# Deakin University

## Faculty of Law

***Reexamining the Goals of Competition Law in Predatory Pricing Cases in the Retail Grocery Industry: A Competitive Perspective of Australia and the United States***

By Noppramart Prasitmonthon

# *Reexamining the Goals of Competition Law in Predatory Pricing Cases in the Retail Grocery Industry: A Comparative Perspective of Australian and the U.S.*

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Introduction

The purpose of this paper is to reexamine what is the goal of competition law as well as to discuss whether the goal(s) suggested by certain law and economics school of thought is still appropriate for competition law in the 21st century. In particular, the paper focuses on the application of antitrust or competition law in dealing with current trade practices in the retail grocery industry. The study is based on a comparative approach between Australian and the U.S. competition laws. Since predatory pricing seems to be one of the controversial trade practices in the retail grocery business, this issue is mainly discussed throughout this paper. The *Wal-Mart* case[1] is used as a case study to analyze the application of competition law dealing with predatory pricing in the grocery industry.

Part one of the paper examines the goal of competition law in the era of the giant supermarket being dominant in the retail grocery industry. The appropriate goal of competition law in order to deal with current business situations is also suggested in part one. Pat two discusses the Wal-Mart case under the U.S. antitrust law. In the last part, the Wal-Mart case is again analyzed under Australian competition law.

## *I. The Goals of Competition Law in the Era of Giant Supermarkets Take All*

### *1.1 The Suggestion of Classic Law and Economics Schools*

The issue of what is the goal(s) of antitrust or competition law is a never-ending debating question among economists and lawyers. Several law and economics schools debated and discussed whether competition law should focus either on purely the economic purpose (i.e. the efficiency of a market purpose) or on multi purposes (e.g. protecting small businesses, consumer protection or even protecting the intervention of political values).[2]

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[1] *Wal-Market Stores, Inc. v. American Drugs, Inc*891 S.W. 2d 30 (1995)

[2] Jens Fejø, Monopoly: Law and Market, Kluwer, Deventer, 1989. at 28.

In brief, one acknowledgeable school believes that competition law should serve only for the economic objective of a pro-competitive policy by creating laissez-fair economic conditions and the market will look after itself. This school of thought is sometimes called "Chicago School". A competition policy operating through this goal will aim at maximization of the consumers' welfare through efficient utilization and allocation of scarce resources.[3] This school also argued that competition law should focus on only promoting the efficiency of a market rather than other goals (e.g., protecting small businesses) that should be left for the government.[4]

Anther recognized school is known as "Harvard School" which argued that healthy competition requires having many players in a market. It also believed that competition law should serve multi goals rather than the economic goal.[5] The populist supporting the multi-goal school opposes the concentration of economic power and focuses more on social and political than economic factors. The "bigness" of businesses is bad in the view of this school since big business is said to be corrupt as well as to have a tendency to intervene in political power.[6] By contrast, this school supported the concept of Jefffersonian democracy in which small, local, responsible, and individual own businesses. This is because the populist believed that economic should be in check; competition protected by many independent players, political democracy is best preserve in an appropriate manner.[7]

However, this paper certainly does not aim to analyze in depth any law and economics schools of thought whether they are right or wrong. The aim of the paper is to argue that competition law focusing on merely a pure economics goal seems to be an inappropriate approach in dealing with the current business's situation. In particular,

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[3] Ibid. at p. 28.

[4] Philip Clarke and Stephen Corones*, Competition Law and Policy,* Oxford University Press, Melbourne, 2000. at p.100.

[5] Ibid. at p.99.

[6] John Duns and Mark J Davision, *Competition Law: Cases and Materials*, Butterworths, Sydney, 2000.at p. 26.

today the retail grocery industry is used as an example of an unprecedented business model that may create unhealthy competition due to less players and results in due to fewer innovation. This may also lead to inability to provide better or alternative products to consumers as well as to impede the enhancement of consumer welfare which is the ultimate goal of most competition laws.

### *1.2 Emerging Problems of Giant Retailers*

The problem of taking over scarce resources by giant retailers is arising in many parts of the world since these big corporations drive out small groceries due to their competitive advantages in many ways. It cannot be said that the allocation or the use of resources of these powerful retailers is sufficient or justified due to resources being concentrated for the use of a few groups of people to maximize profits for themselves. In such circumstances, the free market approach leaving the market mechanism to fix itself hardly seems to be effective to deal with these powerful integrated multinational retailers. Thus, the following paragraph provides more information regarding the new business model of grocery businesses and discusses why competition law should focus on multi goals rather than the only economic goal.

At the present time, large-scale multinational retailers are very large in their capital backing, in possession of raw resources, in having human resources, in the use of technology. In terms of the use of information technology in the retail grocery business, for example, check-out scanners and other advances in technology have allowed modern giant retailers to avoid being saddled with extra stock that may not sell or running out of items customers want to buy.[8] This application of technology can be linked to other logistic systems to time the delivery and to some extent, the production of goods, and ultimately minimize the expenses associated with warehouse

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[7] Ibid. p. 26.

[8] Peter de la Cruz, 'Trade Relations in the Product Market: Retailing, Distribution, and Antitrust Considerations' visited on 13 September, 2002 at <http://www.khlaw.com/uffva.htm>

storage and inventory maintenance.[9] Therefore, they can operate businesses a lot more efficiency than small local businesses.

In the globalization world, these big businesses can also subsidize or use capital to assist their subsidiaries across the world within a second, via electronic money transfers. Another aspect of globalization is the effort by supercenter buyers to seek worldwide best pricing, despite widely varying costs of providing the same products in different parts of the world.[10] As a food retailer increases its volumes through world-wild expansion, it also increases its leverage over earlier parts of the food chain, creating a league in which only the very largest players may compete.[11]

### *1.3 Unfair Efficiency and the Wal-Mart's business practice*

In this paper, Wal-Mart is used as a representative or an example of the large-scale multinational corporation. Wal-Mart is the world's largest retailer and employs more than one million workers.[12] Its grocery formats in the U.S. now total approximately 864 supermarkets and $93.6 billion in sales excluding hundreds of its overseas branches worldwide. This does not include 2,265 stores known as Sam's clubs (named after the Wal-Mart's founder, Sam Walton) or the grocery departments in conventional discount stores. Both formats offer low prices. In the U.S. large discount stores like Wal-Mart and Kmart would move into the outskirts of towns, using their size and buying power to undercut local merchants and draw customers away from the downtown retail district.[13] This is because these kinds of megastores or supercenters

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[9] Ibid.

