

The Role of Courts in Competition Law

Asian Competition Forum 2015

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30 November 2015, Hong Kong

The Asian Competition Forum, which it is my privilege to address this morning, reflects the importance of competition law in our region enhanced by the increasing incidence of bilateral and multilateral free trade agreements which include chapters dealing with that topic. The competition law regimes of the Asian region are at different stages of implementation and development. They have differences reflecting, in part, the legal and constitutional systems in which they are embedded and the effects of local political processes. But to a greater or lesser extent courts become involved in this area of the law. This address looks to some aspects of that involvement albeit from an Australian perspective.

Seven years ago on 4 October 2008, I opened a conference at Melbourne University entitled "Unleashing the Tiger? — Competition Law in China and Hong Kong". The anti-monopoly law of the People's Republic of China had come into effect two months previously on 1 August 2008. One of the architects of that law, Professor Wang, spoke at the conference. In May of the same year, the Secretary for Commerce and Economic Development in Hong Kong had released detailed proposals for a Competition Ordinance for Hong Kong which as you all know was adopted on 14 June 2012. It will be fully implemented with effect from 14 December 2015.

Those important developments occurred against a background of general recognition by countries of the Asian region of the importance of competition law to their economies. That recognition was reflected in the 1999 Leaders' Declaration of APEC Principles to Enhance Competition and Regulatory Reform and the 2010 ASEAN Regional Guidelines on Competition Policy. The APEC principles encompassed concepts of non-discrimination, comprehensiveness, transparency, accountability and implementation. Not surprisingly, they did not contemplate a harmonised approach within the Member States, although perhaps they reflected an aspiration to convergence. In particular, they did not descend to the details of institutional arrangements and the respective roles of administrative regulators and courts.

The ASEAN Guidelines canvassed different enforcement regimes encompassing the possibility that sanctions for civil or administrative wrongdoing could be imposed by an administrative authority with the possibility of subsequent judicial remedies.¹ They made it clear that punishment for criminal offences against competition law should only be imposed by judicial authorities or be subject to judicial review.² The ASEAN Guidelines also contemplated the existence of mechanisms for private enforcement including actions for damages. That rationale was explained in familiar terms:

By allowing damage claims for breaches of competition law, the AMSs [ASEAN Member States] not only strengthen the enforcement of the competition law, but also make it easier for applicants who have suffered damages from an infringement of competition law to seek redress and recover their losses.³

Although private enforcement is not a necessary feature of competition law design, it does introduce incentives for compliance and disincentives for contravention which do not depend upon the resources or enforcement policies of the regulator.

Importantly, the ASEAN Guidelines stated that Member States should recognise the role of the judiciary in the enforcement of competition law, including by direct access to the judicial authority and by review of administrative actions.⁴ They also proposed that there be recourse for infringing parties to at least one appellate body, independent from the regulator and the government.⁵ Judicial review of decisions of the competition regulator was contemplated but not mandated.⁶ The creation of specialised courts or specialised sections within courts with exclusive jurisdiction to hear competition cases was contemplated,⁷ as well as provisions for intervention by the competition regulators.⁸

Although the ASEAN Guidelines are directly relevant to the membership of ASEAN, which is not as large as that of APEC, they raise general questions of structural design in

¹ Association of Southeast Asian Nations, *ASEAN Regional Guidelines on Competition Policy* (August 2010) 6.1.4. <www.asean.org/archive/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf>

² Ibid 6.1.5.

³ Ibid 6.11.2.

⁴ Ibid 7.1.4.

⁵ Ibid 7.1.4.1.

⁶ Ibid 7.1.4.2.

⁷ Ibid 7.1.4.3.

⁸ Ibid 7.4.4.4.

relation to the administration, enforcement and judicial development of competition law which usefully frame this address.

Whatever the level of judicial engagement, competition law poses challenges for courts in relation to the interpretation of statutes in which economic concepts such as 'market', 'market power' and 'lessening of competition' are embedded, the application of those terms or their equivalents to complex situations, the assessment of expert evidence and the review of the findings of expert administrative bodies or tribunals. Some of those general issues which arise with different levels of intensity in different national regimes can be illuminated by particular national experiences. It is on that basis, and with the caveat that it is a particular national experience, that I refer to the role of the Australian courts in competition law.

