HILMER AND "ESSENTIAL FACILITIES"

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I. INTRODUCTION AND CONCLUSIONS

The purpose of this article is to analyse the "essential facilities" doctrine of competition law in light of s 46 of the *Trade Practices Act* 1974 (Cth)[1] (the "Act") and in light of the treatment of such facilities suggested by the *Hilmer Committee Report*.[2]

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1 Section 46 of the *Trade Practices Act*, in summary, provides that a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
- eliminating or substantially damaging a competitor of the corporation (or related corporation) in a market (s 46(1)(a)); or
- preventing the entry of a person into a market (s 46(1)(b)); or
- deterring or preventing a person from engaging in competitive conduct in a market (s 46(1)(c)).

The word "competitor" in s 46(1)(a) include a reference to competitors generally or a particular class or classes of competitors (s 46(1A)(a)). The word "person" in s 46(1)(b) and s 46(1)(c) includes persons generally or a particular class or classes of persons (s 46(1A)(b)). The market power of a corporation is assessed by aggregating its market power with that of related corporations (s 46(2)). The "purpose" test of the relevant conduct is satisfied if the purpose involved was one of a number of purposes so long as it was a substantial purpose (s 4F(b)). Purpose may be inferred from the conduct of the corporation or from other relevant circumstances (s 46(7)).

2 Report by the Independent Committee of Inquiry (Professor FG Hilmer, Chairman) *National Competition Policy*, AGPS (1993). This Report is referred to throughout this paper as the *Hilmer Committee Report*. The Committee was instructed by the Australian Prime Minister to conduct an independent inquiry into national

The major matters covered in this article are:

TABLE I
MAJOR MATTERS COVERED IN THIS ARTICLE

PART	
I	Introduction and Conclusions.
II	What is an "Essential Facility"?
III	"Essential Facilities" and Court Remedies in the United States.
IV	The Reception (or, More Accurately, the Non-Reception) of the US Essential Facilities Doctrine in Australia
V	What Have Australian Courts Said About Trade Practices Remedies?
VI	Enter Hilmer.
VII	Hilmer: An Evaluation.
VIII	An Alternative to Hilmer.
IX	Conclusions: "A Recapitulation Back Again to What I Said Previously".

For purposes only of understanding the conclusions drawn in this article, an "essential facility" is defined as a resource or asset to which access is fundamental for a party wishing to carry on business activity in a market.[3] Two short examples will illustrate the point. Airport access (or at least access to an appropriate number of airports) is essential if one wants to establish an airline. Access to a power distribution grid is essential to a party wanting to construct a power station and, from it, to generate and sell power. Without access in each case, the party involved is precluded from the relevant market and cannot establish or conduct business in it. The facilities themselves cannot reasonably be duplicated.

In competition law, questions arise as to when access to facilities such as those stated should be given and, if so, on what terms. Questions flowing from this may involve the issue of whether a court is the appropriate body to set and supervise access terms or whether these matters should be left to a specialist regulatory authority. If the latter is chosen, should the regulator be specific to the particular industry or should there be an overall regulator for industry as a whole?

There are necessarily mixtures of personal philosophy and subjective views which tend to influence the search for appropriate conclusions on these points. Nonetheless, there is much indicative material available which can be assessed. Based on an assessment of this material as well as, no doubt, some philosophical

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competition policy following the agreement of all Australian Governments on the need for such a policy. No doubt erroneously, and meaning no disrespect to the two other Committee Members (Mark Reyner and Geoffrey Taperell), on occasions the Hilmer Committee Report is, for purposes of style and, idiom only, referred to in this article as Hilmer's Report or "his" (ie Hilmer's Report).

3 The "essential facilities" definitional issue is dealt with in greater detail in Part II.

pre-dispositions, the conclusions drawn by this article on the "essential facilities" issue are as follows:

1. American courts will allow access to an "essential facility" if such access is fundamental (as distinct from desirable) to competitive market entry and the facility itself cannot reasonably be duplicated. Australian courts have shown a strange reluctance to embrace this American jurisprudence. This reluctance is difficult to comprehend because, at least in the author's view, the American jurisprudence gives rise to decisions which are sensible and lay down reasonably clear principles. These are two qualities lacking in competition evaluation on most issues, whatever country's jurisprudence one takes as a model.

   Australian evaluations to date have been based on an analysis of the "purpose" of conduct. If access to an "essential facility" is denied, the courts seek to ascertain whether the "purpose" of such denial offends s 46 of the Act. This analysis seems to me to be misconceived in the case of "essential facilities". "Essential facilities" analysis should be based on "ownership" concepts and an evaluation of when one should be compelled to share resources. Further, the judicial debate in Australia as to whether purpose is "objective" or "subjective" and the further issue of the "substantiality" of the relevant purpose have given rise to inconsistency and have also brought about the result that there are no basic principles for business guidance.

2. It is the author's opinion that we should look more carefully at the quite reserved American approach to remedies in "essential facilities" cases. These decisions constrain the courts to act only within their areas of competency. No such constraint is evident in Australian decisions to date.

   Courts can adjudicate on the question of what is an "essential facility" if they are given an appropriate statute upon which to adjudicate. It is in the enforcement area where courts flounder. If an order is a simple one that access be granted on "non-discriminatory terms", American experience indicates that there is no enforcement problem if the order is totally court enforced by way of contempt proceedings. If, however, the issue becomes wider than this - for example, when there has been no prior access to the facility and access terms and prices have to be determined - the courts have proven somewhat inadequate to the task. This task is one which a regulatory body should perform.

3. The Australian, although not the American, courts have involved themselves in business decision-making where, in the author's view, judges are simply not equipped to handle the tasks which they have set themselves (see the relevant principles in subparagraph (2) above). In the author's view, this is because the Australian judiciary, in its decision-making, has failed to recognise the wider ramifications of what is involved in the decisions it has taken. To date, these wider ramifications are chickens which have not yet come home to roost. If the Act is amended to accord

with the Hilmer Committee recommendations, the Australian courts may be saved the embarrassment of the homecoming of these chickens. If the Act is not, however, so amended, or amended in some other manner, considerable embarrassment and difficulty will inevitably flow from the relevant Australian decisions to date. Judges are, in many cases, simply not equipped to take decisions on access prices and conditions. The courts should not, under the guise of competition law, become business price regulators. Yet it is into this very role that the High Court has catapulted the Australian judiciary in view of its decision in *Queensland Wire Pty Ltd v Broken Hill Proprietary Co Ltd.*[4]

4. If the Hilmer Committee's recommendations for dealing with "essential facilities" are implemented, then the whole question of what to do with "essential facilities" will become a political one. Hilmer suggests a ministerial decision on access to "essential facilities" after advice from a National Competition Council. Clearly such a system has no objectivity, no forum for hearing and no certainty. It is doubtful if large investment decisions can freely be made given such uncertainty.

One view may well be that access to "essential facilities" is better determined politically than by leaving the matter to the courts. The author's view, for the reasons stated in this article, is that this is neither the best nor the most appropriate choice. Indeed, Hilmer in all other aspects of trade practices administration himself extols the benefits of a court based process of law enforcement. There is much to be said for court based enforcement in the area of "essential facilities". However, in view of the Australian court decisions to date, it may be argued that the courts need some statutory guidance.

5. In those cases where the involvement of a regulator is necessary, this article suggests that the relevant principles of access be laid down by statute with possible ministerial directions in appropriate cases, but that implementation of such principles be left to a series of industry specific regulators. In the author's opinion one regulatory authority to oversee all Australian industry is a solution fraught with danger. Hilmer, however, finds in favour of one national regulator. If one believes the Trade Practices Commission ("the TPC") and the Prices Surveillance Authority ("the PSA"), they agree on but one thing - there should be but one Canberra based regulator. But each believes the other is not a competent regulator. I agree with each of them on the latter point, though not the former. Whatever the disadvantages of industry specific regulation, it has immense advantages in principle over any form of overall centralised regulation. It is regrettable, however, that most politicians and policy makers seem to have an almost axiomatic belief in the principle of

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4 (1987) 9 ATPR 48-810 (Pincus J); (1988) 10 ATPR 40-841 (Full Federal Court); (1989) 11 ATPR 40-925 (High Court).

centrally based regulation. Most appear instinctively to join in one Canberra bureaucrat's incredulous disbelief when he said to me:

> Surely you don't want an AUSTEL, an ELECTRITEL, a WATERTEL, a POWERTEL and a GASTEL.[5]

to which I replied:

> That is exactly what I want.

Even to suggest such a proposition meant, to my Canberra bureaucrat friend, that many dots were missing on my mental dominoes. To advocate it seriously was unthinkable.

Hilmer suggests a super-regulator, the Australian Competition Commission, which would combine the functions of the PSA and the TPC. Based on philosophical principle, it is the author's opinion that the Hilmer solution is probably worse than that which would follow if either the TPC or the PSA were presented with the overall regulatory blue ribbon.

6. In relation to industry specific regulation, the experience of primary products marketing regulation can be drawn upon as a model. In such regulation, one Act sets down an overall regulatory mechanism but different regulatory authorities are established for various products. However, even if the battle is lost on this issue and a policy decision is taken that one overall regulator is to be established, the structure suggested in this article can still be utilised.

7. At the conclusion of this article (see Table II in Part VIII), the skeleton of a regulatory access system is set out. This system overcomes the problems of political influence and uncertainty which the Hilmer Committee's suggestions necessarily entail. The system involves:
   - a legislative definition of an "essential facility";
   - a statement as to when access to an essential facility can be denied;
   - a court assessment, rather than a complex political one, as suggested by Hilmer;
   - a court making an access order itself if it is capable of doing so with certainty and if it believes that continual "hands on" court involvement to supervise the order will not be required. Otherwise, the terms of access are to be delegated by the court to an industry specific regulatory authority.

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5 The reference to the various "TELS" is an extension of the title "AUSTEL" (The Australian Telecommunications Authority) set up under the *Telecommunications Act* 1989 to regulate the terms of access of competitive parties to Telecom's (The Australian Telecommunications Commission's) communications network. AUSTEL was the first such regulatory authority set up in the so called deregulatory era and, not surprisingly, it is frequently referred to when a further authority (or "TEL") is contemplated. No doubt "TEL" is the Australian regulatory semantic equivalent of the American political suffix "GATE". WATERGATE has given rise to such unlikely progeny as "IRANGATE" (involving Colonel North, Admiral Poindexter and illegal arms sales to Iran) and even "DIANAGATE" (involving various issues relating to Princess Di, her failed marriage and the publicity which followed from much of this). "TEL" seems similarly pre-destined to be a suffix to a number of words which have singularly little relevance to the original use of the term.

It is strange, perhaps, that even though the regulatory access regime which suggested by this article is quite different from that proposed by Hilmer, it does, in fact, carry into effect the very principles which Hilmer espouses. My major observation on the Hilmer Committee Report as it relates to "essential facilities" is that it has correctly identified the desirable goals but has recommended a mechanism which does not achieve the goals so identified. This article identifies much the same goals as Hilmer. In the author's opinion, the suggestions made in this article achieve those goals.

Having stated all these conclusions, there remains the not inconsiderable difficulty of justifying them. The approach adopted is first to discuss what constitutes an "essential facility" as this doctrine has evolved in its birthplace - the United States (see Part II). Secondly, it is intended to look at the experience of the courts in dealing with such facilities - again based on the American precedent (see Part III). Part IV of the article deals with Australian court attitudes to "essential facilities" and Part V with the Australian experience in relation to court remedies. From this material, it is possible to compare and contrast Australian and American attitudes and experience and to draw some conclusions. Hilmer's recommendations are set out in Part VI and evaluated in Part VII. In Table II, in Part VIII, an alternative to these recommendations is suggested. Having circumnavigated the topic, the conclusions in Part VII and Part VIII are those which have been stated in Part I above.

II. WHAT IS AN ESSENTIAL FACILITY?

A. Terminal Railroad: the Birth of the "Essential Facilities" Doctrine

The American doctrine of "essential facilities" in competition law commences with the well known 1912 case of *United States v Terminal Railroad Association*.[6] There the defendants formed a company and bought certain bridge access land and facilities, thus controlling traffic over a railway bridge across the Mississippi River at St Louis. By virtue of the company's control over these facilities, it also controlled important rail access between the eastern and western rail systems. Those competitors of the bridge controlling parties were effectively shut out of the market because they could not link eastern rail traffic to western rail traffic, and vice versa. St Louis was an important rail link as twenty-four rail lines converged there and, even today, the motto of St Louis is "Gateway to the West" - a highly appropriate description of the city in view of the fact that a vast amount of traffic east-west and vice versa must, for geographic reasons, pass through it.[7]

It was alleged that the activities of the Terminal Railroad Association breached the monopolisation provisions of the United States *Sherman Act*. The Supreme

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6 224 US 383 (1912).

7 Any reader interested in the topography of St Louis will obtain an excellent description of it from the *Terminal Railroad* case: *ibid*.

Court concluded that:

> [The railroad] lines stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not comply with their (ie the bridge owner company's) terms.

The company controlling the bridge was not an independent company but one with six railroad company shareholders. The company was formed:

> for the purpose of acquiring all the terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent and upon a consideration to be agreed upon.

At the date of the suit, fourteen railroad companies had been admitted as shareholders in the bridge controlling company. These fourteen railroad companies controlled one third of the railroad mileage in the United States. The Court observed that it was undeniable that, through their ownership and exclusive control of bridge access facilities, the defendants possessed considerable advantages in respect of the enormous rail traffic which had to use St Louis as a gateway link between the eastern and western rail systems.

The Court was of the opinion that there was nothing illegal, as such, under competition law in combining to purchase a facility. However there may be conditions which lead to illegality. This was not a company which was a provider of transport access over bridges. It was not simply operating facilities as "mechanical devices for the exchange, receipt and distribution of traffic". Various discriminatory charges were made and these impacted severely upon the activities of those subjected to such charges - for example, there were discriminatory charges imposed on short haul traffic crossing the river which impacted significantly on carriers having this type of carriage as a major part of their freighting. A large part of the complaint was in relation to these discriminatory charges.

The court's fundamental holding was as follows:

> ...when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies compelled to use them violates both s 1 and s 2[8] [of the *Sherman Act*] in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolise commerce among the states, which must pass through the gateway at St Louis.

The Court thus made an order requiring admission to the bridge controlling company:

> ... of any existing or future railroad ... upon just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

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8 Section 1 of the US *Sherman Act* broadly accords with s 45 of the Australian *Trade Practices Act* in that it makes illegal anti-competitive combinations. Section 2 of the US *Sherman Act* is broadly akin to s 46 of the Australian *Trade Practices Act* in that it illegalises "monopolisation". The Australian law is based on the philosophical principles of the American law. However, the Australian legislature has attempted to cover by statute much of the American law made by judicial decision. The result is that the Australian *Trade Practices Act* is far more prolix than its American predecessor and shows some different emphases.

Orders were also made abolishing discriminatory billing and any short haul charge:

> that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of [the short haul] area.

Any disagreement as to the terms of admission of companies or rates to be charged would be adjudicated by the court. The court further noted that nothing in the decree was meant to affect the power of the Interstate Commerce Commission over rates to be charged by the bridge controlling company involved, its billing procedures or "any other power conferred by law upon such Commission".

The *Terminal Railroad* case marked the birth of the American "essential facilities" doctrine. The doctrine was destined for a long life and to breed substantial progeny.

B. Development of the "Essential Facilities" Doctrine in the United States

Fascinating as the topic may be, space constraints do not permit a case by case study of the decisions spawned by the *Terminal Railroad* case. This article's treatment of the development of the "essential facilities" doctrine in the United States must, therefore, be by reference to some illustrative cases and by way of expression of general conclusions from such cases.

In the *Associated Press v United States*,[9] the United States Supreme Court held that the exclusion of newspapers from membership of the American Press ("AP") news gathering services and the prohibition on individual AP members supplying news to non-members caused harm to new entrant newspapers.[10] The court decreed that individual members should not be prohibited from providing news to non-members, and that any newspaper should be admitted to AP on non-discriminatory terms.

