The New Era in Competition Law

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The conference title – *The New Era in Competition Law* - is fitting; we are at the beginning of a new era in competition law in this country.

It's quite an honour to be able to speak to this topic alongside Rod Sims; and I very much appreciate and thank RBB for the occasion, the topic and the invitation. This is becoming a landmark event in the Australian competition/economic calendar.

Interestingly, we find ourselves at this point when antitrust or competition law principles and philosophy globally remain quite contested. It's true that the long history of competition law has seen:

- the development of a robust field of economics (industrial organisation) that can provide a solid economic foundation for modern competition law; and
- strong convergence and acceptance of a common set of principles.

But in important respects this long history has seen divergence and conflict as well. Inherent contests in competition law remain with us and there are important choices to be made as we enter this new era.

The three main pillars of competition law are:

- no anti-competitive agreements, horizontal or vertical;
- no exclusionary monopoly or unilateral conduct; and
- no anti-competitive mergers.

These three pillars underpinned by experience have been bolstered by the development and refinement of *per se* and other technical evidential rules and legal standards. In turn these rules and standards have also moved around over time (or at least their acceptance as having a sound economic basis has moved around).

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I suspect that Rod Sims would say there is a fourth pillar: market studies. I will make some comments on that later, as that is also part of the "new era". For now my focus is on these three fundamental competition law principles.

The history of modern competition law in this country is one where in 1974 we sought to codify the US antitrust principles as we understood them into the then *Trade Practices Act*. Our 1974 law addressed these three broad limbs of antitrust law, through prohibition of:

- anti-competitive agreements – s 45;
- misuse of market power (s46) and anti-competitive exclusionary vertical arrangements (s 47); and
- anti-competitive acquisitions – s 50.

There were some specific *per se* rules and legal standards reflecting the US jurisprudence and statute law in 1974, i.e. the *per se* prohibition against resale price maintenance – s 48; and the prohibition against certain forms of price discrimination (cf Robinson Patman Act) – s 49.

When we codified these US antitrust standards we did it in an Australian legislative drafting style. This was quite different from the US principles-based approach; our style was to seek to define clear boundaries.

Because of the possibility of under-capture, we defined the boundaries in risk-adverse ways; and in doing so, created the risk of over-capture. This resulted in the need to build in a range of exemption mechanisms and exceptions.

Over time we formalised more specific rules for price fixing (s 45A) and exclusionary contracts (s 4D) and we tinkered.

The result is that Australia ended up with a "highly codified" competition law, a tendency to be overly proscriptive, and heavy reliance on piecemeal exceptions and administrative processes to ameliorate the excessive proscription.

Contrast the US approach which I have mentioned and I am sure that you will be familiar with. We can also contrast the administrative law approach in the EU, where high level rules developed, evolved and supplemented their meaning through detailed administrative guidelines.

The result is that in Australia we developed an excessive level of legal formalism, where statutory construction has at times predominated over competition analysis. This approach has been rigid and not well able to flexibly adapt to developments in thinking over time.

Some judges and the Competition Tribunal were able to discern antitrust principles and apply them well within our legislative framework. But not all judges were inclined to or able to do so. Some judges were receptive to economic evidence and others less so. Perhaps at times this was a function of the limitations of the evidence that was presented and what it sought to achieve, but not always. The drafting of our Act provided trap doors through which economic evidence could be pushed.

Section 46 suffered this fate: it started poorly with judicial glosses; was put on a good workable footing (*Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*[i]); worked for a while (*ACCC v Australian Safeway Stores Pty Ltd*[ii]; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd*[iii]; *NT Power Generation Pty Limited v Power and Water Authority & Anor*[iv]); and then with *Rural Press*[v] an artificial and disconnected legalistic approach to causal connections was introduced. The ACCC got shy and backed off. The hunting dog retreated to the porch.

The concept of a contract, arrangement or understanding suffered the fate of legal formalism too.[2]

Formalism was both a friend and foe to the ACCC. In seeking to get the benefit of the *per se* offences, I have noted before that the ACCC often strained to characterise communications as price-fixing commitments, when it may be that it would have achieved a different result had it run the case on the basis of a commitment to share and receive information (as opposed to fix prices) for an anticompetitive purpose.[3]

The history of lost cases, such as the lost petrol cases (*Trade Practices Commission v Services Station Association Ltd*[vi]; *ACCC v Apco Service Stations Pty Ltd & Anor*[vii]), can be seen as one in which the ACCC, attracted by the apparent easy life of the *per se* standard of s 45A (or s 4D in other cases), was forced to characterise nuanced commercial cooperative interactions into the language of the Act prohibiting agreements to fix prices (or collective boycotts).

