QUEENSLAND WIRE AND ITS PROGENY DECISIONS: HOW COMPETENT ARE THE COURTS TO DETERMINE SUPPLY PRICES AND TRADING CONDITIONS?

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This article discusses the implications of section 46 Trade Practices Act 1974 (Cth) in relation to the 1989 High Court decision in Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited and two of its progeny decisions, Pont Data Australian Pty Ltd v ASX Operations Pty Ltd, and O'Keeffe Nominees Pty Ltd v BP Australia. The author concludes that the courts are not competent to determine supply prices and trading conditions. He suggests that the High Court's decision leads to bureaucratic regulation by Judges, which in turn produces uncertainty for commercial decision-makers in the area of competition law.

I. INTRODUCTION

The High Court in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited*[1] ("*Queensland Wire*") has now laid down the basic parameters in relation to the interpretation of section 46 of the Trade Practices Act 1974 (Cth) ("Trade Practices Act"), covering misuse of market

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1. (1989) ATPR ¶ 40-925.

power. Subsequent to the decision in this case, the Trade Practices Commission made the observation that:

> The QWI [Queensland Wire Industries] judgments provide clear judicial interpretation and a practical approach to certain important elements of the section where previously some ambiguity had prevailed ...[2]

Yet, despite its highly commendable attempt to give its version of what section 46 means in its Background Paper,[3] there can be no doubt that it has been unable to communicate its message without considerable ambiguities and uncertainties. One might suggest that the fact that the Commission took a year to issue its Background Paper despite its undertaking to do so given almost simultaneously with the release of the High Court's *Queensland Wire* decision, is a fair indication that the Commission's description of the High Court judgments as "clear judicial interpretation" is a description of those judgments in terms of generous, but, it is suggested, somewhat inaccurate, accolades.

This paper is not written so much with the intent of engaging in erudite legal analysis as with the intent of examining the problems facing commercial decision-makers and their legal advisers. Such an approach is taken on the basis that any law to be workable must be intelligible. An analysis is also made of some policy issues in relation to section 46 and whether its interpretation, overall, is beneficial or detrimental to competition policy goals. The prime issue to be examined is that of misuse of market power and the role of the courts in determining supply prices and product supply conditions.

II. SECTION 46: THE STATUTORY PROVISIONS

It will be assumed that readers are familiar with the basics of section 46 of the Trade Practices Act. It prohibits entities holding "a substantial degree of power in a market" from "taking advantage of that power for the purpose of" substantially damaging a competitor, preventing market entry or deterring a person from engaging in competitive conduct.

2. Australian Trade Practices Commission *Misuse of Market Power* (Background Paper on s 46 Trade Practices Act 1974 (Cth) 1990) 5.
3. Ibid.

III. THE ESSENCE OF THE QUEENSLAND WIRE DECISION: WHAT IS "TAKING ADVANTAGE" OF MARKET POWER?

It is not intended to go over the facts in *Queensland Wire* in detail. In short, Broken Hill Pty Co Ltd ("BHP") produced "Y-bar" feedstock which it sold exclusively to its wholly owned subsidiary company, Australian Wire Industries ("AWI"). AWI produced fence posts from the Y-bar feedstock and sold these as a producer. Queensland Wire Industries ("QWI") sought supply of the BHP produced Y-bar feedstock so that it could produce fence posts and compete against AWI at the fence post producer level. BHP refused to supply except at unrealistically high prices. It was accepted throughout the case that the prices at which BHP offered to supply were so high that the offer was, for all relevant purposes, a refusal to supply. BHP had never supplied Y-bar feedstock to anyone other than to its wholly owned subsidiary, AWI, and it did not intend to start doing so.

It is not intended here to discuss market definition. No matter what market definition was adopted, BHP was a dominant producer, having up to 97 per cent of the market share.

The certainty of legal interpretation which faced the litigants is indicated by the fact that all four judges of the Federal Court (one at trial and three on Appeal) held against QWI. In the High Court, there was a resounding reversal of judicial wisdom in that all five judges sitting on the case held in favour of QWI. In a Channel Nine television interview given the day after the High Court decision, the owner of QWI stated that, after the Full Federal Court decision, his team, having lost two matches to nil, had taken off its boots and socks and was going to the showers when the High Court called it back for a rematch. Not surprisingly, he was delighted with the change in refereeing approach which delivered him victory in the High Court rematch.

The real issue before the High Court was what constituted "taking advantage of" market power. At first instance, Justice Pincus had held[4] that there must be some commercial reprehensibility involved in conduct before it breaches section 46. He noted that all overseas authority was to this effect. The Full Federal Court, by inspirational but, in the writer's view, unconvincing economic reasoning, by-passed the necessity to make any decision on this

4. *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* (1987) ATPR ¶ 40-810.

matter.[5] The High Court case was effectively an appeal from the decision of the trial judge. The High Court reversed the trial judge's conclusions and held that BHP was taking advantage of its market power because:

1. BHP's conduct was possible only because of the absence of competitive conditions. If BHP had been subject to competition in Y-bar feedstock, it would have been compelled to supply QWI.
2. BHP supplied other products from its rolling mills. Y-bar feedstock was the only product which BHP did not supply. Thus, adverse conclusions could be drawn from the fact that the refusal to supply was not in accordance with BHP's normal policy.
3. The High Court did not deal in detail with supply price. In their joint judgment, however, Chief Justice Mason and Justice Wilson thought that the prior offer by BHP was at "an excessively high price relative to other BHP products".[6] Elsewhere they stated that the essence of BHP's culpability was that it would not supply at "a reasonable price".[7] Justice Deane thought that the prior offer to supply was at an "unrealistically high price",[8] whilst Justice Toohey thought BHP was in sin because it had refused to supply Y-bar to QWI at "competitive prices".[9]
4. All judges rejected the concept that BHP had to act in some commercially reprehensible manner in order to take advantage of its market power. So long as market power is "used", this is enough to breach section 46. The Court claimed that this interpretation was necessary in order to remove the notion of morality from the Trade Practices Act. Overseas cases categorising permissible and impermissible conduct on the basis of "commercial reprehensibility" were thus rejected. To follow the overseas cases, in the words of Chief Justice Mason and Justice Wilson, would incorporate into the Act an "unexpressed and ill defined standard".[10]

5. *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* (1988) ATPR ¶ 40-841 Bowen CJ, Morling and Gummow JJ. The Full Federal Court held that as BHP had never "supplied", there was no "market" involved. Hence the question of whether BHP "took advantage" of its market power could not arise.
6. *Queensland Wire* supra n 1, 50,006.
7. Ibid.
8. Ibid, 50,012.
9. Ibid, 50,017.
10. Ibid, 50,010.

IV. PROBLEMS FOR COMMERCIAL DECISION-MAKERS POSED BY THE QUEENSLAND WIRE DECISION

The above analysis of *Queensland Wire* is adequate for purposes of the present discussion. It is now appropriate to note briefly some of the difficulties facing the commercial decision-maker as a result of the High Court's determination.

A. Absence of Competitive Conditions

First, the High Court says that a party infringes section 46 if it acts in a manner possible only because of the absence of competitive conditions. What are "competitive conditions"? Does one need a number of competitors for the court to find "competitive conditions"? If so, how many? The problem in the High Court reasoning is that it lays down a moving abstraction as the basis for evaluating conduct. Whilst it is possible in competition analysis to compare one state of competition with another and then ascertain by such comparison whether competition has been lessened or enhanced, it is quite another thing to define a state of being as one in which "competitive conditions" exist.

As a corollary to this analysis, it is to be noted that the High Court assumed axiomatically that BHP would supply Y-bar feedstock if it had been subject to "competitive conditions". It is impossible to know how the court concluded this. There was, throughout the case, not one scintilla of evidence offered on the point. If the court concluded that companies always supply outside entities when they are subjected to "competitive conditions" (whatever that term may mean) the court is so wrong as to appear naive. We all know that any number of companies subjected to competitive conditions frequently choose not to supply their products to outside entities.

