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Abstract for Paper

The *Trade Practices Act* 1974 incorporates a comprehensive competition law compliance regime. The remedial Part VI is enhanced by Parts VII and IX, dealing with authorizations, notifications and review of determinations granting powers to both regulators to consider public interest in anti-competitive conduct by Australian corporations, and by accrued jurisdiction under Part XIA, to all persons. Concerns and criticism about lack of transparency in decision-making by the ACCC has been widely expressed; met by Merger Guidelines and, by Senate-rejected amendments establishing a formal clearance procedure. On 19 june 06 a new amendment TPAct was put to the House in relation to non-merger authorizations and an enforcement regime by criminal penalties for serious anti-competitive conduct.

This paper explores Australian options for the future of anti-competitive conduct regulation with some reference to the extensive experience of the European Union Commission. In the corporate law and corporate governance context, reviews of public benefit and detriment must consider not only economic efficiencies but also the supervening complex constitutional constraints.

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Fundamental to an understanding of how the competition regulatory regime operates in Australia currently is an appreciation of the governmental policy relating to efficiencies in the economy.

Specifically, the concepts of markets, market power and competition are central to the application of all relevant sections of Part IV Trade Practices Act, 1974.[2]

PART IV--RESTRICTIVE TRADE PRACTICES

45. Contracts, arrangements or understandings that restrict dealings or affect competition
45A. Contracts, arrangements or understandings in relation to prices
45B. Covenants affecting competition
45C. Covenants in relation to prices
45D. Secondary boycotts for the purpose of causing substantial loss or damage
45DA. Secondary boycotts for the purpose of causing substantial lessening of competition
45DB. Boycotts affecting trade or commerce
45DC. Involvement and liability of employee organisations
45DD. Situations in which boycotts permitted
45E. Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services
45EA. Provisions contravening section 45E not to be given effect
45EB. Sections 45D to 45EA do not affect operation of other provisions of Part
46. Misuse of market power
46A. Misuse of market power—corporation with substantial degree of power in trans-Tasman market
46B. No immunity from jurisdiction in relation to certain New Zealand laws
47. Exclusive dealing
48. Resale price maintenance
50. Prohibition of acquisitions that would result in a substantial lessening of competition
50A. Acquisitions that occur outside Australia
51. Exceptions
51AAA. Concurrent operation of State and Territory laws

With the exception of s 48, all sections require having the purpose or effect (or the likely effect) of substantially lessening competition in a market. They are negatively framed provisions; therefore requiring considerable evidentiary material, often at high levels of expertise, to discharge claims of breaches of the Act against corporations.

Briefly, some examples dealt with by Australian Courts include:

[2] Trade Practices Act, 1974 (Cth)

Section 46

A competitor of a subsidiary of BHP claimed that the firm had misused the substantial market power it held by effectively refusing to sell it a raw steel product known as Y bar which (once machined) was used extensively in rural fencing. At the time (mid 80s), BHP held 97 % of the market for steel output and supplies in Australia, with substantial barriers to entry to the market, notably the high set-up costs of a rod and bar mill. The expert economic evidence sought to prove that the legal distinction between a corporation and its subsidiary did not exist for the purposes of identification of the relevant market. [3]

The High Court rejected the proposition that a separate market for Y bar did not exist, thus opening the way for an application of the section. The trial Judge had found such a market did not exist, probably because of a strict legal interpretation of s4E, requiring regard to be had to "substitute products, being products which have a reasonable interchangeability of use and which have a high cross-elasticity of demand, ie where a small decrease in the price of a particular product would cause a significant quantum of demand for a similar product to switch to the product in question". This analysis is quite legitimate, albeit somewhat limiting and misguided, so the High Court got it right, ultimately.

The facts and procedures in this case at the three levels of the judicial hierarchy illustrate some of the difficulties associated with the application of this area of corporate law:

Firstly, the usage of expert economic evidence may clash with a lawyer's pre-set view of corporate structure;
secondly, the fundamental purpose of the legislation is economic rather than legal;
thirdly, this law is international in origin and requires a deep understanding of the application of economic principles ahead of a classic technical legal approach.

[3] Queensland Wire pl v BHP co ltd (1989) ATPR ¶41-721 (1989) 167 CLR 177 per Deane J

Section 45

A large publisher of rural newspapers, Rural Press, was confronted with the change in structure of rural councils in South Australia, with larger geographic areas of concern than previously. Expansion of circulation for one small local newspaper competing with the Rural Press, River News, became an imperative, of particular concern being local government notices and local services advertisements. Rural Press sought by commercial pressures to preempt the expansion of the competitor into their existing Riverland circulation area by threatening to establish a new very local newspaper in direct competition, which would destabilize the new entrant from operating in the newly included areas and the response was to cause the newcomer to revert to their original prime circulation region. The ACCC claimed that the communications between the companies to engage in these practices of market carve-up constituted anti-competitive behaviour.[4]

The Rural Press parties advanced four separate submissions in support of their contention that there had not been a substantial lessening of competition. First, they pointed to the small scale of trade involved and the sustained history of regional newspapers in South Australia confining themselves to well-defined geographic areas. Secondly, the Rural Press parties contested the notion that the River News had ever been, in fact, withdrawn from the particular area: they argued that it had continued to circulate there and that its advertising revenue from the region had not substantially fallen. Thirdly, it was submitted that there was never any realistic prospect of the River News offering potential of competition in the relevant area in any event. Fourthly, the Rural Press parties asserted that the findings that there had been a substantial lessening of competition had failed to take account of the extent of competition in the regional newspaper market from local radio, regional television and statewide newspaper and television services provided in other markets.

The High Court rejected the relevance of the additional modes of advertising. Importantly, it considered that it was the potentially significant effects of

[4] *Rural Press ltd v ACCC* (2003) ATPR ¶41-965 [2003] HCA 75

the introduction of the newcomer to the market which was salient. The market itself did not have to be substantial; rather, the purpose or effect of the conduct had to substantially lessen competition. The Court held that Federal Full Court erred by concentrating too narrowly on the purpose of preventing River News selling papers to readers and space to advertisers, and not enough on the correlative – the purpose of preventing readers buying papers and advertisers buying space from that publisher. If one's purpose was to prevent the supply of services, an inevitable part of that purpose had to be to prevent the acquisition of those services by the person or persons to be supplied. The purpose of maintaining market power was indistinguishable from the purpose of preventing supply of certain services to, and acquisition of those services by, readers and advertisers. Acquisition of those services by readers and advertisers from the River News was inconsistent with the prevention of supply by the River News.

