Review of the Competition Provisions of the Trade Practices Act 1974

Submission to Trade Practice Review Committee

by

Michael Kyriacou Peters *BA(UNSW)., LLB(Syd)., M.Com(UNSW).,LLM(Lond)*
Lecturer, School of Business Law and Taxation
The Faculty of Commerce and Economics
University of New South Wales
Sydney, NSW 2052

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Preamble

As Australia enters a new phase of economic re-structuring, new challenges are emerging for both the Trade Practices Act (TPA) and its regulator (ACCC).

Amongst the issues of concern is Australia's inability of compete globally, the continuing trend towards market concentration and the extent of confidence by business in dealing with the TPA. Of equal concern is the prominence of efficiency and economic criteria in the decision making process, and the absence of social or non economic factors. Promoting competitive trading theoretically may benefit consumers in terms of services and price and what about the community. What type of community do Australian want, a community driven by efficiency, with price deciding who gets access to essential services and facilities. Should the community protect small business by placing big business under scrutiny, and in doing so send an unfavourable message to investors.

Australia and the world economy is today a very different place in many respects that in the days of the Hilmer Report. The community may not be so patient with the economic models promoted in the past. Key concepts, criteria and outcomes need to be better defined. Ultimately, the community as much business must support the aims of the TPA. By defining the type of community, and through this the type of economy Australia wants may in itself legitimate the aims of the TPA. This submission highlights a number of areas which should be considered as part of the review of the TPA.

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Summary of Submission : Recommendation

1. Review and perhaps rewrite section 46 to consider including the concept of competition, and specified policy outcomes.

2. Introduce what is meant by deregulation, the preferred policy outcomes and the criteria to measure such outcomes.

3. If competition is a preferred public policy objective this should be more clearly defined in the Act.

4. Review whether s 46 should focus on conduct - behaviour or the outcome of the behaviour.

5. The intention of the supplier should be of lesser concern than its consequence when deciding on s, 46 matters, to enable the court to examine intent as a means of determining the facts rather than the "mind" of the supplier.

6. ACCC should be encouraged through the Act to apply penalties as a signal to the market place of the importance of a transparent, reliable commercial conduct.

7. There should be further price monitoring and regulation for key industries.

8. Investigate the establishment of an access commission "Key Access Commission" (KAC) not to compete but to compliment the ACCC's role to guarantee all Australians access to key services and facilities (including price based access).

9. Consider using the European Union position which is based on "dominance" when examining mergers.

10. ACCC be encouraged to refine the criteria and introduce a more co-operative model to enable the public and other stake holders the opportunity to participate in the decision making process in reference to mergers.

11. The ACCC should not be encouraged to adopt the US relaxed approach to the issue of mergers.

12. Social criteria should have the same dominance as economic criteria.

13. Criminal sanctions should be considered for gross breaches of the TPA.

14. Perfect competition should not be the focus of the TPA. Competition with clearly defined outcomes should be the focus of the TPA is language which is relevant to a deregulated economy.

Regulating Market Power

There is little doubt that Australian markets will continue to be localised, relatively small and prone to be dominated by few suppliers. It is imperative that public policy protects the public, encourages entry of new suppliers and protect them from unfair practices. It is not the role of the regulator to pre-empt the market, rather it is to ensure that the level playing field is somehow introduced and managed into the market.

Section 46 of the TPA prohibits a corporation which has a substantial degree of market power from abusing that power. Currently there are three elements required to establish a breach of s 46:

1) there must be a relevant market and it is possible to measure the corporation's power within that market;
2) there needs to be an element of an abuse of that power often referred to as improper conduct;
3) and there is a need to show proof of a proscribed purpose.

It is curious that such a key provision of the legislation which by implication is about competition does not mention. By implication s 46(1) refers to conduct undertaken with some intention to damage the competitor. However, it is not completely certain whether this provision is available to protect competition or competitors or even consumers. In whose interests does this provision serve?

The High Court has looked at this issue in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* (1989) 167 CLR 177 at 191 per Mason CJ and Wilson J where their Honours came to the conclusion that it was the consumers interests that should be served, which in turn could only be served if competition was to be encouraged. In the same case the court noted that the provisions in Part IV of the TPA encouraged competitive behaviour in the marketplace and was not necessarily concerned with economic efficiency. Their Honours observed, *inter alia,* that the interests of consumers and their welfare were the ultimate beneficiaries of competitive conduct.

