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***The Future of  
Competition Law***

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## INTRODUCTION

One can view the ACCC from many perspectives.

The ACCC is an instrument of economic policy enabling it to contribute to better economic performance in this country through promoting competition in the interest of achieving enhanced economic welfare for all Australians. In doing so it is involved in what some regard as a paradox. It seeks to promote free competitive markets by means of substantial intervention.

The ACCC is an instrument of law. It was decided when the Trade Practices Act was introduced in its modern form in 1974 that legal means and instruments would be used to give effect to an economic policy, competition policy. It is imaginable that a different scheme could have been used. It is imaginable that a broad competition policy would have been adopted with the implementation being left in the hands of politicians, or it could have been placed in the hands of regulators with courts playing little or no role. In fact, it was decided that implementation should be essentially court based, that is to say that certain forms of behaviour would be prohibited by law, that a law enforcement agency (the TPC) would be established to enforce the law in the courts and that final decisions would be with the courts. Essentially, it was decided that the general provisions of the law would be applied on a case by case basis. As I will discuss later the ACCC also has now acquired a more traditional regulatory role where it makes final decisions in regard to matters such as access and monopoly prices subject to appeal to a Tribunal.

The ACCC is of political significance. Essentially it is an independent body involved in promoting competition and regulating monopoly for the benefit of the public. In carrying out this role it deals with and often is in conflict with major interest groups. The nature of its relationship with the legislature and government of the day is of interest in this context.

There is also an international dimension to the work of the ACCC and the Trade Practices Act.

As a regulator, the ACCC also is a subject of interest to scholars of public administration.

## A STRATEGY FRAMEWORK

One framework of some value is based on an adaptation of a class of private sector business strategy models developed by Professor Mark Moore of Harvard's Kennedy School of Government, a teacher at the Australian and New Zealand School of Government.

One class of private sector model focuses on three key variables and their relationships (See Figure 1). Essentially a firm's strategy can be analysed by reference to:

- its output, or value added
- market demand
- its operating capability

## BUSINESS STRATEGY MODEL

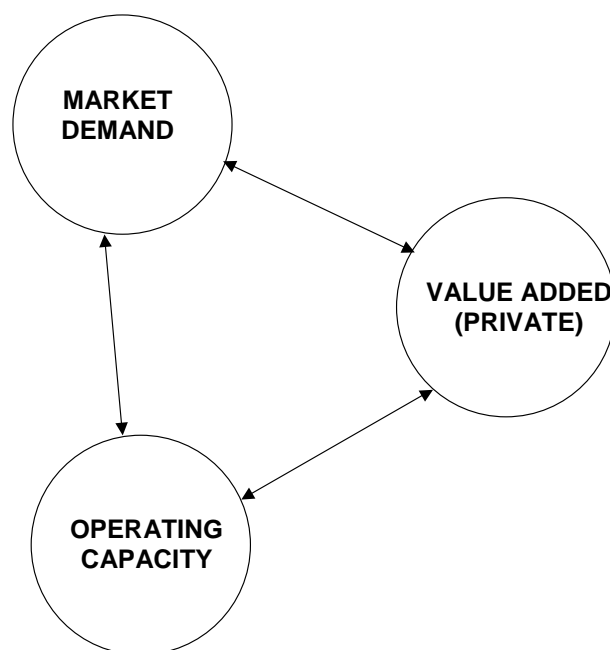


Figure 1

Each variable can be fruitfully analysed in depth. Then the interrelationships of the three variables can be studied to throw light on the effectiveness of the firm's strategy eg. value added may not match demand; or operating capability may not support the value added dictated by demand.