In Australia the relevant statute is the *Competition and Consumer Act 2010* (Cth) (*Competition and Consumer Act*) previously known as the *Trade Practices Act 1974* (Cth) (*Trade Practices Act*). The Act creates an independent regulator — The Australian Competition and Consumer Commission (ACCC). It has compliance and enforcement functions. It can authorise possibly anti-competitive conduct on a public benefit test including mergers and acquisitions which would otherwise be prohibited⁹ and it can grant or refuse merger clearances.¹⁰ It can take proceedings in the Federal Court of Australia for civil remedies or penalties to enforce the Act. There is a wide range of remedies including injunctions¹¹, declarations¹², mandated compliance programs¹³, pecuniary penalties¹⁴ and compensation orders.¹⁵ Findings of fact in Commission proceedings can be used for the purpose of subsequent private enforcement actions arising out of the same breach.¹⁶ Criminal offences under the Act, the principal competition law offence being cartel conduct, would be prosecuted by the Commonwealth Director of Public Prosecutions. Private parties may bring actions for damages or other civil remedies for contraventions of the Act although they cannot prosecute for penalties or criminal fines. There is no standing requirement, so

⁹ *Competition and Consumer Act 2010* (Cth) ss 88(9) and 90(9).

¹⁰ *Ibid* ss 95AC and 95AN.

¹¹ *Ibid* s 80.

¹² *Ibid* s163A.

¹³ *Ibid* s 86C.

¹⁴ *Ibid* s 76.

¹⁵ *Ibid* s 79B.

¹⁶ *Ibid* s 151CD.

declaratory or injunctive relief may be sought even if, for want of any loss, the applicant cannot claim damages.¹⁷

The Australian Competition Tribunal (the ACT) has the power to review decisions of the ACCC in relation to authorisations and clearances and other matters. Although headed by a serving Federal Court Judge, it is not a judicial body. Decisions of the ACCC including the use of its investigative powers are potentially subject to judicial review in the Federal Court. The Federal Court has jurisdiction in matters arising out of the *Competition and Consumer Act* which include private actions for contraventions of the Act.

The mix of an administrative regulator with a specialist appeal or review tribunal and court based judicial review, appeal and enforcement processes is reflected in a number of countries in the region. In Hong Kong, the Competition Tribunal is a court of record. It can hear enforcement actions brought by the Hong Kong Competition Commission (the Commission) and is empowered to impose fines for contraventions. It can hear private actions for damages as follow on actions to Commission proceedings and, as I understand it, can rely upon findings of contraventions made by the Tribunal in such proceedings. It can also hear applications by parties appealing Commission decisions. Appeals from the Tribunal on matters other than appeals arising from Commission decisions may be further appealed to the Hong Kong Court of Appeal and thereafter to the Court of Final Appeal. Appeals arising out of Commission decisions may be further appealed on points of law only. By way of contrast, in the People's Republic of China there are several regulatory bodies operating under the supervision of the Anti-Monopoly Commission. Merger and clearance decisions can be appealed to the Beijing First Intermediate People's Court and thereafter to the Beijing People's High Court.

The general court system can be engaged at various levels depending upon the particular regulatory design. It may be engaged in direct judicial review of the lawfulness of a regulator's actions and these flesh out the extent and limits of its powers. In Australia there were a number of cases in the 1970s and 1980s challenging the validity of particular exercises of coercive investigative powers by the regulator. One of the more dramatic was a holding by a judge of the Federal Court that the Chairman of the Trade Practices Commission had committed a contempt by issuing a notice under the Act requiring production of

¹⁷ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

information and documents relating to pending judicial proceedings involving the party to whom the notice was issued.¹⁸

The courts may also explain the nature of the particular functions conferred upon regulators and review bodies. A recent example in Australia appears from the decision of the High Court of Australia in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*.¹⁹ The case concerned rather complex provisions of Pt IIIA of the *Trade Practices Act*. That part provided that determinations could be made by a relevant Minister that the owner of facilities, including infrastructure facilities such as roads or railways, should allow those facilities to be used, for an appropriate tariff, by others who might be competitors of the owner.

The first step in the process was for a body called the National Competition Council to recommend to the Minister that a service be declared for the purposes of Pt IIIA. Various criteria had to be satisfied before such a recommendation could be made including that it would be uneconomical for anyone to develop another facility to provide the same service. There was provision for the ACT to review such declarations. The task given to the ACT under the Act was review by way of 'a reconsideration of the matter'.

In the case before the Court which concerned privately owned iron ore railways in the Pilbara mining area of Western Australia, a declaration was made by the Minister in relation to those railways. On review, the ACT effectively embarked on a fresh inquiry as to whether it should be made. The parties provided the ACT with material far in excess of that placed before the Minister including 130 affidavits from 73 witnesses and a large number of documents. Fifteen of the witnesses were economists. The ACT hearing occupied 42 sitting days.