Misuse of Market Power

Section 46, which deals with the misuse of market power, implies that a concentration of market power is tolerable only if it is used in an approved manner. This permitted use of power may be of benefit to the consumer but may not necessarily promote efficiency in the economy.

Deregulation is likely to create a far more structured economy, where rivals within the marketplace attempt to neutralise their competitors. Industry rationalisation can be considered the code word for the efficient re-engineering of markets, and changing the spheres of interest in the markets from one group of suppliers to another. In recognising this, s 46 prohibits a corporation from misusing its market power in a manner, which is likely to eliminate or substantially damage a competitor, prevent new suppliers entering the market and discourage competitive conduct within the market place.

Incidents where a misuse of market power identified include: a refusal to supply or deal with third parties or to provide access to essential technology or facilities, price discrimination and predatory pricing.

Reviewing the Concept of Market Power

In a deregulated environment, the way regulators and courts deal with the idea of market power may need review in light of the new economic context. Currently there is a trend towards defining market power in terms of economic theory, such as the supplier's ability to set prices, delivery dates and features to a product.[1] Where are the social criteria or characteristics of this concept? Perhaps market power is more than sales but the way suppliers have an impact on the community, residential areas, the environment, and minority groups in society, children and the aged. Dispute this the court's have been reluctant to consider other factors other than primary economic

The judiciary links market power with ability to set prices without alienating their customers or providing their rivals the opportunity to capture their share of the market. Power would seem to be associated with market share, price sensitivity and the ability of competitors to have an impact on the supplier in question. Perhaps the TPA has been over influenced by the economic theory of the Chicago School which argues that in a deregulated environment the market is price sensitive? Customers are constantly on the lookout for movements in prices, and with the exception of markets where there is no substitution for the existing product, customers will within reason and ability to travel, seek out new products to replace those which have had an increase in price. However in a demographic situation such as that of Australia, where oligopolistic market structures are prevalent, the only form of neutralising movement in prices is the ability of the consumer to find products of substitution. Likewise, if market power, or rather economic power is to be put in check, perhaps non economic factors should be considered.

As a result of technological change it is possible to argue that there are more products of substitution in the contemporary Australian economy than there has been in its entire history. It will therefore mean that even suppliers who have, or are perceived to have, market power, would have to be careful in exercising such power; otherwise they would lose their market share. Therefore it is more likely perhaps those larger suppliers, well known in the market place would use their power carefully rather than attract any attention. Such suppliers may use good public relation techniques to achieve this end, yet stakeholders outside the limits of economics do not have a role to ensure that such suppliers should act in a responsible manner. Perhaps this should be the role of other regulators ands laws such as corporation's law, or regulations dealing with investment funds. However, because the market place is where transactions are completed, people are affected, competitors are unfairly damaged, and the Committee may wish to consider whether the TPA has a legitimate role in expanding the definition of market power to non economic criteria.

[1] As per *Plume v Federal Airports Corporation; Ex parte Habib v Plume* (1997) ATPR 41-589.

Regardless of what the TPA promotes larger suppliers may be tempted to drive their own destiny. In effect that may not be a bad thing, unless it stops others from exercising their economic rights. It could then be argued that these suppliers, in fact, only have the ability to exercise power, but that the consequences of doing so would be so detrimental that it neutralises any true influence they have. Such suppliers can use their influence as a means of leverage in setting a particular mood within the marketplace, in the hope that their rivals would follow suit. This evokes the question of ability to exercise one's power with the nature and sufficient influence this power has to direct market trends. It is therefore important to set a threshold, which incorporates a supplier's ability to exercise its power effectively as a means of measuring market power.

In a deregulated environment, it would be difficult to set such a measuring standard. It is argued that the threshold of what constitutes market power would change over time relative to the market technology and substitutability of the product. There can be no one effective universal threshold or test, within the contemporary context of a deregulated economy.

A Test for Market Power

The test to measure market power must be identified before it falls within "a substantial degree of power in a market". This ought to be an objective test. Further the test ought to incorporate an examination of whether the power so identified is real and can be used by the supplier for their benefit to engage in anti-competitive behaviour. In a deregulated environment, market power will manifest itself in different ways, and not necessarily cause anti-competitive behaviour. Such considerations were noted by Mason CJ and Wilson J, in *Queensland Wire Industry*[2] where the court had to analyse the market forces which indicate where the influence lies within the market and identify who are the custodians of such influence and whether such influence was substantial in nature. Once that is achieved, the Court looks at evidence to show that such power, or rather such ability was used for improper purposes that is to bring about anti-competitive conduct. To assist the judiciary, s 46(7), incorporated in the TPA by the *Trade Practices Revision Act* 1986, allows the courts to deem a misuse of market power by the conduct of the supplier and agents.

