

# COMPETITION LAW, ADJUDICATION AND THE HIGH COURT

KATHRYN McMAHON\*

*[This article explores the statutory interpretative practices and debates in recent competition law cases considered by the High Court. While these debates appear to centre on 'textual/literal' versus 'contextual/purposive' interpretative practices, further examination reveals that these theoretical differences do not adequately predict outcomes. Instead, these practices often mask undisclosed policy decisions that give preference to particular economic and political outcomes concerning the role of the state and the market over other desirable goals. This raises important practical and jurisprudential issues concerning legislative supremacy and judicial accountability, which have significance that extends beyond competition law adjudication.]*

## CONTENTS

I	Introduction .....	782
II	The Debate in Context: <i>Visy</i> .....	784
	A The Approach of Kirby J .....	786
	B The Majority Joint Judgment .....	788
III	The Literal Interpretation of Competition Statutes.....	789
	A 'Textualism' and Competition Statutes .....	789
	B From 'Contract' to 'Market' .....	793
	C Interpretation as an 'Attack with Scissors' .....	798
IV	Legislative Purpose, Economic Theory and Foreign Judgments .....	801
	A The Goals of Competition Law .....	801
	B Economic Analysis as Authority .....	805
	C 'Judicial or Other Glosses' .....	809
V	<i>Boral</i> .....	811
	A Cost-Based Tests and Legislative Purpose .....	813
	B The Recoupment Approach and Judicial Precedent.....	815
	C Choice of Economic Theory .....	820
	D The Australian Market Context.....	823
VI	<i>Rural Press</i> .....	825
VII	<i>NT Power Generation</i> .....	828
VIII	Conclusion.....	836

## I INTRODUCTION

Since 2001, there have been more decisions of the High Court of Australia dealing with competition law than in the previous 27-year history of the *Trade Practices Act 1974* (Cth) ('TPA').<sup>1</sup> These decisions have been the subject of

\* LLB (UNSW), BEc, LLM, PhD (Syd); Associate Professor, School of Law, The University of Warwick. I would like to thank David Fraser, the two anonymous referees and the Editorial Board of the *Review*, for their helpful comments and suggestions.

<sup>1</sup> See, eg, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 ('*Melway*'); *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 ('*Boral*'); *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR

detailed analyses of their contribution to the law's treatment of a range of anti-competitive conduct.<sup>2</sup> These judgments have also been notable for a fascinating and strident debate between High Court judges on a potentially more important issue to competition law, but one which has received little academic attention. This debate centres on what Kirby J describes as 'the proper interpretation and application of provisions of the *Trade Practices Act 1974*'.<sup>3</sup> While the judgments contain multiple and complex approaches to statutory interpretation, they can be broadly characterised as either 'textual/literal' or 'contextual/purposive'. These different approaches are mirrored in a debate which has pitted the views of Kirby J against those of other members of the High Court. While dissenting judgments by Kirby J are not uncommon,<sup>4</sup> it is the force with which these opinions are offered that is extraordinary. Two examples embody the scope and nature of this judicial debate. In the first, Kirby J concludes his judgment in *Visy* with the observation that '[o]ut of politeness, I would not have said this but for the criticism addressed to my endeavour, to which I adhere.'<sup>5</sup> In the second instance, and with similar directness, Kirby J in *Rural Press* stated:

This is the third recent decision of this Court ... in which a majority has adopted an unduly narrow view of s 46 of the Act ...

In my view, the approach taken by the majority is insufficiently attentive to the object of the Act to protect and uphold market competition ... It is unrealistic, bordering on ethereal ... The outcome cripples the effectiveness of s 46 of the Act ... Judicial lightning strikes thrice ... Effective anti-competitive threats can be made without the redress which s 46 appears to promise. Once again I dissent.<sup>6</sup>

Judicial debates about statutory and constitutional interpretation occur frequently in the current High Court.<sup>7</sup> As in the case of debates in other jurisdic-

563 ('*South Sydney Football Club*'); *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 ('*Visy*'); *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 ('*Rural Press*'); *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 ('*NT Power Generation*').

<sup>2</sup> See, eg, Stephen Corones, 'Section 46 of the *Trade Practices Act: Boral*, the Dawson Committee and the Protection of Small Business' (2003) 31 *Australian Business Law Review* 210; Geoff Edwards, 'The Hole in the Section 46 Net: The *Boral* Case, Recoupment Analysis, the Problem of Predation and What To Do about It' (2003) 31 *Australian Business Law Review* 151; George A Hay, '*Boral*-Free at Last' (2003) 10 *Competition & Consumer Law Journal* 323; Rachel Trindade and Rhonda Smith, 'The High Court on *Boral*: A Return to the Past?' (2003) 10 *Competition & Consumer Law Journal* 336; Brenda Marshall, 'The Relevance of a Legitimate Rationale under s 46 of the *Trade Practices Act*' (2003) 8 *Deakin Law Review* 49; Rhonda Smith and David Round, 'Section 46: A Strategic Analysis of *Boral*' (2002) 30 *Australian Business Law Review* 202; Stephen Corones, 'The Characterisation of Conduct under Section 46 of the *Trade Practices Act*' (2002) 30 *Australian Business Law Review* 409.

<sup>3</sup> *Visy* (2003) 216 CLR 1, 13.

<sup>4</sup> Michael Pelly, 'Kirby, the Outsider on the Bench', *The Weekend Sydney Morning Herald* (Sydney), 21–22 February 2004, 10; cf Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724.

<sup>5</sup> (2003) 216 CLR 1, 26.

<sup>6</sup> (2003) 216 CLR 53, 105.

<sup>7</sup> See, eg, *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, where Kirby J disagreed with what he regarded as a 'too literal' interpretation by the majority of the Court, comprising McHugh, Gummow, Hayne and Heydon JJ, of the *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW). At 265 (citations omitted), Kirby J stated:

tions, they often mask fierce ideological differences regarding the judicial function in a liberal democracy. In a competition law context, these debates are of fundamental importance because they problematise the justiciability of the competition provisions of the *TPA* and the *TPA*'s role in the regulation of economic activity. In practice, competition law is often understood as primarily concerned with the achievement of 'open-ended' and 'result-oriented' purposes — such as 'competition in a market', 'efficiency' and 'consumer welfare' — in complex economic situations where inferences about illegal conduct must be drawn from facts on the basis of often conflicting and evolving economic theories. A rigid adherence to 'textualism' and the 'plain meaning' of statutory words may result in the defeat of these open-ended legislative purposes. At the same time, others argue that deference to the achievement of such open-ended purposes may too readily result in a misconstruction of the literal and plain meaning of statutory words, thereby raising questions of the nature of the judicial role and of the rule of law in a parliamentary democracy. Both approaches, 'literal' and 'purposive', can also mask undisclosed policy decisions to prefer one set of economic and political outcomes concerning the role of the state and the market over other desirable and plausible goals.

The purpose of this article is not to determine a correct approach to the interpretation of competition statutes. Rather, this article will explore the debate in recent High Court decisions in an attempt to make more explicit the policy choices underlying the modes of interpretation adopted. It will become clear, on closer inspection, that approaches frequently described as opposing actually invoke similar reasoning and interpretative models. At the same time, judges will sometimes invoke entirely inconsistent interpretative models in apparently 'like cases'. These inconsistencies can lead to a confused understanding both of the role of law in the regulation of economic behaviour and of the basic jurisprudential understanding that like cases should be treated alike.

## II THE DEBATE IN CONTEXT: *VISY*

The High Court decision in *Visy* provides a useful starting point for a more detailed examination of the implications of these interpretative differences.

Visy Paper Pty Ltd ('Visy') was a vertically integrated business involved in the collection of wastepaper and cardboard, which it also recycled to produce paper and cardboard. Northern Pacific Paper Pty Ltd ('NPP') was a competitor in the collection and acquisition of wastepaper which it sold to recycling firms, including Visy. Visy proposed to enter into an agreement with NPP whereby NPP

Because the approach taken by this Court to problems of statutory interpretation is influential upon all Australian courts, we should be on guard against any temptation to return to the dark days of literalism. Above all, this Court should strive to be consistent. In all cases, but especially in legislation enacted to achieve important social objectives, the purposive approach is the correct one to follow.

For a discussion of the debate concerning constitutional interpretation in the High Court, see Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1; Jeffrey Goldsworthy, 'Interpreting the Constitution in Its Second Century' (2000) 24 *Melbourne University Law Review* 27.

would supply waste to Visy, but would be prevented from acquiring goods and supplying wastepaper services to Visy's customers.<sup>8</sup>

The Australian Competition and Consumer Commission ('ACCC') instituted proceedings against Visy, claiming that it had attempted to make a contract containing an 'exclusionary provision' as defined in *TPA* s 4D, contrary to *TPA* ss 45(2) and 45(2)(a)(i). Section 4D(1) defines an 'exclusionary provision' as:

a provision of a contract, arrangement or understanding ... made [or proposed] ... between persons any 2 or more of whom are competitive with each other; and the provision has the [substantial] purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons ...

At first instance, Sackville J dismissed the ACCC action.<sup>9</sup> On appeal, a majority of the Full Federal Court ruled in favour of the ACCC.<sup>10</sup> Visy's appeal to the High Court was dismissed.<sup>11</sup> However, the majority joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ did so for largely different reasons from those of Kirby J, who delivered a separate concurring judgment.<sup>12</sup> The main differences in their approaches turned on statutory interpretation.

Breach of *TPA* s 4D is a per se offence where there is no requirement to establish a 'substantial lessening of competition'. However, on appeal the ACCC claimed that the conduct in question fell under both ss 45 and 47 of the *TPA* and due to the operation of s 45(6) (the 'overlap' provision), the conduct was removed from consideration under s 45.

Section 47(1) prohibits 'exclusive dealing', which is defined in s 47(2)–(9). Section 47(10) provides that, for conduct to contravene s 47(1), it must also have 'the purpose, or likely effect, of substantially lessening competition'.

The central issue in the case was the relationship between the statutory provisions governing an 'exclusionary provision' in s 45 (as defined in s 4D) and those governing 'exclusive dealing' in s 47. If the conduct was characterised under the former section, it would amount to a per se breach. If under the latter, the conduct would only amount to a breach if it had the purpose of, or resulted in, a substantial lessening of competition. The ACCC had already conceded at trial that the conduct could not be shown to have had a purpose, or the effect, of substantially lessening competition.<sup>13</sup>

The crucial provision was s 45(6) of the *TPA*, which is intended to prevent overlap between ss 45 and 47 by removing from consideration under s 45 an 'exclusionary provision' (conduct as defined in s 4D) which also amounts to

<sup>8</sup> *Visy* (2003) 216 CLR 1, 7–8 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>9</sup> *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731 ('*Visy First Instance*').

<sup>10</sup> *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2001) 112 FCR 37 ('*Visy Federal Court Appeal*'). Hill and North JJ comprised the majority, Conti J dissented.

<sup>11</sup> *Visy* (2003) 216 CLR 1.

<sup>12</sup> The sole dissenting judgment was delivered by Callinan J.

<sup>13</sup> *Visy First Instance* (2000) 186 ALR 731, 746 (Sackville J); *Visy* (2003) 216 CLR 1, 8 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

‘exclusive dealing’ under s 47<sup>14</sup> or would do so but for the absence of a substantial lessening of competition.<sup>15</sup>

The relevant ‘exclusive dealing’ provision was s 47(4), which provides that a corporation will be in breach of s 47(1) if it acquires goods or services on condition that the person from whom they are acquired will not *supply* (as distinct from *acquire*) goods or services to a particular class of persons. In contrast, an ‘exclusionary provision’, as defined in s 4D, deals with conditions that restrict both supply and acquisition.

Visy argued that the conduct had a double characterisation or dual significance and that s 45(6) removed it from consideration under s 45. The wastepaper collection business involved both the provision of wastepaper services and the acquisition of goods (wastepaper), particularly in instances where the collector paid to acquire the wastepaper. The provisions of the contract proposed by Visy restricted NPP’s freedom to supply services to others (wastepaper collection) and also restricted its freedom to acquire goods (wastepaper) from them.

The majority joint judgment of the High Court dealt with the issue merely as a matter of characterisation of the conduct in question within the literal meaning of the statutory words. Their Honours held that as a matter of formal construction, s 47(4) applied to restrictions on supplying services but did not apply to restrictions on *acquiring* goods. The latter conduct must therefore be dealt with under s 4D, as s 45(6) removed it from consideration under s 47(4).<sup>16</sup>

#### A *The Approach of Kirby J*

Kirby J agreed that the appeal should be dismissed but differed in his characterisation of the agreement and the interpretation of the *TPA*. His Honour stated that the provisions were not intended to ‘work in a mechanical or artificial way’<sup>17</sup> and that it was important to avoid semantics ‘by identifying the legislative policy behind the applicable sections’.<sup>18</sup> Kirby J argued that it was necessary to characterise the agreements as either a ‘horizontal’ or ‘vertical’ restraint in order to better understand their competitive consequences.<sup>19</sup> His Honour argued that ‘exclusionary provisions’ were horizontal agreements which restricted output with effects substantially equivalent to the elimination of price competi-

<sup>14</sup> Section 45(6) provides that:

The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that [it] contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) ... constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

(a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) ... contravene, section 47 ...

<sup>15</sup> *TPA* s 47(10).

<sup>16</sup> *Visy* (2003) 216 CLR 1, 6–7 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>17</sup> *Ibid* 19.

<sup>18</sup> *Ibid* 20.

<sup>19</sup> *Ibid* 15–16. For a discussion of horizontal and vertical agreements in competition law, see generally Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (1999) chs 6–7.

tion. Such arrangements were ‘inherently harmful to the competitive process’ and ‘without legitimate justification’.<sup>20</sup>

His Honour argued that legislative policy accords ‘greater vigilance towards, and scrutiny of, horizontal arrangements among competitors’<sup>21</sup> than non-price vertical restraints, such as exclusive dealing, which are not always anti-competitive. Kirby J believed that the *TPA* similarly makes this horizontal/vertical distinction in its different treatment of conduct under ss 45 and 47.

His Honour argued that the crucial question was whether the ‘non-competition’ clauses were primarily referable to the horizontal relationship between the two corporations as competitors, rather than to their vertical supplier–purchaser relationship.<sup>22</sup> Once Kirby J had concluded that the agreement could be characterised as horizontal, he applied s 4D. Thus, s 45(6) did not operate to allow the agreement to be dealt with under s 47.

His Honour made clear that this purposive approach was not only to be invoked when there was ‘ambiguity’.<sup>23</sup> It should also be used in circumstances of poor legislative drafting. That is, where the legislative words ‘constitute a less than perfect example of the drafter’s art’<sup>24</sup> and are ‘neither clear nor elegant’,<sup>25</sup> even if this falls short of ambiguity.<sup>26</sup>

Kirby J pointed out that:

It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the *TPA* that achieves the apparent purposes of that Act ... Keeping such purposes in mind helps to shine the light essential to finding one’s way through the maze created by the statutory language. Even then, there is a substantial danger of losing one’s way in the encircling gloom.<sup>27</sup>

Kirby J suggested that there would be no need to resort to the extra-legal concepts if the statutory words were ‘clear and elegant’.<sup>28</sup> This may be contrasted with the majority joint judgment’s assertion that plain or literal meanings could be gleaned and applied.

<sup>20</sup> *Visy* (2003) 216 CLR 1, 21.

<sup>21</sup> *Ibid* 24.

<sup>22</sup> *Ibid* 23.

<sup>23</sup> *Ibid* 24–5.

<sup>24</sup> *Ibid* 20.

<sup>25</sup> *Ibid* 25.

<sup>26</sup> *Ibid*. Cf *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321, where Mason and Wilson JJ stated that departing from the literal interpretation ‘extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.’

<sup>27</sup> *Visy* (2003) 216 CLR 1, 24.

<sup>28</sup> *Ibid*.

Kirby J noted that this purposive approach had now been generally adopted by the High Court as its usual approach to problems of statutory construction.<sup>29</sup> In *CIC Insurance*, one of the cases cited by Kirby J, the High Court had stated that:

the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy.<sup>30</sup>

For Kirby J, the ‘plain and literal’ reading preferred by the majority joint judgment had little meaning and utility for the judicial function if it were divorced from ‘context’ and ‘purpose’.

### B *The Majority Joint Judgment*

The majority joint judgment cited several cases where the High Court, and Kirby J in particular, had endorsed the literal approach they adopted.<sup>31</sup> For example, in *Victorian WorkCover*, Kirby J had noted that ‘[t]here is a modern tendency to concentrate on judicial exposition of legal concepts in preference to analysis of statutory provisions that contain the applicable law. This tendency should be resisted.’<sup>32</sup>

<sup>29</sup> Ibid 20. His Honour referred to the following cases: *Bropho v Western Australia* (1990) 171 CLR 1, 20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (‘*CIC Insurance*’); *Eastman v DPP (ACT)* (2003) 214 CLR 318, 365–6 (Heydon J). See also *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>30</sup> (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted). Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (citations omitted), where McHugh, Gummow, Kirby and Hayne JJ stated:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. In *Commissioner for Railways (NSW) v Agalinos* [(1955) 92 CLR 390, 397], Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

<sup>31</sup> *Visy* (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ). The decisions cited were: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 89 (Kirby J); *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520, 545 (Kirby J) (‘*Victorian WorkCover*’); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 111–12 (Kirby J).

<sup>32</sup> (2001) 207 CLR 520, 545 (citations omitted); cf *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR 411, 460 (citations omitted), where Kirby J stated with regard to statutory construction and purposive interpretation that:

First, it is necessary to recall a basic point already alluded to. The duty of this Court is ultimately to the Act. It is the Act that states the applicable law.

...

It is reasonable that parties should seek predictability in the operation of statutory language, drawn from judicial approaches to that language in the past. But in the end the duty of courts is owed not to judicial synonyms or lawyers’ metaphors used to explain the language of the statutes. The duty is to the statutory language itself.

The majority joint judgment argued that to adopt the horizontal/vertical classification:

confuses the task of construing the Act's provisions. It is necessary to pay attention to the text of applicable statutes in preference to judicial or other glosses on that language. Not only does adopting these terms distract attention from the language of the Act, it does so by introducing terms which are, so it seems, intended to convey value or other judgments about the social or economic consequences that are assumed or expected to follow from the making of or giving effect to the arrangement to which one of these descriptions is applied.<sup>33</sup>

Gleeson CJ, McHugh, Gummow and Hayne JJ added that to invoke the horizontal/vertical classification was to invite the adoption of such terms from the 'wholly different statutory context of United States antitrust law',<sup>34</sup> where they are 'jargon' with no agreed or fixed meaning.<sup>35</sup>

The debate in *Visy* cannot simply be characterised as one between 'literal' versus 'purposive' interpretations. Instead, it raises more complex ideas about the role of the judiciary and the intention of the legislature in competition law cases. In the Parts that follow, the implications of these ideas for competition law will be examined, drawing on other recent High Court decisions.

### III THE LITERAL INTERPRETATION OF COMPETITION STATUTES

#### A 'Textualism' and Competition Statutes

The literal interpretation by the majority in *Visy* corresponds to a 'textualist' approach to statutory interpretation which has been prominent in the US, particularly in the case of constitutional interpretation. Proponents aim to construe words in their ordinary sense,<sup>36</sup> taking account of specialised conventions of statutory interpretation, semantic contexts and linguistic practices pertaining to law.<sup>37</sup> They believe that the text is the best evidence of what is enacted, rather than notions of legislative intent or history which may be unreliable or conflicting and ultimately undemocratic, in that they may not represent the views of the entire legislature.<sup>38</sup> As one of the chief proponents of textualism, Scalia J states that '[t]he text is the law, and it is the text that must be

<sup>33</sup> *Visy* (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ) (citations omitted).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* 11.

<sup>36</sup> See generally Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (1997); Justice Frank H Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law and Public Policy* 61; William N Eskridge Jr, 'The New Textualism' (1990) 37 *UCLA Law Review* 621. There is a suggestion that the Australian High Court has adopted something similar to Scalia's textualist approach to interpretation: see David Tucker, 'Textualism: An Australian Evaluation of the Debate between Professor Ronald Dworkin and Justice Antonin Scalia' (1999) 21 *Sydney Law Review* 22.

<sup>37</sup> John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70, 81; cf Jonathan T Molot, 'The Rise and Fall of Textualism' (2006) 106 *Columbia Law Review* 1.

<sup>38</sup> See especially Justice Frank H Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harvard Journal of Law and Public Policy* 59.

observed.<sup>39</sup> Another leading textualist, Easterbrook J, stated that '[s]tatutes are law, not evidence of law'.<sup>40</sup> Textualism is also linked to self-understandings of the legal profession — namely, that legal reasoning is a craft and a distinct discipline.<sup>41</sup>

The primary difficulty with the textual/literalist approach adopted in the majority joint judgment in *Visy* is that, in competition law, rarely can the proscribed conduct be discerned from a literal interpretation of the statutory words. In identifying the operation to be given to *TPA* s 45(6), the majority joint judgment stated that it was not useful to adopt the description, favoured by Kirby J, of the relevant arrangement as 'horizontal' or 'vertical'.<sup>42</sup> What the majority joint judgment failed to recognise is that the statutory words they construed — in *TPA* ss 4D, 47 and 45(6) — can be said to offer no greater 'agreed or fixed meanings' than the words they rejected.