[10] Albert A. Foer, 'Food Retailing: the Two Faces of Supermarket Mergers' visited on 13 September, 2002 at <http://www.antitrustinstitute.org/recent/37.cfm>

[11] Ibid.

[12] Wal-Mart visited on 18 August, 2002 at <http://www.union-network.org/UNIsite/Sectors/Commerce/…>

[13] Jim Cullen, 'Category Killers Stalk Small Towns: U.S. Regulators Shrug at 'Free-Market' Consolidation' visited on 13 August, 2002 at <http://www.populist.com/2.97.Cover.html>

requires huge space for storing their merchandise: the stores rage from 120,000 to over 200,000 square feet (12,000 to 20,000 squares meters).[14]

However, many communities in the U.S. are fighting back to save their local downtown.[15] At least 51 communities in the U.S. have rejected megastores or forced them to withdraw. Many of these amounted to anti-Wal-Mart campaigns because its thousands of stores and have been most aggressive in targeting small and middle-sized towns. Nevertheless, the adverse effect of nearby Wal-Mart could arise in no-Wal-Mart communities. One study showed that Litchfied, Minneapolist of America, did not have a Wal-Mart, but the town was losing business to four nearby Wal-Marts, each within 40 miles of town. The closest is 20 miles away.[16] As Wal-Mart comes in with lower prices it drives the mom-pop stores out of business; that is the free market at work.

The situation above illustrates that Wal-Mart employed low price strategies to eliminate small competitors. It is no surprise that Chicago school economists may be unsympathetic to the claims of small businesses since they believed that small businesses should be driven out of business because they are less efficient than big chain stores. In fact, the real trouble is the moms-pops stores get discouraged, or they do not have the resources to get back into the market.[17] Moreover, it seems that economists blinding themselves with such economics theories underestimated the ability of a company to engage in anti-competitive practices. The entry barriers are usually higher than economists would predict.[18]

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[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

### *1.4 What Should We do?*

According to the Wal-Mart case, a question for antitrust lawyers is not whether they should apply competition according to the economist's concept, but the right question to be asked is what is the object of competition law. Antitrust lawyers were told that competition laws were designed to protect the consumers, in other words to maximize consumer welfare, not to protect competitors.[19] Hence, if the competition was offering lower rates to the customers, the reasoning was that was good for customers.[20]

However, it may be a misunderstanding to consider that "obtaining goods at low prices" is the only way to maximize consumer welfare. In fact, consumer welfare can be enhanced through the maintenance of "communities values" where people in communities patronize each other's businesses in friendly mutual manners. For example, the more shops the community has the more jobs are created, and the more jobs the more capital and resources that are efficiently allocated for benefit of all the people.

Nevertheless, at least, in the federal antitrust policy of the U.S., for example, they seem to ignore such community values of helping small business survive.[21] There is something beyond the most efficient way do things. There were no values factored into antitrust decisions. Pitofsky said that "it is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust law".[22] One might conclude that competition law would a bad law if it fail to preserve other community values as well as to promote fairness of competition between big and small equally.

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[18] Ibid.

[19] Robert H. Bork, *The Antitrust Paradox*, the Free Press, New York, 1978. at p. 51.

[20] Ibid. at note 13.

[21] Ibid.

[22] R Pitofsky, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051.

Thus, governments should be aware of the danger in allowing Wal-Mart to continue its expansion and growth. Services may deteriorate and unemployment may increase as competitors lose out to the supercenters.[23] Industry may not be spared as the powerful customer dictates pricing. Product quality would be compromised if low costs were the only priority. Socially unacceptable working condition would be a result of squeezing goods prices. In the long term, the quality of commerce personnel might come to deteriorate, as the industry does not offer competitive wages and conditions.[24] Again, the rise of powerful supermarkets warrants a reexamination of traditional competition law and policy.

### *II. A Case Study: Wal-Mart vs. Other Small Grocery Stores*

The U.S. case, *Wal-Market Stores, Inc. v. American Drugs, Inc.*[25], is used as a case study of antitrust law dealing with the problem of predatory pricing. The purpose in discussing this case is to examine the policy of U.S. courts in dealing with current antitrust cases where the trading operation of giant retailers such as Wal-Mart aversely affected their neighboring small grocery stores. Although the *Wal-Mart* case is not a grand precedent in the U.S. antitrust law, it reveals the court's attitude regarding modern business operations of supermarkets in the allegation of anti-competitive conduct such as predatory pricing. Furthermore, this case would clarify the purpose of U.S. antitrust law whether it aims to enhance the efficiency of competition only or has other goals to preserve, including protection of small business as well as political values.[26]

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[23] Ibid. at note 12.

[24] Ibid.

[25] 891 S.W. 2d 30 (1995)

[26] Ibid. at note 6., p. 28.
*See* also, R Pitofsky, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051.
Pitofsky advocated that antitrust law should concern other goals such as "political value" other than economic value or the efficiency of competition. He reasoned regarding protecting "political value" that excessive concentration of economic power may result in intervention of political power (e.g. a

In 1987, Wal-Mart, which was established in Faulkner Country, Arkansas, traded various products including pharmaceuticals and health and beauty aids, but did not mainly rely on pharmaceuticals for its retail sales.[27] The Wal-Mart's main trading philosophy was "low prices always" or "everyday discounting" since its founder, Sam Walton, beginning his first Wal-Mart store in 1962 set the goal to sell products at the lowest possible price[28] Its discounting prices certainly impacted negatively on earning profits of nearby small businesses more or less as Wal-Mart's low-price tactic attracted consumers from small stores who cannot afford to compete with Wal-Mart.

On December 17, 1991, three Faulkner County pharmacies: so-called American Drugs, Inc.; Tim Benton d/b/a Mayflower Family Pharmacy ("Family Drug") and Jim Hendrickson, d/b/a Baker Drug—filed a lawsuit against Wal-Mart in Faulkner Country Circuit Court.[29] The plaintiffs alleged that Wal-Mart advertised, offered for sale, and sold at retail prices certain items of goods at less than its cost in breach of the Arkansas Unfair Practices Act (the "Arkansas Act").[30] Specifically, they claimed that Wal-Mart made below-cost sales for the purpose of injuring competitors and destroying competition. The plaintiffs sought an order for recovery of actual damages (at least $100,000), and for punitive damages in amounts to deter Wal-Mart from future violations (in excess of $1,000,000).[31]

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government's decision market) by dominant businesses. In such situation, a few giant corporations control economical welfare of all.

