Speech to the New Zealand

Institute of Economic Research

Building a modern Trade Practices Act:
A trans-Tasman analysis

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Professor Allan Fels

Chairman

Australian Competition and Consumer Commission

1 Introduction

Ladies and Gentlemen.

Tonight, I want to discuss two particular topics that I hope will be of interest to you.

First, I will provide a brief examination of competition law as it exists in our two countries. I want examine similarities and differences, and investigate possible future developments. In examining our competition experience it seems clear that both our countries have gained from the experience of the other. In addition, our respective law has progressed, if not in perfect harmony, then in the same general direction and with the same general intent.

Then I want to focus more closely on the current discussion about competition law in Australia. In doing so, I will concentrate on improvements that, in the view of the Commission, could be made to the Australian Trade Practices Act. These would have the effect to bring the Act into line with best international practice. As part of this I will canvass the Commission's practice of public comment.

The key message, I think, is that competition law in both Australia and New Zealand should not be set solid, or considered to be immutable and unchanging.

2 Competition law in Australia and New Zealand

Ladies and Gentlemen.

Economic and commercial ties between our two countries reach right back to the days of colonial settlement. Formal relationships, however, and a more integrated approach to market development were given impetus in 1965 with the signing of the New

Zealand/Australia Free Trade Agreement and the Australia-New Zealand Closer Economic Relations Free Trade Agreement of 1983.[1]

Since 1983, the legislative paths of competition law in New Zealand and Australia have been similar although not identical. As well, as Maureen Brunt has commented, a distinctive New Zealand-Australia case law has also been evolving.[2]

Prior to 1970, formal trade practices legislation, based on a model imported from the United Kingdom, was enacted in both countries. New Zealand led the way with the *Trade Practices Act 1958*, and Australia followed with the *Trade Practices Act 1965*.

Australia then introduced the *Trade Practices Act 1974*, which marked a substantial departure from the existing legislation.

New Zealand followed less radically with the *Commerce Act 1975*, only to introduce its major body of competition law, the Commerce Act, in 1986. Framed on the Trade Practices Act, the *Commerce Act 1986* benefitted from twelve years of Australian experience and improved on the original Australian legislation.

Ladies and gentlemen.

It is a general principle that where markets and competition policy lead competition law tends to follow.

New Zealand acted to deregulate and privatise industries and utilities in advance of both the Commonwealth and state governments in Australia. One possible reason for this is the unitary structure of the New Zealand polity. By way of contrast, Australia exists as a federation; the Australian Constitution confers on the federal government substantial but not comprehensive powers over economic behaviour. This means that

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[1] White, D.: *Cross Tasman Trade in Competition Law: Convergence or Divergence*, in Hanks, F. and Williams, P. (eds.): 'Trade Practices Act – A Twenty Five Year Stocktake' (The Federation Press, 2001).

federal and state governments need, and needed, to cooperate on national policies such as competition policy.

In moving to implement a comprehensive competition policy in the 1990s, which culminated in the so-called Hilmer reforms, Australian policy makers and legislators addressed issues dealing with:

- the extension of competition law to non-incorporated entities and the professions, and
- the development, between federal and state governments, of a competition principles agreement by which public monopolies were to be reformed, and access regimes to services were to be established.

In part, we observed and benefitted from the competition experience of New Zealand, and the application of court-based remedies that resulted from the s.36 framework. For example, in 1995, the Australia Parliament introduced a specific and formal legislative regime that provides for access to network industries and natural monopoly infrastructure in Part IIIA.

Our experience with Part IIIA is that it has worked, if not perfectly, then relatively well. Action by the Commission under Part IIIA has enhanced competition and resulted in consumer benefit in concentrated and important national industries, such as telecommunications, gas and electricity.

The history of infrastructure regulation in New Zealand has been different. Until recently, New Zealand has adopted a 'light-handed' approach to utility regulation, and in this has relied upon prohibitions contained in the Commerce Act. The Australian approach, in part, has been more prescriptive.

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[2] Brunt, M.: *Australia and New Zealand Competition Law and Policy*, in Hawk, B, (ed.): 'International Antitrust Law and Policy', Annual Proceedings of the Fordham Corporate Law Institute (New York, Transnational Juris Publications, Inc., p135, 1993).

In telecommunications, however, regulation of New Zealand's market has changed significantly with the introduction of the Telecommunications Act of 2001. The Act introduced a number of functions for New Zealand's Commerce Commission empowering it to:

- resolve disputes between service providers over price and non-price terms and conditions for access to designated services
- to make recommendations on any other services that should be subject to its dispute resolution powers
- undertake costing and monitoring activities relating to the Telecommunications Service Obligations and determining how these costs will be allocated to industry players, and
- propose and approve industry codes of conduct.

