

THE DAWSON COMMITTEE ON COMPETITION, ECONOMIC EFFICIENCY, UNIVERSALITY AND PUBLIC POLICY

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I INTRODUCTION

One of the less publicised contributions of the Dawson Committee ('the Committee') is its view that economic efficiency is the ultimate goal of competition law.¹ For the Committee, this leads naturally to a second and related goal – that competition law should be applied uniformly across the economy, avoiding measures specific to a particular industry. In this respect it reinforces the same principles espoused by the Hilmer Committee in its 1993 report on national competition policy.²

Although separated by 10 years, each committee faced equally forceful arguments by sectors seeking accommodation under the competition law, and, at times, exemption from it. Invariably the benchmark against which these arguments are assessed is how well they fulfil the dual goals of efficiency and what might be termed 'universality'.

In the brief space allowed for this *Forum*, this piece examines these goals in the Dawson Review and inquires whether some of the sectoral arguments, seemingly directed only at technical reform of the competition law, are not also in fact directed at these dual goals and their place in public policy.

II ECONOMIC EFFICIENCY

The Hilmer Committee and the Dawson Committee consider economic efficiency to be the ultimate goal of competition because it results in high productivity and with it improvements in economic welfare.³ Competition

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1 Trade Practices Act Review Committee, Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) 32 (the 'Dawson Review').

2 Committee of Inquiry into National Competition Policy, *Review of the Committee of Inquiry into National Competition Policy* (1993) (the 'Hilmer Report').

3 Dawson Review, above n 1, 32.

encourages allocative efficiency by promoting the use of resources in those areas where they are most valued. Productive efficiency is achieved by discouraging practices that detract from maximising output. Dynamic efficiency is recognised in improved goods and services that are the product of technical innovation.

The impact of economic efficiency is said to be evident in the performance of the Australian economy in the past decade. Modelling undertaken of economic growth resulting from the Hilmer reforms suggested an annual gain in GDP of 5.5 per cent, equivalent to \$23 billion a year in 1993–94 dollars.⁴ Enhanced competition in the provision of infrastructure was particularly crucial to realising these gains.⁵ The empirical evidence lends support to each committee's faith in competition and efficiency.

Efficiency is an objective shared among other developed and developing economies pursuing controls over restrictive trade practices. In the early antitrust experience of the United States (and still today) efficiency is cited as the sole aim of competition law.⁶ It is not only because competition, like efficiency, is a readily understood economic concept. It is also because it is considered the only objective basis upon which conduct may be assessed and gains measured.

However, it is said that if competition law is to remain a system of law rather than applied economics, it must be responsive to other influences, not efficiency alone.⁷ It may be called to the aid of broader equity and public interest goals including political freedom, protection of small business, equity in economic dealings and comity.

Although few countries have abandoned social or political goals, the current philosophy favours economic efficiency alone. However, that philosophy is not universally agreed and finds little express support in the *Trade Practices Act 1974* (Cth) ('Act') itself. The objective of the Act is to enhance the welfare of Australians.⁸ Broadly construed, the objective entertains public interest goals beyond economic welfare alone.

The Act itself reflects the concept of 'public interest'. Authorisations and notifications under the Act require a balancing of competitive detriment and public interest. Access declarations under Part IIIA require the National Competition Council to be satisfied that access is not contrary to the public interest. In assessing declarations, the Council considers economic efficiency a 'key public interest consideration' but not the sole consideration.⁹

Equally, the intergovernmental agreements that reflect the structural reforms of the Hilmer Committee mandate a balancing of public benefit and cost.¹⁰ It has been suggested that not only should the process by which this is achieved be transparent but also that the methodology used for weighing up the benefits and

4 Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A Report by the Industry Commission to the Council of Australian Governments* (1995).

5 Bureau of Industry Economics, *Overview 1995: International Benchmarking* (1995) 19.

6 See Judge Robert Bork, *The Antitrust Paradox* (1978) 7.

7 Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* (1977) 11.

8 *Trade Practices Act 1974* (Cth) s 2.

9 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act 1974, Part B – Declaration* (2002) 111, [9.9].

10 Clause 1(3) *Competition Principles Agreement* (1995) requires a balancing of costs and benefits.

costs should take account of both quantitative and qualitative data.¹¹ That view permits recognition of policies relating to ecologically sustainable development, social welfare and equity considerations, policies relating to occupational health and safety, industrial relations, economic and regional development including employment and investment and the competitiveness of Australian business.¹² Among them is the efficient allocation of resources,¹³ not as the sole criterion, but one of many. These same factors guide the administration of the public interest criterion in access declarations.¹⁴

As both Hilmer and Dawson suggest, competition is vital to attaining efficiencies and productivity gains. However, market incentives do not always coincide with community expectations. In these circumstances the aim is to find measures that promote improvements in efficiency, while affording some place for these broader values.¹⁵ Ultimately that is a role for government. What is in issue is how this may best be achieved and the vehicle intended to achieve it.

