REGULATORY POWER AND FREE TRADE: THE RULES OF ENGAGEMENT IN THE ERA OF DE-REGULATION*

WARREN PENGILLEY**

I TERMINOLOGY

A *The Dictionary Meaning of "Free"*

Necessarily my subject matter conjures up definitional issues. The first definitional issue is what is meant by "free".

The meanings given to the word 'free' in the Macquarie Dictionary occupy the best part of a whole column. Those most suited to the subject I here discuss probably are:

- exempt from external authority, interference, restriction etc
- independent, unfettered
- permitted or able at will (to do something)
- not subject to special regulation or restrictions
- clear of obstructions or obstacles.

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** Dr Pengilley is Professor of Commercial Law at the University of Newcastle and Special Counsel to Deacons Lawyers, Sydney. He was formerly a Commissioner of the Australian Trade Practices Commission.

My brief is to speak on regulation, de-regulation and competition law in the above context.

I speak only in relation to the domestic scene. The issue of free trade in the international arena is one for a paper, or a series of papers, in its own right.

B *The Meaning of "Regulation"*

In a commercial context, the opposite of 'freedom' and 'competition' is probably 'regulation'. The Macquarie Dictionary defines 'regulation' as 'a rule or order prescribed by authority'. To 'regulate' is to control or direct by rule.

C *Placing the Various Definitions in a Real World Commercial Context*

The above "objective" definitions are not, however, of great assistance in my view. Commonly used words are not scientific terms. Within the dictionary definition of "regulation" any form of government intervention is covered. In common parlance, however, I think most of us would reject this. Economic activity cannot exist without laws which govern its existence. Without laws, things such as money, credit, corporations and the like simply do not exist. Further, it is inconceivable that economic activity can function in a context of social anarchy. Therefore, government intervention in a "law and order" or "defence" context is not what I would regard, at least in the present context, as "regulation".

It is necessary, therefore, in my view, to distinguish between general legal standards against which economic activity is conducted on the one hand and "regulation" on the other. The two differ significantly in their nature and operation. "Regulation" has within it the concept of "licensing", "certifying", "making orders", "approving", or "directing". Detailed regulation generally involves decisions on an on-going and case-by-case basis in circumstances which do not usually result in a precedent which can be applied in a more general context. This is the antithesis of general background laws set up to enable industry to operate or general laws which specify how industry is to operate.

It is this view of "regulation" which I here adopt.

D *A Regulator is any Entity Which Has the Power to Regulate*

It is immediately obvious, given the above, that a body such as the Australian Competition and Consumer Commission (the ACCC) is both a regulator (in that it approves, directs, restricts and certifies various matters on a case-by-case basis – such as, for example, setting telecommunications access prices) and also a non-regulator, or perhaps a de-regulator (when it enforces general background laws governing competitive conduct or general background laws prohibiting misleading or deceptive conduct). It is also the case that the court system, generally regarded as having nothing to do with regulatory activity, can be a regulator[1] as well as enforcing laws compelling

[1] For example, in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* (1989) ATPR ¶ 40 – 925, the High Court held that BHP had taken advantage of its market power, and breached s 46 of the *Trade Practices Act*, by refusing to supply to Queensland Wire at other than a 'reasonable price'. Necessarily it follows that the court must believe that it can

market activity. The fact of regulation has nothing to do with who does the regulation. A regulator is any person with the power to regulate. Private parties may be regulators just as effectively as many government entities.[2] Indeed, much of our competition law is aimed at preventing what I would call private regulation.

E *Views of the Trade Practices Act and its Operation Involve Fundamental Philosophical Conflicts*

There is, in light of the above, a fundamental philosophical conflict in relation to one's approach to the *Trade Practices Act*.

In my view, the so-called "free enterprise" economy will not be truly free (and it may not be very enterprising either) if there is no mechanism to ensure that its members are unconstrained by obstructions and obstacles which other market participants can place in their path. I, therefore, support the basic competition philosophy behind the *Trade Practices Act*. In this context, I regard the Act as a tool of ensuring "free trade".