Current designated services include interconnection with Telecom's fixed network, wholesaling of Telecom's fixed line services, number portability, roaming on cellular networks, and co-location of cellular transmission facilities.

In Australia, legislation in 1997 provided for the Commission to, amongst other things, regulating access within and enforce competitive safeguards in our telecommunications industry. The legislation included specific amendments to the Trade Practices Act, provision for transitional arrangements, a revised *Telecommunications Act 1997*, and amendments to the *Radiocommunications Act 1992*.

The intention of the legislation was to establish open market access to both telecommunications infrastructure and service provision.

Amendments to the Trade Practices Act introduced two new parts (Part XIB and Part XIC): one dealt with anti-competitive conduct, and the other set out the rules and procedures for guaranteeing access to network services.

Further to this, in April 2002 the Australian Government announced a number of changes to the Act.

These changes essentially involve a tightening of the regime and are designed to provide more transparency about Telstra's costs, more timely regulatory outcomes and discourage gaming behaviour by incumbents.

These apply in addition to the parts of the Act that, more generally, regulate restrictive and unfair trade practices.

In Australia, the regulatory regime that applies to the electricity supply industry is neither perfect nor complete. At present the regulatory regime exists as a product of our federal system, and reflects the history, complexity and numbers of the interests involved in generations, transmission and distribution.

At present, in Eastern Australia (excluding Tasmania) there is a single wholesale market for electricity, and an access regime for the transmission and distribution networks in participating jurisdictions. The arrangements for the operation of the national electricity market are set out in the National Electricity Code.

In general electricity reform has been aimed at exposing the contestable parts of the industry to competition. However, those elements of the electricity industry that are not currently susceptible to competitive pressures, such as elements of transmission and distribution network service provision, are instead subject to regulatory supervision. This regulatory supervision is directed at facilitating competition in upstream and downstream markets, in part through eliminating monopoly rent taking by transmission network service providers (TNSP).

After an initial reliance on general competition law, through s.36 of the Commerce Act,[3] and information disclosure requirements, there have been a number of reforms that have seen the further evolution of self-regulatory arrangements.

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[3] Section 36 of the Commerce Act states that a company in a dominant market position is prohibited from using that position for the purpose of limiting competition.

As part of these reforms, Part 4A of the *Commerce Act* was introduced, which provides for a special statutory scheme for the regulation of large electricity line (transmission and distribution) businesses. Other reforms have included the creation of the Electricity Governance Establishment Project, which represents a rationalisation of existing governance structures, and to determine the rules governing wholesale, retail, security, transmission and distribution companies. Finally, the Government also introduced the *Electricity Amendment Act 2001*, which enables for regulation of the industry in the event that the Government determines that the industry rules established by the Electricity Governance Project are inappropriate.

The New Zealand approach to the regulation of the monopoly gas pipelines has been different from that for electricity, and reflects the requirements of managing a system dominated by the Maui field and contracts. In this the New Zealand gas experience also diverges from that of Australia, which involves the regulation of the extensive networks linking different resources in different locations operated by different companies.

In contrast to the more formal Australian approach, we may characterise the New Zealand model as providing a 'loose' regulatory cover, based on information disclosure regulations to assist in determining whether or not pipeline owners are exploiting market power. In such circumstances, recourse is then had by way of the relevant anti-competitive provisions of the Commerce Act. The third element of this approach is a system of industry self-regulation, which exists in the form of a voluntary code of conduct.

As in Australia, I understand that the Government here is now undertaking a review of the regulatory regime for gas, with consideration being given to access issues, industry governance and improving the regulation of natural monopoly gas pipelines.

Ladies and gentlemen.

All this suggests to me that there has been a process of trans-Tasman enhancement, whereby we have learnt from, and improved upon, the legislation of the other. To my

mind, this has been an important characteristic in the development of our competition law, and has worked to our mutual benefit.

For example, the Australian merger test changed from substantial lessening of competition to dominance in 1978 and reverted back to an SLC test in 1992.

In NZ amendments in 2001 to the Commerce Act resulted in changes to s.47 to strengthen the control of business acquisitions by replacing a dominance test with a 'better targetted and stronger SLC test'.

Simultaneously, changes to NZ's s.36 had the effect of bringing the provision closer to Australia's s.46 (the objective of which is to prevent firms with substantial market power from engaging in illegitimate anti-competitive conduct). That is, NZ changed s.36 so that the threshold of substantial degree of market power was brought into line with Australia's s.46.

I mentioned before that the competition provisions of the Trade Practices Act are currently under review, and that I will talk about this in more detail later. However, in our submission to the review committee, the Commission advocated in introduction of criminal sanctions for hardcore collusion and the addition of an effects test to s.46.

