period, may amount to rational conduct on the part of a corporation yet be conduct proscribed by s 46(1) of the Act. For example, it could do so by chilling the competitive conduct of current participants in the market and forcing them to abandon that conduct and to revert to pricing above competitive levels[269]. Alternatively, it could deter the entry of new competitors into the market. Or it could induce the exit of present competitors in the expectation of securing a greater concentration of an oligopolistic market, productive, in the long term, of coordinated supra-competitive pricing. Such coordination might not necessarily be explicit. In such a concentrated market, it would not need to be[270].

417 In the present case, each of the foregoing recoupment hypotheses was plausible, according to the evidence. The market for CMP in Melbourne during the relevant time was already highly concentrated. There was an attempted entry by a more efficient corporation. This, as well as a prior downturn in demand, put pressure on prices. A number of corporations already in the market then joined in a price war. This tended to indicate that the prices previously charged were probably set at levels significantly higher than costs. In such a context, it is not implausible to suggest that one of the key players in the market, such as BBM, might engage in predatory pricing in order to achieve one, or more, of the foregoing objectives as a longer-term strategy.

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268 509 US 209 (1993), which was brought under §2 of the Clayton Act as amended by the Robinson-Patman Act.

269 See Professor Bork's analysis referred to by Finkelstein J in *Boral* (2001) 106 FCR 328 at 392 [240]: Bork, *The Antitrust Paradox*, (1978) at 144.

270 Hay, "Facilitating Practices: The Ethyl Case (1984)", in Kwoka and White, *The Antitrust Revolution: Economics, Competition, and Policy*, 3rd ed (1999) 182 at 186-189.

418 The internal documents of BBM, referred to in detail by members of the Full Court, confirmed that this indeed was what BBM intended. Those documents do not merely contain generalised statements about the "crushing", "destroying" or "wiping out" of competitors. Sometimes, such statements may indeed be viewed as hyperbole, having only limited evidentiary value. However, BBM's plans are consistent, in their detail, with an economically rational strategy of predation engaged in by a major player in a market characterised by a small number of rivals.

419 What is the alternative hypothesis, advanced by BBM and its expert witnesses to meet the inferences that speak so powerfully from the internal documents of BBM? As I have indicated, BBM argued that the documents represented no more than corporate "boasting"[271]. But that explanation was rejected by the Full Court, correctly in my view, for the reasons stated above. Then it was argued that BBM's behaviour could be explained as an orderly competitive adjustment to changed conditions of demand for CMP. This argument proceeded on the basis that a decline in demand leads to excess of productive capacity in the industry, which results in a fall in prices. That fall leads, in turn, to the exit of some producers. This alteration in the number of participants in the market reduces industry capacity in line with consumer demand. This, in due course, produces some rise in prices.

420 However, the problem with this "innocent" explanation of BBM's conduct in relation to the market forces in question, so far as this case is concerned, is that it is not consistent with BBM's actual behaviour during and following the price war. In particular, BBM's internal documents indicate that BBM itself expected the downturn in demand to be reversed[272]. Indeed, this was one of the reasons for BBM's decision to invest in further capacity at that critical time[273].

421 Most participants in the applicable market for CMP expected the downturn to be temporary. In such circumstances, one rational or logical response would have been for participants to use their capacity *less* intensively. They would have done this until some degree of recovery occurred. In particular, this would have been the preferred outcome for a stronger, vertically integrated corporation such as BBM. It had the access to financial resources to withstand the downturn without forcing prices down in the short term. But the attempt of some incumbents to maintain their respective sales as well as the entry of a new competitor (C & M), led to the price war that ensued. This is what created the

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271 *Boral* (2001) 106 FCR 328 at 379 [181].

272 *Boral* (2001) 106 FCR 328 at 372 [165].

273 *Boral* (2001) 106 FCR 328 at 373-374 [172]-[174].

appearance of competition that impressed the primary judge and now the majority of this Court. Respectfully, I regard it as a mirage.