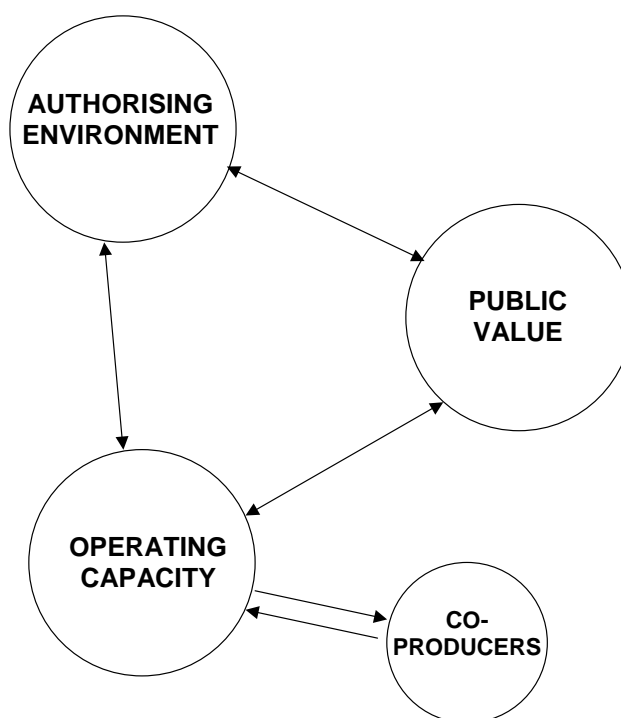
Adapting this for a regulator (See Figure 2), the key variables are:

- its value to the public (public value)
- its "authorising environment" i.e. the political environment which gives rise to legislation, regulation, and other political requirements and values which govern its work
- its operating capability. This includes the strengths and weaknesses of the organisation. The model can also be extended to include "co-producers" of value such as law firms that in many cases help achieve compliance with the law through their promotion of compliance programs.

It is not my intention to apply this model very fully in this paper. However, as the paper proceeds we may note:

- the public value of ACCC work in achieving compliance with the Trade Practices Act via enforcement, thereby promoting competition and fair trading; and in its regulatory work which brings monopoly prices closer to efficient levels than otherwise.
- the authorising environment from which the Trade Practices Act, Commission appointments, the Commission budget etc is delivered is subject to many interest group pressures, most notably the big business lobby. The media is another source of influence.
- the operating capacity of the ACCC, which has not been much out of line with the requirements of the other variables, at least in recent years.

## REGULATORY STRATEGY MODEL



**Figure 2**

A key relationship between these three variables arises, however, because of a mismatch between

- the achievement of a high degree of public value by vigorous and successful ACCC action and
- the authorising environment which is subject to great countervailing pressure against this by the big business lobby. To some extent a high degree of publicity by the ACCC about its actions acts as an antidote.

## THE TRADE PRACTICES ACT

The Trade Practices Act in its modern form was enacted in 1974 and its essential structure has not changed since then but there has been considerable expansion and the addition of new functions especially in relation to the regulation of public utilities.

### Part IV

The Act prohibits anti-competitive conduct of various kinds. In particular it prohibits price fixing agreements between competitors, collective boycotts between competitors, other anti-competitive agreements, secondary boycotts, misuse of market power, anti competitive exclusive dealings, resale price maintenance and anticompetitive mergers.

The role of the ACCC is to police this law. It may investigate and litigate in order to achieve injunctions, fines, damages (in some cases) and other possible orders.

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There is no divestiture power to break up large businesses. The regime is a civil law one in relation to the competition part of the Act.

Private enforcement is also possible and frequent. In other words private actions can be taken by firms and by individuals who have a relevant interest to get injunctions and damages and sometimes other orders. Private enforcement of course does not give rise to fines nor can injunctions be sought by private parties in relation to anticompetitive mergers.

There is a similar regime under Part V of the Act which deals with consumer protection. Essentially the ACCC is involved in national consumer protection issues mainly where there are instances of misleading or deceptive conduct or product safety. There is the possibility of criminal actions involving fines but not jail sentences under Part V of the Act.

In more recent times the Act has been extended to cover unconscionable conduct by business against business as well as by business against consumers.

Unlike in many other countries authorisation of anticompetitive behaviour prohibited under Part IV of the Act is possible for most but not all forms of proscribed anticompetitive conduct. Authorisation is possible if the benefit to the public exceeds the detriment by reduced competition.

Adjudication is by the ACCC with the right of appeal to the Australian Competition Tribunal, a tribunal which is headed by a Judge of the Federal Court but with membership which includes an economist and a person with business experience.

The ACCC also was involved in GST price regulation for a time but this legislation has now ceased. The ACCC also administers the Prices Surveillance Act.

Finally, the ACCC is involved in considerable international work these days.