The recognition that the market structure in Australia is oligopolistic in nature is implied by s 46, which does not provide for any form of authorisation of conduct, which would constitute a misuse of market power. Unless the conduct falls within ss 45, 45B, 47 or 50, it is likely that the supplier has contravened s 46 of the TPA. This provision does not discourage the accumulation of power; it is primarily aimed at the misuse of such power. Therefore taking advantage of the power and linking it to anti-competitive conduct is a means of limiting the power of oligopolies.

In *Natwest Australia Bank Limited v Boral Gerrard Strapping Systems Pty Ltd*[3] Boral had supplied a pastoral company wool strapping products. The company went into liquidation. Boral recovered the strapping equipment but was still owed rent. Natwest as the receivers could not sell an item of equipment because Boral would not supply

[2] *Queensland Wire Industries v BHP* (1989) ATPR 40-925 at 50,010.
[3] (1992) ATPR-41-196.

the strapping equipment without which the piece of equipment was useless. French J noted[4] that there was no link between Boral's conduct not to supply the new purchaser of the pastoral company and Boral's perceived market power as a substantial supplier of wool strapping in Australia. His Honour noted that:

"the conduct must either by necessary implication from its very nature or by reference to other pleaded facts or circumstances constitute a use of that power. It is not sufficient to show that a corporation with market power has engaged in conduct for the purpose of preventing entry of another person into a market or deterring or preventing a person from engaging in competitive conduct."[5]

A similar situation occurred in *Plume v Federal Airports Corporation.*[6] An airport shuttle-bus service owner had sought a licence from the Federal Airports Corporation to operate a shuttle service between the airport and the city of Sydney. The Federal Airports Corporation did not approve the application, and it was argued by the operator that they had breached s 46 because the refusal denied the operator entry into the market, and therefore the Federal Airports Corporation was using its power and monopoly (as the only operator of airports in Sydney) to prevent the carrying on of the business of a shuttle service between the airport and the city. However the court found that the Federal Airports Corporation was exercising its ability to regulate the traffic and services which emanate from the airport, rather than reducing competition in the transport industry.

Such decisions are likely to continue where the courts using economic models, come to recognise that s 46 reflects a degree of tolerance for highly structured concentrated markets which the TPA and the ACCC are unlikely to break up in the near future. This is in contrast to the anti-trust laws of the USA and the European Union, where both the statutes and the regulators have a history of breaking up trusts and cartels and suppliers which have market power and the ability to use this market power.

Managing What We Have

The effectiveness of any law is its perhaps its ability to relate to changing circumstances. Some things are not likely to change. For instance Australia will always be characterised with a few suppliers maintaining market power; what the law may perhaps increasingly provide is a management tool. There is some risk in using the TPA as a management tool. First, any economic tool such as the TPA must deal with what they find, and then deal with it in a realistic manner. In *Plume v Federal Airports Corporation*[7], the Court stated that any person who wishes to enter into the lucrative business of a bus service between the airport and hotels would need the consent of the Federal Airports Corporation. It may be unrealistic to argue that every bus operator has the right to visit the airport. The Federal Airports Corporation has an important public licence as a monopoly to operate airports. Their ability to use this monopoly to choose who visits airports is a justifiable and legitimate use of power. The question therefore is that some uses of market power are acceptable while others are considered to be a misuse of that power and anti-competitive.

[4] (1992) ATPR 41-196.
[5] (1992) ATPR at 41- 644.
[6] (1997) ATPR 41-589.
[7] (1997) ATPR 41-589.

In *General Newspapers Pty Ltd v Australian and Overseas Telecommunications Corporation Limited*[8] argued that the manner in which Telecom had contracted for the printing of the white and yellow pages was a blatant use of Telecom's market power to determine who would print it and at what cost. Instead of opening it to public tender Telecom had given the printing contracts to printers with whom it had built up a relationship. It was argued by the aggrieved printers that Telecom had engineered the negotiations and the subsequent contract so as to disregard any potential competition from other printers. As the yellow and white pages were considered to be the printing industry's biggest contract and Telecom was aware of this, they used their ability to influence the market by determining who should print it and at what price. The court in applying *Natwest Australia Pty Ltd v Boral Gerrard Strapping Systems Pty Ltd*[9] noted that there was no relationship between Telecom's market power and the manner in which they contracted the printers. The behaviour of the supplier in the deregulated economy will come under greater scrutiny as the only means of regulating deregulation. But this may not lead to more participants in the market place. It can be argued that the TPA has not been very successful in promoting diversity. Even when the courts have intervened to support small business, there does not seem to be any follow up, with the opening up of markets. Perhaps the review into the TPA can examine ways to protect small business.

