BOOK REVIEWS


This is an excellent book.

At its narrowest, the book provides a history of competition laws in Australia from European settlement in 1788 to the passing of the 1974 Act that forms the basis of Australia’s current competition laws.

However, the book really does much more than this. It provides a case study for the problems that face a country that is trying to develop and effectively enforce competition laws. Some issues, such as the constitutional constraints on the Australian Federal Government, are (at least partly) unique to Australia. But many of the lessons that can be drawn from the book are of broad appeal and interest. Indeed, this book provides a how to (and a how not to) manual for the many countries that are in the early stages of implementing competition laws.

The book considers three broad phases of Australia’s history. The first covers the period leading up to and immediately after Australia’s federation in 1901. The second considers the period leading up to the 1965 Act, Australia’s first effective competition laws. The third covers the impact of the 1965 Act leading up to the 1974 Act.

Australia’s federation occurred in the shadow of the US Sherman Act and national antitrust laws soon followed. But the popular focus was external, not internal. Imports were derided on patriotic grounds and

“[t]he staunchly protectionist Prime Minister Alfred Deakin promised to defend Australia’s producers, workers and consumers by introducing ‘protection in all its aspects – fiscal, industrial and against monopolies’” (p.33).

The resulting Australian Industries Protection Act 1906 (AIPA) included provisions against domestic monopolisation modelled on the Sherman Act. However, its aim was protectionist. The targets were the overseas trusts and monopolies that were seen to compete unfairly, using predatory behaviour to harm Australian businesses.

Two factors, however, intervened. The AIPA was “never actually used against an American trust” (p.35). Rather, the focus quickly shifted to domestic cartels. Also, the courts found that a number of the sections of the AIPA could not be enforced unless the behaviour extended across state boundaries. “[A]ny monopolisation or restraint of trade contained within one State ... were untouchable by the Commonwealth” (p.37).

This second factor has plagued effective competition laws in Australia ever since. One way around the issue is for state governments to enact legislation to mirror the federal laws. While individual states passed a variety of laws, they were rarely consistent. The book catalogues an extraordinary range of state price control and antitrust regulation, including nine different Bills and Acts in New South Wales alone between 1909 and 1939.

Indeed, it was only in the mid-1990s that state governments enacted competition laws to mirror the federal law, bringing partnerships, unincorporated businesses and government business activities under competition laws for the first time.

The period between 1901 and 1965 illustrates a battle between different levels of government, business and the courts, to control anti-competitive behaviour. Trade associations were used by businesses to fix prices and ensure collusive tendering. In Western Australia, action was taken against cement manufacturers but failed in the courts. The “judgment rested on the understanding that the product market was not confined to cement and therefore the cement manufacturer faced competition from glass, aluminium, plastics and wood” (p.117).

In New South Wales, “judgments upheld the rights of producers to collude, to fix prices and to enforce resale price maintenance” (p.117). As a result, by the early 1960s, “there were between 500 and 600 trade associations operating in Australia” (p.150), many operating as legal (and sometimes state supported) cartels. Sir Garfield Barwick, a prominent lawyer and politician, led the development of the 1965 Trade Practices Act. He wanted an Act that prohibited a range of both unilateral and concerted practices, subject to a “public benefits” defence. Compromise meant that the eventual law only deemed collusive tendering and collusive bidding as “inexcusably unlawful” (p.156).

1 All page references are to the book.
Other practices, such as third-line forcing and monopolisation were “examinable” by the Commissioner of Trade Practices. While some agreements between competitors needed to be registered, “[a]n agreement was legal until found by the Commissioner to be against the public interest” (p.157).

The implementation of the 1965 Act highlights three key insights for countries that are adopting new competition rules today.

First, education is critical. Much of the Commissioner’s work was educating business and the public about the benefits of laws against restrictive trade practices. This was critical to the law’s acceptance. “It was this process, as much as the legislation itself, that ultimately proved critical to changing business attitudes to the acceptance of anti-competitive agreements” (p.170).

Secondly, persuasion may be better than litigation, particularly when attempting to unwind the web of anti-competitive agreements that can exist in the absence of competition laws. The Commissioner, Ron Bannerman, used a “light handed” approach to enforce the 1965 legislation.

“In most instances, Bannerman persuaded industries involved in agreements that he deemed to be against the public interest to end their anti-competitive arrangements without recourse to litigation” (p.174).

This approach was successful in a wide range of industries, including many that had a long history of restrictive agreements (p.184).

Thirdly, while industry associations may claim a “broader purpose”, in the absence of effective competition laws, their real aim will often be to maintain collusion. The effective introduction of the 1965 Act in Australia meant that, without the ability to enforce collusion, many trade associations were wound up (p.184).

Nonetheless, the 1965 Act had limited effectiveness. The Act focused on the “public interest” as a defence. But this term is open to significant interpretation and went beyond consumer interests. For example, the view that a collusive agreement could provide public benefits by limiting “excessive” competition, continued in the courts.

The 1965 Act also failed to include merger provisions. Mergers provided a useful alternative to collusion and the Act led to a “rash of proposed mergers” (p.188).