In dissent, and in relation to the application of Section 46, Kirby J held that the conditional threat made by Rural Press to River News was causally connected with the relevant market because it was only by virtue of the substantial market power of Rural Press, in that market, that a commercial reason existed for making the conditional threat. Because of the market power of Rural Press they enjoyed the resources and economic power necessary to carry out their conditional threat so as to make it real and effective. It is the economic and therefore practical sense of the threat to which the legislation is directed. He further confirmed the global economic purpose of the legislative provisions relating to competition law: [5]

> **Kirby J:** Once again, proceedings are before this Court concerned with the meaning and application of provisions of the *Trade Practices Act 1974* (Cth) (``the Act") [99]. A principal object of that Act is to protect and advance competition in markets in the Australian economy [100]. This is a large national purpose. It is also important for Australia's international competitiveness. It invokes objectives beneficial for consumers in local markets and for the national economy. The Act should not be given a narrow interpretation that defeats its effectiveness. So far as its language permits, it should receive the meaning that ensures the achievement of its important objects [101].
>
> 101. These opening remarks reflect a theme stated by me in earlier decisions [102]. In my opinion, they help to explain differences that have emerged between the approaches taken by the majority of this Court in decisions delivered since *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [103] and the opinions that I have favoured [104]. Generally speaking, in other contexts, this Court has adopted the principle of a purposive construction of legislation [105].

[5] Rural Press ltd v ACCC (2003) ATPR ¶41-965 [2003] HCA 75

It is a principle having special application to legislation with protective objects beneficial to consumers and to the community at large. No exception should be carved out for cases involving responses to anti-competitive conduct by corporations and their officers. Yet that, in my respectful opinion, is effectively what has happened.

99 ss 4D, 45, 46 and 75B.

100 The Act, s 2 (the Act's purpose is stated as ``to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection").

101 Bropho v Western Australia (1990) 171 CLR 1 at 20 approving Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404 at 421-424 per McHugh JA (diss).

102 Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) ATPR ¶41-805 at [90]-[92]; 205 CLR 1 at 35-37 [90]-[92]; Boral Besser Masonry Ltd v Australian Competition and Consumer Commission (2003) ATPR ¶41-915 at [323]; 77 ALJR 623 at 676-677 [323]; 195 ALR 609 at 682; News Ltd v South Sydney District Rugby League Football Club Ltd (2003) ATPR ¶41-943 at [90]; 77 ALJR 1515 at 1531 [90]; 200 ALR 157 at 178-179.

103 (1989) ATPR ¶40-925; 167 CLR 177.

104 cf Griggs, ``Unconscionability in the High Court — the ACCC on the receiving end again!", (2003) 19 *Australian and New Zealand Trade Practices Law Bulletin* 21 at 23.

105 See eg *CIC Insurance Ltd* v *Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council* v *GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78]; *Eastman* v *Director of Public Prosecutions (ACT)* (2003) 77 ALJR 1122 at 1150 [140] fn 94; 198 ALR 1 at 39.

[6] Rural Press ltd v ACCC (2003) ATPR ¶41-965 [2003] HCA 75

Section 47

Three directors of a consulting group carried on business through various companies referred to collectively as the Port Botany Group. The business included packing and unpacking shipping containers. They dealt with AFS, a company that had acted as a local agent for a United States freight forwarder called Brennans. When Brennans was taken over by a competitor of AFS, AFS decided to set up its own American operation and AFS USA was formed to carry on that activity. [7]

In 1999, AFS USA needed to raise capital. The appellant and the respondent directors of AFS USA formulated the "deal" by which the appellant would lend approximately $1 million to AFS USA. In return for this loan, the respondents guaranteed the discharge by AFS USA of the loan. A "certainty in relation to the work" was also guaranteed. The loan agreement obliged AFS USA to direct all work of packing and unpacking shipping containers at certain ports "to the corporations that the lender shall direct".

During June and July 1999, the parties agreed upon the terms of the loan to AFS USA and the guarantee to be given by the respondents. The loan was to be made by instalments between July 1999 and June 2000, and to be repaid by payments in August 2000, 2001 and 2002 with the balance, together with compounded interest at the rate of 20%, in September 2003. The respondents subsequently made a deed of guarantee dated 23 December 1999. That deed recited that the appellant had advanced funds, at the request of the respondents, to AFS USA.

AFS USA repaid some but not all of the money lent. The appellant commenced an action in the Supreme Court of New South Wales against the respondent directors as guarantors of the loan, claiming payment of the balance of the loan and interest. The respondents pleaded that the loan agreement was an agreement to effect the illegal purpose of exclusive dealing as defined in s 47(6) of the Trade Practices Act 1974 (TP Act) and accordingly was void and unenforceable. The respondents further alleged that, if they had entered into a guarantee in favour of the appellant, that guarantee was void and unenforceable having been given to effect, and maintain the illegal purpose of third line forcing.

An amended defence relying on the Trade Practices Act claim was struck out initially in the Supreme Court of New South Wales. However, the Court of Appeal granted leave for it to be reinstated and transferred the matter to the Federal Court of Australia. [8]

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[7] SST Consulting Services pl v Reison anor (2006) ATPR ¶42-118 [2006] HCA 31
[8] Riesen v SST Consulting Services Pty Ltd [2002] NSWCA 163

At first instance, Emmett J entered judgment for the amount claimed (which, by then, had amounted to $1,514,890) and dismissed the cross-claim. To the extent that there was an unlawful provision in the overall agreement the appellant was held entitled to treat that provision as severed from the arrangement, so as to permit the enforcement, as against AFS USA, of its obligations in respect of the advances. It was held that it followed that the obligations in respect of the advances that were guaranteed by the respondents were valid and enforceable obligations.