A literal interpretation of competition statutes arguably collapses because the meaning of words used in the statute is often deeply embedded in economic concepts such as the notion of a 'substantially lessening of competition'.<sup>43</sup> Statutory words alone cannot encapsulate fully the myriad of economic conduct under analysis. The textualist's preference for deciphering obscure legal terms of art or resorting to the 'lexicographical' meaning<sup>44</sup> can only be of marginal assistance. As the High Court had already pointed out in 1989 in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*, the *TPA*'s objectives are 'economic and not moral ones'.<sup>45</sup> Deane J stated that the interpretation of statutory words such as 'market', which appears in *TPA* s 4E, involves 'value judgments about which there is some room for legitimate difference of opinion ... The outer limits ... of a particular market are likely to be blurred'.<sup>46</sup> More recently, McHugh J noted in *Boral* that the interpretation of the word 'market'

must be determined in accordance with economic principles. The terms of the Act have economic content and their application to the facts of a case combines legal and economic analysis. Their effect can only be understood if economic theory and writings are considered.<sup>47</sup>

The view of McHugh J, who was a member of the majority in *Visy*, is a clear indication that courts do not always adopt a literal interpretation of statutes. The failure to acknowledge that differing interpretations are applied or the justification for their adoption results in confusion.<sup>48</sup>

<sup>39</sup> Scalia, above n 36, 22.

<sup>40</sup> *Re Sinclair*, 870 F 2d 1340, 1343 (7<sup>th</sup> Cir, 1989).

<sup>41</sup> See generally Tucker, above n 36.

<sup>42</sup> *Visy* (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>43</sup> See, eg, *TPA* ss 45(1), 47(10), 50(1).

<sup>44</sup> See Manning, above n 37, 81–3.

<sup>45</sup> (1989) 167 CLR 177, 194 (Deane J) ('*QLD Wire*').

<sup>46</sup> *Ibid* 196. Cf the Trade Practices Tribunal in *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169, 189 (Woodward P, Members Shipton and Brunt) ('*QCMA*'), where the Tribunal stated that '[c]ompetition is a process rather than a situation'.

<sup>47</sup> (2003) 215 CLR 374, 454 (citations omitted). See below Part V for further discussion of *Boral*.

<sup>48</sup> Similar interpretative problems are apparent in the US antitrust decisions. See Daniel A Farber and Brett H McDonnell, "'Is There a Text in the Class?'" The Conflict between Textualism and Antitrust' (2005) 14 *Journal of Contemporary Legal Issues* 619, 664–5.

The application of s 46, the misuse of market power provision, for example, requires the court to draw difficult distinctions between competitive and predatory (or abusive) conduct.<sup>49</sup> When does a firm that cuts its prices — an activity that would normally be regarded as highly competitive conduct — engage in conduct which might amount to predatory pricing and fall foul of s 46? What costs would also be relevant and what about the role of ‘intent’? When does a refusal to license a patent become an abuse of market power?

The statutory words of s 46 which prohibit firms with substantial market power from taking advantage of that power for one of three proscribed purposes<sup>50</sup> do not assist greatly in this determination. In *QLD Wire*, Mason CJ and Wilson J refused to read in any ‘additional, unexpressed and ill-defined standard’,<sup>51</sup> and declared that the element of *misuse* was determined by exclusive reference to the three paragraphs of the proscribed purposes.<sup>52</sup>

The proscribed purposes are so widely drawn and ill-defined, however, as to be largely unhelpful in drawing the distinction between competitive and predatory conduct. They deal primarily with injury to competitors — a result which is often the outcome of legally competitive conduct.<sup>53</sup> Yet, the courts in s 46 cases continue to seek to determine whether conduct breaches s 46 by reference to these words.<sup>54</sup>

Stephen F Ross points out that the more detailed structure of the *TPA*, in contrast to the sparse language of the *Sherman Act*,<sup>55</sup> may narrow but ‘does not eliminate ... the discretion that judges have to craft sensible rules’.<sup>56</sup> Ross cites, in support of this view, the High Court decision in *Devenish v Jewel Food Stores Pty Ltd*<sup>57</sup> which held that ambiguities in the *TPA* are to be interpreted to promote a ‘broad construction’<sup>58</sup> consistent with ‘the wide, remedial and protective ambit’<sup>59</sup> of the *TPA* and thus require ‘strong reasons ... to justify an interpreta-

<sup>49</sup> See, eg, Klaus J Hopt, ‘Restrictive Trade Practices and Juridification: A Comparative Law Study’ in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (1987) 291, 301–2 (citations omitted), who argues:

Such separate definitions [of market abuse] are made even more difficult by the interdependency of different legal criteria: the relevant market, market dominance, and abuse of market power. Like moving targets they remove themselves from a well ordered application of law ... in the abuse control of market-dominating companies, competition law reaches its limits for both conceptual and practical reasons.

<sup>50</sup> *TPA* s 46(1).

<sup>51</sup> (1989) 167 CLR 177, 191.

<sup>52</sup> *Ibid.*

<sup>53</sup> The legislatively proscribed conduct can be found in cases where such minimal standards as ‘detering ... a person from engaging in competitive conduct in ... any ... market’ in *TPA* s 46(1)(c) can be applied.

<sup>54</sup> See below Part III(C).

<sup>55</sup> 15 USC §§ 1–7 (2000 & Supp IV, 2004).

<sup>56</sup> Stephen F Ross, ‘Some Outside Observations on Overly Restrictive Agreements and the Souths Rugby Case’ (2004) 12 *Competition & Consumer Law Journal* 83, 84.

<sup>57</sup> (1991) 172 CLR 32; see Ross, above n 56, 94.

<sup>58</sup> (1991) 172 CLR 32, 44 (Mason CJ).

<sup>59</sup> *Ibid* 43 (Mason CJ).

tion of the provision which would narrow the scope of the provision and exclude conduct falling within its literal terms.<sup>60</sup>

In *Visy*, the statutory language used in *TPA* s 4D, to define an exclusionary provision, required an analysis of whether the parties were ‘in competition’ and an assessment of the ‘purpose’<sup>61</sup> of the agreement proposed by Visy. The interpretations given to the words ‘supply’ and ‘acquisition’ in *TPA* s 47(4) were in reality very much determined by elements which defied a mechanical ‘textual’ interpretation. As the majority joint judgment pointed out, whether a particular contract was characterised as ‘supply’ or ‘acquisition’ depended on the ‘market’ and the price available for wastepaper:

In every case the collector took title to the waste paper, but in some circumstances it could be said that the collector provided a service to the person from whom it was collected. Who paid whom, and how much, was, at the relevant times, affected by the price obtainable for exporting waste paper.<sup>62</sup>

Whether a fee was collected for the wastepaper was entirely dependant on the current market price. If there was an excess supply (because export prices were low) it would be more likely that the supplier of the wastepaper would have to pay a fee for its collection.<sup>63</sup> Only in these circumstances, according to the High Court, could it be said to be ‘providing a service’ and therefore constitute an ‘acquisition’ in accordance with the *TPA*. This demonstrates that while the majority joint judgment purportedly applied a ‘literal’ test, their Honours referred explicitly and implicitly to non-textual and variable economic concepts in their characterisation of the circumstances and facts of the case.

The majority joint judgment nevertheless maintained that theirs was the *only* interpretation available on the basis of a literal statutory construction and that the horizontal/vertical classification adopted by Kirby J ‘inverts the proper order of inquiry because the argument proceeds from classification to a conclusion about the application of the Act’.<sup>64</sup> An examination of the US authorities, however, from which this terminology derives, casts doubt on this view. The classification in the US is merely a starting point for further examination under § 1 of the *Sherman Act*.<sup>65</sup> If the restraint directly restricts competition on price or output it is treated as per se illegal — a so-called ‘naked restraint’. Alternately, it may be found to be merely ancillary to an otherwise lawful contract.<sup>66</sup> Consideration is

<sup>60</sup> Ibid 45 (Mason CJ).

<sup>61</sup> For a discussion of the variability in the meaning of ‘purpose’ in *TPA* s 4D, see *South Sydney Football Club* (2003) 215 CLR 563; Ross, above n 56; K McMahon, ‘“Church Hospital Board or Board Room”?: The Super League Decision and Proof of Purpose under Section 4D’ (1997) 5 *Competition & Consumer Law Journal* 129.

<sup>62</sup> *Visy* (2003) 216 CLR 1, 7 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>63</sup> See *ibid* 29, where Callinan J indicated that ‘the conditions in the markets, particularly as to supply and demand from time to time might well dictate whether what one day might be regarded as an acquisition, might, on another, be properly viewed as the provision of a service.’

<sup>64</sup> *Ibid* 11 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>65</sup> 15 USC § 1 (2000 & Supp IV, 2004) provides in part that ‘[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.’

<sup>66</sup> See, eg, *Addyston Pipe & Steel Co v United States*, 175 US 211, 240–1 (Peckham J) (1899); *Board of Trade (Chicago) v United States*, 246 US 231, 238–9 (Brandeis J) (1918).

then given to the various factors under the ‘rule of reason’, including the presence of market power, possible legitimate business justifications (including efficiencies) and the investigation of whether there is a less restrictive alternative.<sup>67</sup>

For Warren Pengilley, the result in *Visy* was problematic:

To have important issues of what in the case was a joint venture being decided by minute and illogical distinctions ... is unforgivable in a rational competition policy. The result of the *Visy* case was that a joint venture which the ACCC conceded was not anticompetitive was in fact banned per se because of the in-elegant machinations of the draftsman’s quill.<sup>68</sup>

For Pengilley, the ‘blame’ for the ‘bad result’ was placed on Parliament and the apparent drafting deficiencies of the *TPA* rather than on the courts, which as Kirby J suggests, have a duty to interpret the *TPA* and to find ‘one’s way through the maze created by the statutory language’.<sup>69</sup> Pengilley’s view that judicial interpretation cannot save bad drafting is supported in this case by the fact that the application of different interpretative methods by Kirby J also similarly produced this ‘bad result’.

#### B From ‘Contract’ to ‘Market’

One of the main difficulties with the majority joint judgment in *Visy*<sup>70</sup> is that its practical outcome undermines the jurisprudential justification for a strict adherence to statutory words: legal formalism. Unenacted pronouncements, it is argued, threaten the requirements of the rule of law — namely, the demands of generality, publicity, prospectivity, clarity, capability of being followed, stability and congruence between official action and a declared rule.<sup>71</sup> Only formalism, it is argued, provides private actors with clear prescriptions to guide behaviour.<sup>72</sup> In reality, however, competition law deals with and regulates the formulation of

<sup>67</sup> See generally *California Dental Association v Federal Trade Commission*, 128 F 3d 720 (9<sup>th</sup> Cir, 1997); revd 526 US 756 (1999). The Australian statutory context similarly treats as per se illegal horizontal agreements between competitors which contain an exclusionary provision (*TPA* s 4D) or which amount to price-fixing (*TPA* s 45A). Agreements falling outside these per se provisions, whether horizontal (*TPA* s 45) or vertical (*TPA* s 47), will be found to be illegal if, after weighing a number of factors, they are found to ‘substantially lessening competition’ in the market.

<sup>68</sup> Warren Pengilley, ‘Thirty Years of the *Trade Practices Act*: Some Thematic Conclusions’ (2004) 12 *Competition & Consumer Law Journal* 1, 30. In response to the Committee of Inquiry, Australia, *Review of the Competition Provisions of the Trade Practices Act (2003)* (*‘Dawson Report’*), a joint venture defence has been inserted to ensure that pro-competitive activities are not dealt with under the per se exclusionary and price-fixing provisions: *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth). The passage of the Trade Practices Legislation Amendment Bill [No 1] 2005 (Cth) was delayed. In 2006, the Trade Practices Legislation Amendment Bill 2006 (Cth) was introduced into the House with further amendments dealing with merger clearance and authorisation. The Act received Royal Assent on 6 November 2006. Arguably, the enactment of these provisions would not have been necessary if the courts had been more flexible in their interpretation and consideration of the pro-competitive aspects of joint arrangements.

<sup>69</sup> *Visy* (2003) 216 CLR 1, 24.

<sup>70</sup> *Ibid.*

<sup>71</sup> See generally Lon L Fuller, *The Morality of Law* (revised ed, 1969) ch 2. On defining regulatory goals and constitutional values, see Karen Yeung, *Securing Compliance: A Principled Approach* (2004) ch 3.

<sup>72</sup> William S Blatt, ‘Interpretative Communities: The Missing Element in Statutory Interpretation’ (2001) 95 *Northwestern University Law Review* 629, 677.

economic incentives. Bruce Owen argues that ‘antitrust law must operate chiefly through its effects on the expectations and incentives of economic actors rather than through the direct regulation of each transaction’.<sup>73</sup>

One interpretation of the majority joint judgment is that whether or not the conduct of the parties came within the relevant provision was entirely dependent not on their contractual promises, but on whether there was a market demand for wastepaper. If, as Pengilley argues, *Visy* allowed important issues to be ‘decided by minute and illogical distinctions’,<sup>74</sup> it must be questioned whether the interpretative practices employed by both the majority joint judgment and Kirby J will have an adverse effect on the practical expectations of economic actors concerned with the legal consequences of their behaviour.<sup>75</sup>

Another approach to the proposed agreement in *Visy* would have been to examine the economic incentives for entering into the agreement: was it primarily to ensure the restriction of output and competition (referable to a horizontal agreement) or to facilitate the efficient downstream (vertical) supply of services? If the appropriate characterisation was horizontal, it should also be asked what NPP sought to gain from an agreement which restricted the customers with whom it could deal. Could any pro-competitive elements of the agreement be balanced against apparent anti-competitive ones? This would be comparable to the US ‘rule of reason’ analysis.<sup>76</sup> All of these questions are consistent with the Australian statutory language, in particular the proof of the requirement ‘in competition’ and the purpose requirements in s 4D. The majority joint judgment did not undertake this assessment but focused on the omission of the term ‘acquiring’ in s 47.<sup>77</sup> In other words a different outcome may have been possible in the case, without resorting to legislative redrafting, by ‘construing the Act’s provisions’ and paying ‘attention to the text’.<sup>78</sup> The language did not compel the result at which the majority arrived.

Competition law adjudication generally moves from an analysis of a ‘contract’ to one of its effects on a ‘market’, often requiring the answer to complex counterfactuals concerning ‘as if’ competition. This exposes the futility of attempting to transpose the operation of the statutory language onto the formal terms of the contract without placing this analysis within the wider context of the effect of the contract on the market. This narrow approach is evident in *Visy* when Gleeson CJ, McHugh, Gummow and Hayne JJ asked whether the conduct in question met the description given in *TPA* s 45(6) and noted that: ‘It does not

<sup>73</sup> Bruce Owen, ‘Book Review’ (2004) 21 *Yale Journal on Regulation* 441, 442–3. See generally Justice Richard A Posner, *Economic Analysis of Law* (6<sup>th</sup> ed, 2003).

<sup>74</sup> Pengilley, above n 68, 30.

<sup>75</sup> See Breyer CJ in the United States Court of Appeals decision in *Town of Concord v Boston Edison Co*, 915 F 2d 17, 22 (1<sup>st</sup> Cir, 1990), where his Honour argued that antitrust rules must be administratively workable: ‘They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of the complex rules, but in reaction to what they see as the likely outcome of court proceedings.’

<sup>76</sup> Cf *California Dental Association v Federal Trade Commission*, 128 F 3d 720 (9<sup>th</sup> Cir, 1997); revd 526 US 756 (1999).

<sup>77</sup> The omission of ‘acquiring’ from *TPA* s 47 has a long legislative history: see *Visy* (2003) 216 CLR 1, 17 (Kirby J).

<sup>78</sup> *Ibid* 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

invite or permit any distributive application of that part of the sub-section in which giving effect to the contract in some ways falls within the sub-section and giving effect to it in other ways does not.<sup>79</sup>

Hugh Collins points out that:

In the private law of contract, for instance, it is argued that judicial decisions involve the weighing-up of competing rights according to a scheme of principles, and that courts do not need to refer to social policy goals in order to determine the outcome of a case.<sup>80</sup>

The private law of contract, however, does not provide an entirely useful model for the interpretation of competition statutes that regulate for public purposes. It is essential to understand that when competition law moved away from its foundations in traditional common law definitions of ‘restraint of trade’ and the constitutive rights which may flow from ‘private bargaining’ to an analysis of the effects of conduct on a market, this ideal of legal autonomy and analytical coherence was ruptured.<sup>81</sup> Competition law adjudication is forever struggling to balance the private law of property with the promotion of competition in a market (which may require fair and non-discriminatory access to a private facility or licensing of a patent).<sup>82</sup>

The argument that only a literal construction of the legislative words will retain this ‘legal autonomy’, promote legal certainty and enhance business confidence ignores an empirical reality. That is, the majority joint judgment and Kirby J in *Visy* applied opposite modes of interpretation, but came to the same substantive outcome. Moreover, in *Visy First Instance*, Sackville J applied a different interpretative rule from that of both the majority joint judgment and Kirby J to dismiss the ACCC’s claim.<sup>83</sup> Sackville J determined that, had any of the proposed agreements been made, *TPA* s 45(6) would have removed them from consideration under *TPA* s 45(2).<sup>84</sup> His Honour did not agree that the non-competition provisions could be divided into discrete components: not to supply services to, and not to acquire goods from, third parties. Sackville J also rejected the ACCC’s ‘narrow’ construction that the words, ‘by reason that’, in

<sup>79</sup> Ibid 12.

<sup>80</sup> Hugh Collins, ‘Regulating Contract Law’ in Christine Parker et al (eds), *Regulating Law* (2004) 13, 18–19. Collins goes on to argue that contract adjudication increasingly requires the balancing of more open-ended public purposes which seek to undermine this view of the legal autonomy of contract law: at 19–32.

<sup>81</sup> See generally J D Heydon, *The Restraint of Trade Doctrine* (2<sup>nd</sup> ed, 1999) ch 3; Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997) ch 1.

<sup>82</sup> For example Peritz argues that the US Supreme Court decision in *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 (1977) (*‘GTE Sylvania’*) provides a good example of differing views of property rights in an antitrust context: Rudolph J R Peritz, *Competition Policy in America 1888–1992: History, Rhetoric, Law* (1996) 256–8. The majority of the Court agreed with the Chicago School view on the pro-competitive effect of vertical restraints. The Court allowed a manufacturer to control the sale of their goods by restraining the competition of independent retailers, long after ownership of those goods had passed to independent retailers.

<sup>83</sup> (2000) 186 ALR 731, 757. In *Visy* (2003) 216 CLR 1, 26–7, Callinan J agreed in substance with Sackville J’s reasoning and conclusion in *Visy First Instance*, and that of the dissenting appeal judge, Conti J, in *Visy Federal Court Appeal* (2001) 112 FCR 37.

<sup>84</sup> *Visy First Instance* (2000) 186 ALR 731, 755.

s 45(6) were to be understood as equivalent to 'if and in so far as'.<sup>85</sup> His Honour gave importance to Parliament's intention in drafting the provisions, as evidenced by the legislative words and the legislative history, and in particular, to the different choice of words used in ss 45(5) and 45(7) ('in so far as') and in s 45(6) ('by reason that').<sup>86</sup> His Honour argued that s 45(6) was ambiguous and therefore demanded the application of the rule of statutory construction that resolves ambiguity in favour of the respondent to proceedings.<sup>87</sup>

This interpretative rule may be contrasted with Kirby J's view that in the face of 'legislative opacity'<sup>88</sup> the judicial challenge is to adopt a construction of the *TPA* which achieves the legislative objectives of competition law. In *Visy*, this included a statutory construction which applied the per se provision in s 4D against the interests of the respondent.<sup>89</sup>

The application of different interpretive practices may have little explanatory value regarding the outcome in many cases. As McHugh J argued in *South Sydney Football Club*, it probably would have made little difference to the matter in issue in that case whether the word 'purpose' in s 4D was construed 'objectively' or 'subjectively': 'Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong. Frequently, there is simply no 'right' answer to a question of construction.'<sup>90</sup>

This does not indicate that competition law adjudication is entirely indeterminate.<sup>91</sup> It does mean, however, that competition law interpretation is not always aided by the ultimately sterile 'literal' versus 'purposive' debate regarding the interpretation of statutes. The challenge for decision-makers is to make more transparent the foundations and sources of their ultimate decisions. As Duncan Kennedy indicates:

If the judges are wrong in their claims that their reasoning process and the pre-existing materials determine the rules, you might search for determination 'above' or 'below' them. If you are going 'above', you might be interested in normative or descriptive determination.<sup>92</sup>

<sup>85</sup> Ibid 756.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, citing with approval the statement of Franki J in *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1, 48, that 'if the language of the Act after the ordinary rules of construction have been applied remains ambiguous or doubtful, it is appropriate to remove or resolve that ambiguity or doubt in favour of a [respondent], at least, where the proceedings are for a penalty.'

<sup>88</sup> *Visy* (2003) 216 CLR 1, 24.

<sup>89</sup> In allowing the ACCC's appeal, a majority of the Full Federal Court examined the same legislative history as Sackville J in *Visy First Instance* (2000) 186 ALR 731, and concluded that 'by reason that' should be read as equivalent to 'if and in so far as': *Visy Federal Court Appeal* (2001) 112 FCR 37, 55 (Hill and North JJ). Conti J dissented and applied similar reasoning to Sackville J: at 57.

<sup>90</sup> (2003) 215 CLR 563, 580. Cf *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, 573-4 (Wilcox, French and Gyles JJ) ('*Universal Music*').

<sup>91</sup> See generally Allan C Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (2000).

<sup>92</sup> Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997) 277.