In *Queensland Wire Industries Pty Limited v Broken Hill Pty Co Limited*[10] the High Court supported the endeavours and circumstances of small to medium sized businesses when they were operating in oligopolistic and highly structured markets. This in effect is not a means of producing a more efficient market because economies of scale in this particular market would reduce costs per unit and enable Australia to export its end product, in this instance steel wire and associated products, far more efficiently than having many small operators.

It can be argued, therefore, that the court was in effect establishing the principle that many suppliers would lead not to necessarily more competition, but a better outcome for the public, and in particular small business, by encouraging new entrants in the market, which over time would reduce market structures hampering access to suppliers. Perhaps this principle should be codified within the TPA.

In *Eastern Express Pty Limited v General Newspapers Pty Limited,*[11] the Federal Court found that economies of scale would increase economic efficiency in that particular market. Wilcox J[12] argued that an agreement between Sydney eastern suburbs real estate agents to only advertise in local newspapers they were shareholders in, would break the monopoly of the only other paper in the suburb. By extension, the agreements could be argued to be pro-competitive even if they may reduce the choice available to the real estate agent. Perhaps the issue is whether one evil, limiting a party's freedom to contract could be supported because it would bring about a more diverse and competitive market. How could deregulation prevail if competition, however artificial and restrictive is not encouraged. The courts response

[8] (1993) ATPR 41-215.
[9] (1992) 111 ALR 631
[10] (1989) ATPR 40-925.
[11] (1991) 30 FCR 385
[12] Ibid at 421

is to allow the cause of competition prevail, only if the restriction is not indefinite and harsh. Perhaps the focus of the TPA should be economic rather than social, in either case; the courts when applying the TPA are increasingly relying on economics to justify their determination. This may be due to an over emphasis on economic criteria. Perhaps the TPA should give greater guidance as to social outcomes. For instance free speech would be encouraged where more outlets for its expression are available.

Should Economics Rule the Law?

The TPA is primarily a consumer protection and competition statute. It is not surprising that economics tends to dominate the thinking and application of the TPA. However, economics on its own is not a tool for producing social outcomes. It may be sometimes convenient to group the non economic concerns of the TPA as "other" or "public benefit" without addressing the type of society we are promoting through competition law. It would seem the TPA, the regulator is more concerned with the type of economy rather than the type of community desired. This is partly due to both the legislatures and judiciary's unquestionable acceptance of economic theories as the basis to the model of competition. Economic efficiency or the promotion of a workable market focused on the type of community we want should perhaps be the prime objective of economic policy in Australia and reflected in the TPA.

This is not a new issue. The debate between public benefit and economic efficiency is evident in submissions to the Griffiths Committee, where the TPC argued that although economic efficiency is the focal point of competition policy there ought to be some consideration of social-political objectives. This was evident in *Queensland Wire Industries Pty Limited v Broken Hill Pty Co Limited*[13] where Mason CJ and Wilson J noted that the purpose of s 46 is to "protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end". This is in contrast to Deane J, who noted, *inter alia*, that the objective of s 46 "is the protection and advancement of a competitive environment and competitive conduct by precluding advantage being taken of a 'substantial degree of market power in a market' for any of the proscribed purposes.

In *Queensland Wire Industries Pty Limited v Broken Hill Pty Co Limited*[14] Mason CJ, Wilson, Deane, Dawson and Toohey JJ found although BHP had advantage of their market dominance, s 46 was morally neutral and should only be applied as an economic concept. The Court described the object of s 46 to protect the consumer interest, based on the assumption that competition will produce such a result. The Court decided that BHP had breached s 46 without the need to show that their conduct had lessened competition. Although the court has adopted a restrictive definition of s 46, this has not statistically caused greater competition. The case is not considered as an instrument of reform. The narrow definition and application of s 46 has not encouraged competition.