On appeal to the Full Court of the Federal Court (Wilcox, Sackville and Finn JJ), the appeal was allowed, the orders of the trial judge were set aside and the appellant's application was dismissed. The Full Court held that it was not possible to sever the offending provision which obliged AFS USA to direct work to corporations nominated by the appellant from the balance of the loan agreement and that, accordingly, the agreement as a whole was illegal and void. This was said to follow from the conclusion that the parties had structured their contractual arrangements in such a way as to evince a mutual understanding that the obligations assumed by the parties under the contracts constituted an indivisible whole such that severing the offending provision would fundamentally alter the character and nature of the agreement they had made.

Was the appellant's claim under the guarantee, for the balance of the loan and for interest, properly met by the answer that the principal debtor, AFS USA, was not indebted to the appellant because the contract of loan was illegal and unenforceable? Or did s 4L of the TP Act require severance of provisions of the loan agreement so that the principal debtor's obligations to repay the loan and to pay interest remained enforceable?

Section 4L relevantly provides that if the making of a contract contravenes the TP Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under s 87 or 87A, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable.

The primary Judge, Emmett J said was that the effect of s 4L was that "even if the making of a contract *involves* a contravention of the TP Act, the contract would be valid and enforceable *except to the extent* that the provision of the contract that renders the contract a contravention *can* be severed" (emphasis added). [9]

[9] SST Consulting Services pl v Reison anor (2006) ATPR ¶42-118 [2006] HCA 31

The High Court held that taking into account the definition of "services" in s 4(1) of the TP Act, it follows that the appellant's granting or conferring upon AFS USA the right to borrow money from the appellant was a supply of "services" to AFS USA. That supply was on the express condition that AFS USA would acquire services of a particular kind or description (namely, "all work of pack and unpack LCL nature" at the specified ports, including transport) from another person (namely, corporations nominated by the appellant). It followed that, by making the loan agreement and by providing the loan, the appellant engaged in the practice of exclusive dealing within s 47(6), a course prohibited by s 47(1).

In relation to section 4L, the Court held, that, on its proper construction, the section *requires* rather than *permits* the severance of offending conditions. The phrase "in so far as" marks the limit of the severance that must be undertaken. In many cases that would be achieved by a "blue pencil" approach to severance. However, that may not always be the case. If it is not, the phrase marks the limit of invalidity and unenforceability of the offending condition. The working out of those limits in each case will depend upon the particular contractual provisions that are to be considered. In the present case, no such difficulty arose. So much of the provisions of the loan agreement as required repayment of the loan with interest are valid and enforceable. It followed that the answer which the respondents sought to make to the claim against them on the guarantee they had given was not made out.

In dissent, Kirby J held that the Full Federal Court was correct to conclude that the "particular provision" in the impugned contract, namely, the exclusive dealing provisions in the loan agreement, should not be severed from that agreement pursuant to s 4L of the TP Act. Adopting the purposive approach to the legislation, he noted that:

> 1. the tying arrangements gave rise to an unlawful exclusive dealing that was manifestly contrary to s 47 of the TP Act. A total lack of redress in such a brazen case would be astonishing
>
> 2. the arrangements were not incidental, accidental, fortuitous, the product of oversight or merely ancillary to the terms of the contract

3. the parties' common interest was achieved at the cost of the public interest which the Act, and specifically s 47, was designed to protect

4. this case must be distinguished from earlier cases in which an unlawful provision has been severed, as they concern much more limited ("ancillary") provisions in the contract and less serious breaches of the Act than those disclosed in the contract in this case,

and

5. severance is not available because the exclusive dealing provisions lay at the core of the loan agreement (and of the deed of guarantee which contained an explicit cross-reference to the terms of the loan agreement).

However, the majority of the High Court thought the outcome to be wholly consistent with the purpose, text and structure of the Act.

> It is an outcome that recognises that the consequences of contravention are prescribed by the Act, not by resort to a general and all-embracing principle whose application in this case would favour one group of parties knowingly concerned in the contravention over another party in like contravention of the Act. AFS USA and the respondents were all knowingly concerned in the appellant's contravention of the Act. It was the first respondent who, on behalf of AFS USA, offered "certainty in relation to the work". Yet on the respondents' arguments, the debt which AFS USA owed would be irrecoverable. That result would not advance any purpose of the Act. Nor, for the reasons given earlier, is it a result that is consistent with either the Act's text or its structure.

In contradistinction, Kirby J[10]:

> The reasons of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons") conclude that this appeal should be allowed. I disagree. My disagreement reflects considerations that I have identified in earlier decisions of this Court involving the meaning and operation of the *Trade Practices Act* 1974 (Cth) ("the TPA").

[10] SST Consulting Services pl v Reison anor (2006) ATPR ¶42-118 [2006] HCA 31

58. Having correctly insisted that the resolution of this appeal is to be found, not in common law doctrines of severability, as such, but in the applicable statutory provisions, the majority has then faltered. It has failed to apply one of the most important rules for the ascertainment of statutory meaning. I refer to the rule that obliges meaning to be assigned by reference to the purpose of the Parliament in enacting the provision. It is not enough to subject the words to "metaphysical analysis".

59. When giving meaning to the TPA, decision-makers with the responsibility of interpretation should do so by reference to the Act's purposes, ascertained with the assistance of available tools. These might include the background to, and history of, its enactment; the entire context and structure of the legislation; the course of relevant amendments to the text; and the content of sources that throw light on the issues, such as law reform and like reports, admissible parliamentary speeches and applicable supplementary materials.

60. This appeal is ultimately concerned with giving effect to the command of the Parliament, expressed in the TPA. When that command is clarified, it sustains the unanimous conclusion of the Full Court of the Federal Court of Australia, now before us. The section of the TPA providing for severability of a provision must be given effect, but in a way that conforms to the large, national objectives of the Act. When this extra element is added to the reasoning of the other members of the Court, and the severability provisions are viewed in that context, the result is the opposite to that reached without due regard to it. It requires an order that the appeal be dismissed. That is the order which I favour.