The High Court held that it was not the task of the ACT to decide afresh on the new body of evidence before it whether the service declared by the Minister should have been declared. Its task was to review the Minister's decision by reconsidering the decision on the material before the Minister supplemented only by whatever material the National Competition Council provided in answer to requests made by the ACT pursuant to a

¹⁸ *Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 44 FLR 182.
¹⁹ (2012) 246 CLR 379.

particular provision of the Act.²⁰ As the ACT had not performed that task, the High Court held that the Federal Court on judicial review of the ACT's decision should have granted certiorari to quash it. The case illustrates the use of judicial review to define the functions of a body set up under a competition law.

Under the Australian legal system, the Federal Court has a general statutory jurisdiction for judicial review of the decisions of federal authorities.²¹ There is an analogous constitutionally entrenched jurisdiction conferred on the High Court.²² There is also general provision for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Actions may be taken in relation to competition law in the general jurisdiction of the Federal Court to hear and determine matters arising under a law of the Commonwealth.²³ There is also a general jurisdiction in relation to matters arising under the Constitution.²⁴ In addition, actions may be brought relevant to competition law in the exercise of the specific jurisdiction to hear and determine private actions for damages for other remedies based upon contraventions of the *Competition and Consumer Act*.

An interesting example in the exercise of the Federal Court's general jurisdiction, in matters arising under federal law, which involved a challenge to the Commission's decision, occurred in a case I heard as a Federal Court judge in 2003.²⁵ The Australian Gas Light Company (AGL), which was a major retailer of electricity in eastern Australia, proposed to acquire a 35 per cent interest through a holding company in a base load power generator in the La Trobe Valley in Victoria. That meant it would be involved in both the retailing and wholesaling of electricity — a degree of vertical integration which the regulator was concerned would be likely to have the effect of substantially lessening competition in a market contrary to s 50 of the *Trade Practices Act* as it then was. The regulator declined to bring proceedings to enjoin the transaction where it would have borne the burden of proving the likely effect of the acquisition. It did indicate, however, that it might apply post acquisition for a divestiture order. As the acquisition could not go ahead with that sword of Damocles hanging over it, AGL applied to the Federal Court for a declaration that, with

²⁰ (2012) 246 CLR 379, 406 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²¹ *Judiciary Act 1903* (Cth) s 39B(1).

²² Commonwealth Constitution s 75(v).

²³ *Judiciary Act 1903* (Cth) s 39B(1A)(c).

²⁴ *Judiciary Act 1903* (Cth) s 39B(1A)(b).

²⁵ *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317.

appropriate undertakings, the acquisition would not have the feared effect. The case was therefore a hearing on the merits of the alleged anti-competitive effect of an acquisition. Eventually declarations were made in favour of AGL. The urgency of that case was such that it had to be heard in three weeks and judgment delivered three weeks later.

The general court system at the intermediate and final appellate levels may also be engaged in the hearing of appeals from single judges who have made decisions on judicial review or in cases of alleged or apprehended contraventions in which remedies are sought by the regulator or by private applicants where private causes of action are available.

An important question for the administration of competition law is whether the judicial hearing and determination of matters arising under competition statutes should be carried out by specialised courts or specialised sections of courts or left to generalist judges.

Non-judicial regulators with responsibility for the administration of competition law will be composed of persons with appropriate experience or expertise. That is an obvious requirement for the body which has frontline responsibility for a range of functions under competition law. And when a specific purpose appellate or review tribunal is created such as the non-judicial Australian Competition Tribunal or the judicial Competition Tribunal in Hong Kong, it will be expected that the persons appointed to those bodies will have an appropriate background or the capacity quickly to acquire appropriate expertise.

The ACT is headed by a serving Federal Court judge as its President and has other serving Federal Court judges as Deputy Presidents. When sitting on the ACT they exercise administrative not judicial functions. They are not full time appointees. They continue to do judicial work in their capacities as Federal Court judges. They ordinarily sit with a business person and an economist. Their principal responsibility is to review decisions of the regulator. On the other hand, the Competition Tribunal created under the Hong Kong Act is created as a judicial body with original and review jurisdiction and appears to have the character of a specialist court.

