ROOTS, BRANCHES AND OTHER OBJECTS– ONE STEP BEYOND THE HARPER REVIEW?

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The Harper Review Panel is currently finalising its "root and branch" review of the Competition and Consumer Act 2010, having made a series of draft recommendations for significant changes to its competition provisions. It has not explicitly revisited the object of the Act as specified in s 2, although its Terms of Reference and Draft Report contain various statements as to the objects and purposes of the Act's competition provisions. Given the wide-ranging nature of the Harper Review and the Panel's related proposals for reform, and tensions between some objects and some provisions, this article advocates the need to revisit the primary objects clause in the Act and specify the object(s) of its competition provisions with greater clarity to facilitate their effective future operation.

INTRODUCTION

The Harper Review Panel was required by its terms of reference[1] inter alia to examine the competition provisions of the *Competition and Consumer Act 2010* (CCA) to ensure that they are driving efficient, competitive and durable outcomes, and recommend legislative reforms to achieve competitive and productive markets throughout the economy and thereby improve the economy and welfare of Australians.

The Panel made a series of draft recommendations in relation to the competition provisions of the CCA in September 2014 and will deliver its final report by March 2015. It was not asked to revisit the object of the CCA as specified in it, and accordingly has not suggested any legislative change to it. Given the wide-ranging nature of the Review, the Panel's related proposals for reform, and the opportunity presented by them, this article explores whether the primary objects clause in the CCA should itself be reframed, and/or whether the object(s) of the competition provisions of the CCA should be separately specified.

THE OBJECT OF THE CCA

As the Federal Government is considering tinkering with everything else, it should in the author's view also consider whether the currently specified object of the CCA remains fit for purpose. That object is currently as set out in s 2 as follows.

> *to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*

The section was introduced in the *Competition Policy Review Act 1995* as part of the Hilmer reforms which expanded the then Act's coverage and extended its application more broadly across the economy, business and government.[2] The relevant Explanatory Memorandum and Second Reading Speech are not informative as to construction of s 2, as they do no more than restate its

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1 Harper Review Panel, *Competition Policy Review Draft Report* (September 2014) Appendix A, pp 300-302 at http://www.competitionpolicyreview.gov.au (Draft Report).

2 Hilmer FG, Rayner MR and Taperell GQ, *National Competition Policy: Report by the Independent Committee of Inquiry* (Australian Government Publishing Service, Canberra, August 1993) (Hilmer Report). In *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at [15] the High Court observed that the object of the Act was the same before 1995, and would have been the same afterwards if s 2 had not been inserted.

terms. It might, however, be noted that in the latter Senator Crowley made the following more general observations.

> *It is important to understand that this Government is not interested in reform or competition for its own sake. The package recognizes that economic efficiency is one element of a broader public policy context which also includes social considerations. Explicit recognition is given to these broader elements of the public interest in the bill and in the Competition Principles Agreement. The package gives appropriate recognition, not only to competition and efficiency considerations, but to all the other policy objectives which governments must balance in making policy decisions, such as ecologically sustainable development, social welfare and equity considerations, community service obligations, and the interests of consumers.*

More specifically in relation to the competition provisions of Pt IV of the then Act, the Hilmer Report concluded that the appropriate role for them was the protection of the competitive process, and hence economic efficiency and the welfare of the community as a whole, rather than the conferral of benefits on particular sectors of society, be they consumers or competitors[3]. No separate objects clause was inserted for Pt IV.

WHY OBJECTS MATTER

Why does the stated object of the CCA matter? First, because although the meaning of a word or phrase in an Act is ordinarily the literal or grammatical meaning, that must be informed by the consequences of a literal or grammatical construction and the purpose of the Act and its provisions: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] and [78] per McHugh, Gummow, Kirby and Hayne JJ.[4] Section 15AA of the *Acts Interpretation Act 1901* makes it clear that a construction which promotes the purpose or object of the CCA is to be preferred to a construction which would not.

The courts have to date not explicitly construed s 2, but have sought to adopt a construction of the substantive sections in issue which achieves the object specified in it.[5] For example, in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 429 [159]-[160], Gaudron, Gummow and Hayne JJ explicitly acknowledged that the provisions of Pt IV are to be interpreted in accordance with the CCA's general s 2 object of enhancing the welfare of Australians through the promotion of competition, and that Pt IV is concerned with the protection of competition, not competitors. On the other hand, some judges have focussed in particular of the interests of consumers: *O'Keeffe Nominees Pty Ltd v BP Australia Ltd* [1990] ATPR 41-057 at 51,741 per Spender J, and *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at [383]-[387] per Kirby J.