However, much of that Act, and much of the ACCC's activities in relation to its enforcement, are now clearly regulatory in nature. So the ACCC can determine access conditions to so called essential facilities, it has a significant role in determining telecommunication prices and has exercised a heavy regulatory role in activities such as gas and electricity.

One's views as to the desirability of the *Trade Practices Act's* regulatory activity, and the way in which it is exercised, are not necessarily the same as one's views as to the desirability of background competition laws by which industry conducts its overall activities.

Philosophically, therefore, it is quite possible to regard the *Trade Practices Act* in the same way as the curate's egg – good in parts – and there is no necessary inconsistency in doing so.

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determine what constitutes a 'reasonable price' yet this must necessarily involve an evaluation of cost, supply and demand factors specific to individual cases which decisions are of no general precedent value. The court system in these circumstances becomes, in my view, a regulatory body. Price setting is inherently regulatory as this concept is understood in this paper. Any decision, whether given by a court or otherwise, which contributes to this result is also a regulatory one.

[2] This point has been put in many ways. Perhaps it is no better put than by a submission, now many years ago, of the Canadian Manufacturers' Association when urging strengthening of the *Canadian Combines Act*. The submission stated:
'The members of this Association have adhered to the belief that a system of economic enterprise that is free, private and individualistic is the foundation of our past achievements, our present high standard of living and economic prosperity and the best hope for rapid future development. This system it is recognised, may be endangered either by undue governmental or undue industrial control. The operator of an individual firm may have his freedom of choice as to what goods he will make, what technique of production he will use, what prices he will charge and what areas he will sell in, taken away from him just as effectively by an industrial combine or monopoly as by government edict'. [Submission of the Canadian Manufacturers' Association to a Government Committee to study the Combines Legislation in Canada (cited from the 1952 Report of the Committee, 22).]

THE RISE OF THE REGULATOR AND A DISCUSSION OF "REGULATORY PROBLEMS"

Before proceeding further, it is appropriate to discuss some of the more obvious problems which present themselves with the rise of the government regulator.

F *The Rise of the Regulator Under the Banner of "De-Regulation"*

This is the age of competition. It is also the age of so called "de-regulation". Or so the rhetoric goes. Yet but a cursory examination of the facts reveals that Australian commerce is now subject to a whole new wave of regulators – at both Commonwealth and State and Territory levels – which were not even contemplated a decade ago.[3] These regulatory authorities, largely, but certainly not solely, set up as the result of the corporatisation or privatisation of governmental trading entities have usually been established on the principle that they further competition. Yet their functions are primarily regulatory in nature. The facts are that, even confining oneself to the Federal level, it is now extremely difficult to ascertain just who is responsible, politically and administratively, for what.[4]

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[3] For example, the Independent Pricing and Regulatory Tribunal of New South Wales; the Office of the Regulator-General of Victoria; the Queensland Competition Authority; the South Australian Independent Industry Regulator; the South Australian Independent Pricing and Access Regulator; the Tasmanian Government Prices Oversight Commission; the Office of the Tasmanian Electricity Regulator; the Western Australian Independent Gas Pipelines Access Regulator; the Western Australian Office of Water Regulator; the A.C.T. Independent Pricing and Regulatory Commission and the Northern Territory Utilities Commission. For a note on these bodies and their roles see Frank Zumbo, 'Administration and National Competition Policy' (2000) 8 *Trade Practices Law Journal* 175.