There are obvious advantages in specialised courts or judges. They do not approach each new case with a large learning curve on the relevant legal and economic background. They will be, or soon after appointment will be expected to become, familiar with the statutes, the precedents and the literature and economic concepts underlying the law. They

may undertake specialised judicial training for that purpose. Suitably experienced and educated, they should be able more readily to identify the issues in the cases before them, sift the evidence and weigh the competing testimony of economists and the submissions of counsel than a generalist judge without significant prior exposure to the field. So specialisation may be thought more likely to produce expeditious and consistent and therefore predictable decisions.

On the other hand there is a risk, with specialist courts or judges, of a narrowing of perspective and a degree of comfort with counsel and even parties who regularly appear in the jurisdiction. Specialist courts or tribunals can develop their own club jargon which becomes a kind of barrier to entry for persons who are not regularly involved in the jurisdiction. A further general concern is that very few areas of the law can be quarantined from other areas. Competition law has private and public law dimensions; it may even have constitutional dimensions. It may intersect with many other areas of the law.

In 2012, Australian competition law intersected with the law relating to foreign state immunity. An airline corporation, PT Garuda Indonesia Ltd, which is wholly owned by Indonesia, was sued by the ACCC in the Federal Court in relation to alleged anti-competitive activities in which it was said to have engaged with other airlines. The activities related to the prices which Garuda charged its air freight customers. The ACCC sought injunctions, declarations and pecuniary penalties against the airline. Garuda applied to have the proceedings dismissed or permanently stayed on the basis that they were inconsistent with the *Foreign States Immunities Act 1985* (Cth). There is a general grant, under s 9 of that Act, of immunity to foreign states from jurisdiction of Australian courts. The immunity extends to separate entities of foreign states. It was not in dispute that Garuda was a separate entity of Indonesia. The immunity granted by the Act is, however, subject to exceptions; in particular it does not cover cases in which the proceeding in question concerns a commercial transaction.

The High Court rejected Garuda's argument that the exception only applied to proceedings seeking to vindicate a private law right. Further, it held that a commercial transaction was not limited to transactions which the common law of Australia would characterise as contractual. The plurality held that the arrangements and understandings alleged by the ACCC against Garuda were dealings of a commercial, trading and business

character respecting the conduct of commercial airline freight services to Australia.²⁶ The definition of a 'commercial transaction' was satisfied. Examples can be multiplied of intersections between competition law and other areas of the law which reflect the general difficulty of quarantining any area of the law from any other.

There is a variety of ways of dealing with the question of specialisation, none of which can be said to be the only or correct way. In many cases, a mix of specialised first instance review with more generalist appellate review is seen as appropriate. Hong Kong has dealt with the problem by, in effect, creating a specialised court at first instance but subjecting it on appeal to courts of general appellate jurisdiction. Judicial education can of course be provided to more generalist judges focussing on particular areas of their jurisdiction without the need to create specialist divisions or courts. Continuing education is a feature of judicial life in many of our jurisdictions.

In Australia, apart from the particular and limited review functions conferred on the ACT, cases arising out of the competition law are heard in the original and appellate jurisdiction of the Federal Court. Internal administrative arrangements have recently been made within that Court to create national groups of judges allocated to particular practice areas. This enables those groups of judges to build up expertise within a particular area. It does not prevent movement of the judges from one group to another or concurrent membership of more than one group. It allows rotation between different groups. Personally, I am inclined to favour that kind of management arrangement over the more confining mechanism of a specialist court. Of course even with a specialist court, membership of the court can be rotated with appointments out of courts of general jurisdiction for a limited time. Appointments to the court can also be made of judges on the basis that they exercise that special jurisdiction for part of the time and exercise more general jurisdiction as members of a generalist court.

The position of the courts in Australia in the administration of competition law must be understood in light of the separation of the judicial power of the Commonwealth from the executive and legislative power of the Commonwealth which the High Court has found to be mandated by the Commonwealth Constitution. The judicial power of the Commonwealth can only be exercised by judges appointed under s 72 of the Constitution for a term ending when

²⁶ *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 254 [41]–[42] (French CJ, Gummow, Hayne and Crennan JJ).

they attain the age 70 years. They can be removed only by the Governor-General on an address from both Houses of Parliament in the same session praying for removal on the ground of proved misbehaviour or incapacity. This means that no court can be created under Commonwealth law to which judges are appointed for a fixed term or at the pleasure of the executive government. Commonwealth courts can exercise non-judicial functions but only to the extent that they are incidental to the exercise of judicial power. The judicial and non-judicial functions cannot otherwise be combined in the same body.