There are tensions in construing the CCA which require the courts to be mindful of its object(s), first between principles of stricter construction of penal statutes and broader construction of protective and remedial legislation to effectuate its purposes. Thus, for example in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 (*Devenish*), Mason CJ at 43-45 (in dissent on the ultimate outcome) concluded that s 45D (1) should be construed to give the fullest relief which the fair meaning of its language will allow notwithstanding penal exposure.

Secondly, there is a tension between on the one hand construing remedial legislation broadly to protect consumers, and the principle more directly protective of business interests that provisions of the CCA intended to govern and affect business decisions and commercial behaviour should, if such a construction is fairly open, be construed to enable the business

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[3] Hilmer Report, n 2, p 26.

[4] See also *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (Gleeson CJ and Callinan J) at 62 [8].

[5] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at [64], *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 24 [70]-[78] (Kirby J); and *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447 at 533-534 (Burchett J).

person, before he or she acts, to know with some certainty whether or not the act contemplated is lawful.[6]

Thirdly, there is a tension between on one hand an object of fostering competition, and on the other particular provisions which focus in their literal terms on competitors, and/or which proscribe conduct in strict terms without regard to substantive competition or competitive effects.

Fourthly, there is a tension between the generally stated object of the welfare of Australians and implicit objective of economic efficiency, and differing views of what welfare standard should apply and what efficiency is, for example contention as to the scope of public benefits, the role of net social benefit and the use of private profitability as opposed to natural monopoly test of what is uneconomical[7] in access and authorisation jurisprudence.[8]

Finally, the Draft Report sensibly recommends[9] expanded power to the ACCC to grant exemption (including for per se prohibitions) if satisfied that proposed conduct is unlikely to substantially lessen competition or is likely to result in a net public benefit, and a block exemption power based on UK/EU law to supplement the authorisation and notification process. This would be supported by consistent recasting of the CCA's general objects clause and/or the introduction of objects clauses specific to Pts IV and VII.

REVISITING THE CCA'S OBJECT

What then does the current objects clause of the CCA mean and how should it be expanded, constrained or otherwise refined to facilitate the proper construction and efficient administration and enforcement of the competition provisions of the CCA? Should they have their own specified object or objects, particularly where those objects have been in part stated and in part assumed in the terms of reference for and draft report of the Harper Review Panel?

Extrinsic material can of course be used to assist construction, but only to confirm the ordinary meaning conveyed or to determine meaning if the provision is ambiguous or obscure or ordinary meaning leads to a result that is manifestly absurd or is unreasonable: *Acts Interpretation Act 1901*, s 15AB. In any event, the extrinsic materials from 1995 relating to current s 2 are not directly informative, and explanatory memoranda, second reading speeches and the like on the introduction of any Bill implementing Harper reforms are equally likely to be politically driven and lack the specificity and discipline which redrafting the objects clause could provide.

The current object of the CCA is simply to "enhance the welfare of Australians", through the three specified means of promoting competition, fair trading and consumer protection which were addressed originally in Pts IV, VII and VIII, and Pt V, respectively. There is no differentiation or reconciliation of consumer and business interests or different types of consumers or businesses in s 2, no identification of whether "welfare" is intended to mean consumer welfare or total welfare, and no clarity as to whether it encompasses only economic welfare (and if so which measure and how are efficiencies to be measured).[10] One is also left,

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[6] See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at [8] (Gleeson CJ, Gummow, Hayne and Callinan JJ); and *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 at 403, 406.

[7] See *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

[8] There is less tension between the general s 2 object and the access provisions in Pt IIIA (which was introduced at the same time as s 2) as the object of that Part is specified more precisely in s 44AA. The authorisation/notification provisions of Pt VII (which are of course intrinsically linked to Pt IV) have no separate objects clause; see eg *Re Qantas Airways Ltd* [2004] A Comp T 9 at [177]-[178].

[9] Draft Report, n 1, section 3.14, pp 52-53.