In general the Act adds considerable public value because compliance with it promotes competition, fair trading and economic efficiency.

### **A Brief History**

Australia enacted a strong antitrust Act at the turn of the century modelled on the US Sherman Act but it was emasculated by the High Court. In 1965 the Coalition Government introduced trade practices law. Modern law however took off in 1974.

Initially, in 1974, there was a very large effect on the behaviour of Australian business. The law prohibited anticompetitive agreements and especially put a quick end to many cartels and to some other forms of anticompetitive conduct and had some impact on marketing through its prohibitions on misleading and deceptive conduct.

After the initial “big bang” things became somewhat quieter and the Commission itself was highly occupied with dealing with numerous authorisation applications. There was not a great deal of encouragement from government for trade practices law after the initial big bang effect. After a large initial contribution to public value, the Act and the TPC’s contribution diminished.

As the first economist appointed to Head the Commission I had a view of the priorities and in my first speech to the National Press Club in October 1991, I

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suggested an agenda for competition law. (This speech has been republished on ACCC website on June 30, 2003.) This was intended to ensure the Act delivered much more public value. I want to give you a report card on that and to suggest an agenda for the next decade.

First, I said that the Trade Practices Act, needed to be made effective through vigorous and proper enforcement of its competition, consumer protection (and later the small business and secondary boycott) provisions, with penalties in appropriate cases.

This was achieved through:

- breaking up cartels in overnight freight express, building products, vitamins, power transformer and other high profile cases with multimillion dollar penalties; and
- reinvigorating the somewhat dormant consumer protection provisions of the Act. This included actions for refunds to thousands of aborigines for improperly-sold life insurance policies; refunds of about \$100 million to 285,000 AMP customers over a misleading insurance policy; Telstra refunding \$45 million over misleading marketing for a wire repair plan; Target televising corrections for an advertising campaign; intervention in the Olympic ticketing fiasco; and so on.

The second agenda item was the need to extend the law to all areas of business, including the professions, public utilities and agricultural marketing boards. This was achieved by the extension of the Act in 1995 following the Hilmer report and by its subsequent application in the Courts to such entities as the Australian Medical Association.

Recently, ACCC announced a most important authorisation decision requiring the Royal Australian College of Surgeons to put an end to its closed shop by opening up its processes of selection, training, and its accreditation of hospital posts. This will help overcome a serious emerging shortage of surgeons in all parts of Australia.

The third agenda item was to effect a change in the merger law from a dominance test to a substantial lessening of competition test. The changeover occurred in 1993 in a smooth manner. I believe this change has already had – and will continue to have – beneficial long term effects on the competitive structure of our economy.

The fourth change I flagged was the application of competition law and principles to the field of intellectual property. This was achieved through the removal of import monopoly arrangements for CDs, computer software and the many products which used copyright on labels and packages to secure an import monopoly. Thus far ACCC have only been partly successful in relation to books. Also important is the forthcoming cutback in the scope of the intellectual property exemption from the Trade Practices Act.

Fifth, there was the need for the introduction of a reasonably balanced, sensible, and perhaps conservative application of economic regulation to such monopoly, and near monopoly public utility infrastructure areas as telecommunications, energy and transport. This particularly related to pricing and access issues. As I have mentioned earlier this occurred.

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Sixth, I did not foresee that the ACCC would be involved successfully in a massive prices oversight exercise in relation to the introduction of the GST in 2000, involving about one billion price changes.

Seventh, I did not foresee the extension of the Act into the enhanced protection under the Trade Practices Act of small business from unconscionable conduct, nor the extended application of it to secondary boycotts, as happened for example in the 1998 waterfront dispute, but also in other cases.

Eighth, I was also concerned about the need for a larger operating budget for the ACCC. This was achieved through a 30 percent or so rise in 2000 and by a series of smaller rises with the staff numbers increasing gradually from about 200 to 450. Better funding for litigation was also provided. All this enhanced the operating capability of the ACCC, bringing it into better alignment with its enhanced contribution to public value.

Finally, there was a need for much greater public and business awareness and understanding of the Act. Essentially this could be achieved by telling the story of successful concluded ACCC cases through the media (via all mediums). The purpose of publicity was, by raising public awareness, to make the law work better, to gain more support for the law and to help build a competition culture in this country, thereby contributing to good economic performance.

