

**QUEENSLAND WIRE INDUSTRIES V THE BROKEN HILL PROP CO (1988) 167 CLR 77**

High Court of Australia

**FACTS**

BHP manufactured 'Y Bar', a product used for the popular 'star picket post' style of fencing in rural Australia. This product was sold mostly to AWI, a wholly owned subsidiary of BHP. BHP and AWI held the vast majority of the Australian market as far as this product as concerned. The applicant (QWI) was in competition with BHP and AWI in the 'star picket post' market and sought its 'Y Bar' supplies from BHP.

The applicant was initially refused this supply and later offered it at an extremely high price. BHP and AWI explained that the high prices reflected a desire of the 2 companies to preserve their business in the 'star picket post' market.

**ISSUES**

Had BHP breached section 46 of the Trade Practices Act by abusing market power. A breach of section 46 requires that the respondent corporation (1) has a substantial degree of power in a market; and (2) takes advantage of that power for the purpose of eliminating (3) substantially damaging a competing corporation by (4) preventing their entry into the market; or (5) deterring or preventing them from engaging in competitive conduct in the market.

**FINDINGS**

The first step for the Court to follow is to identify the relevant market and discover the degree of the respondent's power in that market. The market constitutes not only the respondent's product but similar products which can substitute or compete with the original product. The degree of market power and determining whether it is "substantial", is done by considering the following factors:

- i. Ability to raise prices without losing customers
- ii. What percentage of the market share was held
- iii. The extent to which the respondent's conduct in the market was constrained by competitors
- iv. What degree of vertical integration the respondent assumes (a large degree is often evidence of monopoly)
- v. Then identify whether the respondent has taken advantage of their power for the purpose of substantially damaging a competitor.

It was held that 'take advantage' did not imply some hostile intent was necessary in the use of the power - it simply means 'use of the power'.

In finding that the respondents were in breach of section 46, it was noted that the relevant market was steel and steel products and the respondents had a substantial degree of power as they were one of only 2 steel producers in the country; and the respondent had taken advantage of the power for the requisite purpose when it refused to supply the product to QWI in order to prevent their entry into the market.

## QUOTE

Mason CJ and Wilson J said:

*“The phrase “take advantage” in 46 (1) does not require a hostile intent ... If the purpose of section 46 were the economic well-being of competitors, then a similar implication of intent might well be appropriate ... But the object of section 46 is to protect the interests of consumers.”*

## IMPACT

A person with substantial market power may be liable for abuse of market power if they exploit their market power.

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