There are other areas where the law differs between our two countries.

First, in the context of the review of the Act, we have strongly argued the case for the introduction of cease and desist powers to stop quickly incidents of misuse of market power. Relief to damaged parties should not take five to seven years, which has been the time in Australia required for courts to come to a final decision in a number of particular cases. Were Australia to make such a change, then in this area we would be following the example set by New Zealand. While cease and desist powers have yet to be tested here, they should allow for quicker action than through the usual court processes.

Secondly, civil penalties for price fixing (or hard core collusion) are calculated differently. The sanction in New Zealand provides for a penalty that is the greater of: $NZ10 million; three times the value of any commercial gain or expected commercial gain; or, if the gain is not known, ten per cent of the turnover of the body corporate. In Australia, there is a fixed upper penalty of $10 million dollars.

Now, although I believe in the case of hardcore collusion that pecuniary penalties alone provide an insufficient and inappropriate deterrent to the wrongdoer, the existing New Zealand regime, in the area of civil penalties, is in advance of Australian law.

Thirdly, New Zealand's Commerce Act provides a voluntary notification regime for business acquisitions, under which parties contemplating acquisitions may submit an application for clearance to the New Zealand Commerce Commission. I note that this replaced a compulsory system of pre-merger notification.

The current system requires that the Commerce Commission give clearance if it is satisfied that an acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market.

If clearance is granted, then s.47 (dealing with acquisitions and whether or not there is the effect of a substantial lessening of competition) does not apply to the proposed acquisition, provided it is made in accordance with the terms of the clearance. As an aside, I am not aware that there has been a call in New Zealand for changes to be made to the way clearances are handled.

I have to say that the circumstances in Australia are a little different, which makes the adoption of a voluntary notification system unlikely.

Ninety five per cent of mergers investigated by us on average do not raise significant competition concerns. We have an informal system that works efficiently and well. Given this, it is uncertain that a move to a more formal clearance system would improve certainty for parties seeking approval for a merger or acquisition.

I note that some New Zealand practitioners would argue that Australia's system would be more transparent if we provided reasons such as those set out in clearance decisions. It is sometimes claimed that, while parties generally have a reasonable understanding of the position of the ACCC, third parties find it hard to determine with sufficient precision the reasoning behind particular decisions. Without necessarily agreeing with this, I accept that they may be some scope for greater transparency in Commission reasoning.

The fourth area of difference arises in the treatment of parallel imports of copyright works and subject matter. This is a practice allowed in New Zealand since 1998.[4] The New Zealand government has, however, recently announced a limited reintroduction of bans on parallel imports for certain copyright matter.

The newly elected New Zealand Government undertook in 2000 to review the parallel importation arrangements with a particular focus on the impact of the arrangements on New Zealand's creative industries. The review, which involved public consultation, did not find substantial evidence that reintroducing bans on parallel imports would stimulate investment in, and the promotion overseas of New Zealand's creative talent.

In December 2001, the New Zealand Government announced its response to the review. It decided that parallel import bans would not be reintroduced for sound recordings, books or computer software. However, the Government will continue to review the impact of parallel imports on those copyright products for the next three years.

The situation differs therefore from that which prevails in Australia. Legislation to enable the parallel importation of both books and computer software is currently before the House of Representatives.

Ladies and gentlemen.

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[4] *Copyright (Removal of Parallel Importation) Amendment Act 1998* (NZ).

As a final comment in this brief, positive study of the law, a feature of the Australia-New Zealand model is the existence of a dual system of adjudication.

Courts decide whether or not ‘a practice lessens competition (*per se* or subject to some statutorily specified competition test), and administrative bodies are required to decide if, exceptionally, a particular proposed practice would likely result in a benefit to the public that would outweigh any likely anti-competitive benefit’.[5]

Turning now to the issue of further and future cooperation on competition law and administration, I would just like to make a few points.

The first is that the development of closer economic relations between Australia and New Zealand is a process analogous to globalisation, and necessitates a regulatory response that transcends national boundaries. The benefits of a deep market integration between Australia and New Zealand would be increased by the further harmonisation of our respective competition regimes.

The second point follows from the first and is that respective courts are only able to use trans-Tasman powers in matters associated with ss.36A/46A (misuse of market power), 155A/98A (evidentiary and court processes) of the Commerce Act and Trade Practices Act respectively.

There is no reason why these powers should not be extended to apply to all competition issues, and is more important as trans-Tasman competition is relied upon to allow consumers choice. Such an extension would facilitate investigation in all trans-Tasman competition cases and could be made through some fairly minor changes to existing legislation.

