

AUSTRALIAN BUSINESS LAW REVIEW

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EDITORIAL 325

ARTICLES

Section 46 of the Trade Practices Act – has the High Court made a “u-turn” on “taking advantage”? – Margaret Brock

Examination of High Court decisions on misuse of market power in regard to the element of “taking advantage” reveals inconsistency of application. Whilst being consistent regarding the need for a connection between the market power and the impugned conduct, the High Court has not been consistent regarding the degree of connection required. Two streams have developed, one supporting a high degree of connection, the other a lower degree before a firm is found to have “taken advantage” of its market power. Added to this has been the development of the “rational business explanation” which, it is argued, is either used as a defence to a s 46 action or is premised on the higher threshold of connection. Initially the High Court supported the lower threshold. In later decisions, whilst expressing support for the earlier decisions, in application the High Court favoured the higher threshold and at one point the rational business explanation. This trend appears to have been reversed with the most recent High Court decision which indicates substantive support for the earlier s 46 decisions. 327

Taking advantage of market power in section 46 of the Trade Practices Act 1974 (Cth) – Ian B Stewart

Economists and lawyers have striven to articulate when market power is present in s 46 of the *Trade Practices Act 1974* (Cth) (the Act), and when advantage has been taken of it. A degree of confusion remains, however, in the application of the concepts of market power and taking advantage and s 46 will be amended as a result of the Senate Economics References Committee report *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (the Small Business Inquiry), although the proposed changes mainly restate the existing law. The first part of this article examines the sources of market power, the distinction between sources of market power and actual market power, and the extent to which market power may be inferred from conduct. The second half of the article considers when market power can be said to have been taken advantage of, with particular emphasis on the comparison of the firm’s conduct with that which a competitive market would enforce on a firm facing similar supply and demand conditions..... 343

Equitable compensation – its place in the remedial sphere – Matthew Broderick

Equitable compensation has been the subject of detailed consideration by the High Court and State appellate courts in recent years. The remedy is awarded on compensatory terms

for breach of fiduciary duty, breach of the equitable standard of care and diligence, breach of confidence and in equity's concurrent jurisdiction in cases of fraud. It applies in a wide variety of situations. The remedy has become increasingly popular in recent times, as exemplified by the judicial and academic interest it has generated. Academic interest in the remedy has outflanked its usage, although that is sure to change. 369

BANKING AND FINANCE

Quistclose and resulting trusts 392

INTELLECTUAL AND INDUSTRIAL PROPERTY TRUSTS

Melbourne 2006 Commonwealth Games – an ambush ahead? 397

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