[27] *American Drugs, Inc., et al. v. Wal-Mart, Inc*, in the Chancery Court of Faulkner County, Arkansas First Division, visited on 21 August, 2002 at <http://www.antitrust.org/walmart/chancery.html>

[28] The Wal-Mart Section, visited on 14 October, 2002 at<http://www.geocities.com/zayre88/R_walmart.html>

[29] *American Drugs, Inc., et al. v. Wal-Mart, Inc*, in the Chancery Court of Faulkner County, Arkansas First Division, visited on 21 August, 2002 at <http://www.antitrust.org/walmart/chancery.html>

[30] Roy Beth Kelley, 'Case Note: Wal-Mart Stores, Inc, v. American Drugs, Inc.: Drawing the Line Between Predatory and Competitive Pricing' 50 *Arkansas Law Review and Bar Association Journal* 103.

[31] Ibid.

The trial court found that Wal-Mart was liable for a state below-cost pricing statute in such allegations of three small pharmacies.[32] Wal-Mart was found to have violated the Arkansas Act in its pricing of a half-dozen pharmaceutical products, although its pharmacy division overall, and its total store operations were profitable.[33] The trial court also indicated circumstantial evidence in inferring that Wal-Mart possessed the requisite intent to injure its competitors through below-cost sales.[34] The evidence included: (1) the number and frequency of below-cost sales; (2) Wal-Mart's stated pricing policy: "Meet or beat the competition without regard to cost"; (3) Wal-Mart's stated purpose for below-cost sales of attracting a disproportion number of customers; and (4) the in-store display of a pricing comparison of products sold by competitors.[35]

However, Wal-Mart appealed and the Arkansas Supreme Court reversed the trial court's decision. The Supreme Court pointed out that the lower court failed to detail specific information being needed to determine that number, frequency, and extent of the sales resulted in a violation of the Arkansas Act.[36] Although the Court acknowledged that certain items of Wal-Mart (e.g., Crest toothpaste, Listerine, Oil of Olay and Tagamet) were sole below-cost, it reasoned that the Arkansas law did not make loss leaders illegal.[37]

According to the Supreme Court decision, selling varying loss leader items was "markedly different from a sustained effort to destroy competition in one article by selling below cost over a prolonged period of time."[38] The Court also believed that Wal-Mart's cutting-price sales of certain goods were boosting competition rather than anti-competition since consumers were benefit from the low prices resulting

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[32] E. Thomas Sullivan and Herbert Hovenkamp, *Antitrust Law, Policy and Procedure* , (3rd eds), Contemporary Legal Education Series, Virginia, 1994. at p. 709.
[33] Ibid. at p. 709.
[34] Ibid. at note 8.
[35] Ibid.
[36] Ibid. at note 30.
[37] Ibid. at note 8.

aggressive price competition. Furthermore, the Court rejected that three pharmacies suffered loss caused by Wal-Mart's cutting-price sales since it found that the pharmacies all continued to make a profit and there was no suggestion that the pharmacies stopped selling any items as result of Wal-Mart's practices.[39]

### *2.1The Problem of Inconsistency of the Test for Predatory Pricing*

To understand what causes uncertainty of court decisions in this case, one need to appreciate the application of federal and state laws in the U.S. The *Arkansas Unfair Practices Act* is based on a federal legislation, specifically the *Robinson-Patman Act* being amended *the Clayton Act* in 1936 by the Congress.[40] The *Roinson-Patman Act* enacted during the Great Depression in order to protect small local retailers from the price discrimination of supermarket chains having substantially large buying power on suppliers.[41] Predatory pricing is also triggered by section 2 of the *Sherman Act* 1890 if an alleged firm has an attempt to monopolize a market by employing the price-cut plan.[42]

However, there is a large gap between federal and state laws in respect of predatory pricing. While the federal laws focus on efficiency of competition in the market, most state predatory pricing aim to protect small businesses.[43] More specifically, states sought to prohibit businesses from using loss leaders to attract customers into the store.[44] To satisfy state statutes relative to the prohibition of below cost sales, a plaintiff must prove that a defendant (1) set prices below cost and (2) did so the purpose of injuring competition. Certain state statutes even allow a court to infer intent

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38 Ibid. at note 30.
39 Ibid.
40 Richard Craswell and Mark R. Fratrik, 'Predatory Pricing Theory Applied: the Case of Supermarket v. Warehouse' (1986) 36 *Case Western Law Review* 1.
41 Ibid. at note 8.
42 Ibid.
43 William H. Jordan, 'Predatory Pricing After Brooke Group: the Problem of State "Sales Below Cost" Statutes' (1995) 44 *Emory Law Journal* 267.
44 Ibid.

to injure competition provided the evidence indicates that the defendant's price was below cost. However, to satisfy the proof of predatory pricing under section 2 of the *Sherman Act* seems too burdensome to plaintiffs in certain ways as it requires them to prove: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anti-competitive conduct directed to achieve the unlawful purpose; and (3) a recoupment of defendants acting as "loss leaders".[45] In *William & Sons Baking v. ITT Continental Baking Co*.[46], the court applying this federal law pointed out that the plaintiff must prove "by clear and convincing" evidence that the defendant's pricing policy is predatory.[47] Therefore, inferred evidence seems to be unacceptable to prove the predatory intent of defendants regarding alleged pricing.

The *Wal-Mart* decision was not surprised by many U.S. scholars. While a trial judge found Wal-Mart guilty of predatory pricing under the Arkansas Act, it was undoubtedly true that the Supreme Court interpretation of federal predatory pricing law would have granted summary judgment for Wal-Mart.[48] Importantly, the Supreme Court was reluctant to apply the *Arkansas Act* aiming to protect small businesses. The Court went on to state that the state law transforming such concepts from the *Robinson-Patman Act* was intended as an emergency reaction to the financial disasters occurring during the Great Depression. There was no financial emergency taking place in this case to require the Court to address the use of loss leaders illegal without direction from the legislation.[49] Furthermore, that the plaintiffs failed to prove the specific requirement under the prohibition of predatory pricing of the federal law. Thus, the Court was not able to award a judgment in favor of the plaintiffs' claims without satisfying the proof of predatory pricing engaged by Wal-Mart.

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[45] Ibid. at p. 692.