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[5] Brunt, M.: loc. cit.

In fact, one could go further and give the courts on either side of the Tasman full jurisdiction under either Act. [6]

I believe that we create a better competitive environment by creating better competition law. Harmonisation should therefore be a matter for serious public and legislative consideration.

My final point is that we would benefit from closer administrative links between our respective competition commissions. There is existing cooperation, for example in the areas of staff and technical exchange, which I believe provides a solid basis for further development.

That said, a more formal arrangement could take the form a New Zealand Commissioner becoming an ex-officio members of the ACCC, and similarly, an Australian sitting, ex-officio, on the New Zealand Commission; increased staff transfer; and an enhanced exchange of information. A formal 'second generation' arrangement, such as that between Australia and the United States, would also be well worth considering.

This could be especially valuable in the regulatory areas of both Acts (that is, for access and pricing matters) where direct experience of others' laws and practices would be very useful.

3 The review of the Trade Practices Act

Ladies and gentlemen.

I now want to focus on the current discussion in Australia about changes to the competition provisions of the Trade Practices Act. The principles I want to canvass may have some relevance to the application of law in New Zealand.

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[6] For a full discussion see Spier, H.: *Australia-New Zealand – Competition Law and Administration – What Next From Across the Tasman and Beyond?*, Speech to IIR-New Zealand Competition Law Mastercourse, February 2002.

To the extent therefore, that you consider my arguments interesting and valuable, then you are welcome to repeat them as often as possible.

My view is that the review provides an opportunity to review the Act and to bring its competition provisions into line with best international practice. The review will also examine the processes whereby the Act is administered by the Australian Competition and Consumer Commission.

On this, New Zealand seems to be in advance of Australia. I understand that there already has been a lengthy debate here about criminal penalties, the effects test and about cease and desist powers.

To make the Act work better the Commission is seeking a number of changes.

Criminal sanctions and pecuniary penalties

The first change being sought by the Commission is the introduction of the possibility of there being criminal sanctions under the Trade Practices Act for hardcore collusion by big business.

Hardcore collusion in the form of secret price-fixing agreements, bid rigging and market sharing is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in some areas of the modern economy.

There has been a significant rise in international concern about collusion as reflected in recent resolutions by the OECD Council of Ministries concerning hard core collusion by big business, including apparent growing global collusion.

We believe that hardcore collusion is ethically objectionable, a form of theft and little different from classes of corporate crime that already attract criminal sentences. The possibility of criminal sentences is therefore appropriate for this kind of behaviour.

We should join the United States, Canada, Japan, Korea, now Britain and some other parts of the world in having criminal sanctions for collusion. In my view, it is only a matter of time before we do this. I hope we do it as a result of this review.

The Commission believes that the present system is not properly based. The penalty regime is based on imposition of pecuniary penalty and does not allow for criminal sanctions. Pecuniary penalties – or 'fines' - are not a deterrent sufficient to prevent 'hard-core' collusion by big business.

Given the nature and effect of collusion, this is not appropriate.

The view of the Commission is that the possibility of gaol is a far more effective deterrent for the wrongdoer who is considering wrongdoing – even more so, when leniency practices are working well.

Prior to 1993 the pecuniary penalties applicable to breaches of the Act were low. The maximum penalty per offence was $250,000 for a corporation and $50,000 for an individual. Moreover, in no case until then had the total penalty exceeded $250,000.

In 1993, the penalty was increased to a maximum of $10 million for a corporation for an offence and to $500,000 for an individual.

Shortly afterwards in early 1995, penalties of around $15 million were imposed on **TNT**, **Ansett Freight Express** and **Mayne Nickless** for conduct that occurred under the previous penalty regime (of $250,000 maximum).

Individual penalties were also imposed. For example, the CEO of **Mayne Nickless** was personally subjected to pecuniary penalties for behaviour prior to his becoming CEO.

$21 million fines were applied in 1995 under the new penalty regime to **Boral CSR** and Pioneer for price fixing for ready mixed concrete in South Eastern Queensland.

It could be argued that since 1993 penalties have risen sufficiently to deter hard core collusion.

It is now clear that the new fines, although having had a significant effect, are still not sufficient. There has been a considerable number of price-fixing cases since then:

- Australian executives were involved in the international vitamin price-fixing cartel well after 1993. Fines of around $26 million were imposed by the Federal court on the companies and executives
- There has been extensive price fixing in the power transformers industry. Fines of $20 million have already been collected and the case has not concluded at this point. The behaviour persisted until 1999 - that is, the behaviour persisted even after fines were increased.