[10] Economic efficiency is often not stated but presumed to be the primary goal of competition law and policy. As it comprises allocative efficiency, productive efficiency and dynamic efficiency, one needs to consider how they are to be weighed in relation to each other in modern markets. A focus on efficiency is quite different from considering whether consumers pay too much.

given the second reading speech, pondering the extent to which it was also intended to encompass some broader notion of social welfare introducing moral overtones.[11]

As the focus here is on the competition provisions of the CCA, the "fair trading" and "consumer protection" aspects of the objects clause reflected in Pt V and its successors and supplements in the unconscionable conduct provisions and otherwise in the *Australian Consumer Law* (ACL) can be put to one side. Relevantly the object is to enhance (some form of) welfare for (presumably all) Australians "through the promotion of competition". There is no distinction between competition and competitors, no specification or prioritisation of fair competition as opposed to unfair competition, and no focus on protecting or enhancing the competitive process or related efficiencies or encouraging innovation.

This might not matter if the relevant substantive provisions were clear in their terms and had been interpreted consistently. But that is not the case, particularly in relation to s 46 with its literal focus on harming competitors rather than the competitive process and s 4D with its variable application.[12] It also matters because of the overreach and potential for overreach of current per se prohibitions on third line forcing,[13] resale price maintenance[14] and cartel conduct.[15] With various changes to those substantive prohibitions being suggested in the Panel's Draft Report, the scope of the objects clause should likewise be revisited.

Enhancing welfare by promoting competition may seem a straightforward and meritorious object, but what is "welfare" intended to mean, what is the yardstick by which it is evaluated, and what form of "competition" is to be promoted?

WHOSE WELFARE?

Internationally, competition legislation and regulation varies as to explicit and implicit consideration of "welfare" and what it means.[16] Most regulators consider "consumer welfare" the most relevant yardstick, and a majority are directly bound by statute to promote "consumer welfare".[17] However, many do not agree on what "consumer welfare" comprises, with Australia's ACCC acknowledging that the term has a variety of uses and meanings; in static analysis it is synonymous with consumer surplus, but in dynamic analysis it is more closely aligned with total surplus (i.e. consumer and producer).[18]

Although a majority of international competition authorities focus primarily on consumer surplus, half consider total welfare in addition to consumer welfare and debate continues as to

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[11] The morality of competition law is a large topic necessarily beyond the scope of this article, but relevant nevertheless to any root and branch review. Moral overtones intrude, for example, when the importance of small business is trumpeted and monopolies are considered inherently bad and exploitative, while in a dynamic real world economy above normal returns motivate innovation and improved living standards. See eg Tucker J, "Controversy: Are Antitrust Las Immoral?" (Spring 1998) 1 *The Journal of Markets & Morality* 75 at 77, and Chen DL, *Markets and Morality: How does Competition Affect Moral Judgment* (Duke Law School, October 2011) http://www.economicscience.org.

[12] Reid B "Section 46-A new approach" (2010) 38 ABLR 41, and Wylie IS, "What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond" (2007) 35 ABLR 33.

[13] Wylie IS, "Not that Old Chestnut Again – Third Line Forcing under the Competition and Consumer Act 2010" (2011) 19 CCLJ 18.

[14] Subject to rule of reason analysis in the United States: *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007).

[15] Wylie IS, "Cartel Output Restrictions – Construction and Common Sense Collide and Particularity of "Persons" under the Trade Practices Act 1974" (2010) 38 ABLR 23.

[16] International Competition Network Discussion Document, *Competition Enforcement and Consumer Welfare* (10th Annual Conference, The Hague, 17-20 May 2011) available at http://www.internationalcompetitionnetwork.org/uploads (ICN Survey).

[17] ICN Survey, n 16, p 90.

[18] ICN Survey, n 16, p 18.

what is the appropriate competition law standard.[19] A majority of authorities state that they prefer a long term dynamic approach to short term static approach, and consider intermediate consumers and not solely the welfare of ultimate end users.[20] The European Union and Commission differentiate the definition of "consumer" in consumer protection laws from its meaning in competition law where it encompasses all users including wholesalers, retailers and final consumers.[21] Accordingly, although they apparently focus on a consumer welfare standard, they consider economic benefits for society as a whole, not only or primarily for final consumers.[22]

Where healthy competition exists, consumers eventually benefit from improvements in total welfare, but the two standards can conflict, particularly when considering issues of market power and its use and depending on whether one takes a static or dynamic approach. Simplistically for example from a static viewpoint monopolies are inherently bad and result in higher consumer prices, but from a dynamic viewpoint they come and go, having created value which incentivises further innovation and having delivered consumers more and better choices and products.