It is not unusual in Australia to see Federal judges appointed to non-judicial bodies. Such applications, however, are made 'persona designata' — that is to say the judge is appointed in his or her personal capacity. Appointment of Federal judges to the ACT is made on that basis. Such appointments are valid provided they are not incompatible with the judicial office of the judge.

An example of the application of those principles in the case of competition law occurred in 1970. Under a limited competition law enacted in 1965, the *Trade Practices Act 1965* (Cth), a Trade Practices Tribunal was created which had the power to determine whether certain classes of 'examinable agreement' or 'practice' existed and, if so, whether they were contrary to the public interest. Section 50 of that Act provided that the basis for the Tribunal's determination was the principle that the preservation and encouragement of competition was desirable. An agreement or practice determined to be contrary to the public interest was unenforceable. The Tribunal could make restraining orders to enforce its determinations. Disobedience of such an order was punishable by the Commonwealth Industrial Court as if it were a contempt of that Court. The Tribunal was not a court. The Commonwealth Industrial Court was a Federal court created in accordance with the provisions of the Constitution. The validity of the provisions conferring power on the Tribunal was challenged on the basis that they impermissibly conferred judicial power on a non-judicial body. In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*²⁷, the High Court held that the making of determinations and the issue of restraining orders by the Tribunal did not involve the exercise of the judicial power of the Commonwealth and therefore did not offend against the separation of powers under the Constitution. It is not necessary for present purposes to explore the reasons for that decision.

²⁷ (1970) 123 CLR 361.

It suffices to make the point that constitutional considerations, and in particular the existence or non-existence of a doctrine of separation of powers, can affect institutional design.

Australian courts have made a significant contribution to the development of competition law. Before the enactment of the *Trade Practices Act 1974*, competition law had not played a large part in the commercial life of the nation. The first statute was the *Australian Industries Preservation Act 1906* (Cth) which was based on the United States *Sherman Act*.²⁸ It conditioned its principal prohibitions on the existence of an intention to cause a detriment to the public. The first reported price fixing trial on the merits under that legislation was heard by a single justice of the High Court sitting in the original jurisdiction.²⁹ It lasted 73 days and was described by the trial judge, Sir Isaac Isaacs, as 'exceptional in its character, partaking necessarily to a great extent of the nature of an investigation'.³⁰ He produced a 270 page judgment which has been described as 'an analytical tour de force which displays an understanding of the economics of monopoly which is creditable by any standards'.³¹ Isaacs' judgment was reversed on appeal by the Full Court of the High Court on the ground that the evidence did not establish detriment to the public or intent to cause such a detriment.³² The Full High Court in that appeal displayed something of a judicial culture unsympathetic to competition. The Court observed that:

Cut-throat competition is not now regarded by a large portion of mankind as necessarily beneficial to the public.³³

That was an observation which rather underscores the importance of the judicial culture when it comes to the administration of competition law. There were other competition laws enacted in some of the States prior to the 1974 Act.³⁴ But the case law under them was

²⁸ 15 USC §§ 1-7 (1890).

²⁹ *R and Attorney-General (Cth) v Associated Northern Collieries* (1911) 14 CLR 387.

³⁰ *Ibid* 399.

³¹ Geoffrey Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy*, (FW Cheshire, 1967) 34. See also Alan Ransom and Warren Pengilley, *Restrictive Trade Practices: Judgments, Material and Policy* (Legal Books, 1985).

³² *Adelaide Steamship Co Ltd v The King and The Attorney-General of the Commonwealth* (1912) 15 CLR 65, 103.

³³ *Ibid* 76.

³⁴ *Profiteering Prevention Act 1920* (Qld); *Monopolies Act 1923* (NSW); *Unfair Trading and Profit Control Act 1956* (WA).

sparse.³⁵ The effects of those competition laws and the cases decided under them seem to have been marginal to the commercial life of the nation.

The *Trade Practices Act 1965* succeeded the *Australian Industries Preservation Act 1906* (Cth). It provided for registration of various classes of agreement between competitors and defined examinable practices which included price discrimination, third line forcing, inducing, refusal to deal and monopolisation. The Commissioner of Trade Practices could apply to a Trade Practices Tribunal and seek restraining orders on the basis that the agreement or practice was contrary to the public interest. While the word 'market' appeared in the 1965 Act it was only in a geographical context. Geographical extent and product substitutability were recognised but not brought together conceptually as elements necessary to market definition. In May 1971, Pt 4A of the 1965 Act was enacted prohibiting resale price maintenance but the High Court held that to the extent that the Act relied upon the corporations' power provisions which required particulars of restrictive agreements to be supplied to the Commissioner of Trade Practices; it was beyond the legislative powers of the Commonwealth.³⁶

The *Trade Practices Act 1965* was a weak competition law but despite its weakness it laid the foundation for its more powerful successor in 1974.