[11]

Section 50

AGL instituted proceedings seeking declarations that the Loy Yang (power station) Share Sale Agreement and the GEAC Subscription Deed did not, either independently or together, have the effect, or would not have been likely to have the effect, of substantially lessening competition in a market in contravention of sec 50 of the Trade Practices Act 1974 (``the Act''). AGL supported this application for declaratory relief by reference to characteristics of the Victorian retail market for the supply of electricity. [12]

Those characteristics were said to constrain the ability of AGL (at 35% shareholding) to lessen competition within that market. In particular, AGL referred to the operation of the National Electricity Market (``NEM'') which was a wholesale electricity exchange. AGL contended that, by reason of the NEM's operation, interstate electricity generators competed with and constrained the pricing of Victorian electricity generators.

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[11] SST Consulting Services pl v Reison anor (2006) ATPR ¶42-118 [2006] HCA 31
[12] Aust Gas Light Co v ACCC (2003) ATPR ¶41-956

This, together with other specific characteristics of the Victorian retail electricity supply market, meant that the Loy Yang business was said to be: unable to sustainably and profitably price electricity above the average long run costs of generating electricity which represented the competitive level of electricity prices; unable to sustainably and profitably withhold capacity from being available for generation at the competitive level of electricity prices; and competitively constrained in the course of supplying electricity into the NEM. Accordingly, AGL pleaded that, as a result of the agreements it would not have had any ability or incentive to control the operations of the Loy Yang Business to benefit its retail operations and/or to disadvantage the retail operations of competitors to AGL.

The ACCC asserted that the Federal Court lacked jurisdiction to grant the declaratory relief sought. This was said to be the case because there was no ``matter'' for the Court to determine pursuant to sec 50 of the Act. It was contended that the Court did not have jurisdiction to grant the declarations sought because neither sec 163A of the Act nor sec 39B(1A) of the Judiciary Act 1903 (Cth), on their proper construction, provided an available source of original jurisdiction. In that connection, it was submitted that there was not a matter ``arising'' under the Act for the purposes of either of those provisions. Further, sec 21 of the Federal Court of Australia Act 1976 (Cth) was said to have presupposed the existence of original jurisdiction derived from a different source, an accrued jurisdiction. In addition to these issues of statutory construction, the ACCC contended that the matter was not captured by the jurisdiction because many of the facts pleaded concerning the characteristics of relevant markets were based on unstated assumptions concerning the prospective state of affairs, activities and relationships of GEAC and its associated corporations. In that context, the ACCC particularly asserted that the failure of each of the parties to the relevant agreements to provide binding undertakings with respect of their future conduct rendered the factual subject matter underlying the proposed declaratory relief too uncertain to constitute substantive and justiciable subject matter before the Court.

The ACCC's objection to the Court's jurisdiction was heard as an issue preliminary to the substantive question of whether the declarations were to be made.[13]

Importantly, in dismissing the objection to jurisdiction, French J held that there was a real controversy about the right of AGL to proceed with the proposed acquisition in relation to the Loy Yang Power Station and Coal Mine. Its freedom to do so had been challenged in a very practical way by the ACCC in correspondence and most explicitly in its defence where it denied that the proposed acquisitions would not contravene sec 50 of the Act. The Court was entitled to grant declaratory relief in relation to a proposed course of conduct.

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[13] Aust Gas Light Co v ACCC(#3) (2003) ATPR ¶41-966

The claim had to have a nexus with a contemporary controversy in which a party's freedom was challenged in some way. But it is not open to a party to merely secure legal advice from the Court nor answer a hypothetical question divorced from real controversy.

Section 50 of the Act necessarily imported uncertain judgments about the prospective post-acquisition state of competition in the market. That uncertainty did not render the section non-justiciable. Uncertainty was an inescapable aspect of the operation of a section based upon likelihoods which had to be assessed in determining whether the condition upon which acquisition was prohibited was satisfied or not.

Because AGL had standing to seek the declaratory relief sought, it could invoke with equal facility the jurisdiction conferred by sec 39B(1A) of the Judiciary Act and that conferred by sec 163A of the TP Act; albeit that the latter may have been subsumed by the former. There was a ``matter arising" under the Act for the purposes of both those provisions because the question of whether a prohibition under a federal law applied to a particular course of conduct was a matter which arose under that law.

The Court's role then, extended, in effect, having regard to the proper role of Federal Courts under the Constitution, to that of invoking supervisory jurisdiction inviting continuous regulatory behaviour. [14]

ISSUES ARISING FROM THESE ILLUSTRATIVE CASES

The manner in which the Federal statutory and accrued jurisdiction is currently exercised identifies several significant conflicts in the Competition Law regulatory regime in Australia.

1. The adoption of (or rather failure to recognize) the validity of economic efficiencies in the competition equation.
2. The fundamental globalization of the relevant law through adoption of competition policies, paradoxically clearly benefiting some economies ahead of others.

[14] Aust Gas Light Co v ACCC(#3) (2003) ATPR ¶41-966

3. The clash of cultures between the application of economic principles and the classic usage by the Courts of rules of proper statutory interpretation.
4. The acceptance of the purposive approach by (sections of) the Courts, leading to a common view of the regulatory rationale of the binary structure of the Commission and Courts / Tribunal. Without such acceptance of jurisdiction the sine qua non of the application of the sections, viz. the potential prohibition of uncertain outcomes makes little sense.
5. The refinement, consolidation and codification of Competition Laws and Policies by due legislative processes, including the pre-eminence of the National Competition Council.

ECONOMIC EFFICIENCES

The notion in economics is that scarce resources can best be allocated to meet the wants of the community by aspiring, in any given market, to a position of purely competitive behaviour. Competition Policy should ensure that firms will meet demands at the lowest possible price to the consumer. If those demands are not met within the defined market, product and geographic, consumers are entitled to expect other firms to enter the relevant market to satisfy their needs. Both production efficiency, focusing on both average and marginal cost structures, and allocative efficiency, considering the range of goods and services available for supply due to consumer demand are important factors in the equation.