Efforts to promote the 'plain meaning' of the words of the *TPA* in the interests of legal and business certainty can lead to interpretations which are over-inclusive of anti-competitive conduct and which ultimately defeat the apparently clear legislative purposes of the 'promotion of competition' and consumer welfare. The legislature itself has acknowledged that the 'total answer' must be sought elsewhere by explicitly including economic concepts in competition statutes.<sup>93</sup>

The failure to recognise the inability of statute to encapsulate the broad ranges of conduct in regulatory provisions has, as Kirby J pointed out in *Boral*, 'led to the retaliatory enactment of legislation of intolerable detail and complexity.'<sup>94</sup> These constant legislative amendments often remain merely symbolic gestures. As Gunther Teubner argues, '[t]he legislature is constantly producing amendments to indicate changes of direction. However, these signals no longer appear on the internal screen of the legal system; they vanish without trace.'<sup>95</sup>

Other jurisdictions which have attempted more prescriptive formulations of competition statutes have often failed and reverted to broadly worded statutes where wider discretion is vested in the decision-maker.<sup>96</sup> This is the approach adopted in the US where both §§ 1 and 2 of the *Sherman Act* are formulated in broad terms.<sup>97</sup> Articles 81 and 82 of the *Consolidated Version of the Treaty Establishing the European Community*<sup>98</sup> contain more lengthy non-exhaustive lists of abusive practices, but it remains for the decision-maker to specify the elements of these offences in the circumstances of each case.<sup>99</sup>

<sup>93</sup> These include the inclusion in the *TPA* of definitions such as 'competition' in s 4 and 'market' in s 4E.

<sup>94</sup> (2003) 215 CLR 374, 498. The proposed amendment to insert a new provision which includes a statutory definition of 'predatory pricing' was arguably an example of this misguided approach. The proposed insertion of s 46(3A) provided that to determine whether a firm has substantial market power or has taken advantage of that power for a proscribed purpose, the court may have regard to the firm's capacity 'to sell in that or any other market a good or service at a price below the cost to the corporation of producing or acquiring the good or supplying the service': see Trade Practices Legislation Amendment Bill [No 1] 2005 (Cth). This provision was not included in the *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth), which received royal assent on 6 November 2006.

<sup>95</sup> Gunther Teubner, 'Juridification — Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (1987) 3, 22.

<sup>96</sup> For example, in Canada, plans to move away from a more prescriptive approach to competition law were set out in the report of the House of Commons Standing Committee on Industry, Science and Technology, Parliament of Canada, *A Plan To Modernize Canada's Competition Regime* (2002). It recommended subsuming specific provisions dealing with price discrimination and predatory pricing under a general test of 'substantial lessening of competition' under *Competition Act*, RSC 1985, c 34, s 79.

<sup>97</sup> Section 1 provides in part that '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' Section 2 provides in part that '[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony'.

<sup>98</sup> Opened for signature 26 February 2001, [2002] OJ C 325/33 (entered into force 1 February 2003) ('*EC Treaty*').

<sup>99</sup> Article 81 prohibits agreements, undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. These practices include price-fixing, limiting production or sharing markets. Conduct may be exempted under art 81(3) where it contrib-

The majority joint judgment's view in *Visy*, that '[i]t is necessary to pay attention to the text of applicable statutes in preference to judicial or other glosses',<sup>100</sup> is not a view of the judicial function that is shared by the committees which, from time to time, have been established to review the *TPA*. The committees relied on the courts to particularise the broad terms of the legislative words.<sup>101</sup> For example, the *Dawson Report* commented with regard to s 46 that 'reliance is necessarily placed upon the courts to refine the broad terms in which the legislation is cast in order to achieve its object.'<sup>102</sup>

It was a preference for judicial interpretation or common law development of these rules rather than legislative change which led to the *Dawson Report's* recommendation against any amendment of *TPA* s 46.<sup>103</sup> The *Dawson Report* indicated that since amendments to s 46 in 1986, a number of decisions 'have contributed to the development of the jurisprudence relating to the misuse of market power' thereby reducing the uncertainties surrounding its operation.<sup>104</sup> Such jurisprudential developments were expected to continue in several decisions that were then pending on appeal.<sup>105</sup> The *Dawson Report* warned that this newly developed jurisprudence would be of no consequence if an 'effects test' were introduced. It advised that legislative change should not take place where it would create the risk of uncertainty.<sup>106</sup> In addition, the proposed alternative test 'focusing on the effect or likely effect of substantially lessening competition in a market' would necessitate a redrafting of the section so that pro-competitive behaviour could be distinguished from anti-competitive behaviour.<sup>107</sup>

### C Interpretation as an 'Attack with Scissors'

While the *Dawson Report* referred specifically to *TPA* s 46, its confidence in judicial interpretation rather than reliance on legislative amendment to reduce uncertainties may have been a little premature with respect to competition law

utes to improving the production or distribution of goods or to promoting technical or economic progress. Article 82 prohibits any abuse by one or more undertakings of a dominant position within the common market insofar as it may affect trade between Member States. Such abuse may consist of: imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development; applying dissimilar conditions to equivalent transactions with other trading parties; making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>100</sup> (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>101</sup> See Independent Committee of Inquiry into National Competition Policy, *National Competition Policy (1993)* 62 ('*Hilmer Report*').

<sup>102</sup> Committee of Inquiry, above n 68, 84. Many recommendations from the *Dawson Report* were incorporated in the *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth).

<sup>103</sup> See Recommendation 3.1: Committee of Inquiry, above n 68, 88. The Howard Government accepted the view of the Committee: Australian Government, *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974* (2003) 4-9 <[http://www.treasurer.gov.au/tsr/content/publications/pub\\_downloads/TPAResponse.pdf](http://www.treasurer.gov.au/tsr/content/publications/pub_downloads/TPAResponse.pdf)>.

<sup>104</sup> Committee of Inquiry, above n 68, 84.

<sup>105</sup> *Ibid.* Although this could be reassessed in light of the outcome of s 46 cases on appeal at that time, such as *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339 ('*Safeway*'), *Rural Press* (2003) 216 CLR 53 and *Universal Music* (2003) 131 FCR 529.

<sup>106</sup> Committee of Inquiry, above n 68, 84.

<sup>107</sup> *Ibid.* 85.

more generally, as we have seen from the differing approaches between the majority joint judgment and Kirby J in *Visy*.

The importance attached to the actual language of the *TPA* in Australian competition law cases is puzzling to commentators in the US, such as George A Hay, who contrasts the Australian approach with that taken by the American judge who rarely refers to the statutory language in an antitrust case.<sup>108</sup> Hay calls this approach excessively 'lexicographical ... as if the answer to the question of what constituted a substantial degree of market power could really be found in the dictionary.'<sup>109</sup> He goes on to argue that excessive reliance on statutory words has important (and not always benign) consequences for how judges receive economic evidence and how they arrive at conclusions.<sup>110</sup>

In *Boral*, Kirby J compared the excessively literal interpretation of the misuse of market power provision to attacking s 46 'with scissors'.<sup>111</sup> His Honour argued that dissecting the concepts of s 46 in this way offended 'the orthodox approach to the interpretation of legislation.'<sup>112</sup> His Honour argued that the statutory concepts of 'take advantage', 'for the purpose of' and the 'proscribed purposes' were separated out for proof by similar or conflicting evidence rather than through an integrated economic approach to the analysis of predatory conduct.<sup>113</sup>

This method has practical consequences and produces outcomes which are not always consistent with a finding of a predatory purpose.<sup>114</sup> For example, the court may determine that the firm engaged in conduct for a proscribed purpose but did not take advantage of its market power. If the firm did not engage in predatory conduct contrary to s 46, however, it should be impossible to find a proscribed purpose.<sup>115</sup> These findings have little meaning and can lead to a confusing rather than an illuminating understanding of what should always be

<sup>108</sup> George A Hay, 'Economic Essays on Australian and New Zealand Competition Law' (2005) 50 *Antitrust Bulletin* 299, 304.

<sup>109</sup> *Ibid* 306.

<sup>110</sup> *Ibid* 305.

<sup>111</sup> (2003) 215 CLR 374, 497.

<sup>112</sup> *Ibid*.

<sup>113</sup> *Ibid* 497–9.

<sup>114</sup> It is not the intention of this article to provide an extensive analysis of the *TPA* s 46 case law, but to focus on some apparent inconsistencies in interpretative practice in some of these recent cases.

<sup>115</sup> *Boral* (2003) 215 CLR 374 provides examples of analyses which arguably stem from the 'scissoring-up' of s 46. Heerey J in *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410, found that in formulating its pricing conduct, Boral Besser Masonry Ltd (a subsidiary of Boral Ltd) had acted with a proscribed anti-competitive purpose but had not 'taken advantage' of its market power: at 445–6. Heerey J made the assessment that 'there is sufficient evidence that it had one or more of the proscribed purposes' from an examination of Boral Besser Masonry Ltd's strategic business plan. His Honour argued that '[t]aking advantage of market power for a proscribed purpose is a composite expression involving two elements: at 445. If, as Heerey J ultimately determined, the firm did not engage in predatory pricing contrary to *TPA* s 46, it should logically be impossible to find a 'proscribed purpose'. On appeal to the High Court, Gaudron, Gummow and Hayne JJ pointed out the difficulties with this approach: 'what is involved is not an isolated corporate state of mind; it is not to the point that a firm had in mind one or more of the proscribed purposes, if, on the evidence, the anterior sequential steps for the operation of s 46 cannot be taken': *Boral* (2003) 215 CLR 374, 434.

See below Part V for further discussion of *Boral*.

the central question — namely, the establishment of a standard to distinguish illegal predatory behaviour from lawful competitive conduct. This in turn detracts from the broader questions warranted by an economic approach: does this conduct harm consumer welfare? Is the behaviour profit-maximising or is it output-reducing? Can the conduct only be explained by an anti-competitive purpose?

This confusion often surrounds the interpretation of ‘take advantage’ and its relationship to other elements in s 46. To ‘take advantage’ of market power has been interpreted as the requirement of establishing a linkage between the market power and the conduct by examining the ‘counterfactual’: whether a firm in a competitive position would have acted in exactly the same way as the firm with market power.<sup>116</sup>

In *Melway*,<sup>117</sup> the High Court expressed difficulties with the counterfactual and preferred to ask whether the market power ‘*materially facilitated*’ or ‘*made it easier*’ for the corporation to act for the proscribed purpose than otherwise would be the case.<sup>118</sup> The establishment of this linkage as an element of the offence under s 46 is arguably superfluous and confusing to the issue at hand, namely whether the conduct is exclusionary. It is not a requirement demanded by the statutory language. As the cases and commentary demonstrate, any conduct by a monopolist, whether exclusionary or competitive, can be linked to its monopoly power. For example, the charging of a monopoly price is the exercise of monopoly power, but is not exclusionary conduct under US or Australian competition law.<sup>119</sup> Whether such conduct is an abuse of market power under the law of each jurisdiction is ultimately dependent on the economic theory the court applies and a debate about whether the law should regulate the extraction of monopoly rents. The answer to these more complex questions is given little assistance by the statutory language.

A preferable test, which would be consistent with the statutory language, might focus on the rationality of the conduct — similar to the test in § 2 of the *Sherman Act* — adopted by the recent US Supreme Court decision in *Verizon Communication Inc v Law Offices Curtis V Trinko*.<sup>120</sup> This ‘profit-sacrifice’ test relies on ‘a willingness to forsake short-term profits to achieve an anticompetitive end.’<sup>121</sup> The ‘profit-sacrifice’ test examines the employment of business practices that would not be considered profit-maximising except for the expectation that rivals

<sup>116</sup> This interpretation originated in comments made in the joint judgment of Mason CJ and Wilson J in *QLD Wire* (1989) 167 CLR 177, 192, that a firm will be in breach of s 46 if its conduct could not have been engaged in but for the absence of competitive conditions: ‘It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant.’ Dawson J stated that BHP ‘used that power in a manner made possible only by the absence of competitive conditions’: at 202. Cf at 197–8 (Deane J), 216 (Toohey J).

<sup>117</sup> (2001) 205 CLR 1.

<sup>118</sup> *Ibid* 23 (Gleeson CJ, Gummow, Hayne and Callinan JJ) (emphasis added).

<sup>119</sup> For the US, see, eg, *Berkey Photo Inc v Eastman Kodak Co*, 603 F 2d 263 (2<sup>nd</sup> Cir, 1979); cert denied 444 US 1093 (1980). In Australia, it is also not exclusionary conduct, unless the conduct also amounts to a price squeeze: see, eg, *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd [No 2]* (1991) 27 FCR 492, 502 (Lockhart, Gummow and von Doussa JJ).

<sup>120</sup> 540 US 398 (2004) (*Trinko*).

<sup>121</sup> *Ibid* 409 (Scalia J).

are to be driven from the market or chastened. Others suggest the appropriate test is a 'no economic sense' one which requires proof that the challenged conduct would not be rational for the defendant absent a tendency to eliminate or lessen competition.<sup>122</sup> Within this test, business justifications may be examined but evidence demonstrating that the actor or firm did not have this state of mind is not sufficient to avoid liability.

The focus in the US on the economic rationality of the conduct in question is potentially a far more useful test for the analysis of predatory behaviour. Determining what amounts to predatory conduct under *TPA* s 46 is not assisted by scissoring up the section into 'take advantage', 'purpose' and the 'proscribed purposes'. It is also an interpretation of s 46 which is not necessarily demanded by the statutory words. Kirby J highlighted the importance of such an interpretation in *Boral*, where he stated that if s 46 is read as a whole, then

the mind of the decision-maker is released from the artificial categorisation which the splitting of s 46(1) into separate ideas involves. No longer is it appropriate to think separately of a 'corporation' of the qualifying kind; of a 'market' for the particular purposes; of 'taking advantage' of 'power'; and of the 'purposes' of such conduct and whether they are proscribed. Instead, the ideas interrelate. Each helps to inform the meaning of the others.<sup>123</sup>

#### IV LEGISLATIVE PURPOSE, ECONOMIC THEORY AND FOREIGN JUDGMENTS

##### A *The Goals of Competition Law*

There are inherent limitations in any textual/literal approach to statutory interpretation that only takes meaning from the statutory words. This is because it is impossible to set with precision the conduct to be proscribed in a competition statute. One alternative approach, advanced by Kirby J in *Visy*, stresses the importance of giving 'effect to the identified legislative policies'.<sup>124</sup> His Honour highlighted in *Boral* that:

The old days of adopting a purely textual or verbal construction of legislation have given way, in this country and in others, to a purposive approach. By this I mean that courts seek to ascertain, and give effect to, the object of the legislature.<sup>125</sup>

A purposive approach assumes that legislative objectives can not only be identified, but that they can be specified to a sufficient degree so that legal rules can be formulated and applied to the facts in issue. The identification of legisla-

<sup>122</sup> See Andrew Gavil, 'Integrating New Economic Learning with Antitrust Doctrine — Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance' (2005) 72 *Antitrust Law Journal* 3, 5. The Solicitor-General argued this test in a brief before the US Supreme Court in *Trinko*. For a critique of the approach in *Trinko*, see Eleanor Fox, 'Is There Life in Aspen after *Trinko*? The Silent Revolution of Section 2 of the *Sherman Act*' (2005) 73 *Antitrust Law Journal* 3.

<sup>123</sup> (2003) 215 CLR 374, 499.

<sup>124</sup> (2003) 216 CLR 1, 19–20 (citations omitted).

<sup>125</sup> (2003) 215 CLR 374, 498 (citations omitted). Cf Farber and McDonnell, above n 48, 665.

tive objectives is therefore crucial to the formulation and interpretation of the rules governing the conduct which competition law seeks to regulate. Robert H Bork alludes to the prerequisite nature of objectives in stating that '[o]nly when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.'<sup>126</sup>

There is often little agreement, however, about these purposes notwithstanding that they are informed by differing ideological approaches to the role of law in the regulation of economic activity. The identification of multiple intents or purposes also gives rise to the 'textualist' objection that attempts to give effect to legislative intent is ultimately an incoherent and indeterminate exercise. This is because judges will merely select those aspects of legislative debates and histories which support their conclusions.<sup>127</sup>

The object of the *TPA*, stated in s 2, is 'to enhance the welfare of Australians though the promotion of competition and fair trading and provision for consumer protection.' In the High Court decision in *QLD Wire*, Mason CJ and Wilson J stated that the object of s 46 was to 'protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.'<sup>128</sup> Their Honours specifically rejected the purpose of protecting individual competitors.<sup>129</sup> Yet, the promotion of consumer welfare has not always been consistently identified as a goal for the provision.<sup>130</sup> For example, the then Attorney-General, Lionel Bowen, stated in his Second Reading Speech to the Trade Practices Revision Bill 1986 (Cth) that an amendment to s 46 was 'most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors.'<sup>131</sup>

Similarly, in the international context, the goals of competition law have not remained constant over time. An examination of the legislative history of antitrust statutes in the US provides an important example of these changes.<sup>132</sup> Early interpretations stressed the importance of freedom to compete and de-concentration, revealing a distrust of larger firms. Similar to the goals

<sup>126</sup> Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) 50.

<sup>127</sup> See Lawrence M Solan, 'Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation' (2005) 93 *Georgetown Law Journal* 427.

<sup>128</sup> (1989) 167 CLR 177, 191.

<sup>129</sup> *Ibid.*

<sup>130</sup> Some decisions under s 46 are also arguably more consistent with the 'protection of individual competitors' than the 'protection of consumers'. The decisions of the Federal Court in *Robert Hicks Pty Ltd (t/as Auto Fashions Australia) v Melway Publishing Pty Ltd* (1998) 42 IPR 627, and the Full Federal Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128 are good examples of the section being used to protect individual competitors rather than to maintain an efficient distribution system. The latter purpose was upheld on appeal in the High Court: *Melway* (2001) 205 CLR 1, 13 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>131</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 1986, 1626 (Lionel Bowen, Attorney-General). Confusion regarding the purposes of the *TPA* can also be found in the wider business community where calls for reform are often instigated by small business groups who do not feel they are sufficiently protected from the predatory actions of larger firms under the *TPA*: cf Senate Economics References Committee, Parliament of Australia, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (2004). The *TPA* has been amended to allow for notification of collective bargaining agreements by small business enterprises: see *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth) sch 3.

<sup>132</sup> See generally Peritz, above n 82.

suggested by Bowen, small enterprises were to be protected in the competitive process from the predatory actions of larger firms with whom they dealt. These goals also had a political dimension with a preference for small rather than large concentrations of economic (and therefore political) power.<sup>133</sup>

The ascendancy of the Chicago School of economic theory during the late 1970s signalled a movement in the interpretation of antitrust statutes from a distrust of concentrated economic power to a commitment to liberty and freedom of contract and a distrust of government intervention.<sup>134</sup> The Chicago School emphasises the importance of promoting consumer welfare through productive efficiencies (which often may only be realised by larger enterprises that may take advantage of economies of scale and scope) and an ideological preference for the ‘market as regulator’. This belief in the self-correcting nature of markets leaves a limited role for statutory or judicial intervention.<sup>135</sup> Chicago School economists argued that consumer welfare (in the form of productive efficiencies) was the only goal consistent with the original intent of the *Sherman Act*. For example, Bork states that only the goal of consumer welfare ‘is consistent with congressional intent, and, equally important, only that goal permits courts to behave responsibly and to achieve the virtues appropriate to law.’<sup>136</sup>

On further examination of the legislative debates, however, the argument that consumer welfare represents ‘congressional intent’ has become increasingly suspect.<sup>137</sup> The Chicago School promotion of ‘economic efficiency’ coincides more with the application of a particular view of modern liberal economic theory (pro-market competition) than with the ‘original intent’ of the framers of antitrust statutes, which was essentially concerned with controlling the political and economic power of large businesses.

The Chicago School version of the historical arguments about legislative intent succeeded, however, in influencing judicial decision-making.<sup>138</sup> Judges and economists have developed this economic theory and have turned it into predictive rules that can be applied by the courts. They have argued that the broad commands in the *Sherman Act* give power to courts through the development of the common law to determine the line between acceptable cooperation and illegal collusion and between vigorous competition and unlawful monopolisation: ‘The *Sherman Act* adopted the term “restraint of trade” along with its

<sup>133</sup> As Learned Hand J pointed out in *United States v Aluminium Co of America*, 148 F 2d 416, 429 (2<sup>nd</sup> Cir, 1945), ‘[t]hroughout the history of [antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units’.

<sup>134</sup> See generally Richard A Posner, ‘The Chicago School of Antitrust’ (1979) 127 *University of Pennsylvania Law Review* 925; Bork, above n 126, chs 2–5; Amato, above n 81, chs 1–2.

<sup>135</sup> See generally Frank H Easterbrook, ‘The Limits of Antitrust’ (1984) 63 *Texas Law Review* 1.

<sup>136</sup> Bork, above n 126, 89.

<sup>137</sup> Robert Lande, ‘Wealth Transfers as the Original and Primary Concern of Antitrust’ (1982) 34 *Hastings Law Journal* 65; Peritz, above n 82, 236–45.