[46] 668 F. 2d. 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

[47] S G Coronoes, *Competition Law in Australia*, (2nd eds.), LBC, Sydney, 1999. at 315.

[48] William H. Jordan, 'Predatory Pricing After Brooke Group: the Problem of State "Sales Below Cost" Statutes' (1995) 44 *Emory Law Journal* 267.

[49] Ibid. at note 30.

### *2.2 The Intent Test for the Proof of Predatory Pricing*

Apart from the problem of uncertainties in applying between federal and state laws, small retailers may experience difficulties to prove the anti-competitive intent of defendants regarding the predatory pricing practice. As the Wal-Mart Court said, it was important to establish the policy goals in many antitrust cases in order to distinguish between highly competitive pricing and predatory pricing.[50] This means the price reduction is not illegal per se under the U.S. antitrust law.

There are also arguments that not all price reductions or below-cost sales are anti-competitive conduct. In the *Brooke Group*[51] decision, the court recognized that even in an oligopolistic market, it would not condemn a firm for reducing its prices to a competitive level to demonstrate the unprofitability of straying from the oligopoly because consumers benefit from this price cut. The court stated that it would be illogical to condemn such lower pricing practice since price reduction may be engaged in for business reasons other than eliminating competitors.[52] For instance, price-cutting may be used to meet competition where a competitor places new products in a market or propose to extend its market share for its existing products. A firm engaging in predatory pricing may need money quickly; sometimes they are struck with excess inventory which may spoil or become obsolete.[53] Hence, a price below average cost can be profit maximizing or loss minimizing in the short run.[54]

To establish pricing predatory, the plaintiff needs to show that the alleged firm's price cutting aims to develop a market position such that firm can later raise prices and recoup lost profits.[55] This standard for drawing the line between competitive and anti-

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[50] Ibid.

[51] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 113 S. Ct. 2578 (1993).

[52] William H. Jordan, 'Predatory Pricing After Brooke Group: the Problem of State "Sales Below Cost" Statutes' (1995) 44 *Emory Law Journal* 267.

[53] Ibid. at note 32, p. 698.

[54] Ibid. at note 32, p. 692.

[55] Ibid. at note 32, p. 693.

competitive price reduction seems to be simple. However, it is proved to be a problematic task for a plaintiff to prove that the defendant could recoup its losses after predatory pricing. Professor Liebeler studied fifty-five predatory cases in U.S. federal courts from 1975 to 1986 and found that with the exception of one case, every lawsuit had been decided for the defendant on summary judgment based on plaintiff's failure to show that the defendant could recoup its losses.[56]

In the Wal-Mart case, although Wal-Mart admitted that it sold certain items below cost, the plaintiffs would fail to show Wal-Mart could recoup its losses with monopoly profits under the federal standard rejecting inferred evidence for the proof of predatory pricing.[57] In fact, Wal-Mart had no losses to recoup. Since its selling below cost of high-competitive products or brand-named products could lure customer in to its store where they would buy other products priced high enough to compensate for any lost revenue from the below-price sales, plus contribute a reasonable profit. Moreover, in fact, Wal-Mart has hundreds of its stores across the country and probably dozen of them in Arkansas.[58] This allows Wal-Mart to cross-subsidize its losses occurring in the "price-war" zone from its profits earning from its stores in other areas. Proving losses or recoupment of a defendant having a deep pocket and being armed by many chain stores like Wal-Mart seems to be burdensome to small retailers who are yearning for fairness in competition.

Another problematic issue in antitrust lawsuit is the proof of pricing below cost. In many cases, this important issue being left unsolved by the courts is whether the price was appropriate and how to determine whether a firm has set its prices at predatory

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[56] William H. Jordan, 'Predatory Pricing After Brooke Group: the Problem of State "Sales Below Cost" Statutes' (1995) 44 *Emory Law Journal* 267.

[57] Ibid.

[58] The number of Wal-Mart Supercenters has increased dramatically since 1993, when it only operated 10 supercenters, now, it is operating over 600 superstores in the U.S. Wal-Mart is also operating the 700 plus stores globally. By 2005 Wal-Mart is predicted to operate 1,400 supermarkets throughout the US. *See,* www.walmartwatch.com, ' Suppercenter Sprawl: Wal-Mart's Growth Strategy' visited on 14 October, 2002 at<http://www.walmartwatch.com/>

levels. The U.S. courts have applied more specific economic tests to define the difference between competitive and anti-competitive price-cutting. A number of U.S. federal courts adopted a test of Processor Areeda and Turner publishing an article entitle "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act" 88 Harvard Law Review 697 (1975), in order to determine whether a price in question is predatory.[59] Areeda and Turner stated that predatory pricing would exist where a firm set its prices below its anticipated marginal cost. However, they accepted that marginal cost, being an economic and not an accounting concept, would be difficult to ascertain from a firm's records. Thus, they set forth that a firm's average variable cost be used as a surrogate for marginal cost. They concluded that a price reasonably anticipated to be above average variable cost should be consider lawful, while a price below reasonable anticipated average variable cost should be conclusively presumed unlawful.[60] Total costs include fixed costs (e.g., plant, property taxes and machines), which do not vary output; and variable costs (e.g., labor costs, raw materials, and utilities) which do vary with output.[61] However, some courts focused not on average variable costs but on average total costs as the level of price below which predatory pricing would be inferred.[62] Nevertheless, certain courts rejected the Areeda-Turner test since the test did not place any weight on predatory intent other than an economic formula.[63]

In the Wal-Mart case, not only asked which formula or mean be used to assess prices in question,but also there was inconsistency in the calculation of cost of merchandise and whether the court should determine a "single product" cost or " market-basket cost". Wal-Mart contended the court looked at "market-basket" cost including consideration of atmosphere of the store, the parking lot, air conditioning, and a whole group of services that surround the purchase of an item rather than single or article

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[59] *ACCC v. Boral Ltd.* [2001] FCA 30 Finkelstein J at 248.
[60] Ibid. at note 32, p. 699.
[61] Ibid.
[62] *ACCC v. Boral Ltd.* [2001] FCA 30 Finkelstein J at 248.

cost. The trial court rejected Wal-Mart's market-basket approach while the Supreme Court applied the Wal-Mart's approach. It may be disadvantageous to Wal-Mart's assertion regarding its objection of below average variable cost sales if the court has compared and calculated producing cost product by product other than the whole goods in the supermarket.