QWI at no stage made any submission to the effect that competitive conditions would compel BHP to supply to other purchasers. The sole source of the Court's enlightenment on this subject appears to be an assertion by the Trade Practices Commission when seeking leave to intervene in the High Court (which leave was, in fact, denied). The submission of the Trade Practices Commission is, however, simply wrong in that it asserts, without any corroborative evidence, that:

> BHP ... can only refuse to supply QWI with impunity if it is confident that QWI cannot obtain supplies of Y-bar from any other source ...[11]

11. The Trade Practices Commission in its submission also referred to certain material from American authors P Areeda and D F Turner *Antitrust Law* (Boston: Little, Brown, 1978) vol 3 83 in support of its view as to an appropriate test of misuse of market power:

The *Queensland Wire* case, in addition to the other problems posed by the substantive points in its judgment, thus raises a highly important procedural problem. How can a litigant either call evidence to rebut the proposition or request the asserting party, in this case the Trade Practices Commission, to substantiate what it says, when it is faced for the first time by an assertion of such importance, made by a party not previously involved in the proceedings (and who is eventually denied leave to intervene)? Perhaps the BHP Goliath gets little sympathy in its fight with David in the form of QWI but the writer believes that there is an enormous and largely unventilated "due process" problem in the procedures pursuant to which the High Court found facts which, in the end, were so fundamentally important to its judgment.

B. Non-Uniformity of Supply Policy

Secondly, the High Court found that conclusions adverse to BHP could be drawn because BHP did not, in relation to Y-bar feedstock, adopt the same supply policy as it did in the case of other products. The short question to be asked is why any supplier has to adopt, or should adopt, the same policy for all products it makes or supplies. To so suggest is strange, to say the least. The Court's comments on lack of uniformity of policy between products must be of concern to all companies holding a substantial degree of market power. Are they all now to have the same policy for every product made?

C. Questions of Supply Price

Thirdly, the question of supply price must be of concern. What is "a reasonable price"? Perhaps of greater concern is the fact that the judiciary now apparently thinks that it can set this price. This must follow from the High Court's decision because the setting of price must be a necessary part of any order that product be supplied. Are marketers now to look at what the Court might think to be reasonable when making pricing decisions? Surely

> ... intervention against such "abuses" as the arbitrary refusal to deal is of questionable wisdom ... injunctive-type relief may require the courts to perform functions and impose constraints akin to those characteristic of public utility regulatory agencies.

This logic is the same as that utilised by Justice Pincus at trial. Unfortunately, the Trade Practices Commission did not spell out this point in its submission (though it was within the general material referred to by the Commission) and, probably for this reason, the High Court made no reference to it in its decision. Had the point been considered by the High Court, one can envisage the possibility of its decision being made on a different basis to that upon which it was, in fact, made.

it is no concern of the courts what price is set or how it is set. To the extent that there is concern at high prices, this is a matter for the Prices Surveillance Authority, not for the Trade Practices Commission nor for the Federal Court of Australia.

D. "Using" Market Power

Fourthly, because there is no commercial reprehensibility involved, it is very difficult to know when a refusal to supply will offend section 46. The Court talks at great length about the dog eat dog nature of competition and how nasty people have to be in order to advance their competitive position. Yet at the same time, it chastises BHP for failing to supply product to its downstream competitor. One can paraphrase the Court's decision by saying that a strong entity must supply its downstream competitors. Surely it is just as important to competition law that individual choice be permitted as to whom *not to supply* as it is in the case of decisions as to whom *to supply*.

E. Other Questions Posed

Other than the questions discussed above, there are two further major unanswered questions in the "supply" aspect of the High Court's judgment:

(a) What is the borderline between something which is taking advantage of market power as distinct from something which is the result of vigorous competition? "Reprehensibility", which is the answer to this question in the United States, is not the answer in Australia. The mere use of market power in Australia, even if such market power was obtained as a result of vigorous competition, is now illegal. The party which has been urged by the competition law to compete is thus turned upon when it wins.[12]

(b) In *Queensland Wire*, did the Court bind BHP to supply QWI eternally? If not, when can BHP now terminate its arrangement with QWI? We are uninformed on this fundamental issue by the High Court judgment.

12. This is the way in which this dilemma is referred to in *US v Aluminium Company of America* (148 F 2d 416), cited by the High Court in *Queensland Wire*, supra n 1.

V. PRICE ISSUES RAISED IN THE QUEENSLAND WIRE PROGENY DECISIONS

A. *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*

The first *Queensland Wire* progeny decision is that of Justice Wilcox in *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd*[13] ("*Pont Data*").

1. Facts

Insofar as section 46 is concerned, the facts were that the Australian Stock Exchange ("ASX") collected certain Stock Exchange information. The Stock Exchange controlled a marketing arm ("JECNET"). Pont Data was in competition with JECNET. The case primarily related to the area of this competition which involved "Signal 'C'".

Signal "C" recorded the transactions on the Sydney and Melbourne Stock Exchange. It was taken by a number of subscribers. Pont Data received Signal "C" and mixed it with information it obtained from other sources. The whole data was then transmitted to clients of Pont Data in accordance with formats devised by Pont Data.

Whilst many subscribers to Signal "C" were end users for their own purposes (for example, stockbroking firms), others such as Pont Data used the information as part of the data to be passed on to others. Signal "C" thus had a "wholesale" and a "retail" aspect.

The Stock Exchange subsidiary, JECNET, performed a similar role to that of Pont Data. The two entities were thus in direct "retail" competition.

The Stock Exchange required Pont Data to enter into an agreement. This agreement, amongst other things, imposed certain fees. There was a differential fee charged depending upon whether the signal was stored or not. Pont Data submitted that this was discriminatory since it penalised those who offered historical information and analysis compared with those who offered information only. Pont Data also objected to the fee structure which it claimed was too high for a product which was a by-product of activities of the Stock Exchange. Pont Data also suggested that the fee structure was being used to subsidise JECNET which was losing money.

13. (1990) ATPR ¶ 41-007; (1990) ATPR ¶ 41-038.

2. The Decision

There were other aspects of the Pont Data claim but it is upon the pricing aspect that it is here intended to concentrate. This aspect was the essence of Pont Data's section 46 case.

Justice Wilcox found that the Stock Exchange had the relevant degree of market power. His Honour held that there was a proscribed "use" of that market power because, amongst other things, the level of fees was set to offset any losses suffered by JECNET. His Honour compared the fees of the ASX with those imposed by the New York and American Stock Exchanges. He concluded that "the price for large installations is excessive in both absolute terms and in comparison to other exchanges in the world".[14]

Further, his Honour concluded that:

> [the respondents conceded] that [they] had no information as to the cost of creating and transmitting Signal "C" and that the charges required under the agreements were unrelated to that cost. Indeed, there was a question whether Signal "C" involved any additional cost at all.[15]

Two witnesses with experience in the Stock Exchange industry testified respectively that Signal "C" was a by-product of the other activities of the Stock Exchange and that the recording of all the information on Signal "C" was essential to the performance of the functions which the Stock Exchange undertook.

His Honour, in these circumstances, was of the view that the Stock Exchange should not be forced to supply Signal "C" in such a manner as would involve a commercially unreasonable result. The difficulty was in determining what was commercially unreasonable. If the ASX operated in a competitive market, the price for the signal would be the fair price as determined by that market and the competition in it. But there were no competitors and thus nothing was available by way of assistance in this regard. Because the supply price in *Queensland Wire* had been ultimately settled by negotiation, this case gave no assistance.