<sup>138</sup> The Chicago School interpretation was applied to the *Sherman Act* in a series of important US Supreme Court decisions: *GTE Sylvania*, 433 US 36 (1977); *Matsushita Electric Industrial Co Ltd v Zenith Radio Corporation*, 475 US 574 (1986) (‘*Matsushita*’); *Cargill Inc v Monfort of Colorado Inc*, 479 US 104 (1986) (‘*Cargill*’); *Brooke Group Ltd v Brown & Williamson Tobacco Corporation*, 509 US 209 (1993); *State Oil v Khan*, 522 US 3 (1997); *Trinko*, 540 US 398 (2004).

dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.<sup>139</sup>

This 'dynamic potential' understanding of the *Sherman Act* also increased the role for economics in competition law adjudication. As John E Lopatka and William H Page note, economics has been permitted to enter the courts' deliberative process 'directly and indirectly through the legal and economic literature, not through expert testimony'.<sup>140</sup>

US judgments in antitrust cases now rarely include any statutory analysis of the legislative text.<sup>141</sup> This is partly because the legislation is sparsely written and contains general admonitions. Where does this leave strong supporters of 'textualism' such as Scalia and Easterbrook JJ, who in some contexts, interpret antitrust statutes from the viewpoint of contemporary economics and economic efficiency<sup>142</sup> and in other contexts, reject non-textual interpretations as undemocratic? While Easterbrook J would say in one situation that '[l]aw does not change in meaning as the political culture changes',<sup>143</sup> he would also claim that the *Sherman Act* 'does not contain a program; it is instead a blank check'<sup>144</sup> which authorises 'courts to create new lines of common law'.<sup>145</sup> Daniel A Farber and Brett H McDonnell refer to these contradictory standpoints and claim that 'textualists like Scalia and Easterbrook cannot both have their cake and eat it: they should either rethink their textualism or seriously consider jettisoning their approach to antitrust law'.<sup>146</sup>

These interpretative inconsistencies are complicated further when it is understood that not all Chicago School judges adopt this 'textualist' approach. Posner J, unlike Easterbrook J, adopts the more pragmatic approach to statutory interpretation espoused by William N Eskridge Jr, among others.<sup>147</sup> It is a more dynamic approach to statutory interpretation which takes into account arguments and (mainly 'public') values reflected in judicial practice over time rather than original legislative intent to reach a decision which best advances current values.<sup>148</sup> It maintains that decisions are supported by a number of sources

<sup>139</sup> *Business Electronics Corporation v Sharp Electronics Corporation*, 485 US 717, 732 (Scalia J) (1988). Cf William F Baxter, 'Separation of Powers, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law' (1982) 60 *Texas Law Review* 661.

<sup>140</sup> John E Lopatka and William H Page, 'Economic Authority and the Limits of Expertise in Antitrust Cases' (2005) 90 *Cornell Law Review* 617, 634.

<sup>141</sup> See generally Farber and McDonnell, above n 48.

<sup>142</sup> Farber and McDonnell argue that an interpretation more consistent with 'textualism' would involve a closer reading of the common law doctrine of restraint of trade, which incorporated notions of fairness and the public interest, than a sole focus on economic efficiency: *ibid* 665.

<sup>143</sup> Easterbrook, 'Text, History, and Structure in Statutory Interpretation', above n 36, 69.

<sup>144</sup> Justice Frank H Easterbrook, 'Workable Antitrust Policy' (1986) 84 *Michigan Law Review* 1696, 1702.

<sup>145</sup> Frank H Easterbrook, 'Statutes' Domains' (1983) 50 *University of Chicago Law Review* 533, 544.

<sup>146</sup> Farber and McDonnell, above n 48, 622.

<sup>147</sup> See William N Eskridge Jr, *Dynamic Statutory Interpretation* (1994) 50–7; Solan, above n 127; Eskridge, 'The New Textualism', above n 36.

<sup>148</sup> Farber and McDonnell, above n 48, 667. It is arguable that Kirby J's preference for a construction which promotes the 'public good' and a 'beneficial construction' adopts this pragmatic and dynamic approach to statutory construction: see, eg, *Boral* (2003) 215 CLR 374, 498–9.

beginning with the statutory text but also drawing on context, legislative purpose and history (including the views of antitrust agencies). Posner J argues that the pragmatist judge does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case.<sup>149</sup>

What influence do differing theories of statutory interpretation have on the outcome of particular cases? As was evident from *Visy*, adherence to a particular theory is a poor predictor of the outcome. In the US, Farber has examined this issue by comparing the outcome of judgments by Posner J (a ‘pragmatist’) with those of Easterbrook J (a ‘textualist’).<sup>150</sup> Both judges sit on the Seventh Circuit Court of Appeals and Farber only examined the cases where they disagreed to determine how closely theories of interpretation were linked to outcomes.<sup>151</sup> Farber concluded that theoretical differences seemed to have only a marginal relationship with outcomes:

Thus, our case studies do not establish any strong connection between theory and outcome. (They also show that pragmatist arguments can support apparently formalistic results, and vice versa) ... Posner and Easterbrook’s starkly conflicting jurisprudential views do not lead to any great disparity in their votes.<sup>152</sup>

If it is correct that theoretical interpretative differences are not a good predictor of outcomes, then this raises important practical and jurisprudential issues which have a significance beyond competition law adjudication.

### B *Economic Analysis as Authority*

What this debate highlights is the necessity of making more transparent the interpretive sources for the adjudication of competition law disputes. For Chicago School judges, the primary interpretative reference is Chicago School economic theory rather than the statutory text. Thus, Posner J argues that ‘antitrust law has become a branch of applied economics’.<sup>153</sup> Farber and McDonnell acknowledge that ‘[i]t is a view of the common law that allows Scalia to summarize the reasoning of one of his own antitrust opinions as follows. In sum,

Cf *Rural Press* (2003) 216 CLR 53, 94, where Kirby J adopts similar reasoning. See below Part VI for discussion of *Rural Press*.

<sup>149</sup> Justice Richard A Posner, ‘The Revival of Pragmatism’ (1996) 18 *Cardozo Law Review* 1, 5.

<sup>150</sup> Daniel A Farber, ‘Do Theories of Statutory Interpretation Matter?: A Case Study’ (2000) 94 *Northwestern University Law Review* 1409; cf Jason J Czarnecki and William K Ford, ‘The Phantom Philosophy? An Empirical Investigation of Legal Interpretation’ (2006) 65 *Maryland Law Review* 841.

<sup>151</sup> Farber acknowledges that both Posner and Easterbrook JJ, as members of the Chicago School and proponents of law and economics, may have similarities that might lead them to vote together more often than two randomly selected judges: Farber, above n 150, 1431.

<sup>152</sup> *Ibid* 1430–1. At 1410, Farber also acknowledges that ‘labels’ are not always consistent with practice: ‘Reading these opinions makes it clear that the conventional view of their theories is an oversimplification: Posner is capable of being quite “formalistic” while Easterbrook’s version of textualism is sometimes quite “pragmatic”’.

<sup>153</sup> Justice Richard A Posner, *The Problematics of Moral and Legal Theory* (1999) 229. Likewise Easterbrook J claims that ‘[a]ntitrust is increasingly a branch of economics’: Justice Frank H Easterbrook, ‘Monopolization: Past, Present, Future’ (1992) 61 *Antitrust Law Journal* 99, 99.

economic analysis supports the view [of the lower court], and no precedent opposes it'.<sup>154</sup>

What are the consequences for the autonomy of judicial reasoning and the respective roles of the judiciary and the legislature of the view that 'economic analysis supports the view, and no precedent opposes it'?<sup>155</sup> This idea of 'economic analysis as authority' has become commonplace in competition adjudication in many jurisdictions. In the European Communities, the formalist assessment of certain categories of conduct has been replaced by a willingness to undertake a contextual analysis of the economic impact of the conduct.<sup>156</sup> In announcing an internal review of art 82 of the *EC Treaty*,<sup>157</sup> the European Commission's Director-General of Competition, Philip Lowe, stated '[a] credible policy on abusive conduct must be compatible with mainstream economics.'<sup>158</sup>

In Australia, the High Court was aware of the utility of 'economics' as an interpretative tool in *QLD Wire*, where it characterised the *TPA* as an 'economic not a moral statute'.<sup>159</sup> The 'literal/textualist' interpretation preferred by the majority in *Visy*, may be interpreted as judicial resistance to the use of this economic theory. Yet McHugh J, who formed part of the majority in *Visy*, observed in *Boral* that '[t]he terms of the Act have economic content and their application to the facts of a case combines legal and economic analysis. Their effect can only be understood if economic theory and writings are considered.'<sup>160</sup> In *Visy*, Kirby J argued that:

Reliance upon the writings of legal scholarship, other disciplines (such as economic science in the context of the *TPA*), the law of other countries, or international law, represents an intellectual contribution to judicial reasoning and judgment. It is not normative. Nor is it prescriptive. But such learning can help

<sup>154</sup> Farber and McDonnell, above n 48, 658–9, referring to Scalia J's view in *Business Electronics Corporation v Sharp Electronics Corporation*, 485 US 717, 735–6 (1988).

<sup>155</sup> The test for sufficiency of economic evidence for admissibility by the court in the US is determined by the rules in *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993). See further Lopatka and Page, above n 140.

<sup>156</sup> See, eg, *Commission Notice on Guidelines on Vertical Restraints* [2000] OJ C 291/1; *Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices* [1999] OJ L 336/21. Cf Roger Van den Bergh, 'The Difficult Reception of Economic Analysis in European Competition Law' in Antonio Cucinotta, Roberto Pardolesi and Roger Van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (2002) 34.

<sup>157</sup> Opened for signature 26 February 2001, [2002] OJ C 325/33 (entered into force 1 February 2003).

<sup>158</sup> Philip Lowe, 'Untitled' (Speech delivered at the 30<sup>th</sup> Annual Conference on International Antitrust Law and Policy, Washington, DC, 23 October 2003) <[http://ec.europa.eu/comm/competition/speeches/text/sp2003\\_040\\_en.pdf](http://ec.europa.eu/comm/competition/speeches/text/sp2003_040_en.pdf)>; see Directorate-General for Competition, European Commission, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (2005) <<http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf>>; cf Economic Advisory Group for Competition Policy, European Commission, *An Economic Approach to Article 82* (2005) <[http://ec.europa.eu/comm/competition/publications/studies/eagep\\_july\\_21\\_05.pdf](http://ec.europa.eu/comm/competition/publications/studies/eagep_july_21_05.pdf)>.

<sup>159</sup> (1989) 167 CLR 177, 194 (Deane J).

<sup>160</sup> *Boral* (2003) 215 CLR 374, 454 (citations omitted).

a court better to understand the nature of the problem presented for its decision.<sup>161</sup>

Kirby J's observation that these economic theories are not prescriptive or normative but merely assist the reasoning process is correct. At the same time, economic theory should not be considered an objective, scientific, non-ideological system. The choice of economic theory by the decision-maker is not value neutral. Rather, the decision-maker must not only be aware of different approaches to economic analysis but also of the particular ideology they may represent. Imelda Maher explains this as follows:

The first issue to be addressed by those enforcing competition law is which theoretical paradigm is to be applied. This choice is itself political with decisions about which economic theory to adopt involving important value judgments as to the role of competition law in public ordering.<sup>162</sup>

Competition statutes must be sufficiently malleable to permit the discussion of these various competing economic theories.<sup>163</sup> Developments in economic measurements which permit, for example, residual demand analysis, also affect the application of economic rules. This is because they allow more accurate measurement of concepts such as market power and the unilateral effects of a merger.<sup>164</sup> More recently, monopolisation provisions in competition statutes have been applied to deal with complicated issues such as the role of asymmetric information,<sup>165</sup> as well as network effects and technological dependency in high technology industries.<sup>166</sup> Developments in industrial economics and game theory have also demonstrated how the strategic practices of individual firms<sup>167</sup> could be profitable and therefore predatory.<sup>168</sup> This evolution in the various disciplines

<sup>161</sup> (2003) 216 CLR 1, 25. The Full Federal Court in *Universal Music* (2003) 131 FCR 529, 568 (Wilcox, French and Gyles JJ) viewed the reception of economic theory in the following manner:

The primary judge referred to the evidence of witnesses called in the cases, to writings on the topic by economists and lawyers, and to the discussion of economic theory in other judgments. The primary task of the Court, however, is to apply the words of the Act to the facts found on the evidence before it. These words involve some economic concepts and the application of the Act to the facts of a particular case may be informed by economic evidence or argument. But it is the language of the Act which defines the task that the legislature has set for the Court. To the extent that the statutory language conflicts with economic theory, the Court is bound to apply the Act.

<sup>162</sup> Imelda Maher, 'Regulating Competition' in Christine Parker et al (eds), *Regulating Law* (2004) 187, 199 (citations omitted).

<sup>163</sup> See below Part V for discussion of *Boral*.

<sup>164</sup> See, eg, *Federal Trade Commission v Staples Inc*, 970 F Supp 1066 (D DC, 1997).

<sup>165</sup> See, eg, *Eastman Kodak Co v Image Technical Services Inc*, 504 US 451 (1992).

<sup>166</sup> See, eg, *United States v Microsoft Corporation*, 87 F Supp 2d 30 (D DC, 1992), which was affirmed in part and reversed in part on appeal: 253 F 3d 34 (DC Cir, 2001). See also *Commission Decision of 24 March 2004 Relating to a Proceeding under Article 82 of the EC Treaty (Case Comp/C-3/37.792 — Microsoft)*, Doc No C(2004)900 final (2004), for which interim relief was denied by the Court of First Instance; *Microsoft Corporation v Commission of the European Communities* (T-201/04) [2004] ECR II-2977.

<sup>167</sup> Cf Einer Elhauge, 'Why Above-Cost Price Cuts To Drive out Entrants Are Not Predatory — And the Implications for Defining Costs and Market Power' (2003) 112 *Yale Law Journal* 681.

<sup>168</sup> See Patrick Bolton, Joseph F Brodley and Michael H Riordan, 'Predatory Pricing: Strategic Theory and Legal Policy' (2000) 88 *Georgetown Law Journal* 2239. In *United States v AMR Corporation*, 335 F 3d 1109 (10<sup>th</sup> Cir, 2003), the Department of Justice argued unsuccessfully

within economics has led some commentators to argue that we are seeing the emergence of a post-Chicago School interpretation of the competition statutes.<sup>169</sup> This approach is characterised by a richer factual analysis of individual cases and the application of more complex rules based on strategic models rather than reliance on more theoretical models<sup>170</sup> and per se tests.<sup>171</sup> For others, this increased complexity and discretion raises the problem of false positives<sup>172</sup> and wrongful convictions, and can be detrimental to consumer welfare and the expectations of rational economic actors.<sup>173</sup>

Where does the consideration of these competing economic theories in competition law cases leave our understanding of the adjudication process in Australia? This article does not suggest that the statutory text should be ignored. To do so would introduce the very anti-democratic complaints voiced by ‘textualists’ in

using game theory that American Airlines was likely to recoup its losses from alleged predatory pricing.

<sup>169</sup> See Jonathan B Baker, ‘A Preface to Post-Chicago Antitrust’ in Antonio Cucinotta, Robert Pardolesi and Roger Van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (2002) 60; Eleanor M Fox, ‘Post-Chicago, Post-Seattle and the Dilemma of Globalization’ in Antonio Cucinotta, Roberto Pardolesi and Roger Van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (2002) 76.

<sup>170</sup> See, eg, *Eastman Kodak Co v Image Technical Services Inc*, 504 US 451 (1992); *United States v Microsoft Corporation*, 253 F 3d 34 (DC Cir, 2001). Cf Bolton, Brodley and Riordan, above n 168; but see *Trinko*, 540 US 398 (2004).

<sup>171</sup> See, eg, *California Dental Association v Federal Trade Commission*, 128 F 3d 720 (9<sup>th</sup> Cir, 1997); revd 526 US 756 (1999).

<sup>172</sup> See generally Ronald A Cass and Keith N Hylton, ‘Preserving Competition: Economic Analysis, Legal Standards and Microsoft’ (1999) 8 *George Mason Law Review* 1; Fred S McChesney, ‘Talking ‘Bout My Antitrust Generation: Competition for and in the Field of Competition Law’ (2003) 52 *Emory Law Journal* 1401; Easterbrook, ‘Workable Antitrust Policy’, above n 144; Owen, above n 73.

<sup>173</sup> In *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2005) 27 ATPR ¶42-006, 43 039 (‘*Baxter First Instance*’), Allsop J in the Federal Court dismissed actions under TPA ss 46 and 47 for misuse of market power and bundling in long-term contracts on the basis of crown immunity. An appeal to the Full Federal Court was dismissed: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2006) 153 FCR 574. In *Baxter First Instance* (2005) 27 ATPR ¶42-006, 43 039 (emphasis in original), Allsop J commented in obiter on the contrast between the apparent predictability of a simple economic model and a more realistic but more complex one with less predicting quality:

It may be said that relatively simple economic theories which rest upon simple assumptions conforming broadly to commonly observable human conduct often have the most explanatory power, because they are readily comprehensible (at least at an intuitive level). However, to rely confidently upon the models generated by these theories, in court, as an *accurate* representation of reality, requires the underlying assumptions and theory to be truly representative of the market described. Unfortunately, accuracy usually necessitates complexity both within the underlying assumptions and the variables comprising the model, which may mean that the results are either incalculable or incomprehensible ...

Allsop J was commenting on the simple model for exclusionary bundling put forward by the expert economist which failed to take into account key elements of an auction process, namely uncertainty. The unpredictability and complexity of the economic models inevitably led back to reliance by the decision-maker on the statutory words and the views of witnesses:

As a result, whilst I can use the model as an indicator (where the correct data is used and the model’s result is correctly computed), it cannot ultimately provide the mathematical answer to the question as to whether Baxter did take advantage of its market power. Further, as a model it cannot take the place of the application of the words of the statute in both the notion of ‘taking advantage of’ and the relevant purpose, and of the necessary fact finding process based on evidence (human and documentary) placed before the Court ...

At 43 039–40.

the US. Rather, one may argue that judges have a number of interpretative tools to deal with the task of statutory interpretation and that a strict adherence to the 'text' has as little utility in Australian cases as it does in the US or the European Communities. It is also clear that judicial claims that competition decisions are based on a strict adherence to the statutory words, but at the same time embrace economic approaches to the determination of the legality of conduct, raise the same objections as those levelled at textualist or Chicago School proponents, such as Scalia and Easterbrook JJ.<sup>174</sup>

### C 'Judicial or Other Glosses'

One further feature of the approach to statutory interpretation found in *Visy* merits examination. The majority joint judgment argued that to adopt the horizontal/vertical classification of conduct favoured by Kirby J was to pay attention to 'judicial or other glosses'.<sup>175</sup> These glosses invite criticism that such terms derive from the 'wholly different statutory context of United States antitrust law'<sup>176</sup> where 'horizontal' or 'vertical' have no fixed meaning and are even considered as 'jargon'.<sup>177</sup>

This rejection of so-called 'foreign glosses' has become a common theme in Australian competition decisions. The Full Federal Court in *Eastern Express Pty Ltd v General Newspapers Pty Ltd* rejected the US tests for predatory pricing by refusing to adopt foreign terms:

Caution is required in translating United States judgments, which place glosses upon the text of the United States antitrust laws, to the interpretation of the Australian law. Our law evinces a somewhat different approach to legislative drafting.<sup>178</sup>

Whether this approach derives from exaggerated judicial nationalism or some other form of narrow parochialism, it is another manifestation of an interpretative position which prefers literalism/textualism.

The apparent rejection of foreign judgments can be seen to be contradicted by the interpretative practice adopted in the seminal Trade Practices Tribunal<sup>179</sup> decision on market definition, *QCMA*,<sup>180</sup> and also in the High Court's decisions in *QLD Wire*,<sup>181</sup> *Melway*<sup>182</sup> and *Boral*,<sup>183</sup> which are littered with references to US and European Communities decisions.

<sup>174</sup> See Farber and McDonnell, above n 48, 622, 668.

<sup>175</sup> *Visy* (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid* 11 (Gleeson CJ, McHugh, Gummow and Hayne JJ). Cf at 26 (Kirby J).

<sup>178</sup> (1992) 35 FCR 43, 70 (Lockhart and Gummow JJ) ('*Eastern Express*'). The Full Federal Court in *Queensland Wire v Broken Hill Proprietary Co Ltd* (1987) 17 FCR 211, 221 (Bowen CJ, Morling and Gummow JJ) rejected the application of the essential facility doctrine under s 46 in similar terms as a 'gloss' upon the terms of the *Sherman Act* which was 'not readily applicable to the terms of s 46'.

<sup>179</sup> Since 1995, the Trade Practices Tribunal has been known as the Australian Competition Tribunal: Federal Court of Australia, *Australian Competition Tribunal* <[http://www.fedcourt.gov.au/aboutct/aboutct\\_admin\\_other\\_act.html](http://www.fedcourt.gov.au/aboutct/aboutct_admin_other_act.html)>.

<sup>180</sup> (1976) 25 FLR 169.

<sup>181</sup> (1989) 167 CLR 177.

This inconsistent approach to the reception of foreign judgments is even apparent within Kirby J's judgments.<sup>184</sup> For example, in *South Sydney Football Club*, Kirby J agreed with the other High Court judges when they warned against the use of the term 'boycott' — considered to be a particularly US concept — to limit the scope of an 'exclusionary provision' as defined in *TPA* s 4D.<sup>185</sup>

The *Dawson Report*, on the other hand, stressed the importance of having 'regard to international developments in the area of competition' when considering possible legislative amendments and of examining whether interpretations have been 'informed by comparative provisions in foreign jurisdictions'.<sup>186</sup>

The courts appear to have grasped this significance in only a few instances. Reliance on foreign materials to elucidate legislative purposes and economic concepts has not been consistent and has been insufficiently theorised. It remains unclear whether they will be regarded as 'jargon' and mere 'glosses' on the statutory words or as aids to an economic and legal understanding of the nature of the conduct under review.<sup>187</sup>

The rejection of foreign concepts also contrasts with efforts by the ACCC to internationalise Australian competition law through bilateral and multilateral agreements and the exchange of information with other competition authorities.<sup>188</sup> The ACCC's guidelines on anti-competitive behaviour and mergers also reflect international approaches to these issues.<sup>189</sup> The ACCC's new *Immunity*

<sup>182</sup> (2001) 205 CLR 1.