The emphasis on efficiencies as an aspiration is significantly influenced by the so-called 'Chicago School' of economists and subsequent judicial analysis in the 1970s and 1980s. [15]

This approach has been confirmed in the High Court of Australia, accepting the objectives of the TPA as economic, with notional constructs of markets, market power, competitors in a market and competition; the main objective being the protection and advancement of a competitive market.[16]

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[15] Posner R, The Chicago School of Antitrust Analysis (1979) 127 UPaLR 925; Hovencamp H, Antitrust Policy After Chicago (1985) UniMichLR 213

[16] Queensland Wire pl v BHP co ltd (1989) ATPR ¶41-721 (1989) 167 CLR 177, 194

Part IV has been consistently interpreted by Australian Courts in the economic context. [17]

In the Full Federal Court, Lockhart, Wilcox and Gummow JJ, in *Arnotts Limited & Ors v. Trade Practices Commission* (1990) ATPR ¶41-061[18] the Court appears to rely to an extent on intuition, born partly of conclusions gained from evidence of industry conduct but also from personal impressions. Thus, having considered the reasoning in the *United Brands case* (1979) 3 CMLR. 211.[19] where the European Court held bananas to be a separate market from fresh fruit generally, their Honours continue thus at p. 51,786:

> "In the same way, it may be said that biscuits have distinct characteristics which set them aside from other products. As we have pointed out, manufacturers recognise this. They speak of 'the biscuit industry'. They concentrate their competitive attention upon other biscuit manufacturers; not concerning themselves with those who distribute corn crisps or chocolates. Retailers recognise this; displaying biscuits -- as a distinct range of products, whether savoury or sweet -- on separate shelves, away from the corn crisps and chocolates. Most importantly, although some consumers may be fickle, there must be many for whom no other product provides an acceptable substitute; who routinely consume biscuits, throughout the year and with little regard for price variations or alternatives. We cannot accept the suggestion that the relevant product market is wider than that for biscuits."

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[17] PER MCHUGH J IN BORAL BESSER MASONRY LIMITED (NOW BORAL MASONRY LTD) V AUSTRALIAN COMPETITION & CONSUMER COMMISSION (2003) ATPR ¶41-915 ;
[18] Arnotts ltd v TPC (1990) ATPR ¶41-061
[19] United Brands co v EC Com [1978] 1 CMLR 429

In VISY PAPER PTY LIMITED v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (2003) ATPR ¶41-952 [20]

KIRBY J : Following reference to 'a United States analogue', expressed that, in relation to anti-competitive arrangements and the TPA it is necessary to take a contextual approach, by identifying the legislative policy behind the applicable sections (s 45(2)(a)(i) when read with s 4D, as well as s 47 of the TPA), in an attempt to ascertain the role that the sections play in the overall scheme of regulating arrangements that restrict competition in the particular market. Such an approach requires consideration of the statutory context in which the terms, ``exclusionary provisions" and ``exclusive dealing", are found. The concepts of horizontal and vertical arrangements are useful in locating the respective fields intended to be covered by the terms ``exclusionary provision" and ``exclusive dealing".

The so-called, Mason approach to market definition drawn from the work done at Harvard in the 1960s [21] is the basis for the methodology for defining the relevant market to determine the effect of changes in competition. Section 4E TPA in defining the concept of 'market' includes the notion of substitutability for the goods or services in question; and this relies on the small but significant and non-transitory increase in price (SSNIP) test in inferring the nature and extent of the market, both on the demand side and the supply side. The usage of the notion of substitutability within this analytical framework was confirmed by the High Court in *Queensland Wire Industries.* [22]

Commentators such as Beaton-Wells have expressed the (now widely-accepted) view: [23]

that the TPA is an instrument of economic policy and that the time is ripe for a broad debate on whether economic goals are the fundamental purpose of the legislation, or whether such goals as the protection of small businesses from unfair trading or capital and labour wealth redistribution, or forms of consumer protection are, or should be, the objectives of the Trade Practices legislation.

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[20] Visy Paper pl v ACCC (2003) ATPR ¶41-952 [2003] HCA 59¶10
[21] Kaysen K, Turner D Antitrust Policy: An Economic and Legal Analysis Harvard UP, 1965
[22] Queensland Wire pl v BHP co ltd (1989) ATPR ¶41-721 (1989) 167 CLR 177
[23] Beaton-Wells C, Proof of Antitrust Markets in Australia, Federation Press, 2003

But the extent to which economic efficiencies operate within the parameters set by other broad political considerations is far from clear. Competition Law has, of course, to take account of other legislation such as occupational health and safety, contracts review, product liability and other consumer information acts. In an era of open international financial markets, fiscal and monetary policies, government procurement, intellectual property , and increasingly, environmental impact regulation will have substantial effects on the implementation of pro-competition policies. So, the regulation of mergers and acquisitions, price discrimination, market dominance and anti-competitive behaviour can only ever be part of a much-broader global picture. Political forces derived from wealth concentrations and shear numbers of voters will still have considerable impact on the implementation of competition regulations. The hugh issue for the Courts, the Tribunal and the Commission is to strike the correct practical balance between regulation in accordance with the law and engaging in widespread social engineering. Then there remains the very significant issue of the legal profession's incapacity through lack of training or academic knowledge or inability through inadequate skills-set to be able to deal with the vast problems associated with regulation in Competition Law and Policy.

GLOBALIZATION OF COMPETITION LAW AND POLICY

Antitrust enforcement relies on considerations of both economic and political objectives, often on a global scale. Increasingly, it will rely on global environmental factors.

The concentration of resources and energy corporations, airlines, vehicle manufactures and insurance in a few large international firms has been an obvious trend over recent years. The provision of financial, media, information and educational services is now totally international. Reduction of cartel or monopolistic tendencies within national boundaries or even the elimination of unnecessary barriers to new entrants is somewhat artificial in such an environment. Parallel imports are growing, effectively protecting the transnational corporations from competition. Efficiencies and lower costs structures are very hard to attain in a small economy such as Australia's.

Arguably, since the 1990s, the pro-competition ethos has been implemented in Australia to a far greater extent than any other nation-state. Most countries have maintained subsidies and structural inefficiencies in the domestic political interest. Free Trade Treaty negotiations are really in their infancy.