As a matter of literal construction it is arguable that "welfare of Australians" incorporates a total welfare standard as both consumers and producers (and intermediate consumers) are "Australians". Australian Courts have not been explicit, but the Australian Competition Tribunal has applied a total welfare standard in the context of Pt VII/authorisation, albeit with the caveat that the weight to be given to benefits varies to the extent that they are not shared by the community generally.[23]

If on the other hand a "consumer welfare" standard is intended, as appears to be the focus of the ACCC and Harper Review Terms of Reference and Draft Report, should it not be explicit? And if so, would it not be desirable to specify what "consumer welfare" is intended to connote? Courts in the United States have reached inconsistent results based on differing conceptions of consumer welfare,[24] and the legislature here should consider what it intends to promote beyond simple economic efficiency, and to what extent. Although the Review's Terms of Reference and Draft Report are replete with references to consumer welfare in various guises, the term remains the most abused and uncertain term in modern antitrust analysis.[25] Our legislature should make explicit what it means.

WHAT COMPETITION?

As all roots and branches of the CCA are being examined, it cannot be assumed that "competition" is always efficiency-enhancing or necessarily otherwise a good thing economically, or indeed morally. The current objects clause proceeds literally on the basis that competition is an end in itself, when it can in fact reduce efficiency, most obviously in the event of market failure.[26] Even cartels (which in the views of most unambiguously reduce economic welfare) can in particular circumstances be efficient and pro-competitive,[27] for example export cartels, sports leagues, industry associations and cartels where there are environmental problems or a common property resource to be shared.

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[19] ICN Survey, n 16, p 81.

[20] ICN Survey, n 16, p 90.

[21] Guidelines on the application of Art 101(3) of the *Treaty on the Functioning of the European Union* (and Art 81(3) of the *Treaty No C 101* of 27 April 2004) (Art 101(3) TFEU)

[22] Joined Cases C-501, 513, 515 and 519/06P, *GlaxoSmithKline Service Unlimited v Commission* [2009] ECR I-9291 at para 63; see also Mombers AEM, *The Goals of EU Competition Law from a Moral Point of View* (Universiteit Utrecht, 20 November 2013) pp 28-30, at http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/LRM-thesis-Arne-Mombers.pdf.

[23] *Re Qantas Airways Ltd* [2004] A Comp T 9 at [166]-[190].

[24] Stuckey ME, "Reconsidering Antitrust's Goals" (2012) 53 *Boston College Law Review* 551 at 573.

[25] Hovenkamp HJ, *Federal Antitrust Policy: The Law of Competition and Its Practice* (4th ed St Paul, MN: Thomson Reuters, 2011) p 85; Stuckey, n 24 at 571 and the various papers and authorities there cited.

[26] See eg *Re Australian Association of Pathology Practices Inc* (2004) 180 FLR 44 at [32]-[40].

[27] Veljanovski C, "Efficient Cartels. Oxymoron or Economic Oversight?" in *Case Associates Casenote* (19 May 2014) http://www.casecon.com/wp-content/uploads/Casenote-Efficient-Cartel-May-2014.pdf.

Without defending cartels, one needs for example to consider where to draw the line in competition policy and enforcement in a world of global warming, energy and other resource shortages and other environmental problems. The tension is demonstrated in the EU which includes within its notion of consumer welfare socio- political characteristics including environmental protection, while the guidelines on Art 101(3) of the *Treaty on the Functioning of the European Union* (TFEU) imply environmental protection's inferiority to efficiency gains.[28] On the one hand, the EC recently permitted a restrictive agreement between washing machine producers and importers to discontinue inefficient machines despite the adverse effect on competition and increased prices (the most polluting machines were the least expensive), while on the other it is challenging as anticompetitive Honeywell and DuPont's cooperation in the development and production of the only currently compliant environmentally-friendly refrigerant for car air conditioning systems.[29]

In introducing the Hilmer reforms in 1995, Senator Crowley recognised the significance of ecologically sustainable development, social welfare and equity considerations, but the objects clause did not, at least explicitly. Twenty years later, and given no separate objects clause for Pts IV or VII, the objects clause of the competition provisions of the CCA should be more nuanced than the bald and unqualified "promotion of competition".