In these circumstances, his Honour said:

> Once it is accepted that [the Stock Exchange] is not entitled to misuse its monopoly position, it ought not to be regarded as unfair to compel [it] to supply Signal "C" at a price which reflects the cost of supplying that signal together with a margin of profit similar to that charged by competitive suppliers in the data industry. I accept that such a price is likely to be low compared with the fees charged in the subject contracts. But

14. Ibid, 51,117.
15. Ibid.

> that is because the cost of supply is low. In a competitive situation that low cost would be reflected in a low price.[16]

Subsequently, his Honour ordered that the Stock Exchange repay to Pont Data all moneys paid under the supply agreements other than the sum of $181.50 and interest thereon. Supply of Signal "C" was ordered on the basis of $100 per annum for Sydney and Melbourne Data. Supply of other data was ordered at a greater, but nonetheless low price and a "once only" establishment fee for new recipients of $1 500 was permitted.[17]

The case went on appeal to the Full Federal Court. The Full Federal Court noted the difficulties involved in settling a supply price and reserved its decision on this point.[18]

The Court stated that section 46 of the Trade Practices Act does not strike at "monopolists" or those in a "monopolistic position". Nor does the section aim at achieving a commercially "reasonable" result.[19] It prohibits corporations with a substantial degree of market power taking advantage of that power for a proscribed purpose. The Court affirmed that it is not a breach of section 46 for a company holding a substantial degree of market power to obtain a particular price provided that it has not taken advantage of that power for a proscribed purpose.

The Full Federal Court thus held that Justice Wilcox was conceptually in error in ordering a price which reflected cost plus a margin of profit.

But what did the Full Federal Court substitute for Justice Wilcox's order?

The Full Federal Court noted firstly the reluctance of the United States courts to rewrite contractual provisions as to price but thought that the wide discretionary terms in section 87 of the Trade Practices Act "may ... mean that this reluctance should not necessarily translate to the Australian situation ... Nevertheless the court must be slow to impose upon the parties a regime

16. Ibid, 51, 132.
17. (1990) ATPR ¶ 41-038. "PAB Data" (data captured by AAP Information Services recording the trading conducted on the trading floor of any of the Perth, Adelaide or Brisbane subsidiaries of the ASX) was permitted to be charged at $3 000 per annum. The same charge was permitted for "SFE Information" (any part of the information which includes data captured on behalf of the Sydney Futures Exchange recording the trading conducted on that Exchange).
18. *ASX Operations Pty Ltd v Pont Data Pty Ltd* (1991) ATPR ¶ 41-069. Their Honours noted the problems in determining a "reasonable price" and cited commentary on this issue in the United States: *Bryars v Bluff City News Company Inc* 609 F 2d 843, 864 (1980); *Consolidated Gas Co of Florida Inc v City Gas Co of Florida Inc* 665 F Supp 1493, 1544-1545 (1987) affd 880 F 2d 297; Werden "The Law of Economics of the Essential Facilities Doctrine" (1987) 32 St Louis Univ LJ 433, 456-461.
19. *ASX Operations Pty Ltd v Pont Data Pty Ltd* ibid, 52,666.

which could not represent a bargain they would have struck between them".[20] The Court thus held that Pont Data's claim would be satisfied if its arrangement with the ASX were declared void ab initio "but on terms designed to attain broad and substantial justice between the parties". As the relevant signal had been previously (that is, prior to September 1988 when the arrangements the subject of the litigation came into effect) supplied on terms "not apparently controversial",[22] the Full Federal Court ordered supply on such prior terms. Not surprisingly, in view of the prior order of Justice Wilcox for supply at $100 per annum, the ASX was happy to accede to this order which would net it in the order of $1.45 million. As the Court noted, the result of this order would be to deny the ASX any increase it would have obtained under the pre-September 1988 arrangements. The court was informed that this was a result which the ASX "accepted ... albeit without enthusiasm".[23] Perhaps so, but no doubt the ASX was far more enthusiastic about this price than one of about $300, which was the alternative.

Pont Data, not surprisingly, resisted the order. It said that it wanted to challenge the "merits" of the old fee scale. The Full Federal Court responded by saying "... whatever its 'merits' that scale represented what was being paid and received over a period extending up to that immediately before 9 September 1988".[24]

The Court further noted that:

> After the conclusion of this litigation, it is to be expected that the parties will enter into fresh contractual arrangements regulating their future relationship, and when this has been done, the provisions for the rate of payment specified in the orders we will make will come to an end, as the terms of the orders themselves will contemplate.[25]

B. *O'Keeffe Nominees Pty Ltd v BP Australia*

The other major *Queensland Wire* progeny decision relating to price and supply issues is *O'Keeffe Nominees Pty Ltd v BP Australia*[26] ("*O'Keeffe*") decided on 3 October 1990. Prior to *O'Keeffe*, section 46 had only ever been applied in cases in which there were one or two market participants. In

20. Ibid.
21. Ibid, 52,667.
22. Ibid.
23. Ibid, 52,668.
24. Ibid.
25. Ibid.
26. (1990) ATPR ¶ 41-057.

O'Keeffe there were six market players, being the major Australian oil companies.

There are two oil refineries in Brisbane operated by BP and Ampol respectively. However, the six major oil companies have "borrow and loan" arrangements in relation to their refineries. This means that each can obtain fuel from the others in those areas where it does not have a refinery. For all practical purposes, therefore, there are six suppliers of petroleum to retailers and jobbers and supply of fuel in Queensland is not limited to those companies having a refinery in that State. On this basis, no supplier had a 30 per cent market share - this being, in the 1987 case of *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd*,[27] the lowest threshold which prior to the case had satisfied the "substantial degree of power in a market" criterion of section 46. Furthermore, never has section 46 been previously applied to a market in which there were six major participants.

The claim was for an interlocutory injunction. However, it takes the reach of section 46 much further than might previously have been thought possible. The case was determined solely pursuant to the provisions of section 46 of the Trade Practices Act covering misuse of market power.[28]

1. Facts

Mr Peter O'Keeffe sold petroleum products to some thirty five service stations in and around Brisbane under various trade names, the core word in each such name being "Matilda". For present purposes, all such service stations were "Matilda" signed, staffed by personnel wearing a "Matilda" uniform and decorated with a "Matilda" brand name and "Matilda" livery. The Matilda chain also marketed certain other products. The chain operated in direct competition with the six major oil companies. O'Keeffe purchased his bulk fuel supplies exclusively from BP, delivery being by road tanker to a Matilda bulk terminal depot.

Since 1982, O'Keeffe had a number of supply agreements with BP varying from six months to two years in duration. All of these agreements provided for supply of petroleum at the resale price as determined by the Prices Surveillance Authority less an agreed discount.

27. (1987) ATPR ¶ 40-809.

28. Also pleaded were breaches of various provisions of s 45 of the Trade Practices Act 1974 (Cth) (relating to anti-competitive arrangements and exclusionary provisions) and s 49 of the Act (relating to price discrimination). However, the judgment in the case considered only s 46 of the Act (misuse of market power).

From November 1988, the major oil companies moved to a system of "rack pricing". Under this system, each major oil company posts a visible price in the market which is available for all buyers of a particular class. According to O'Keeffe, the effect of rack pricing has been to produce a tendency towards price uniformity between the oil companies in respect of particular classes of customers. BP's evidence was that rack pricing was moved independently by each oil Company as an adoption of guidelines published by the Trade Practices Commission.

O'Keeffe was informed by BP that his next fuel supply would be on the basis of the distributor rack price of BP less a rebate. O'Keeffe claimed that there were significant differences between himself and a distributor in that, unlike distributors, he owned his own terminals, operated his own fleet, owned many of his own retail outlets and marketed petroleum products under the distinctive market brand of "Matilda". When O'Keeffe protested at the new pricing arrangements and asked BP to justify them, BP stated that it did not have to justify discontinuing the prior rebate policy. O'Keeffe said, in these circumstances, that he would go to tender for his petrol supplies. In evidence, a representative of BP said that BP thought O'Keeffe was not any different to any other distributor except that there was some saving, in the case of Matilda outlets, in BP not having to pay for branding. That difference, BP said, was reflected in the discount from the distributors' rack price which BP offered O'Keeffe. The discount, said BP, also reflected BP's interest in continuing to trade with O'Keeffe and O'Keeffe's bargaining strength (Matilda had about five per cent of the Queensland motor spirit market).