In the *Gamco* case,[11] the Court found that the denial of access to a specially constructed produce building, which provided rail facilities for most of a city's fruit and vegetable market and was the centre for local trade, was the denial of access to an "essential facility".

The United States Supreme Court in *Silver v The New York Stock Exchange*,[12] found that the denial of stock exchange information to a stock broker involved denial of an "essential facility" to such stock broker. In *Otter Tail Power Co v*

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9 326 US 1 (1945).

10 *Ibid.* Joint arrangements prohibited members from making news available to non-members in advance of publication. The court found that:

> Inability to buy news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for these restrictions, might be published in the future.

The District Court (see fn 10 of the Supreme Court judgment) found as a fact that it was impossible in practice for any one newspaper to establish and maintain an organisation to collect the news of the world. This was the very purpose of the AP arrangements. AP also had contracts for this purpose with similar reporting services in other countries.

11 194 F 2d 484 (1952).

12 373 US 341 (1963).

United States,[13] it was held that the denial of access to a power distribution grid for purposes of "wheeling" power was the denial of access to an "essential facility". In *Fishman v Wirtz*,[14] a sports stadium, because of its unique facilities, was held to be "essential". In that case, access to the stadium was necessary in order physically to enter the market.

The cases continue[15] but the analysis here must draw conclusions without further detailed discussion of individual decisions.[16]

The conclusions as to the American "essential facilities" doctrine are:

(i) The fundamental premise of the "essential facilities" doctrine is that the control of the facility in question carries with it the power to eliminate competition. It seems that the cases also envisage another criterion in order for a facility to be "essential". This is that there must not only be a power to eliminate competition but that this power must not be momentary but at least relatively permanent.[17]

(ii) A facility will be essential only if "duplication of the facility would be economically infeasible"[18] and that denial of access would cause at least a "severe handicap" to a competitor.[19]

(iii) As the word "essential" indicates, a plaintiff must show more than inconvenience, or even some economic loss. He must show that an alternative to the facility is not feasible.[20] So, for example, if a purchaser of power can have that power transmitted over more than one transmission grid, denial of access to any particular transmission grid will not constitute denial of access to an "essential facility".[21]

(iv) There cannot be a violation of the *Sherman Act* if a party controlling an "essential facility" grants reasonable access to such facility by competitors. So, there can be no breach of the *Sherman Act* if access is granted to an essential facility on the basis of payment of a reasonable non-discriminatory fee set at a level which would not drive competitors away. The simple gain of monetary profit at a rival's expense, without more, is

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13 410 US 366 (1973).

14 807 F 2d 520 (1986).

15 For a convenient collection of these cases see the decision of the New Zealand High Court in *Union Shipping New Zealand* v *Port Nelson Ltd* (1990) 3 NZBLC ¶99-182. The following cases, additional to those referred to in that decision, are also of relevance: *Interface Group v Gordon Publications Inc* [1983] 1 Trade Cases 65,466; *Northwest Wholesale Stationers Inc v Pacific Stationery* [1985] 1 Trade Cases 66,640; *US v AT&T* 524 F Supp 1136 (1981); *Ferguson v Greater Pocatello Chamber of Commerce* [1988] 1 Trade Cases 68,070; *Re Air Passenger Computer Reservation System* [1988] 2 Trade Cases 68,316.

16 As is often the case in law, conclusions can often be summarily stated not so much from leading cases themselves but from later cases which analyse the leading decisions. Citation from later cases is thus frequently used in this article in order to establish the general principles sought out.

17 See *Alaska Airlines Inc v United Airlines Inc* [1991] 2 Trade Cases 69,624 and cases there cited.

18 *Corsearch v Thomson & Thomson* [1992] Trade Cases 69,819.

19 Notes 17 and 18 *supra*.

20 Note 17 *supra*.

21 *City of Anaheim et al v Southern Cal Edison Co* [1992] 1 Trade Cases 69,716; *Continental Trend Resources Inc v Oxy USA Inc* [1991] 2 Trade Cases 69,510.

the reasonable exercise of such market power as held and is not actionable.[22]

(v) The wrong perpetrated by the misuse of an "essential facility" is that a monopolist "can extend monopoly power from one stage of production to another, and from one market into another."[23] If this wrong is not present, then there is no misuse of an "essential facility" even though it may sometimes be the case that an inability to obtain access to a facility will be "economically frustrating" to a plaintiff. But if the facility is not an "essential one", and if there is no relevant extension of market power, the plaintiff "simply has no attainable remedy under the antitrust laws".[24]

(vi) A party must show that a duty to deal should be imposed and that harm would result from a monopolist's refusal to deal. A party seeking access to an "essential facility" cannot seek to impose a deal on the basis of the benefit it may obtain from unlimited access to the facility. The fact that a party may save expense is not enough to impose a duty to deal and the holder of an "essential facility" does not have to deal on the basis of permitting unlimited access on the best available terms. To accept such a view would "turn the essential facility doctrine on its head".[25]

(vii) Access to an "essential facility" is not required when this will result in a diminution of the quality of the facility holder's product or where capacity is not available. The purpose of a denial of access must be one of maintaining monopoly power.[26] Neither is the holder of an essential facility required to construct additional facilities in order to meet a particular demand for access.[27]

(viii) If there is no evidence of a scheme to drive competitors out of business, a competitor is generally free to choose those parties to which it will offer its products. This is because a business entity has a right to do business with whom it pleases.[28] A plaintiff must show both that it is excluded from an "essential facility" and that no valid business reason exists for the refusal to deal. In general terms, s 2 of the *Sherman Act* does not restrict the

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22 Note 17 *supra*; see also *City of Vernon v Southern California Edison Co* [1991] 1 Trade Cases 69,336 and cases there cited.

23 *MCI Communications Corp v AT&T* [1983] 2 Trade Cases 65,520; *City of Anaheim et al v Southern California Edison Co* [1992] 1 Trade Cases 69,716 (citing *Otter Tail Power Co* v *US*).

24 *Continental Trend Resources Inc v Oxy USA Inc* [1991] 2 Trade Cases 69,510.

25 *City of Anaheim v Southern California Edison Co* [1992] 1 Trade Cases 69,716.

26 *Ibid.* The Court said in the *City of Anaheim* case that "the Cities seem to contend that Edison has to disable itself so that they can get cheap power. The law requires no such thing".

27 *Continental Trend Resources Inc v Oxy USA Inc* [1991] 2 Trade Cases 69, 510; *Oahu Gas Service v Pacific Resources* [1988] 1 Trade Cases 67,895; *The Jeanery Inc* v *James Jeans Inc* [1988] 1 Trade Cases 67,988; *Mozart Co* v *Mercedes Benz of America* [1987] 2 Trade Cases 67,789; see generally the summary position in *City of Vernon v Southern California Edison Co* [1991] 1 Trade Cases 69,336.

28 *McKenzie v Mercy Hospital* [1988] 2 Trade Cases 68,180; approved in *Continental Trend Resources Inc* [1991] 2 Trade Cases 69,510.

independent discretion of business as to those parties with whom it will deal.[29]

(ix) The essence of a breach of s 2 of the *Sherman Act* by misuse of "essential facility" power lies in the fact that a competitor is disadvantaged. So, the relevant evaluation must be directed to the question of whether a competitor is unable practically to duplicate the facility and whether denial of access is to a competitor. Thus if a denial of access is, for example, to an entity at a different functional level of the market, there is no denial of access to an "essential facility".[30] The "essential facilities" doctrine is thus not one which can be utilised by, say, a re-seller to obtain product supply unless the reseller is also a competitor at the same market level as the product supplier.

As is apparent from the American cases, it is a "facility" which is, generally speaking, involved in "essential facilities" cases. Rarely is a product, without more, involved. This is because the American supplier of a product, generally speaking, has the power to deal as he or she wishes. Further, "product power" only exceptionally gives rise to "market power". Only if an "essential facility" is involved is a supplier's freedom to deal constrained.

It is clear from the above that an "essential facilities" problem can arise in either a single firm or multi-firm context. The *Terminal Railroad* case[31] involved multi-firm activity. The *Otter Tail Power Co* case[32] involved the unilateral decision of a company which controlled a power distribution grid. The distinction between the two cases is not stressed in the judgments themselves as much perhaps as it should be. Unilateral "essential facilities", by and large, tend to be creatures of statute - airport operators, providers of wharf and port facilities, telecommunications providers, power transmission entities and the like. Multi-firm "essential facilities" tend to be non-statutory in form and frequently involve a scarce resource being brought under the control of the few. It is important in the case of statutory "essential facilities" to bear in mind that competition law is not the only legislation which is relevant. The particular statute controlling the facility in question, not competition law, may well be the controlling legislation. These points are obvious but we can all, from time to time, benefit from a reminder of the obvious.[33]

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29 *TV Communications Network Inc v ESPN Inc* [1991] 1 Trade Cases 69,476.

30 *Ibid.*

31 Note 6 *supra.*

32 Note 13 *supra.*

33 My most recent reminder of this is in the Master of Commerce Thesis of Paul Anderson in which he cogently makes the point. See P Anderson, "Antitrust and Regulatory Aspects of Airline Computer Reservation Services", unpublished M. Com Thesis, University of Canterbury (1993). This thesis provides a first class discussion of computer reservation services and access to use services. (The thesis is "first class" not only in the sense in which that term is normally used; Mr Anderson was awarded First Class Honours for his study).

III. "ESSENTIAL FACILITIES" AND COURT REMEDIES IN THE UNITED STATES

In order to save the reader valuable time and the publisher valuable space, this article will draw, as did Hilmer, on the excellent analysis by Robertson Wright[34] on the question of remedies in American law, and state the results of his research on this issue. Wright concludes in relation to the American law that:

(i) A typical order might be that found in *International Salt Co v United States*.[35] This order was that the transgressor was to offer certain equipment "on non-discriminatory terms". As is apparent from the material set out in the analysis above, a "non-discriminatory" access order is often the very order sought by an excluded party. The order sought, and granted, in the *Terminal Railroad* case,[36] the mother of all "essential facilities" cases, was such an order.

(ii) A second type of order is to delegate the access problem to a regulatory body which has a statutory charter to regulate the industry involved. So in the *Otter Tail Power Co* case,[37] the Court delegated access terms and conditions to the detailed determination of the Federal Power Commission ("the FPC"). The FPC, by its enabling statute, was required to ensure that rates for the transmission and sale of power should be "just and reasonable". To this end, the FPC was given investigatory powers and the power to prescribe accounting and reporting procedures. A fact often overlooked in the *Terminal Railroad* case is that the Court's order expressly contemplated, if necessary, the involvement of the Interstate Commerce Commission ("the ICC") on the question of rates to be charged.

(iii) The American courts are reluctant themselves to become involved in the fixing of prices of access. Thus in *Bryars v Bluff City News Co*,[38] the Court noted that "in the ordinary case ... the difficulty of setting a price at which a monopolist must deal might well justify withholding relief altogether".

(iv) The American courts are not as reluctant to order the re-establishment of a ruptured relationship as they are to order supply of a total stranger. Although in theory the position is the same in each case, the difficulty of setting reasonable terms, especially price terms, is a substantial difficulty when a court is faced with the position of considering an order that a party deal with a total stranger. Orders may, however, be made that parties continue to deal on the same basis in future as in the past, especially if

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34 Robertson Wright, "Injunctive Relief in Cases of Refusal to Supply" (1991) 19 *ABLR* 65. The *Hilmer Committee* also utilised Robertson Wright's article in making its access evaluation (see note 106 *infra* and related text).

35 332 US 392 (1947).

36 Note 6 *supra*.

37 Note 13 *supra*.

38 609 F 2d 843 (1979).

prices are readily ascertainable because they are charged to other companies.[39]

(v) There is a reluctance to impose orders which would require the Federal Trade Commission or the enforcing courts to assume a continuous role in supervising business direction.[40]

(vi) The American judiciary has been prepared to concede its limitations in the world of business. In *United States v Paramount Pictures Inc*,[41] the United States Supreme Court put the matter succinctly when it said that a particular order sought should not be given because:

> ... (it) involves the judiciary so deeply in the daily operation of this nationwide business and promises such dubious benefits that it should not be undertaken ...
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> ... the system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be trusted with a vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective ...

Robertson Wright's conclusions from his study of the American cases is that courts will make compulsory dealing orders only in the case of three basic scenarios, these being:

- where supply is ordered on a "non-discriminatory basis";
- where prices can be supervised by a statutory body charged with this regulatory function; and
- where there is some prior history of dealing between the parties or some comparable market price available. In such cases, the court may, as a short term remedy, use the available price to supervise and regulate the price at which the monopolist should deal.

There is recognition that in many cases it may not be possible or appropriate to impose a compulsory dealing order. This recognition is based in part on an assessment of whether the court can effectively implement its order.

The basic problems in court-ordered supply, other than in the three circumstances set out above, are said by noted American authorities, Professors Areeda and Hovenkamp,[42] to be as follows:

(i) the need for certainty and predictability in the standard of liability;

(ii) the problem of the court's practical means of implementing any compulsory dealing order made;

(iii) the fact that, if terms of a compulsory dealing order are to be mandated in detail, inevitably questions of price will come up. There will, therefore, inevitably be resultant charges and countercharges such that prices charged are so high as to amount de facto to a continuation of a refusal to deal or to

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39 *Poster Exchange Inc v National Screen Service Corp* 198 F Supp 557 (1961).

40 See, for example, *Hordce Slay Auto Sales v General Motors Corp* [1982] 2 Trade Cases 64,931.

41 334 US 131 (1947).

42 PE Areeda and H Hovenkamp, 1988 Supplement to *Antitrust Laws: An Analysis of Antitrust Principles and their Application*, Little Brown & Co (1988) cited in Wright, note 34 *supra*, pp 76-7.

an "unreasonable price" or, alternatively, that the price is so low that the defendant cannot possibly make a profit on the supply. Courts are not well equipped to deal with such claims. At the practical level, they have recognised that they are not price control agencies;

(iv) even if the courts are more hospitable to undertaking a price control function, there are formidable difficulties. How is a defendant to be compensated for his risks in developing an "essential facility", for example?

No doubt for these very good reasons, American courts have adopted a conservative role as to their capacity to decree mandatory dealing. Mandatory dealing orders will be made in the United States only in a quite limited number of cases, the guiding principles apparently being whether the court believes that it has the commercial capacity to make the order in question and whether it believes that it has the ability to supervise and enforce that which it decrees.

IV. THE RECEPTION (OR, MORE ACCURATELY, THE NON-RECEPTION) OF THE AMERICAN "ESSENTIAL FACILITIES" DOCTRINE IN AUSTRALIA

A. Australian Court Attitudes to the "Essential Facilities" Doctrine

Australian courts have shunned the American "essential facilities" doctrine in their interpretation of s 46 of the Act (covering misuse of market power).[43] The most emphatic rejection of the doctrine was in the *Queensland Wire* case before the Full Federal Court.[44]

The well known *Queensland Wire* case[45] involved the non-supply of Y-bar by BHP to Queensland Wire. Queensland Wire said that it needed this raw material in order to make Y-bar fence posts so that it could compete with BHP's subsidiary in the retail fencing market. Queensland Wire's case was unanimously upheld in the High Court, having been equally unanimously rejected by the Full Federal Court and at trial.

Only the Full Federal Court became involved in a discussion of the Amerian "essential facilities" doctrine. The Full Federal Court conceded that it had gained assistance from the American authorities by way of comparison with and contrast to s 46 of the Act "but it [did] not find in them any compelling guidance as to the construction of that provision".

The Full Federal Court rejected the American "essential facilities" doctrine holding it inapplicable to s 46 of the Act for the following reasons:

(i) It is not readily accommodated to the terms of s 46 itself, and it is those terms that govern this case.

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43 For the provisions of s 46, see note 1 *supra*.

44 *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1988) 10 ATPR ¶40-841 (Full Federal Court).