In a recent judgment in the transformers matter[7], Justice Finkelstein stated:

> 'Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking, and certainly not conduct that involves turpitude…There are, however, important matters of which the sentencing judge should not lose sight.
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> 'The first is the gravity of an antitrust contravention. It is not unusual for anti-trust violations to involve far greater sums than those that may be taken by the thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society…
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> 'Secondly, there is a great danger of allowing too great an emphasis to be placed on the "respectability" of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to

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[7] *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559, at para.28.

do so.'

Tax cheats who defraud the Commonwealth of revenue maybe subject to criminal liability, depending upon the seriousness of their offence. Similarly, those who manipulate Australian stock markets may, upon conviction, be imprisoned. Why should executives who deliberately enter secretive arrangements to defraud their customers be treated any differently?

Aside from important considerations of equity in the law, criminal liability, including gaol, provides a deterrence not achievable under a civil regime. Work in the United States indicates that the optimal corporate fine would need to be extremely high if fines were to remove the prospect of profiting from participating in a cartel.

Because not all cartels are detected, to effectively deter a corporation from entering a cartel, the maximum fine should be six or seven times the profit arising from the illegal conduct.

Studies have calculated that had the optimal been imposed on more than 400 corporations founded to have participated in cartels in the US, it would have bankrupted more than 60 percent of the firms.

Let me give one example. It has been estimated that the total value worldwide of the commerce affected by the international vitamin cartel was in the order of $20 billion. Conservative estimates would imply a total gain to the three participants in that cartel of $1 billion - $2 billion.

Once the risks of detection is factored into the calculation, the optimal penalty is between $6 billion and $14 billion. Taking into account record penalties imposed worldwide and civil damages the participants have paid out in the order of $2 billion.

Executives have gone to gaol in the US for this cartel, but based on the penalties alone, you would have to ask whether the companies involved (and others observing from the sidelines) would think participation in the cartel was worth the risk.

Not only do large penalties jeopardise the continued existence of the majority of firms, they penalise innocent people - employees, shareholders and creditors.

Some have argued there is no evidence that criminal sanctions and the possibility of gaol will be more effective than pecuniary penalties. Of course there is no empirical evidence, how do you show that conduct that did not occur would have done had criminal sanctions not been in place.

Let me quote to you what James Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division said on a recent trip to Australia. When discussing the deterrent effect of gaol sentences he said:

> ‘Of course, it is not possible to quantify the undetected. That is, cartel behaviour that does not occur because it is deterred by the perceived risk of incarceration. However, it seems clear that when the risk of gaol is introduced into the equation, the conventional businessman’s risk/reward analysis breaks down, and it is that breakdown which is critical to the effective deterrent of anti-trust crime.’

I do not believe that the possibility of criminal sanctions should be of concern to the vast majority of businesses and business leaders in Australia.

Secret, unlawful collusion of a major kind is not the practice of the vast majority of Australian business.

When it occurs, however, it is very harmful, and business is most often the first victim. This is because in most price-fixing cases, the customer is a business, not a household consumer.

Most businesses regard price fixing as abhorrent.

Some businesses will argue that they are not opposed in principle to such a law, but they are concerned at the lack of safeguards.

This accurately describes my own view. I believe it essential that such provisions be accompanied by safeguards.

First, the forms of behaviour to which it would apply would need to be defined. For example, criminal sanctions would only apply to defined acts of collusion such as price fixing, market sharing and bid rigging agreements between big businesses. They would not apply to the rest of Part IV of the Act.

Secondly, proof beyond reasonable doubt would be required. At present the standard for Part IV of the Act is balance of probability.

Thirdly, the Director of Public Prosecutions, rather than the Commission, would conduct the case. Incidentally, New Zealand does not have a DPP system and instead has Crown Prosecutors. These are directed by agencies and do not act in the same way as a DPP. Of course, specific safeguards similar to those provided by the DPP could be built into any system.

Fourthly, the matter would be dealt with by a judge and jury, as the Constitution requires. For an indictable offence, that is an offence involving a gaol sentence of one year or more, a jury of twelve is required and, according, to High Court decisions, its verdict must be unanimous.

Finally, in the case of a guilty decision, a judge would then decide at his or her discretion whether or not someone should be fined or jailed.

Section 46

I now want to turn to how section 46 can be improved. Section 46 of the Trade Practices Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into any market
- deterring or preventing a person from engaging in competitive conduct in any market.

The purpose of s.46 is to prevent firms with substantial market power from engaging in illegitimate anti-competitive conduct. Situations in which it may arise include: predatory behaviour; refusal to supply in an anti-competitive manner; the illegitimate leveraging of market power in one market to damage competition in another market; and some vertical practices.