These *per se* standards arguably operated as a crutch. The ACCC was not confident to apply a "rule of reason" approach to more complex matters. In some cases, use of *per se* horizontal prohibitions was particularly strained, e.g. the *ANZ mortgage broker case*[viii]. But sometimes the ACCC got lucky. For example, in *Flight Centre*[ix] a complex vertical competition issue was shoe-horned into a *per se* horizontal competition case and the High Court (adopting in truth a formalistic and legalistically

[2] *Submission to the Competition Policy Review,* Woodward, L & Rubinstein, M, 2 July 2014, accessed here.

[3] *Submission on the Competition Policy Review's Misuse of Market Power proposal,* Woodward, L & Rubinstein, M, 2 June 2015, accessed here.

directed approach, while saying it was doing otherwise) found for the ACCC.[4] It would have been altogether better had the ACCC proceeded with the SLC claim in its original application.

And of course, the worse barbarism was the ad-hoc or, worse, repeated political tinkering with the Act. The banking price signalling law is the stellar example of this; the Birdsville s 46 amendments perhaps another example.

So we are at the start of a new era. The ACCC and Harper Committee are to be commended for getting us here. Rod Sims has been a leading champion of that public debate.

The changes are significant: SLC standards for misuse of market power and concerted practices; the removal of the idiosyncratic price signalling provisions; the removal of the *per se* third line forcing prohibition; the replacement of the stand-alone exclusionary provision prohibition in s 4D; administratively easy low cost notification for RPM; and streamlined authorisation tests.

Rod and the ACCC had some opponents and they had some friends.[5] From an economic welfare standpoint not all their opponents could be said to be badly intentioned and not all their friends were necessarily seeking to promote economic welfare generally or consumer welfare in particular.

So here we are at the start of a new era. Is it all done and dusted? Will a focus on substantive economic questions predominate? Will solid economic analysis of data applying clear economic standards prevail?

Well, at an economists' conference, I expect all of the economists would hope so and I think most people assume so.

But don't be so confident. If we are to get to that position, much more work is to be done and there will be contests. Hence my opening comment that inherent contest in competition law remains with us. There are important choices to be made as we enter this new era.

The singular organising feature of the Harper amendments is that they leave the era of legal formalism behind – but they leave much work to be done; particularly in terms of identifying when otherwise routine business conduct may be seen to be anti-competitive in purpose or effect.

[4] The result is a decision, when applied to codified legal standards such "supplying" a service, that has a real chance to cause mayhem in our Act, and hopefully will be largely ignored.

[5] I have been a strong supporter of the overall change in approach; a consistent caller for a concerted practice test; a supporter for more nuanced s 46 reform; and a strong sceptic of the protectionist origins for s 46 reform; and a critic of the open specific s 46 proposal (*Submission to the Competition Policy Review,* Woodward, L & Rubinstein, M, 2 July 2014, accessed here; *Submission to the Competition Policy Review: Misuse of Market Power proposal,* Woodward, L & Rubinstein, M, 21 November 2014, accessed here; *Submission on the Competition Policy Review's Misuse of Market Power proposal,* Woodward, L & Rubinstein, M, 2 June 2015, accessed here).

The ACCC as the custodian of the Act, particularly through the guidance it provides and the cases that are presented to the courts, will be central to this. If we are to get to the right place, it will be because the ACCC took a strong long-term leadership position and got us there. The ACCC will need to articulate the theory and framework for competitive harm that it will apply and advocate for under these new provisions. It will need to articulate that clearly and it will need to be consistent over time.

We are not at that point yet. The ACCC has released interim guidelines on misuse of market power and concerted practices. They have been set at the level and length to provide guidance to the informed business person. They do not provide the detailed and nuanced guidance as to the approach that the ACCC will adopt to testing competitive theories of harm in these cases. They are short, well structured, easy to read, generally reliable and a clear statement of the law, supplemented by some examples. They are useful, but much more can and should be done over time, through more detailed analytical guidelines and discussion papers.