O'Keeffe went to tender. The result of this exercise was that those oil companies which replied offered terms inferior to those negotiated with BP. Two oil companies advised that they did not, in the circumstances, wish to supply. O'Keeffe accordingly signed with BP but alleged before the court that the arrangements placed his viability in doubt. The court accepted that there had been "a serious erosion of the operating profit margin available"[29] to O'Keeffe.

O'Keeffe sought an interlocutory injunction against BP to compel supply on the basis of the prior arrangements.

29. *O'Keeffe* supra n 26, 51,733.

2. The Decision

The question for the Court was whether BP had taken advantage of its market power for one of the proscribed purposes under section 46. The Court rejected the concept that BP had taken advantage of its power in the market to impose rack pricing on O'Keeffe. The Court held that it was not the formula on which price was based which was of concern. What was relevant was the comparative bottom line, no matter how this bottom line was reached.

It seemed to Justice Spender, at least for interlocutory purposes, that BP had an ability to nominate a price for its product. The Court believed that this ability was evidence of market power and, if successful, was evidence of taking advantage of market power. The Court's finding is encapsulated in the following quotation:

> BP has imposed the price it has as a consequence of the degree of power it has in the market of supplying wholesale petroleum fuel. It has that power as a consequence of its being one of two refiners who supply to the other major oil companies on the basis of the refinery exchange agreement, but who supply to others outside that agreement on terms which have to be arrived at in a market which lacks the competitive aspects one would normally expect of six major players supplying motor fuel wholesale.[30]

Although both the question of "taking advantage" and "purpose" could not be resolved in any determinative way in an interlocutory application, the Court was of the view that it was seriously arguable that both aspects had been fulfilled. There were a number of factors which the Court thought relevant in this regard:

(a) The major factor was the squeeze in margins. There had been a serious reduction in competitive ability as a result of the imposed price.

(b) BP was vertically integrated. It was not only the refiner of 41 per cent of the motor spirit in South Eastern Queensland but also a supplier to retailers. The effect of the price pressure was to squeeze Matilda's capacity to supply its own retailers who were major distributors in the retail market and competed directly with BP retail outlets.

(c) Evidence was given that Mr O'Loughlin, the Queensland Regional Development Manager of BP, had stated words to the effect that major oil companies wanted the independents out although "they don't say it as blunt as that". (The Court conceded that this was a

30. Ibid, 51,738.

personal view of Mr O'Loughlin but, said his Honour, "it is a matter to which I attach some significance").[31]

(d) The effect of the refinery exchange agreement was that:

> there is in essence a level playing field amongst [the] six major oil companies. That is a relevant factor in assessing the competitive nature of the market.[32]

(e) The Court took note of the fact that Matilda was a potentially large wholesale customer of the six oil companies and of the response of these oil companies to the tender put out by Matilda. There was evidence of a discussion between BP and Ampol. His Honour thought that this was evidence of lack of genuine competition.

On the balance of convenience, his Honour believed that an interlocutory injunction should issue. There was little harm caused to BP by the issue of this injunction. On the other hand, if Matilda could not obtain fuel, it would be out of business.

VI. THE PROBLEMS FOR COMMERCIAL DECISION-MAKERS REVISITED IN LIGHT OF THE QUEENSLAND WIRE PROGENY DECISIONS

The above cases show clearly enough the problems faced by commercial decision-makers in entities having a substantial degree of market power. These problems ultimately raise significant issues at the very heart of competition law itself and the role of the courts in such policy. The following is a discussion of some of the major section 46 problems encountered by the commercial decision-maker:

A. What Constitutes "Competitive Conditions"? When does an Entity Possess the Appropriate Degree of Market Power?

The first problem the commercial decision-maker faces is an assessment of when his or her entity is in the position of having a substantial degree of market power. Prior to *O'Keeffe* there was probably not any great dispute that the entities involved in the various decided cases possessed a substantial degree of market power, once the relevant market had been determined. In

31. Ibid, 51,733.
32. Ibid, 51,739.

O'Keeffe, however, all of this changed. As mentioned, there were six petrol companies involved in that case, although only two companies actually refined in Queensland. Though market share figures were not given in the decision, it appears on information made available to this writer that no company's market share exceeded 25 per cent and that competition for market share was strong. No doubt BP did not consider that it had the requisite degree of market power for this reason.

If *O'Keeffe* is correctly decided, it seems that the commercial decision-maker now has to be able to assess accurately what his or her competitors will do in making an evaluation as to whether a price increase involves a breach of section 46. Only if such competitors will supply more cheaply is there no breach of section 46 in increasing prices. If competitors do not tender at a price cheaper than that at which a current supplier is supplying, then this constitutes some type of evidence that a supplier has substantial market power and/or that the relevant market is not "competitive". One would think, however, that in *O'Keeffe* there were enough other companies in the market to fulfil the "competitive market" criterion in *Queensland Wire*.

An outcome in *O'Keeffe* totally consistent with the facts, but which does not seem to have commended itself to the Court, is that BP offered the lowest price in a competitive environment. If this is so, it is difficult to see how any misuse of market power on the part of BP is involved merely because its new price happens not to be as cheap as the price at which it previously supplied. How is BP misusing its market power because five other competitive companies choose not to tender more cheaply? BP can hardly act without consideration of competitive reaction, even if it is, in fact, successful in raising its market price - as it was in this case.[33] It may be alleged that BP engaged in a price "squeeze" but surely the remedy in that event is not for the court to mandate a price at which BP should supply but for O'Keeffe to obtain petrol from another supplier in the market.

Queensland Wire lays down that section 46 is not breached when a company is involved in a market having "competitive conditions". Comment has already been made on this point.[34] If the petrol market in Queensland with its six competitors (none of whose market share exceeds 25 per cent) is not a "competitive market", what is?

33. This must be so regardless of how the competitors reach their marketing decisions. The case referred to the "rack pricing" system which petrol companies utilise. It was not suggested in the case that this system of pricing was illegal. Further, the court held that it was not the method of reaching pricing decisions but the price itself which BP charged which, along with other matters, put it in breach of s 46.

34. See Part IV A: "Absence of Competitive Conditions".

When does an entity possess a substantial degree of power in a market? No doubt all of this is ultimately a matter of subjective evaluation. Justice Deane rightly pointed out in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union*[35] that the word "substantial" was quantitatively imprecise and is a word not only susceptible to ambiguity but is a word "calculated to conceal a lack of precision".[36] No doubt, however, there are many who would have advised BP that it could not have breached section 46, given the competitive state of the Queensland petrol market.

O'Keeffe poses a real problem for decision-makers in making assessments regarding the threshold question whether section 46 reaches them or not.

B. When is an Entity with Substantial Market Power Obliged to Supply?

In *Queensland Wire*, the High Court assumed, on the basis of a submission to it by the Trade Practices Commission, that BHP would have supplied Y-bar feedstock had it been in a market subjected to "competitive conditions". Assuming that an entity with a substantial degree of market power wishes to set up an installation for its own use only, how can it now do this? The answer must be "with a great deal of difficulty". Yet it is a strange law, one would think, which seeks to inhibit investment because one wishes to produce for one's own consumption only and not supply outside. Commercial decision-makers may well be thwarted in investment decisions if one potential impact of the law is to compel the fruits of their labours to be shared with those toiling outside the vineyard. In light of *Queensland Wire*, however, it would be a brave legal adviser who could assure an investment decision-maker that this could not be the result of a section 46 application if the decision-maker is in a position of substantial market power.

From the decision in *O'Keeffe*, a bizarre result may be that those oil companies competing with BP who did not wish to supply O'Keeffe may themselves infringe section 46. The market was held not to be a competitive one despite the presence of six competitors. If an oil company supplied other jobbers then, on the "consistency of marketing" principle in *Queensland Wire*, it could be argued that such company had an obligation to supply O'Keeffe though never having previously dealt with him. Certainly, in the

35. (1979) ATPR ¶ 40-138.
36. Ibid, 18,500.

circumstances, BP was obliged to continue supply at its prior price even though there were a number of alternative suppliers. It can well be argued that this result, both as regards BP but more particularly as regards the other oil companies, is a strange one under a law aimed at encouraging individual marketing decisions.

