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# Surfing the wavefront

Chief Justice RS French\*

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*In his opening speech to the August 2009 Law Council of Australia Trade Practices Workshop, the Chief Justice looked back 10 years to the themes dominating discussion about competition law on the 25th anniversary of the Trade Practices Act 1974 (Cth). They included misuse of market power, the conflicting purposes of competition law and their relationship to popular perceptions of its proper objectives. Moving forward 10 years, those issues are still with us. Additionally, in the shadow of the global financial crisis there is greater sensitivity to the interface between international trade and competition law and developments in the Asia Pacific region, and that economic evidence in the legal process in the enforcement of competition law is likely to face a particular challenge in jury trials dealing with cartel prosecutions.*

It is not ageist, nor a reflection on those who undergo cosmetic treatments to describe the Annual Workshop as a confluence of the new, the old, and the recently renovated. In using those words I have in mind the agenda, rather than the participants. Each year, the moving wavefront of discussion, debate and retrospection upon Australia's competition laws can be observed at this gathering.

In that spirit, I look back 10 years to when Professors Bob Baxt and Maureen Brunt organised a conference to mark the 25th anniversary of the *Trade Practices Act 1974 (Cth)* (TPA). The topics at that conference went beyond our horizons to the United States, Europe and New Zealand, with papers by Judge Diane Wood, Richard Whish and Douglas White QC. The relatively new access regime under Pt IIIA was discussed under the title "Unleashing a Monster" by John Kench. It was, so he assures me, not a title of his own choosing. In his commentary on that paper, Warren Pengilley exposed what was to be an ongoing debate about the clarity of the purposes of Australia's competition law. In typically colourful metaphor he said:

It is regrettable that our *Trade Practices Act* and the administration of it is a little like the Russian submarine fleet and the North Sea. When the Russians do not know what to do with their radioactive waste, they simply throw it into the North Sea. This is a cheap and easy solution to a problem. No-one cares too much about the long-term consequences. Similarly when we want to do something, be it preventing collusion, having an access regime or preventing price exploitation, we simply throw the issue into the *Trade Practices Act* and throw another bone to the ACCC to chew. Neither the Russians nor ourselves have really thought through the long-term ramifications of what we are doing – and we will both be the sadder for this.<sup>1</sup>

Section 46, now recently renovated, made its inevitable appearance at the conference in a paper jointly authored by Gaire Blunt and Jennifer Neale. They referred to the distinction made by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*<sup>2</sup> between the protection and advancement of the competitive process and the protection of individual competitors. In that case the court identified the single purpose of s 46 as the protection of consumers. The section was seen as predicated on the assumption that competition is a means to that end. The protection of consumers did not involve the protection of competing businesses from each other. Mason CJ and Wilson J said:

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort and these injuries are the

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\* Chief Justice of the High Court of Australia. This is an edited version of a speech delivered at the Law Council of Australia Trade Practices Workshop (Yarra Valley, Victoria, 15 August 2009).

<sup>1</sup> Pengilley W, "Comment on "Part IIIA: Unleashing a Monster?" in Hanks F and Williams PL (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, 2001) p 169.

<sup>2</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

inevitable consequences of the competition s 46 is designed to foster.<sup>3</sup>

Deane J made a similar point when he said that the objectives which the section is designed to achieve are economic not moral.<sup>4</sup> That distinction and clarity of purpose is now said, by some, to have been compromised.

The possibility of provisions in competition law which give effect to more than one conflicting purpose or, to put it more euphemistically, purposes in tension, has always existed and is not unique to Australia. It has from time to time been resisted. We do not go gently into the dark night of policy obscurity. Blunt and Neale quoted Robert Bork, who had made the point with characteristic bluntness in 1978 when he observed that antitrust policy cannot be made rational until a firm answer can be given to the question – what are the goals of the law? The practical question which followed was:

Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.<sup>5</sup>

I agree with that sentiment, and that agreement reflects a general view that we should aim to have laws that give effect to clearly expressed, readily understood purposes. At the same time, as I said in my own contribution to that conference in 1999, we often have to deal with the untidy realities of the processes of representative democracy. As long ago as 1933, in a lecture on Science and Judicial Method, Sir Owen Dixon himself gave voice to those realities when he said that the “methods of a modern representative legislature and its preoccupations ... [were an obstacle to] scientific or philosophical reconstruction of the legal system”.<sup>6</sup>