This provision, which is similar to laws in New Zealand, in North America and in Europe, is intended to steer a balance between preventing illegitimate anti-competitive conduct and not deterring genuine pro-competitive conduct.

Effects test

The Commission also believes that the introduction of an effects test in s.46 would improve the effectiveness of trade practices law.

Similar prohibitions against monopolisation or abuse of dominance in the United States, Canada and the European Union all focus on effects as the ultimate issue.

Australia is different. And so is New Zealand, which, in this matter, has a similar gap to Australian in the law.

In other countries effects is a normal test and is not the subject of controversy.

The reason is that competition law is seen to be about protecting the process of competition in the modern economy.

It is about economics, about the economic effects of certain behaviour, about the harm to the economy from anticompetitive conduct.

The general approach to competition law around the world is that it is concerned with outcomes rather than just the purposes of behaviour.

The Trade Practices Act is an economic statute expressed through the use of legal instruments.

The concern of economic policy is with the effects of behaviour.

If a firm with substantial market power goes too far in terms of illegitimate anti competitive behaviour - takes advantage of that power and causes anti-competitive effects – and causes damage to competition, then such behaviour should be prohibited.

To put this another way: if a dominant firm seriously damages the competitive process with illegitimate behaviour of the kind proscribed in the Act, then, unless purpose can be shown, such behaviour is not unlawful - no matter the harm to competition.

It is difficult to see why this section of the Act should be limited to conduct that has an anti-competitive purpose – others sections are concerned with the purpose or effect of behaviour. In addition, jurisdictions in Europe and in the United States are generally concerned with effects.

Section 46 gives legitimate protection to new entrants to industries dominated by major businesses. Moreover, in my view, such protection is legitimate and appropriate since it is limited to anti competitive behaviour harmful to competition.

Would an effects test dull competition?

This question is not a matter of argument in Europe or North America.

Section 46 is written with ample safeguards to protect legitimate competitive conduct.

Indeed, it has been designed and drafted so as to not compromise vigorous, legitimate conduct. Cases, in practice, are hard to bring and are hard to win.

The High Court's view on this matter is very clear. This section is about protecting competition and interests of consumers. I believe that this would not alter with the introduction of an effects test.

In fact, the competitive process would be helped by the addition of an effects test.

As a final point on s.46, the Commission's view, as I have already mentioned, is that Australian law would be improved by the introduction of cease and desist orders, similar to the provisions enjoyed here in New Zealand.

4 Accountability and reporting to the public

Ladies and Gentlemen.

Two criticisms made of the Commission are that we are not accountable and that we conduct too much of our business in eye of the public.

I believe that of the best mechanisms to be accountable is to answer the media's questions as much as possible. Let me explain a little of the Commission's approach to both publicity and accountability.

The first reason for the Commission providing information to the media is that it helps keep the public informed about an important law, the Trade Practices Act - its operation in practice, and the role of the Commission in relation to the Trade Practices Act in particular.

There is clearly a need to inform everyone, the public, small business, large business, and consumers of their rights and obligations under the law and of how the Commission applies the law. Besides being a form of education, the provision of information to the media helps to promote confidence in the law and its administration,

and is also a form of accountability. It has long been recognised that the public has a basic right of access to the courts. Similarly it has a basic right of access to knowledge about the activities of a law enforcement agency.

Many judges have commented on the need for fair and accurate coverage of cases. Journalists have the role of informing the public of how justice is administered. The court audience extends far beyond those in the courtroom and it is important to alert potential offenders as to what may await them. In addition, there is a substantial public interest in the enforcement activities of regulators, all of which buttresses the need for open court proceedings and media releases.

This is a proposition recently expressed by the Victorian Supreme Court in Australia:

> 'Since everybody cannot visit (a courthouse), citizens in a democracy depend to a substantial extent upon accurate and published reporting of what takes place in an open and truly democratic society, the right of various forms of the media to be present (at court proceedings) and publish is generally regarded as being in the public interest…'[8]

More generally, outside a courthouse, the availability of accurate information makes it possible for citizens to discriminate on important issues and act to their own benefit - and to the benefit of their fellows.

Not only does the provision of information promote public understanding, it also enables public discussion, including critical discussion and debate of the Trade Practices Act and its administration, which in turn helps improve the law.

There are a number of adverse consequences that would result if the regulator failed to provide this kind of information to the public. Essentially the public would be poorly informed because the media and other sources of information to the public would perform the task poorly. The issues are often rather complex and technical. Sometimes

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[8] *Herald and Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 9 per Hedigan J at 278-9.

its work is done in private or with few observers present. Even when its work is done fully in public it is often unclear to reporters what is happening (for example during court hearings the communication between advocates and the court is often technical or cryptic and difficult to comprehend). Moreover the media, on its own, is frequently incapable of understanding and reporting accurately, given limited time and resources. They need help and this is provided through media releases, media conferences and other forms of communication. Also, as noted later, interest groups often disseminate biased or inaccurate information.