C. What Impact may Marketing Decisions taken in One Market have in Another?

The *Queensland Wire* decision held BHP in sin because, amongst other things, its supply policy was not consistent for all its products. Are commercial decision-makers now to take decisions not in light of what is the best policy for marketing a particular product but with one eye turned to the effect that their decision may have on the marketing of other products? Such a conclusion is a strange one for competition law to compel and it is one which is contrary both to the concepts of marketing efficiency and the freedom of choice which competition law is said to encourage. It seems now that consistency of supply has virtue - at least in the eyes of the law - notwithstanding the fact that marketing efficiency and the response to competitive pressures may well demand diversity.

There is no reason whatsoever why different products should not be differently marketed. Yet what lawyer can now advise his client with any degree of certainty that the client's logical decision on the marketing of one product will not also be held by the court to be how he must also market other products? Logical consistency may be a virtue to lawyers but it is incompatible with market dictates and efficiencies. No law should confine product marketers to some concept of "consistency" of marketing policy as a guideline for their actions. Marketers must be free to make totally inconsistent decisions in relation to the marketing of individual products unconstrained by judicial views (not widely shared, as the writer understands it, by marketers themselves) regarding the virtues of consistency in commercial decision-making.

D. What is an Appropriate Supply Price?

1. General Problems in Supply Price Questions

A requirement to supply is, of course, nugatory in itself. All supply is at a price. How does the court determine that, to use a TV program title, "The Price is Right"?

(i) Queensland Wire

The difficulty in the Court's setting the "right price" was one reason why, in *Queensland Wire*, Justice Pincus declined to find BHP in the wrong. His Honour was of the belief that the Court should not be involved in regulatory functions of this kind.

It would have been interesting for the High Court to have made some observations on the question of supply price when it heard the *Queensland Wire* Appeal and found BHP in breach of section 46. However, this question was not even adverted to by the High Court except that comments were made to the effect that BHP's offer price was (depending upon which judgment one takes) "excessively high ... relative to other ... products",[37] not "a reasonable price",[38] "unrealistically high"[39] and not "a competitive price".[40] There was no attempt to quantify a price which may have found favour with the Court or to articulate the principles upon which that price might be based. The price issue was ultimately determined by inter-partes negotiation and thus the case itself gives no guidance on this issue. We thus await the drama of later events to unlock the acceptable price mystery. The writer believes it to be unfortunate that the High Court did not consider this question. Had the court attempted to structure an appropriate decree or commented on the relevant principles of damages assessment, it may well have been forced to amend its reasoning because of the problem of requiring supply at a particular price or based on some appropriate supply price.

(ii) Pont Data

Justice Wilcox in *Pont Data*, however, was not constrained by problems of supply price. His Honour was prepared in *Pont Data* to find that information had been supplied by the Stock Exchange at a price which was "excessive". His view was that the appropriate price at which an entity not in a competitive market should be compelled to supply was "cost" together with a margin of profit "similar to that charged by competitive suppliers". This, of course, poses the initial difficulty whether there is any such identifiable thing

37. Supra n 1, 50,006.
38. Ibid.
39. Ibid, 50,012.
40. Ibid, 50,017.

as the "cost" of a product[41] and how, in a non-competitive market, one can find the mark up of a competitive supplier.[42]

In *Pont Data* on appeal, the Full Federal Court found Justice Wilcox's approach to be conceptually incorrect. What did the Full Federal Court substitute for it and on what basis did that Court calculate the appropriate supply price? The Full Federal Court was fortunate in being able to invent a quasi market price for the purpose of doing "broad and substantial justice between the parties",[43] as there had been supply prior to September 1988 at a non-controversial price. But what is the situation when there is no prior supply and no identifiable market price? In those circumstances, United States courts have bailed out of the argument, as was noted by Justice Pincus at trial in *Queensland Wire*. The Australian courts have not. Presumably, therefore, we have to analyse the situation as did Justice Wilcox at trial in *Pont Data*, that is, that the "reasonable" supply price is based on "cost" plus a reasonable margin. But the problems of what is "cost" and what is a "reasonable margin" are almost insurmountable. To put it all in the context of *Pont Data*, had there been no prior supply of signal to Pont Data, the ASX decision-maker on the "cost plus" theory of Justice Wilcox should have decided to supply the relevant signal at $100 per annum. Because there was, in fact, prior supply at a prior agreed price, the ASX received $1.45 million for its signal. The commercial decision-maker facing these sorts of judicial differences of view may not unreasonably claim that the law is characterised by a singular degree of arbitrariness and uncertainty. To be in breach of the Trade Practices Act because of pricing decision miscalculations is absurd when the courts themselves show a divergence of views of this order.

41. His Honour talks about "cost" as if this is an objectively identifiable concept. But there are as many methods of ascertaining "cost" as there are accounting systems. For this reason, it is interesting to note the observations of the High Court in *Vardon v The Commonwealth* (1943) 67 CLR 434. In that case, a trader was prosecuted under War Time Regulations which provided that it was illegal to sell at a price greater than "cost" plus 20%. The High Court held, after examining various accountancy texts, that the term "cost" was non-definable. To this writer, nothing has changed since then to vary this view notwithstanding the added sophistication of both accountancy practitioners and the technology available to them.

42. In a market which is noncompetitive, it seems to be axiomatic that there can be no other suppliers which can be accurately described as "competitive".

43. Supra n 18, 52,666.

(iii) O'Keeffe

In *O'Keeffe*, it is a fair conclusion from the facts, though not the conclusion adopted by the Court, that BP had the cheapest petrol in town. Yet, even so, it still misused market power because it successfully increased its supply price. To be held to be in breach of section 46, because of prices charged, is surely a strange result when such prices are below those of all one's competitors.

2. Conclusions and Problems Posed

The conclusion from the section 46 cases to date is that the supplier apparently loses in every way. He is in breach whether his prices are higher or lower than anyone else's.

The decision-maker sets prices on the basis of how competitors and the market place generally react to them. It is not the place of competition law to impose some sort of a "cost plus" or court-imposed price "reasonableness" regime on business. Even if it were, the decision-maker may fairly ask what the courts regard as an appropriate cost base and what is the appropriate "mark up". Currently such questions give rise to uncertainty and, by their very nature, are unlikely ever to be clearly answered. The decision-maker, however, is likely to find his decision retrospectively invalidated by the second guessing of courts. Who is better equipped to take the relevant decision - a player in the commercial market or a judge completely insulated from it? And if one is BP and sells the cheapest petrol in town (demonstrably so because no one else will sell cheaper) then one may still be in breach of section 46 because the courts do not like price increases at all. How can a supplier initiate price changes, given these constraints?

Of course, added to all of this is the question of court competency in relation to the setting of prices and terms of supply. The courts have no back up staff. They have no-one with industry experience. They have no general power to gather information. Thus, it might be asked, even if a particular supply price is mandated at one particular point of time, how is this price to be monitored and varied by the courts? Training in cost accounting is not a prerequisite to judicial appointment. Some accounting exercises (for example, the complicated process of allocating "on cost" to a product) appear to the writer to be quite incapable of being performed by the judiciary.

E. When can an Entity with Substantial Market Power Terminate Supply or Change Terms of Dealing?

O'Keeffe involves changes in terms of dealing. The essence of the Court's decision in this case is that it is "wrong" to change already existing price arrangements. The question thus arises whether terms of dealing, when entered into, are immutable in the case of an entity having a substantial degree of market power. If this sounds extreme, the reader is invited to suggest circumstances (other than non-payment of amounts due) in which BHP can now terminate supply to QWI. Except in extreme circumstances, QWI has an eternal supply contract. As companies rarely die, the relationship between BHP and QWI may have been immutably set by the High Court for a century or more. All of this makes the commercial negotiation even of long term arrangements quite meaningless. It is far more useful, no doubt, to obtain a court-awarded contract for perpetual supply.