Those who every now and again descend from the upper reaches of competition law practice into the real world will have noticed that many people in small business and their families and friends are unlikely to be greatly concerned about making distinctions between the protection of competitive processes and the protection of competitors. They will be concerned about market place bullying or the oppressive use of power, even if it falls within the boundaries of legitimate competitive conduct. The political process has registered and given legislative effect to those concerns. One development of importance in that respect has been the enactment of Pt IVA of the TPA relating to unconscionable conduct. The possibility that within the one Act there may be conceptual discontinuity between the objectives of competition law and the objectives of protecting particular classes of player has not proven to be an insuperable difficulty to legislators. And it must be said that when provisions serving different purposes are siloed in different parts of the one statute, the problem is perhaps less acute for the lawyer and courts than when different purposes are reflected in one section of a statute.

There is nothing novel about this phenomenon. It is part of the daily challenge that faces lawyers and the courts. It is not unusual to find statutes which themselves express some inarticulate compromise between conflicting interests.<sup>7</sup> Competition law is no orphan in this respect. Taxation law and intellectual property law provide a feast of examples. In intellectual property law the tension between the encouragement of invention on the one hand and the public interest in the free flow of ideas and products is always present. At least in the intellectual property area however, the conflicting policies are reasonably discernible. In taxation, they are not infrequently lost in a fog of verbiage.

Lawyers and law reformers should be ready to point out to legislators the difficulties that can ensue when a new law passed for one purpose is engrafted onto an old law passed for another. Conflicting policies informing the same provision can generate difficulty in building up a coherent body of principled case law in its interpretation and a degree of uncertainty in its application. It is quite proper to point out to law makers that the protection of competition is a concept distinct from the

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<sup>3</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191.

<sup>4</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 194.

<sup>5</sup> Blunt G and Neale J, “The Development of Section 46 in Australia – *Melway* and its Likely Impact on Business” in Hanks and Williams, n 1, p 223.

<sup>6</sup> Dixon O, “Science and Judicial Method” in Woinarski (ed), *Jesting Pilot* (2nd ed, Buffalo, 1997) pp 11-23.

<sup>7</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [34].

protection of particular competitors. If small business is to be subject to statutory protection, it is probably better that such protection be afforded within a purpose designed statutory framework. In that respect the fact that Pt IV and Pt IVA appear in the same Act does not prevent the recognition of their distinct purposes and the development of coherent jurisprudence in respect of each of them.

One area which did not generate a lot of discussion 10 years ago was the growth of co-operative arrangements between the Commonwealth and the States, which enabled regulatory coverage across the boundaries of constitutional power. This occurs in the field of access regimes, one example of which is the gas pipeline access regime. The division of responsibilities between Commonwealth and States under the *Constitution* has posed a continuing challenge to regulators in a variety of fields and competition law is one of them. The challenges include the achievement of institutional simplicity in the face of jurisdictional complexity. The conferral of functions under State law on federal bodies has been a particular example of that kind of challenge.

Coming forward 10 years to the agenda for the 2009 Trade Practices Workshop, it is properly framed by a paper on the global economic crisis, and in that context a comparison of Australian and European competition issues. This is timely and, it is to be hoped, will lead us into a wider consideration of the interaction between international trade and competition law and recent developments in our own region. It has been suggested that with the increasing internationalisation of commercial activity, more competition law cases will have an international element.<sup>8</sup> This may be complicated where commercial conduct spills across national jurisdictions with different competition law regimes or competition law regimes at different stages of development and sophistication. While the first paper by Graeme Samuel is looking to Europe, we must also look to our own region and particularly the APEC countries. They offer a stark example of differing stages of development. Two of our biggest regional neighbours, India and the People's Republic of China, have only recently enacted what might be called modern competition laws. Positions on India's new Competition Commission only began to be filled last year. China's competition law came into effect in August 2008. Hong Kong is shortly to enact a law, albeit it seems without merger control. Its law is likely to overlap in certain respects with China's laws.