In fact, this problem should be considered, as the issue of market definition which is relevant to the determination of predatory intent of Wal-Mart. Identifying the scope of the market either broadly or narrowly will affect the outcome of this case. As can be seen from the case that the trial court seemed unimpressed by Wal-Mart's arguments that it was incapable of monopolizing the market for health and beauty supplies in Conway, Arkansas.[64] The trial court examined the profitability of the narrow product line approach advocated by the plaintiffs.

However, the Supreme Court focused on a rational economic concept or the efficiency of competition and it reversed the lower court's decision.[65] The Court also stated that it examined that whether prices set below cost or not, and then determine whether specific intent to injure competition existed by "weighting all of the circumstances in the particular case, including the nature of conduct, its consistency and duration, the conditions of the market and the characteristics of the defendant."[66]

Nevertheless, both courts fail to provide precise reasons when the court should apply a narrow line product or a broad line product approach. Both courts seem to rely on the main concept behind either federal or state antitrust laws. As discussed above, the court might apply and interpret the state antitrust law in order to protect small

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63 *ACCC v. Boral Ltd.* [2001] FCA 30 Finkelstein J at 248.
64 Ibid. at note 56.
65 Ibid.
66 Ibid.

businesses whereas it focuses on the efficiency of competition regardless of other goals of antitrust law, thus, section 2 of the *Sherman Act* would apply.

### *III. The Wal-Mart Case under Australian Legal Perspectives*

This part contemplates the facts in the Wal-Mart case, but the *Trade Practices Act* of 1974 ("the TPA") of Australia is used to apply whether Wal-Mart's discounting sales contravene any provisions in the TPA. However, the fact is provided in more specific detail in order to clarify certain legal issues and important facts that are not supplied in the U.S. Wal-Mart case. Apart from examining the legal outcome of the Wal-Mart case under Australian competition law, this part also aims to discover and to analyze the goal of Australian competition law from case authorities applying in this hypothesis.

**The Fact:** ***Three Mates v. Wal-Mart [2002]***

Wal-Mart, the world's largest retail grocery store, has extended its grocery supermarket into Melbourne, Australia since 1999. It also has chain supermarkets in main cities such as in Sydney, Brisbane and Perth, and in suburbs of such cities. Wal-Mart has 40 per cent of the national retail grocery market whereas the second largest is shared by Coles Myer and Woolworths 30 per cent each. There are 30 Wal-Mart stores in Melbourne and it just opened the 31$^{st}$ supermarket in Olinda last year, a small town in the Dandenongs outside Melbourne. Apart from a number of mom-dad grocery stores or milk bars, Coles is operating its supermarket in Olinda area as well. Of course, Wal-Mart posses 60 per cent retail grocery market quickly in Olinda since its goods are sold at lower price than other stores even Coles.

Wal-Mart is still operating its trading business according to its founder's principle stating "low price every day". However, Wal-Mart rotates to discount high competitive or band named products such as Arnotts's biscuits, Nescafé coffee or Coca-Cola cans for a short period of time. For example, Wal-Mart set a discount price of Coke for 50c while small milk bars sell it for 95c. Although no small grocery stores

had to close their businesses down during Wal-Mart's trading, more than 50 per cent of their customers were converted from shopping at nearby grocery stores to shopping at Wal-Mart. This results in less profit earning for small grocery stores' owners and they are concerned that their businesses might have to close down if Wal-Mart and Coles continue to discount their prices of merchandises at very low price to entice customers.

Three grocery stores' owners hereinafter "Three Mates" decided to file a lawsuit against Wal-Mart in October 17, 2002. The plaintiffs alleged that Wal-Mart having a substantial market power in a retail grocery market in Dandenong takes advantage of its market power by employment of predatory pricing in order to eliminate, prevent or deter competitors including the plaintiffs from engaging in competitive conduct in such market. They, thus, alleged that Wal-Mart infringes section 46 regarding misuse of market power under the TPA.

### *3.1 The Application of TPA in the Wal-Mart Case*

Three Mates as plaintiffs need to establish a Wal-Mart's contravention of section 46 of the TPA by proving these following elements:

(1) Wal-Mart with a substantial degree of market power;
(2) took advantage of that market power;
(3) in order to achieve one of these purposes;
   a) eliminating or substantially damaging a competitor of Wal-Mart or of its chain stores being related to Wal-Mart in that or any other market;
   b) preventing the entry of a person into that or any other market;
   c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

However, the plaintiffs should also bear in mind that there was a handful of predatory pricing suing under section 46 and merely one case was proved to be successful in

*Victoria Egg Marketing Board v. Parkwood Eggs Pty Ltd*.[67] Although, in 2001, the Federal Court made a decision on predatory pricing under section 46 in *ACCC v. Boral* [68]("Boral"), the unsuccessful trend continues in the latest case. This does not mean that predatory pricing in the retail grocery store will follow this unsuccessful trend or the court would be more sympathetic to Three Mates as small businesses without reasonably establishing all elements required under section 46. There are reasons behind unsuccessful outcomes of cases of misuse of market power under section 46 that are discussed later in this paper. One obvious reason that was stated by Wilcox J in *Eastern Express Pty Ltd v. General Newspaper Pty Ltd* regarding the difficulty in proving predatory pricing being a breach of section 46 that

> "the special difficulty about a case of predatory pricing was that… the outward manifestation of a decision to engage in predatory pricing is a lower prices, an action which, on its face, is pro-competitive. The face which turn mere price cutting into predatory pricing is the purpose of which it is undertaken."[69]

This statement indicates that price cutting itself seems to be procompetitive, but this price reduction would be considered as predatory pricing if an alleged firm intends to use it for particular reasons (e.g., to eliminate or to deter competitors from a market), this predatory pricing is anti-competitive.

In other words, proving the defendant's intent in practices of predatory pricing whether such pricing practices are anti-competitive or not is problematic. As discussed earlier, price reduction can be pro-competitive when it is used for justified reasons. For example, to establish a place in a market for new products as promotional plans, and to minimize losses in the case of perishable goods or obsolete products can be considered as pro-competitive conduct. Even though consumers certainly obtain such boon from price cutting practices regardless of

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[67] (1978) 20 ALR 129; ATPR 40-081.
[68] [2001] FCA 30
[69] (1991) ATPR 41-128 AT 52, 895.

justified or malicious practices, the vigorous price competition would adversely affect small or weak competitors. The hard question is left to courts to judge whether defendants' pricing is predation having one of anti-competitive purposes under section 46 of the TPA.