The second reason for communicating to the media is that it helps promote compliance with the law and the achievement of desirable economic objectives such as a more competitive economy characterised by a greater degree of fair trade. This is a fundamental objective of the Trade Practices Act and for that to happen compliance is needed. Explaining the law and illustrating its various uses and applications spreads the word amongst business and consumers and helps bring about lawful behaviour and helps to eradicate unlawful behaviour. It also shows those who fail to comply with the law that there could be a heavy price to pay.

The unfavourable publicity surrounding those who breach the law is a further means of inducing other firms to comply rather than face such publicity themselves.

A third reason is that publicity helps build a general culture, understanding and support of competition and understanding of and support for the law and its administration and, more generally, for the application of competition policies across the whole economy. It also promotes discussion on critical evaluation of competition policy generally (since there is more to competition policy than competition law.)

The fourth reason for communicating with the media is that it counters the tendency of many businesses to provide misleading information publicly and privately about how the law works. There is a systematic tendency for businesses, often behind closed doors, to give inaccurate and biased information to politicians about the workings of the law, sometimes in the hope of getting it changed or weakened by legislative amendment or a reduced budget for the regulator. Often the regulator does not know

what is being said to politicians, bureaucrats and other important decision-makers behind the scenes. Accurate publicity about the regulator's actions is an important antidote.

Moreover, I see no problem whatsoever in countering, in public, arguments that have been made by self-interested parties or agents or organisations, often very well funded, and often not overly concerned with presenting a balanced and accurate account of an issue.

Finally, on occasions publicity directly assists in the proper and effective enforcement of the law. Sometimes an announcement that an issue is being investigated brings forward new witnesses who help get to the truth.

Ladies and gentlemen.

Contrary to business claims, the Commission is highly accountable. As well as explaining our actions to the Australian public, we are required to prove our case in court, and we are answerable to parliament.

We cannot affect anyone's legal rights against their will. We are in the Federal Court in 72 cases. In is a fact that most of those CEO's complaining about us are fighting us in court: the **Commonwealth Bank** over alleged unconscionable conduct; **Qantas** over alleged misuse of market power; **Woolworths** over a couple of matters.

Harvey Norman unsuccessfully took us to court over our investigations.

We expected the oil companies to challenge us over raids we made on their premises, but they chose not to – we had Queen's Council's opinion that the raids were justified.

Recently we rejected the **API/Sigma** proposed merger authorisation application. We thought it would harm competition to have a market share of over 60 per cent in NSW, Queensland and Victoria and, combined with the share of their competitor **Mayne Nickless**, 90 percent.

The benefits of the merger were not large. Are we accountable? Yes, they may appeal to the Australian Competition Tribunal.

As well, the Commission is accountable to many Parliamentary Committees; to Ministers in a general sense, though we are independent; to the Ombudsman when there are complaints; and to the Australian Administrative Tribunal.

In s.28 of the Act, Parliament formally provides for the Commission to make general information about the Act available to those engaged in trade or commerce, the general public, and consumers.

In addition, the GST legislation explicitly provided for the release of public notices by the Commission (quickly dubbed shame notices) in instances where we considered that overcharging was occurring under the GST.

There are also adverse publicity orders authorised by the Court.

By publicising details of our activities, the Commission explains actions against those alleged to have breached the Act and those penalised by the courts for breaches, and detailed court enforceable orders to prevent any future breaches.

To provide information the Commission engages in a discourse on a number of levels.

Comment by the Commission about investigations (which is very rare as I explain below) or cases is unpopular with the businesses. Some claim this should not happen and that it is 'trial by media'.

It is not.

The public is entitled to know.

It is also an intrinsic part of accountability.

It is also not ‘trial by media’ to report the commencement or outcome of a trade practices case at court. The Courts have said this often.

Public discussion leads to a clearer understanding of important issues. That said, the Commission however, is careful in its handling of investigations. We think procedural fairness essential.

As a general rule, when there is an investigation or when there is a complaint made to the Commission against a particular company by a person or a competitor, the Commission does not make that matter public. Sometimes the complainant does. Occasionally there is a leak from within a firm, which wants to make matters public for reasons of its own. Occasionally, when the Commission is conducting investigations, people who are being questioned let the press know. These are matters the Commission does not control.

Out of 365 media releases last year, only one per cent related to investigations. Of the one per cent, all but one concerned investigations made public by whistleblowers or by Ministers who referred issues to us.

