Book Review

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CURRENT ISSUES IN COMPETITION LAW – VOLUME I: CONTEXT AND INTERPRETATION

Reviewed by Nicholas Felstead*

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INTRODUCTION

Current Issues in Competition Law is a two-volume collection of essays edited by Michael Gvozdenovic and Stephen Puttick. The two volumes cover "Context and Interpretation" and "Practice and Perspectives". This review will cover the first volume – the second will be reviewed in a forthcoming issue of the *Australian Business Law Review*. The editors' goal is to "make an holistic contribution to several debates and questions in an important, and ever more complex, area of law, that is, ultimately, fundamentally important to the commercial world, and the welfare of our community".[1] This captures the editors' important understanding that competition law is not just for pointy-headed lawyers and economists – the outcomes of competition (or the lack of competition) impact us all.

Context and Interpretation is divided into three parts: (I) Background, History and Theory; (II) Statutory Interpretation in Competition Law; and (III) Emerging Markets. Plainly, this structure is convenient for review purposes.

Background, History and Theory

Part One of the collection reviews the foundation of competition law in Australia.[2]

In "The Courts in Competition Law", the Honourable Robert French AC provides his perspective on the role of the courts in adjudicating competition law disputes. French brings significant expertise to this chapter as one of Australia's greatest competition law jurists. He provides an accessible review of the institutional and constitutional framework for Australia's competition law regime. French notes that the place of courts must be addressed by reference to their "irreducible constitutional functions" and "the degree of flexibility which the Constitution allows in the distribution of adjudicatory roles".[3] Given the limits of the judicial function, and the Australian brand of legalism,[4] French describes competition law as a paradigm case of where judges may be seen as "legal reductionists incapable of holistic perspectives".[5] French concludes that, although there is room for improvement, the courts are "more than tolerably good" in the field of competition law.[6] This chapter will serve as a sufficiently detailed introduction to Australian competition law for law students, the public and practitioners.

Rod Sims AO and Graeme Woodbridge explain the role of the Australian Competition and Consumer Commission (ACCC), its enforcement and policy objectives, and its approach to achieving those

* Lawyer. Views and errors are mine alone.

[1] Michael Gvozdenovic and Stephen Puttick (eds), *Current Issues in Competition Law – Volume I: Context and Interpretation* (Federation Press, 2021) 3 (*Context and Interpretation*).

[2] For readers who want more than the rich four chapters, I recommend the excellent Kerrie Round and Martin Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (Federation Press, 2015).

[3] *Context and Interpretation*, n 1, 6.

[4] See generally James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 719.

[5] *Context and Interpretation*, n 1, 7.

[6] *Context and Interpretation*, n 1, 27.

objectives in their chapter, "The Continuing Journey to Protect Competition: The ACCC's Perspectives on Part IV". They remind the reader that the ACCC must do all it can to prevent incentivised firms from entrenching or extending market power through acquisitions or conduct that limits meritorious competition.[7] One imagines that most people inclined to purchase one or both volumes in this collection will be familiar with the ACCC's role and powers. What will likely be of interest to such readers is Part V of Sims and Woodbridge's chapter, which sets out the issues and challenges the ACCC has faced in relation to anti-competitive conduct, mergers, cartels, authorisations and notifications.[8]

Dr Jill Walker's "Economic Perspective on Part IV" stays true to its title, commencing with a review of the economic underpinnings of competition law, discussing familiar concepts such as market failure, allocative efficiency, and competition both between and within markets. She notes that competition law is "fundamentally an economic law to preserve the conditions under which competitive markets can work to the ends of promoting efficiency and benefitting consumers]".[9] Dr Walker's view is that competition law ought to provide rules directed to protecting and promoting conditions for workable competition, and constrain exercises of market power antithetical to the promotion of efficiency and consumer welfare.[10] The chapter takes a deeper dive into the necessity of regulating co-ordinated conduct, exclusionary practices, mergers, and the exemptions process. In the spirit of Rod Sims' common refrain, Dr Walker highlights that the Pt IV regulations on competition do not stand alone and must work in tandem with the provisions of the *Competition and Consumer Act 2010* (Cth) (*CCA*) concerned with consumer protection and regulated access.[11]

Stephen Puttick, one of the collection's editors, makes his individual contribution in "Competition Law at the Limit of Common Law and Statute". His chapter examines the interface between the statute and common law in the context of competition law by evaluating the relationship between Pt IV of the *CCA* and the common law. In particular, he looks to the common law doctrine of restraint of trade and how the influence of the public interest can result in outcomes that may have been reached under statute, notwithstanding the prevailing attitude of commentators to treat the two as distinct.[12] (If this strikes a chord with readers, I recommend leafing through the pages of Jason NE Varuhas and Shona Wilson Stark's edited collection, *Frontiers of Public Law*.)[13] Puttick disclaims that both private enforcement of the *CCA* with a claim on an economic tort, and class action proceedings, are beyond the scope of the chapter. Whether this is an invitation for a reader to pick up where Puttick leaves us, or an indication of his future work, this is a rich chapter that could easily form the basis of an extended academic project.