However, assuming for present purposes that fostering "competition" per se is a non-negotiable given, we should at least know what form of "competition" is to be fostered. It is to be remembered that it was not until after Sir Garfield Barwick advocated restrictive trade practices legislation[30] in the 1960s that free enterprise-based antitrust principles assumed pre-eminence in Australia, and for him free enterprise was not at heart an economic arrangement but a moral force.[31] Fifty years later the economic (and moral) benefits of "competition" are readily assumed, but most now agree that approach has limits. Unbridled "competition" does not even sit comfortably with the presumed wisdom of those teaching Australia's next generation who go to considerable lengths to discourage "competition" in schools and sporting and other social arenas, presumably with some moral basis or social objective.

Of course perfect competition does not exist (aside perhaps from occasionally on the sporting field). In the 1960s when Sir Garfield Barwick was advocating free market competition legislation,[32] United States courts applied their antitrust laws expansively. Real market divergences from the model of perfect competition were viewed suspiciously and often subject to prosecution,[33] with the effect that decisions were sometimes more directed to protecting small businesses than protecting competition. However, the United States progressively thereafter identified the incoherence of confusing competition with small business protection. By 2007 it had long recognised not only the primacy of protection of competition, not competitors, but also that antitrust law should generally avoid per se illegality as procompetitive justifications can exist for much business conduct, and that dynamic analysis of competitive effects is required.[34]

In Australia, although the object of the CCA has since 1995 encouraged the promotion of "competition", some sections, in particular s 46, in their literal terms do not. Australian

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[28] Mombers, n 22, p 30.

[29] Veljanovski, n 27 and European Commission, "Commission Sends Statement of Objections to Honeywell and DuPont Regarding Cooperation on New Refrigerant Used in Car Air Conditioning Systems", *Press Release* (Brussels, 21 October 2014) at http://ec.europa.eu.

[30] Barwick QC G, "Some Aspects of Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies" (1963) 36 ALJ 363.

[31] Marr D, *Barwick* (Allen & Unwin, 1980) p 185. It was not until 1974 that a predominantly US-based enforcement model was introduced by then Attorney-General Lionel Murphy in the *Trade Practices Act 1974* (Cth).

[32] Most economists support free markets, but only up to a point, typically and circularly only so far as they adhere to the idealised conception of perfect competition: White MD, "A Kantian Critique of Antitrust: On Morality and Antitrust" (2007) 22 *Journal of Private Enterprise* 161, at http://journal.apee.org/index.php?title=Spring2007_7.

[33] Gellhorn E, Kovacic W and Calkins S, *Antitrust Law and Economics* (5th ed, St. Paul, MN, West Academic Publishing, 2004) p 105.

[34] Garza DA et al, *Antitrust Modernisation Commission Report and Recommendations* (2 April 2007) pp 34-42, at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

governments have remained as beholden to the small business lobby (and accordingly to the protection of "competitors") as they were when s 46 was introduced in its various iterations. Equally the CCA retains a large and recently expanded[35] suite of per se prohibitions which make little allowance for procompetitive justifications, dynamic modern markets or competitive effects. No United States style rule of reason analysis is permitted or proposed, and the authorisation and notification processes are overly complex and costly.[36]

SO WHAT WAS THE GOVERNMENT THINKING?

Do the Harper Review's Terms of Reference provide the necessary framework to recast the objects clause or introduce one specific to Pt IV? The relevant objects and purposes of the competition provisions which were articulated in the Terms of Reference[37] are extracted below.

- *to ensure that they are driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets …*
- *to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future …*
- *to improve the Australian economy and the welfare of Australians …*
- *to achieving competitive and productive markets throughout the economy …*
- *no participant in the market should be able to engage in anti-competitive conduct against the public interest within that market and its broader value chain …*
- *realisation of fair, transparent and open competition that drives productivity, stronger real wage growth and higher standards of living …*
- *effective in protecting and facilitating competition, provide incentives for innovation and creativity in business …*
- *ensuring that the CCA appropriately protects the competitive process and facilitates competition …*
- *support the growth of efficient businesses regardless of their size …*
- *to encourage reasonable business dealings across the economy – particularly in relation to small business …*
- *in emerging markets and across new technologies, particularly e-commerce environments, to promote entrepreneurship and innovation …*
- *having regard to the impact on long-term consumer benefits in relation to value, innovation, choice and access to goods and services, and the capacity of Australian business to compete both domestically and internationally …*
- *key markets – including, but not limited to, groceries, utilities and automotive fuel – … to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains …*
- *promote competition and productivity …*
- *ensure a fair balance between regulatory expectations of the community and self-regulation, free markets and the promotion of competition.*

AND WHAT DID THE PANEL DO?