What can we learn from history? We have been at the start of new eras before in competition law and they have gone well. I will briefly touch on two – the introduction of the modern Act in 1974 and the introduction of the SLC mergers test in 1993. On the first of these, I am dependent on old cases and old-folklore; on the mergers test, I was closely involved at the TPC/ACCC and as with all competition practitioners have continued to be closely involved over the following 25 years.

In 1974, Australian competition law was able to draw on the extensive review of restrictive agreements that the Office of the Commissioner of Trade Practices had reviewed under the 1965 Act. The review of those cases was analysed and discussed openly by the Office, including through the notable use of Annual Reports by the Commissioner, Ron Bannerman, to shed light and guidance on these practices. Ron Bannerman continued this approach as the inaugural Chairman of the newly established TPC.[6]

The approach adopted was one of coherent, considered, measured and evolving custodianship of the Act and thoughtful application of economic principles to the issues at hand. The Commission was aided by the contribution of the Tribunal and the economists deeply grounded in industrial organisation economics who sat on it. In particular, Maureen Brunt in *QCMA*[x] and Brian Johns in *Howard Smith*[xi]. Brian Johns later went on to be the ACCC Deputy Chair under Professor Bob Baxt, and brought a depth of understanding of the economics of industrial organisation to the TPC. This can be seen in the excellent s 46 Guidelines published in 1990, following the *QWI* decision.

That tradition continued with strong specialist competition economists in leading positions within and on the Commission itself. People such as: Jill Walker, Rhonda Smith, Ross Jones and Stephen King.

[6] Corones et al, *The introduction of competition policy in Australia: The role of Ron Bannerman* (2007) 47(2) *Australian Economic History Review* 178-199.

The open way in which these issues were raised allowed for strong external debate, which aided understanding and clarity. External economists such as Philip Williams, Neville Norman and Bob Officer were leading and influential contributors.

This environment also influenced the legal community, including the bar and eventually the judiciary. Robert French, a one-time TPC associate commissioner and the outstanding competition law jurist of this country, developed his understanding of competition law in this environment.

The other new era I mentioned was the re-introduction of the SLC test for mergers in 1993. In mergers we saw a toing and froing between simpler substantive competition tests and more legalistic and formal tests. We started with an SLC standard. In 1977 Business and Consumer Affairs Minister Howard slipped in a dominance test as part of the Swanston legislative package. This test required legalistic rules regarding what was an acquisition and how to aggregate market shares/positions of different entities.[7]

Fortunately, Professor Alan Fels (as TPC Chair) was able to persuade the Government to reintroduce a simple SLC standard.[8] There are still important legal requirements, such as the standards for likelihoods and counterfactuals. But these are directed to the substantive question in issue and are basically tests for causation and risk of competitive harm.

So we have a direct analogue to the introduction of an SLC test for misuse of market power and concerted practices. It is instructive to see what the then TPC did when the new mergers provision was introduced.

In November 1992, the TPC issued (in draft) its thoughtful, coherent and fulsome merger guidelines. They were drafted by outstanding economists, Professor George Hay from Cornell University and Dr Jill Walker. I got to live closely with these guidelines for the next three years as the first head of the Mergers and Asset Sales Branch – they were invaluable guidance.

These guidelines evolved over time and were supplemented with richer and more detailed analysis, particularly at the time that Stephen King was the Mergers Commissioner.

In the following almost 25 years, merger decisions have been all about the substance and not about the law. Or perhaps almost all, if we put to one side the *Metcash* decision[xii] on counterfactuals and likelihoods and the arcane recent Federal Court challenge to the Tribunal's *Tabcorp/Tatts* decision[xiii].

[7] I should note that many of those dominance cases do involve very sophisticated competitive effects analysis; my point being that there was the added, ultimately not helpful, legal formal elements that also came to the fore.

[8] One which is nearly the same as that introduced in the 1914 US Clayton Act.

The advisory community has deeply valued these guidelines and the broader guidance approach of the ACCC; reflected in guidance for specific areas such as banking and media markets and public competition assessments for many mergers.

The text of the law is simple. That is its strength. But you couldn't possibly hope to extract all the meaning just by legal interpretation. Court and Tribunal cases have been limited. Yet we have thousands of merger decisions across complex and nuanced commercial scenarios. In some individual cases some people will argue about the decision. But across all those decisions there is a strong common understanding of the approach to be applied and the ACCC's analytical framework is well accepted. Even courts can now talk in the language of SSNIPs.