422 According to the evidence, BBM did not at first respond in a "competitive manner" to the foregoing developments[274]. Instead, it maintained high prices. It was only when BBM began to lose a considerable part of its market share that it decided not only to regain that share but to retaliate against, and punish, those competitors that had instigated the price war and to force the exit of some of them. BBM's desire, unhidden in its internal documents, was not only the creation of a market that would be reduced to fewer (and mainly larger) players once the downturn was reversed. It was also to prevent future aggressive price wars of the kind that had necessitated its response. In this context, the references to a "stable" and "orderly" market mean a market in which there is no vigorous price-undercutting[275]. In other words no (or less) price competition.

423 In the Full Court, Beaumont J referred to a strategic planning document prepared in 1995 which described BBM's tactic to put pressure on the Melbourne market during a downturn "in order to precipitate a shake-out and subsequently consolidate our position" and the view expressed in that document that[276]:

> "From a *long term view* this development presents the opportunity to break out of the cycle which has prevailed in Victoria over many years. [BBM] needs the capacity to supply the market through highs & lows (at a high market share 40 per cent +) to remove the ability of minor players to survive when the market turns up thus allowing them to play another day always *at the expense of gross margins and market share*. The coup-de-grace could have been delivered to 2 minor players in 1994 had [BBM] had sufficient productive capacity."

424 As I have pointed out, BBM's strategy of using the downturn in the market to impose discipline on the other (minor) participants, in order to deter competitive pricing, deter entry and return to a more "orderly" or coordinated market once the downturn was reversed, was entirely consistent with economically rational corporate behaviour by a "big" player in a concentrated market. It just happens to be behaviour that is proscribed by s 46 of the Act once the necessary statutory conditions, laid down by that section, are met by the corporation impugned as being in breach.

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274 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 421 [50]-[52]. See also at 421 [54] with reference to BBM's concern about the competitive pricing of other rivals.

275 *Boral* (2001) 106 FCR 328 at 372 [164], [166]-[167].

276 *Boral* (2001) 106 FCR 328 at 373 [173] (emphasis added).

425 This conclusion is reinforced if one looks at the features of the relevant market. It was characterised by a small number of fairly large producers. The product was homogeneous, rather than differentiated. There were few non-price aspects upon which the rivals could compete. The prices offered and charged by the various corporate rivals were widely known in the market. There would be some, but comparatively small, brand loyalty and service considerations. Accordingly, trying to enforce disciplined or "orderly" pricing was one of the few ways by which a large player in the market could hope, in due course, to be able to earn supra-competitive profits. If this were attempted explicitly (as by horizontal agreements between the remaining market participants) it would be forbidden by other provisions of the Act[277]. However, properly advised corporations are scarcely likely today to fall into the mistake of such overt agreements. On the other hand, economic literature has long recognised that, in some markets, there is no necessity for explicit agreements between rivals in markets that seek to achieve such outcomes[278]. The fewer, and more similar, are the residual rivals in a concentrated market, the easier will it be for unexpressed coordination between them to exist, without the hint of any breach of those provisions of the Act that forbid overt agreements[279].

426 The foregoing reasons explain why the merger control provisions of the Act[280] are addressed, at least in part, to the avoidance of highly concentrated oligopolistic markets. Presumably, this is also a reason why the requirement to establish a breach of s 46 of the Act was altered in 1986, to delete the confinement of the application of the section to corporations that were "in a position substantially to control a market" and, instead, to apply it to corporations that have "a substantial degree of power" in the market. Viewing s 46 of the Act in the context of its place in the overall legislative strategy to respond to restrictive trade practices in Australia, and considering it in the light of its history, the application of s 46 to a case such as the present becomes clear.

427 *The build-up of capacity*: Whatever may be the difficulties in markets such as that for CMP in Melbourne at the relevant time, in seeking to pursue a strategy of predatory pricing in order to oust, or deter the entry of, a competitor, there is no doubt that a "big" player, at least, could reinforce a "credible threat" to

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277 The Act, ss 45, 45A, 45EA.