The intersection between trade policy and competition policy requires our increasing attention. Allan Fels made the point about its importance clearly and simply in 1995, when he warned that:

If trade barriers are lowered and it is easier for imports to enter a country, the effects of this liberalisation can be defeated if there are anti-competitive arrangements in domestic markets, especially in distribution sectors, which prevent the imports from reaching consumers or result in significant increases in their prices to consumers. Hence trade policy needs to be complemented by an effective, domestic competition policy.<sup>9</sup>

The world is still wanting an international competition law regime, though there has been a degree of convergence and measures have been taken to avoid conflict. The International Competition Network has undoubtedly made a valuable contribution with the development of guidelines and best practice statements on a variety of issues relevant to competition law. But these are not binding. Associate Professor Brendan Sweeney has observed in a recent paper in the *Melbourne Journal of International Law*:

it is not yet certain that the existing system has produced acceptable solutions. The horizontal networks that presently dominate the field may need to be supplemented by some binding vertical arrangements. For example, the incentives for protectionism built into the system may require supranational oversight to ensure that commitments to non-discrimination are honoured. Further, in a world beset by severe economic crisis, domestic politics may place an unbearable strain on an international merger system that relies on notions of comity and rational discourse.<sup>10</sup>

As he observed, international competition law is still very much a work in progress.

<sup>8</sup> Noonan C, *Emerging Principles of International Competition Law* (Oxford University Press, 2008).

<sup>9</sup> Fels A, *World Trade and Competition Policy*, Paper presented to the 24th Conference of Economists (Adelaide, 28 September 1995).

<sup>10</sup> Sweeney B, "International Competition Law and Policy: A Work in Progress" (2009) 10(1) *Melbourne Journal of International Law* 58 at 69.

Another inevitable part of the agenda for the Workshop is the new criminal cartel legislation. It poses significant legal and logistical challenges for courts and parties. It will also pose a particular challenge to economists who may be called upon to give evidence before prosecution or defence in trials involving alleged cartel offences. If economists do appear as witnesses in cartel prosecutions, it can be expected that they will find themselves operating in a more highly charged forensic environment than that to which they are accustomed in civil litigation under the TPA. The American expedient of summary disposition based on judicial consideration of expert evidence before the commencement of a jury trial may not be as readily available within our constitutional and legal framework. This is a matter for the future. Given the legal and logistical challenges of cartel litigation, it will be interesting to see how many cases actually see the light of day in a court.

Another important issue is that of the role of economists in competition law. The role of economists has, of course, been central to competition law since the enactment of the TPA in 1974. As the Second Reading Speech for the Bill that became the Act acknowledged, it was not possible to transmute economic considerations with which the Act was concerned into legal concepts capable of precise expression. The Minister said, perhaps somewhat optimistically:

The courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional judicial role.<sup>11</sup>

Professor Brunt said, not without a hint of apprehension:

We begin with a statute; it is to be interpreted and enforced by courts of law; necessarily we are in the hands of lawyers.<sup>12</sup>

The initially uneasy tension between economists and lawyers is analogous to that between lawyers and other professions who typically regard lawyers as blinkered reductionists, incapable of grasping the wholeness of things. One of the most valuable functions of the Workshop over the years has been to provide a forum in which lawyers and economists have been able to talk to each other and gradually develop an understanding of their respective roles and modes of discourse. This kind of interaction and mutual comprehension is essential if competition law is going to work. It will not operate with lawyers or economists alone. It requires an interdisciplinary approach.

A similar and equally valuable feature of the Workshop over the years has been the interaction that it provides between the private profession and the regulators. In the discharge of regulatory functions, the Australian Competition and Consumer Commission must operate, as must all regulators, at arms length from those whom it is its responsibility to regulate. That does not mean that the transaction costs of regulation cannot properly be reduced by facilitating civil and rational communication and reciprocal understanding of the view points and methodologies of the various parties and sectors involved in competition regulation.

In short, the Workshop promises, as it has so often delivered in the past, the best of the new, and the old, and the recently renovated.

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<sup>11</sup> Australia, House of Representatives, *Parliamentary Debates* (Hansard), Second Reading Speech (16 July 1974) pp 227-228.

<sup>12</sup> Brunt M, "Economic Overview", *Monash Trade Practices Lectures* (1975).