45 *Ibid.* Other references for this case are (1987) 9 ATPR ¶40-810 (Pincus J at trial) and (1989) 11 ATPR ¶40-925 (High Court). The case was ultimately settled on terms not to be disclosed.

(ii) The 'essential facility' doctrine evolved as a gloss upon the succinct terms of the *Sherman Act*.

(iii) We have some difficulty, at least in cases where a monopoly of electric power, transport, communications or some other 'essential service' is not involved, in seeing the limits of the concept of 'essential facility'. In *Fishman v Wirtz*[46] it was a sports stadium in Chicago.

(iv) Even if there be such a doctrine, there is a particular difficulty where the aid of the courts is sought to oblige the respondent to accept the applicant as a customer.

(v) In applying the 'essential facility' doctrine, there would appear to be a need to consider the impact upon it of another 'doctrine', that of upholding conduct engaged in for 'legitimate business purpose'.

(vi) there is ... force in BHP's submission that the 'essential facility' cases involved discriminatory refusals to deal rather than, as in the present case, a 'vertically integrated' monopolist who had refused to deal at all in an intermediate product and committed it solely to its own manufacturing operations. In the United States, this has been described as 'a largely unexplored topic'.[47]

The High Court in the *Queensland Wire* case made no comment at all on the "essential facilities" discussion engaged in by the Full Federal Court. This fact subsequently led the New Zealand High Court to decline to adopt the "essential facilities" doctrine "as is",[48] even though it had done so in a prior decision.[49] Although not adopting the "essential facilities" doctrine "as is", in view of the Australian High Court's failure to comment on it in the *Queensland Wire* case, the New Zealand High Court noted, however, that its own reasoning reached the same conclusion as that which it would have reached had it applied the "essential facilities" doctrine. The Court noted that this was not surprising since "the common outcome to common competition issues is perhaps to be expected".[50]

B. Commentary on the Attitude of the Federal Court to the "Essential Facilities" Doctrine in *Queensland Wire*

The Full Federal Court, in rejecting the "essential facilities" doctrine out of hand, on Christmas Eve 1987, did not take advantage of the very real opportunity offered it to look at the logic of the American decisions in point. As Australian law is concededly taken from its American predecessor, it seems unfortunate that, as the Federal Court saw fit to comment on the American doctrine, it did not also analyse the doctrine in any searching way.

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46 Note 14 *supra*.

47 In support of its proposition, the Court cited "Refusals to Deal with Vertically Integrated Monopolists" (1974) 87 *Harvard LR* 1720.

48 *Union Shipping NZ v Port Nelson* (1990) 3 NZBLC ¶99-182.

49 *Auckland Regional Authority v Mutual Rental Cars* (1988) 2 NZBLC ¶99-100.

50 The *Union Shipping* case, note 48 *supra*.

The observations of the Full Federal Court might be regarded as obiter in that it decided the case before it on market definition grounds.[51] However, its observations on the "essential facilities" doctrine are of importance. The following comments can be made on those observations (the sub-paragraph numbers hereunder relating to the same sub-paragraph numbers as the court's arguments for rejection of the doctrine, as set out in Part IV(A) immediately preceding):

(i) No doubt the US *Sherman Act* and s 46 of the *Trade Practices Act* are worded differently. In applying overseas precedent, it will be the exception, rather than the rule, for a relevant overseas statute to be worded identically to the Australian legislation being considered by a court. What the Court could well have considered, but did not, was the economic and business logic of the American cases. Section 46 of the Australian *Trade Practices Act* is aimed at preventing exclusion from markets. The American *Sherman Act* has exactly the same aim. The two statutes may have different wording, but they have the same economic and marketing thrust.

In economic statutes only the generality is expressed. The courts are left to translate this generality and apply the applicable principles to specific fact situations. This point was clearly recognised when the *Trade Practices* Act was enacted and, in many ways, economic principles were considered by the legislature to be of greater importance than the statutory language itself.[52]

In the author's view, the Full Federal Court erred in failing to undertake a principled comparative analysis between American and Australian law simply because different words have been used in each statute.

(ii) No doubt the "essential facilities" doctrine did evolve as a "gloss" on the *Sherman Act.* But most laws evolve in this way. Presumably the word "gloss" means nothing more than "that which follows from the outcome of various cases". In any event, the "gloss" on the *Sherman Act* started very early and is firmly entrenched. The initial precedent of the *Terminal Railroad* case[53] was decided about two decades after the enactment of the *Sherman Act* in 1890. This American precedent had stood for some 65 years at the time the Australian Full Federal Court made its decision. It

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51 The Full Federal Court held that, as there had been no sale of Y-bar at the time, there was no "market" for Y-bar. The High Court, quite rightly in the writer's view, overruled this conclusion. For all practical purposes, therefore, the High Court was hearing an appeal from Pincus J at trial on the supply issue.

52 "Legislation of this kind is concerned with economic considerations. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision. Such an approach leads to provisions, particularly those describing the prohibited restrictive trade practices, which have been drafted along general lines using, where possible, well understood expressions. I am confident that this will be more satisfactory. The Courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional legal role": Second Reading Speech to the Trade Practices Bill (25 October 1973), Australia, House of Representatives 1973, Debates, Vol HR84, pp 2734-5.

53 Note 6 *supra.*

had been consistently applied, not overruled, in that time. Many would believe that calling the American "essential facility" doctrine a "gloss" on the *Sherman Act* considerably underestimates the doctrine's place in American antitrust jurisprudence. The "essential facilities" doctrine is, in fact, well established by precedent under that Act. American judges would, no doubt, be less than impressed if a submission were made to them that the American "essential facilities" precedents should be overturned because they constitute only a "gloss" on what no doubt would have to be argued in such a submission as being "the true meaning" of the *Sherman Act*.

(iii) The Court's fear as to where the doctrine would lead seems totally unfounded, provided that the American principles are firmly adhered to. The Federal Court expressed concern at the doctrine applying to a sports stadium in Chicago, the view apparently being taken that if it could apply to sporting stadiums, it could apply virtually to anything. Their Honours perhaps should visit American sporting stadiums before expressing such concern. Sporting stadiums in the United States clearly can qualify as "essential facilities" in appropriate cases. The compelling reasons leading to this conclusion in *Fishman v Wirtz*[54] are set out in detail in the case. If their Honours believed the doctrine to have been wrongly applied in that case, they could perhaps have said why this was so rather than, as appears, simply applying their knowledge of Australian sporting venues, without modification, to a completely different American scene.[55]

(iv) The Full Federal Court also believed that there was a particular difficulty in having the court require BHP to accept Queensland Wire as a customer. Undoubtedly this concern is a valid one. However, the American courts have been at pains to preserve the "freedom to deal" of business in that country. For this very reason an American court would undoubtedly not have compelled BHP to supply Queensland Wire. But this is quite a different thing from saying that the "essential facilities" doctrine has no application at all in Australian law.

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54 Note 14 *supra*. The Court said in that case as follows:

> Here the defendants through the economic leverage provided by their stadium monopoly succeeded in driving out all competition for ownership of the Bulls. They used their monopoly in one market to foreclose competition in another - a classic violation of the antitrust laws ... all those who might have bid for the Bulls ... faced the insuperable obstacle of the defendant's stadium monopoly ... the District Court found that Wirtz ... had refused to give ... a lease at the Chicago Stadium *'as a purposeful means of excluding a competitor'... the refusal to deal was not merely the unilateral act of Arthur Wirtz*, but rather was *a critical element in a common scheme to prevent* IBI from acquiring the Bulls ... *there was no legitimate business reason for the refusal* ... the Chicago stadium was the *only stadium* in the Chicago area during the relevant time period which was suitable for the exhibition of professional basketball ... *the court concluded that the stadium was not just better - it was 'unique'*. (emphasis added).

55 The author believes that *Fishman v Wirtz* was correctly decided in light of the United States situation in relation to sporting stadiums (see comments in note 54 *supra*). However, the author equally believes that it is unlikely that any sporting stadiums - at least in Australian capital cities - would be likely to be held to be an "essential facility" even if the doctrine were to apply here. The greater range of facilities available in Australian capital cities would, of itself, be enough to make the doctrine inapplicable.

(v) The Court's concern with a supplier's right to refuse to deal for legitimate business purposes is clearly a serious matter for evaluation. However, as the previous evaluation of American cases shows, the "freedom to deal" issue is an important factor to be taken into account in making a decision as to whether there is an obligation to grant access. There is thus no obligation to grant access even to an "essential facility" if such access, for example, requires the creation of additional capacity or would result in a diminution of product quality. The Federal Court's concern is accommodated within the American doctrine, not rejected by it.

(vi) Undoubtedly, as suggested by the Full Federal Court, "essential facilities" cases usually involve discriminatory refusals to deal rather than assessments of the conduct of vertically integrated monopolists. This point, however, says nothing about the general relevance of the "essential facilities" doctrine and, in any event, many would categorise BHP's conduct as being a discriminatory refusal to deal.

Simply put, the answer to the Federal Court's concern, in the context of the *Queensland Wire* decision, is that an essential facility was not involved in that case. The question in the case was the obligation to supply a product to a customer. It was not a question of withholding a facility from a competitor at the producer level. Further, a product, not a facility, was involved. Because there were substitutes for the product it was not "essential" to Queensland Wire, as much, no doubt, as Queensland Wire would have liked BHP to supply the product to it.[56] Given this understanding of the American "essential facilities" doctrine, it is quite appropriate to apply the doctrine to, but decline to accede to, a request by Queensland Wire for product supply. It is quite another thing, however, to say that the doctrine is totally inapplicable to Australia in all respects.

On the basis of the above analysis, the author's view is that the Federal Court's rejection of the American "essential facilities" doctrine is based both on a misunderstanding of it and on the drawing of wrong conclusions about it. However, notwithstanding the Court's rejection of the doctrine, the court accepted that the doctrine may apply to "electric power, transport or some other "essential facility". There is thus, notwithstanding the Court's rejection of the doctrine and even if such rejection is accepted, still the possibility of the application of the "essential facilities" doctrine to quite a significant area of commerce.

In the author's opinion, the Full Federal Court's conclusion, even if not its reasoning, is clearly correct.[57] BHP should not have been found in sin in not

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56 See comments note 58 *infra*.

57 Obviously enough, it follows that the writer believes that the High Court conclusion was wrong. However, the High Court decision does not involve the "essential facilities" doctrine and, for this reason, the High Court decision is not here discussed. For the writer's reasoning on this issue, see WJ Pengilley, "Refusal to Deal - Misuse of Market Power", *Special Report: Australian Trade Practices Reporter*, 16 March 1989; WJ Pengilley, "The High Court decision in Queensland Wire: Who now has to supply what and on what terms?" (1989) 5(2) *Australian and New Zealand Trade Practices, Advertising and Marketing Law Bulletin* 9; *The Australian Corporate Lawyer* 9; (1991) 36(1) *The Antitrust Bulletin* 201; WJ Pengilley, "Misuse of Market Power: Queensland Wire and Beyond" (June 1990) *Commercial Law Quarterly* 18; WJ Pengilley,

supplying Queensland Wire. However, the same conclusion could have been reached by the Full Federal Court accepting the relevance of the "essential facilities" doctrine and applying it, rather than by rejecting the doctrine in its totality.[58]

C. "Essential Facilities" and the Australian Trade Practices Commission

Notwithstanding the apparent judicial rejection of the "essential facilities" doctrine in Australia, the the TPC still seems to embrace it. In its *Background Paper on Misuse of Market Power*,[59] the TPC accepts that some debate can occur over what is in effect an essential facility but that "reference may be obtained from American case law." The TPC then considers what will constitute misuse of market power by denial of access to an essential facility. In this regard, its views follow the case pattern established by American law but add, fortified no doubt by the High Court decision in the *Queensland Wire* case,[60] that a denial of access to an essential facility may be a breach of s 46 if such denial lessens competition in downstream markets in which the facility holder competes.

The TPC, in its Background Paper on Misuse of Market Power, considers it appropriate to view the relevant issues as ones of economic principle. In doing this, the TPC has found significant similarity between the American and Australian legislation. Thus, even if the American "essential facilities" doctrine has been unenthusiastically received, by the Australian judiciary, it will still be of relevance.

"Queensland Wire and its Progeny Decisions: How Competent are the Courts to Determine Supply Prices and Trading Conditions" (1991) 21(2) *University of Western Australia Law Review* 225.

58 The brief conclusions, if applying the "essential facilities" doctrine, would be that BHP did not have to supply Queensland Wire for the following reasons:

1. A product, not a facility, was involved.
2. In the United States, BHP would probably not have been guilty of any improper purpose. Producing product for itself only and not supplying to others would be legitimate business conduct.
3. In any event, the product was not "essential" for QWI to compete in the sale of fence posts at the retail level because fence posts could be obtained elsewhere. In the trial judge's decision, but not referred to in the Federal Court or in the High Court judgments, the following facts of relevance were noted:
   (i) BHP feared Korean imports and was prepared to reduce prices by 15 per cent to meet imports. Imported product was clearly available.
   (ii) Dalgetys had threatened to source product from Korea. BHP extended discount terms to it and "reacted to the threat with considerable concern".
   (iii) BHP believed that it was generally recognised that Smorgon would shortly manufacture Y-bar in Australia. An alternative source of Australian product was thus available in the event that it was profitable for such a source to enter the market.
   (iv) Boral Cyclone made X-Bar fence posts. These were not popular but were clearly substitutable for Y-Bar fence posts and thus in the same market.
   (v) New Zealand Wire Industries manufactured star picket fence posts. These were too expensive to sell well in Australia but were clearly available, and constituted substitutable products for BHP Y-bar fence posts.

Thus, in the author's view BHP's refusal to deal excluded no new competitive market entry at the producer level. Refusals to deal in "essential facilities" cases almost necessarily involve significant competitive market exclusion.

59 Trade Practices Commission, *Misuse of Market Power - Background Paper*, AGPS (February 1990).

60 (1989) 11 ATPR ¶40-925. Other references to this case are (1987) 9 ATPR ¶40-810 (Pincus J at trial) and (1988) 10 ATPR ¶40-841 (Full Federal Court).

The doctrine will clearly be taken into account by the TPC in deciding whether or not to commence litigation.

D. What have the Australian Courts Substituted for the "Essential Facilities" Doctrine?

There have been very few s 46 cases in Australia to date which could possibly be regarded as involving the "essential facilities" doctrine, as this is understood in antitrust law. I have elsewhere surveyed and summarised the Australian s 46 cases to date and will not here repeat that exercise.[61] Of the s 46 cases decided, it appears, even on the very generous approach of those who see essential facilities issues hiding under every bush, that only the following Australian cases to date can be regarded as having any possible "essential facilities" overtones:

(i) *Berndon Investments Pty Ltd v Fitzroy Island Pty Ltd*;[62]
(ii) *Queensland Wire Industries Pty Ltd v BHP*;[63]
(iii) *Williams v Papersave Pty Ltd*;[64]
(iv) *Pont Data v ASX Operations Pty Ltd*;[65]
(v) *Taprobane Tours v Singapore Airlines Ltd*;[66]
(vi) *Australasian Performing Rights Association Ltd v Ceridale*;[67]
(vii) *Dowling v Dalgety Australia Limited*;[68]
(viii) *Natwest Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*;[69]
(ix) *General Newspapers v Overseas Telecommunications Corp.*[70]

Most of the above cases are included only to satisfy those who see the "essential facilities" doctrine as having application whenever someone wants something important and supply is denied. Going through the cases, we can exclude most of them from the present discussion by making some fairly basic judgments about them. Thus the *Berndon Investments* case can be excluded because, although access to a holiday island boat pier might, in certain circumstances, be arguable as being an "essential facilities" case, the plaintiff in the case totally failed to establish any relevant market and, for this reason, the case was dismissed. The *Papersave*

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61 WJ Pengilley, "Misuse of Market Power: Present Difficulties - Future Problems" (1994) 2(1) *Trade Practices Law Journal* 27.