It focussed on the long term interests of consumers (without defining them), and identified[38] in particular two forces that will influence whether the CCA is fit for purpose:

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[35] For example the cartel prohibitions in Pt IV, Div 1 introduced from 24 July 2009.

[36] Draft Report, n 1, p 52. Thirty years after introduction of what became the *Competition and Consumer Act 2010* the ACCC received its first application for authorisation of resale price maintenance, notwithstanding that procompetitive justifications and effects of that practice have long been advanced: ACCC, "ACCC Proposes to Conditionally Authorise Minimum Retail Prices on Festool Power Tools", *Media Release 256/14* (21 October 2014) at http://www.accc.gov.au.

[37] Draft Report, n 1, Appendix A.

[38] Draft Report, n 1, p 4.

- the rise of Asia and other emerging economies, requiring a heightened capacity for agility and innovation to match changing tastes and preferences and laws, and
- new technologies "digitally disrupting" the way many markets operate, requiring competition law that does not unduly obstruct their impact while preserving traditional safeguards for consumers.

In making a series of recommendations for change to the substantive competition provisions of the CCA, the Panel focussed on[39] whether they:

- focus on enhancing consumer wellbeing over the long term;
- protect competition rather than protecting competitors;
- strike the right balance between prohibiting anticompetitive conduct and not interfering with efficiency, innovation and entrepreneurship, and
- are as clear, simple and predictable as they can be?

Notably in relation to mergers the Draft Report rejected mooted expansion of market definition to include consideration of global markets, while contemplating amendment to the scope of "competition" to include competition from potential imports.[40] In doing so it stated that "the objective of the CCA is to protect and promote competition in Australian markets" and that "the CCA is concerned with the economic welfare of Australians … for the benefit of Australian consumers … the purpose of the competition laws is to enhance consumer welfare".[41] It then rejected the need to encourage "national champions" in Australia's small economy in the context of modern global markets based on historical analysis concerning traditionally traded goods and the presumed pre-eminence of consumer welfare.[42]

The objectives identified in the Draft Report are not entirely at one with each other, s 2 of the CCA, specification in the Terms of Reference of increased integration of the Australian economy in global markets, or recognition otherwise in the Draft Report of the significance of increasing globalisation of markets and need to be agile and innovative to meet overseas consumer demand. The Draft Report accordingly does not reconcile the interests of Australian producers competing in global markets with those of local Australian consumers. That is a tension which the legislature should address in any reframed objects clause.

WHAT SHOULD WE DO?

With the Harper Review's final report and recommendations to the Federal Government due by March 2015, it is desirable to articulate with clarity exactly what the object(s) of the competition provisions of the CCA is (are) now intended to be. It is apparent from the above that, in the manner of politically driven reviews, the Harper Review's Terms of Reference were to a degree schizophrenic as its political authors attempted to be all things to all people. The Panel has done well to distil what matters and recommend various substantive changes in the Draft Report, but the generally applicable objects clause remains as unexplained as it was on its introduction in 1995. In a simplistic attempt to progress the debate the author offers five alternatives for consideration in parallel with the proposed changes to substantive provisions and exemption procedures.

The first alternative is of course the "do nothing" option. Given the intentionally wide ranging nature of the Review, the opportunity that presents, tensions in the current CCA and its objects clause, and overlap of those matters with the substantive changes proposed, this alternative has little to commend it. Change should be considered to clarify what is intended by core terms and/or to provide greater flexibility dealing with modern market issues, given the blunt stick provided by current extensive per se prohibition and impractical burdensome nature of the

[39] Draft Report, n 1, p 5.

[40] Draft Report, n 1, section 15.2, pp 192-198.

[41] Draft Report, n 1, pp 198, 193 and 195.