<sup>183</sup> (2003) 215 CLR 374. The Full Federal Court in *Safeway* (2003) 129 FCR 339, was also willing to support its findings on monopolistic power and collective boycotts with decisions under the *Sherman Act*, notwithstanding that they occurred 'in a somewhat different statutory context': at 411 (Heerey and Sackville JJ). Their Honours referred to *Klor's Inc v Broadway-Hale Stores Inc*, 359 US 207 (1959) and *United States v Griffith*, 334 US 100 (1948).

<sup>184</sup> See *Visy* (2003) 216 CLR 1, 25 (citations omitted), where Kirby J agrees 'that it would be a mistake to import uncritically into the *TPA* extra-statutory concepts. Doing that could, in some circumstances, distract attention from the task of interpreting the provisions of the *TPA*.'

<sup>185</sup> (2003) 215 CLR 563, 600–1, 615; see also at 573–4 (Gleeson CJ), 590–1 (Gummow J).

<sup>186</sup> Committee of Inquiry, above n 68, 39. The Australian Government responded as follows:

The Government agrees with the values expressed in Recommendations 1.1 to 1.4. The Government supports the need to make sure that our competition provisions reflect international best practice and notes the international consultation and research undertaken by the Committee in completing this review.

Australian Government, above n 103, 1–2.

<sup>187</sup> For example, in decisions such as *Safeway* (2003) 129 FCR 339, it is also not clear whether the US judgment in *Klor's Inc v Broadway-Hale Stores Inc*, 359 US 207 (1959) was cited as an aid to the economic understanding of the exercise of monopolistic power or because it involved a similar factual situation concerning retail stores.

<sup>188</sup> See ACCC, *What We Do* (2005) <<http://www.accc.gov.au/content/index.phtml/itemId/255434/fromItemId/255432>>. For example, the ACCC is a member of the International Competition Network ('ICN'), which is an informal, voluntary, cooperative body made up of national and multinational competition authorities: ICN, *About the ICN* <<http://www.internationalcompetitionnetwork.org/aboutus.html>>; ACCC, *International Forums* (2005) <[http://www.accc.gov.au/content/index.phtml/itemId/304796/fromItemId/255432#h3\\_22](http://www.accc.gov.au/content/index.phtml/itemId/304796/fromItemId/255432#h3_22)>.

<sup>189</sup> See ACCC, *Merger Guidelines* (1999) 33, which incorporates the US tests such as the 'small but significant and non-transitory increase in price' test to measure market concentration and the examination of efficiencies.

*Policy for Cartel Conduct*<sup>190</sup> is closely modelled on approaches to this issue in the US and the European Communities.<sup>191</sup> As Maher argues:

The influence of US antitrust can thus be seen as an integrating mechanism facilitating doctrinal consistency where competition law(s) are jurisdictionally fragmented. ... Competition law is self-referential with American antitrust law a main source of reference.<sup>192</sup>

It would be erroneous, however, to equate the global harmonisation of competition law with 'Americanisation'. There is considerable international resistance to the 'importation' of US antitrust laws without a more contextual understanding of regional and national markets and legal frameworks.<sup>193</sup> While it is true that US antitrust decisions have provided useful interpretative tools for the application of competition law in a number of jurisdictions, they must not be accepted uncritically.<sup>194</sup> The political implications of the economic theory implicit in these decisions should always be acknowledged.

The discussion about the relevance and acceptance of foreign judgments for Australian competition law really centres on their 'legitimacy' as interpretative models. Perhaps they are, along with expert evidence, merely 'analogies', as Allsop J suggested in *Baxter First Instance*.<sup>195</sup>

The litigation in *Boral* provides further examples of apparent inconsistencies in the approaches to statutory construction and the reception of foreign judgments as aids to the interpretation of competition statutes by the High Court.

## V BORAL

In *Boral*,<sup>196</sup> the ACCC claimed that Boral Ltd ('Boral'), through its subsidiary Boral Besser Masonry Ltd ('BBM'), had engaged in predatory pricing in breach of s 46 of the *TPA*. The ACCC claimed that between 1994 and 1996, Boral had offered to supply concrete masonry products in Melbourne below their avoidable cost in order to drive out its competitor, C & M Brick (Bendigo) Pty Ltd

<sup>190</sup> The immunity policy offers immunity from penalties for participants in cartels who come forward with relevant information concerning collusion: ACCC, *ACCC Immunity Policy for Cartel Conduct* (2005).

<sup>191</sup> See generally Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003).

<sup>192</sup> Maher, above n 162, 196.

<sup>193</sup> See generally Eleanor Fox, 'Antitrust Law and Regulatory Federalism: Races Up, Down and Sideways' (2000) 75 *New York University Law Review* 1781; Michal S Gal, *Competition Policy for Small Market Economies* (2003).

<sup>194</sup> For an example of the European Communities' resistance to the adoption of US approaches, see *Commission Decision of 3 July 2001 Declaring a Concentration To Be Incompatible with the Common Market and the EEA Agreement: Case COMP/M 2220 — General Electric/Honeywell* [2004] OJ L 48/1; Dimitri Giotakos et al, 'General Electric/Honeywell — An Insight into the Commission's Investigation and Decision' (2001) 3 *Competition Policy Newsletter* 5; William E Kovacic, 'Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy' (2001) 68 *Antitrust Law Journal* 805.

<sup>195</sup> (2005) 27 ATPR ¶42-066, 43 049. Allsop J stated that '[t]he ACCC made reference to a number of cases in the United States dealing with bundling. None is, of course, decisive of the operation of ss 46 or 47 of the Act. They are, however, of assistance as analogies for the purpose of analysis': at 43 049.

<sup>196</sup> (2003) 215 CLR 374.

(‘C & M’) and a related company. It was further claimed that Boral engaged in strategic practices designed to discourage future entry into the market, including increasing capacity by acquiring a plant and upgrading facilities during a period of recession.<sup>197</sup>

Heerey J at first instance found in favour of Boral, notwithstanding a determination that BBM had priced throughout the relevant period below avoidable or variable cost. His Honour found that Boral did not have a substantial degree of market power and therefore did not meet the threshold requirements for a breach of s 46.<sup>198</sup> Nonetheless, Heerey J assessed in obiter the predatory pricing claim under *TPA* s 46. His Honour applied the concept of ‘recoupment’,<sup>199</sup> as adopted in the US authorities on predatory pricing, to find that BBM had no prospect of being able to recoup its losses by charging supra-competitive prices even if its two competitors left the market. His Honour also found that the pricing and strategic practices to increase capacity were ‘legitimate business decisions’ in a competitive and recessed market.<sup>200</sup> The ACCC appealed to the Full Federal Court which found in its favour.<sup>201</sup> Boral then appealed to the High Court which upheld the appeal, with Kirby J dissenting.<sup>202</sup>

In upholding the appeal, a majority of the High Court<sup>203</sup> once again commenced with a textual rather than a purposive analysis. Gleeson CJ and Callinan J stated: ‘We are concerned with the language of s 46.’<sup>204</sup> Gaudron, Gummow and Hayne JJ appeared to prefer a purposive approach,<sup>205</sup> but ultimately applied a textual analysis: ‘It is necessary to look first to the text and structure of the Act, particularly s 46.’<sup>206</sup>

<sup>197</sup> Ibid 393–4 (Gleeson CJ and Callinan J).

<sup>198</sup> *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410, 440 (‘*Boral First Instance*’). Heerey J determined that the market comprised of walling and paving products and not the narrower market definition argued by the ACCC of concrete masonry products. His Honour then found that the low barriers to entry and the existence of strong competitors meant that BBM did not have the power to behave independently of competition and competitive forces.

<sup>199</sup> Ibid 442–3. See further below Part V(B).

<sup>200</sup> Ibid 442–4. These conditions included falling market share, deep recession and decline in building activity, competition from other building products and excess capacity in the industry.

<sup>201</sup> *Australian Competition and Consumer Commission v Boral Ltd* (2001) 106 FCR 328 (‘*Boral Federal Court Appeal*’).

<sup>202</sup> *Boral* (2003) 215 CLR 374. The majority comprised judgments delivered by Gleeson CJ and Callinan J, by Gaudron, Gummow and Hayne JJ and by McHugh J. While the case raises many interesting issues, including a claim by the ACCC of conduct amounting to conscious parallelism, the discussion in this article will be confined to those issues raised by the approaches to statutory interpretation: see further Smith and Round, above n 2.

<sup>203</sup> The majority of the High Court agreed with the finding of Heerey J in *Boral First Instance* (1999) 166 ALR 410 that BBM did not have a substantial degree of market power. The majority’s comments with respect to the application of the recoupment standard, in order to determine whether conduct was in breach of *TPA* s 46, were therefore obiter.

<sup>204</sup> *Boral* (2003) 215 CLR 374, 420.

<sup>205</sup> Ibid 429. Their Honours stated: ‘The provisions of Pt IV are to be interpreted in accordance with the subject, scope and purpose of the legislation, in particular the object stated in s 2 of enhancing the welfare of Australians through the promotion of competition.’: at 429.

<sup>206</sup> Ibid 432.

The problem with relying on text and structure is that s 46 ‘does not refer specifically to predatory pricing’.<sup>207</sup> Gleeson CJ and Callinan J noted that ‘there is nothing in s 46 that, as a matter of law, requires a distinction to be drawn between pricing below or above variable or avoidable costs’.<sup>208</sup> Any purely text-based approach rejects cost-based and recoupment standards for predatory pricing. The interpretation must rely on extra-textual concepts. Unfortunately, an attempt to do so is readily dismissed as the importation of foreign concepts.<sup>209</sup> Gleeson CJ and Callinan J declared:

There is a danger that a term such as predatory pricing may take on a life of its own, independent of the statute, and distract attention from the language of s 46. There is also a danger that principles relevant to the laws of other countries may be adopted uncritically and without regard to the context in which they were developed.<sup>210</sup>

#### *A Cost-Based Tests and Legislative Purpose*

While the establishment of a cost-based distinction ‘as a matter of law’ within the statutory words is difficult on a ‘textual’ reading of the *TPA*, the distinction may be drawn if a purposive interpretation is applied. Faced with the same dilemma in the US — specifically, how to establish a bright line test for predatory pricing under the broadly drawn § 2 of the *Sherman Act* — Phillip Areeda and Donald F Turner argued that a price could only be conclusively considered predatory if it fell below reasonably anticipated short-run marginal costs (average variable cost (‘AVC’) as a proxy) because only pricing below this measure has the potential to eliminate equally efficient rivals or potential entrants.<sup>211</sup>

Areeda and Turner considered this to be a conclusive and objective test for predatory conduct. The test was characterised as a ‘legal’ rather than an ‘economic’ test because it was deliberately under-inclusive. It did not capture all instances of predation as determined by economic theory. Rather, it was a rule

<sup>207</sup> Ibid 420 (Gleeson CJ and Callinan J). Cf at 428 (Gaudron, Gummow and Hayne JJ): ‘the Act has never contained any specific and comprehensive prohibition of a practice of cutting prices to below cost’. Similarly, McHugh J first looked at the legislative object, stating that ‘[w]hen a court applies the provisions of s 46 it must do so with the legislative object of the section in mind’: at 459. His Honour also noted at 459:

In the literature, ‘predatory pricing’ is generally understood as being anti-competitive because of the reasons for which firms engage in the practice. While this is so, for the purposes of a claim under s 46, courts must focus on the wording of the section. Assuming that ‘predatory pricing’ is a useful term in the context of s 46 even though the section does not refer to it, ‘predatory pricing’ must be given its legal content by reference to the section.

<sup>208</sup> Ibid 421.

<sup>209</sup> See above Part IV(C).

<sup>210</sup> *Boral* (2003) 215 CLR 374, 421. Gleeson CJ and Callinan J considered at 421 that this was consistent with the approach in *Boral Federal Court Appeal*:

Finkelstein J, in his reasons for judgment, pointed out that the context in which predatory pricing has been considered in the United States is materially different from that of s 46, and that an expectation of recoupment of monopoly prices at the end of a period of illegal pricing behaviour is not a statutory requirement for the application of s 46.

<sup>211</sup> Phillip Areeda and Donald F Turner, ‘Predatory Pricing and Related Practices under Section 2 of the *Sherman Act*’ (1975) 88 *Harvard Law Review* 697.

which judges (and juries) could apply. Although subsequent courts argued about the appropriate allocation of costs (fixed or variable) and the appropriate measure of cost (AVC or average total cost) in the application of the test, it was the accepted approach under § 2 of the *Sherman Act* until the promotion of the recoupment standard by the Chicago School.<sup>212</sup>

A below-AVC or ‘avoidable cost’ standard could therefore be applied as a matter of law under *TPA* s 46 if the objective of the provision was understood as being to ‘protect the interests of consumers’.<sup>213</sup> Such a standard, however, cannot be elicited from a purely textual interpretation of the section, as Gleeson CJ and Callinan J stated in *Boral*: ‘Predatory pricing is a concept that was examined in the evidence of economists, and in the judgments in the Federal Court. Ultimately, however, it is the language of the Act that must be construed and applied.’<sup>214</sup>

The High Court dismissed the cost-based data as being of ‘limited utility’.<sup>215</sup> Although the facts clearly acknowledged that BBM’s prices for the relevant period were below its AVC (a clear instance of predatory pricing based on the Areeda and Turner standard), the majority regarded this as inconclusive.<sup>216</sup>

This rejection in *Boral* of any standard of cost for the determination of predatory pricing is consistent with Federal Court cases under s 46 of the *TPA*. The Full Federal Court in *Eastern Express* said it would be an ‘error to translate into the operation of s 46 the US decisions’ and went on to state that:

No pre-ordained and fixed categories as to the level of pricing or economic theory or practice of costing necessarily controls the drawing of that inference [as to proscribed purpose] in any particular case. Whether the finding as to purpose which is sought against the corporation should be inferred from the evidence as to pricing must be judged by considering not only the logic of the matter; the court must also consider whether ‘general human experience’ would be contradicted if the conduct which occurred were unaccompanied by the purpose sought to be proved.<sup>217</sup>

This approach arguably left the law of predatory pricing under s 46 in a state of flux where no particular categories could be determined and applied as a

<sup>212</sup> See, eg, *California Computer Products Inc v International Business Machines Corporation*, 613 F 2d 727 (9<sup>th</sup> Cir, 1979); *Northern Telephone Co v American Telephone & Telegraph Co*, 651 F 2d 76 (2<sup>nd</sup> Cir, 1981); *William Inglis & Sons Baking Co v ITT Continental Baking Co Inc*, 668 F 2d 1014 (9<sup>th</sup> Cir, 1981).

<sup>213</sup> *QLD Wire* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J).

<sup>214</sup> (2003) 215 CLR 374, 421.

<sup>215</sup> See *ibid*.

<sup>216</sup> *Ibid*. Gleeson CJ and Callinan J stated that ‘[t]o observe, as a matter of objective fact, that BBM’s prices were often lower than BBM’s variable costs is inconclusive’: at 421. Below-cost pricing was dismissed as merely ‘meeting competition’ because the Court was not in a position to compare BBM’s prices with its competitors’ AVCs which were thought to be lower, especially in the case of one competitor, C & M. If C & M were considered to be substantially more efficient, it might be inferred that their AVCs were significantly lower than BBM’s costs and they may well have been lower than BBM’s prices. Of course, the whole thrust of the Areeda and Turner bright line test is that there is no need to compare the cost of rivals as the court should be trying to infer the predatory purpose of the firm engaging in the predatory conduct.

<sup>217</sup> (1992) 35 FCR 43, 71–2 (Lockhart and Gummow JJ). These comments were obiter as the Federal Court held that General Newspapers Pty Ltd did not have a substantial degree of market power.

standard for identifying predatory pricing without further clarification. The Court suggested that even ‘above-cost’ pricing could be predatory and offered the seemingly non-justiciable standard of ‘general human experience’.<sup>218</sup> What is clear is that while these standards are not derived from an interpretation based on economic theory or foreign glosses, they also cannot be derived from a merely textual reading of the section. The Court in *Eastern Express* failed to recognise and problematise this apparent inconsistency.

The rejection of any ‘standard of cost’ is also contradicted by what the courts actually do. The courts in *Eastern Express* and *Trade Practices Commission v CSBP & Farmers Ltd*<sup>219</sup> did grapple with cost-based data and in *Eastern Express* the case was dismissed at first instance because the newspaper in question was not being published at a loss: ‘If there is no loss, it would be difficult to infer a proscribed purpose.’<sup>220</sup> This is a clear indication at least that the Areeda and Turner standard was relevant to the question of liability under s 46.

The textual approach and apparent rejection of foreign concepts and economics was also contradicted by Heerey J in *Boral First Instance* and by McHugh J in *Boral*, both of whom ultimately accepted, to the benefit of the ACCC, the foreign concept of the current US approach to predatory pricing, and its Chicagoan notion of recoupment.<sup>221</sup>

#### B The Recoupment Approach and Judicial Precedent

Recoupment as a separate or even threshold test for predatory pricing is based on a recognition that low prices benefit consumers and that it is undesirable to punish such conduct unless there is a likelihood that the losses incurred by the defendant will be later recouped by higher prices. Any other rule runs the risk of deterring pro-competitive pricing. The Chicago School argues that given the rarity of predatory pricing, the risks of under-deterrence far outweigh the risks of over-deterrence.<sup>222</sup> This view of the marginal impact of predatory pricing upon consumer welfare is consistent with the Chicago School’s understanding of the self-regulation of the market. The only circumstance where below-cost pricing

<sup>218</sup> Ibid 72.

<sup>219</sup> (1980) 53 FLR 135.

<sup>220</sup> *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385, 409 (Wilcox J).

<sup>221</sup> See *Boral First Instance* (1999) 166 ALR 410; *Boral* (2003) 215 CLR 374. Both Heerey J and the majority of the High Court found that Boral did not have the requisite level of substantial market power so the comments on ‘recoupment’ were obiter: see *Boral First Instance* at 442–3; *Boral* at 422 (Gleeson CJ and Callinan J), 469–70 (McHugh J). Kirby J, in dissent, also adopted the recoupment approach: at 502–15. The remainder of the High Court did not endorse any particular approach to the determination of predatory pricing. Recoupment was considered by Gleeson CJ and Callinan J, but not by Gaudron, Gummow and Hayne JJ.

<sup>222</sup> Bork, above n 126, 144–5; cf R Koller, ‘The Myth of Predatory Pricing: An Empirical Study’ (1971) 4 *Antitrust Law & Economic Review* 105.

could be considered rational is when the sacrifice of profits in the period of predation can be recouped by a stream of monopoly profits in the future.<sup>223</sup>

The recoupment standard in predatory pricing could therefore be incorporated under s 46 through an interpretation which gives effect to the statutory purpose defined as the ‘protection of consumers’.<sup>224</sup> Consumer welfare is only damaged if a firm can recoup losses through future monopoly pricing. If losses cannot be recouped, then consumers have gained and benefited from the period of low prices. McHugh J wrote that ‘[t]reating recoupment as a fundamental element in determining a claim of “predatory pricing” provides a simple means of applying s 46 without affecting the object of protecting consumer interests.’<sup>225</sup>

The statutory purpose of the protection of consumers is equally consistent however with the application of the Areeda and Turner ‘cost-based’ test for predatory pricing.<sup>226</sup> The choice between these economic theories cannot easily be resolved by a purposivist interpretation which asks how ‘reasonable persons pursuing reasonable purposes reasonably’<sup>227</sup> would decide the issue. The application of cost-based standards over recoupment standards is not resolved by a debate about the statutory purpose or by the text, but by a political preference for intervention in the market or the self-regulation of the market.<sup>228</sup>

How the shift was made from a clear indication of the statutory interpretation of s 46 in the decision in *Eastern Express* — which refused to read in any foreign concepts and rejected any ‘pre-ordained and fixed categories as to the level of pricing’<sup>229</sup> — to Heerey J’s clear acceptance and application of the recoupment approach in *Boral First Instance*, raises interesting interpretative questions within the context of Australian competition law. It is curious that Heerey J did not feel constrained nor find a need to grapple with the precedents set by the Full Federal Court’s decisions in this area.<sup>230</sup> This is even more problematic given that his Honour found that BBM had priced below avoidable cost for an extended period. This is a clear instance of predatory pricing on the Areeda and

<sup>223</sup> The US Supreme Court applied this recoupment model in *Matsushita*, 475 US 574 (1986), *Cargill*, 479 US 104 (1986) and *Brooke Group Ltd v Brown & Williamson Tobacco Corporation*, 509 US 209 (1993). As Bork, above n 126, 145, argues:

Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses.

This passage was cited with approval in the US Supreme Court’s decision in *Matsushita*, 475 US 574, 589 (Powell J) (1986).

<sup>224</sup> *QLD Wire* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J).

<sup>225</sup> *Boral* (2003) 215 CLR 374, 469–70. Cf Gaudron, Gummow and Hayne JJ regarding recoupment: at 440.

<sup>226</sup> See above n 211 and accompanying text.

<sup>227</sup> Manning, above n 37, 91.

<sup>228</sup> See below nn 256–61 and accompanying text.

<sup>229</sup> (1992) 35 FCR 43, 72 (Lockhart and Gummow JJ).