62 (1983) 5 ATPR ¶40-400.

63 Notes 44 and 45 *supra*. The "essential facilities" argument was discussed only by the Full Federal Court. The major relevance of the case to "essential facilities" lies in the discussion of the question by the Full Federal Court rather than in the subject matter of the case itself having any great relevance to the "essential facilities" question. The writer believes that an "essential facilities" argument in the *Queensland Wire* case would have lost on the merits (see comments note 58 *supra*).

64 (1987) 9 ATPR ¶40-781; (1987) 9 ATPR ¶40-818.

65 (1990) 12 ATPR ¶41-007; (1990) 12 ATPR ¶41-038; (1991) 13 ATPR ¶41-069; (1991) 13 ATPR 41-109.

66 (1990) 12 ATPR ¶41-054; (1992) 14 ATPR ¶41-159.

67 (1990) 12 ATPR ¶41-042; (1991) 13 ATPR ¶41-074.

68 (1992) 14 ATPR ¶41-165.

69 (1992) 14 ATPR ¶41-196.

70 *General Newspapers Pty Ltd v Australian Overseas Telecommunications Ltd* (1993) 15 ATPR ¶44-215 (Wilcox J at trial); on appeal (1993) 15 ATPR ¶41-274 sub nom *General Newspapers Pty Ltd v Telstra Corporation*.

case involved no demonstration of any special facility and no demonstration of market power. The *Taprobane* case became academic on appeal when the Full Federal Court redefined the market in such a way that Singapore Airlines had only a 3 per cent market share. Given this, any sort of market power was impossible to exercise and, for this reason, the court did not continue its discussion as to whether Singapore Airlines was in breach of s 46. The *Ceridale* case likewise became academic when the Full Court found that the denial of the licence involved had nothing to do with market power and was, in fact, because the applicant had not completed the relevant application forms. The applicant had thus, in reality, never applied for the licence it was claiming was wrongfully denied to it. The *Natwest Bank* case collapsed when the "refusal to supply" allegation was held, in s 46 terms, to be:

> manifestly untenable, and to the extent that the pleading seeks to support such a case, it should be struck out.

The *Queensland Wire* case can also be excluded. It was not an "essential facilities" case, though the "essential facilities" doctrine was argued and the Full Federal Court made observations on it.[71]

So, in looking at "essential facilities" cases, or quasi "essential facilities" cases to date in Australia, one is really limited to an evaluation of what the Australian courts have done with *Pont Data v ASX Operations*, *Dowling v Dalgety Australia*; and *General Newspapers v Overseas Telecommunications Corp*. Although these three cases will be considered, clearly the *Pont Data* case is the one which had the greatest potential for a successful invocation of the "essential facilities" doctrine. This case involved distribution by the Stock Exchange of stock exchange trading information. The Stock Exchange was the sole compiler of this information. Clearly this information was "essential" to a person needing access to it. The Stock Exchange was a competitor with the data company to which it supplied the relevant information. Further, in the United States, the "essential facilities" doctrine has been successfully invoked to obtain access to stock exchange trading information.[72]

A basic point to note from all of the above three cases is that the Australian courts have not sought to lay down any objectively ascertainable criteria pursuant to which the legality of conduct might be able to be assessed in advance. This is, of course, in marked contrast to the American courts where the criteria for essential facilities access have been set out extensively in the case law.[73] These criteria were consolidated in 1983 in *MCI Communications Corp v AT&T*,[74] and the US courts have sought to apply these consolidated criteria in subsequent cases.

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71 The reasons why an "essential facilities" argument would not, in the writer's view, have succeeded in the *Queensland Wire* case, even if the doctrine had been accepted, are set out in note 58 *supra*.

72 *Silver v New York Stock Exchange* 373 US 341 (1963).

73 See Part II of text.

74 Note 23 *supra*. The Court in this case suggested that the "essential facilities" doctrine involved an evaluation of the following criteria:

- whether there was control of an essential facility by a monopolist;
- whether a competitor could practically or reasonably duplicate the essential facility;

The Australian courts have concentrated very strongly upon the interpretation of the word "purpose" in interpreting s 46. Interpreting the word "purpose" is a difficult enough exercise on its own. An added complication is that, in the Act, conduct may be engaged in for a proscribed purpose if such purpose is a "substantial purpose", though other "purposes" may also be present.[75]

(i) Purpose

A "purpose" evaluation poses significant problems. Is "purpose" "subjective" or "objective" and what do these terms mean? How much of a proscribed purpose does one have to have before illegality results? Very few actions are done solely for one single identifiable purpose. The often quoted example in this area is the soldier who kills one of the enemy. Is his "purpose" to destroy the enemy or defend himself? When one blends these complex assessments with the requirement of "substantiality",[76] there are further difficulties. In particular, this is so when, as Deane J has noted:

> The word 'substantial' is not only susceptible of ambiguity; it is a word calculated to conceal a lack of precision.[77]

If the law is to be capable of some certainty, it is important that the courts float some buoys, even if they do not establish beacons, in order to give guidance to business sailing on the sea of commerce. Regrettably, the Australian courts have done no such thing. One might even conclude that the Australian courts have, in fact, demonstrated a total unwillingness to do anything but make each decision a case by case evaluation with little but the subjective view of the relevant judge ultimately deciding the issue. If guidance is desired as to what constitutes an "essential facility", or even more widely, when a breach of s 46 occurs, business can look only with frustration at what the courts have told them.

In the "essential facility" context a "purpose" test sits somewhat uneasily unless the courts are prepared to read this test in a manner which can provide commercial guidance. Denial of access to an essential facility is based on ownership. It is a study in sophistry to seek to ascertain whether the exercise of ownership rights (which, by their exercise, necessarily exclude others) is substantially an exercise of ownership rights or substantially an exercise in excluding others. Any exercise of ownership rights must necessarily include within it both factors.

Justice Pincus in the trial of the *Queensland Wire* case[78] would have answered the conundrum by following American authority. His Honour held that, although a

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- whether the denial of the use of the facility was to a competitor; and
- what was the feasibility of providing access to the facility.

Alhough these criteria appear appropriate in light of prior American case law and *MCI Communications Corp v AT&T* has been frequently followed, it should be noted that the *MCI Communications* criteria have not been expressly approved by the United States Supreme Court.

75 *Trade Practices Act*, s 4F.

76 *Ibid.*

77 *Tillman's Butcheries Pty Ltd v The Australasian Meat Industry Employees' Union* (1979) 2 ATPR ¶41-138 per Deane J (His Honour was then a Judge of the Federal Court of Australia).

78 The *Queensland Wire* case (Pincus J at trial) note 45 *supra*.

party did not have a right to withhold supply simply because he was the proprietor of the goods and thus believed he could do as he would with them, nonetheless there was no obligation to deal unless there was a *misuse* of market power. A party could refuse to deal if it had "valid business reasons" for doing so. The relevant enquiry in this regard was whether the defendant's conduct had "impaired competition in an unnecessarily restrictive way". His Honour thus found that, whilst BHP had the relevant proscribed purpose, it had not "taken advantage" of its market power. "Taking advantage" of market power required "reprehensible behaviour directed against a competitor". This behaviour could not occur if one were refusing supply for valid business reasons or if one was not impairing competition in an unnecessarily restrictive way.

Had His Honour's judgment stood, one could see the possibility of American "essential facilities" logic being followed in Australia. One would have to act "reprehensibly" or "improperly" if, as the owner of an essential facility, one denied access to it. Based on this, one could see, in the fullness of time, the development of appropriate tests consistent with the concept of facility "ownership". If the relevant improper conduct were not present, then the owner of the facility would be seen as exercising his ownership rights. If, on the other hand, a court could spell out some "reprehensible" or "improper" conduct, then the conduct would be seen as exclusionary within s 46. It is not hard to imagine, over time, a series of court decisions characterising different types of conduct as being in either the permitted or prohibited category and some certainty of prediction as to essential facilities access being established.

As is now history, however, the judgment of Pincus J did not survive in the High Court. The High Court held that the term "reprehensible" established an ill defined standard of conduct. The question, in the words of Mason CJ and Wilson J is:

> simply whether a firm with a substantial degree of market power has *used* that power for a purpose proscribed in the section...

Now, of course, anyone with any degree of market power will seek to "use" it. The real question is, in what circumstances and by whom, should such "use" be permitted? "Misuse", according to the High Court, is not the relevant test.

What is wrong with "misuse" as a test? In the High Court, the problem with a "misuse" test seemed to be that it incorporated a concept of morality into the Act. Their Honours were anxious to stress that morality and economics were quite separate issues. Justices Deane and Dawson in particular strongly asserted that s 46 does not involve moral decisions. Whilst this may well be so, morality is not necessarily invoked merely because the term "reprehensibility" is used. Would that "morality" was the only problem which the High Court saw in all of this. In this event, the selection of a more morally neutral word would solve all the difficulties. The High Court has, however, simply admonished business that it must not "use" such market power as it has. At the same time, strangely, the Court has given us all a lecture on how tough competition really is and how one business is quite justified in hurting, and indeed is encouraged to hurt, another in the competitive race. Regrettably, the Court asserts these two propositions but tells us little about

the dividing line between the proscribed and the encouraged conduct. The Court has made it difficult, perhaps impossible, to find specific criteria by which one can judge in advance whether one's actions do or do not comply with s 46. An illegal "purpose" follows purely if one "uses" such market power as one has.

(ii) Is Purpose "Objective" or "Subjective"?

Not only have the courts failed to specify the circumstances in which a purpose will be permissible or proscribed, they have not identified, with any degree of precision, what the appropriate yardstick of evaluation is to be. In the *Pont Data* case, the Full Federal Court, in a joint judgment,[79] concluded that:

> There was no dispute that in s 46 'purpose' was to be ascertained 'subjectively' rather than 'objectively'.

Subsequently, Lockhart J, in the *Dowling* case,[80] cited six cases to reach the conclusion that s 46 involves subjective considerations. In *General Newspapers v Telstra Corp*,[81] Davies and Einfeld JJ were, however, equally able to state that:

> After it has been ascertained what the nature of the conduct was, what the conduct was designed and was likely to achieve and what was the manner of its implementation, the ultimate test is an objective test which ... involves notions of markets, market power, competitions in a market and competition.

One is forced to conclude from all of this that the search by judges for the Holy Grail of "objectivity" versus "subjectivity" in assessing "purpose" is doomed to failure. One is inclined to the view that the words are a mask behind which the subjective evaluation of the judge is made. Australia is not alone in this. A search through the equivalent New Zealand cases shows the same sad mixture of so-called "objective" and "subjective" tests pursuant to which one is meant to divine the "purpose" of a party's conduct.[82]

The problem is best shown in Australia in the *Dowling* case.[83] This case involved the refusal of the three major pastoral companies to give a local agent, Mr Dowling, access their jointly owned saleyards in the rural town of Goondiwindi. Justice Lockhart had to attempt to find the "true" purpose behind the conduct of the pastoral companies. His Honour had to find this as an "either/or" proposition (either the "true purpose" was to exclude Dowling or the "true purpose" was that the pastoral houses merely wished to take advantage of their saleyard investment).

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79 (1991) 13 ATPR ¶41-069 per Lockhart, Gummow and Von Doussa JJ.

80 Note 68 *supra*.

81 Note 70 *supra*.

82 See *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* (1987) 2 NZLR 647 (objective test, Barker J); *New Zealand Apple and Pear Marketing Board v Apple Fields Limited* (1989) 2 NZBLC 103 at 564 (subjective test, Holland J); (1987) 3 NZLR 158 (objective test, Cooke P in Court of Appeal); *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* (1990) 3 NZBLC ¶99-175 ("clearly a subjective matter", Tipping J). In *Union Shipping New Zealand* v *Port Nelson Ltd* (1990) 3 NZBLC ¶99-182 the New Zealand High Court prevaricated between the two tests saying:

> ... the commercial field is one in which objective ascertaining of states of mind has much to commend it. We would be sorry to see the objects of s 36 (the New Zealand equivalent of s 46 of the Australian *Trade Practices Act*) inhibited by any undue subjectivity as to purpose ...

83 Note 68 *supra*.

An "either/or" proposition, however, is, as has been discussed, at odds with reality. Obviously enough, the pastoral houses had as their purpose, and probably as their substantial purpose, *both* objectives. His Honour solved the problem with an extensive recitation of the facts with the conclusion appended to them that:

> ... the pastoral houses hold a simple view that they have invested a considerable amount of money in their own asset, the Goondiwindi Saleyards. Saleyards are one of the means whereby they carry on their businesses of providing livestock selling services. Why should they let other agents use their asset ...?

I do not disagree with the decision in the *Dowling* case and, indeed, it is exactly the same decision as would have been obtained by the application of the American "essential facilities" doctrine.[84] But if the question before the courts is ultimately to be answered by a judicial throw of the dice in the manner of the *Dowling* decision, the "essential facilities" doctrine means nothing and the ramifications of such reasoning for s 46 at large are also of considerable concern. No doubt, the mother of the "essential facilities" doctrine, the St Louis Terminal Railroad Association, would see great virtue in such a decision. It could plausibly argue that it too was only a joint venture company which did not see why it should share with others the facilities in which it had made a substantial investment.[85]

The most recently decided Australian case of possible relevance to the "essential facilities" doctrine is the *General Newspapers* case.[86] In this case Telecom insisted, as a condition of its tender for Directories that the tenderer devote its printers entirely to Telecom. This meant that other directory publishers were unable to obtain access to the only available four colour printing presses in Australia. It was alleged that other directory publishers would necessarily be excluded from the market by this Telecom requirement. The Full Federal Court held that the dedicated press requirement was necessary to ensure product quality and cited American experience to this effect. The case was not argued on an "essential facilities" submission. Whether or not printing presses constitute an "essential facility" might be a matter of some debate but, where such presses are the only ones in Australia available for four colour directory printing, no doubt a respectable case can be mounted for the application of the doctrine. If one concedes that the "essential facilities" doctrine runs to such presses, however, the *General Newspapers* case represents nothing more than an application of the "business justification" test utilised in the United States, ie access to an "essential facility" can always be denied if there is a valid business justification for doing so. The lengthy exposition by the court, in the *General Newspapers* case, on the

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84 The market, as found, was for the provision of livestock selling services NOT the market for the provision of livestock auctioneering services. Given this, the "essential facilities" doctrine would not operate because livestock selling can be conducted outside saleyards. In any event, the pastoral houses were prepared to sell Dowling's cattle in their saleyards on a commission basis and it could be argued that this was "reasonable access" for Dowling to such yards.

85 The *Terminal Railroad* case, note 6 *supra*. The Supreme Court of the United States in the *Terminal Railroad* case considered this argument but rejected it, giving objective reasons for such rejection - see Part II of the text of this article.

86 Note 70 *supra*.

relative merits of a "subjective" versus an "objective" test were, in the author's view, quite irrelevant to the Court's ultimate conclusion. In any event, the Court came down on the side of the "objective" test - the opposite conclusion to what appeared, until then, to be the established wisdom on the point.

Given such a situation, it is reasonable to conclude that the "objective" versus "subjective" debate has produced nothing resembling an answer to the problem of when facility access should be allowed. Neither is the debate really a very useful one by which to analyse the problem. An objective test is somewhat at odds with the concept of "purpose" as one would think that any "purpose" test must permit of exculpatory factors. Yet, clearly enough, the word of a defendant alone as to what he intended by his actions cannot itself be the sole basis of evaluation. The truth of the matter is, especially in the "essential facilities" field, that motives are mixed. Ultimately what is involved is "ownership" - something quite removed from an evaluation of "purpose". When one party exercises ownership rights, someone is necessarily excluded from property. It is a barren enquiry as to which is the owner's dominant purpose in doing what he is doing.

One might think that an appropriate approach to the problem of facilities access would be for the court to lay down certain criteria which would, prima facie, indicate a breach of the "essential facilities" doctrine and then permit a defendant to adduce exculpatory factors. A judicial balance would still be required. However, the relevant factors being evaluated would be before the court for assessment rather than being subjective to the judge as he purports to probe the decision-maker's mind.