In *TPC v CSR Limited*[15] French J stated, inter alia, that:

[13] (1989) 167 CLR 177.
[14] (1995) 167 CLR 177.
[15] (1991) ATPR 41-076.

"The provisions of Part IV of the *Trade Practices Act* are directive to procuring and maintaining competition in trade and commerce: *Refrigerated Express (Australasia) Pty Limited v Australian Meat & Livestock Corporation (2)* (1980) 44 FLR 444 at 460 (Deane J). They are of a regulatory rather than penal character".[16]

Whether it means that the market determines price, or implies that efficiency ultimately leads to better diversity of product and price and thus is of benefit to the public is not certain. It can be implied that the role of deregulation and the law is to simply discourage inefficiencies, or simply another form of codifying equitable doctrines such as unfair and unconscionable business practices.[17]

In *TPC v Service Station Association Limited*[18] the Federal Court noted that "the Act is considered to promote and stimulate competition between business people and to discourage and remove business practices which inhibit competition". The court in relying on such a holistic and economically literate definition of the function and role of the TPA noted that it was simply developing these notions,[19] and that there was substantial case law to support it, such as *Radio 2UE Sydney Pty Limited v Stereo FM Pty Limited.*[20] Therefore it is not outside the norm to consider that the judiciary was simply reflecting the mood of the late 1980s and early 1990s, which was prevalent not just among economists and politicians but business and to a lesser extent consumer bodies.

The Economic Planning Advisory Council's discussion paper entitled *Promoting Competition in Australia,*[21] noted that competition is a preferred public policy objective because it promotes an efficient allocation of resources.[22] It was argued that if a form of competition were enforced upon the market, then those companies, which have a concentration of market power, would lose their position and allocate their resources and efforts to finding new ways of maximising their profit. One such way is to increase their efficiency. A less stridently argued point was that competition would lead to a reduction in the quality of opportunity and would also tend to eliminate discrimination in the workplace as suppliers aim for efficiency rather than for any discriminatory or other practices. The Report, however, did note that competition might at times contradict social policy objectives, relating to full employment and maintaining minimum living standards.

In such circumstances a limited form of intervention should be allowed in the marketplace to ensure social objectives are not harmed and so that a balance can be set between social objectives and outright competition. The Report reflected the view of the time, which promoted competition as an antidote and saviour for the stagnating economic growth which was being experienced by most members of the OECD and developed countries.

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[16] Ibid

[17] The jurisprudential basis for using the law in economic management is debatable: see R A Posner, *Overcoming Law*, Harvard University Press, Cambridge, 1995, pp 18-19, 76.

[18] (1993) 116 ALR 643

[19] Ibid.

[20] (1992) 62 FLR 433 at 444

[21] Economic Planning Advisory Council, *Promoting Competition in Australia*, Council Paper No.38, AGPS, Canberra, 1989.

[22] Ibid.

Perhaps this provision requires some thought as to whether the law is concerned with the conduct-behaviour or the outcome of the behaviour, who the law is protecting, ie is it competition, consumers or competitors. Perhaps the law should be concerned with discouraging any form of commercial injury (other than that accepted in the dynamics of competitive behaviour).

Perhaps the intention of the supplier should be of lesser concern than its consequence. This will enable the court to examine intent as a means of determining the facts rather than the "mind" of the supplier.

The US Position

In recent times s 2 of the Sherman Act has gain prominence with the prosecution of Microsoft. A monopoly is established where there is evidence that it was improperly obtained or maintained improperly. The Federal Court of Appeals (D C Circuit) came to the conclusion that the behaviour must have an anti-competitive effect. Another way of putting it is to ask whether the behaviour has injured competition to the detriment of the consumer. This also allows the monopoly to argue that they have acted in a pro-competitive manner.

Areas of Review

In a deregulated competitive environment it would not be unreasonable to allow an argument that the behaviour was commercially viable and pro-competitive and not necessarily an abuse of market power. Perhaps the perceived abuse is a consequence rather than the motive for the behaviour. Further since the TPA is the centrepiece of competition policy the concept of competition concept should be incorporated in the TPA.

The Regulator

It is often misunderstood that the ACCC wields too much power. This is confused with a need for a proactive regulator within a deregulated commercial environment. The difficulty has been should a statutory body such as the ACCC determine the fate of markets, suppliers, investors, employees and the like. It is noted that the ACCC is a unique body in terms of the range and diversity of powers vested in it to investigate and judge a range of commercial behaviour which includes the following powers.