Court decisions to date also make quite meaningless the concept of competition policy that, by and large, make it better that supply contracts be open for regular review than for such contracts to be de facto eternal.[44] BHP itself must feel that competition policy speaks with a forked tongue when it is told by the Trade Practices Tribunal not to supply Koppers for more than 20 years because a lengthier agreement lacks public benefit,[45] yet is told by the High Court to supply QWI without restriction as to time because not to do so is a misuse of market power.

44. There have been very few decisions by the courts or by the Trade Practices Tribunal in relation to the competition issues involved in lengthy supply arrangements. Perhaps the decision of greatest stature is that concerning the BHP/Koppers Joint Venture, a decision of the Trade Practices Tribunal: *Review of BHP/Koppers Purchasing Agreement* (1981) ATPR ¶ 40-203.

    See also *Joseph Lucas (Australia) Pty Limited* (1974-5) ATPR (Com) 8706, reasoning adopted by the Full Commission in *Kennedy-Thompson Pty Ltd* (1977-8) ATPR (Com) ¶ 35-340; *G Gramp & Sons Pty Limited* (1974-5) ATPR (Com) 8612; *Queensland Rugby League* (1976-7) ATPR (Com) ¶ 35-100.

    All of these decisions indicate that competition authorities do not favour lengthy and open ended supply agreements. The High Court in *Queensland Wire*, however, sees competition virtue in ensuring supply to parties on an open ended basis.

45. See *Review of BHP/Koppers Purchasing Agreement* ibid.

VII. POLICY QUESTIONS

A. Are the Courts Adjudicating on Questions of "Fairness" or Questions of "Competition"? Which is the More Appropriate Standard?

The High Court in *Queensland Wire* said much on the question of how ruthless the competitive process necessarily is. Thus, for example, Chief Justice Mason and Justice Wilson in their joint judgment said:

> ... Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way ... and these injuries are the inevitable consequence of the competition which sec 46 is designed to foster.[46]

Leaving aside the question whether the High Court misapplied its own criteria in protecting QWI from the very injury which it held to be the inevitable consequence of competition, one might think that the "follow on" decisions have clearly enough looked at protecting competitors from unfairness and not at protecting the competitive process itself. So, BP could not increase its supply price to O'Keeffe's Matilda outlets because this may disadvantage O'Keeffe to the point possibly of putting him out of business. In *Pont Data*, Justice Wilcox held that it would be "not unfair" to compel supply at the price he determined. Although the Full Federal Court in *Pont Data* thought that the approach of Justice Wilcox was philosophically flawed, it nonetheless ordered supply at a price which would do "broad and substantial justice between the parties".[47]

The generally accepted United States position is that competition laws are about the protection of "competition" not about the protection of individual "competitors".[48] Thus in the United States, unlike the Australian position to

46. (1989) ATPR ¶ 40-925, 50,010.
47. Supra n 18, 52,666.
48. Such conclusion dates from the 1977 United States Supreme Court decision in *Brunswick Corp v Pueblo Bowl-O-Mat Inc* ("*Brunswick*") 1977 - 1 Trade Cases ¶ 61,255. See also *Cargill Inc v Monfort of Colorado Inc* 1986-2 Trade Cases ¶ 67,366; *Sun Publishing Co Inc v Meeklenburg News Inc* 1987-1 Trade Cases ¶ 67,642; *Gould v Sacred Heart Hospital of Pensacola* 1990 Trade Cases ¶ 68,993. The principle that the antitrust laws protect "competition" not "competitors" does not, however, rely only upon *Brunswick*. It dates from *Brown Shoe v US* 1962 Trade Cases ¶ 70,366 and *Brunswick* has been cited on many occasions as flowing from this decision: see, for example, *Re Association of Retail Travel Agents v AFTA* 1987 Trade Cases ¶ 67,450; *Gianna Enterprises v Miss World (Jersey) Ltd* 1982-3 Trade Cases ¶ 65,206; *Hayden Publishing Co Inc v Cox Broadcasting Corp* 1983-1 Trade Cases ¶ 65,456. A monopolist's activities in order to breach the antitrust law

date, questions of fairness are not fundamentally relevant to antitrust evaluations. One would think that this conclusion should follow in Australia in view of the stirring words of the High Court in *Queensland Wire* on the ruthless nature of competition and the competitive process. However, the opposite conclusion, it is submitted, has been reached both in *Queensland Wire* itself and in its progeny decisions.

The Australian courts, therefore, have to determine whether competition law is, in fact, to be something which, in the words of Chief Justice Mason and Justice Wilson in *Queensland Wire*, is "ruthless" or whether the court has to inject some type of palliative to protect those worse off. It is submitted that the American approach is to be preferred because it is in accordance with what the High Court said in *Queensland Wire* and is in accordance with the thinking of economists. Courts have to jettison their traditional approach of dispensing "fairness" and recognise the realities of competitive life - realities articulated in *Queensland Wire* but not, it is submitted, applied either in that case or in subsequent section 46 decisions. In doing this, the train of thought adopted by economists will have to be embraced. But this will not be easy. The philosophical difficulty is perceptively put by Leigh Masel, former Chairman of the Australian National Securities and Exchange Commission, in the following words:

> The approach of lawyers to questions involving economic subject matter is usually quite different from that of economists. The lawyer's approach reflects the centuries old tradition of viewing problems in the context of a case or law suit which is the traditional arena for settling disputes between parties. In addition much of the common law is the formalisation of rules covering individuals in their personal relationships. Thus when lawyers, judges and law professors are faced with issues having broad social or economic consequences, they tend to approach the subject having specific individuals in mind. Their acceptance or rejection of a practice will often reflect their notion of the fairness of the transaction.
>
> Economists on the other hand tend to think with a different tradition behind them. At best they strive for objective, as distinct from moral, attachment and seek systematic verification for conclusions through empirical data and interpretations which they place on empirical data. The economist does not regard himself as affected by matters of individual morality or mutual fairness concerning a transaction between individual parties. His main concern is how parties are affected generally by a given practice,

"must tend to cause harm to competition; unrelated harm to an individual or consumer is not sufficient": see *Mr Furniture Warehouse Inc v Barclays American Commercial Inc* 1990 - 2 Trade Cases ¶ 69,276.

whether it results in a desirable allocation of resources and in some cases whether a return to a class of persons reflects a competitive or monopoly gain.[49]

It is the approach of the economist which fundamentally protects freedom of decision-making even though many entities may individually be disadvantaged by decisions taken. Freedom of decision-making to the economist is basic to the functioning of the competitive process itself whatever the effect individual decisions may have on particular entities within that process.

B. "Use" of Market Power and "Commercial Morality"

Those reading the words of Leigh Masel may conclude that the High Court has already reached the economists' evaluation which the writer advocates. A leading part of the High Court's judgment in *Queensland Wire* states that morality has nothing to do with the Trade Practices Act. Indeed, it is on the basis that morality has no part to play in competition law that the High Court reaches the conclusion that concepts of commercial reprehensibility have no part to play in section 46 evaluations. Thus "use" not "misuse" of market power is all that is required. Morality, says the High Court, is irrelevant.

It would be tempting to conclude that the "commercial reprehensibility" test can be validly rejected because it necessarily involves questions of evaluating "morality". It would also be tempting to believe that the High Court has written "morality" out of the Trade Practices Act. The prime temptation to accept both of these propositions is caused by the fact that the High Court has stated them to be so. However, deeper evaluation shows that neither proposition can withstand detailed scrutiny.

The propositions put are not, in the writer's view, realistic when one looks at the true reason for utilising "commercial reprehensibility" analysis. Alternatively, the propositions fall down when one looks at the function of the courts in declaring what constitutes commercial morality.

49. L Masel "The Regulatory Commissions and the Courts: An Uneasy Relationship" An address to the Committee for Economic Development in Australia Sydney (NSW) May 1982. It can be seen from the United States cases cited in this paper that United States courts have largely adopted the reasoning of economists that freedom of decision-making is basic to the functioning of the competitive process itself, whatever effect individual decisions may have on particular entities within that process. The United States courts have also rejected the concept that antitrust laws have the function of promoting friendly business relationships or are designed to keep firms "happy and gleeful": See *Interface Group Inc v Gordon Publications Inc* 1983-1 Trade Cases ¶ 65,466; *Berkey Photos Inc v Eastman Kodak Co* 1979-1 Trade Cases ¶ 62,718.