[4] In much of Australia's empowered regulatory activity, it is a major problem to ascertain who is, in fact, the relevant regulator and who is politically accountable for that regulator. Much of the administration of our competition law, for example, relies upon interdepartmental arrangements which, though not secret, are not widely publicised and are often vaguely worded. Much of the Act is administered by "the Treasury". Within this Department, however, political accountability for Treasury administration is divided amongst the Treasurer, the Minister for Financial Services and Regulation and the Assistant Treasurer. Country of Origin matters are administered by the Minister for Industry, Science and Resources and the Parliamentary Secretary to that Minister but the Minister for Health and Aged Care also has a role as Minister responsible for food labelling. Part X of the *Trade Practices Act* is administered by the Minister for Transport. Telecommunications is administered by the Minister for Communications, Information, Technology and the Arts. The Minister for Small Business and Industrial Relations has a pivotal role in relation to s 45D of the *Trade Practices Act* covering secondary boycotts and in relation to the promulgation of mandatory and voluntary codes. All of these divergent politicians have a role in administering but one Act of Parliament. Little wonder, therefore, that one of the writer's queries on country of origin laws could not find a political home and provided only material for inter-Ministerial ping pong, no-one wanting to answer the query and forwarding it to another allegedly responsible department. [See W J Pengilley, 'What is happening about that ACCC Misleading Country of Origin Guideline?' (2000) 8 *Competition and Consumer Law Journal* 69]. At the regulatory level, the ACCC and the National Competition Council are the major players. In relation to access to services, there are a variety of State Access regimes accountable to State Ministers. The ACCC itself is a significant regulator in relation to the *Broadcasting Services Act 1992*, the *Moomba-Sydney Pipeline System Sale Act 1994* and the *Australian Postal Corporation Act 1989*. There are interconnecting pieces of legislation, State and Federal, which relate to the regulation of electricity under the *National Electricity Code*, gas under the *National Gas Access Code* and Airports under the *Airports Act*. All of these ultimately find their way to the ACCC as regulator under Pt IIIA of the *Trade Practices Act*. The ACCC also approves trade mark certifications under the *Trade Marks Act 1995*. [See generally W J Pengilley, 'Who administers

G *The Inherent Expansion of Regulation, Both Horizontally and Vertically*

Regulatory spread is inevitable. It is an inherent factor in regulation. As one aspect of economic life comes under regulation, individuals find methods of frustrating the regulator. Thus the regulator feels it necessary to extend regulation to encompass those fields which require control if the original object of regulation is to be obtained. This involves a widening scope of regulatory action over ever increasing segments of the community. Some random examples clearly demonstrate the point made.

1 *The Prices Surveillance Authority and Regulatory Spread: The Regulation of Aeronautical Charges*

The Prices Surveillance Authority[5] thought it could not properly carry out its task to monitor aeronautical charges unless it could also monitor car rental charges, leasing charges and other commercial arrangements entered into by the Federal Airports Corporation.[6] The regulation of one area of charges, according to the Prices Surveillance Authority, necessitated the regulation of another.

2 *The ACCC and Regulatory Spread*

The ACCC believes that the *Prices Surveillance Act*, set up to survey prices in the economy, should now be revised to enable it to be a pricing regulatory instrument. The ACCC believes that it should have the power to fix prices and that its decisions should have the force of law. The ACCC believes that it should be able to consider price increases in advance of their implementation and should be able to impose conditions on their implementation.[7]

The power given the ACCC to regulate 'access prices' to 'essential facilities' pursuant to the ACCC's arbitration powers under the *Trade Practices Act's* Pt III Access Regime is also now regarded by the ACCC as inadequate. The ACCC believes that an effective access pricing scheme will not eliminate the potential for excessive pricing. So, the ACCC seeks the right to determine end product prices in addition to access prices,

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our competition and consumer protection laws?' (1998) 6 *Competition and Consumer Law Journal* 258.] Various industry codes can now also be declared, whether mandatory or voluntary codes, under Pt IVB of the *Trade Practices Act* with resulting consequences in terms of Pt IVA of the Act. All Australian franchising activity is now regulated under a declared mandatory code.
We may soon desperately need a CCH Reporter devoted entirely to finding out, and indexing, who is responsible for what in the competition and regulatory fields. There is a major business opportunity for a publisher to establish the *Competition and Regulatory Bodies Finding Reporter*.