278 See Posner, *Antitrust Law*, 2nd ed (2001) at 94.

279 Hay, "Facilitating Practices: The Ethyl Case (1984)", in Kwoka and White, *The Antitrust Revolution: Economics, Competition, and Policy*, 3rd ed (1999) 182 at 189.

280 The Act, ss 50, 88, 90.

current and potential competitors by stepping up investment in capacity. A build-up of capacity might commit a corporation to produce an enhanced volume of output because it can do so, with its new capacity, at a low marginal cost[281]. This, in turn, would have the effect of indicating to actual, and potential, competitors that the corporation concerned will persist with its strategy. It would signal that, by its investment, the corporation is raising its own "barrier to exit" from the market[282]. Yet, at the same time, it is also signalling a new and greater determination to outlast existing competitors who choose to undercut prices and to deter any potential competitors who might be contemplating entry to that market. As the ACCC submitted in this Court, this is why BBM made sure that its decision to step-up capacity was widely known in the industry.

428 The investment of a big market player in new equipment, of itself, may be perfectly innocent behaviour. Indeed, it could be rational conduct, appropriate to changing technology and market circumstances. The courts would hesitate to adopt any principle that would discourage such investment. It will commonly be to the advantage of consumers and the public more generally. They will normally benefit from the reduction in prices that typically follows the introduction of cost savings brought about by new technology.

429 Nevertheless, this is another example of apparently innocent corporate behaviour that may, in particular evidentiary circumstances, be consistent with predatory conduct of the kind that s 46 of the Act is designed to prevent and sanction[283]. The terms of s 46(5) of the Act reinforce this conclusion. In the present case, the ACCC did not complain, as such, about the build-up of capacity by BBM. Its complaint related, rather, to the timing of the decision in a period of excess capacity, coupled with the below cost pricing found and the evidence of other conduct on the part of BBM that strengthened the inference that it had made its decision *when it did* to "take advantage" of its market power for the proscribed purposes that the primary judge accepted BBM to have.

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281 Geroski, Gilbert and Jacquemin, *Barriers to Entry and Strategic Competition*, (1990) at 27-29; Tirole, *The Theory of Industrial Organization*, (1988) at 314-316. See also Dixit, "The Role of Investment in Entry-Deterrence", (1980) 90 *Economic Journal* 95 at 95-96 with reference to Spence, "Entry, Investment and Oligopolistic Pricing", (1977) 8 *Bell Journal of Economics* 534.

282 Geroski, Gilbert and Jacquemin, *Barriers to Entry and Strategic Competition*, (1990) at 60-62.

283 Tirole, *The Theory of Industrial Organization*, (1988) at 323.

430 *BBM's purposes and likelihood of recoupment*: It is true, as the reasons of Gleeson CJ and Callinan J point out[284], that before this Court, the ACCC did not allege any violation of the Act based on actual collusion or tacit coordination ("conscious parallelism") between BBM and any other participant(s) in the market[285]. But in considering the economic rationality of corporate conduct, including ultimate or long-term recoupment (without which predatory pricing makes little sense), it is impossible to ignore entirely the potentiality of the market in which BBM operated to lend itself to such outcomes. Indeed, BBM's desire to avoid future price wars can only really be rationalised in terms of its expectation that the dynamics of this particular market would produce that consequence, if only BBM could rid itself (as it did) of a number of less resilient or price-cutting competitors.

431 In *Brooke Group*[286], after accepting that there may be other forms of recoupment which would be just as harmful to consumers as a monopolisation of the market, Kennedy J, writing for the Supreme Court of the United States, commented that the duty of the decision-maker was to look at the evidence adduced in the case in order to assess whether the alleged conduct had a reasonable prospect or likelihood of leading to such recoupment in the form of supra-competitive pricing. This was to be judged by reference to the realities of the market.