1. The Reason for Utilising "Commercial Reprehensibility" Analysis

A difficulty lies in the words "commercial reprehensibility" themselves. These words, used in the United States to characterise misuse of market power, have been held by the Australian High Court to have "morality" overtones. However, the words are, in fact, nothing more than a shorthand term to encapsulate and generically describe such diverse specific conduct as:[50]

- predatory pricing;
- denial of access to essential facilities;
- exclusive dealing and fidelity rebates;
- the bringing of harassing litigation;
- product "tying";
- actions directly aimed at eliminating a competitor from the market;
- price discrimination, or other favourable dealings, with a dominant purchaser; and
- retributive action undertaken because a party will not "toe the line" which a dominant entity wishes to implement.

Given the above, the term "commercial reprehensibility", in reality, is no more a moralistic one than is, say, the term "negligence". The term "negligence" encompasses in a single word a myriad of court decisions which enable parties to assess how their conduct will be judicially evaluated. It lays down certain standards which are expected in certain situations. It may, of course, be argued that the term "negligence" has within it a concept of moral reprehensibility. In a sense it does but only in the sense that all laws eventually must be based upon some generally accepted standards of behaviour. Lawyers do not throw out the useful concept of negligence because it may have some moral overtones. They use the concept as a tool in evaluating what the law says about different fact situations. So, in utilising the concept of "commercial reprehensibility", lawyers primarily do so as an aid to analysis and reasoning and not to express a moralistic stand. If "commercial reprehensibility" is found, then certain results follow. The concept of "commercial reprehensibility" is a broad based core element concept against which conduct may be assessed. If the courts reject this core element and substitute no test against which conduct may be evaluated, then such certainty as would otherwise exist is substantially, if not totally, eroded.

50. It is not intended here to give extensive references to the various cases detailing the relevant principles involved in each practice named, but merely to give a listing of the practices themselves.

In reality, therefore, the use of the concept of "commercial reprehensibility" as the test of legality says no more about commercial morality than does the use of the concept of negligence in the law of tort. It is only a generic term to describe quite diverse specific conduct unfavourably regarded by the courts in their competition decisions.

2. The Function of the Courts in Determining what Constitutes "Commercial Morality"

An alternative approach to the "morality" issue may well be to look at the role and function of the courts and what they, in fact, do by virtue of their decision-making. In the commercial area, what is "morality"? Jurisprudentially, the answer to this question must be that commercial morality is what the courts declare it to be. If this is so, it is quite vacuous to suggest that the courts can write commercial morality out of the Trade Practices Act. By their decisions, the courts create the very morality which the High Court claims to be excluding from the Act.

Despite the vigorous assertions of the High Court to the contrary, the courts have not divorced, and in the writer's view, cannot divorce, decisions as to the legality of commercial conduct from the creation of commercial morality. What the High Court and other courts in subsequent decisions have done, in fact, is to create a morality of section 46 commercial conduct. So, for example, the courts have established that BHP "should" supply QWI and that the Stock Exchange "should" provide information to Pont Data at a certain price.

3. Conclusions as to "Use" of Market Power and "Commercial Morality".

The Australian courts currently say that conduct is wrong when market power is "used". No indication is given as to what "use" means. Given this, Australian courts are second guessing business decisions without disclosing to business the standards upon which this second guessing takes place. In the real world of commerce, everyone has at least some market power which he or she attempts to "use". This, as the High Court itself would agree, is what the competitive process is all about. Yet in "using" this power, illegalities may follow. If the business person asks the extent to which he can "use" his market power, the courts presently reply only that, if you have a substantial amount of it, you cannot "use" it at all. In the real world of business where every entity, at least to some degree, uses market power in all commercial

dealings, this guidance is of little use. Business must be able to point to something more than just "use" of market power if it is to know with any degree of certainty what it can or cannot do. It should be able to point to things which it can avoid doing and, by so avoiding, not breach the Act.

There is no conceptual or philosophical difficulty in using a "commercial reprehensibility" test as the yardstick by which to evaluate conduct. The problem is that the words do have some emotive overtones in much the same way as, say, the word "negligence" has. The High Court has, regrettably, and in the writer's view erroneously, totally equated these emotive overtones with questions of morality. In reality, the term only describes how certain types of conduct known to the law are evaluated by the law. The concept is no different to many other shorthand terms used by lawyers in their legal analyses.

Perhaps the real irony of all this is that the High Court in *Queensland Wire* opted for a "use" test and not a "commercially reprehensible conduct" test because the latter would incorporate into the Act an "unexpressed and ill-defined standard".[51] The reality is that the refusal of the Court to adopt a "commercially reprehensible" conduct test has given rise to the very ill-defined standards which the High Court thought, by its interpretation, it was avoiding. Even more disappointing is the fact that these standards are, in fact, incorporating moralistic evaluations whilst, at the same time, the High Court purports to have withdrawn such matters from judicial consideration.

C. Is Competition Law Aimed at "Regulation" or "Deregulation"? Which Objective is it Achieving?

Competition law is generally considered to be the alternative to "regulatory" law. It is thus generally regarded as "de-regulatory". Having said that, there is singularly little agreement in the community as to what is encompassed by the term "deregulation". It is thus pertinent to philosophise a little on what is meant by the terms "regulation" and "deregulation".

One could well attack this problem by resorting to dictionaries. The Macquarie Dictionary tells us that "regulation" means "a rule or order, as for conduct, prescribed by authority"; "the state of being regulated"; or something "according to or prescribed by regulation".[52] Given this definition, all laws are "regulatory".

51. Supra n 1, 50,010.
52. *The Macquarie Dictionary* (St Leonards, NSW: Macquarie Library Ltd, 1981) 1457.

In common parlance, however, most of us would reject this. There are many government dealings which are not commonly regarded as "regulation". Some examples are governmental interventions to bring into effect general laws governing economic and commercial relationships. Economic activity cannot exist unless there are laws to govern its existence. Without the law, things such as money, property, credit, corporations and the like simply do not exist. It is inconceivable that economic activity can function against a background of legal anarchy. Intervention in an economic "law and order" role is, in the writer's belief, generally not regarded as "regulation".

It is essential to distinguish between the general legal standards against which economic activity is conducted on the one hand and "regulation" on the other. The two differ significantly in their nature and operation. It seems to the writer that "regulation" usually has within it a concept of quite specific control. Such control has within it all the accoutrements of "licensing", "certification" and the making of "orders" without which something cannot be done or some decision cannot be implemented. Detailed regulation generally involves the review of decisions on an "on going" basis. These characteristics are the antithesis of the general background codes set up to enable industry to operate.[53]

If competition law is seen to be a force for "deregulation", it must be seen as a general background law. The competition law must not be seen as requiring constant permission of the courts to engage in certain conduct. If constant permission has to be sought from the judiciary, then competition law becomes a law of regulation. If the law cannot be acted upon with reasonable predictability, then it will likewise be seen to be a law of regulation with parties having to seek court declarations to have their conduct blessed.[54]

53. This seems to be the only real basis upon which a "regulatory" law can be contrasted with a "deregulatory law". However, such logic does not appear to have been firmly embraced by the High Court. See, for example, *Bourke & Ors v State Bank of New South Wales* (1990) ATPR ¶ 41,033 in which s 52 of the Trade Practices Act 1974 (Cth) (dealing in a general way with misleading or deceptive conduct) was held not to apply to the State Bank of NSW.

54. Provision is made for such declaratory relief in the Trade Practices Act (1974) (Cth) s 163A in relation, amongst other things, to matters under Part IV of the Act. Such right is not extended to most Part V matters. Whether declaratory actions will become common in future is not known.