What lies ahead?

The economy is constantly changing.

Globalisation, new technology, and international and domestic liberalisation is generally good for consumers and competition, creating new business opportunities. In some respects this reduces the need for the application of competition law, for example globalisation leads to more import competition, enabling a more tolerant view of mergers in the traded goods sector. But it can also create new forms of anticompetitive conduct (e.g. the spectacular recent increase in the number of global cartels such as the recent vitamins cartel), new sources of market power (e.g. Microsoft), and new kinds of market scams (e.g. international internet fraud).

So the future is one where “everything will be different” (as markets change) but “everything will be the same” (the temptations of anticompetitive behaviour will remain). So long as there are markets there will be the challenge of competition for market players, and so long as human nature remains unchanged, some participants will be tempted to act in anticompetitive or misleading and deceptive ways.

Hence there will always be a need for a competition law. Indeed as more markets become deregulated, the greater is the need for it in these markets since the desire to undo the pro-competitive effects of deregulation are high. That is why these days the Act and the ACCC are of mutual importance in preventing outbreaks of anticompetitive behaviour, whether through collusion, anticompetitive mergers, abuse of monopoly power, or unfair trading, in every sector, whether it be agriculture, manufacturing, construction, mining, distribution, transport, energy, communications or services. Without a firmly applied law, the competitive thrust of the economy would be quickly lost, and much harm done to its performance; public harm would replace public value.

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Let me now look ahead at some changes we should make and also at the Dawson Report.

Sadly, the gains of cartel behaviour are so large and the likelihood of detection so small, some companies will still risk their hands – and their reputations and, perhaps, their livelihoods.

As a result, one can only welcome the Government's recent in-principle adoption of criminal sanctions of high-level, high impact, hard core collusion, as recommended by the recent Dawson review.

But while Dawson got it right in that respect, I am somewhat mystified by its recommendations about so-called collective boycotts or – as they are termed in the Act – agreements about exclusionary provisions [s4D, S45]. If adopted, the recommendation would seemingly make a major change to our collusion laws. Until now, every country that I know of (including Australia) has automatically outlawed bid-rigging and market-sharing agreements between competitors, without requiring proof to the courts that they substantially lessen competition. Dawson appears to have abandoned this crucial principle of automatic prohibition. If such a law had applied in the 1990s, some of the most important cartel busting activities would have ended very differently. The Mayne Nickless /TNT freight express cartel involved market sharing. The Boral /Pioneer/CSR concrete case involved bid rigging. We would probably not have got the same results and if there had been any outcome, it would have taken much longer.

Neither the Dawson Report, nor the Government's response, mention this change in explicit terms, nor explain why such a revolution should occur. I wonder if the committee understood the full implications of the recommendation.

Similarly, the recommendations concerning joint ventures would also seriously threaten the application of the Act. Presently there is provision for more lenient treatment of price fixing, market sharing and the like in relation to genuine joint ventures. The provisions define joint ventures very tightly. But Dawson has recommended a very loose definition of joint venture. Such a law would mean that it should be comparatively easy if competitors want to agree on prices, or to divide up a market between them, simply to establish themselves as a joint venture. Such actions would only be prohibited if the Commission could establish in a court of law that there was “a substantial lessening of competition”. The British Airways/Qantas pricing agreement on the Kangaroo Route would almost certainly have not been subjected to an authorisation application under the looser joint venture approach. Had the proposed new definition applied the important challenge to the banks' credit cards cartel – as we saw it – which played a crucial role in setting the RBA credit card reforms would have been made immensely difficult and would probably not have proceeded.

Such proposals were not discussed with the ACCC, consumers nor small business by Dawson before being proposed.

The Dawson Report upheld the substantial lessening of competition merger test but has recommended some changes to the process by which mergers are dealt with under the law. These will have to be tested. They essentially turn on the committee's belief that the Australian Competition Tribunal, headed by a judge, should have a greater role in deciding merger outcomes.