Mergers

The ACCC authorisation of mergers has delegated it the opportunity to define markets for the purpose of deciding whether a proposed merger is likely to be anti-competitive. Often overlooked is the ACCC's ability to allow, most mergers on conditions set by the ACCC and usually with the consent of the parties concerned (under s 87B) under which a merger may proceed.

The ACCC's ability to grant immunity from prosecution for anti-competitive behaviour is wide. With the inclusion of s 50 the ACCC has enabled it to apply to mergers that may result in "dominance" as being contrary to the concept of "substantial lessening of competition". It is expected that the management of mergers

will increase as the Australian economy goes through consolidation in key industries. The strategic use of the ACCC's powers will determine whether Australia will have the benefit of such industries as Pay TV, phone, video on demand, pharmaceutical's and refinery.

Behaviour

Sophisticated markets promote sophisticated marketing techniques. Perhaps frankness in promotion and marketing is due to become a major issue. Mobile phone, Pay TV, insurance, banking, travel, and pension investment contracts are a few of the agreements which are prone to confusing consumers. The ACCC will require further regiment of penalties to signal to the market the importance of a transparent, reliable market place. Perhaps the introduction of community service orders may reinforce the importance of good commercial practice.

Pricing

In any deregulated economy price sensitivity becomes a paramount driver of consumer behaviour. Especially in markets where differentiation is superficial at best. Such, markets usually consist of "staple" services and products, necessary for the living standards of all Australians. Perhaps subsidises can no longer be justified (politically if not economically). Access to such services, based on price is essential to maintain Australia's reputation as a developed nation. It is proposed that the ACCC's powers in setting price ceilings on gas pipelines, electricity, telecommunication, rail, airport and education be enhanced.

Access: A Fundamental Right

Perhaps the greatest challenge for a deregulated economy is to guarantee all citizens access to the services and facilities which are so often taken for granted. As these services and facilities are increasingly transferred to private investors, the issue of access may emerge second only to the competition provisions of the TPA.

As it currently stands the ACCC is the regulator and determines the terms of access. It is proposed that the Committee may investigate the possibility of expanding this role, perhaps with the establishment of a "Key Access Commission" (KAC) not to compete but to compliment the ACCC's role. Whereas the ACCC may focus on the consumer and safety aspect of access the KAC would ensure access to the services and facilities by other suppliers both national and overseas.

Perhaps it could be structured along the lines of the UK Competition Commission and the Office of Fair Trading (OFT). In accordance with the UK model the Director General of OFT monitors commercial transactions which may be anti-competitive (such as mergers), then reports them to the Secretary of State, who in turn decides to refer the merger to be investigated by the Competition Commission. This two step process may be appropriate where it comes to access to key markets.

It is not a matter of reducing the ACCC's power; rather, it is greater focus on such important key industries, which require greater specialisation, different forms of

resources and people to ensure all Australians have access to phones, water, rail, air travel, education and electricity.

Merger Management

ACCC's approach to mergers is critical. The ACCC is potentially the de facto market regulator, determining the destiny of suppliers, stakeholders and markets. The ACCC has adopted flexible and define criteria to consider permitting mergers. These criteria form guidelines and are subject to change. The grounds in which merger proposal is examined is similar to the USA, "substantial lessening of competition". This criterion seems to have been introduced to capture virtually any merger, considering the size and dynamics of the Australian economy. Perhaps public policy is focused on providing the regulator a say, a stake in every merger.

This is in contrast with the European Union position which is based on "dominance". If this was to be adopted in Australia (as was the case before 1986) the scope of intervention in mergers would be limited. Perhaps the Australian position is limiting to larger suppliers seeking to ally themselves with competitors to take advantage of global opportunities. Perhaps the current position hinders consolidation of the key industries. However, if Australia was to adapt the European Union position, there would be more certainty, predictability in what areas of merger activity would be prone to ACCC intervention. Perhaps this would create a form of commercial confidence that would lead to enhanced investment and capitalisation in key industries.

Although the criteria used to determine merger proposals is complex it does address both commercials and public interests. However, there may be an opportunity to simplify the procedures and inject some certainty to business as they wait for their fate.

The ACCC's determines all merger applications using the following steps:

1) Defining the market, which requires the ACCC to identify the market in its various forms: Product, Geographic (location), Functional market;

2) The ACCC then examines the market power of the parties and the proposed arrangement.