[42] Draft Report, n 1, p 195.

current authorisation process. The Panel has to a degree recognised this in its draft recommendations, for example its proposed s 46 defence and modified exemption procedures.

A second alternative might be to retain the existing objects clause covering the whole of the CCA, with minimal amendments to clarify the meaning of welfare and competition, for example as follows.

> *to enhance the consumer welfare and total welfare [or specify one standard and define it] of Australians through the promotion of fair, transparent, open and efficient competition [with "competition" and "market" definitions refined to accommodate innovation/globalisation issues] and fair trading and provision for consumer protection*

The third possibility could be an objects clause specific to the competition provisions of the CCA, although care is needed not to create tensions in other areas given the ACCC's roles in both competition and consumer protection enforcement.[43] As one of many possible examples, an amended clause reflecting some of the Parliament's Terms of Reference might be reworked along the following lines.

> *to enhance the consumer welfare and total welfare [or specify one defined standard] of Australians through the protection of the competitive process, the promotion of fair, transparent, open and efficient competition, and the promotion of efficient businesses which have incentives to invest and innovate and can compete effectively in Australian and global markets [and/or amend "competition" and "market' definitions to accommodate innovation/globalisation issues]*

A fourth alternative could be an interpretative principles clause and/or list of factors to be taken into account applying generally or to particular prohibitions, along the lines of those introduced following review of the unconscionable conduct provisions in what are now ACL ss 21(4) and 22. It could be framed for example as follows.

> *It is the intention of the Parliament that [and/or] without limiting the matters to which the court may have regard for the purpose of determining whether a person has contravened [the competition provisions of the CCA or as specified], the court may have regard to [such matters from the Harper Review Terms of Reference and Report or otherwise as appropriate to prioritise and clarify the key objects]*

A final alternative or supplementary possibility, albeit one that has not to date been embraced despite extensive history and precedent in the United States, could be the legislative introduction of US-style rule of reason analysis[44] for any one or more of the restrictive trade practices/antitrust prohibitions[45]. At its (deceptively) simplest, it could specify that a contravention will not be taken to have been committed unless the provision or conduct in issue unreasonably restrains trade. Depending on the legislator's preference as to onus of proof, it could be framed as a defence available if the respondent establishes for example that the relevant provision or conduct:

- does not unreasonably restrain trade (using a simplistic form of the US test), or

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[43] The access regime-specific objects clause s 44AA could remain, or be reconsidered separately having regard to existing jurisprudence and Reviews concerning the operation of that Part. Part VII in relation to authorisation/notification would however benefit from a specific objects clause given the tension between "public benefit"/total welfare standard and advocacy of "consumer welfare"/consumer welfare standard elsewhere.

[44] See eg *Standard Oil Company of New Jersey v United States* 221 US 1 (1911), *United States v American Tobacco Co* 221 US 106 (1911) which held that s 2 of the *Sherman Act*, which bans monopolisation, did not ban the mere possession of a monopoly but banned only the unreasonable acquisition or maintenance of monopoly, and the opinion by Brandeis J in *Chicago Board of Trade v United States*, 246 US 231 (1918) where the court found that an agreement between rivals limiting rivalry on price after an exchange was closed was reasonable and thus did not violate the *Sherman Act*. Analysis under the rule of reason focuses on the economic but not the social consequences of a restraint: *National Society of Professional Engineers v United States* 435 US 679 (1978).

[45] For example in the United States, non-price vertical restraints and resale price maintenance are also subject to rule of reason analysis: *Continental Television v GTE Sylvania* 433 US 36 (1977), *State Oil v Khan* 552 US 3 (1997) and *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007).

- does not have the effect (or likely[46] effect) of substantially lessening competition (using terms more familiar under the existing CCA), or that
- the effect of the conduct is to benefit the long term interests of consumers (adapting part but not all of the Panel's recommended defence to contravention of s 46).

CONCLUSION

Which option is to be preferred and in what form cannot be arbitrated by this author. However, it is in his respectful view highly desirable that the legislature take this opportunity to reconsider explicitly the object(s) of the competition provisions of the CCA, and to specify them with clarity to facilitate their effective future operation.

I.S. Wylie 10 November 2014

[46] If this was included, "likely" should not bear its currently excessive and variable scope: Wylie IS, "What is 'Likely' in the Competition and Consumer Act 2010?" (2012) 20 CCLJ 28.