5 Now merged with the Australian Competition and Consumer Commission.

6 Prices Surveillance Authority, 'Inquiry into Aeronautical and Non Aeronautical Charges of the Federal Airports Corporation' (Matter PI/92/7, 17 August 1993).

7 ACCC Submission to the Productivity Commission Review of the Prices Surveillance Act (June 2000) Par 4.4. This view was not accepted by the Productivity Commission and seems to be based entirely upon price increases in tug services in Port Jackson in February 1998 contrary to the ACCC's recommendation. The point in the text, however, is still validly made, ie that regulators will seek to expand their regulatory control in order to bring those who do not agree with them within their regulatory net.

describing this as a power which would be 'a useful and important adjunct to access reforms'.[8]

Not only does regulation expand to encompass more activities. The regulator also seeks to involve itself more deeply in decisions as to how entities conduct their business. Regulatory spread is thus both vertical and horizontal in nature. In its "commercial churn" conflict with Telstra, for example, part of the ACCC complaint was the technology which Telstra employed in relation to the transfer of a service to a new provider. The ACCC sees the solution to this as being that it should have the power to require a telecommunications entity to engage in specific conduct, namely conduct that the ACCC believes should be that of a carrier or service provider in a competitive telecommunications market.[9] The ACCC sees this as requiring a telecommunications entity to carry out a positive act, such as replacing its technology, at the direction of the ACCC. Such a power would give the ACCC the legal right to mandate the technology with which a telecommunications entity carries on its business – an intrusion which, so far as I am aware, applies to no other regulator or industry in Australia except where safety is an issue.

3 *Regulatory Expansion: The Conclusion*

It is simply not possible to have just "a little bit of regulation" in any particular industry. The above examples of the expansion, or attempted expansion, of regulatory power illustrate this point. There are any number of akin examples which could be added to this list.

H *Regulatory Foresight: The Use of Regulatory Power to Thwart Innovation*

One must question how wise regulators can be in any event – especially in rapidly changing markets such as the telecommunications market. Our long term telecommunications vision of 13 years ago is, in retrospect, laughable.[10] I wonder how

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8 Ibid, Par 4.2.

9 ACCC Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation (August 2000) Par 5.8.

10 In 1988, a new telecommunications policy was introduced. A regulator, AUSTEL, was to be established. One of its functions was to be to *protect* the then Telecom monopoly. "Bundling" of phone and fax services was not to be permitted. Third party voice switched traffic was not permitted to be carried on satellite. One avowed policy objective was to prevent the diversion of traffic from the public network to private operators. The writer made the following observations on this policy which policy was then regarded as very forward thinking:
'Telecom has, over time, been highly successful in fending off competitive influences which would weaken its market position. Thus, Telecom initially objected to a domestic communications satellite. When it was realised that this could not be stopped, it changed its strategy and argued, with partial success, that the satellite should be placed in its hands. Much of the competitive threat of the satellite was neutralised when the *Satellite Communications Act* specifically excluded AUSSAT from providing public switched telephone and data services in competition with Telecom. [See 'Battle of Satellite Waves', *National Times* (Sydney), 14-20 March 1986; *Australian Financial Review* (Sydney), 4 November 1987]. This restriction is to continue. [Senator Gareth Evans, Minister of Transport & Communications, *Ministerial Statement on Australian Telecommunications Services,* AGPS, Canberra (1988) 77-78)]. With ever multiplying technological changes, there will undoubtedly be other areas over which the regulatory net will soon be spread. It has already been foreshadowed that the reservation of basic switched voice services will necessarily entail a restriction on the supply by entities other than Telecom and OTC of services which 'bundle' a switched voice connection with any other service or set of

laughable our most recent telecommunications policy, based on television entry restrictions and a prohibition of alternative supply of many products by way of the internet, will be in light of alternative available information providers and available alternative technology. Here we see the expansion of regulatory powers to thwart, not encourage, innovation and technology. Can such regulation succeed in view of the fact that the internet is so notoriously difficult to control? Is it even desirable, long term, that such regulation should succeed? We will all await the outcome of this with interest. My bet is that in 13 years time the present regulatory controls will be as laughably irrelevant as the controls of 13 years ago are to today.