Moreover, in an economy the size of Australia's, the beneficial results remain fairly insignificant; affecting less than 1% of the world's total gross domestic product. Three States, the United States, the European Union and China constitute more than 55% of the world's current total GDP. Only Europe has a comparable comprehensive Competition Law and Policies regime. The other two do not. It is noteworthy that within the period of the last twenty years or so, since the deregulation of our banking and financial sector commenced, the Australian economy has fallen in relative size from about tenth to about fifteenth in the world. Apart from the US, the five largest EU States, Japan, India, Russia, Brazil, Korea, Canada, Mexico, Indonesia, Taiwan (likely to be part of China) are larger. Turkey (to become an EU State), Iran, Argentina, Thailand and South Africa may well overtake Australia within five years or so. Our GDP adjusted for purchasing parity per capita has fallen from a US rough equivalence to 30% less than that of the US: $33,000 to $44,000; perhaps we are now only the twentieth richest peoples on the globe. We rank about 55th in terms of size of population, and within a few years will not be in the top 60 countries of the world. [24]

Environmentally, we are at far greater risk than most countries. We will be amongst the first to run out of water!! It may be just the time to undertake a rigorous costs / benefits analysis of the regulatory regime of our Competition Laws. We have had a tendency to emulate the EU Commission and adopt rather defunct federal US antitrust laws with little understanding of the practical realities of their operation in those vast and complex economies. It is worth noting that three or four States of the US have larger economies than Australia. In addition, it has become clear that our Australian judiciary are ill-trained in economics and (apart from a few exceptions) do not recognize nor indeed value the strong interrelationships between the law and economics and are quite unlikely to have previously examined the full extent of Competition Law and Policy. [25]

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[24] cia factbook 2006: https://www.cia.gov/cia/publications/factbook/docs/rankorderguide.html

[25] In one case the Full Court admonished the primary Judge for his intemperate reported remarks that he "didn't really believe in all this competition stuff, and was not prepared to apply the law".
The penalty was substantially increased by the Full Court on appeal.

Most Judges, it seems, are merely aware that in the second reading speech in 1973 Senator Murphy noted that "The purpose of the Bill is to control restrictive trade practices and monopolization and to protect consumers from unfair practices." [26] (when many were at Law School or in their early years of practice!).

Few have studied the Trade Practices Act in a formal academic setting.

But much has changed since 1973.

Now, it is clear that the provisions in Part IV are really the basic competition law relating to corporations and the provisions of Part V are actually designed to enhance the competitive behaviour of corporations. Both, based as they are on Constitution s 51(xx), rely for implementation on specific Policy and enabling legislation Documents; the Competition Principles Agreement, relating to government activities, Part IIIA TPA relating to access regimes for essential infrastructure, the Agreement to Implement the National Policy and Related Reforms dealing with financial arrangements, and the Competition Code Agreement , pursuant to which the States have passed further Acts. This was achieved by the Competition Policy Reform Act 1995, which established a new Part XIA, a 'Competition Code', scheduling the application of Part IV, the authorization, penalty and remedial provisions to 'persons', thus expanding the scope of the legislation beyond the constitutional limitations of 'corporations'. In addition s6 TPA was inserted relying on the Constitution trade and commerce power (s51(i)), the territories power (s122) the executive power (s 61) and the incidental power (s 51 (xxxix)), by which a reference to 'corporations' in the TPA is extended to include natural persons. Also, each State and Territory has passed mirror legislation applying the 'Competition Code', (eg Competition Policy Reform (NSW) Act 1995) and any amendments to Part IV now require consent of the States. In addition, there are now telecommunication industry specific provisions in Parts XIB and XIC, dealing with service providers and access regimes. It is worth noting that, rather than a simplified system emerging, the competition regulatory regime is now, in practice, (particularly relating to National Access Regimes) even more complex as the political economy of the federation tends to encourage the States to set up their own regulatory structures.

The effects of the constitutional complexity in Australia may be contrasted with the Competition regime in the European Union where Directives issued by the Regulator Commission have direct effect in national courts and are interpreted pro tanto, voiding infringing provisions of agreements.

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[26] Commonwealth Parliamentary Debates Senate v57 1013-1014

The collective knowledge of the European Competition Directorate-General, and the EU States' Competition authorities, especially with the development of authorization and notification procedures, is readily available online with details of the leniency policies; with information for differing economic sectors; which assists parties and their advisers considerably in determining the likely attitude of the regulator to potentially anti-competitive conduct. [27]

Arguably, Australia, on the other hand, is developing a minefield overlaid with dynamic political pressures. In addition to interpreting the Tribunal decisions (as established by Part III) to review authorization and notifications and to deal with access and merger decisions, parties and their advisers are obliged to consider the multifaceted reasoning of the High Court and the Federal Court, the media headlining of the ACCC and the current documentation of the Productivity Commission relating not only to corporate behaviour but also, increasingly, to groups of individual professionals, such as lawyers and medical practitioners.

A complete overhaul of the appropriate regulatory system for the Australian economy is now becoming quite imperative. The undue complexity of the Australian regulatory regime was encapsulated in the second reading speech response to the National Access amendments to the TPA by Senator Stephens on 10 August 2006:

> Under the current regime, the Treasurer, any responsible state or territory minister or any other party can apply to the National Competition Council to have a monopoly facility declared essential. The National Competition Council then makes a recommendation to the responsible minister, and the applicant has a right to appeal the minister's decision in the Australian Competition Tribunal. Once declared, access arrangements, including price, can be negotiated between the facility owner and those seeking access, and the arrangement is registered with the ACCC. If the parties cannot agree, the ACCC arbitrates. The result of the arbitration can be reviewed by the tribunal, and the tribunal's decision can be appealed in the Federal Court. Alternatively, the owner of a monopoly facility may set out the terms of access for any party wishing to gain access. This undertaking is then registered with the ACCC. …

(The story of failure of regulation remains largely untold.)

> Prospective market entrants simply are not prepared to take on the legal power of state governments. There is a lack of appreciation in the policy community that proponents or financiers of major infrastructure projects have to deal with a number of regulators and regulatory regimes.