As a lawyer, I have been fortunate to be able to formally study industrial organisation economics. I would say the reason we have a well-accepted merger regime in this country is because economics has supplied the layers of meaning required to make decisions that are coherent and substantively consistent.

Importantly, we have an approach which is understandable, tractable and falsifiable. The approach is tied into the clear public policy rationale that industrial organisation economics and the economic welfare approach provide.

Today the strength of the ACCC rests on that heritage. As we enter this new era it is valuable to recognise that it was the ACCC (and TPC) that was a leader, through exceptional open debate and guidance, leading to an approach of consistency and clarity.

Some may say that nothing is new: the s 45 SLC test has been around a long time and we haven't required this depth of guidance to date; so why do we think we need it now. One answer to that is the lack of non-merger SLC cases means we don't actually have much guidance at all. Further, just as the new merger test was to apply to many more mergers, the extension of the law in s 45 and 46 will necessarily mean that it will be applying to a much wider field of commercial activity.

In the case of mergers, we at least had a clear idea of what particular conduct the new standard would apply to; in the case of the new misuse of market power provisions and concerted practice provisions – just what specific business conduct they will apply to is much more open ended and uncertain.

Another answer to the question of why provide guidance now, is that there are inevitable contests and different views, so it is desirable that the ACCC develop its own analytical guidance to the enforcement of these provisions and that it share its approach with the wider competition advisory community. This would provide an open environment for debate and foster coherent and consistent custodianship of these new provisions over time.

The Chicago/Harvard school debate was one important contest in competition law. What the Chicago School showed us is that simplistically attractive analysis and rules of thumb could reach the absolute wrong and anti-consumer conclusions. Simple observations can be easy to understand and intuitive, and they can be wrong.[9]

Economics helps us get to the right answer. But for the economists in the room, I would say you can't simply assume that the ACCC will apply a standard industrial organisation economic welfare model to its approach to the new s 45 and 46 provisions. Arguably, this is what s 2 of the Competition and Consumer Act is directing us to, but it is not explicit.

So pay attention. The ACCC's s 45 and s 46 guidelines don't as of yet provide any guidance around the competitive theories of harm that the ACCC considers applying. In form, they are documents that look more like they were written by lawyers or administrators with an eye to warning businesses and keeping options open; rather than written by economists articulating a coherent economic theory of harm.

This is all fine, if ensuing time simply allows this picture to be filled in – but will it?

And what will that picture look like? Views as to the proper role of competition law differ and have always done so. There are many contested views about the role of competition law, such as:

- restraining the accumulation of economic power;
- ensuring fairness and a level playing field;
- creating and maintaining opportunities for market access;
- restraining market exploitation or the extraction of consumer surplus by suppliers; and
- fostering and ensuring a common market.

[9] E.g.: the simple observation that the lowest price product in the market is most competitive and that a merger that results in higher own firm prices is anti-competitive – would be wrong. Low prices do not necessarily demonstrate competitiveness and high prices do not necessarily demonstrate a lack of competitiveness – it's the response of consumers to changes in prices; that is how demand responds to prices and how prices respond to demand that is key. Consider as an example the Virgin/Tigerair acquisition. Tigerair had the lowest prices in the market; the merger was expected to enable Tigerair to improve its performance, which would enable it to increase its prices and be more sustainable. Other airlines did not need to respond to its low prices, as consumers did not shift from other airlines to Tigerair in response to its prices. This was a reflection of its very weak brand position, and overall performance, which was also in part due to its remote operation from Singapore. The acquisition was anticipated to fix those issues – and would make Tigerair a more acceptable choice for consumers. This would mean that while it could raise prices, it would also mean that competitors would now be more likely to need to respond to it and to reduce their prices in response in a way they had not needed to before and.

Just as there is not necessarily a fixed view on the proper role of competition law, the confidence/trust in markets by regulatory institutions and consumers compared to the confidence/trust in regulators is also not fixed. Where you sit on that spectrum will determine whether you are comfortable for regulators to be more or less intrusive and less or more concerned about regulatory error. Some competition law settings are informed by a confidence in markets and a wariness of regulation; others the complete opposite.

These factors can be just as important, or more so, to the settings of competition law; compared to the standard industrial organisation economic model that is taught as underpinning modern competition law. It is these factors that explain the fundamentally different approach to competition law in Europe and the US, and even within Europe, between say the UK and the Dutch and the Germans. Where do we sit in Australia? I don't know, I think it is up in the air.