<sup>230</sup> These precedents include *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) 3 ATPR ¶40-081; *Trade Practices Commission v CSBP & Farmers Ltd* (1980) 53 FLR 135; *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 13 ATPR ¶41-128; *Eastern Express* (1992) 35 FCR 43.

Turner standard and ‘a prima facie violation’.<sup>231</sup> Yet, as Heerey J had already determined that the appropriate standard was that of recoupment, the level of pricing was of little relevance, because below-avoidable cost pricing, even for a prolonged period, can amount to a rational business decision.<sup>232</sup> In support, Heerey J cited the Full Federal Court’s statement in *Eastern Express* that ‘[n]o pre-ordained and fixed categories as to the level of pricing or economic theory or practice of costing’ necessarily permits the drawing of an inference of predatory pricing.<sup>233</sup> This statement merely avoids setting a cost standard for predatory pricing. It does not necessarily rule out the relevance of below-cost pricing because it is equally consistent with the view that even above-cost pricing can be predatory.<sup>234</sup>

Heerey J, relying on the definition offered by an expert witness, Professor George Hay,<sup>235</sup> and US decisions under § 2 of the *Sherman Act*,<sup>236</sup> defined predatory pricing as ‘selling below cost plus recoupment by supra-competitive pricing’.<sup>237</sup>

The term ‘predatory pricing’ does not appear in s 46 or in its nearest counterpart in United States anti-trust law, s 2 of the *Sherman Act*. Nevertheless, the term forms part of the discourse of courts, lawyers and economists in both countries ... It is not suggested that the term has some different or qualified meaning in Australia. Therefore it will be helpful to examine the concept, to see how it is applied in the United States, and to consider its application in the context of s 46.<sup>238</sup>

Is the ‘discourse of Courts, lawyers and economists in both countries’ a legitimate source of authority? Are the views of economists equivalent to precedent as an interpretative source? Which economists’ views are relevant? What is the justification for preferring the Chicago School test over that of Areeda and Turner? How does this interpretation fit within the *text* of s 46? In what way could the text *qualify* the meaning of recoupment in Australia?

<sup>231</sup> As noted by Kirby J in the High Court: *Boral* (2003) 215 CLR 374, 514.

<sup>232</sup> And therefore may not necessarily amount to a ‘taking advantage’ of market power: *Boral First Instance* (1999) 166 ALR 410.

<sup>233</sup> (1992) 35 FCR 43, 71–2 (Lockhart and Gummow JJ); see further above nn 217–18 and accompanying text.

<sup>234</sup> Finkelstein J came to the same conclusion in *Boral Federal Court Appeal* (2001) 106 FCR 328, 398, in his review of the previous s 46 predatory pricing decisions.

<sup>235</sup> Professor Hay’s career included ‘six years as Director of Economics in the Economic Policy Office of the US Department of Justice Antitrust Division’: *Boral First Instance* (1999) 166 ALR 410, 441–2.

<sup>236</sup> See *Barry Wright Corporation v ITT Grinnell Corporation*, 724 F 2d 227 (1<sup>st</sup> Cir, 1983). Heerey J approves Brennan J’s focus on recoupment as an essential element of predatory pricing in *Cargill*, 479 US 104, 117 (1986): *Boral First Instance* (1999) 166 ALR 410, 441. Brennan J defined predatory pricing as ‘pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run’: at 441.

<sup>237</sup> *Boral First Instance* (1999) 166 ALR 410, 440.

<sup>238</sup> *Ibid.* Heerey J goes on to cite, but does not elaborate further on, the Full Federal Court’s warning: ‘It is necessary of course to bear in mind the warnings in *Eastern Express* that caution is required in translating United States judgments to the interpretation of Australian law which ‘evinces a somewhat different approach to legislative drafting’: at 440 (citations omitted).

A similar issue concerning competing theories of economics and the role of precedent was raised in the US decision of *State Oil Co v Khan*.<sup>239</sup> An issue of maximum vertical resale price-fixing came before Posner J in the Court of Appeals. Posner J was willing to find for the defendant on the basis that maximum resale price-fixing should not be treated as per se illegal under § 1 of the *Sherman Act* because it can amount to pro-competitive behaviour. His Honour suggested that it should be treated similarly to non-price vertical restraints under the 'rule of reason'.<sup>240</sup> Nonetheless, his Honour found for the applicant because he was bound by the clear Supreme Court precedent in *Albrecht v Herald Co*<sup>241</sup> which declared that maximum resale price-fixing was illegal per se. On appeal, the Supreme Court decided to overrule *Albrecht v Herald Co* and based its reasoning on Posner J's analysis of the pro-competitive effects of maximum resale price maintenance in the Court of Appeals and decided that this type of agreement should be dealt with under the 'rule of reason'.<sup>242</sup> For Posner J, the relevant interpretative tools were not just what he decided was the best economic theory to apply to the particular facts, and nor was the text of the *Sherman Act* to be treated as a 'blank cheque'.<sup>243</sup> Rather, the constitutional interpretative constraints imposed by precedent and stare decisis determined and constrained the nature and extent of his Honour's interpretive freedoms as a lower court judge.

Heerey J was not faced with the application of a per se precedent; his Honour was instead confronted with differing interpretations of TPA s 46. Competing economic approaches to predatory pricing, judicial interpretation and the failure of previous Australian case law to adopt a recoupment standard should have been given greater weight or more careful discussion. At the very least Heerey J should have been at pains to establish how the recoupment approach was consistent with these previous decisions and the text of s 46, especially as the choice of one economic theory over another raises important questions concerning the role of competition law in market regulation.<sup>244</sup>

These same interpretative inconsistencies can be discerned in the High Court's decision in *Boral*, which clearly stated its preference for a textual approach and a rejection of foreign concepts. Yet the High Court upheld the appeal by Boral, with McHugh J explicitly agreeing with Heerey J on the recoupment issue.<sup>245</sup>

<sup>239</sup> 93 F 3d 1358 (7<sup>th</sup> Cir, 1996).

<sup>240</sup> Ibid 1363, citing *GTE Sylvania*, 433 US 36 (1977).

<sup>241</sup> 390 US 145 (1968).

<sup>242</sup> *State Oil Co v Khan*, 522 US 3 (1997). Posner J has stated: 'It is the only occasion on which I have been gratified to be reversed': Richard A Posner, *Antitrust Law* (2<sup>nd</sup> ed, 2001) 189.

<sup>243</sup> *Contra* Easterbrook, 'Workable Antitrust Policy', above n 144, 1702.

<sup>244</sup> See below Part V(C).

<sup>245</sup> *Boral* (2003) 215 CLR 374, 464–5. The High Court's finding of 'recoupment' was confused with the threshold question of whether BBM had a 'substantial degree of market power'. Finkelstein J in *Boral Federal Court Appeal* (2001) 106 FCR 328 treated BBM's alleged capacity to eliminate rivals from the market as being the critical aspect of its supposed market power, stating: 'It is the exclusionary conduct that establishes market power, not the reverse.': at 413. Cf at 389 (Merkel J). It was then a relatively easy matter for McHugh J to determine that BBM did not possess 'substantial market power' merely because it was unable to recoup its losses: *Boral* (2003) 215 CLR 374, 464.

McHugh J believed that the text of s 46 placed no obstacle to the application of the term ‘recoupment’ as it was understood in foreign judgments to be an aid to interpretation:

Even when one allows for the differences between the Australian Act and the United States legislation, no valid reason justifies rejecting the United States jurisprudence as an aid in developing the law relating to ‘predatory pricing’ in this country.<sup>246</sup>

It is useful to recall here that it was McHugh J who argued as part of the majority joint judgment in *Visy* that to adopt the horizontal/vertical classification of conduct favoured by Kirby J amounted to a ‘gloss’ which ‘distract[ed] attention from the language of the Act’.<sup>247</sup> This apparently contradictory approach by the High Court is never appropriately theorised or problematised as an interpretative practice. Kirby J identified this anomaly in *Visy*:

For example, in *Boral*, members of this Court were of the opinion that the concept of ‘recoupment’, as developed in antitrust decisions and literature in the very different statutory context of the United States, could be used to shed light on the circumstances in which, in this country, a corporation ‘take[s] advantage’ of a substantial degree of market power for the purposes of s 46 of the *TPA*. In *Boral*, the joint reasons of Gaudron, Gummow and Hayne JJ even made reference to ‘horizontal price-fixing arrangements’. Knowledgeable readers of *Boral* would have understood what their Honours were getting at by their use of that expression. Such readers would not have mistaken that reference to *horizontal* arrangements for jargon or slogans. I am willing to assume that readers of my reasons in this case would bring the same appreciation to my use of the same adjective.<sup>248</sup>

The High Court had already established however that the threshold test of whether the firm possesses ‘substantial market power’ and whether it has misused this power were two separate questions under s 46. In *Boral* (2003) 215 CLR 374, 422, Gleeson CJ and Callinan J stated ‘as the decisions in *Melway* shows, they are two questions, not one’. See also *Universal Music* (2003) 131 FCR 529, 563 (Wilcox, French and Gyles JJ); cf *Baxter First Instance* (2005) 27 ATPR ¶42-066, 43 039 (Allsop J).

In the context of s 46, a firm must almost be a monopolist to have an opportunity to recoup because only such a firm can have the prospect of earning monopoly profits after the victim has been eliminated by predation. The failure to recoup, however, does not always necessarily mean that the firm did not have substantial market power when it engaged in the conduct, as it is not the success of the conduct which is important: *Eastern Express v General Newspapers Pty Ltd* (1991) 30 FCR 385, 404–5 (Wilcox J). The ability to engage in predatory conduct is a consequence of the possession of monopoly power and it is why only firms with ‘substantial market power’ are examined under s 46. But it is an error to examine the conduct as the indicator or measurement of market power rather than as its manifestation. Much of this confusion arguably stems from the manner in which ‘take advantage’ has been interpreted under s 46 (introducing complicated counterfactuals) and the treatment of the relationship of conduct to market power.

<sup>246</sup> *Boral* (2003) 215 CLR 374, 465. McHugh J stated that ‘Heerey J placed no gloss on s 46 when he applied the United States cases on recoupment. Rather his Honour gave legal content and effect to the terms used by the legislature’: at 469.

<sup>247</sup> (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>248</sup> *Ibid* 25–6 (emphasis in original) (citations omitted). Yet, in *Alexander v Perpetual Trustees WA Ltd* (2003) 216 CLR 109, concerning the interpretation of the *Wrongs Act 1958* (Vic), Kirby J seemed to concur with the statements of the majority in *Visy*. Citing *Visy* (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ), Kirby J stated at 138 that

this appeal is yet another instance of the phenomenon, all too common, for Australian lawyers and courts to attempt to resolve novel disputes by reference to judicial elaboration rather than

By referring to ‘knowledgeable readers’, Kirby J recognises that meaning is very much determined and informed by an ‘interpretative community’.<sup>249</sup> The text is informed by the reader’s knowledge of competition law and policy and when Kirby J refers to the terms ‘vertical’ and ‘horizontal’ he relies on that interpretative community to understand his meaning. While this implies a departure from ‘textualism’, it does not require or assert that all meaning is indeterminate. Meaning is bound or constrained by what this ‘interpretative community’ (which includes the economic expert) decides is the meaning, by reference to competition policy, and how this policy has been incorporated within precedent.

### C Choice of Economic Theory

The application of economic principles to identify anti-competitive behaviour is not ideologically neutral. Competing economic theories of predatory pricing represent differing views of the state (laissez-faire or interventionist) and the market. A theory that permits any level of pricing to be potentially predatory is willing to undertake a more dynamic contextual analysis of the actual competitive impact of the particular pricing practice in the market. The recoupment theory, approved by Heerey J in *Boral First Instance*, is clearly consistent with deference to the self-regulating capabilities of the market. It is founded on the idea that predatory schemes rarely occur and that the risk of false positives is high. The ideological origins of Heerey J’s reasons for preferring one theory over another, especially one which was arguably more consistent with precedent, should perhaps have been more transparent. As Lopatka and Page point out, judges do not have boundless discretion in this area:

antitrust must be a body of law that integrates economics into its rules over time so that the rules can provide an efficient system of incentives for businesses ... courts should take steps to help ensure the legitimacy of their decisions. First, the reliance on economic authority should be as transparent as possible. Where a court has surveyed the literature in a contentious area, it should acknowledge the controversy and justify its reliance on one viewpoint. Where a court formulates a rule or standard, it should identify not only the economic theory on which it relies, but also the institutional considerations that affect its decision.<sup>250</sup>

Recoupment should have been identified as a particularly Chicagoan approach that rejects cost standards as the sole determinant of predatory pricing conduct. This fact was recognised by Finkelstein J in *Boral Federal Court Appeal* when he discussed the Chicago School origins of the recoupment standard. Finkelstein J noted that the standard had not been accepted uncritically<sup>251</sup> and recog-

the text of an applicable statute. This Court has drawn this tendency to notice more times than I care to remember. The present is a classic illustration.

<sup>249</sup> See generally Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980); Blatt, above n 72.

<sup>250</sup> Lopatka and Page, above n 140, 695–6 (citations omitted).

<sup>251</sup> *Boral Federal Court Appeal* (2001) 106 FCR 328, 394–7.

nised that the practical implications of adopting the standard may frustrate the objects of the provision.<sup>252</sup>

The ideological origins of these theories is not debated or elucidated by Heerey J at first instance, nor by McHugh J in the High Court. The economic principles are simply applied as scientifically neutral. Yet, the sources used to support the theory are all Chicagoan in origin. For example McHugh J, citing Posner J, puts forward a particularly Chicago School view of the duties of the dominant market player: ‘Even a firm with a substantial degree of market power “has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches”.’<sup>253</sup>

But how does adopting this approach square with the opposing view that firms with substantial market power may have a ‘special responsibility’<sup>254</sup> not to distort competition or the way in which ‘take advantage’ has been defined under s 46 to include an examination of how market power can ‘facilitate’ anti-competitive conduct?<sup>255</sup>

This is a debate about the reception and interpretation of economic evidence and imperfect information. A clear choice to apply certain economic theories will screen the relevance of certain evidence over other proof.<sup>256</sup> If recoupment is the operative economic theory to be applied, the court will give precedence to facts concerning market structure over facts concerning ‘cost data’.<sup>257</sup> The complicated cost-based data which are often presented to the courts in predatory pricing cases and its uncertain effect on consumer welfare are used as justifications by the Chicago School not to develop tools for the better assessment of that data but to caution against legal intervention altogether. Both Heerey J<sup>258</sup> and the High Court gave little probative value to the evidence of below-cost pricing because it was of ‘limited utility’<sup>259</sup> to the recoupment question which is determined solely by an examination of market structure. McHugh J again cited Posner<sup>260</sup> to

<sup>252</sup> Ibid 397, where his Honour noted: ‘The effect of accepting the definition that found favour with the trial judge should be considered. As the United States decisions demonstrate, it will be almost impossible to maintain a successful predatory pricing prosecution against a firm other than a monopolist’.

<sup>253</sup> *Boral* (2003) 215 CLR 374, 461, citing *Olympia Equipment Leasing Co v Western Union Telegraph Co*, 797 F 2d 370, 375 (Posner J) (7<sup>th</sup> Cir, 1986) (citations omitted), who also stated that:

the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. ‘A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits’ ...

Cf *Trinko*, 540 US 398 (2004).

<sup>254</sup> In the European Communities, a party who makes a dominant undertaking under art 82 of the *EC Treaty* has ‘a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market’: *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (C-322/81) [1983] ECR 3461, 3511.

<sup>255</sup> *Melway* (2001) 205 CLR 1, 23 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>256</sup> See Lopatka and Page, above n 140, 642.

<sup>257</sup> See, eg, *Matsushita*, 475 US 574, 594 fn 19 (Powell J) (1986); Lopatka and Page, above n 140, 653.

<sup>258</sup> *Boral First Instance* (1999) 166 ALR 410.

<sup>259</sup> *Boral* (2003) 215 CLR 374, 421 (Gleeson CJ and Callinan J).

<sup>260</sup> Ibid 462, citing Richard A Posner, *Antitrust Law* (1<sup>st</sup> ed, 1976) 188.

support his view of the inadequacy of the pricing or cost standards (which would be highly relevant to the Areeda and Turner test) for predatory pricing:

In my view, what is required is not a bright line rule about costs but a more sophisticated analysis of the firm, its conduct, the firm's competitors, and the structure of the market not only at the time in which the firm has engaged in conduct allegedly in breach of the Act but also before and after that conduct.<sup>261</sup>

Recoupment is clearly an economic approach to predatory pricing which was open to the court. However, in failing to problematise the origins of the theory, perhaps Heerey J shares the view of proponents of the Chicago School regarding the application of their theory by the courts. Easterbrook J has stated, referring to a number of US Supreme Court decisions<sup>262</sup> which have applied Chicago School interpretations, that '[n]one can be said to "adopt" the Chicago School ... because the Chicago School is not a "school" so much as it is a method of asking questions.'<sup>263</sup>

The presentation of recoupment as the only possible interpretation also ignores the 'judicial fact' that it is an approach which has not been universally accepted in comparative jurisdictions.<sup>264</sup> For various reasons, UK and European Communities courts have not applied recoupment as a standard or test in recent predatory pricing decisions.<sup>265</sup> McHugh J does not refer to these UK or European

<sup>261</sup> *Boral* (2003) 215 CLR 374, 462. Similarly McHugh J stated, at 470 (citations omitted), that:

It enables a court to avoid getting into the messy area of cost analysis, examination of various accounting figures and competing expert evidence on the question of what are the relevant costs. A recoupment test requires the court to examine the market structure — something the courts have had less difficulty with than with cost analysis — and determine the ability of a firm to recoup its losses from its price-cutting. As Judge Easterbrook said, delivering the opinion of the United States Court of Appeals, Seventh Circuit, in *AA Poultry Farms Inc v Rose Acre Farms Inc*:

'It is much easier to determine from the structure of the market that recoupment is improbable than it is to find the cost a particular producer experiences in the short, middle, or long run (whichever proves pertinent). Market structure offers a way to cut the inquiry off at the pass, to avoid the imponderable questions that have made antitrust cases among the most drawnout and expensive types of litigation.'

It is only when the market structure is such that a firm could recoup, that courts will need to consider the relationship between price and cost.

<sup>262</sup> See especially *Matsushita*, 475 US 574 (1986); *Aspen Skiing Co v Aspen Highlands Skiing Corporation*, 472 US 585 (1985); *GTE Sylvania*, 433 US 36 (1977).

<sup>263</sup> Easterbrook, 'Workable Antitrust Policy', above n 144, 1699.

<sup>264</sup> Finkelstein J recognised this in *Boral Federal Court Appeal* (2001) 106 FCR 328, 397.

<sup>265</sup> In *Tetra Pak International SA v Commission of the European Communities* (C-333/94) [1996] ECR I-5951, 5983–4, the European Court of Justice stated that it was not necessary for the European Commission to prove conclusively that the price-cutting firm will be able to recoup its losses following the elimination of its rivals. In *Commission Decision of 16 July 2003 Relating to a Proceeding under Article 82 of the EC Treaty (COMP/38.233 — Wanadoo Interactive)*, Doc No COMP/38.233 (2003), the European Commission imposed a fine on a subsidiary of France Télécom for predatory pricing; the possibility of recoupment was investigated but not used as a key element in the final decision. See also European Commission, 'High-Speed Internet: The Commission Imposes a Fine on Wanadoo for Abuse of a Dominant Position', Doc No IP/03/1025 (Press Release, 16 July 2003). In its discussion paper, the European Commission stated that it did 'not consider it ... necessary to provide further separate proof of recoupment in order to find an abuse': Directorate-General for Competition, above n 158, 35. France Télécom's appeal to the Court of First Instance has been dismissed: *France Télécom SA v Commission of the European Communities* (T-340/03) (Unreported, Court of First Instance of the European Communities, Vilaras P, Martins Ribeiro, Dehousse, Šváby and Jürimäe JJ, 30 January 2007). In the UK Competition Appeal Tribunal's decision in *Napp Pharmaceutical Holdings Ltd v Direc-*

Communities decisions, preferring the ‘sound economic reasoning’ of courts in the US and the Office of Fair Trading in the UK which, he says, ‘regard the concept of recoupment as a fundamental element of a successful “predatory pricing” claim’.<sup>266</sup>

More importantly, there is no discussion in *Boral* of how the recoupment standard has benefited from recent economic research that has questioned the Chicago School assumption regarding the rarity of predatory pricing schemes.<sup>267</sup> More recent studies, employing developments in industrial economics, argue that recoupment can be established in a number of ways. Predation is examined in the context of a more dynamic market and from a strategic perspective, with the view that firms take into account how their behaviour will affect the behaviour and expectations of existing and potential rivals.<sup>268</sup> Any account of the expected profit from such behaviour should therefore take into consideration the indirect profits that result from the reactions of these other firms.<sup>269</sup> These strategic theories take account of such variables as imperfect or asymmetric information, transaction costs and time lags, and argue that a firm can develop a ‘reputation’ for predation. Although predatory pricing may not be profitable in the context of a single entrant, it may be so in the long run due to the effect it has on existing and potential rivals. The predatory campaign can be observed by potential entrants who may be deterred from entering the market through fear of meeting an aggressive response<sup>270</sup> or who are led to believe that they cannot compete with the monopolist.<sup>271</sup> Neither Heerey J nor McHugh J considered this more nuanced reading of ‘recoupment’.