[27] The information is provided by the Competition DG: http://ec.europa.eu/comm/competition/index_en.html

> The national access regime is a case in point.
>
> There are state regulators, industry regulators, the National Competition Council and potentially also the ACCC to deal with. It is not just an issue of unnecessary compliance burden through regulatory duplication; there is also the issue of inconsistent regulatory frameworks and the concomitant disincentive to invest in the face of heightened risk of regulatory failure.[28]

Rather than creating a unified regulatory structure, the Hilmer [29] reforms have spawned a legion of twenty-two regulators at different levels of government and in different sectors of the economy. Part IVB, Industry Codes[30], will, in due course, spawn an additional level of self-regulation for many corporations.

Market access regulation relating to infrastructure essential services has become an entangled web held hostage not just to the usual federal-state political tensions but also to internal bureaucratic disputes at the state levels over ministerial responsibility.

ENFORCEMENT AND REMEDIES

Part II establishes the Australian Competition and Consumer Commission to enforce the provisions of the Act which may include Authorizations and Notifications (Part VII), Remedies and penalties, including criminal and educative orders (Part VI), and now Industry Codes (Part IVB) and Unconscionable Conduct (Part IVA). The Commission has broad investigative powers (Part XII, especially s 155) and supervises Access to Services in Part IIIA. Moreover, consistent with the Productivity Commission report *Review of the national access regime*, the government has agreed that statutory pricing principles should be established in relation to Part IIIA in order to provide guidance for Assess pricing decisions and to contribute to consistent and transparent regulatory outcomes over time, as well as certainty for investors and access seekers. But the bill did not enshrine the Review principles in legislation. It is now proposed that these pricing principles are to be determined by the Treasurer, specified in regulation and then, in due course, interpreted by the ACCC!

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[28] Stephens U. Second Reading Speech, 10 August 2006:
http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2353789&table=HANSARDS
The National Competition Council is an independent advisory body of persons with experience in industry, commerce, economics, law or administration is set up to advise the various governments on matters relating to the Competition Principles Agreement.

[29] National Competition Inquiry (Hilmer Committee), AGPS, 1993

[30] Trade Practices Act, 1974

STATUS OF THE TRADE PRACTICES LEGISLATION AMENDMENT BILL 2006

The Bill to amend the Act in relation to the merger provisions, notification and authorizations, has not gone beyond the first reading stage, on 19 June 2006 in the House of Representatives. [31] This bill which includes criminal sanctions for serious anti-competitive conduct, and investigative procedures for cartel arrangements, was promised in a fanfare last year. It includes collective bargaining regulations in relation to pricing contracts. Then there is the government's flawed Dawson bill, which still seems to hang in abeyance. [32] Given the nature of the regulatory and enforcement regime, it is doubtful that quite soon, any participant in corporate law practice will be able to see the woods for the trees.

Against this developing infra-structure, is the further complication of jurisdiction for enforcement, which is primarily held by the Federal Court, but there is still some residual doubts relating to the remaining cross-vesting provisions in the States' legislation, following the invalidation by the High Court of the national scheme. [33]

CLASH OF CULTURES: LAW AND ECONOMICS

In blindly simplistic terms the early decisions of the Courts appeared to approach with little understanding of the economic issues: [34]

> In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.
>
> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate.

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[31] http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2266&TABLE=BILLS
[32] http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2075&TABLE=BILLS
[33] Re Wakim (1999) 163 ALR 270
[34] *Queensland Coop Milling Assoc ltd v Defiance Holdings ltd* (1976) ATPR ¶40-012 (1976) 25 FLR 169

Now, at the other end of the analytical spectrum, some Judges, when confronted with the new complexities of the past thirty years, have felt a need to attempt in their decisions to rewrite the competition law textbooks!

For example, in Boral [35] McHugh J's concluding analysis of the importance of entrant limitations, following some 120 paragraphs of what is, essentially, a review of all economic principles relevant to the application of s46:

> A barrier to entry could be defined as something that affected a firm, by virtue of its status as an outsider in the market, in a manner that prevented, or acted as a disincentive for, entry into the market. There could have been both structural and strategic barriers to entry in a market. The existence of structural barriers could have been assessed objectively. The existence of strategic barriers to entry could only have been assessed by looking at what was likely to happen in the particular market. While it could have been difficult, it was necessary to have drawn the line between factors that merely made entry difficult because of a firm's superior efficiency and size and those that were properly considered strategic barriers to entry.
>
> In assessing strategic barriers to entry, it was necessary to distinguish between the usual practices or conduct of the incumbent firms that acted as a barrier and conduct in the circumstances of a period of economic depression or extremely vigorous competition. Pricing below cost was by its nature generally so transitory that by itself it usually could not have been considered a barrier to entry. Once BBM determined to stay in the market, it was entirely rational for it to have adopted a strategy of bettering its competitor's prices for as long as it could. Competitive cost cutting could not have been regarded as a strategic barrier to entry and proof of substantial market power.

[35] Boral Besser Masonry ltd v ACCC (2003) ATPR ¶41-915 [2003] HCA 5

> Given the competitive nature of the market, it was not relevant that BBM was part of a financially strong vertically integrated group. Financial strength was not equivalent to market power, although financial resources could have gone to explaining the reason for a firm's power. The low barriers to entry in this market by themselves were strong indicators that at no relevant time did BBM have substantial market power. Moreover, on many occasions, its customers were able to dictate to it the terms of business.

And Kirby J at paragraph 399:

> *Economic theory supports legal analysis*: What I have said to this point is based substantially on an understanding of the requirements of the applicable legislation, viewed in the light of an analysis of the language of s 46 of the Act and a consideration of such authority as is available to elucidate its meaning and intended operation. However, in deference to the full argument of the parties, the reasoning of the judges of the Federal Court and the importance of the issues, I would make it clear that my conclusion is strongly reinforced by an examination of this case taking into account the economic purposes of s 46 and an analysis of the subject market.

Appeal Courts reviewing evidence and restating the law in 1000 paragraphs!!

Even new younger judges have been tempted to rewrite their particular version of the practical implications of conducting the regulation of Competition Law in the context of economic policies :

Justice Allsop in the recent Liquorland case sought, towards the end of his 848 paragraphs, to clarify the new role of economic evidence in applying the law: [36]

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[36] AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v LIQUORLAND (AUST) pl (2006) ATPR ¶42-123 [2006] FCA 826

837. …it is appropriate to say something of the place and role of expert witnesses in cases such as this. In giving reasons for rulings on some of the expert evidence ([2005] FCA 630) I identified some aspects of the presentation of expert evidence in competition cases. If I may repeat, by way of paraphrase, part of what I there said in the context of ruling on evidence in the following.