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I do not agree with another proposal which is that where firms want mergers authorised on the grounds of their benefit to the public they should be able to apply directly to the Tribunal and bypass the Commission. Others have pointed to obvious severe mechanical difficulties about this idea concerning the role which the Commission would play, given that the Tribunal is not an investigative body. When the Commonwealth Government established the Prices Justification Tribunal in 1973, a number of experiments were conducted using a variety of different approaches to the relationship of the Tribunal to the staff who did the investigations. They all involved difficulties.

Also the Tribunal thus far has been an unfriendly forum for consumer and small business. It is usually knee deep in lawyers.

Even more fundamentally, the Dawson committee, with little discussion, has rejected one of the most fundamental tenets of the Act. The Act's philosophy is to prohibit anticompetitive behaviour including anticompetitive mergers. Unlike many other countries Australia is, however, prepared to allow anticompetitive mergers but only if it can be demonstrated that they are of sufficient benefit to the public that they should occur. The power to authorise is an extremely important one. If, for example, that only two firms in an industry seek to merge, it is the power of licensing a monopoly in perpetuity. Until now there have been stringent safeguards to protect consumers, business, customers, suppliers and others from any unwarranted authorisations.

Under the Dawson proposals, however, there will be no right of appeal for consumers, suppliers or others against Tribunal decisions. This seems undesirable. A few lax decisions – and they are more likely when there is no right of appeal and when there are obvious procedural and investigatory problems with the proposal - and the level of concentration in the economy will sharply increase.

Regarding universal application of the Trade Practices Act, Part X of the TPA is an eyesore. In the middle of an otherwise pro competition law there is provision in Part X for an anticompetitive shipping cartel that is out of tune with today's economy. It should go. One of my disappointments is that Part X concerning shipping cartels has not been repealed despite recommendation by the Hilmer Report and by the ACCC that it should be.

Regarding the removal of parallel import restrictions, only restrictions on books remain. I also favour removal of the restrictions on pharmaceuticals noting that it is possible to achieve the same effects if necessary through health regulations.

Intellectual property issues will be more important in coming years as the knowledge economy develops although I would hasten to point out that Australia will for many years ahead be a net importer of intellectual property rather than a net exporter and so it should be very wary of protectionist schemes. We should resist pressures under a free trade agreement with the USA for any repeal of the reforms which ended import monopolies on CDs and the like. I would not necessarily oppose strengthening the piracy laws if appropriate.

Small business is a major beneficiary of the provisions under the Trade Practices Act. However when the Act began to apply to all forms of business in 1995 (though for some there was a period of transition,) quite a number of small businesses found that they had to apply for authorisations for some of their services. The Dawson

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Report has come up with recommendations that could ease the burden on small business in making these proposals.

Unfortunately, despite a record of general vigour and success in litigation the Commission has won only one Section 46 case in the last decade. Does anyone believe that there has been only one instance in which an Australian business with substantial market power has misused it to harm competition in that period? Even if unsuccessful results were occurring – and the Commission has in fact lost a string of cases - cases typically take up to seven years or more. For that reason alone the law cannot be said to be effective. A faster remedy is required!

The recent Boral decision makes one gloomy about applying s.46. Soon after the decision the ACCC announced it was abandoning four of the 15 cases it was investigating under s. 46 and others were being reviewed.

In brief some of the main issues raised by the Boral case are:

- the decision by the High Court comes close to treating the concept of a substantial degree of market power as being the same as the concept of dominance, despite 1986 amendments to the Act intended to cover cases where a group of firms shared market power.
- the term “take advantage” needs to be defined by the Parliament to make it clear that if the behaviour is based on market power and is somehow facilitated by it, that is sufficient to constitute “taking advantage”.
- there could be a case for explicit reference to predatory behaviour.
- It should be made clear in the Act, that the so-called “recoupment” requirement is not necessary. Boral, for example, made a loss in the market in which it cut prices (with the purpose of eliminating competitors, as the Court found). Getting the money back later in that market was irrelevant because its behaviour was a signal to all other potential small competitors in the hundreds of other markets it is in that there could be a similar reaction. (Of course, I was disappointed the Court believed that Boral couldn't get the money back in that market: this was a finding of fact by the trial judge which seems to have influenced the High Court.)