#### D The Australian Market Context

When applying economic theory, decision-makers must also be mindful of the highly concentrated Australian market in which they are applying the rules. A more interventionist approach by the courts may be required to protect consumer

*tor General of Fair Trading* [2002] CAT 1 (Unreported, Bellamy P, Members Colgate and Grinyer, 15 January 2002) [261] (Bellamy P, Members Colgate and Grinyer), evidence of recoupment was considered unnecessary; cf *Aberdeen Journals Ltd v Office of Fair Trading* [2003] CAT 11 (Unreported, Bellamy P, Members Bain and Quigley, 23 June 2003) [445] (Bellamy P, Members Bain and Quigley).

<sup>266</sup> *Boral* (2003) 215 CLR 374, 464. Cf Office of Fair Trading, United Kingdom, *Assessment of Conduct: Draft Competition Law Guideline for Consultation*, Doc No OFT414a (2004) 17–19.

<sup>267</sup> Particularly the reliance placed by the Chicago School on earlier studies by John S McGee which questioned whether Standard Oil was ever engaged in predatory pricing to drive out competing refineries: see Bork, above n 126, 153–5; *Standard Oil Co v United States*, 221 US 1 (1911); cf John S McGee, ‘Predatory Price Cutting: The Standard Oil (NJ) Case’ (1958) 1 *Journal of Law & Economics* 137; Koller, above n 222. See further Bolton, Brodley and Riordan, above n 168, 2243–8.

<sup>268</sup> See Bolton, Brodley and Riordan, above n 168; cf Elhauge, above n 167.

<sup>269</sup> Janusz A Ordover and Daniel M Wall, ‘Proving Predation after *Monfort* and *Matsushita*: What the “New Learning” Has To Offer’ (1987) 1 *Antitrust* 5.

<sup>270</sup> *Ibid* 6. See also Jonathan B Baker, ‘Recent Developments in Economics that Challenge Chicago School Views’ (1989) 58 *Antitrust Law Journal* 645, 649; Garth Saloner, ‘Predation, Mergers, and Incomplete Information’ (1987) 18 *Rand Journal of Economics* 165.

<sup>271</sup> Ordover and Wall, above n 269, 7; cf Frank H Easterbrook, ‘Predatory Strategies and Counterstrategies’ (1981) 48 *University of Chicago Law Review* 263, 288; *United States v AMR Corporation*, 335 F 3d 1109 (10<sup>th</sup> Cir, 2003).

welfare in a smaller market which is dominated by oligopolies. In these conditions, market forces cannot always be relied upon to regulate and erode market power.<sup>272</sup> US antitrust policy and its enforcement mechanisms are arguably designed for a very large economy in which economies of scale do not limit the number of competitive alternatives available to most buyers and may not always readily apply to small economies with non-tradable goods and services.<sup>273</sup>

A contextual analysis of the nature of the competitive constraints within the Australian market may have allowed greater prominence to be given to the ACCC's arguments regarding collective dominance and strategic predation in *Boral*, rather than deference to the market response of a competitor to depressed conditions and competitor price-cutting.<sup>274</sup> Such an examination may have rejected the relevance of Posner's account of a firm with substantial market power having 'no general duty' and the ability of the competitive market to prevent recoupment through the exercise of market power.<sup>275</sup> Instead, the High Court was not willing to accept the Full Federal Court's view that the upgrade of facilities by BBM during the period of recession was intended to signal to others in the market that BBM was willing to continue the price war for some time and that it could absorb whatever losses resulted (a strategically erected barrier to entry).<sup>276</sup>

Kirby J argued that a more interventionist approach may indeed have been more consistent with a textual reading of *TPA* s 46. The 1986 amendments to the threshold test required for the establishment of market power in s 46 were made to ensure that the test applied to firms in situations where there is less than market dominance and to major participants in an oligopolistic market where 'more than one firm may have a substantial degree of power in a market'.<sup>277</sup> Kirby J adopted recoupment as the appropriate mode of analysis, but believed its meaning was constrained by the wording of s 46.<sup>278</sup> His Honour also thought that

<sup>272</sup> See Gal, above n 193, ch 5.

<sup>273</sup> See Owen, above n 73, 445.

<sup>274</sup> As Kirby J noted in *Boral* (2003) 215 CLR 374, 507, the facts were similar to the coordinated oligopoly in the *Brooke Group Ltd v Brown & Williamson Tobacco Corporation*, 509 US 209 (1993); cf *Universal Music* (2003) 131 FCR 529, 583 (Wilcox, French and Gyles JJ), where the Court accepted, in obiter, an argument that signalling or the knock-on effect of publicity could intimidate other retailers and was relevant to the anti-competitive effect of a refusal to supply.

<sup>275</sup> *Boral* (2003) 215 CLR 374, 461 (McHugh J).

<sup>276</sup> McHugh J did consider, but ultimately rejected, these factors, stating: 'However, if pricing below cost is to be considered a strategic barrier to entry through its signalling effect, information asymmetries in the market would need to be considered': *ibid* 478–9.

<sup>277</sup> Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) [45]. A more interventionist interpretation of s 46 may also have been justified by an examination of the policy underlying the entire legislative scheme. Clearly, in *NT Power Generation* (2004) 219 CLR 90, the High Court justified their more interventionist approach by reference to the legislative policy to apply the *Hilmer Report* reforms: see below Part VII.

The necessity of providing statutory access (*TPA* pt IIIA), for example, to monopoly providers of utilities in a highly concentrated market has also been recognised in other parts of the *TPA*: see *TPA* pt IIIA ('Access to Services'); cf *TPA* pts XIB ('Anti-Competitive Conduct Rules in the Telecommunications Industry'), XIC ('The Telecommunications Access Regime'). The provision for authorisation of mergers on 'public benefit' grounds (*TPA* ss 90(9), 90(9A)) is also arguably evidence of the need to take into account non-economic issues in merger analysis in a small economy.

<sup>278</sup> *Boral* (2003) 215 CLR 374, 505–6.

the requirement for a dangerous or high probability of supra-competitive prices would involve judges writing an ‘effects’ element into the section.<sup>279</sup>

But the consideration of recoupment arguably makes little sense without some consideration of the likelihood of success of the pricing scheme — which is determined in economic theory not by an assessment of actual success, but from the market conditions and structure. The difficulty with this approach is that Kirby J applies a recoupment standard which he believes is more consistent with the ‘text’, yet it is also arguably inconsistent with economic literature on the subject. Another approach would perhaps have made more explicit how the strategic theories Kirby J discusses could also permit recoupment.<sup>280</sup>

Like McHugh J’s embrace in *Boral* of foreign concepts,<sup>281</sup> Kirby J’s view contrasts with his non-textual interpretation in *Visy*.<sup>282</sup> Both approaches raise problems of interpretative consistency, but more importantly they signal the need for a more transparent discussion of the actual economic or statutory justifications for preferring one interpretation over another.

Many of the interpretative issues raised in *Boral* and *Visy* concerning the role of the text, legislative intent and the application of economic theory continued in the two later High Court competition law decisions of *Rural Press*<sup>283</sup> and *NT Power Generation*.<sup>284</sup>

## VI RURAL PRESS

Rural Press Ltd (‘Rural Press’) was a publisher of regional newspapers in South Australia. A rival wanted to publish a newspaper in one of Rural Press’ markets. Rural Press sought the cessation of the rival newspaper in return for an agreement not to compete in the prime circulation area of the rival publisher. The ACCC claimed the agreement substantially lessened competition in the market and/or contained an exclusionary provision contrary to ss 45(2)(a)(ii) and 4D of the *TPA*. The ACCC also claimed that Rural Press’ actions amounted to a misuse of market power in breach of s 46. Mansfield J, at first instance, found Rural Press in breach of all three provisions.<sup>285</sup> On appeal, the Full Federal Court upheld Rural Press’ appeal on ss 4D and 46.<sup>286</sup> A majority of the High Court (Kirby J dissenting) upheld the claims on ss 4D and 45, but dismissed the s 46 claim.<sup>287</sup>

<sup>279</sup> Ibid 514 (Kirby J). At 497, his Honour also noted:

It is a mistake to import uncritically into the notion of ‘market power’, as appearing in s 46 of the Act, either overseas case law or pure economic theory. True, these sources may sometimes assist the Australian decision-maker. But in the end, the duty of that decision-maker is to give meaning to the words of the local statute.

<sup>280</sup> See Bolton, Brodley and Riordan, above n 168.

<sup>281</sup> See above n 221 and accompanying text.

<sup>282</sup> See above Part II(A).

<sup>283</sup> (2003) 216 CLR 53.

<sup>284</sup> (2004) 219 CLR 90.

<sup>285</sup> *Australian Competition and Consumer Commission v Rural Press* (2001) 23 ATPR ¶41-804.

<sup>286</sup> *Rural Press v Australian Competition and Consumer Commission* (2002) 118 FCR 236.

<sup>287</sup> *Rural Press* (2003) 216 CLR 53. Gummow, Hayne and Heydon JJ delivered the majority joint judgment. Gleeson CJ and Callinan J delivered a separate concurring judgment.

Again the High Court cautioned against the interpretation of ‘exclusionary provision’ within s 4D by reference to a gloss, such as the concept of a ‘boycott’ which lacked ‘precise meaning’,<sup>288</sup> and could not ‘be permitted to divert attention from the text’.<sup>289</sup> Gleeson CJ and Callinan J noted that the use of the term boycott has ‘driven courts to the unproductive and inappropriate task of seeking to construe the parliamentary materials and speeches rather than the statute.’<sup>290</sup> In particular, their Honours argued that the term ‘boycott’ fostered the assumption of a requirement for some form of animosity towards the object or objects of an exclusion.<sup>291</sup>

While the need for proof of animus was correctly rejected, the failure to read into ‘purpose’ within s 4D some idea of a ‘purpose of injuring or disadvantaging’ the particular person or class of person may exclude the main issue for analysis in competition cases — namely, whether there was an anti-competitive ‘purpose’.<sup>292</sup> As s 4D is a per se provision, the section must be interpreted in a manner to avoid an operation which would capture potentially pro-competitive conduct and defeat the objectives of the *TPA*.<sup>293</sup> The conduct should be analysed from the perspective of whether it restricts output, and ultimately price competition, to the detriment of consumers. This approach may allow the consideration of pro-competitive arguments regarding market-sharing (for example, a limitation on competition to prevent free-riding).<sup>294</sup>

On the question of ‘take advantage’ under s 46, the majority again seemed to construe the provision narrowly. They agreed with the Full Federal Court that Rural Press had not taken advantage of its market power but rather had taken advantage of its access to a printing press and professional structure to threaten to publish a competing newspaper.<sup>295</sup> Rural Press could have entered the rival market whether or not it had a substantial degree of market power. The majority joint judgment employed the terminology for the determination of ‘take advan-

<sup>288</sup> Ibid 62 (Gleeson CJ and Callinan J). Gummow, Hayne and Heydon JJ, citing *South Sydney Football Club* (2003) 215 CLR 563, 574 (Gleeson CJ), stated: ‘the term “boycott” lacks “a precise meaning”, and use of it carries the danger of distracting the inquirer towards seeking that meaning “rather than the proper task, which is finding the meaning of the statutory language”’: *Rural Press* at 81.

<sup>289</sup> *Rural Press* (2003) 216 CLR 53, 62 (Gleeson CJ and Callinan J). Gleeson CJ and Callinan J, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, stated that a court construing a provision in an Act ‘must strive to give meaning to every word of the provision’: at 382.

<sup>290</sup> *Rural Press* (2003) 216 CLR 53, 62.

<sup>291</sup> Ibid 63. *TPA* s 4D does not require such a purpose, although it may sometimes exist. An exclusionary provision may be directed toward particular persons or classes of persons without necessarily having a purpose of injuring or disadvantaging them. However, a purpose of the kind defined and proscribed must exist, and must be directed toward particular persons or classes of persons, for the legislative prohibition to apply: at 62–3.

<sup>292</sup> Ibid 84 (Gummow, Hayne and Heydon JJ). Their Honours cited the decision in *South Sydney Football Club* (2003) 215 CLR 563, 590 (Gummow J), which stated that a reading of the legislative history of s 4D removed the requirement for precise identification of those sought to be prevented, restricted or limited in their conduct by the purpose of the exclusionary provision.

<sup>293</sup> See generally Ross, above n 56.

<sup>294</sup> See generally *Rothery Storage & Van Co v Atlas Van Lines Inc*, 792 F 2d 210 (DC Cir, 1986), cited in *Rural Press* (2003) 216 CLR 53, 88 fn 125 (Gummow, Hayne and Heydon JJ).

<sup>295</sup> *Rural Press* (2003) 216 CLR 53, 74–5 (Gummow, Hayne and Heydon JJ).

tage' from the High Court's decision in *Melway*<sup>296</sup> to test whether the conduct was 'materially facilitated by the market power'.<sup>297</sup> The majority observed:

Section 46(1) distinguishes between 'taking advantage' and 'purpose' ... To reason that Rural Press and Bridge took advantage of market power because they would have been unlikely to have engaged in the conduct without the 'commercial rationale' — the purpose — of protecting their market power is to confound purpose and taking advantage.<sup>298</sup>

This is another example of separating ('scissoring up') the issues within s 46 which may arise from a literal reading of the provision rather than a reading which is contextually consistent with the statutory objective. An overly literal reading may ultimately diminish or confuse the essential judicial enquiry under s 46 — that is, finding the distinction between competitive and anti-competitive conduct. This distinction is determined by a number of interpretative factors which inform a textual reading.

In dissent, Kirby J once again despaired at what his Honour perceived to be an excessively narrow interpretation of s 46 by the majority, which effectively defeated the 'large national' and 'beneficial' purposes of the *TPA* to 'protect and advance competition'.<sup>299</sup> His Honour rejected the narrow approach to the interpretation of 'take advantage' preferred by the majority, which merely determined whether the firm 'could'<sup>300</sup> have engaged in the same conduct in the absence of market power in the sense of mere physical possibility as a 'narrow, formalistic and substantially verbal ground'.<sup>301</sup> Kirby J perceived this, along with the approach in *Melway* and *Boral*, to be a construction of s 46 which is

insufficiently attentive to the object of the Act to protect and uphold market competition. It is unduly protective of the depredations of the corporations concerned. It is unrealistic, bordering on ethereal, when the corporate conduct is viewed in its commercial and practical setting. The outcome cripples the effectiveness of s 46 of the Act ... Effective anti-competitive threats can be made without the redress which s 46 appears to promise.<sup>302</sup>

His Honour preferred to focus on the commercial considerations of the firm and applied a test similar to the US 'profit-sacrifice' test.<sup>303</sup> Kirby J argued that there was no business or economic reason for the conditional threat. Rather, 'Rural Press and Bridge were indicating a willingness to forego potential revenue and the expansion of their business'.<sup>304</sup>

In adopting an interpretation which sought to promote the *TPA*'s 'large national' purpose and 'beneficial' objectives, Kirby J seems to have adopted a

<sup>296</sup> (2001) 205 CLR 1.

<sup>297</sup> *Rural Press* (2003) 216 CLR 53, 76 (Gummow, Hayne and Heydon JJ).

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.* 94.

<sup>300</sup> Using the formulation developed in *Melway* (2001) 205 CLR 1, 26 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>301</sup> *Rural Press* (2003) 216 CLR 53, 100.

<sup>302</sup> *Ibid.* 105.

<sup>303</sup> *Ibid.* 103.

<sup>304</sup> *Ibid.* 102.

pragmatic approach to statutory interpretation.<sup>305</sup> No doubt his Honour believed, although the links were not clearly identified, that these ‘national purposes’ were best served by an application of an economic ‘profit-sacrifice’ test which focused on the commercial context of the firm’s behaviour.

The practical consequences of the differing approaches of the majority and Kirby J were not politically neutral. For Kirby J, the application of the purely textual approach of the majority was ‘unduly protective of the deprivations of the corporations concerned’ and ultimately defeated the ‘national purposes’ of the *TPA*.<sup>306</sup> The problem with a purposive interpretation however is that broad goals such as ‘national purposes’, without further elaboration, do not adequately dictate contextual rules.

The political consequences of these interpretative practices for the role of the courts in the regulation of the state and the market were once again evident in the High Court decision in *NT Power Generation*.<sup>307</sup>

#### VII *NT POWER GENERATION*

The Power and Water Authority (‘PAWA’) is a statutory authority under s 4 of the *Power and Water Authority Act 1987* (NT). It is a vertically integrated monopoly involved in the generation and distribution of electricity in the Northern Territory. NT Power Generation Pty Ltd (‘NT Power Generation’) is a private company that generates electricity. It requested access to the transmission grid owned by PAWA in order to distribute and sell electricity to selected consumers in the Darwin–Katherine area.<sup>308</sup> NT Power Generation argued that it could do so at a price cheaper than that charged by PAWA.

The Northern Territory Government was in the process of commercialising the state-owned electricity industry with a view to privatisation. It was also in the process of introducing a statutory scheme for the provision of access to its transmission infrastructure as demanded by its obligations following the implementation of the *Hilmer Report*. PAWA was reluctant to provide access to NT Power Generation because it argued that this would allow NT Power Generation to ‘cherry pick’ the more profitable customers in advance of the implementation of a more equitable, negotiated access regime. PAWA also had statutory universal service obligations, including the provision of cross-subsidised services to remote areas. The introduction of a competitive market through the access regime would permit PAWA to restructure tariffs to avoid cross-subsidisation.<sup>309</sup>

An action for breach of s 46 against PAWA by NT Power Generation for refusal to grant access was dismissed at first instance<sup>310</sup> and by a majority on

<sup>305</sup> See further above nn 147–9 and accompanying text.

<sup>306</sup> *Rural Press* (2003) 216 CLR 53, 105.

<sup>307</sup> (2004) 219 CLR 90.

<sup>308</sup> The action also concerned Gasgo Pty Ltd, a corporation in which PAWA held all the shares: *ibid* 82 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>309</sup> *Ibid* 142 (McHugh ACJ, Gummow, Callinan and Heydon JJ), citing *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481, 567 (Mansfield J).

<sup>310</sup> This was mainly on the grounds of crown immunity: see *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481.

appeal to the Full Federal Court.<sup>311</sup> However, the High Court upheld an appeal (Kirby J dissenting),<sup>312</sup> finding that PAWA had taken advantage of its substantial market power in the transmission/distribution markets for the purpose of injuring NT Power Generation in the downstream electricity supply market.

The initial jurisdictional issue concerned whether the statutory authority was 'carrying on a business' under *TPA* s 2B and therefore unable to claim Crown immunity to avoid the application of the *TPA*.<sup>313</sup> The majority of the High Court appeared to adopt a purposive interpretation of the *TPA* and to reject a more narrow interpretation of s 2B, that PAWA's refusal to grant access was not part of 'carrying on a business':

The Act is seeking to advance the broad goal of promoting competition. Certain provisions of the Act, particularly in Pt IV, necessarily turn to a significant degree on expressions which are not precise or formally exact. One example is 'market': there can be overlapping markets with blurred limits and disagreements between bona fide and reasonable experts about their definition, as in this case. Other examples are 'substantial', 'competition', 'arrangement', 'understanding', 'purpose' and 'reason' (which need only be a 'substantial' purpose or reason: s 4F). It is not appropriate to subject the application of this type of legislation to a process of anatomising, filleting and dissecting in the fashion advocated by PAWA.<sup>314</sup>

The majority's interpretation, which sought to advance 'broad goals' in preference to an interpretation that would amount to 'anatomising, filleting and dissecting' the *TPA*, contrasts with the strict textualist approach of the majority in *Visy* (of which McHugh and Gummow JJ also formed a part) and the narrow interpretation of s 46 in *Rural Press* (of which Gummow, Callinan and Heydon JJ formed a part). In what way does the 'text' justify these differing interpretations? To what extent can the differing interpretative practices be explained by the public (*NT Power Generation*) versus private context (*Visy*, *Rural Press* and *Boral*) of the defendant's conduct in issue? Were apparently contradictory interpretative practices adopted in different decisions to achieve consistent political outcomes concerning the appropriate role of the courts in the regulation of (private) economic actors?

The majority's interpretation of 'take advantage' and 'purpose' in *NT Power Generation* arguably provides another example of 'scissoring up' the section (but not it seems 'anatomising, filleting and dissecting'). Their Honours construed taking advantage of market power separately from 'purpose'<sup>315</sup> and applied the

<sup>311</sup> *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399. Lee and Branson JJ comprised the majority, Finkelstein J dissented.

<sup>312</sup> The majority opinion was jointly authored by McHugh ACJ, Gummow, Callinan and Heydon JJ. Kirby J dissented.

<sup>313</sup> Section 2B of the *TPA* was introduced in 1995 by *Competition Policy Reform Act 1995* (Cth) s 81. It removes Crown immunity defences to the application of the *TPA* for state and territory governments and their instrumentalities 'so far as' they carry on a business. *NT Power Generation* also raised important issues which are beyond the scope of this article, concerning the application of the *TPA* (under the *Competition Code of the Territory*) to statutory authorities and the scope of Crown immunity.