It was anticipated from the outset that the courts would play a very significant role in the development of the law. In the Second Reading Speech, the Minister referred to the very broad terms in which the 1974 Act was drafted. The economic considerations with which the Act was concerned could not be translated into precisely expressed legal concepts. The Minister said:

The present Bill recognises the futility of such drafting. Many matters have, of course, had to be stated in detail. But other provisions, particularly those describing the prohibited restrictive trade practices, have been drafted along general lines using, wherever possible, well understood expressions. I am confident that this will be more satisfactory. The Courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional judicial role.³⁷

³⁵ *J Kitchen & Sons Pty Ltd v Stewart's Cash and Carry Stores* (1942) 66 CLR 116; *Attorney-General v Brickworks Pty Ltd* (1941) 41 SR (NSW) 72; *Cockburn Cement Pty Ltd v Wallwork* (1958) WALR 75.

³⁶ *Strickland v Rocla Concrete Parts Pty Ltd* (1971) 124 CLR 468.

³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 July 1974, 228 (Mr Enderby).

The Minister's reliance upon the 'traditional judicial role' of the courts in applying the new law assumed that traditional judicial methods and modes of reasoning would be enough for its satisfactory development. However, as Professor Brunt, one of the architects of the Act, had remarked, it was essentially an instrument of economic policy. In dealing with anti-competitive conduct within markets, it was dealing with an economic subject matter and it employed economic concepts in its drafting. She observed, perhaps rather nervously:

We begin with a statute: it is to be interpreted and enforced by Courts of Law, necessarily we are in the hands of lawyers.³⁸

The traditional legal education of most judges serving in Australian courts since 1974 took as its point of departure, a basic model of judicial or legal reasoning that was syllogistic. The relevant rule of law was to be applied as the major premise. Facts were to be found as the minor premise. The law was applied to the facts and a conclusion followed expressed by way of a declaration or distribution of rights or liabilities which might involve the exercise of discretion. That model is adequate for cases which concern factual questions and the application of laws which are expressed in words that bear their ordinary English meaning and which have concrete factual referents. Much of the bread and butter work of the courts is carried out according to that model. However, beyond that model the construction and application of statutory rules of law can involve evaluative and normative or purposive judgments. Economic laws use evaluative and normative terms. Their application requires more than the discovery of pre-existing meanings. It is akin to a law-making function. It involves what a prominent Australian legal philosopher, the late Professor Julius Stone, called 'a legal standard'. He said:

When courts are required to apply such standards ... then judgment cannot turn on logical formulations and deductions but must include a decision as to what justice requires in the context of the instant case.³⁹

³⁸ M Brunt, 'Economic Overview', (Speech delivered at the 1975 Monash Trade Practices Lectures, Melbourne, 1975).

³⁹ Julius Stone, *Legal Systems and Lawyers' Reasonings* (Maitland Publications, 1964) 263–64.

Relevantly, he identified the rule of reason in United States anti-trust law and the words 'detriment of the public' which appeared in the Australian *Industries Preservation Act 1906* as examples of that kind of legal standard. Such a standard involves norm creation and is one of the categories of judicial law-making which the legislature has delegated to the judiciary.

The statutory language of the competition law provisions of the *Trade Practices Act 1974* was rich in economic metaphor. The concept of 'market' was probably the leading example. An early and often cited definition of that term was given in 1976 by the Trade Practices Tribunal comprising Justice Woodward of the Federal Court as Chairman and Professor Brunt and Mr Shipton as non-judicial members. The case was *Re Queensland Cooperative Milling Association Ltd; Re Defiance Holdings Ltd*.⁴⁰ The Tribunal stated:

We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.⁴¹

Other economic concepts embedded in the language of the *Trade Practices Act* included such terms as 'substantially lessening competition', 'a substantial degree of power in a market', 'take advantage of ... power', 'eliminating or substantially damaging a competitor', 'preventing the entry of a person into a market'. Amendments in 1992 to the merger control provision in the Act introduced a range of factors to be applied in determining whether an acquisition would have the effect or be likely to have the effect of substantially lessening competition in the market.⁴² There were references to 'height of barriers to entry to the market', 'the level of concentration in the market', 'the degree of countervailing power in the market', 'the dynamic characteristics of the market, including growth, innovation and product differentiation' and 'the nature and extent of vertical integration in the market'. Each of those

⁴⁰ (1976) 8 ALR 481.