Since then, the Full Federal Court has by a 2/1 vote overturned a negative decision by a single court judge regarding the section 46 element in the Safeway case. Safeway has said it will appeal to the High Court and so has the ACCC.

The Full Court has also overturned a verdict by a single judge that the two record companies Universal and Warner had broken Section 46 (although it found breaches of Section 47).

## **Energy Regulation**

I am concerned at recent developments regarding governance in the energy market to the extent that they could involve States regulating national energy markets. A national regulator largely separate from the ACCC is not especially desirable in my view. But it is alarming if, as it seems, it is to be controlled by a majority of States.

## **New Zealand – closer competition ties**

The time has come for serious consideration to be given to integrating competition law and policy in Australia and New Zealand. The governments of the two countries

should take immediate steps to bring the law and the agencies together more closely by appointing cross members, by establishing a law which enables full cooperation, common information collection and information sharing between the agencies and mandates consultation on issues of common interest such as the Qantas/Air New Zealand merger. Longer term the laws and agencies should be integrated.

### **Dumping Authority**

One of the most serious restrictions on competition is our international trade laws. They are quite inconsistent with the principles we apply in competition policy. A particularly serious example concerns dumping laws claimed to protect Australian business from unfair competition. However the dumping laws go much further than that and deny consumers the benefits of much fair competition from abroad. The principles of dumping law are quite incompatible with the principles that we apply in relation to predatory pricing for example. A private study commissioned originally by the OECD found that most cases that succeeded under dumping law because of low prices would have totally failed under competition law. In my view the dumping authority needs to be subsumed under the Trade Practices Act but this is too difficult politically at present. I suggest that moves be made to gradually bring dumping law into line with competition law by cross membership of the dumping authority and the ACCC, by adopting similar procedures and methods of investigation, by introducing criteria and concepts that are more similar eg the protection of competition rather than the protection of competitors. It is especially hypocritical that businesses which seek mergers because there is import competition then apply for dumping protection immediately afterwards.

It is also hypocritical to argue in relation to s46 that the law should protect firms from anticompetitive behaviour only but apply the opposite standard in relation to dumping. Why are our business lobbies not speaking out against this law which protects competitors, not competition?

### **Publicity**

The Commission sought in my time to raise the profile of the ACCC. The purpose of this was to make the Act more effective.

Thus, publicity adds to public value.

The public has a right to know about the Trade Practices Act and its application: people are entitled to know their rights as well as their obligations under the law.

The Commission's publicity campaigns have had a powerful effect also in spreading the culture of competition.

Another important effect is to counter criticism of the Commission and the Act made behind closed doors as part of attempts to weaken and water it down by big business lobbying.

Thus, publicity also tends to make it easier for the authorising environment to accept high public value output from the ACCC.

Big business does not like the publicity the Commission has obtained. The publicity has built strong public and small business support for the Act, the Commission and

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for competition, and has got in the way of vested interests who want the law to be softened, to be applied softly or who want exemptions.

The big business community has been casting around for years to find some reasons why the public should not be informed. They have tried to throw the “trial by media” slogan at the ACCC. The fact is, however, that hardly any of the ACCC publicity relates to matters that have not already been to trial and settled. Had the ACCC engaged in trial by media over the years, there would have been court reprimands. There have not been. The only occasion when there was an element of “trial by media” was during the GST period when the ACCC was encouraged by the temporary legislation to issue notices condemning firms it considered had been overcharging. When in the exceptional circumstances of the case, the ACCC somewhat ill advisedly cooperated in allowing the photo of staff returning from the Caltex raid to appear, this provided critics with a golden opportunity to play the “trial by media” card. On the whole this push was resisted by Dawson, with its proposed, fairly mild media code of conduct to be determined, if possible by the ACCC with small and large business, consumers and farmers.

Publicity has stemmed from strong enforcement, and in turn has made it more effective, adding to public value.

Dawson and most of the other reviews, have not dug deeply into the basic issues surrounding competition law, nor looked broadly at the role of and challenges to competition law as the economy changes in the years ahead. The case for a divestiture power in the Act, recommended by my predecessor, Professor Baxt, has not been seriously looked at. The arbitration negotiation model of regulation has also not been looked at deeply. Nor have global issues been taken up.