E. Could not the Courts Lay Down some General Criteria of Conduct? There is a Precedent in the *Adelaide Beer* Case

It can be objected that courts should not lay down general criteria of conduct by way of case law decisions. Those uttering such a cry appear to believe that one, if praying long enough, will ultimately receive either "subjective" or "objective" enlightenment as to what "purpose" means and what sort of "purpose" is involved. As is obvious enough, however, this exercise in sophistry has not, to date, helped much. I am of the view that court-established criteria give rise to a far more useful approach to the problem of access. Unfortunately, court guidance to business to date is obfuscatory at best, and non-existent at worst.

The setting down of criteria, and even (as some may see it) the reversal of some onuses of proof in doing so, has not been a matter which has inhibited the courts in other trade practices areas. Indeed, Fisher J boldly grasped this issue in the very first price fixing case brought by theTPC. In the *Adelaide Beer* case,[87] His Honour found that certain presumptions followed when competitors met together and unexplained market effects followed after such a meeting. A defendant then had the opportunity of explaining to the court the circumstances of his particular involvement and of explaining why adverse inferences should not be drawn against

87 *TPC v Nicholas Enterprises Pty Ltd* (1979) 2 ATPR ¶40-126.

him. A similar approach to the "essential facilities" doctrine, either judicially or legislatively, would make a lot more sense than the present approach of equipping the judiciary with divining rods, armed with which they purport to search the inner recesses of businesspersons' minds when such businesspersons make their decisions.

The strength of the American "essential facilities" doctrine is that it is "criteria based". The weakness of the Australian position is that "purpose" is subjective to each judge and evaluative criteria are missing.

V. WHAT HAVE THE AUSTRALIAN COURTS SAID ABOUT TRADE PRACTICES ACT REMEDIES?

A. The *Queensland Wire* Case

As has been previously noted, the American courts have been reserved in the remedy role which they believe it is appropriate for courts to play.[88]

This reserved role impressed Pincus J in the *Queensland Wire* case. His Honour thought that, whatever the rights or wrongs of BHP's position in not supplying Y-bar to Queensland Wire:

> In this case, it is likely that if the applicant succeeds in forcing BHP to supply Y-bar, another would-be manufacturer of fence posts, or other such manufacturers, may well be able to force supply also. Then, how is the available Y-bar to be distributed among the participants? BHP has, according to the evidence, excess rolling capacity and could undoubtedly make sufficient Y-bar to satisfy all requirements, if demand increases because of competition; but is it to be forced by the court to increase its production of Y-bar? If so, what quantities must it produce?
>
> Problems of the same sort underlie an award of damages. The carefully presented damages evidence on behalf of the applicant is based on certain assumptions, the details of which need not be recounted, as to the way in which BHP should have conducted itself so as not to infringe s 46. Awarding damages on the basis sought necessarily involves the court in retrospectively fixing a proper price - ie one in conformity with the requirements of s 46 as well as fixing a fair distribution of the Y-bar.[89]

His Honour also noted that:

> ... if there is no history of previous trading to set a standard, it must be difficult to frame an order. It would seem to be absurd simply to enjoin BHP to supply the applicant in accordance with s 46, leaving it to be decided on contempt proceedings

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88 See Part III of the text of this article. The American courts recognise that the contempt remedy is an inappropriate one for enforcement of decrees requiring detailed business supervision. In summary, courts will, in the United States, limit their remedies to:

(i) ordering access to facilities on "non-discriminatory terms";

(ii) delegating access conditions to an authority charged with the task of regulating the industry; or

(iii) as a short term measure, ordering the recommencement of dealing between parties on pre-existing terms if there is some comparable market price available by which to judge the price issue.

89 (1987) 9 ATPR ¶40-810 at 48,821.

whether any offer of supply should be held to comply with the injunction as to price, quantity and other terms.[90]

The High Court, however in holding that BHP breached s 46, must have regarded the pleas of Pincus J as unsustainable. Regrettably, the High Court on this, as on the "essential facilities" issue itself, said nothing. We are thus left to guess at what the High Court believes to be the applicable criteria of supply. The High Court judgments are even more frustrating because of their refusal to speak on the price issue whilst, nonetheless, condemning BHP's offer to supply as being at "an excessively high price relative to other BHP products";[91] as being at an "unrealistically high price";[92] and as being in breach of s 46 because it did not supply at a price which would enable Queensland Wire to sell at retail at "competitive prices".[93]

Given this, it might have been appropriate for the High Court to indicate those prices, or the method of calculating those prices, which the Court would have found acceptable. Obviously enough, the Court would have found no breach if supply had been at an acceptable price. Obviously enough, the Court feels that it must be in a position to establish such a price. We are left in darkness, however, as to the specifics.

The decision of the High Court raises considerable difficulties as to the role the Court sees for itself in tailoring remedies in the case of non-supply and non-access. Such difficulties may be summarised as follows:

(i) What is a "reasonable price"?

(ii) Are the courts equipped to set a "reasonable price"? By their nature, courts are composed of lawyers not businesspersons. But the issue goes further than this. Courts have no investigatory staff. They have no access to overall material and their decision making function is necessarily limited to issues on evidence put before them by the parties.

(iii) Courts are not experts in the particular industries for which they are asked to set a price. Is the High Court the appropriate forum for the setting of the nation's steel prices? I would suggest that, if any price regulation of steel prices is to be done, such regulation should be done by a body having at least some expertise in the steel industry. High Court judges, whatever their eminence, cannot claim steel industry expertise as one of the criteria of their appointment.

(iv) "Price" is, in any event, only one element of supply. Supply involves other practical considerations such as quality of product, terms of supply and credit risk evaluations. As Pincus J pointed out at trial, if two or more

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90 *Ibid.* The similarity of reasoning here to that of the American court in the *Paramount Pictures* case (note 41 *supra* and related text) is striking. See also the comments in note 94 below.

91 (1989) 11 ATPR ¶40-925 at 50,006 per Mason CJ and Wilson J.

92 *Ibid* at 50,012 per Deane J.

93 *Ibid* at 50,017 per Toohey J. This characterisation has even greater problems than the characterisation of Mason CJ and Wilson J (note 91 *supra*) and that of Deane J (*ibid*). The capacity of a purchaser to sell at a profit depends upon all manner of issues related to the efficiency of such purchaser. Over this efficiency, of course, a vendor has no control.

purchasers want supply, rationing may have to be implemented. Perhaps, indeed, further quantities may have to be produced. As the practicalities of supply are further examined, the difficulties proliferate and the relevance of the expertise of lawyers decreases.

(v) The final question arises as to how courts can enforce their orders. If the courts cannot make specific orders, then the courts' contempt power will be useless as an enforcement tool. No-one should be able to be sent to gaol for disobedience of an order which lacks appropriate specificity.[94]

(vi) The above problems are compounded by the fact that price and supply terms are not static. Parties will, no doubt, be returning to the courts on a ritualistic basis to seek variations in orders made. The reasons for which variations may be sought are endless and many of these reasons will be quite outside the control of the parties before the court - for example, price variations may be sought for currency variations, inflation or changed market conditions.

Some of these problems can be ameliorated by a regulator with investigatory staff and industry expertise. Insofar as the courts are concerned, however, the High Court judgment in the *Queensland Wire* case drops the judiciary into very deep water without any swimming lessons. Had not the *Queensland Wire* case been privately settled, it is almost impossible to see how the High Court could have given meaning to its decision had the matter been referred back to it to put specifics into its prior generality.

B. Cases Subsequent to *Queensland Wire*

The inability of courts to adjudicate price levels has been dramatically demonstrated in two subsequent cases where the point has been directly put in issue - the *Pont Data* case in Australia and *Clear v NZ Telecom* in New Zealand.

(i) Pont Data

In the *Pont Data* case,[95] the essence of the s 46 breach was that the Australian Stock Exchange supplied stock exchange information too expensively to Pont Data in comparison with the supply price to its own subsidiary, Jecnet. Pont Data and Jecnet were competitive in resupplying stock exchange information by way of signals sent to subscribers to their respective services. A breach of s 46 was found. In this case, the Federal Court was, however, unable to duck the supply price issue, as had the High Court in the *Queensland Wire* case, because the point was directly pleaded and was of the essence of the case.

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94 See *Thomson Australia Holdings Pty Ltd v TPC* (1981) 148 CLR 150 at 156 where Murphy J stated the necessity for injunctions to state specific forbidden acts with as much clarity as possible; *TPC v Walplan Pty Ltd* (1985) 7 FCR 495 at 496 where Pincus J stated that contempt proceedings should not be a second venue to ascertain whether there had been a breach of the Act. See also the comments of Pincus J in the *Queensland Wire* case at trial (notes 89 and 90 *supra* and related text.). See also the comments of the US Supreme Court in the *Paramount Pictures* case (note 41 *supra* and related text).

95 Note 65 *supra*.

Justice Wilcox at trial found that one should look at a competitive price as being the appropriate supply price. But, as in nearly all "essential facility" cases, there were, in the case of the Stock Exchange, no competitors whose supply price could be looked to as a yardstick. So, said Wilcox J, one had, therefore, to go to a second evaluative standard and look at the cost of production and the profit normally obtained. The marginal cost of production was, said his Honour, what was relevant. A supply price, on this reasoning, had to be calculated on what it cost to connect an additional purchaser to the already existing information gathering system. This marginal cost of supply which was, thought his Honour, the appropriate supply price, was $100 per annum. Pont Data thought the cargo cult had come to town. The Stock Exchange, and all other investors in essential facilities in Australia, immediately asked why they should invest further in such facilities when any freeloader could obtain from the Federal Court an access order to their investment.

The *Pont Data* case went on appeal. The Full Federal Court was just as perplexed about what to do as was Wilcox J. In due course, the Full Federal Court concluded that Wilcox J was wrong. The appropriate supply price was not the marginal cost of supply but a price "designed to obtain broad and substantial justice between the parties". This, said the Full Federal Court, was the supply price negotiated between the parties prior to their present dispute. The court refused to let Pont Data introduce evidence that these pre-litigation prices were also set at a time when the Stock Exchange was misusing its market power even though, at that time, no litigation had been commenced. Likewise, the court refused an application by the Stock Exchange to index the pre-litigation price for inflation which was running at 17 per cent - 18 per cent during many of the years in question.

On these grounds, the Full Federal Court judgment meant that Pont Data had to pay $1.45 million per annum for its signal[96] - a far cry from Wilcox J's $100 per annum! Had there been no prior supply price, one does not know what the Full Federal Court would have done or how it would have calculated a price "designed to obtain broad and substantial justice between the parties".

(ii) Clear v NZ Telecom

The issue of access price was raised, even more directly, in the *New Zealand Telecom* case.[97] This case involved Clear Communications seeking access to the NZ Telecom network. The Court believed such access should be made available

96 This is the relevant price as it appears to the writer from the judgment. One of the lawyers in the case advised the writer informally that the price was more in the order of $650,000 than the $1.45 million appearing from the judgment though, when so advising, was unable to cite the figures which led to his conclusion. Whether the appropriate price is $1.45 million or $0.6 million is, however, only a matter of degree. The problem of a large discrepancy between either price and $100 still exists. Also the problem of the court setting an appropriate supply price, in principle, is just as great in the case of a discrepancy between $1.45 million and $100 as it is in the case of a discrepancy between $0.6 million and $100.

97 *Clear Communications v NZ Telecom* (unreported, High Court of New Zealand, Ellis J and Professor M Brunt, 22 December 1992).

pursuant to s 36 of the New Zealand *Commerce Act* (dealing with abuse of a dominant position in a market, this being the New Zealand equivalent section of s 46 of theAct). The practical problem of access price then raised its ugly head. The Court laid down a pricing principle which it called "The Baumol-Willig Rule" after its proponents.[98] The Court, however, cried out in anguish as to the difficulties facing it in pragmatic terms. It needed not a court but a specific regulator to implement access on an everyday basis.[99]

The difficulty in which a court finds itself in relation to detailed regulation is well illustrated by the following short observations from the *New Zealand Telecom* case:

(i) The calculation of an access charge to operate on a day to day basis could well involve "man years"[100] of work. Clear had not had an opportunity, at the time of the hearing of the case, to evaluate the figures put to the Court by NZ Telecom. The Court noted that NZ Telecom's figures could well be disputed and that they "must admit of differing judgments and room for difference of opinion and argument." One must ask, in the event of such a difference of opinion, whether it is appropriate for such difference to be resolved by a court. One must further ask whether, indeed, the personnel and procedures of a court system are likely to be at all conducive to such a resolution.

(ii) The Court noted that, if the "Baumol-Willig Rule" was to be implemented:
... there would be a need for careful design of the administrative system. Regular reviews would be necessary to adjust for shifting prices and costs. It would be important to design an arm's length mechanism that would minimise the possibility of collusion. There is another point in which some regulatory presence may be needed. It would be important for the reviews not to take place at too frequent intervals, for that would reveal sensitive market information; the adjustments should be backdated, with interest covering the time value of money.

(iii) Finally the Court said:
... we cannot take the evidence further. The court is not a regulatory agency. We cannot pursue investigations as to:
1. Whether Telecom's overall return on shareholders' funds contains monopoly rent;
2. Whether the particular segments of Telecom's business that enter the Baumol-Willig rule contain monopoly rents;
3. Whether Telecom has established excess capacity or wasteful capacity in its networks;
4. Whether Telecom's operations are conducted in an inefficient manner.

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98 For further discussion see WJ Pengilley, "Determining Interconnection Prices In Telecommunications: New Zealand Lessons on the Role of a Regulator" (1993) 1(2) *Competition and Consumer Law Journal* 147.

99 There is no New Zealand telecommunications regulator akin to that of AUSTEL in Australia. The New Zealand political choice was to leave these issues entirely to competition law and the courts.

100 The Court notes "we are sure (the witness) meant 'person years'".

All questions of whether a price charged is the result of an efficient or inefficient operation were thus thought by the Court to be outside its province. Yet if a court is to set a "reasonable price", surely this must involve some assessment of the operational efficiency of the entity whose prices are being set.

If ever the theoretical inadequacies of courts to handle access prices and conditions are shown, they are shown by the Australasian experience to date in the *Pont Data* and *New Zealand Telecom* cases. It thus seems, broadly speaking, that a court's capacity to order and enforce access is limited to an order for access on "non-discriminatory terms". This is a yardstick which can be measured against already existing access granted to others. As the United States Court of Appeals said in *Bryars v Bluff City News*:[101]

> ... no price regulation problems (arise in 'bottleneck theory' cases) because a court (can) simply order the owners of a unique facility to treat all customers on equal terms. The same thing is generally true in any setting in which a monopolist deals with some businesses but refuses to deal with others.

If, however, a court is involved in the minutiae of devising an order in terms of price and access conditions, a specific regulator must be called in. If such a regulator already exists, the court can delegate to it. If such a regulator does not exist, then the court's adoption of such a role is a classic case of the cure being worse than the disease.

VI. ENTER HILMER

Against the above background, Professor Fred Hilmer and his committee members reported in August 1993.[102] The Committee was established by the Prime Minister following agreement by all Australian Governments on the need for a national competition policy and its basic principles. The Report of the Committee was comprehensive. However, it is only in relation to "essential facilities" that the Report is here considered.

The Hilmer Committee ("the Committee") initially rejected an administrative investigation procedure to replace legal prohibition - a proposition which it characterised as being "perhaps the boldest proposal for dealing with misuse of market power".[103] It thought such an approach had weak deterrent value, was potentially slow, gave rise to unnecessary intrusion and left deserving parties without remedy. The Committee contrasted this with the procedures through Australian courts which:

> have a strong reputation for consistency and fairness, and the notion of judicial precedent enhances business certainty.[104]

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101 Note 38 *supra.*

102 Note 2 *supra.*

103 *Ibid.*

104 *Ibid*, p 70.