⁴¹ Ibid 517.

⁴² *Trade Practices Legislation Amendment Act 1992* (Cth) s 6.

factors had to be considered in the metaphorical workplace which is the market. Some of them piled metaphor upon metaphor. Nevertheless, it became the role of the court to apply them to particular cases and so give them content. Their application was necessarily purposive. The definition of a 'market' by reference to the dimensions of function, product range and geographical extent involve what I think of as a kind of 'focussing process' leading to the clearest picture of the area of activity relevant to the competitive process in issue.⁴³ Further, in determining whether apprehended conduct was likely to have the effect of substantially lessening competition in a market, the apprehended effects had to be commercially relevant. That was not demonstrated by transient phenomena. The phenomena had to be of a long run character. The court was not concerned with the effect of conduct on competitors but on competition.

The body of case law and the expertise of judges in dealing with those economic concepts developed over decades in Australia. The Federal Court had to become sensitive to economic issues and to the need for procedures which would enable them properly to be addressed against the background of a useful but sometimes tense relationship between economists, advocates and judges. There was a learning curve. I venture to say that there always is for courts embarking on this area of jurisdiction for the first time. It is particularly important for judges to engage at conferences like this with mixes of practitioners, academics and regulators to keep abreast of the practical issues affecting the working of the legislation on the ground. There are, of course, appropriate conventions of judicial reticence and proper distance between courts, regulators and the profession. Nevertheless, if those conventions are observed the involvement of the judiciary can be a very valuable one.

There has always been a question about the suitability of the judicial system as a mechanism for the determination of economic questions. Proposals for judicial specialisation or referral of economic issues to the Trade Practices Tribunal were put to an independent committee of inquiry into national competition policy, chaired by Professor Fred Hilmer, which reported in 1993.⁴⁴ Dissatisfaction was expressed in submissions to that committee with Federal Court procedures for utilising economic material in judgments about economic facts. Although the committee considered that proposals for refinement of court processes

⁴³ See generally *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158, 174–79 (French J, Spender and O'Loughlin JJ agreeing).

⁴⁴ Commonwealth, *National Competition Policy Review – National Competition Policy* (1993) (Hilmer Report).

were worthy of further consideration, it did not accept the submissions for specialist divisions or for referral of economic issues.⁴⁵

Whether or not a court is a specialist court there are inherent limits on what any court can do having regard to the nature of the judicial function. The Australian concept of that function is derived ultimately from the Constitution but reflects common law concepts of what courts do. It has been stated on many occasions and in varying language by the High Court. In 1983, four justices of the Court said:

The unique and essential function of the judicial power is the quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.⁴⁶

Courts do not undertake roving inquiries into market structures and behaviour. As former Chief Justice Brennan once observed:

The courts do not — indeed, they cannot — resolve disputes that involve issues wider than legal rights and obligations. They are confined to the ascertainment and declaration of legal rights and obligations and, when legal rights are in competition, the courts do no more than define which rights take priority over others.⁴⁷

The observation by Brennan CJ also directs attention to the fact that the answers which can be provided by the courts to the questions which come before them are often incomplete from the point of view of the litigant or the wider public. The misconception about the function of courts is sometimes reflected in academic criticisms that the court has 'missed an opportunity' to expound upon some point of law.

The focus of the Hilmer Committee's review of Australian competition law was largely on administrative institutional arrangements. It did, however, discuss remedies and the difficulties facing courts when asked to set prices in cases involving refusals to deal and the court's use of economic materials. Concerns about the expertise and competence of the

⁴⁵ Ibid 178–79.

⁴⁶ *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan, Deane JJ).

⁴⁷ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 16.

court in handling complex economic issues were reflected in submissions which tried to suggest an enhanced role for the Trade Practices Tribunal. The Committee however, pointed

out:

There are constitutional difficulties with performance of judicial functions by non-judicial bodies, and there are sound reasons for upholding this constitutional distinction: in matters with potential penalties of up to \$10 million; or remedies as extreme as divestiture, it is appropriate that the assessment and balancing of evidence and the making of final decisions should lie with a judicial body.⁴⁸

The court-centred nature of competition law in Australia involves intrinsic limits which were described by Professor Brunt in 1994 when she wrote:

[T]he core should consist of rules governing business conduct of a largely self-enforcing character, possessed of reasonable certainty and compliability; that the matters to be litigated are justiciable in the sense that they give rise to articulated and economically relevant issues that can be tested in an adversary setting and evaluated by the court; and that there be available effective remedies of a dispositive and non-regulatory kind.⁴⁹

In the earlier years of the exercise of its jurisdiction, the Federal Court attracted some criticism for undertaking an unduly restrictive approach to the admission of expert economic evidence without requiring disclosure of the assumptions upon which it was based. That criticism evidenced something of a cultural divide between economists and the legal profession. A source of the difficulty may have been that the testimony of economists in competition cases often presents less as evidence than as argument. For example — where should the line be drawn along the spectrum of substitutable products for the purpose of defining a product market boundary once the facts as to substitutability are in? The question is likely to be resolved upon consideration of arguments and submission. The same is true of questions about whether competition is lessened and whether the lessening is substantial and the extent of market power in a particular case. When I was on the Rules Committee of the Federal Court we responded to that perceived difficulty by proposing a rule of court which was accepted and which provided that the Court might:

⁴⁸ Hilmer Report, above n 43, 171–72.

⁴⁹ Maureen Brunt, *The Australian Antitrust Law after 20 Years - A Stocktake* (1994) 9 *Review of Industrial Organisation* 483, 518.

[I]n proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence.⁵⁰

Some commentators suggested that the rule involved a downgrading of economic testimony by relegating it to the status of mere submission. However, argument which offers to the court models for the characterisation and evaluation of primary factual evidence can play a very significant role in the outcome of litigation. The benefits to the court of a well-constructed economic argument are no less than those of a well-constructed legal submission.

Other innovations that have developed over the years in the Federal Court include the practice of 'hot-tubbing' which enables expert witnesses from both sides of an argument to testify concurrently and engage in a dialogue with clarifying questions from counsel. While this does not work in every case, it has proven to be a very useful tool for ensuring that the areas of disagreement are narrowed and properly identified.

The Federal Court has benefited from its interaction with the ACT in acquiring some of the economic vocabulary and methodology appropriate to the construction and application of the law. A leading example is the definition of 'market' which I referred to earlier. It has also adopted procedures used by the ACT where they can be accommodated within the judicial function. That cross-fertilisation has been enhanced by the appointment to the ACT of serving judges of the Federal Court working with economists of high standing and reputation.

The Australian judiciary has played a central role in the development of the broadly stated provisions of Australian competition law. It is, however, important to bear in mind that the courts are not the only players in the developmental process. That proposition is highlighted by the exposition of the functions of the regulator by the founding Chairman of the Trade Practices Commission in Australia, the late Ron Bannerman. He did not see the role of the Commission as being limited to give effect to the existing law but to play a part in its improvement. In a lengthy and very informative paper entitled 'Points from Experience

⁵⁰ *Federal Court Rules 1979* (Cth) O 10 r 1(2)(j).

1967–1984' which was attached to the 1983–1984 report of the Commission, he described how he used annual reports as an 'instrument of progress'.⁵¹ He saw the reports as a means of communicating to the legislature what was really emerging from the regulator's experience of administering the legislation. Reports from the Commission became part of the process of the development of the law and sought to gain a degree of bipartisan acceptance. Bannerman was also acutely conscious of the need to establish public acceptance of the law. He said:

It is a fundamental mistake to regard the mere passage of law as curing problems. Law gathers respect only through acceptance or enforcement. Acceptance of course assists enforcement. Conversely, sufficient enforcement may eventually bring acceptance, but that can be slow and expensive. Therefore a law needs to have or to acquire a sufficient constituency of support. It is task for public administration in a new field to build support for the law and to develop acceptance for it from those directly affected.⁵²

That kind of function is a function peculiarly for the regulator and not for the courts. There can be seen in that exposition a degree of complementarity between the role of the regulator and the distinctive role of the courts focussed on the case by case development of the law.

In these remarks I have tried to draw attention to the nature of the functions undertaken by courts in Australia in the administration of competition law. Different courts in different countries will operate within varying constitutional frameworks. In some countries, important questions of statutory interpretation are taken to the legislature rather than determined by the courts. Nevertheless, it is difficult to conceive of any effective competition law in which the courts do not play an important part. For it is through many decisions, case by case, that the working of legal principles in a practical real world context is fleshed out.

⁵¹ RM Bannerman, 'Points from Experience 1967–1984' in Trade Practices Commission; *Annual Report 1983–1984*.

⁵² Ibid 157 [A.2.1].