Statutory Interpretation in Competition Law

Part Two commences with Perry Herzfeld SC taking the reader on the journey of "Statutory Interpretation from *Visy* to Today". Herzfeld notes that the approach of majority in *Visy Paper Pty Ltd v Australian Competition & Consumer Commission*[14] reflected the primacy of text, and such an approach has generally since been followed.[15] He also acknowledges (or reminds us) that "[g]iving primacy to the statutory text does not deny the relevance of the purpose of a provision or indeed the purpose of the *CCA* as a whole".[16] There is one beautiful passage from the chapter that ought to be considered by all:

[7] *Context and Interpretation*, n 1, 28.

[8] *Context and Interpretation*, n 1, 38.

[9] *Context and Interpretation*, n 1, 101.

[10] *Context and Interpretation*, n 1, 67.

[11] *Context and Interpretation*, n 1, 102.

[12] *Context and Interpretation*, n 1, 118, 121.

[13] Jason NE Varuhas and Shona Wilson Stark, *Frontiers of Public Law* (Hart Publishing, 2020).

[14] *Visy Paper Pty Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 1; [2003] HCA 59.

[15] *Context and Interpretation*, n 1, 131.

[16] *Context and Interpretation*, n 1, 138.

> [I]n the *CCA*, as in all legislation, a posited construction must be reasonably open on the natural and ordinary meaning of the words of the *CCA* read in the context in which they appear. That limitation is *ultimately an aspect of the rule of law*. "[I]n a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would otherwise have said if a newly considered situation had been envisaged".[17]

This is an important reminder to those in whom the executive have entrusted with interpreting the law – language matters and if judicial interpretation of text becomes unmoored from ordinary understanding, traders may be unable to confidently engage in business practices. In essence, this chapter is a primer on statutory interpretation in the context of competition law. Treating it as such, key takeaways include that answering questions of construction will often involve the simple application of natural and ordinary meaning;[18] and that in a statute as prescriptive and detailed as the *CCA*, there is little basis to read in requirements, qualifications or exceptions not found in text.[19] This chapter is a particular highlight in (what may be obvious by this point) a fantastic collection.

If an epigraph consisting of an Aristotle quote did not give it away, those familiar with her writing would instantly pick that "A Likely Story: Future Counterfactuals in Competition Law" is the work of Dr Ruth Higgins SC. The chapter commences with a brief review of the concept "likely effect", which correctly is said to punctuate Pt IV of the *CCA*. Dr Higgins notes that the structure of Pt IV provisions invites a "causation analysis that includes a forward-looking conditional counterfactual".[20] Through the lens of s 50 of the *CCA*, the chapter considers the meaning of "likely", issues concerning the factual and counterfactual analysis, and the mode of proof of hypothetical events. Dr Higgins reminds us that the reason that law "must operate in the real world"[21] is because it has consequences in the real world.[22] Difficult legal and economic questions are not answered only in the "cool hours" of the library, and the law "must ultimately be wordly".[23]

Justice Mark Moshinsky's chapter, "Defining and Determining a 'Substantial Lessening of Competition'", takes a deep dive into the familiar phrase found throughout Pt IV of the *CCA*. His Honour sets out the various provisions employing the phrase, discusses each of "purpose, effect, and likely effect" and considers the constituent elements of the expression "substantial lessening of competition".[24] It should suffice to say that the chapter is exceptionally well-written and contains comprehensive analysis is . It is obvious that the Justice Moshinsky has spent the best part of a decade writing for a public audience – the language is clear and simple, the structure is easy to follow, and it contains only the necessary number of footnotes.

To round out Part II, Dr Rhonda L Smith and Arlen Duke provide a comprehensive answer to the vexing question: "What Is the Market?". The authors introduce familiar characteristics of markets, including product, geographic and temporal dimensions, before exploring the hypothetical monopolist test (HMT) and small but significant non-transitory increase in price (SSNIP) and related practical issues. In particular, Dr Smith and Duke highlight the importance of properly identifying the "focal product" when applying the HMT or SSNIP.[25] In my view, this chapter could become an oft-cited piece as a result of its clear and concise explanations of familiar but difficult concepts. At the very least, it is likely to become a mainstay on assigned reading lists for university competition law electives.

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[17] *Context and Interpretation*, n 1, 146 (emphasis added), quoting *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 237.

[18] *Context and Interpretation*, n 1, 132.

[19] *Context and Interpretation*, n 1, 134, 136.

[20] *Context and Interpretation*, n 1, 149.

[21] *Australian Gas Light Co v Australian Competition & Consumer Commission [No 3]* (2003) 137 FCR 317, [348] (French J); [2003] FCA 1525.

[22] *Context and Interpretation*, n 1, 163.

[23] *Context and Interpretation*, n 1, 164.