Obviously mistakes have been made over the years by the ACCC. It is not particularly illuminating to produce a list of individual cases because most of the claimed mistakes involved difficult judgments at the margin, rather than fundamental principles (e.g. the Foxtel-Australis decision) or exceptional circumstances (the oil raids, with the unknown whistleblower telling all to the press).

The bigger issue is that the Commission inevitably makes mistakes because it has to make judgments about the future. For example, it has probably allowed mergers it should not have, and disallowed mergers it should have allowed.

One regret I have about the policy debate on the Act is that it is almost wholly focused on the restrictions that should exist to protect business against an allegedly zealous regulator (in reality, the ACCC was just, in my time, bringing enforcement into line with world best standards).

There has hardly been any discussion of the greater danger that there are few safeguards for business or the public against a tame regulator.

## SOME GENERAL ISSUES

### Some Economics Issues

Competition law differs from some other forms of economic policy which remove government intervention and the distortion that may go with it. Competition law involves active intervention by governments in order to achieve “free” competitive markets.

Also, when governments deregulate, there is often, paradoxically, a need for greater regulation under the Trade Practices Act. Where deregulation involves the horizontal and vertical separation of the different elements of a former monopoly, there needs to be a merger law to prevent reintegration and the application of collusion laws also in case the new businesses seek to collude. Where there is no disaggregation, government monopoly may be replaced by a private (or public) monopoly or dominant firm which, although exposed to new entry, still enjoys a very high degree of market power. Some regulation of access to its facility may be required. Some price control may be required and the provisions of section 46 concerning the misuse of market power may be especially relevant.

Further economic questions concern the kind of competition law application which should occur in order to promote competition. Where there are problems, should there be structural measures? Should we have a divestiture power in Australia, for example? In the United States it has been used in relation to steel, oil, chemicals, tobacco and telecommunications to name a few (and it looks like it will now not be used in relation to Microsoft). The Hilmer Report emphasised a preference for structural measures, rather than regulatory measures, in relation to public utilities.

If, however, there is to be regulation, should it be “light handed” or otherwise? How compatible is “light handed” regulation with the existence of a high degree of market power?

Another general economic issue about competition law concerns the impact of economic change in the form of globalisation, new technology, domestic and international liberalisation and deregulation and ongoing structural change. Many and, indeed, most of these changes, have significant implications to the application of competition law. They often wider consumer choice, create business opportunities and reduce the need for intervention to protect competition. However, as I have mentioned earlier, these processes can also give rise to new forms of anti competitive conduct (such as sharp rise in international cartels in recent years), new sources of market power (Microsoft), challenging global mergers and new forms of consumer scams often operated on an international scale using new technology.

As the economy changes, there will need to be a continuing application of competition law as new issues arise. Generally speaking, the legislative framework for competition law seems broadly adaptable to these new situations as the underlying legislative concepts such as “substantial lessening of competition” enable continual reassessments and redefinitions of market power and competition in light of economic change.

Regarding globalisation, the main requirement is to take account of the greater role of import competition in relevant markets and to factor this into decisions about competition including merger decisions. It should also be noted that in Australia’s small economy, there is provision for authorisation of anticompetitive behaviour,

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especially, anti competitive mergers, if there is an argument for them based on economies of scale. On the other hand, there is also an important need, as export and import competitors become more exposed to international competition, to ensure they are supplied competitively and efficiently. This is contributed to through effective competition law.

### Politics

Many of the tensions concerning competition law arise from a contradiction between the interest of the individual, especially the individual corporation, and the community. The community, including the business community, wants and needs competition law. Everyone needs to be supplied competitively and efficiently. On the other hand, corporations resent the application of the law to them individually and have the maximum interest to weaken its application to them. They often seek exemption or softening of laws that are likely to apply particularly to them.

The calculus of cost and benefit from the application of competition law varies from consumers and small business (which generally benefit from it with little cost) to big business which generally wants to water down competition law and its application to itself while extending its reach to many others. The support of big business organisations for competition law has been equivocal over the years.

From the point of view of political analysis, it is worth noting that support for competition law and its application may be thought of in relation to a matrix.