### *3.2 The Establishment of Possessing "Substantial Market Power" of the Defendant*

The most important element to establish the defendant's contravention of section 46 of the TPA is the proof of possessing substantial market power of the defendant.[70] As the *Eastern Express* and *Boral* decisions evidenced that the plaintiffs failed to prove having substantial market power of the defendants, the courts in both cases ruled that the defendants did not violate section 46. It is meaningless to prove other elements of section 46 if the court first found that the defendant does not have substantial market power in a market. Since the proof of having substantial market power is a threshold of section 46 or even the life and death for the outcome of the case, Three Mates should seriously make their effort to prove it!

However, one should note that section 46 does not require monopoly power to be shown as in *Mark Lyons Pty Ltd v. Burshill Sportsgear Pty Ltd*[71], Wilcox J said that "substantial" meant real or of substance rather than trivial or minimal. The Explanatory Memorandum introducing the 1986 amendment to section 46 also stated that "a corporation does not need to be able to dominate a market power in order to satisfy the section 46 threshold."[72] The proof of dominance is said to be too high a degree of market power.[73] Three Mates need to consider these following issues relevant to show the possession of substantial market power of Wal-Mart in an alleged market.

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[70] Ray Seitwall, 'The Use of Cost Based Test and the Test of Recoupment by Australian Courts in Predatory Pricing Cases: Some Further Insights from the Recent Federal Court Decision in *Boral* Ltd' (1997) 7 *Competition & Consumer Law Journal.*

[71] (1987) 75 ALR 581: (1987) ATPR 40-809

[72] Ibid. at note 47, p. 132.

[73] Ibid. at p. 132.

### *A) Determining the Scope of the Market in Question*

Prior determining whether or not Wal-Mart possessed substantial market power in an alleged market, the court needs to define the scope of product market as well as of geographic market in question. Three Mates may claim that the market was certain merchandise sold at very low prices by Wal-Mart such as Arnott's biscuit, Netcafé and Coke and the geographic market is the Dandenongs. It is likely that Wal-Mart prefers wider or larger market definition. It would counter-argue that the market was actually the whole product in its supermarket and the geographic market covered throughout Victoria. It is trite try to say that misuse of market power must occur in "a market". This is because the term "market" is defined under section 4E of the TPA which means that a market in Australia includes, in relation to a market for goods and services, a market for goods and services that are substitutable for, or otherwise competitive with, other goods or services.

However, like the hypothesis case, a number of cases related to section 46 disputed in the issue of scope of the market. The plaintiffs attempt to narrow the market definition because if a narrow definition can be sustained, the defendant's market power position will be stronger and the likelihood of the defendant being liable for abuse of its substantial market power increase.[74] By contrast, a wider market definition reduces the market power of the defendant with the consequence that the likelihood of its transgression of the law is reduced.[75]

Certain case authorities could be used for backing up Three Mates's argument in regard to the scope of market power issue: *Arnotts Ltd v. Trade Practices Commission*[76]*("Arnotts")*, *Queesland Wire Industries Pty Ltd v. Broken Hill Proprietary Co Ltd* ("*QWI*")[77] and *ACCC v. Boral* ("*Boral*").[78] Three Mates may

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[74] Warren Pengilley, 'Misuse of Market Power: Australia Post, Melway and Boral' (2002) 9 *Competition & Consumer Law Journal.*

[75] Ibid.

[76] (1990) ATPR 41-061

[77] (1989) ATPR 40-925 AT 50,008

assert that such brand named products being sold at discount prices at Wal-Mart have their own ream of markets since these products create brand loyalty and most consumers would distinguish them from other goods in the store. In such circumstances, these premium brand products should not be considered as substitute of ordinary products. In *Arnotts,* Dr. Geoffrey Walker pointed out in the issue of product market definition and substitutability that

> "in one sense, all goods and services competed for the buyers' custom, and in that sense, were within the same market. In another sense, most items being distinct in some respect, each item had its own market."[79]

Mason CJ and Wilson made the same point in the *QWI* case.[80] They indicated that substitutability was a matter of degree: 'sufficient degree of interchangebility and 'only to a limited extent interchangeable'.[81] For example, if Wal-Mart increased its Nescafé price, Nescafé consumers would seek for cheaper Nescafé at other stores rather than substituting coffee in other bands at Wal-Mart or buying tea instead of coffee. This draws the scope of Wal-Mart's market by inviting the court to consider that Wal-Mart had a substantial market power in each particular single product rather than in the whole grocery product market.

It is no doubt that Wal-Mart would argue to avoid the trap of section 46 by denying that it does not dominate such particular brand-named merchandise market or arguing that Three Mates is wrong in the definition of market in question. Wal-Mart continues to argue that particular items of goods alleged by the plaintiff are just a submarket of the whole retail product. Nescafé, for example, could be considered as a part of

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[78] (2001) ATPR 41-803; bc200100518; [2001] FCA 30.
The full Federal Court in *Boral* took a narrower approach in defining the scope of the market. Justice Finkelstein opposed the trial court's market definition that "each product had its own characteristics which made it more or less capable of satisfying a particular requirement". He concluded that there was a separate market for the sale of concrete mansonry products and that concrete mansonry products were not part of wider wall building materials market.

[79] Ibid. at note 8, pp. 97-8.

[80] CLR at 188; ALR at 582

drinking products sold in supermarkets since any drinking products containing caffeine to enhance physical endurance could substitute for Nescafé. Thus, the court should look at the product market in question as the whole retail grocery product.

A case authority that Wal-Mart that may use for its claim is in *Taprobane Tours WA v. Singapore Airlines Ltd*[82]. In this case, Lee J ruled that there were two relevant markets: airline services to the Maldives via Singapore; and whole tours to the Maldives. The trial court found the defendant, Singapore Airlines, had substantial market power in the former market, thus, its conduct fell within section 46 after evaluation was found to be in breach. However, on appeal, the market was found to be "packaged island holiday tours originating from Australia" on the basis that such tours were inter-substitutable. Singapore Airlines had only 3 per cent of this widely defined market. Singapore Airline's conduct was meaningless to consider further under section 46 since there was no the "substantial degree of market power" which is a critical requirement of the section.[83]

Another argument in the Wal-Mart hypothesis case regarding a geographic market is whether a market in question covers merely the Dandenongs, a suburb of Melbourne, or the whole state of Victoria. Although a geographic market seems less complicated than a product market, Sheppen J even noted the 'fuzziness' inherent in geographic definition, quoting Dean J in the *QWI* case: "The outer limits (including geographic confines) of a particular market are likely to be blurred."[84] At this point, Three Mates would provide the court the evidence showing that the geographic market should be limited in the Dandenongs since most consumers considering convenience of short distance place for shopping rather driving for miles in order to shop discount goods around Victoria are likely to go to shop nearby their home or within their town. A

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[81] Ibid. at note 8, at pp. 97-8.