These factors can swamp the economics if you are not too careful. There is not much point in undertaking some economically rigorous foreclosure analysis, if the regulator is concerned with market access opportunities and level playing fields in and of themselves. As economists, you may not have much to add.

Finally, I would like to conclude with some brief remarks on competition agency market studies. I am not sure if it is a fourth pillar of competition law, but it is clearly a new pillar of broader competition policy.

I have some ambivalence about this development and some words of caution.

The first thing I should note that at one level there is nothing new here; competition enforcement agencies have always had the capacity to do market studies. In my time at the ACCC there was an important study into the legal profession and later, together with the RBA, into credit charge interchange. The ACCC price surveillance/monitoring role has long seen it undertake market studies; and of course we have seen major studies in petrol and retailing.

But it seems to me that what we see today is not simply the type of detailed dive that a competition enforcement agency might undertake from time to time, but rather a new engagement around competition policy reform and perhaps even more broadly, micro-economic reform.

Micro-economic reform and competition policy appear to have stagnated in this country. In this gap, the ACCC, led by Rod Sims, has been a strong voice on occasions. A clear example of that is in the area of privatisation of public monopolies. In the absence of strong government leadership in competition policy and micro-economic reform, the ACCC has bravely been prepared to speak up and take a more leading role. Government has even supported this by referring issues to it for market studies and perhaps even to defer to it.

I can say that not all my clients like or agree with the policy positions that the ACCC and Rod have articulated, but on occasion many have. That is, business itself may welcome this type of role for the ACCC.

I am ambivalent about this role, because I think this really is a role for Government to take the lead on; but if it is not doing so, then perhaps the ACCC taking a leadership position is a good thing.

So to the words of caution.

We know the standard public policy paradigm: look for whether there is a market failure and propose regulations or regulators to correct it.

In theory there is meant to be some net benefit assessment in there. But I would query whether any Government or regulator ever properly assesses the true costs of regulatory intervention (or even cares very much).

Which leads me to my first caution, which is an adaption of Maslow's law of the instrument or Maslow's hammer. There is the risk that to a regulator undertaking market enquiries, everything might look like market failure. If you go looking for it, you might find it everywhere; and you may miss bigger forces that counteract it over time.

Which leads me to my second caution. If regulators themselves are prone to regulatory failure,[10] then having found market failures, we run the risk of not correcting market failures, but simply adding regulatory failure to market failure. Regulatory solutions could also compound or lead to other market failures.[11]

Finally, my third word of caution. This is a further adaption of Maslow's hammer. To the market enquiry agency with a competition law enforcement tool, all market failures may look like competition law enforcement cases. As our competition enforcement agency undertakes more market studies, it may have a tendency to find competition law breaches in market failures. It may then tend to develop a competition law theory that gives it the maximum scope to intervene in these cases of market failure. We may end up with a theory of competition law enforcement as simply correcting market failure or to promote micro-economic reform. This would take it well beyond our traditional understanding of competition law. It may sound an extreme possibility, and let's hope so.

So in conclusion:

- We are at the start of a new era of competition law;

[10] Woodward, L, *Inherent Limits on Regulatory Excellence – What we don't talk about,* ACCC/AER Regulatory Conference, 27-28 July 2017, Brisbane, accessed here.

[11] Thanks to comments of Professor George Yarrow on the regulatory excellence paper.

- Congratulations and thank you to the Harper Panel and to Rod and the ACCC for getting us here;
- Now the next big challenge begins; and
- Let's pay attention and be ready for the debate.

Thank you

[i] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) CLR 177.
[ii] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 4)* (2006) ATPR 42-101.
[iii] *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 97 ALR 513.
[iv] *NT Power Generation Pty Limited v Power and Water Authority & Anor* [2004] HCA 48.
[v] *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53.
[vi] *Trade Practices Commission v Services Station Association Ltd* (1993) 44 FCR 206.
[vii] *Australian Competition and Consumer Commission v Apco Service Stations Pty Ltd & Anor* [2006] HCATrans 272.
[viii] *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* [2015] FCAFC 103.
[ix] *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited* [2016] HCA 49.
[x] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (1976) 8 ALR 481.
[xi] *Re Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd* (1977) FLR 385.
[xii] *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151.
[xiii] *Applications by Tabcorp Holdings Limited* [2017] ACompT 5.