432 This citation brings me to an area illustrative of the mistake that can attend the unconsidered application of anti-trust analysis from other jurisdictions without attention to the difference in emphasis of the relevant legislative provisions. The United States provisions that would apply to conduct commonly described as "predatory pricing" include §2 of the Sherman Act (which is directed to a "person who shall monopolize, or attempt to monopolize"[287]) and §2 of the Clayton Act as amended by the Robinson-Patman Act (prohibiting price discrimination "where the *effect* of such discrimination may be substantially to lessen competition or tend to create a monopoly … or to injure, destroy, or prevent competition"[288]). As such, each of these provisions directs attention to the outcomes or effects of particular conduct. By way of contrast, the provision

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284 Reasons of Gleeson CJ and Callinan J at [97].

285 See *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 at 61. In the United States context see *Theatre Enterprises Inc v Paramount Film Distributing Corp* 346 US 537 at 541 (1954).

286 509 US 209 at 230-232 (1993).

287 15 USC §2.

288 15 USC §13(a) (emphasis added).

of the Act under consideration in the present proceedings, s 46, as presently framed, prohibits conduct on the part of a particular kind of corporation with specified anti-competitive purposes[289]. No reference is made to the effect, or likely effect, of such conduct either in the form of monopolisation or a substantial lessening of competition in the market. Such considerations, so far as they exist, are left to inferences that must be compatible with the statutory text.

433 The primary judge did not explain this difference in emphasis in adopting the United States approach to recoupment. Instead, his Honour made two comments relating to BBM's prospects for recoupment. First, he held that BBM persisted in selling its product below avoidable or variable costs for an extended period and "never thought that it could"[290] be in a position to charge supra-competitive prices. This presumably was a reference to BBM's subjective expectations. As such, it was a conclusion that appears glaringly improbable and directly inconsistent with the overwhelming and uncontested evidence contained in BBM's documentation. In modern litigation of this type electronic data, copies of emails, company records required by statute and other such objective materials combine to displace past dependence upon judicial impressions of particular witnesses, particularly in cases of this kind where the task of the decision-maker is that of deriving a purpose that can be attributed to a corporation made up of many actors.

434 For instance, the primary judge's conclusion is inconsistent with the repeated references in BBM's strategic documents to the expectation that once some of the rivals that engaged in price-undercutting were forced to exit, prices would drift up and profitability would increase[291]. It is also inconsistent with the finding that on a number of occasions BBM itself attempted to engineer such a rise in prices[292]. It is worth noting that once its objective of driving some of its rivals out of the market was accomplished, with Rocla and Budget ceasing operations by June 1996, BBM proceeded to raise its own prices and refused to match lower quotes in order to win major projects[293].

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289 *Queensland Wire* (1989) 167 CLR 177 at 205 per Toohey J. See also Corones, "The Characterisation of Conduct under Section 46 of the Trade Practices Act", (2002) 30 *Australian Business Law Review* 409 at 412.

290 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 442 [169].

291 *Boral* (2001) 106 FCR 328 at 372 [166], 374 [176], 375 [177].

292 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 425 [68], [72], 428 [86]-[87], 430 [98].

293 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 431 [103].

435 The primary judge also paid insufficient attention to the economic realities of concentrated markets supplying a homogeneous product. This is, at least to some extent, an objective inquiry. The fact that price competition had occurred between BBM and Pioneer during the price war and some personal hostility had surfaced between the officers of the two corporations[294] was by no means conclusive of the issue whether prices would have drifted up to supra-competitive levels if BBM's plan to rid the market of most of the other rivals had succeeded. Further, the primary judge made no reference to the vertical integration of the Boral group, which was one of the sources of BBM's power in the CMP market. From the evidence accepted by the primary judge it is clear that BBM's decisions were affected by the concern of the Boral group about its reputation in other markets in which it participated[295]. This may have made it possible for BBM to embark on an exclusionary strategy injurious to competition without assessing the likelihood of recoupment in the CMP market in Melbourne.

436 Secondly, the primary judge found that BBM "had no prospect of being able to recoup its losses by charging supra-competitive prices"[296]. Given the wording of s 46, it is not necessary to establish that as a result of the impugned conduct, recoupment in the form of supra-competitive prices was certain. Nor is it necessary to establish that there was a dangerous or high probability of such an outcome[297]. To require that would involve judges writing a provision about the effects of conduct into the section.