[82] (1990) 96 ALR 405.

[83] Warren Pengilley, 'Misuse of Market Power: Australia Post, Melway and Boral' (2002) 9 *Competition & Consumer Law Jouranl*.

[84] (1989) 167 CLR 177, 196.

relevant case that Three Mates could employ to support its argument is in *TPC v. Australia Meat Holdings Ltd* [85]where Wilcox J noted that although it was theoretically possible to transport cattle from any part of Queensland for slaughter in any other part of Queensland, the practical field of rivalry was more limited. Likewise, consumers could drive throughout Victoria for shopping as they wish, but it seems impractical to do so.

***B) Indicators of Market Powers***

Whether Wal-Mart had market power in a retail grocery market either in Dandenong or Victoria is also a significant task that Three Mates had to convince the judges. Wal-Mart would typically contend that it does not have market power in a market in question since grocery businesses are easy to set up and operate with small capital. This shows low barrier to entry into the retail grocery business industry since any one with small capital can open their own grocery stores.

Three Mates should argue against Wal-Mart's assertion with Wal-Mat large-economic scale and advantage of technology that are not possible for any one with small capital can duplicate. For example, Wal-Mart networks its computer system with its chain stores around the world as well as with computer system of brand named suppliers such as Proter & Gamble ("P&G").[86] The super computer network of Wal-Mart is known in the retail grocery industry to be the most hi-tech in the world as well as prohibited expensive (probably cost millions dollars).[87] Wal-Mart's use of cutting edge technology reduces unnecessary cost such as cargo cost due to the need to keep goods in stock or cost of obsolete or perishable goods. Due to its the just-in-time delivery system, Wal-Mart stores can immediately send the order to its suppliers in order to fill up Wal-Mart's shelves in time before running out of goods.[88] For example, the computer system sends a signal from a store to P&G identifying an item

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[85] (1988) ATPR 40-876

[86] 'Why is Wal-Mart So Successful?' visited on 13 September, 2002 at<http://www.planetpapers.com/Assets/553.php>

[87] Ibid.

[88] Ibid. at note 8.

low in stock. It then sends, a resupply order, via satellite, to the nearest P&G factory, which then ships the item to a Wal-Mart distribution center or directly to the store. Due to this win-win approach between Wal-Mart and P&G, P&G can lower its costs and pass some of the savings on to Wal-Mart.

It is clear that only large-scale economic businesses would duplicate Wal-Mart's businesses or invest in million dollars project in order to complete with Wal-Mart. Due to such complicated networks and the application of information technology of Wal-Mart's distribution systems, one hardly thinks that small businesses can compete with this giant retailers. New entrants with small budgets would have to think carefully whether or not they can attract customers to shop at their stores. The answer is they hardly do so since they cannot set their prices lower than Wal-Mart due to lack of deep pocket or cross-subsidization akin to Wal-Mart. The example above would assist Three Mates to convince the court that Wal-Mart has substantial market power in this retail grocery industry and it abuses its market power by predatory pricing.

A case authority that can be use for supporting Three Mates's argument regarding high barriers to entry in the retail grocery industry created by Wal-Mart is in the *Boral* case. The Federal Court stated that "barrier would exist if the incumbent had absolute cost advantages such as would flow from …technology, and other scarce factors relating to production and the capital cost of establishing a new firm."[89] Furthermore, Wal-Mart's predatory pricing in itself can be considered as the creation of barrier to entry. This is expressed by Dawson J in QWI that market power can be exercised by means other than power to raise price by restricting output was accepted as he stated that:

> "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 arrangement, ***predatory pricing*** or refusal to deal…" [90](Emphasis added)

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89 *ACCC v. Boral Ltd.* (2001) FCA 30 at 337.

90 *Queesland Wire Industries Pty Ltd v. BHP Co Ltd* (1987) at 200.

### *C) Taking Advantage of Market Power*

Three Mates needs to prove that Wal-Mart's predatory pricing is abuse of its power. Of course, the requirement of possession of substantial market power of Wal-Mart must be satisfied the court in order to allow the court to make a judgment whether or not Wal-Mart misuses its power. In *Boral*, Finkelstein J made the same point that the examination of market power and its use were a part of the same exercise.[91] The existence of market power based on this approach cannot be examined independently of the alleged exclusionary conduct. It is the exclusionary conduct that establishes market power, not the reverse.[92]

Wal-Mart might argue that its discount sales were to meet competition with Coles and other big-sized stores as well as for its business survival. It does not have any intention to eliminate or to deter small stores including Three Mates which are not considered as Wal-Mart's competitors due to their economic-scale. Wal-Mart continues to defend itself as without malicious intention, its conduct should not be considered as "taking advantage of market power".

However, Three Mates' counselors may point out the "taking advantage of" principle laid down in the *QWI* case. As the High Court by Dawson J in *QWI* held that the phase "take advantage of" in section 46 neither has any moral tones nor is commercial responsibility required.[93] The Court reasoned further that "a plaintiff must prove that defendant had used its market power, in the sense that is a causal link between the conduct and the defendant's market power, and the defendant would be unlikely to have engaged in such conduct under the competitive conditions."[94] Nevertheless, the High Court did not distinguish any explicit basis between monopolistic practices and

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91 Michael O'Bryan, 'Section 46: Legal and Economic Principles and Reasoning in Melway and Boral' (2001) 8 *Competition & Consumer Law Journal.*

92 Ibid.

93 *Queensland Wire Industries Pty Ltd v. Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, at 202

94 Ibid. at 202

vigorous competition.[95] At least, this guidance of "taking advantage of" is construed in a pejorative sense, not a neutral sense that allows the plaintiff to show that there was an abuse or something abnormal, predatory, forceful or deceitful related to the defendant's behavior.[96]

### *4.3 The Cost-Based Test and the Purpose Test under Australian Law*

Some plaintiffs suiting a defendant under the TPA may have a course of concern whether they have to show the court that prices set by the defendant are below cost as well as the defendant's recoupment after the success of its predation. In other words, whether or not the "cost-based" and "recoupment" tests are applied in order to establish the contravention of section 46. Since these two requirements are critical under the U.S. antitrust law in order to assist courts to find the predatory intent of defendants, this intent finding approach might have influence on Australian courts more or less. There were a few predatory pricing cases of Australia that cited U.S. case authorities regarding two tests for distinguishing between predatory pricing and competitive pricing: *Eastern Express Pty Ltd v. General Newspapers Pty Ltd.* and, *ACCC v. Boral Ltd* .[97]

The *Eastern Express* case, for example, Wilcox J at the trial court stated that as the concept of predatory pricing was developed in the U.S., such U.S. principles would be useful for a guidance to the application of section 46 of the TPA.[98] His honor dismissed the claim because Eastern Express fail to prove that Wentworth's price cuts resulted in the Wentworth Courier being published at a loss. He, however, concluded that it was not necessary to apply some measure of cost below which it could be said that Wentworth were engaging in predatory pricing.