	Anti Competition	Pro Competition
Anti intervention		
Pro intervention		

Competition policy wins its strongest support from those who favour competitive markets and can tolerate intervention. Libertarians dislike intervention and are uncomfortable with competition law even if they like markets. Some people dislike big business and welcome intervention and for this reason support the ACCC even though they do not necessarily like the working of competitive markets. Those most opposed, presumably, are opposed to both competitive markets and intervention.

Politicians have a dilemma. There are demands from the public to rein in corporate misbehaviour, corporate excess, overcharging and the abuse of market power. Small business also demands protection. The property rights disputes are very large. Governments need an independent umpire. Governments are also responsible for the efficient operation of the economy and, for this reason, they also need competition law. But the application of the law can cause stresses in their relationship with big business.

The usual solution to the dilemma is to establish independent regulators accountable to Courts. Generally, the competition regulator is not given final power, at least not in

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Anglo-Saxon countries. Rather the regulator has to act as a kind of police force whose task is to investigate and then prosecute a case before a court. Court processes are thought to provide good safeguards to those accused of breaking the law and they are probably more acceptable to the community than is conferring substantial final power of decision making on regulators (although in Europe regulators have decision making power that is subject to the possibility of appeal through the Courts). At the regulatory end of the Trade Practices Act spectrum, we have something like this in Australia with the regulator making binding decisions most of which can be appealed.

The independence of the regulator creates some interesting political dynamics. On the one hand, politicians are able to ward off interest group pressures by conferring decision making power on independent regulators and courts and, on the other hand, they sometimes believe that they are ultimately held responsible for these decisions by the public and by business.

In the area of competition law, the approach has been for Trade Practices Act matters to be handled independently of government. It is up to the ACCC, for example, to determine its priorities as to litigation, adjudication and so on. With price regulation on the other hand, under the Prices Surveillance Act, it has long been accepted (since the early days of the Whitlam government) that governments should set the general direction for prices policy. They should, for example, decide which industries are to be regulated, leaving only decisions about the price level in the hands of the independent regulator.

Politicians can have differing attitudes to regulation. When it goes wrong, they want the regulator to bear the blame. This is all care, no responsibility. Of course, in fact, the politician can be the target (often not justified) of criticism when a regulator in his or her portfolio is seen not to be doing the job well. On the other hand, if the regulator is seen to be doing the job well, the politician rarely gets credit and may, in some cases, resent the success of the regulator.

The nature of the independence of the regulator requires some analysis. Broadly speaking, decisions about individual matters are left in the hands of the regulator. However, the government can still influence outcomes by its legislation and associated regulation, by appointments, by setting budgets and, in some cases, by informal pressures.

Another issue concerns the accountability of the Commission. Some say that it is not accountable. This is wrong. Under Parts IV and V the Commission can not affect legal rights against anyone's will without having the sanction of a Court order. It must prove its cases in Court. It may face strong resistance from well resourced defendants. Where there are adjudications, ie, where authorisation is sought from the Commission, there is a right of appeal to the Australian Competition Tribunal and it is frequently exercised. Some claim that for commercial reasons, businesses will not challenge Commission decisions. My own experience has been that the reasons they do not challenge the Commission are that the Commission is usually right and that serious legal challenges would be fruitless. Moreover, my experience has been that where the Commission has made a mistake, most firms will challenge in Court.

In this regard, the Dawson Committee rejected business proposals that there should be an oversight committee or an inspector general for the ACCC. It did propose some stepping up of the ACCC consultative arrangements and this is something the Commission supported. There will also be a Parliamentary Standing Committee.

## **The Future of Competition Law – Giblin Lecture 2003**

Again, this was welcome to the Commission. It now awaits the Uhrig report on corporate governance.

### **CONCLUSION**

The economic challenge for politicians in relation to the Trade Practices Act is that they need its effective enforcement more than ever if a competitive, efficient economy is to be achieved. Its public value is very great, but there is pressure on the authorising environment to weaken the Act. The political challenge is to handle serious interest group pressures, each one of which is seeking an exemption, or soft treatment of itself. Reconciling these conflicting goals requires a strong, ongoing commitment to competition law by government.

Whether Australia continues to enjoy its good microeconomic performance in the period ahead depends on the willingness of governments to stand firmly behind competition law in the face of these pressures.



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