<sup>314</sup> *NT Power Generation* (2004) 219 CLR 90, 117 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>315</sup> *Ibid* 141 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

counterfactual to determine if PAWA had taken advantage of its market power.<sup>316</sup> The majority found that if there had been a competitive market with other suppliers of infrastructure services, PAWA would not have been able to withhold access.<sup>317</sup> But the use of the counterfactual of a highly competitive market to impose liability is arguably not helpful (and is in fact unrealistic) in a transmission market which was a statutory natural monopoly.<sup>318</sup>

The majority arguably failed to give appropriate consideration to PAWA's purpose in withholding access. Legitimate goals could include the carrying out of statutory public purposes, the provision of universal services and the introduction of an access regime.<sup>319</sup> An examination of these purposes could have permitted the conclusion that there was no anti-competitive 'purpose' under s 46. The majority argued that it would be more appropriate to consider these 'public purposes' under a 'public benefit' test as part of an authorisation argument under s 88, which cannot be obtained for conduct prohibited under s 46:

Section 46 does not permit the drawing of a distinction between short-term anti-competitive purposes (here keeping NT Power out of the market) and long-term pro-competitive objectives (establishment of an access regime), and does not permit the former to be nullified or excused by the latter. Nor is it relevant that, in PAWA's submission, entry by NT Power might cause such losses to PAWA that it would cease to subsidise services to remote communities.<sup>320</sup>

A purely textual interpretation would surely have permitted the contrary conclusion to be drawn. The absence of an authorisation procedure under *TPA* s 88 may have evidenced a legislative intention that legitimate and anti-competitive purposes could be balanced under s 46. This is especially true when purpose under s 46 has been interpreted subjectively.<sup>321</sup> Section 4F also provides that if there is more than one purpose, the proscribed purpose must be the 'substantial purpose'. Under s 46, 'legitimate business purposes' have always been balanced against apparently anti-competitive ones.<sup>322</sup> In *Melway*, a majority of the High

<sup>316</sup> The majority initially considered whether the conduct was a taking advantage of proprietary rights rather than a taking advantage of market power: *ibid* 117–19 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>317</sup> *Ibid* 135 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>318</sup> In a natural monopoly, the competition is *for* the market rather than *within* the market: see generally *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) 22 ATPR ¶41-752; *affd* (2000) 22 ATPR ¶41-783. In *Melway* (2001) 205 CLR 1, 25, Gleeson CJ, Gummow, Hayne and Callinan JJ stated that: 'It is one thing to compare what it has done with what it might be thought it would do if it lacked that power. It is a different thing to compare what it has done with what it would do in circumstances that are completely divorced from the reality of the market.'

<sup>319</sup> These are similar arguments to those that failed under *TPA* s 2B.

<sup>320</sup> *NT Power Generation* (2004) 219 CLR 90, 140 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>321</sup> The Full Federal Court in *Eastern Express* (1992) 35 FCR 43, 66 (Lockhart and Gummow JJ), noted: 'The determination of purpose for the operation of s 46 is to be ascertained subjectively, in the sense that what is to be ascertained is the intent of the corporation engaging in the relevant conduct'.

<sup>322</sup> For the meaning of 'substantial', see *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, 348 (Deane J); *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, 138–9 (Lockhart J). The balancing of pro-competitive with anti-competitive purposes could also be usefully examined in a similar fashion to developments in the 'rule of rea-

Court found that a manufacturer's refusal to supply in order to maintain a distribution system did not always manifest an anti-competitive purpose as 'there may be explanations of the arrangements which justify the conclusion that restricting competition was no part, or no substantial part, of the purpose of the manufacturer'.<sup>323</sup>

In *Boral*, the High Court found that the competitive state of the future market would make it unlikely that BBM could recoup the losses it sustained during its period of price-cutting.<sup>324</sup> There the Court was willing to take into account the long-term competitive structure of the market (which prevented the firm from sustaining any long-term anti-competitive objectives) over any anti-competitive purposes which may have been inferred (at least on the Areeda and Turner standard) from the short-term below-average avoidable cost pricing. By contrast, in *NT Power Generation*, PAWA's long-term competitive (and public) purpose for refusing to grant access to NT Power Generation, relating to the planned introduction of a statutory access regime, was not considered relevant by the Court to allow its apparently anti-competitive purpose to 'be nullified or excused'.<sup>325</sup>

In the comparative jurisdictions of the US and the European Communities, many examples are provided of the courts in competition cases balancing justifications concerning public or 'non-profit' purposes against apparently anti-competitive purposes in a 'rule of reason' analysis.<sup>326</sup> It is a particularly restrictive interpretation of the *TPA* if the majority in *NT Power Generation* are correct in asserting that apparently 'improper purposes' cannot be 'nullified or excused by the latter [public purposes]', or that the absence of an authorisation provision for s 46 demonstrates a legislative intent to exclude 'public purpose' arguments under the misuse of market power provision.<sup>327</sup> The majority was of the view that any adverse consequences to PAWA caused by the statutory construction were 'not reasons for adopting a narrower construction of the section'.<sup>328</sup>

son' under *Sherman Act*, 15 USC § 1 (2000 & Supp IV, 2004), where the balance of proof shifts between the plaintiff and the defendant: *California Dental Association v Federal Trade Commission*, 128 F 3d 720 (9<sup>th</sup> Cir, 1997); revd 526 US 756 (1999). A 'rule of reason' type approach was applied under § 2 of the *Sherman Act* in *United States v Microsoft Corporation*, 253 F 3d 34 (DC Cir, 2001).

<sup>323</sup> (2001) 205 CLR 1, 20 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>324</sup> Heerey J found that recoupment focused on the 'reduction of competition in the long run': *Boral First Instance* (1999) 166 ALR 410, 441.

<sup>325</sup> (2004) 219 CLR 90, 146 (McHugh ACJ, Gummow, Callinan and Hayne JJ).

<sup>326</sup> In the US, under § 1 of the *Sherman Act*, see *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma*, 468 US 85 (1984); *California Dental Association v Federal Trade Commission*, 128 F 3d 720 (9<sup>th</sup> Cir, 1997); revd 526 US 756 (1999). In the European Communities, under art 81(1) of the *EC Treaty*, see *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] ECR I-1577. See further Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057.

<sup>327</sup> Or indeed, under those sections where authorisation is available, with the argument that the public benefit should exclusively be considered in that procedure rather than by way of a balancing process by the court.

<sup>328</sup> *NT Power Generation* (2004) 219 CLR 90, 146 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

In *NT Power Generation*, the High Court was reluctant to consider ‘public purposes’ or ‘non-commercial obligations’ which could disrupt the strict application of another ‘public’ purpose — the implementation of ‘competitive neutrality’ principles.<sup>329</sup> The majority seemed to imply that, in certain circumstances, s 46 could compel the Crown to carry on a business, a result which could have extraordinary repercussions for statutory authorities.<sup>330</sup> As Kirby J noted, ‘this was a governmental decision concerning the use of the infrastructure of a public agency based on governmental reasons’ and ‘not a purely commercial or business decision’.<sup>331</sup>

The Court did not accept PAWA’s argument that the refusal of access to NT Power Generation was merely a consequence<sup>332</sup> of the implementation of the long-term purpose of introducing a statutory access regime into the electricity industry in the Northern Territory. In other High Court authority a contrary interpretation was taken of ‘purpose’.

In *South Sydney Football Club*,<sup>333</sup> a majority found that ‘purpose’ within s 4D was the subjective purpose of the provision in the context of the agreement as a whole.<sup>334</sup> Gummow J adopted the interpretation of Finn J at first instance,<sup>335</sup> that what is to be ascertained is the reason (or reasons) for the inclusion of the provision, which can be determined by ascertaining the effect or effects the parties subjectively sought to achieve.<sup>336</sup>

The majority accepted the findings of the trial judge that the ‘purpose’ of the provision was the organisation of a new sustainable 14-team rugby league competition which was defined by size and quality. The fact that this ‘purpose’ was achieved by the exclusion of a team (the South Sydney Rabbitohs) did not make the exclusion a ‘purpose’ of the agreement. Any selection process with more applicants than is feasible is bound to result in some excluded clubs.

Once again, Kirby J’s dissent in *South Sydney Football Club* is a forceful critique of the statutory interpretation favoured by the majority. Kirby J was adamant that ‘[o]nce again I disagree with the majority of this Court on the

<sup>329</sup> On ‘competitive neutrality’, see generally Independent Committee of Inquiry into National Competition Policy, above n 101, ch 13.

<sup>330</sup> See *NT Power Generation* (2004) 219 CLR 90, 119 (McHugh ACJ, Gummow, Callinan and Hayne JJ) (citations omitted), where, under the heading of ‘Compelling the Crown To Carry on a Business’, the majority noted that

Branson J denied that ss 2A and 2B, in conjunction with s 46, could be read as requiring the Crown to engage in a business activity. However, s 46 and other provisions can operate not only to prevent non-governmental traders from doing prohibited things, but also to compel them positively to do things they do not want to do.

<sup>331</sup> *Ibid* 162. Any statutory authority in the process of commercialisation is now potentially liable, particularly if they adopt the ‘language’ pursuant to that commercialisation such as ‘business products’ and ‘commercial services’. The High Court considered the use of these terms as ‘admissions’: ‘Technically they are “informal” admissions, but, having been made pursuant to statutory duties and in a document which there was a statutory duty to make public, they are of the utmost solemnity’: at 111 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>332</sup> Or ‘collateral damage’, the phrase used in *Rural Press* (2003) 216 CLR 53, 84 (Gummow, Hayne and Heydon JJ).

<sup>333</sup> (2003) 215 CLR 563.

<sup>334</sup> Gleeson CJ, McHugh, Gummow and Callinan JJ all delivered separate but concurring judgments, Kirby J dissented.

<sup>335</sup> *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, 659.

<sup>336</sup> *South Sydney Football Club* (2003) 215 CLR 563, 584–5.

application of the *Trade Practices Act 1974* (Cth) ... Once again, the Court ... favours a more limited application of the Act.<sup>337</sup>

Is there another way to look at the interpretative differences in the High Court decisions in *NT Power Generation* and *South Sydney Football Club*?<sup>338</sup> In *NT Power Generation*, Kirby J (dissenting) focused on the 'context' of a statutory authority which was subject to ministerial direction, making a 'non-commercial' decision. For Kirby J, the conduct did not amount to a misuse of market power. In *South Sydney Football Club*, Kirby J (dissenting) was critical of the majority's view which he argued injected too much 'context' by its apparent focus on the nature of sporting competitions and the necessity of selection on the basis of quality to achieve that end. His Honour reminded the Court of the 'commercial' character of sports organisations and the necessity of an arguably 'textualist' adherence to the terms of the *TPA*:

True, it might have been justifiable in terms of the interests of the sport, the fans, the majority of the affected players ... But these are not the questions posed by the Act. In s 4D(1)(b), it addresses attention only to the purpose of the provision ... when the context of sport is put in its correct place, such a provision is exclusionary.<sup>339</sup>

His Honour argued that if his interpretation amounted to 'statutory over-reach', then the situation was for the legislature not the courts to address.<sup>340</sup> Again certain contradictory interpretative positions are presented. In *South Sydney Football Club*, Kirby J suggested that interpretative errors were for the legislature to resolve. In *Visy*, his Honour saw it as the judiciary's task to make it through 'legislative opacity' to adopt a construction which furthers the statutory objectives.<sup>341</sup>

In *NT Power Generation*, the Court declared a denial of access on the basis of control of the infrastructure, the simple counterfactual (that PAWA would not have denied access in a competitive market) and a finding its purpose was to protect its revenue stream.<sup>342</sup> The approach of the Court could perhaps be characterised as an application of the 'essential facility' doctrine,<sup>343</sup> under which

<sup>337</sup> Ibid 590.

<sup>338</sup> Under ss 46 and 4D respectively.

<sup>339</sup> *South Sydney Football Club* (2003) 215 CLR 563, 612 (emphasis in original) (citations omitted).

<sup>340</sup> Ibid 604.

<sup>341</sup> (2003) 216 CLR 1, 24.

<sup>342</sup> In granting access, the Court gave very little consideration to the infrastructure owners, the Northern Territory citizens and taxpayers, who must now share their asset with a competitor. Neither did the Court properly consider the effect this decision may have had on the provision of services to consumers in the Northern Territory. The judgment also raises difficult issues of the determination and supervision of the access price, especially in a non-competitive market where cross-subsidies are present. For a determination of a predatory pricing claim in a market dominated by a statutory monopoly and cross-subsidies, see *Commission Decision of 20 March 2001 Relating to a Proceeding under Article 82 of the EC Treaty (Case COMP/35.141 — Deutsche Post AG)* [2001] OJ L 125/27.

<sup>343</sup> The 'essential facility' doctrine involves imposing on a monopolist who controls a facility a duty to deal with a competitor that, if denied, can impede production or access to a market. The doctrine has most often been applied in situations of denial of access to a utility or transport infrastructure where it is impractical or unreasonable to require the competitor to duplicate the facility. These have included a railway bridge, electricity transmission grids and terminal facilities: see Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58

examination is largely confined to questions of the control of the facility, a denial of access and an objective examination of the physical capacity of the facility to provide access.<sup>344</sup> Under *Melway*, s 46 requires a more rigorous analysis of the anti-competitive effect of the denial which places the focus squarely on the economic rationale for the decision. This could include an examination of the 'profit-sacrifice' or 'no economic sense' tests devised for exclusionary conduct under § 2 of the *Sherman Act* which would have permitted an evaluation of anti-competitive 'purpose'.<sup>345</sup>

The outcome in *NT Power Generation* is inconsistent with previous cases which have been reluctant to incorporate access regimes such as the essential facility doctrine under s 46.<sup>346</sup> This reluctance was one of the reasons why the *Hilmer Report* recommended the enactment of Part IIIA of the *TPA*, which introduces a statutory access regime.<sup>347</sup> Although, as the High Court notes, the operation of s 46 is not affected by the operation of the statutory provisions in Part IIIA, it is also arguably open to interpretation that the legislature has evinced an intention that access to former statutory utilities (after the relevant period of corporatisation and/or privatisation) is to be determined within the statutory scheme of Part IIIA.

Moreover, the 'essential facility' doctrine has never been formally applied by the US Supreme Court and was recently rejected once again in *Trinko*<sup>348</sup> in circumstances very similar to those in *NT Power Generation*. In *Trinko*, the presence of a highly regulated federal and state statutory access regime in the telecommunications market was thought to 'significantly diminish the likelihood of major antitrust harm'<sup>349</sup> making it unnecessary to impose a judicial doctrine of forced access under § 2 of the *Sherman Act*.<sup>350</sup> The Supreme Court stated that antitrust analysis must always be attuned to the particular structure and circumstances of the industry in issue, including awareness of the significance of regulation.<sup>351</sup> The Court restated the long-recognised right of a trader 'to refuse to deal' with a rival.<sup>352</sup> The limited circumstances where a refusal to cooperate

*Antitrust Law Journal* 841. For a discussion of the application of this doctrine under s 46, see Kathryn McMahon, 'Misuse of Market Power' in Ray Steinwall et al (eds), *Butterworths Australian Competition Law* (2000) 215, 248–56.

<sup>344</sup> The 'essential facility' doctrine tends to focus more on the denial of the facility per se and the feasibility of providing the facility than on a full factual enquiry into the purpose to injure competition. The High Court established that there was an absence of any capacity, technical or safety constraints to the provision of access by PWA: *NT Power Generation* (2004) 219 CLR 90, 118–19 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>345</sup> See above nn 120–2 and accompanying text.

<sup>346</sup> See, eg, *Queensland Wire v Broken Hill Proprietary Co Ltd* (1987) 17 FCR 211; *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109.

<sup>347</sup> See Independent Committee of Inquiry into National Competition Policy, above n 101, 243–4.

<sup>348</sup> *Trinko*, 540 US 398, 410–11 (Scalia J) (2004).

<sup>349</sup> *Ibid* 412 (Scalia J).

<sup>350</sup> *Ibid* 411 (Scalia J). For a contrary determination of a grant of access to a private (with partial public ownership) enterprise which was subject to similar universal service obligations, see *Commission Decision of 21 May 2003 Relating to a Proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG)* [2003] OJ L 263/9.

<sup>351</sup> *Trinko*, 540 US 398, 410–11 (Scalia J).

<sup>352</sup> *United States v Colgate & Co*, 250 US 300 (1919).

with rivals raises antitrust concerns<sup>353</sup> were not invoked in this case because ‘the services allegedly withheld are not otherwise marketed or available to the public’.<sup>354</sup> The High Court in *NT Power Generation* rejected the relevance of this case. It was considered

not an authority which compels or influences the result in this case. Section 46 is in different terms from § 2 of the *Sherman Act 1890*. Section 2 is backed by the sanction of imprisonment; s 46 is not. Section 2 requires ‘the willful acquisition or maintenance’ of monopoly power — a test which is entirely different from and stricter than that in s 46.<sup>355</sup>

*NT Power Generation* provides another example of how competition law decisions manifest differing views of the Court’s role in the regulation of the market. *Melway*, *Boral* and *Rural Press* are arguably consistent with the ‘market as regulator’ approach of the US Supreme Court in *Trinko*. These same principles were not applied in *NT Power Generation*. In *Boral* and *Rural Press*, foreign judgments and interpretations were embraced to promote a reading of the *TPA* with the ‘market as regulator’ in the interests of private competitors.<sup>356</sup> In *South Sydney Football Club*, the context of a sporting competition was invoked to preclude liability for an exclusionary provision. In *NT Power Generation*, the majority interpreted the *TPA* in accordance with its ‘broad goals’, which were constructed as a desire to see statutory enterprises open to competition in the interests of a private operator. As Kirby J stated:

No doubt others will contrast the energetic deployment of trade practices law in the circumstances of this case, affecting a governmental corporation having governmental obligations to the public welfare, with the repeated refusal of this Court in recent times to do the same thing where the corporation concerned was private, successfully defending its market power against smaller private would-be competitors.<sup>357</sup>

These interpretative inconsistencies in *NT Power Generation*, in the context of these other High Court cases, are not easily explained by a reference to the statutory language. Issues such as the relative role of the courts and the legislature, as well as the appropriate regulation of public versus private enterprises in the market, had an impact on the preferred mode of interpretation.

<sup>353</sup> See *Aspen Skiing Co v Aspen Highlands Skiing Corporation*, 472 US 585 (1985).

<sup>354</sup> *Trinko*, 540 US 398, 410 (Scalia J) (2004). The Supreme Court’s view is in line with that of Posner J in *Olympia Equipment Leasing Co v Western Union Telegraph Co*, 797 F 2d 370, 375 (7<sup>th</sup> Cir, 1986), that a monopolist has ‘no general duty to help its competitors’. This was cited with approval by McHugh J in *Boral* (2003) 215 CLR 374, 461: see above n 253 and accompanying text. However, McHugh J was in the majority in *NT Power Generation* which, in imposing the duty on PAWA to provide access, rejected the relevance of *Trinko*: (2004) 219 CLR 90, 134 (McHugh ACJ, Gummow, Callinan and Heydon JJ).

<sup>355</sup> *NT Power Generation* (2004) 219 CLR 90, 134 (McHugh ACJ, Gummow, Callinan and Heydon JJ) (citations omitted). The Court was referring to the interpretation of § 2 of the *Sherman Act* provided in *United States v Grinnell Corporation*, 384 US 563 (1966).

<sup>356</sup> In *Visy* (2003) 216 CLR 1 the *TPA* was interpreted strictly, which arguably gave little weight to the economic context of the agreement between the parties in the market.

<sup>357</sup> *NT Power Generation* (2004) 219 CLR 90, 163 (citations omitted).

## VIII CONCLUSION

This article has explored the statutory interpretative practices and debates at play in a number of recent High Court competition law cases and has examined the consequences of these interpretations for the application of competition law in Australia.

A merely 'textual' analysis can result in a provision being narrowly interpreted to the detriment of a more coherent approach regarding the economic characterisation of conduct. A purposive approach, however, may provide no further rules for the identification of anti-competitive conduct in a particular case. This is because more than one economic rule may be consistent with consumer welfare.

Any interpretative practice or label that is invoked is often a poor predictor for the outcome of competition law decisions. Apparently contradictory interpretative practices seem to be adopted in different decisions to achieve particular policy outcomes concerning the appropriate role of the courts in the regulation of public and private economic actors. This has important consequences for the roles of the judiciary and the legislature in the context of competition law.

What is needed is not a resolution of the ultimately sterile debate between text and purpose, but a more contextual and deeper theoretical understanding of the multiplicity of interpretative sources. This does not mean that competition rules are indeterminate and that competition statutes merely provide a 'blank cheque' for the application of modern economic theory. Rather, the decision-maker is ultimately constrained not only by the 'text', but also by economic theory and its application, by the common law and precedent and by public policy debates concerning the role of the courts in the regulation of economic activity.

The legitimacy of this approach is founded on an appropriately theorised and transparent understanding of the economic principles to be applied in the context of the statutory text and of legislative purpose. This must include an understanding of the ideological origins of the economic theory with respect to its role in market regulation. It must also include the acknowledgment of any theoretical debates surrounding its application. The appropriateness of the particular theory for the Australian market and the Australian legislative framework must also be considered. Only such an approach can provide a clear direction to litigants as well as to economic actors regarding their expectations of the market.

An understanding of the constraints on decision-making is not assisted by the apparent judicial practice of rejecting interpretative practices from the US and other jurisdictions as so-called 'foreign concepts' and 'judicial glosses'. This is not only counterproductive within a statutory context that largely takes its meaning from economic concepts in a global economy. It is also not representative of what the Australian courts have in fact done in particular cases.

The adoption of a more appropriately theorised approach to interpretive practices will also be beneficial on a more practical level. '[I]n the context of such legislative opacity and unwieldiness',<sup>358</sup> such an approach will obviate the need for the constant redrafting of the *TPA* as the High Court shifts its interpretive focus to suit its unarticulated concepts, goals and purposes.

<sup>358</sup> *Visy* (2003) 216 CLR 1, 24 (Kirby J).