The ACCC is then required to examine other criteria such as import replacement, barriers to entry for other suppliers and other factors. It is these factors that are of interest from the point of the public interest. Efficiency and economic considerations seem to dominant the criteria. Perhaps there should be an expansion and clarification of the "public benefit". Clearly deregulation has not produced greater diversity, and price dynamics.

Although the ACCC has clearly listed the criteria and process to bring about certainty as to process and grounds of termination, the public benefit is not clearly defined. Perhaps the ACCC can review and clarify in greater detail how it intends to promote the public benefit. In doing so, perhaps the ACCC can refine the criteria and introduce

a more co-operative model to enable the public and other stakeholders the opportunity to participate in the decision making process. The clarified criteria would give business certainty.

The ACCC should not be encouraged to adopt the US relaxed approach to this issue which has allowed mergers such as Boeing & MacDonald Douglas to occur creating an entity dwarfing others globally in the aviation market.

Whatever approach is taken it is unlikely that this area of the TPA can be simplified without injuring the interests of the stakeholders. It would seem that the ACCC requires greater concentration of specialised input to determine what the market is, what the policy outcomes preferred are and how can the public benefit be promoted equally with purely economic concerns

Efficiency and the TPA

Efficiency is important to maintain Australia's global trade position and living standards. Globalisation however, poses a new challenge to the TPA. If competition is increasingly linked to efficiency, then is the TPA more interested in a highly productivity economy where members of the community subsidise Australia's competitive advantage, or should this advantage arise from sound economic performance based on Australia's comparative competitive advantage.

The introduction of competition and efficiency as objectives of the TPA need to be examined in terms of the rules of statutory interpretation, which in recent years has favoured applying the law in compliance with the legislature's purpose. *Acts Interpretation Act 1901 (Cth)* s 15AA requires the courts to interpret statute in such a way as to "promote the purpose or object underlying the Act". Therefore Parts IIIA, IV, XIB and XIC, which focus on the promotion of competition, illustrate the legislatures concern that competition by the focal point of the TPA whereas the concept of consumer protection appears to be limited to that of fair-trading.[23] This reinforces the view that competition law has promoted competition to be synonymous with that of efficiency.[24]

The presumption in favour of competition has altered this position to some extent as it allows evidence of efficiency or other public benefit to over ride instances where authorisation of anti-competitive behaviour is requested. The purpose of the TPA as amended by the *Competition Policy Reform Act 1995 (Cth),* has to some extent been influenced by the USA experience.[25] The US judiciary is more likely to consider whether the conduct leads to efficiency when determining whether such conduct is

[23] See Mason CJ and Wilson CJ in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* (1989) 167 CLR 177, 191 and also Drummond J in *Davids Holdings Pty Ltd v Attorney General of the Commonwealth* (1994) 49 FCR 211, 248

[24] The debate between fair trading and competitive trading was evident in the Report by the House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance; Towards Fair Trading in Australia* 1997.

[25] For an analysis of the balance between competition and consumer welfare as objectives of competition law see Kozinski CJ in *United States v Syufy Enterprises* 903 F 2d 659 (9th Cir 1990), 662-664.

competitive. The Australian judiciary has been hesitant to follow the US analysis when considering Part IV conduct.[26]

This provides a range of competitive benefits to the supplier.[27] For instance, the supplier can purchase larger volume of resources at substantial discounts and incorporate their savings in their profit margins. The size of the business may provide substantial cost savings, but the bureaucracy to run such economies of scale may make the business less efficient.[28]

Concentration of market power may be the result of a truly competitive efficient firm. The existence of an influential supplier would provide significant benefits to the market, and may stifle competition in the process.[29]

Any activity which leads to a reduction in the corporation's desire to be efficient can be considered as not only detrimental to the economy, but also to the shareholders and employees of the corporation. Thus, the corporation, which seeks to influence price may in due course adversely affect itself as much as it affects the economy. It may lead to a misallocation of resources, not just within the economy, but within the corporation. For instance, large enterprises may achieve their dominant market position due to inventiveness, accepting high risks and good management. But once they reach such a dominant market position, they may use political rather than economic factors to maintain their position. The enterprise may become actively involved in the political process, helping promote certain politicians, policies and the like. Such enterprises need to focus on the market place to secure their income rather than to trade and economic policies.[30] Perhaps the TPA should be reviewed in light of the challenges suppliers need to manage both locally and internationally, and whether the TPA can act as a promoter of better practices rather than discriminative or "domestically" subsidised practices for the sake on promoting international trade. Perhaps the TPA should be reviewed in terms of outcomes rather than motivators.