437 The primary judge made a further error, with respect, in his discussion of the relevance of recoupment. His Honour[298] adopted the following analysis[299]:

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294 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 439 [154].

295 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 426 [75].

296 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 442 [169].

297 cf *Brooke Group* 509 US 209 at 251-252 (1993) per Stevens J.

298 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 442 [167].

299 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 442 [166].

> "A firm with a substantial degree of market power can move above the market price and not suffer a significant diminution in sales. If it chooses to sell below market price, or at a loss, or below avoidable cost, there are two possibilities: (i) legitimate non-proscribed business purpose or (ii) anti-competitive proscribed purpose. It will be anti-competitive if the firm has engaged in the conduct so that competitors will exit the market so that in due course it will more readily enjoy the advantages of market power and recoup its losses."

438 A number of criticisms may be made of this passage. First, as I have pointed out, in the United States jurisprudence, recoupment is treated as a preliminary issue. That is, if the structure of the market is such that recoupment is unlikely, then no inquiry needs to be entered upon into whether or not prices are below cost or otherwise too low. Secondly, in the present case, the primary judge found that BBM priced below variable cost for an extended period[300]. In such circumstances, Professors Areeda and Turner would infer both an anti-competitive purpose and a prima facie violation. Thirdly, if recoupment was relevant to discriminating between purposes that were prohibited under s 46 and those that were not, the primary judge expressly found that in formulating its pricing conduct, BBM had acted with a proscribed anti-competitive purpose[301]. In that context, given the structure and characteristics of the relevant market, the findings of the primary judge that BBM priced selectively and below avoidable cost for an extended period, and did so with a proscribed purpose, are a significant hurdle in the way of a conclusion that s 46 was not violated.

439 The members of the Full Court did not find it necessary to review the findings of the primary judge on the recoupment issue, as their Honours held that recoupment analysis formed no part of the application of s 46[302]. Before this Court, the ACCC similarly submitted that it was unnecessary for any reference to be made to the plausibility of recoupment in the form of supra-competitive prices in a claim under s 46 based on "predatory pricing". That submission has been rejected. As such, it does not present a bar to this Court's reviewing the recoupment analysis of the primary judge.

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300 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 434 [119].

301 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 445 [189].

302 Although Merkel J made reference to "an expectation of some recoupment by reason of higher prices and better profitability with fewer rivals": *Boral* (2001) 106 FCR 328 at 389 [226].

440 Despite the absence of a reference to recoupment in s 46, the question whether the impugned conduct could result in a market structure more conducive to supra-competitive pricing may be useful in the context of its application where the alleged violation involves low pricing, for the reasons outlined earlier[303]. It serves the purpose of distinguishing harm to competitors which is a result of the ordinary vicissitudes of market rivalry from the kind of harm that the statutory provision is concerned with. That concern is harm to the competitive process ultimately affecting the welfare of consumers. The issue of whether or not there is a plausible medium- to long-term recoupment scenario will therefore largely be tied up with the determination of market power in the context of the structure and characteristics of the market[304]. The capacity to engage persistently in exclusionary conduct, such as below cost pricing, which would be ruinous for a corporation subject to competitive constraints, will be a relevant indicator of the presence of market power.

441 *Prospective application of s 46*: The clear conclusion from the uncontested primary evidence, reinforced by the primary judge's findings about BBM's pricing and "purposes", is that BBM engaged in a variety of exclusionary or predatory conduct. This involved pricing below avoidable costs in terms that were selective and discriminatory. It involved pursuit of a market strategy designed, among other things, to put some of BBM's rivals out of business. In the events that occurred, it was a strategy that, in part, succeeded.