The Committee also concluded that the American "essential facilities" doctrine, had not developed sufficiently to provide a suitable model for Australian law.[105] The Committee recommended that s 46 remain as is but that a positive duty to deal be required in some circumstances. It also made recommendations about refusals to deal and pricing questions which follow from these.

Chapter 11 of the Committee Report deals with "Essential Facilities". Because the High Court has not accepted the doctrine and the Federal Court has specifically rejected it, the Committee did not see a judicial application of the doctrine unless s 46 were to be statutorily amended in some way. The Committee also, quite correctly, saw difficulties in courts imposing terms and conditions on access, particularly in relation to price.[106]

The Committee acknowledged that it is necessary carefully to limit the circumstances in which one business is required by law to make its facilities available to another. It says, quite correctly in my view, that:

> ... failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment.[107]

The Committee concluded, however, that some industries were of such importance that access regimes should be established. It instanced electricity transmission grids, telecommunication networks, rail tracks, ports, pipelines and airports as examples. It was of the opinion, however, that access regimes did not need to be legislated and administered on an industry-specific basis. Whilst each industry has its own peculiarities, there were also important common issues. The view of the Committee, therefore, was that any access regulation should be by an economy-wide regulatory body rather than by a series of industry-specific regulators. In this regard the Committee said:

> ... the Committee is not convinced that access regimes of this kind need be legislated and administered on an industry-specific basis. While each industry has its own peculiar characteristics, there are also important similarities between access and related issues across the key infrastructure industries. The development of a common legal framework offers the benefits of promoting consistent approaches to access issues across the economy. It also permits expertise and insights gained in access issues in one section to be more readily applied to analogous issues in other sectors. For similar reasons, ... the Committee considers that an access regime of this kind should be administered by an economy-wide body rather than a series of industry-specific regulators.
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> The Committee recognises the important industry-specific work undertaken to date on facilitating access to various essential facilities of national importance. Some of this work may provide a useful foundation for access declarations under the

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105 The Committee cited KM Vautier, Occasional Paper No 4, *The Essential Facilities Doctrine*, New Zealand Commerce Commission (1990) p 65, in which she concluded that "the doctrine has not developed with clarity, coherence or consistency, let alone with strong economic foundations." No doctrine in antitrust law has the above desirable characteristics to the extent we would all love. The writer's observation, as is apparent from the preceding text, however, is that the "essential facilities" doctrine, in comparison with the present Australian interpretation of much of s 46, is a beacon of clarity, coherence and consistency.

106 *Ibid*, p 243. The Committee cited the article by R Wright, note 34 *supra*, in support of its conclusions.

107 *Ibid*, p 248.

> Committee's proposed access regime, should the decision be made to provide a right of access in the relevant industries ...

The Committee noted that many "essential facilities" in Australia have been traditionally owned by Government but that there are many examples of privately owned facilities of a similar nature. The rules the Committee suggests are intended to cover essential facilities, regardless of ownership.

The first conclusion of the Committee was that a decision on access to an essential facility should ultimately be one for Government and not for a court or other unelected body. Thus a right of access should be created by Commonwealth ministerial declaration. The Committee suggested that the Minister's discretion should be limited by three legislative criteria and a pre-condition that the declaration is recommended by an independent body. The three legislative criteria are:

(i) that ministerial decrees granting access should require that access to the facility is essential to permit effective competition in a downstream or upstream activity;

(ii) that the making of the declaration is in the public interest, having regard to:
   (a) the significance of the industry to the national economy; and
   (b) the expected impact of effective competition in that industry on national competitiveness; and

(iii) that the legitimate interests of the owner of the facility must be protected through the imposition of an access fee and other terms and conditions that are fair and reasonable including recognition of the owner's current and future requirements for the capacity of the facility.

A pre-requisite to the grant of access would be a recommendation by the National Competition Council ("NCC") that the above legislative pre-requisites are fulfilled. The NCC was envisaged as being a body providing high level independent analytical advice to all governments. Enquiries by the NCC would be triggered by a reference from a Commonwealth, State or Territory Government. The Minister would, however, have the power to decline to make a declaration notwithstanding the recommendations of the NCC.

Despite the recommendation that a centrally administered authority conduct the regulation, the Committee apparently saw no reason why all access should be on the same criteria of evaluation. It set out a number of policy judgments which might be made by the regulatory body as to access terms and pricing decisions. Amongst these were the present Optus terms of access to Telecom facilities,[108] the terms of access of Clear Communications to New Zealand Telecom's network,[109]

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108 Access on the basis of directly attributable incremental costs intended to assist the new entrant overcome the competitive advantages of the incumbent.

109 See WJ Pengilley, note 98 *supra*. In short terms, the "Baumol-Willig rule" permits pricing at a level sufficient to compensate a telecommunications carrier for agreeing to carry another's message over its own network.

the American terms of access to electricity transmission grids[110] and the UK charges for access to gas pipelines.[111]

The Committee stressed flexibility and that:

> No single principle or rule of any degree of specificity is likely to meet the policy concerns of every market.[112]

Whilst the ultimate determination of pricing matters would be a matter for the relevant Commonwealth Minister, the Minister would be required to seek the advice of the NCC. Hilmer envisaged that access arrangements would in the first instance be negotiated. If this failed, an arbitral process was envisaged under the auspices of the Australian Competition Commission, a merged body of the current TPC and the PSA. Pecuniary penalties in the case of breach might be inserted into access arrangements. Access to governmental "essential facilities", State or Federal, would be organised along the same lines as the above.

VII. HILMER: AN EVALUATION

A. Hilmer and the Role of the Courts

There are three initial points which should be made about the Committee and its attitude to courts, their function and the judicial acceptance of the "essential facilities" doctrine.

(i) Hilmer and the "Essential Facilities" Judicial Conundrum

First, it must be conceded that the Committee was facing a conundrum in relation to "essential facilities". The Australian High Court, it seems, sees no problems in courts setting prices and ordering supply and access terms. This conclusion must follow from its decision in the *Queensland Wire* case. Hence a Hilmer critic may well say that there are no real problems in access remedies and that nobody other than the court system is required to perform the relevant task. Fortunately, Hilmer recognised that which the High Court has not - that is that courts are quite incapable of performing satisfactorily in these areas except to the extent previously stated. Whilst American courts have recognised judicial limitations in this regard, the Australian High Court apparently does not yet see the problem.

(ii) Hilmer and the Possibility of a Judicial "Essential Facilities" Doctrine in Australia

Secondly, Hilmer has given away the possibility of an "essential facilities" doctrine being judicially accepted into Australia. This may have been a premature

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110 Pricing permits owners of grids to recover all costs in connection with the transmission services and necessary associated services.

111 Charges for access are based on principles which apportion costs and permit an appropriate return on capital.

112 Note 2 *supra*, p 255.

step as the High Court has not yet spoken on the issue. Many have read the High Court failure to comment on the "essential facilities" doctrine in the *Queensland Wire* case as a rejection of the doctrine. On this, there are two observations. First, the Federal Court did not exclude the doctrine from "electric power, transport, communications or some other 'essential facility'". Hence the Federal Court itself (and presumably the High Court by its failure to comment) left plenty of scope for the operation of the doctrine in most of the industries covered by the Committee's report. Secondly, one can but surmise that the failure of the High Court to comment on the "essential facilities" doctrine may have had nothing to do with its acceptance or rejection of the doctrine at all. It may simply have been that their Honours were very busy at the time. The High Court had to hand down a substantial number of judgments to meet the retirement deadlines of Sir Ronald Wilson on 13 February 1989, two working days after the *Queensland Wire* decision. The Court, given this, may well have chosen not to comment on an issue which could in any event, have been obiter dicta. So the apparent judicial rejection of the "essential facilities" doctrine might not be as conclusive as the Hilmer Committee suggests. But even if the judicial acceptance of the "essential facilities" doctrine into Australia is doubtful, perhaps Hilmer has discarded the alternative position too readily, ie that s 46 could be amended in some way to incorporate the doctrine. Regrettably, the Report suggests this possibility but does not go on to canvass its merits. To my mind, this should have been a first line of evaluation - particularly when, generally speaking, the Committee found the structure of the present competition regime appropriate and only in relation to "essential facilities" did it take a fundamentally different structural approach from that presently in place.

If the possibility of amending s 46 had been considered, it seems to me that it would not have been a very difficult task to excise from it the current "purpose" test as it relates to "essential facilities" and to replace this test with a more useful one. This would be a criteria based evaluation. To those who say this cannot be done, I reply that the Hilmer Committee has itself largely recommended such criteria and that criteria based evaluations are found in American precedent. The Hilmer criteria and American court precedents show considerable similarities.

(iii) Hilmer and the Inconsistency of Recommending Administrative Remedies

Thirdly, there are some inconsistencies in the Committee's approach to the "essential facilities" issue and the administrative procedures which it suggests should be implemented. The Committee comments highly favourably on the function of the courts in giving consistency and fairness in trade practices matters and on the fact that court precedent gives rise to business certainty of action. It comments on the inadequacy of administrative solutions (weak deterrent value, potentially slow, unnecessarily intrusive and parties left without remedies). Yet the Committee concludes that an administrative solution is appropriate for essential facilities access determinations - and this notwithstanding the weaknesses it finds in such solutions generally. The Committee presumably discarded a court-based

solution to the essential facilities access problem because of the difficulties which courts have in giving remedies - a weakness the Committee correctly identifies. However, the possibility of a court-based *determination* and a regulation-based *remedy* is not canvassed. Such a hybrid solution would overcome both the difficulties courts face in making access decrees (which are difficult to structure in detail and require court "hands on" involvement) and would at the same time preserve the strengths seen by the Committee in a court based determination system. The possibility of a mixed judicial/regulatory remedy is not novel. In the United States, it will be recalled that in the *Otter Tail* case,[113] the Supreme Court found that access should be given but delegated to the Federal Power Commission the task of determining the details of access terms and conditions.

B. Hilmer and the Reasons for Choosing a Non-judicial Nationwide Regulator

No doubt much of what we decide in life is somewhat intuitively based, and the Committee is perhaps no different from the rest of us in this regard. However, even if reasoning is intuitively based, it is this author's opinion that some further elaboration of the relevant principles involved in a report of a national committee of enquiry could be expected. Hilmer, in fact, says extremely little in justification of the proposals made. All that Hilmer says is:

- that a decision to grant a right to access involves an evaluation of important public interest considerations and that the ultimate decision maker should be a government and not an unelected body;[114]
- that the body supervising regulatory access should be a nationwide regulator. This has the benefit, says Hilmer, of promoting "consistent approaches to access issues across the economy" and that it "also permits expertise and insights gained in access issues in one sector to be more readily applied to analogous issues in other sectors";[115] and
- that, in any event, the access issue is relevant only if issues of significance to the national economy are involved.

The Committee puts the above propositions as being self-evident. I regard them as being highly contentious at best, and wrong at worst.

(i) Is an Elected Representative Appropriate to Decide Access Issues?

In this author's opinion, decisions on rights of access do not involve distinctively important public interest issues at all. They involve an evaluation of competition principles - no more and no less. In any event, even if Hilmer is right, "public benefit" issues under the Act are currently decided by non-elected bodies - the TPC and the Trade Practices Tribunal. Hilmer finds no fault with this and recommends

113 Note 13 *supra.*
114 Note 2 *supra.*
115 *Ibid*, pp 248-9.

its continuance. Courts also, by their very function, daily decide important public interest matters.

The very reason for placing many issues before non-elected tribunals is that impartiality is likely to be exhibited and expertise in evaluation, hopefully, is delivered. If one places important issues of property rights in a political forum, different agendas necessarily become relevant and the faith of business in the fairness of assessment of issues will frequently be in doubt. Strangely, the Committee recognises these points when recommending judicial evaluation for all enforcement of the Act other than enforcement involving "essential facilities". In addition Hilmer finds that judicial procedures are accessible, speedier and give more certainty because of their authority as precedent. Yet, having recognised all of this, the Committee, in the case of "essential facilities", turns its back on the very process it otherwise favours, giving as its reason for doing so that "important public interest issues" are involved.

(ii) Does Hilmer Make Access a Lobbying Issue?

Sadly, the machinery contemplated by the Hilmer Committee seems to envisage and entrench not an open and impartial evaluation of issues, but a political lobbying process. The machinery suggested by Hilmer invokes:

- lobbying to have an enquiry triggered by a reference to the National Competition Council. This involves lobbying because only a government (State, Territory or Commonwealth) can trigger such an enquiry. Presumably an enquiry will not be triggered if a majority of government votes (based on some criteria of weighting) oppose it;
- lobbying to have an access issue decided favourably or unfavourably by the expert policy body known as the National Competition Council; and
- lobbying to have the access issue decided one way or the other by the relevant Minister. Under the machinery suggested by Hilmer, the Minister can decide not to implement access even if the National Competition Council advises that it should be granted.

(iii) The Question of Essential Facilities Being Relevant Only When a Matter of Significance to the National Economy is Involved

Hilmer concludes that the issue of access is relevant only if a declaration is made that access is in the public interest having regard to the significance of the industry to the national economy. Because of this a decision by an elected representative is appropriate.

Three issues arise here.

(a) An "Essential Facility" is not Necessarily Significant to the National Economy

The first issue is that an "essential facility" does not have to be significant to the national economy for denial of access to amount to a misuse of market power. A party denied access may be just as disadvantaged if a relatively local market is

involved as if a national one is involved. The *Gamco* case[116] is a classic one. There access was denied to a specially constructed marketing facility which had the only rail links for produce to be brought to a particular city. Similarly, if Australian cynics would actually read the logic of the American decision in *Fishman v Wirtz*,[117] rather than join in the Federal Court's denigration of that decision in the *Queensland Wire* case, they would quickly realise that an American sporting stadium can well be an "essential facility", even if perhaps an Australian stadium would not be so regarded.

(b) Politicians are Motivated by Political, Not Legal or Economic, Imperatives

The second issue is the simple one of how politicians, if pressed by particular interests, will find certain issues to be of high national importance when the fact is that they are not. The reverse of this proposition is, of course, also applicable. Political pressures and reaction to them have not changed and are not likely to do so. History gives the precedent for cynicism in this area. No one was more committed to competition policy, and to its independent adjudication principles, than was the late Senator Lionel Murphy when he was Attorney-General. It was indeed largely his political commitment which led to the enactment of the Act. Section 90(9) of the Act, as originally enacted, empowered the Attorney-General, by written notice, to direct the TPC to authorise a merger if the merger was *in the interests of national economic policy*. The words of the Act seemed to envisage some fairly heady stuff. But the three decisions made under this section by Senator Murphy himself in the first nine months or so of the Act's life, whilst he was Attorney-General, related respectively to a biscuit merger, a potato chip operation and the acquisition of a tyre factory in Somerton, Victoria. In none of the cases did the direction specify the national economic policy involved and it was certainly not apparent at the time how national economic policy was remotely affected by any of these mergers. In discussion with me at the time, I was Commissioner of the TPC, Senator Murphy said that it was not his personal desire that decision making in the particular cases should be by direction rather than by way of adjudication, but that other cabinet "political imperatives" meant that this course had to be taken.

Section 90(9) was repealed by the Liberal-National Party upon its attaining office. However, the bi-partisan nature of the political process was apparent even in the repeal of the section. The cost of the repeal of s 90(9) was an extension of s 29 of the Act to permit the Government to give "special circumstances" directions to the TPC in *all* authorizations (ie not only mergers).[118]

The issue of political pressure for Ministers to declare "essential facilities" in order to advance private interests has been recognised as a trade practices problem in New Zealand and it is, no doubt, a universal phenomenon wherever politicians,

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116 Note 11 *supra*.