838. In cases such as this dealing with a social science, the views of Professor Brunt expressed, if I may respectfully say so, with her customary clarity in chapter 8 of the helpful compendium of her work *Economic Essays on Australian and New Zealand Competition Law*, illuminate one aspect of the helpful, indeed essential, role for expert evidence in this field. In that chapter, Professor Brunt quoted Keynes at page 358, where that learned economist said:

The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions.

839. The "economic" questions here involved the assessment of the purposes of humans working in a commercial environment and the appropriate economic framework in which to discuss them.

840. With the taxonomy of expert evidence of fact, assumptions, reasoning process and opinions as an accepted (indeed necessary) framework, one then comes to the role of the economist in a case such as this. Because it is a social science, and because it is a way of approaching matters and a way of thinking about matters, there is a role, for the economist to assist the court by expressing, in his or her own words, what the human underlying facts reveal to him or her as an economist and what it reflects to him or her about underlying economic theory and its application.

841. For instance, if in this case there had been tendered a mass of industry data about consumer behaviour, about catchment areas for shops and about activities of shopkeepers, and senior counsel for the Commission closed his case and addressed me on that question, I could well understand and expect one submission from the respondent to be that there was a startling and illuminating absence of evidence in this case - the lack of assistance that I was given from an economist putting together, sorting and ordering, within the confines of economic theory, the human behaviour reflected by that raw data. It might be said that a *Jones* v *Dunkel* inference or conclusion could be drawn if the Commission could not find an economist to assist me with the interpretation, from an economic standpoint, of that raw data. That, I think, throws up the problem in some of the objections to admissibility that were made, in some respects in relation to the form of the evidence, and in some respects in relation to the problem about the attacks on the witnesses, in particular, Dr Walker, in cross-examination.

842. The recognition of the place of expert economic assistance in the manner described by Professor Brunt means that often the point of the expert opinion is to give a form or construct to the facts. It may appear to be an argument put by the witness. So it is.

The discourse is not connected with the ascertainment of an identifiable truth in which task the Court is to be helped by the views of the expert in a specialised field. It is not, for example, the process of ascertaining the nature of a chemical reaction or the existence of conditions suitable for combustion. The view or argument as to the proper way to analyse facts in the world from the perspective of a social science is essentially argumentative. That does not mean intellectual rigour, honesty and a willingness to engage in discourse are not required. But it does mean that it may be an empty or meaningless statement to say that an expert should be criticised in this field for "putting an argument" as opposed to "giving an opinion". In this respect, regard should be had to the comments of French J in *Sampi* v *State of Western Australia* [2005] FCA 777 at [792]-[793] where his Honour said in dealing with the anthropological evidence in native title cases:

Aspects of the reports offered what might properly be called argumentative or taxonomical conclusions or inferences relevant to the claimed determination of native title. To call them such is not necessarily to denigrate them. The judgment of the Court in determining the application is in part evaluative. The Federal Court Rules recognise that there are aspects of so called expert testimony which are argumentative and can be treated as submission. Order 10 r 1(2)(j) provides:

'Without prejudice to the generality of sub-rule (1) or (1A) the Court may - ..

(j) in proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence.'

The rule of court was developed in part to respond to concerns about the way in which rules of evidence might lead to the exclusion of helpful economic testimony in competition law cases. Economic experts typically offer opinions about questions such as market definition relevant to the application of particular provisions of the Trade Practices Act 1974 (Cth). Such opinion is by way of characterisation of primary evidence and is essentially argumentative in character albeit the characterisation is informed by relevant expertise. An anthropologist, as in the present case, may offer an opinion on whether a particular group of people constitute a distinct or discrete society of persons. The nature of the taxonomical exercise is conceptually similar to that undertaken by the economist.

> There is potentially some tension between the recognition that expert testimony may have the character of submission and the Practice Direction relating to expert witnesses which contemplates acceptance by the expert of a duty to the court in providing opinion evidence and which rejects the proposition that the expert is simply a 'hired gun' for the party who calls him or her. That tension and associated difficulty in the way of accepting expert testimony as evidence can arise where the opinion offered becomes advocacy for a particular outcome.

Justices Wilcox, French and Gyles JJ in UNIVERSAL MUSIC AUSTRALIA took the view just a few short years ago that the lawyer's role is properly that of a mere technician : [37]

> 53. The concept of a ``market'' is a metaphor used to describe a range of competitive activities by reference to function, product and geography. The application of the metaphor may be informed by economic analysis, provided it is rooted in commercial realities. However, whether or not a particular corporation has market power, within the meaning of a provision such as s 46 of the Act, is not a matter to be resolved by debates between expert witnesses; the issue is raised by statutory words of ordinary English meaning which are to be construed and applied by the Court. His Honour (Hill J)acknowledged this at para 410:
>
> ``... ultimately the question whether market power in the relevant sense exists will not be determined by economists or the way economists may use the words in economic texts but by the court informed, nevertheless, by the evidence of economists derived from their study of market behaviour, and having regard to the factual matrix from which the conclusion must be drawn."

The majority of the High Court now appear to agree with this view of the role of the Courts in the regulatory regime. [38] That superbly technical lawyer, Justice Hill, died suddenly in august 2005. [39]

In conclusion, it is perhaps worth considering whether lawyers and economists have the relevant answers in any case. Climate change is being driven by greenhouse gases which is being driven by greater production of goods and services which is driven by competition in the marketplaces in the purported interests of consumers. [40] There has to be a better role for the corporate lawyers and the regulators in the future of this planet than facilitating this flawed process.

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[37] Universal Music Aust pl v ACCC (2003) ATPR ¶41-947 [2003] FCAFC 193
[38] SST Consulting Services pl v Reison anor (2006) ATPR ¶42-118 [2006] HCA 31
[39] In quite tragic circumstances.
[40] Intergovernmental Panel on Climate Change WMO and UNEP, Paris, 2 feb 2007 http://www.ipcc.ch/activity/ar.htm