442 Yet, the rules against exclusionary conduct, of the kind with which s 46(1) of the Act is concerned, should obviously be capable of application before events later impugned by the ACCC have been fully played out[305]. This is so because the Act contemplates that corporations and their officers, and the ACCC, should be aware in advance of the kind of conduct that is prohibited and sanctioned by the section. It would not be satisfactory to suggest that a corporation, or the ACCC, must wait to see how things pan out. Otherwise, whether a breach of the section has occurred or not would depend upon whether, as a matter of evidence, one or more competitors had decided to leave the market or one or more had successfully entered the market. That would hardly represent an acceptable interpretation of s 46.

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303 See these reasons at [408]-[413].

304 *AA Poultry Farms* 881 F 2d 1396 at 1401 (1989).

305 *Melway* (2001) 205 CLR 1 at 10-11 [8].

443 The ultimate outcomes of exclusionary conduct will often be uncertain[306]. They will depend upon too many imponderables. In some circumstances, after the event, the results may not coincide with the original expectations and objectives[307]. Yet such conduct can, of itself, damage the interests of consumers. It can do so:

- by forcing the exit of equally or more efficient competitors; or
- by increasing the concentration of the market and making it more conducive to anti-competitive practices and outcomes; or
- by making the entry of new competitors into the market less attractive; or
- by strengthening the predatory reputation of the corporation engaging in such conduct.

Those were the reasons for the legislative prohibition of such conduct in s 46. The section should not be whittled away. Yet that, in my respectful view, is what the approach now taken by this Court will produce.

444 *Breach of s 46 was shown*: BBM's conduct in the designated market during the period the subject of these proceedings was a clear response to the price wars and the unpleasant necessities of price-undercutting that had, for a time, been forced upon BBM by its rivals until it asserted its muscle in the market.

445 BBM set out, by its pricing strategy, to "drive … competitor[s] out of the market"[308]; to "reduce the number of masonry manufacturers"[309]; and to "make it more difficult for new entrants to gain a foothold"[310] – all in order to achieve "stability" and avoid the "merry go round of pricing"[311].

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306 Joskow and Klevorick, "A Framework for Analyzing Predatory Pricing Policy", (1979) 89 *Yale Law Journal* 213 at 217.

307 Adams and Brock, "Predation, 'Rationality,' and Judicial Somnambulance", (1996) 64 *University of Cincinnati Law Review* 811 at 860-862.

308 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 446 [190].

309 *Boral* (2001) 106 FCR 328 at 376 [177].

310 *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410 at 446 [192].

311 *Boral* (2001) 106 FCR 328 at 372 [166]-[167].

446 This was anti-competitive conduct. It was engaged in by a corporation. That corporation was clearly a big player in the particular market. It had a substantial degree of economic power in that market. It deliberately set out to act as it did. In doing so, it took advantage of its substantial power. As the primary judge found, at the time BBM had one or more of the purposes proscribed by s 46 of the Act. As the Full Court found, in acting as it did, BBM was in breach of s 46.

Conclusion and orders

447 When all the peripheral facts and sophisticated legal and economic analysis in this appeal are stripped away, what is the outcome that now follows from the approach of the majority of this Court?

448 The conclusion unanimously reached by three appellate judges in the Full Court of the Federal Court is set aside. The impugned "big" player, as its own records disclosed and the primary judge found, had the express purpose of deterring entry and eliminating certain competitors from the market, in part as a response to their earlier price-undercutting that had endangered a relatively placid market. By inference, the corporation was concerned that more such uncongenial competition would otherwise ensue. Its conduct reduced the number of market players effectively to three. The corporation's purpose was fulfilled to that extent. With the number of rivals reduced and the appellant's market share correspondingly increased, its market power was further consolidated. Short-term pricing sacrifices were made for long-term economic rewards. Inevitably, these would come at a probable cost to consumers. This is precisely the type of market conduct that s 46 of the Act forbids. Despite that, the corporation is now absolved because, it is said, it did not possess, and take advantage of, the requisite degree of power in the relevant market. Respectfully, I regard that conclusion as contrary to the reasonable inferences arising from the evidence. No error on the part of the Full Court is shown. I therefore dissent.

449 The appeal against the judgment of the Full Court of the Federal Court of Australia should be dismissed with costs.