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95 Ibid. at note 47, pp. 320-321.

96 Ibid. at note 4, p. 336.

97 *Eastern Express Pty Ltd v. General Newspapers Pty Ltd.(1992)*
*See also, ACCC v. Boral Ltd. [2001]*

However, on appeal in *Eastern Express*, the Full Court rejected the establishment of prices below cost was only one factor to be considered in inferring a section 46 purpose. The Court stated that

"The expression 'predatory pricing' is not a statutory expression in this country, nor, it would appear, in the United States. Caution is required in translating United States judgments, which place glosses upon the text of the United States antitrust law, to be the interpretation or the Australian law. Our law evinces a somewhat different approach to legislative drafting."[99]

In *Boral*, the Federal Court also stated the same caution of importing such U.S. predatory pricing approach as it expresses their rejection of the tests "avoidable cost" and "recoupment" as necessary elements of section 46.[100] Furthermore, in earlier decisions in the Federal Court of Australia, *Victoria Egg Marketing Board v. Parkwoods Eggs Pty Ltd*.[101] and *TPC v. CSBP and Farmers Ltd*[102] dealing with predatory pricing were shown that there was no need to consider what degree of price cutting was indicative of predation.[103] In finding the proscribed purpose of section 46, the Full Court in *Victoria Egg Marketing Board,* for example, merely focused on the "sporadic element", that was to say competition which was not intended to be permanent but was for a temporary purpose, was a hallmark of a predatory practices and distinguished it from legitimate competition.[104] It indicates that the cost-based and the recoupment tests in Australian predatory pricing cases are not as essential as they are required under the U.S. predatory pricing.

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98 *Eastern Express Pty Ltd v. General Newspapers Pty Ltd.* (1992) 106 ALR 297; 35 FCR 43 at 411

99 Ibid. at 104.

100 Michael O'Bryan, 'Section 46: Legal and Economic Principles and Reasoning in Melway and Boral' (2001) 8 *Competition & Consumer Law Journal.*

101 (1978) 33 FLR 294.

102 (1980) 53 FLR 135.

103 *Eastern Express Pty Ltd v. General Newspapers Pty Ltd.* (1992) 106 ALR 297; 35 FCR 43 at 102.

104 Ibid. at note4, p. 333.

The important element being required to satisfy section 46 in the case of predatory pricing is whether the corporation in question used its market power for a purpose proscribed by section 46.[105] As the *Eastern Express* court stated on appeal that the price-cost relationship was only one matter, but the most important issue to be taken in to account by a judge in deciding whether a proscribed purpose may be inferred. Rather than pre-ordained and fixed categories in economic theory or practice of costing, the Court in *Eastern Express* pointed out that "general human experience" was needed to consider in order proving the proscribed purpose.[106] Therefore, the prohibition of section 46 may be satisfied notwithstanding that it is not below marginal or variable cost and does not result in a loss being incurred.[107]

As this paper attempts to examine or even to discover the goal of competition law that may emerge in case law, it is worthwhile to analyze the reaction of Australian courts in respect of the adoption of the U.S. cost-based test. The reluctance of Australian courts to adopt the U.S. cost-based test in finding predatory pricing may infer that they are less enthusiastic to make decisions based on pure economic purposes. Whether or not Australian courts are in favor of populistic goals supporting the existing of many small firms is unclear since the court's intention seems to focus on the problem of the application of the law with a particular case (i.e. predatory pricing). It may be erroneous to conclude that denying to apply the economic test with economic cases in competition law is the rejection of the efficiency goal of Chicago School.

In fact, Australian courts tried to serve the goal of the competition legislation as Parliament legislated it. The goal of Australian competition law is in section 1 of the TPA, which stipulates that "the object of this act is to enhance the welfare of Australians through the promotion of competition ***and*** fair trading ***and*** provision for consumer protection." (Emphasis added) This provision indicates that Australian

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105 *Eastern Express Pty Ltd v. General Newspapers Pty Ltd.* (1992) 106 ALR 297; 35 FCR 43 at 112.
106 Ibid.
107 The Explanatory Memorandum accompanying the Trade Practices Revision Bill 1986 (Cth)

competition law does not focus on one major economic goal that merely aims at the efficiency of a market by creating free economic conditions. Although the term "fair trading" in section 1 of the TPA may mean nothing regarding the need of protection small businesses, this might make the court to be cautious and to look closely at big firms or multinational firms like Wal-Mart.

## Conclusion

The paper reexamines whether the goal(s) of competition law set out by class law and economics school is appropriate in dealing with the current economic situation such as predatory pricing in the retail grocery industry. As discussed earlier, although the "Chicago School" supporting the efficiency purpose as the goal of competition law seems to be widely adopt by the U.S. court, the economic goal seems inappropriate to the ultimate goal of modern competition law. The paper pointed out the failure of antitrust law focusing on the efficiency or economic goal only that may lead to less competition at the end since most less efficient businesses, small businesses, are driven out of a market. The Wal-Mart case in the U.S. is the evidence of the inappropriateness in adopting the one particular goal policy for competition law in the situation where small businesses hardly compete with powerful integrated retailers. The same case is contemplated to examine Australian courts' trend in deciding predatory pricing cases as well as to analyze whether any law and economic schools of thought regarding the goal of competition are influencing in their decisions. There is no clear evidence that Australian competition laws are better in the enhancement of consumer welfare than the U.S. counterpart, but the "fairness" object stipulated under section 1 of the TPA would ensure consumers' benefit thorough the fair competition among big and small businesses in Australia.