Richard A Posner[31] proposes the theoretical model of the concept of competition based on four major tenets. Firstly, competition is a desired outcome because it encourages economic efficiency. Secondly, competition encourages diversity of product. Thirdly, competition permits the price mechanism to allocate resources in the most efficient manner; and fourthly, competition enables democratic principles to operate. Accordingly competition can be argued to be the ultimate public policy, a solution to the allocation of scarce resources and distribution of wealth based on efficiency.

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[26] *Davids Holdings Pty Ltd v Attorney General of the Commonwealth* (1994) 49 FLR 211, this is reinforced in the interpretation and application of s 46 whereby Mason CJ and Wilson J concluded that the purpose of s 46 was to promote free competition in contrast to fair trading, but were non committal as to the efficiency outcome of this view.

[27] see objective under 152AB which was designed to encourage the economically efficient use of services.

[28] See R.M Cyert and J.G March., *A Behavioural Theory of the Firm*, Prentice Hall, New Jersey, 1963; Porter, *Competitive Strategy*, Free Press, New York, 1980.

[29] I.M Kirzner., *How markets work: disequilibrium, entrepreneurship and discovery,* Centre for Independent Studies, St Leonards, NSW, 1998.

[30] An analysis of modern corporate behaviour suggests that the political process determines corporate behaviour relative to the market power of the corporation.

[31] See Posner, Richard A. *Economic analysis of law*, Little Brown, Boston 1986.

The modern day statutory approach to competition is found in section 2 to be "the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

In *Re Queensland Milling Association Limited*[32] the Trade Practices Tribunal found competition to be a process rather than a situation. The process would ideally reflect the market force of demand and supply within independent and separate suppliers acting as rivals to each other to entice the patronage of consumers.[33] Rivalry itself does not form the centrepiece of the competition concept. The structure and function of the market place provides a more practical and workable definition of competition, such as the number and nature of the suppliers, and the respective influence they exert in the market.

In *Re Queensland Co-operative Milling Association Limited*[34] the court recognised the importance of adopting a flexible definition of competition, which may change over time. As marketing techniques become more sophisticated, a more general and flexible concept would have enabled the judiciary to impose restrictions on such behaviour, even though they may not fall within the anti-competitive principles as determined by the judiciary.

This flexible approach allows the use of the public benefit aspect of competition to be applied to bring about preferred objectives. For instance, the promotion of competition may countervail the liberty to trade, and in both cases applying the same definition may produce the required outcome. The TPA however is more concerned with the encouragement of competition within the market, rather than the ability of individual suppliers to compete. Perhaps there should be a review as to what outcomes are expected when the competition is applied in the economy.

Economic Outcomes

It can be argued that the TPA carries much history and perhaps increasingly less relevance. The public benefit has shifted, suppliers no longer limit their market operation.. For instance, retailers such as Woolworth's are now petrol retailers, banks do insurance, and transport corporations operate hospitals. There needs to be a clear policy position as to whether the ACCC should be the manager of commercial affairs, of the destiny of markets or whether the deregulatory free market approach is to prevail. It is suggested that the ACCC should continue in its role as regulator with perhaps greater powers to argue for criminal sanctions for behaviour that lessens competition and creates discrimination in the market place.

However if this is to be granted the ACCC would have to be compelled to bring about more certain, transparent procedures and guidelines. This would be of benefit to both business and the public. Otherwise, the situation will continue whether parties to a proposed merger may not be certain as to whether they can take their matter to the Federal Court. There needs to b a more comprehensive reasoning at every element in

[32] (1976) ATPR 40-012.
[33] Ibid.
[34] (1976) 8 ALR 481.

the decision making process from the choice of market definition to market power, competitive and public policy outcomes.

Conclusion

Perhaps economic policy is of greater importance today than in the past. Many Australians are increasingly relying on their own savings to live on, they invest in Australian business, and they are in the market place as consumers. They are becoming more prices sensitive. Globalisation, deregulation are issues of a local, domestic scale as they are stories on the news bulletins. If the TPA and its regulator has any one role it is to provide confidence in the policy makers and policy to provide more than just effectively dividends but social benefit to the community, equally confidence to business to conduct their commercial dealings in certainty.

Michael K. Peters
School of Business Law and Taxation
University of New South Wales
Sydney
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