For the Dawson Committee that vehicle is not the competition law. However, many of the submissions to the Committee directly or indirectly argue for competition law to occupy a central place in addressing broader public interest goals. For example, there was and continues to be forceful arguments that s 46 should in some meaningful way extend to protect small business in its dealings with large business. Indeed, the perceived failure of such measures is blamed for increasing concentration in retailing and other sectors, and the corresponding loss of the 'corner store' and with it real or perceived values held dear.

Similar pleas were made to the Hilmer Committee. Some suggested that competition law should aim to protect competitors rather than the competitive process, so that less viable firms do not fail.¹⁶ This is based on the argument that there is intrinsic value in these firms continuing that cannot be measured by efficiency gains alone. The Dawson Committee is of the view that the aim of the Act is to protect the competitive process, not individual competitors – the Act is not to be used as a device to achieve social outcomes unrelated to the promotion of competition.¹⁷

In the context of its terms of reference, it was incumbent on the Committee to assess whether these considerations are supported by the established legal and economic norms, most recently articulated in the High Court decisions in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*¹⁸ and *Boral Besser Masonry Limited v Australian Competition and Consumer Commission*¹⁹ ('Boral').

11 House of Representatives Standing Committee on Financial Institutions and Public Administration, Commonwealth of Australia, *Cultivating Competition: Inquiry into aspects of the National Competition Policy Reform Package* (1997) 29–30.

12 *Competition Principles Agreement (1995)*, cl 1(3), paras (a)–(i).

13 *Competition Principles Agreement (1995)*, cl 1(3)(j).

14 National Competition Council, above n 9, 114 [9.20].

15 Productivity Commission, Commonwealth of Australia, *Stocktake of Progress in Microeconomic Reform* (1996) 26.

16 Hilmer Report, above n 2, 5.

17 Dawson Review, above n 1, 36.

18 (2001) 205 CLR 1.

19 (2003) 195 ALR 609.

The concern of some interest groups is not simply that their proposals did not succeed – it was never going to be possible or desirable for the Committee to provide concessions to all. It is that at some level there is scepticism of the goals (like efficiency) that support our competition law. However, the place efficiency should occupy under our law is a much broader policy debate. It was not a debate for the Dawson Committee.

III THE PRINCIPLE OF UNIVERSALITY

Ever since the modern version of the Act commenced, there have been calls for it to be applied uniformly to all business activity, whether in public or private ownership.²⁰ The Hilmer Committee similarly recognised that the law should not confer benefits on a particular sector of the community. More accurately, it recommended that, where broader policy considerations conflict with competition law, there should be a transparent exemption process such as s 51, an authorisation or notification.²¹

At various times this exemption power has been applied by jurisdictions for specific activities. Those that have attracted the most attention and criticism have been designed to protect orderly marketing arrangements, particularly in the agricultural sector.

For some time the professions, unincorporated bodies and other non-corporate entities were beyond the constitutional reach of the Act. In what is still an extraordinary example of cooperative federalism, the Commonwealth and States agreed to a Competition Code that applies the competition law to all entities, regardless of the business structure they employ. This sanction has encouraged significant reforms, for example to the legal profession. Efforts continue to be made to achieve the same reforms in other professions.

The Dawson Committee is less entertaining of exemptions. It is concerned that s 51 exemptions will continue to be used to meet the needs of particular sectors or to exempt them altogether. It recommended that governments apply competition law as broadly as possible across the economy and extend to the commercial activities of governments themselves, that industry-specific measures are avoided and competition law not be used as a means to introduce an industry policy.

The concern that the government's commercial activities are escaping capture is not well supported by empirical studies presented by the Dawson Committee. Certainly, jurisdictions have historically used vehicles that have cloaked them with Crown immunity, placing them beyond the reach of the competition law. Sections 2A and 2B remove that protection if the entity is involved in a business. While that concept can be problematic as the *NT Power* case demonstrates,²² it

20 Report to the Minister of Business and Consumer Affairs, Trade Practices Act Review (1976) 84 (the 'Swanson Committee').

21 Hilmer Report, above n 2, 26.

22 *NT Power Generation Pty Limited v Power and Water Authority* (2003) ATPR ¶41-909.

has not unravelled completely and continued vigilance may well prevent it doing so.

The use of specific exemptions has also been made more transparent since amendments to s 51 were introduced in 1995. Jurisdictions seeking exemptions must now notify the Australian Competition and Consumer Commission.²³ The Commonwealth has the power to disallow an exemption, an exemption must expressly refer to the Act and exemptions by regulation may apply for a period of only two years.