There is nothing unique in the concept of regulation which requires that it be carried out by a bureaucrat. Judicial regulation can be just as insidious and destructive of business choice as bureaucratic regulation. In fact, judicial regulation in many ways may be more counter productive than the more familiar bureaucratic regulation. Regulatory bureaucrats normally have technical qualifications in, and constant familiarity with, the industry they are called upon to regulate. They have investigatory and back up staff. The judge lacks both these attributes. Further, judicial regulation is the more dangerous because frequently it is simply not recognised for what it is - regulation. Citizens will generally recognise a regulatory bureaucrat for what he is. Strangely, however, a judge doing exactly the same thing is frequently not seen to be a regulator at all. We are all trained at mother's breast to recognised the judge as an impartial adjudicator, not as a regulator.

Have the judicial decisions on section 46 furthered the cause of deregulation or have they led to an opposite result? If one goes to the cause celebre of section 46 interpretation, *Queensland Wire*, then one finds a classic example of judicial regulation. As previously stated, the High Court said that BHP had to supply QWI. The necessary corollary to this must be that the Court is prepared to lay down a supply price and dictate quantities to be supplied.[55] This is regulation just as surely as the same orders made by a statutorily-based Steel Commission or Steel Industry Authority. No-one would doubt that the latter was regulatory. It is strange that so few see the former as equivalent to regulation. The only real difference between the two is that a statutory authority would undoubtedly have greater competence in running Australia's steel industry than would a Federal or High Court judge, no matter how eminent he or she may be in the law.

In *Queensland Wire*, the Trade Practices Commission cited material to the High Court from noted American authorities, Areeda and Turner.[56] Unfortunately, the Commission did not spell out to the court a very important

55. The Court in *Queensland Wire* did not have to determine these matters because they were settled by the parties on terms not to be disclosed. The Court's regulatory powers do not necessarily stop at supply price and quantity determinations. Thus, for example, if there are shortages, will the Court allocate product between competing purchasers or perhaps order BHP to produce more? If the Court does either of these things, what will be the basis upon which it makes the necessary orders? The difficulties in the concept of ordering supply are legion. It has to be assumed that the High Court foresaw none of these problems as not a word on the subject was uttered in any of the judgments in *Queensland Wire*.

56. Areeda and Turner supra n 11, 73-83.

part of the Areeda and Turner material which it had cited. Within the Areeda and Turner material is the following observation:

> ... intervention against such "abuses" as the arbitrary refusal to deal is of questionable wisdom ... injunctive-type relief may require the courts to perform functions and impose constraints akin to those characteristic of public utility regulatory agencies.[57]

Perhaps because the Commission did not spell this out in its submission to the High Court, the Court may have thought it unnecessary to comment on the point made by Areeda and Turner. Regrettably, no judgment in the High Court said anything on this aspect notwithstanding the fact that it was one powerful reason put forward by Justice Pincus at trial for denying relief to QWI.

There can be no doubt that court decisions to date under section 46 are judicial actions not adjudicating upon market place conduct in the broad sense but which are directly aimed at, and have the effect of, controlling prices and patterns of distribution. As such, these decisions come squarely within the Confederation of Australian Industry's definition of "regulatory activity". This is something which this writer deeply regrets, having always taken the view, now untenable in relation to section 46, that competition law is robustly deregulatory and that it is philosophically quite wrong to regard the Trade Practices Act as a regulatory law.[58]

57. Ibid, 83. See also comments in *Town of Concord v Boston Edison Co* (1990) 59 ATRR 476 in which the difficulties of giving remedies which do not involve the court in "regulatory" functions are discussed.

58. See W J Pengilley "Private and Public Regulation under Competition Law: An Evaluation" (1981) 9 Australian Business Law Review 3, 25.

> ... I find it, on the [Confederation of Australian Industry] definition, very difficult to see the *Trade Practices Act* ... as "regulatory" in any overall sense ... [t]he Act does not have any of the effects basic to the CAI definition of "regulation". The Act does not:
>
> - control prices;
> - control entry into or exit from the relevant market place;
> - control product standards (except ... in relation to some safety and information standards);
> - control patterns of distribution;
> - control other significant aspects of economic activity.
>
> The very purpose of the Act is to have these matters controlled not by the bureaucracy, public or private, but by individual decision-making. To the extent that business is affected by the Act, it is affected only to preserve this basic market position.

Competition, by definition, involves positive action, innovation and resourcefulness. The words "to compete" are action words par excellence. The infinitive bursts into activity. The contrast, of course, is with term "to be regulated" which is negative. It is to suffer or to be inhibited from doing something. It is in the latter sense that section 46 is being interpreted. Direct judicial regulation brings this result. It is broad conceptual background conduct which should be evaluated by the Court, not minute regulatory conduct involving price setting and court licensing. The first step to bring about this result is to "objectify" the standards of conduct to which section 46 relates. A return to the concept of "misuse" of market power rather than mere "use" of it would be a major step in this direction.[59]

59. It can strongly be argued as a matter of pure statutory interpretation that a "misuse" interpretation of s 46 is the correct one. The heading to the section is "Misuse of market power". This section heading must be contrasted with Commerce Act 1986 (NZ) s 36 (the New Zealand equivalent of s 46) which reads "Use of Dominant Position in a Market". "Misuse" means "a wrong or improper use", a "misapplication"; an "ill use"; "to use wrongly or improperly"; to "misapply"; to "ill use" or "maltreat": Macquarie Dictionary supra n 52, 1115. "Use", on the other hand, merely means to "put into effect" or "to treat anther person in a certain manner". The courts have used headings to Parts and Divisions of the Trade Practices Act 1974 (Cth) in the interpretation of sections within such Parts or Divisions. See, for example, *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) ATPR ¶ 40-067; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) ATPR ¶ 41-022. The fact that such headings have been used in interpreting the Act when the section heading to s 46 was ignored in its interpretation may be technical. See Acts Interpretation Act 1901 (Cth) ("Acts Interpretation Act") s 13 regarding the status of section headings, in contrast with s 15AB of the same Act. On this basis, the writer believes that the section heading to s 46 should have been utilised in the interpretation of the section.

Note that section 15AB of the Acts Interpretation Act also permits the reception of explanatory memoranda and Ministerial speeches to clarify any obscurity or ambiguity in an Act. The Ministerial Second Reading Speech on the Trade Practices Revision Bill 1986 in relation to the s 46 amendments clearly states that "What is being aimed at is the *misuse* by a business of its market power": Australia, House of Representatives 1986 *Debates* Vol 147, 1626 (emphasis added). The Explanatory Memorandum to the Trade Practices Amendment Bill 1985 (Australia, House of Representatives 1985 *Explanatory Memoranda*) in relation to the s 46 amendments states at para 36 that:

> The new marginal note '*misuse* of market power' is a more accurate characterisation of conduct of the kind to which s 46 is directed than 'monopolisation' as used in the Act now [emphasis added].

and at para 48:

> The section is not directed at size as such, nor at competitive behaviour as such. What is prohibited, rather, is the *misuse* by a corporation of its market *power* [emphasis added].

Presumably the High Court thought s 46 not to be obscure or ambiguous and thus there was no need to seek assistance in the extended aids to statutory interpretation now

VIII. CONCLUSION

It is very difficult indeed to find anything to say in commendation of *Queensland Wire* and its progeny decisions other than that David is fairly consistently beating Goliath. Some may regard this, of itself, as a virtue. The downside is, however, that decisions of a regulatory kind are being made by judges who are not involved in the relevant industry and are not competent to make decisions on terms and conditions of supply, supply price or dealership terms. Competition law thus has to suffer some victories even by Goliath as the price of having market oriented decision-making. The dead hand of judicial regulation, and the inhibition which it can bring to business conduct, is just as much to be feared as any other form of regulation - perhaps more so. Judicial regulation is what *Queensland Wire* brings to Australian commerce.

available to it under s 15AB of the Acts Interpretation Act. Needless to say, the writer does not share this view and believes that such material should have been utilised. Had this been done, *Queensland Wire* would have resulted in a "misuse" doctrine being applicable to s 46 and not to a "use" doctrine being the test of infringement.