[24] *Context and Interpretation*, n 1, 165.

[25] *Context and Interpretation*, n 1, 184, 186.

Emerging Markets

The final part of this first volume explores the application of competition law to digital, media and infrastructure markets.

Associate Professor Kathryn McMahon contributes an excellent chapter on "Economic Theory, Competition Regulation, and Digital Markets". The chapter explores market definition in multi-sided markets, the role of network effects and multi-homing in assessing market power, the nature of innovation markets and the role of data in competition regulation. These insights are valuable, but it is the next part of the chapter that captures attention as it turns to the debate between the "New Brandeis Movement" and the "Neo-Chicago School".[26] Associate Professor McMahon argues that critics of the New Brandeis Movement are out of step with contemporary developments in competition enforcement, and although the defence of the Neo-Chicago School "may be presented as a principled rejection of discretionary decision-making and the upholding of sound economic orthodoxy, … in reality, it is a push-back against a challenge to a long-held ideology of non-intervention in the market".[27] The chapter concludes with a reminder that an economic analysis of digital markets requires further theoretical and empirical research to properly understand competitive processes. Importantly, legislators and decision-makers must "'translate' debatable theoretical conceptions into workable legal rules that comply with fundamental principles [of the rule of law], including, not least, that laws must be clear, prospective, and certain".[28]

"Digital Platform Acquisitions: Anti-Competitive Mergers or Misuses of Market Power" – the title itself is evocative, no doubt an active decision to draw readers in by co-authors Dave Poddar, Michael Gvozdenovic, and Joshua Sinn. The authors propose two approaches that ACCC could use to tackle potentially problematic digital platform acquisitions. First, dubbed by the authors as the "factual", by relying on the traditional s 50 tool to enjoin a merger or acquisition. Second, the "counterfactual", by engaging s 46 and reframing impugned conduct as a misuse of market power. The authors note that the factual approach, and its requirement of assessing hypothetical futures, is challenged when faced with impugned transactions involving nascent competitors.[29] More pointedly, they describe the fatal flaw of s 50 as the absence of a "purpose" limb to enjoin a transaction.[30] The authors therefore look to the s 46 prohibition on misuses of market power as an alternative to address digital platform acquisitions and, particularly, nascent digital acquisitions and cumulative transactions.

Felicity McMahon and Jacqueline Downes review "Recent Developments in ACCC Review of Media Mergers". McMahon and Downes consider whether the ACCC's approach to reviewing media mergers reflects changing competitive realities and dynamics. They look to the manner in which the ACCC has considered market definition for media content and advertising, the assessment of competitive harm in media mergers, and the emergence of potential new markets. McMahon and Downes are partners at a firm of solicitors, and the chapter therefore characteristically commences with a practical framework for analysing media mergers.[31] For a junior practitioner assigned to a media merger matter, pages 259–262 would serve as a very good starting point (or refresher). The key conclusions drawn in the chapter include that the ACCC is becoming increasingly flexible and understanding of contemporary developments in its analytical approach, and that this is crucial given the highly dynamic nature of media markets. While such flexibility is welcome, the authors consider that "more definitive changes" to the ACCC's approach to market definition and assessment may become necessary.[32]

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[26] *Context and Interpretation*, n 1, 211.

[27] *Context and Interpretation*, n 1, 215.

[28] *Context and Interpretation*, n 1, 228.

[29] *Context and Interpretation*, n 1, 240.

[30] *Context and Interpretation*, n 1, 242. For my part, further discussion of this so-called "Achilles' heel" would have been a welcome expansion.

[31] *Context and Interpretation*, n 1, 259–262.

[32] *Context and Interpretation*, n 1, 277.

The final chapter in this first volume, by Belinda Harvey and Stephanie Phan, covers "Emerging Issues in Mergers in Infrastructure Markets". The authors look to the approaches taken in three recent cases – *Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission*;[33] *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)*;[34] and *Australian Competition and Consumer Commission v Pacific National Pty Ltd*.[35] As the authors note, infrastructure markets are often characterised by high barriers to entry and the competitive landscape is constituted by a few dominant players. However, Harvey and Phan correctly note that the approach to market definition is always going to be a key turning point for merger decisions, and that every case will turn on its own facts.[36] The authors also include an insightful discussion about the role of undertakings, both structural and behavioural, in infrastructure mergers.[37]

Conclusion

This collection is a must-read for competition and regulatory practitioners. Prior to formally reviewing the collection for this journal, I had scoured the pages of several chapters across both volumes for my own practical purposes. Chapters will no doubt end up on essential reading lists for competition law electives. Chief Justice Allsop suggests in the foreword to the volume that competition law exists to benefit all members of the public – I commend the collection to all.

[33] *Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission* [2020] FCA 117.

[34] *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)* [2019] FCA 669.

[35] *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49; [2020] FCAFC 77.

[36] *Context and Interpretation*, n 1, 297.

[37] *Context and Interpretation*, n 1, 294.