In addition, the legislative review obligations of jurisdictions under the National Competition Policy have seen some action in curtailing government protections. Jurisdictions have also relied on transparent authorisations favoured by the Hilmer Committee to support the national codes that are the feature of the national electricity and gas markets. Each jurisdiction has substantially complied with its legislative review obligations to remove provisions that restrict competition. New legislation is now subject to a similar test intended to remove regulatory impediments to competition.

The justification for the universality principle is its place in promoting economic efficiency:

Efficiency and consequently welfare, may suffer if the regulation of competition is not uniform. Differing regulatory treatment of different sectors of the economy will provide differing incentives for investment and effort by discouraging participation in particular sectors and will detract from the ability of markets to allocate resources in an efficient manner. Productivity, growth and welfare may then all suffer.²⁴

However, both Hilmer and Dawson acknowledge that competition may not always be consistent with the most efficient outcome. For example, the costs of production may not truly reflect externalities, some of which are the consequence of direct government intervention.

Some submissions to the Dawson Committee sought qualifications to the universality principle in the form of specific exemptions. For example, the Rural Doctors Association of Australia submitted that the Act should exclude the provision of medical services to rural and remote areas by resident medical practitioners.²⁵ A considerable number of submissions also sought a general exemption for collective bargaining arrangements as a means of addressing their lack of bargaining power in dealings with large business.

The Dawson Committee consistently opposed general exemptions because it would remove a substantial part of the economy from the operation of the Act and reverse the reforms of the past decade. Although wishing to support the purity of that principle, in the end the Committee itself felt compelled to permit a qualification to it: a new notification provision is proposed for collective bargaining by small business with turnover of \$3 million to enable it to exercise a

23 *Conduct Code Agreement*, 11 April 1995, cl 2.

24 Dawson Review, above n 1, 36.

25 Rural Doctors Association of Australia, *Submission to the Review of the Impact of the TPA on the Recruitment and Retention of the Rural Medical Workforce* (2001).

degree of countervailing power in dealings with large business.²⁶ Rural producers, doctors and small grocery stores may well use the procedure.

However, a number of small business groups consider the reforms inadequate. Central to their concern is that there is insufficient protection from the predatory behaviour of large firms and unconscionable conduct in commercial dealings.²⁷ Much, if not all, of this concern stems from the High Court's finding in *Boral* that the company had not abused its market power in the pricing of its concrete masonry products.

The government supports the Dawson Committee's recommendations. However, the Australian Labor Party and the Australian Democrats have signalled further concessions for small business.²⁸ What is not clear is the form these concessions may take and the extent to which they may erode the universality principle which successive committees, including Dawson, have strived to maintain. These will be matters for the Senate Economics References Committee which has been given the task of inquiring into whether the Act adequately protects small business from anti-competitive or unfair conduct.²⁹

IV CONCLUDING COMMENTS

There is a common theme that links the primary objective of competition law with the universality principle – economic efficiency. If economic efficiency is the sole goal of competition law, then it is argued that sectoral exemptions (such as those proposed by small business and others) may introduce distortions which inhibit its attainment.

Sectors seeking protection from the competition law do not see the connection in quite the same way, or if they do, reject it in favour of broader social or public interest goals considered more important. For some this means protection of their sector and its constituency. For others the importance attaches to broader societal values – the development of rural and regional Australia, the survival of the corner store, ready access to doctors and the like.

The debate is not new. Governments faced similar issues in implementing the National Competition Policy. Even today some point to that Policy for the demise of rural Australia and the agricultural sector. In economic terms the failure is explained by the inability of firms to operate efficiently, to compete aggressively or to manage transition issues when a sector undergoes change. In non-economic terms this is viewed as a failure of public policy.

26 Ibid 120–1.

27 See Mark Davis and Fiona Buffini, 'Sector Betrayed by Inquiry', *Australian Financial Review* (Sydney), 17 April 2003, 6; Mark Fenton-Jones, 'Small Business Disappointed with Dawson Review', *Australian Financial Review* (Sydney), 22 April 2003, 55; Peter Switzer, 'It's Law of the Jungle', *The Australian* (Sydney), 17 April 2003, 2.

28 See Mark Davis, 'Proposals Not Enough: ALP: Dems', *Australian Financial Review* (Sydney), 17 April 2003, 4.

29 The Senate was given the reference on 25 June 2003 and is required to deliver its report on 4 December 2003.

It is said that democratically elected governments must choose between different weights or social welfare functions to determine what is desirable, depending on what they think equity is – they must decide how to trade-off efficiency and equity objectives.³⁰ The Dawson Committee, like the Hilmer Committee before it, has again brought these issues to the surface.

30 Craig Johnston 'Consumer Welfare and Competition Policy' (1996) 3 *Competition and Consumer Law Journal* 245, 258.