The 1965 Act was replaced in 1974 by a new Act that followed the style of US legislation, including provisions against mergers that substantially lessened or restrained competition. While it banned all anti-competitive agreements, it retained the ability for these to be authorised on public benefit grounds. In this sense, it captured features of the US “rule of reason” jurisprudence and was an early example of the exemptions style of enforcement used in the EU and elsewhere today.

Histories that follow the development and progression of a specific category of laws in one country are rare. So what lessons can be drawn by academics, legal practitioners and enforcement agencies from a book that crisply documents 200 years of Australian experience?

Lesson One – The debate in favour of laws protecting the competitive process is complex

To many people, the argument in favour of competition is not obvious. Indeed, Barwick preferred an approach based on “promoting public welfare rather than focussing on competition per se” (p.130).

Barwick, of course, was right. Protecting competition is an instrument to protect public welfare. But the focus on competition is necessary to avoid spurious arguments. Anti-competitive arguments may be dressed in the social interest. For example, cartels in Australia argued that collusion was necessary to ensure a stable business environment. Focusing on competition is a way to short circuit the type of debate that dominated Australia for much of the 1900s.

Lesson Two – In the absence of effective competition laws, cartels will thrive

The book documents how, until 1965, the lack of effective competition laws in Australia meant that cartels and collusive agreements flourished. For example, “in the 1950s it was estimated that collusive tendering occurred in 50 to 60 per cent of all government purchases” (p.124).

It was only the successful implementation of the 1965 Act that started to unwind these cartels and their enforcement through trade associations.

The book provides both a broad overview of cartel activity and a focus on the specific case of the Newcastle coal cartels in New South Wales. Starting in the mid-1800s, these coal cartels instituted a variety of practices used by (legal) cartels around the world, including production quotas for members and minimum prices. When these agreements failed, either due to cheating by members or the effect of “outside miners” on coal supply and prices, other methods were tried. For example, in the early 1900s, the miners attempted to vertically extend their cartel into transport, to ensure that “outsiders” or “cheaters” would be unable to ship their coal to market. Vertical restraints were used in contracts to restrict sales to cartel members. To avoid the reach of the new AIPA antitrust laws, it was suggested that the cartel manage its operations out of London, beyond the reach of the Australian legislation.

The case study of the 1910 Coal Vend case, while based on work previously published in the Journal of Business History, is a highlight of the book. It raises issues of the welfare standard, public detriment and the measurement of consumer harm that are common to many modern competition cases.
Lesson Three – Competition laws may have limited success but they are better than the politically acceptable alternatives

Competition laws are imperfect. But the book shows how other politically acceptable remedies for market power are worse.

For example, in the absence of effective competition laws, Australian governments turned to direct ownership to influence competition. In the early to mid-1900s, Australian governments ran a range of businesses in banking, shipping, oil refining, brickworks, pipeworks, flour mills, fish trawlers, timberyards, and clothing, to name only a few.

These interventions were generally ineffective and costly. “Supposedly to help dairy farmers obtain a fair price for their product, in 1906 the South Australian Government ... opened a butter factory to compete against both privately owned and cooperative factories” (p.65). The factory closed with heavy losses in 1935.

Similarly the Western Australian Government established a (loss making) shipping company. “Although it was established to break the shipping ring, in 1938 it joined it” (p.67).

The book shows that, while competition laws may be imperfect, they are better than the alternatives.

Lesson Four – Small countries face a bigger hurdle to win the intellectual argument for competition

Australian history, from around 1910 to 1960, shows the difficulty of winning the intellectual argument for competition. Given the relatively small size of the Australian market “monopolistic practices [were] seen as one solution to gain economies of scale” (p.124). There was a view that monopoly could be benevolent.

However, it must be remembered that the US introduced the Sherman Act in the late 1800s when, by modern standards, it was a relatively small economy. In the lead up to the 1965 Act in Australia, Barwick noted that

“[t]he American antitrust legislation was brought in at almost the same stage of the American economy as we are now experiencing in Australia – the change-over from a primary producing country into an industrial country” (p.132).

Both Australian and US history shows the fallacy that small economies are different and do not need (or need different) competition laws.

In summary, this book provides an excellent mix of well-documented facts and data together with the “stories” that make for exceptional reading. For researchers, details of various collusive arrangements, commissions of inquiry and legislation will be an invaluable resource. For practitioners and the casual reader, the discussion of the relevant debate and cases provides a vivid account of the difficulties of designing and selling competition laws. Indeed, the benefit of using Australia as a case study for the modern development of competition laws is not its success but its failure to prevent anti-competitive practices for the best part of a century. It highlights the barriers to successful implementation of competition laws and the importance of selling both the concept of competition and the benefits of competition laws to politicians, the judiciary and the general public. To economists and competition lawyers, these benefits might seem obvious. But to many parties, competition appears unfair and destructive. As a multitude of countries around the world implement new competition laws, this book provides a well-written and timely case study of what to do and not to do when regulating for competition.

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