117 Note 14 *supra*. For details as to the Court's reasoning in this case, see 54 *supra*.

118 In relation to Australia and the operation of politics on trade practices policy and decision making, see WJ Pengilley, "Competition Policy and Law Enforcement: Ramblings on Rhetoric and Reality" (1984) 2(1) *Australian Journal of Law and Society* 1.

who are subject to sectional lobbying interests, have decision making powers which can grant or withhold important commercial prizes.[119]

(c) Ministerial Decisions are Difficult to Challenge, Regardless of How They are Reached

Finally, of course, the administrative decisions of Ministers are very hard to challenge on their merits. For all relevant purposes ministerial decisions cannot be corrected even if based on quite erroneous facts, on the exercise of quite erroneous reasoning or on blatant political considerations. I doubt if business will, in the mid-1990s, have great faith in such a political evaluation of important rights - rights in relation to which large investment decisions depend and upon which some advance certainty is totally basic to decision making. This problem is particularly acute because the investment decision maker has no idea as to what may be the political philosophy of government when access to his facility is sought. The investment decision and the seeking of access to the facility may be decades apart and the political situation at the time of investment decision may be quite different from that at the time when a party seeks access to the facility created. Only the certainty of law and impartial adjudication can give the investor the certainty so necessary to long term investment decisions.

Perhaps it is indicative of the future that Hilmer's only suggested check on the relevant Minister making a totally political decision (ie the establishment of a National Competition Commission) was not even considered by the Council of Australian Governments ("COAG") meeting on 25 February 1994. In broad terms, COAG endorsed, at that meeting, a large number of the Hilmer Committee recommendations. The absence of any mention of the NCC is ominous. It may well indicate a view that "essential facility" access decisions are, in future, to be totally political and that Hilmer's one possible check will not be implemented.

C. Is a National Regulator Appropriate?

As will be apparent from what precedes, I, with Hilmer, believe in the accessibility, impartiality, objectivity and, hopefully, the expertise which comes with judicial evaluation. Added to all of this is the important fact that the judicial process has no political agenda. Further, only judicial evaluations can give long term certainty. Certainty is essential to decision making when substantial long term investments have to be made - investments which will be inhibited if there is a lack of predictability, at the time of investment, as to what the law will require at some future date.

Equally importantly, however, I am of the opinion that courts have limitations on what they can do. These limitations, though not apparent as yet in Australian judicial reasoning, are well able to be ascertained from precedent elsewhere. If a

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119 In relation to New Zealand see NZ Ministry of Commerce, *Review of the Commerce Act, 1986: Reports and Decisions*, (1989) p 8: "Ministers are likely to face considerable pressure to declare an essential interest to advance private interests. These situations do not necessarily coincide with the promotion of the competitive process or the overall public interest".

court access order involves so much expertise and "hands on" involvement that the court itself cannot properly monitor the order it makes, a regulator seems to be the only way to ensure that the order is, in fact, fairly implemented.

The ideal solution to the access problem would appear, therefore, to be a mixture of judicial decision and regulatory activity. It is this compromise which I think ultimately constitutes the desirable solution. For the present, however, the question is what sort of regulator should be brought in as part of the access enforcement machinery of trade practices law.

This is a complex issue and probably it logically subdivides into three sub-issues, these being:

- the philosophical issue - in principle, is a national regulator desirable?;
- the pragmatics - what runs are "on the board" to favour a national regulator?; and
- what do the regulators say about each other?

(i) Philosophy

(a) Hilmer's Conclusions do not Preclude Industry Specific Regulation

The philosophical issue is a simple one for those already involved in the regulatory process. They see, as Hilmer did, the benefits of expertise, centralisation and cross industry experience. Regulators themselves staunchly believe one body should regulate all access. Anything else can be given various characterisations. Most other suggestions are branded by regulators as "inefficient".

Hilmer does not, however, necessarily support this reasoning in his Report, although he clearly supports the centralist single regulator conclusion. Although centralised regulation by one regulatory authority is accepted almost axiomatically by Hilmer, there is much in his Committee's reasoning which could just as easily lead to the opposite conclusion, ie that industry-specific regulation is desirable. Whilst Hilmer rejects industry-specific regulation, the Report concedes that "each industry has its own peculiar characteristics",[120] that there has been "important industry-specific work undertaken to date on facilitating access to various essential industries of national importance" and that "any general access regime ... requires flexibility to be adopted to differences between industries and within industries over time".[121] Furthermore, the Report states that different pricing and access conditions may be necessary in the case of different facilities.[122] Hilmer envisages that any access declaration that the Minister might make would apply "to a particular user or a particular class of user."[123] In addition, the Committee

120 Note 2 *supra*, p 248.
121 *Ibid*, p 249.
122 *Ibid*, p 251.
123 *Ibid*, p 252.

believes that:

> neither the application of economic theory nor general notions of fairness provide a clear answer to the appropriate access fee in all circumstances.[124]

From these premises, the Committee concludes that there is a wide variety of factors applicable to an evaluation of access in any particular case. The Committee states that:

> An access regime capable of application to several factors in the economy requires the flexibility to respond to circumstances peculiar to particular industries and facilities, as well as changes in industry conditions over time. No single principle or rule of any degree of specificity is likely to meet the policy concerns of every market.[125]

(b) Diversity of Regulatory Decision Making is More Consistent with Competition Principles than is a Single Regulator

Perhaps the real question in the "specific" versus "single" regulator debate is whether, philosophically, one believes in centralist regulation or diversity of regulatory decision. This can be a matter of what one believes competition law is all about. I am of the opinion that diversity of decision making is far more in tune with the philosophical principles of competition law. I, therefore, favour industry-specific regulation by industry-specific regulators for philosophical reasons which will now be explained.

It should be asked, as a basic principle, why competition law, generally speaking, prevents industry players getting together to make joint decisions on matters such as price, terms of dealing, marketing and the like, and why competition law compels diversity of decision making. Likewise, why does competition law seek to control, rather than permit, the aggregation of economic power?

No doubt there are a number of answers to the above enquiry. But at least one answer is inherent in the nature of decision making itself. We encourage diversity of decision making because, although some decisions made may well be wrong, we think it desirable to encourage an industrial structure whereby no one decision maker has the capacity to make a decision which is a tragedy for the nation as a whole. It is not necessarily that co-ordinated decision making always gives rise to a worse result. It is that we seek, by competition law, to implement a system which encourages diversity and thus puts a safety net under our business decision making process in order to guard against disaster.

In principle, the same logic follows in the case of governmental decision making. There is a strange naivety, it seems to me, in the view of many that the governmental decision maker is in some ways inherently wiser than his or her counterpart in private enterprise. Frequently therefore, we trust government decision makers with the power to make decisions which can, in fact, easily result in a tragedy for the nation as a whole. No doubt the justification for this approach

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124 *Ibid*, p 253.
125 *Ibid*, p 294.

is that government represents the will of the people and thus should be trusted with important decision making functions for this reason. But governmental regulatory decision making is far removed from the ballot box. One, therefore, would think that, in principle, it would be wise to apply diversity of decision making to government for exactly the same reason as we apply it to private enterprise. Diversity of decision making, whether that decision making be public or private, provides the community with a good deal of protection from the limitations of human wisdom. This protection is endangered when the decision making process passes to the few. It matters little to this proposition whether the few happen to be employed in the governmental or non-governmental sector.

(c) Diversity of Regulators is not Inconsistent with the Administration of the Act by a Single Authority

Philosophically, when looking at regulation, we also have to look at the type of law involved. It is an easy but erroneous step to assume that laws governing competition and laws governing terms of access to an essential facility are the same. The sole regulator advocate, on this basis, would argue that if there is one TPC, why should there not be one Essential Facilities Access Commission? Such a view is superficially attractive but is basically flawed. This is because it is necessary to distinguish between laws relating to general legal standards against which economic activity is conducted on the one hand and "regulation" on the other. Nearly all creations of economics are also creations of law. Economic activity cannot exist unless there are laws to govern its existence. Without laws, things like money, property, credit and corporations do not exist. In the author's view competition law is, or should be, one of those general laws against the backdrop of which business functions. But these general background laws are quite different from laws which apply only to specific industries and which have all the accoutrements of "licensing", "fair pricing determinations", "certifications" and the making of "orders" - especially when the criteria of evaluation cannot be broadly expressed and are perhaps highly subjective to the decision maker. The activities of an essential facilities regulator are akin to the specific regulation of the latter kind.

A generalised background law is appropriately administered by a body with broad expertise which can be applied to a wide range of business activities. Thus, it is appropriate for the TPC to administer competition law "across the board". But it by no means follows from this that one body should be the sole administrator of industry specific regulatory laws. The two types of laws are fundamentally different and, for this reason, it is quite proper that the administration of each be based on quite different principles.

Given the above philosophical evaluation, it seems to me that diversified decision making, to the extent that it can be effected, is to be encouraged in the case of access regulation. Thus, it is the author's view that, philosophically speaking, industry-specific regulation has much to commend it which a single regulatory authority does not. There is nothing in the Hilmer Committee Report

which necessarily or logically leads to any different conclusion. Further, such a conclusion stands entirely consistently with a view that it is appropriate for there to be but one body, the TPC, to administer the "background" of the Act.

(d) The "Capture Theory" and Regulatory Diversity

The advocates of industry regulation by a single body, however, have a final arrow in their quiver. They argue that industry-specific regulators can become "captured" by the industry they regulate. The "capture theory" is strongly pressed as a reason for central regulation and avoidance of industry specific regulators. Sometimes "capture theory" is asserted as a self-evident truth without any supporting evidence to back the conclusion reached.[126]

It is not possible here to comment in detail on the "capture theory". It is appropriate, however, to put another view. Even if central regulators are not "captured" by the industries they regulate, central regulators undoubtedly have a capacity to be captured by "perceived views" at any relevant time as to what particular theory a regulator should implement. A central regulator will, in all likelihood, subject industry across the board to this "perceived view" without any real appreciation of individual needs. Centralisation, when coupled with the bureaucrat's need for "rationality" of enforcement (or as Hilmer puts it, "the benefits of promoting consistent approaches to access issues across the economy"),[127] can easily give rise to decisions which are catastrophic for the nation as a whole - especially as no opinion on competition policy, whether legal or economic, appears to be immutable. The TPC's views on merger policy constitute a case in point. The 1989 position which the TPC espoused was rejected by it in 1991, without any detailed reasoning, as being "simply inadequate". The intervening "fad", or the "perceived view" which caused this change of approach, was the publication of Harvard academic Professor Michael Porter's book *The Comparative Advantage of Nations*. Porter, who speaks with Apostolic zeal, has gathered a band of disciples for his cause, the percussion section of which is the Australian TPC.[128] So, we now live under a different merger test from that equally

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126 "Capture theories" are easily stated and frequently accepted as gospel in each and every specifically regulated industry. By way of example, the *Australian Financial Review* in its Editorial of 7 January 1994 found no difficulty in relation to the legal profession in propounding, without any back up material, that:

> Regardless of how independent the specialist regulator is supposed to be, experience clearly shows that specialist regulators are easily 'captured' by the interest groups they are supposed to regulate. The regulators become too absorbed with the problems of the people they are regulating, and because of their specialisation, they have too little contact with the wider community. They are too prone to forget that a concession to assist the regulated industry will impose costs on consumers.

It is not the purpose of this article to debate the merits of the above views in relation to the legal profession. What does seem strange to the writer is the way in which specialist regulation is condemned without, in the case in question, any supporting material whatsoever.

127 Note 2 *supra*, p 249. It is interesting to note the Hilmer Committee view that consistency is a virtue whilst, at the same time, commenting extensively that all access issues are different and require different evaluations.

128 The Trade Practices Commission submitted in 1989 to the *Griffiths Committee House of Representatives Enquiry on Monopolies Mergers and Takeovers* that a "dominance test" for merger illegality was appropriate for Australia. The Commission submitted to the 1991 *Cooney Senate Committee of Enquiry on Monopolies and Mergers* that a "substantial lessening of competition test "was appropriate. The dominance test which the

vigorously espoused by the TPC but a few years ago. Not surprisingly, the TPC's viewpoint has been extensively queried by the Australian Industries Commission.[129] No doubt the pendulum will swing yet again in due course. One should take seriously the comments of Professor Barry Hughes of The University of Newcastle when he says:

> All theories come a cropper at some time or other. That's why economics is devoted to fashion.[130]

Hughes should know. He was formerly an economics advisor to the Treasurer, Paul Keating.

The problem of a single regulatory body is that, no matter how skilled or competent it may be, it is almost certain to follow the current economic fashion from time to time. It is, therefore, more than capable of making regulatory decisions which can be disastrous for the nation as a whole. Whatever its other disadvantages, industry-specific regulation does not involve this risk and the chances of such disastrous decisions are thus correspondingly less.

(e) Diversity of Regulatory Authorities Gives Policy Flexibility

One great advantage of industry-specific regulation is it provides greater flexibility than a sole industry regulator. If an industry-specific regulator is convinced that it is wrong, policies can be changed. On the other hand, a single regulator has considerable difficulty in doing this because its policies are imprinted on a number of industries. A changed policy in one industry thus necessitates a changed policy in a number of industries. Accomplishing this change can be a difficult and often disruptive process. There is thus an unacknowledged downside when a single regulator is involved. The virtues of "consistent approaches", so stressed by Hilmer, come at the unstated price of considerable policy inflexibility.

(ii) Pragmatics

Consistent with the above philosophy, one can find ample evidence for the view that there is no "right way" to approach the problem of "essential facilities" access. Hilmer effectively says so in his Report. But there is plenty of other evidence which points to the same conclusion.

In citing the examples hereunder, I do not attempt to adjudicate the issue of "correctness", but rather to point out that there are a variety of approaches to the problem. My opinion, therefore, is that it is better to let differing approaches co-

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Commission espoused but two years earlier was subsequently condemned, without any analysis, as being "simply inadequate". The Commission accepted, virtually without any query or dissent, the views put by Harvard's Michael Porter in his book, *The Competitive Advantage of Nations*, Macmillan Press (1990), even though this text said nothing about Australia or, indeed, about any country with an economy similar to that of Australia. For the writer's evaluation of this episode, the tactics of the Commission and its selective citation of Porter's work see WJ Pengilley, "Merger Policy: Why did the Cooney Committee answer the Trade Practices Commission's Prayers?" (1992) 22 UWALR 300.

129 Australian Industries Commission, *Pro-competitive Regulation*, AGPS (November 1992).

130 "Don't blame me: I'm an Economist" *The Good Weekend* (*Sydney Morning Herald* Magazine), 19 January 1992.

stamp on all Australian industry simply for the sake of pre-conceived universal ideals.

For evaluative purposes, I instance two recent important transport evaluations and the PSA's observations on them.

(a) Shipping: Brazil and the Prices Surveillance Authority

The first example relates to shipping cartels and the *Brazil Panel Report* into these.[131] The Brazil Panel recommended retention of the Shipping Conference Provisions contained in Part X of the Act. It reached this conclusion by focusing on "shippers and shipping services rather than on regulatory agencies or expressions of abstract principles". The Panel believed that it was essential that transactions be permitted to proceed under clear rules. The view taken was that "light handed" regulation could best be achieved by an industry-specific regulator. Importantly, on-going expertise in the industry was needed and this expertise was not available "off the shelf". Part X of the Act was thought appropriate to shipping because it enabled carrier co-operation so that carriers could provide to shippers scheduled, co-ordinated and regular services. Co-operation between shippers enabled them to meet suppliers of ocean carriage on more even terms.

The PSA, however, slammed the Brazil Panel Report. According to the PSA, the Brazil Panel "had missed an opportunity for fundamental reform."[132] The key factor should have been competitive rates, said the PSA. The PSA further condemned the Brazil Panel because "contrary to the Hilmer Committee, the Brazil Panel had proposed a new industry-specific body... as the arbiter of disputes between the lines and shippers".[133] The TPC (whose authorization process had been jettisoned by the Brazil Panel as "predominantly legal and bureaucratic and not commercial", and thus unsuitable as a method of solving industry disputes), also joined the condemnatory chorus. Not surprisingly, Professor Hilmer added his voice to the condemnation.