Oil Company Walk In

Regarding the recent oil company walk in, there has been some misinformation. The facts are that a whistleblower contacted the Commission last year with information of concern. The Commission advertised for the whistleblower to come forward without disclosing which industry was concerned. The whistleblower provided some information including documents. The whistleblower contacted the Commission again by letter. This letter was copied to *The Daily Telegraph,* which wanted to publish and told us so. The Commission requested *The Daily Telegraph* not to publish until further notice from the Commission. The Commission conducted its walk in, then afterwards during the morning told *The Daily Telegraph* that it withdrew its request for non publication. *The Daily Telegraph* requested and was given some basic and factual information about the walk in. It also requested a photo. The walk in had already

occurred.

Contrary to claims by many business people such as the Australian Chamber of Commerce and Industry, no photographers or cameras were present at the walk in. However, *The Daily Telegraph* was advised that staff would be returning during the afternoon from the **Caltex** head office to the nearby Commission office. They took a photograph of them bringing back boxes containing Commission material and when the photo appeared there was a caption which may have left the impression the boxes contained Caltex material. At no time was *The Daily Telegraph* told nor was it implied or suggested that the boxes contained Caltex material. The boxes removed from various sites later in the day and on other days contained Caltex material but those particular boxes did not. Caltex has chosen to criticise the Commission not *The Daily Telegraph* for the caption.

One matter which surprised the Commission was that there was no challenge by the oil companies to the Commission raid. The Commission cannot investigate under the Trade Practices Act unless it has reason to believe there may have been a breach of the law. The Commission formed the view that this precondition for the walk in had been satisfied. More than that, it took the matter to independent Counsel, an experienced QC who gave us his independent opinion that the walk in was justified.

We expected a challenge from the oil companies. There have been many challenges to the use of our powers. We have won nearly all of them. But we were still surprised that the oil companies chose not to challenge us but instead later to conduct a public relations campaign about the caption concerning the boxes.

Caltex claims that its reputation has been harmed. The fact is that the public is well able to distinguish between investigations, allegations and Court verdicts and knows that an investigation does not mean that someone has broken the law.

If oil companies have a bad reputation with the public, this is not the fault of the Commission. It is the fault of the oil companies. There have been strenuous efforts in recent weeks mainly by Caltex to put the blame on the Commission for their reputation

with the public.

Should there be oversight of the Commission?

There have been suggestions that the Commission needs oversight. There have been particular suggestions that the Chairman in some fashion makes the decisions and that these need oversight. This is based on misconceptions. Prior to 1974 there was a single Commissioner, Mr Bannerman in charge of competition law enforcement. Partly in recognition of the issues that can be raised when there is one person responsible, it was decided to establish a Commission. There are currently five Commissioners including myself. All are independent. We meet frequently, debate and vote on issues. The Act makes clear that issues are to be decided by majority vote of the Commissioners. The decisions generally reflect the summation of the collective views of individual Commissioners.

It is true that there is a Board of Review of the Commissioner of Taxation but the Taxation Commissioner is not part of a Commission but a single decision maker. Moreover, the Board is purely advisory. In addition the Taxation Commissioner's decisions are of a different kind to those of the Commission. Those decisions are binding although they can be appealed to a Court.

There are obvious problems with an Commission Review Board. What would it do?

Overrule Commission decisions? Resolve disputes with firms rather than have them go to Court? Would it consider complaints or objections to our decisions by customers or consumers, for example, say a consumer opposed a bank or retail or oil company merger, could they take it to the Board? Who would be the members - business people with potentially conflicting interests? Small as well as big business? Farmers? Consumers? Or would it be just another set of expert independent people like the Commissioners (presumably people who do not have active interests as consultants for business)? Would this not create another layer of bureaucracy? Isn't this just an attempt to nobble the Commission which is already highly accountable to the Courts? What is wrong with the Commission's Consultative Committee, which meets regularly

and is well attended by business people, although I note that neither the President nor more particularly Executive Director of the Business Council of Australia have attended for the last five years despite invitations which are sent to the Executive Director, unless as happened for a time, the Director diverts them to other staff.

5 Conclusion

Ladies and Gentlemen. I want to conclude on this note.

Clearly, there is a strong similarity between our respective competition laws. By disposition and history, we have bodies of law that are developing an almost perfect congruence.

This is something I welcome.

In addition, however, there are ways to make our law work better. And on this I would welcome closer links and closer cooperation.

In Australia, I believe that the Commission faces an important and busy year. I understand that the review is of considerable importance. However, I also believe that it is essential the Commission pays close attention to our normal and usual business, which is the firm and proper enforcement of Australia's competition law.

And this, I want to assure you, is our exact intention.

Thank you for your time tonight.