I do not purport to know who is right in relation to the need for Part X of the Act to be retained. I suspect that there are only various opinions and no one is objectively correct. What is extraordinary, however, is that those with a single regulator interest find it axiomatic that the Brazil Panel should be condemned because the views of that Panel as to who should regulate industry are not the same as Hilmer's. The ideological stance that the nature of regulation is a closed book because Hilmer has said so is a matter which must be of considerable concern. Hilmer has certainly not said nearly enough about the nature of regulation to cause us to don any such blinkers.

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131 *Liner Shipping Cargoes and Conferences: The Part X Review* (a review of Part X of the *Trade Practices Act*), AGPS (1993) (The "Brazil Panel Report").

132 See *Daily Commercial News*, 17 February 1994.

133 *Ibid.*

(b) Airports: The Federal Airports Corporation and The PSA

A second example can be taken from the PSA's Report on the Federal Airports Corporation.[134] The difference of approach between the Federal Airports Corporation ("the FAC") and the PSA was immediately obvious. The FAC took a managerial approach. Its task, it said, was to charge prices on an overall network basis which would lead to the statutorily targeted return. It did not think that specific unit costing was applicable - in particular to less busy aerodromes. This approach was condemned by the PSA as "in conflict with economic efficiency" because "cross subsidising was inefficient" and "economic efficiency requires that each good or service be priced separately".

The FAC, being the sole provider of airport business facilities, used off airport market comparisons to set its business lease rentals. The PSA had "strong reservations regarding the validity of this methodology",[135] though it really suggested no other basis of calculation. The PSA wanted to extend its price monitoring role to business rentals charged by the FAC. It made certain observations on these rentals even though s 56 of the *Federal Airports Corporation Act* excluded such charges form the PSA's charter. The PSA recommended a change to the Act to extend its scope of price monitoring. The Report was thus an occasion for the PSA to attempt to widen its regulatory bailiwick.

The FAC believed that runway congestion charges should not be fully recovered. The PSA thought that congestion charges (which are not, of course, charges incurred by the FAC at all but charges incurred by airlines and airline passengers) should be recovered as a matter of "efficient pricing principles" and also to lay down "administrative rules in determining access to the runway". The PSA saw price as the method of resolving runway congestion whereas the FAC had other criteria which it also utilised. The PSA's conclusions on specific unit costing and congestion charges were reached despite the fact that the International Air Transport Association submitted that stretching an "ability to pay" concept to landing charges could contravene the Chicago Convention which obliges all signatories to provide airport facilities to others on a non-discriminatory basis. Also "user pays" peak pricing would, according to a NSW Government submission, have severely impacted on the regional economy of NSW, rural airlines and their passengers. The PSA simply said in relation to this that regional airlines had not adequately considered the means available of adapting to increased

134 Prices Surveillance Authority, *Inquiry into the Aeronautical and Non-Aeronautical Charges of the Federal Airports Corporation*, AGPS (17 August 1993).

135 The PSA expressed reservations because, amongst other reasons, the FAC had market power in relation to the grant of airport business concessions. But, of course, there is some degree of market power in any commercial site - for example, a large regional shopping centre may be just as attractive to a business person as any airport site. The position is, of course, quite different in the case of airport landing charges and the like. No doubt, for these reasons, business concession rates are not subject to PSA surveillance whereas "aeronautical charges" are. Undaunted by this statutory restriction, the PSA made observations on the FAC's business charges and recommended changes to the *Federal Airports Corporation Act* so that the PSA would also be able to monitor business rentals charged by the FAC.

peak landing fees and that inefficient pricing practices should not be continued. Given that congestion charges are not charges incurred by the FAC but by airlines and passengers, one wonders as to which is the more acceptable and realistic policy as to how an airport should be run for the benefit of air travellers as a whole.

The fact that the PSA views have equally plausible and respectable alternatives, other than those of the FAC itself, is illustrated by an FAC commissioned study of Adelaide, Hobart and Bankstown Airports undertaken by the National Institute of Economic and Industries Research ("NIEIR"). NIEIR concluded that, if the FAC's airport cross subsidisation policy were eliminated to accord with PSA views, landing charges and other services would increase by 122 per cent in Adelaide, 194 per cent in Hobart and 1,329 per cent at Bankstown.[136]

Again, it is not the author's intention to adjudicate upon whether the PSA, the FAC or NIEIR is correct on the respective issues upon which each speaks. Suffice it to say that regulation according to PSA efficiency concepts may well be considered by many not to be the way to run an airport system and that all the PSA would do, if its Report were implemented, would be to increase aeronautical charges for no real purpose. This at least is the reaction of Mr WA Swingler, Managing Director of FAC who reacted to the PSA Report by saying that:

> The PSA seems to take every opportunity to give the Corporation advice. My advice to the PSA when dealing with airport matters is to confine itself to its statutory responsibilities and when it becomes appropriate to make public statements to ensure that they are balanced and do not add to the conflicts and misconceptions, which are imposing increasing costs on the industry. In short, the PSA could assist in reducing airport charges instead of helping push them up.[137]

(iii) What Do the Regulators Say About Each Other?

If there were any entity which should clearly be the nation's "essential facilities" regulator, one would think there would be total agreement as to who this should be. In its submission to the Hilmer Committee, however, the TPC stoutly asserted that the PSA had regulatory experience which was "limited, particularly in relation to public utility pricing".[138] The TPC thought, not surprisingly, that there should be one national access regulator which should be the TPC. The PSA in its submission to the Hilmer Committee equally strongly asserted that there should be one national regulator which, not surprisingly, should be the PSA. The PSA thought that the TPC had "no past experience or appropriate skills for the pricing task". There would, asserted the PSA, "be a loss of focus and expertise if some aspects of prices policy were to be undertaken by the TPC rather than the PSA".[139] Hilmer, rather

136 "Fares up with airport changes, says report", *Australian Financial Review*, 16 August 1993, p 7. Dr Cousens, PSA Chairman attacked the NIEIR study as it was "not a proper representation" of the effect of the PSA's views: *Australian Financial Review*, 17 August 1993.

137 *Travel and Tourism Review*, Jan/Feb 1994, p 4.

138 Trade Practices Commission, *Submission to the National Review Committee* , AGPS (April 1993) pp 57-8.

139 See speech by Dr Cousens, PSA Chairman to Australian Chamber of Commerce reported in The *Australian Financial Review*, 5 May 1993. See also PSA, *Submission to the Committee of National Competition Review*, AGPS (24 February 1993). The PSA advocated the creation of a Monopolies Commission with a wide ranging brief. It saw such a body as a successor to its role and a body into which it would be merged.

than believing each body's views about the incompetence of the other and opting for a number of specific industry regulators, decided to recommend that the TPC and the PSA be joined into an Australian Competition Commission.

To me, the only feasible justification for a TPC/PSA merger is a misplaced application of the mathematical principle that if you multiply two regulatory minuses together you get a regulatory plus. Judging by the criticism each body makes of the other on the face of the lobbying record, however, the more appropriate result may well be thought to be that obtained by the addition of the two minuses, which, of course merely doubles the negativity involved. If one believes both the TPC and the PSA, and no doubt each body urges that we should believe it, the result of a TPC/PSA merger can only be a magnification of the deficiencies which, to date, each body has identified in the other.

VIII. AN ALTERNATIVE TO HILMER

A. The Principles of an Alternative Solution

There is no point in being critical unless one can be constructively so. Therefore, I offer an alternative suggestion to that made by the Hilmer Committee. In making this suggestion, the following guiding principles are adopted:

- that there should be an attempt legislatively to define when access to a facility is to be granted; and
- that, as far as possible, an "essential facilities" access remedy should be judicial. Hence, the first step in any proceedings for access to an essential facility should be the obtaining of a court order for such access.

The advantages of a judicial remedy - at least in the first instance - do not need further elaboration. They have been set out at length earlier in this article and are clearly articulated in the Hilmer Report.

An appropriate starting point in any regulatory access regime should, therefore, be that any person, including any government, should be able to approach the court for an access order. The grounds upon which access can be ordered should be legislatively prescribed. That the triggering of an access enquiry should be possible on the motion only of the Commonwealth Government or a State or Territory Government, as Hilmer suggests, seems to me quite wrong.

Specific regulation should be utilised only if a court itself is unable to supervise a remedy. If, therefore, a court believes, for example, it can grant access on "non discriminatory terms", then the court should be able to make such an order.

The problem becomes complicated when a court believes that access should be ordered but does not believe it can supervise an appropriate access order. The reasons for the court reaching this conclusion could be an inability to specify the terms of the order with adequate certainty, lack of court expertise or the court's view that an access order would place an undue burden on it by requiring consistent "hands on" involvement. In such cases a regulator is needed in order to supervise access. It seems here that we can well learn from industry regulation in

the primary industry field as this may well be the most similar practical regulatory experience we have. I do not suggest that primary industry regulation is aimed at pro-competitive activity. Nonetheless, it gives valuable lessons and experience, at a practical level, as to how specific industry regulation can operate.[140]

B. Some Specific Suggestions as to an Alternative Solution

The suggestions for an alternative access system are phrased in somewhat general terms. However this is, of course, all that has been done by the Hilmer Committee itself. I regard the suggestions made below simply as blocks to be built upon rather than as being a final product.

The applicable suggested principles advocated for an "essential facilities" access scheme are set out in Table II hereunder.

TABLE II
SUGGESTED PRINCIPLES IN RELATION TO "ESSENTIAL FACILITIES"

1. ESSENTIAL FACILITIES AND ACCESS

(1) Legislatively Define What An "Essential Facility" Is

There must be some legislative definition of an "essential facility". Only in this way can some basic certainty be put into the whole process. Without certainty, significant investment decisions are likely to be curtailed. In essence, there does not appear to be anything to which objection can be taken in the American case law. Hilmer essentially adopts these criteria. It is simply a matter of enacting these fundamentally agreed criteria law.

Thus an "essential facility" could be defined as having the following two major characteristics:

- the facility is one to which access is essential, and not merely desirable, to a party wishing to enter a market in competition with the owner or owners of the facility; and
- the facility is one which it would not be economically feasible to duplicate.

(2) Legislatively State When Denial Of Access To An "Essential Facility" Is Justified

Based on precedent to date, denial of access to an essential facility would be permitted if, amongst other things:

- a grant of access would be likely to result in a diminution of product quality;

140 The applicable NSW legislation is the *Marketing of Primary Products Act* 1983 (NSW).

- a grant of access would be likely to result in a lack of capacity available to the owner of the facility or a lack of capacity to such owner in the reasonably foreseeable future;
- some other valid business reason exists for a denial of access and such business reason is demonstrably unrelated to the exclusion of a competitor from using the facility.

(3) Legislatively State When Access To An "Essential Facility" Is Permitted

In principle, access to an essential facility would be permitted if the facility involved is "essential" (as in (1) above) and denial is not justified within the principles set out in (2) above.

(4) Provide For Review Of Access Orders

Provision should be made for the review of access orders and, if appropriate, for termination of them on the ground, amongst other possible grounds, that the owner of the facility requires the capacity of the facility and, for capacity reasons, access should no longer be granted.

2. THE ACCESS ORDER WHICH MAY BE MADE

(1) If access to an essential facility is to be permitted, then such access should be on reasonable terms.

(2) A court should be permitted to make an access order without delegating the question of appropriate access terms to any regulatory access authority provided that:

(i) the order is one which provides for non-discriminatory access on terms already granted to another party and the court believes that it has the ability to supervise such an order by way of contempt proceedings in the event of a breach of it; or

(ii) the order is one which is agreed between the parties and, in the view of the court is fair and reasonable in all the circumstances and can be supervised by the court by way of contempt proceedings for a breach of it; or

(iii) there is such other order as the court believes can be made by it and which the court believes it can supervise by way of contempt proceedings for breach of it.

Supplementary provisions may be necessary to implement the above generality. For example, legislation could set out that an order can be supervised by the court by contempt proceedings only if the order can be clearly expressed on its face and does not require constant application to, or supervision by, the court.

Non-discriminatory access orders are likely, in the fullness of time, to be the orders most frequently sought. These are the types of orders which courts can both make and supervise. Given the above, it is likely that a considerable number of "essential facilities" cases would

be decided by the courts without resort to any need for specific regulatory activity of any kind.

(3) If the court believes that an access order to an essential facility should be made but it is unable to make an order within (2) above, the court may:
   (i) delegate the details of an access order to any regulatory entity charged with the regulation of prices and conditions of trading in the industry to which the facility relates; or
   (ii) declare that the order should be made subject to a detailed regulatory access order to be determined by a regulatory access authority and advise the Minister accordingly.

3. REGULATORY ACCESS AUTHORITIES

The role of regulatory access authorities should be set out. In essence it would be envisaged that such authorities would, when established, have certain general powers. These would relate to the powers to conduct enquiries and, subject to the consent of the Minister, to establish access criteria in the particular industry. The Minister might also be given the power to lay down by regulation certain matters applicable to accessing the facilities of particular industries.

The access authority would have a supervisory role. A criterion of access must be that the facility owner receive fair compensation for any access given. If this is not done, then access to the facility may not be possible because such access may constitute the appropriation of property on other than "just terms" and, for this reason, be unconstitutional.[141] Regardless of this, however, "just terms" are of the essence of access conditions.

For reasons stated throughout this article, I believe that there should be industry-specific regulation. This is so that diversity of decision making is retained in the regulatory process. Presumably, appropriate legislation could provide, as does primary industry regulatory legislation, for consolidation or amalgamation of authorities in order to suit work load requirements. This should overcome any suggestion that, unless there is one overall regulatory authority, industry-specific regulators will have nothing to do. The number of access regulators is likely to be small. But their "hands on" function is likely to be continuous. One overall authority could be responsible for any smaller access orders or smaller access orders could be administered by an already existing authority.

141 The Commonwealth Constitution s 51(xxxi) provides that the Commonwealth can acquire property only on "just terms". It can be argued that an access order is unconstitutional if no compensation is payable. However, the whole concept of reasonable access envisages "just terms" being provided to the facility holder and provision should exist for the assessment of these terms, whatever may be the Constitutional position.

C. No Doubt Refinement to the Above is Needed

No doubt the concepts in Table II above need refinement. They are presented purely as a skeleton from which to build a functional system. The suggested principles for the structure and role of regulatory access authorities are those used in State and Federal primary industry regulation. It is this regulatory precedent which seems to be the one most relevant to the present discussion.

As stated, in due course the majority of access orders sought are likely to be for "non-discriminatory access". If the suggested proposals were to be implemented, the work of specific regulatory authorities, in the long term, is likely to be little and an access regime may well be largely court determined and administered. This is consistent with competition law where specific regulation is a last option and is one to be utilised only if other options are, for institutional or competency based reasons, unsatisfactory.

IX. CONCLUSIONS: "A RECAPITULATION BACK AGAIN TO WHAT I SAID PREVIOUSLY"[142]

The suggested arrangements set out above appear to have everything which an "essential facilities" access arrangement needs. They encompass everything the Hilmer Committee seems to desire but do so in a far more direct way. If, contrary to the strong views presented in this article, the concept of separate regulatory authorities is not accepted, then the proposals can be adapted to a single regulatory authority.

The conclusions were stated at the commencement of this article and, in the author's opinion, the arguments advanced throughout the article justify the conclusions reached. I believe that the suggested provisions set out above implement a simple "essential facilities" access scheme which does away with the complexity, political influence and lack both of legislative certainty and judicial objectivity contained in the Hilmer Committee recommendations. Ultimately, if a highly political scheme of the nature foreshadowed in the Hilmer Committee Report is implemented, the Committee will have effected that which it avowedly said it wanted not to do, ie it will have discouraged investment in "essential facilities" because of the impossibility, at the time of investment, of ever knowing what is likely to happen to such facilities in the future.

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142 Rex ("Moose") Mossop: NSW Rugby League Football commentator, national icon and master tautologist. Compared with the Moose, the attempts of lawyers ("give devise and bequeath"; "null and void" or even "null and void and of no effect whatsoever") are a mere shadow of tautological excellence.