I *The Problem of Centralised Decision Making*

If we ask, as a matter of principle, why competition law prevents industry members from getting together to make joint decisions on pricing and marketing, we get various answers. At least one concept involved, however, is inherent in the nature of decision making itself. We encourage diversity of decision making because, although some decisions may well be wrong, we believe it desirable that no one decision maker should have the capacity to make a decision which is a tragedy for the nation as a whole. Probably, when it is all boiled down, this is what we most fear from monopoly power. We may perhaps, therefore, tolerate some inefficiency to guard against the above possibility. Diversity of decision making puts a safety net under our business decision making and to a degree is a protection against the limitations of human wisdom.

This principle is just as applicable to governmental decision making as it is to private decision making. Human wisdom is not the particular province of private or public decision making. There is much to be said for diversity of decision making simply because of the economic safety net which such diversity brings. Consistency with competition law principles demands that these principles also be applied to public sector decision makers.

This argument should not be misunderstood. It is not a disparagement of the wisdom of the members of any regulatory body. It is merely acknowledging that they, like the rest of mankind, have limitations on their wisdom and that a system to ensure that these limitations do not result in a disaster for the nation as a whole is a much better system than one which permits this possibility. Neither is the argument about the effectiveness or ineffectiveness of the implementation of decision making. It is not suggested for one moment that decisions should be ineffective or unable to be enforced. Neither does it

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services. [Evans, *Ministerial Statement* (above) par 3.58 p46]. Further, the Government intends to regulate the provisions of services which are, or may become, direct substitutes for switched voice services. [Evans, *Ministerial Statement* (above) par 3.58 p46]. All of this is justified by the explanation that such restrictions 'will prevent undue diversion of traffic from the public network to private operators'. [Evans, *Ministerial Statement* (above) par.3.61 p47].

No doubt regulations will expand horizontally to prevent people privately utilising alternative methods of communication as and when inventive genius creates such methods. We can expect no less if one of the five major functions of the new 'independent regulator', AUSTEL, is specifically said to be that of '*protecting*' Telecom's monopoly. [Evans, *Ministerial Statement* (above) par .6.14(b) p126]." (Emphasis added).

See W J Pengilley, 'The Exclusion of Competitive Carriers' in M Armstrong (ed), *Telecommunications Law: Australian Perspectives* (1990) 295.

Such a "forward thinking" policy of but 12 years ago shows how even recently conceived regulatory policies have very little capacity to take into account and foresee technological and market changes even in the short term.

follow that if decision making power is diversified, this necessarily gives rise to weakness in implementing decisions taken. The philosophical point is about who makes the decisions, not their enforcement.

On the basis of the above logic, power aggregation is something to be looked at with concern. Yet power aggregation frequently accompanies regulation - and it certainly has done so in Australia. The most obvious example is that of the ACCC. It has powers in a wide number of industries.[11] It also has a wide variety of divergent functions – price setter, competition enforcer, consumer advocate, adjudicator, publicist, educator and arbitrator, to name but some. The problem of being impartial, and being seen to be impartial, is magnified in the case of such hydra headed functions all being bestowed on one entity. So, if the ACCC sets policy by way of guidelines, it can well be argued that it cannot give due adjudicative impartiality to particular instances of conduct which may challenge such policy. If consumer benefit is but one factor to be weighed in a price setting or arbitration context, can the ACCC be expected to give appropriate impartial consideration to other factors when the protection of consumer interests constitutes such a large part of its charter? The ACCC sees no problem in fulfilling all these roles. Many outside the ACCC, however, do not see it this way.

III THE CASE FOR GOVERNMENT REGULATION

A *The Reasons Given for Government Regulatory Intervention*

There are clear warning signs that government regulation is not lightly to be embarked upon. But all countries have government regulation, even the most capitalist.

Those who argue for regulation in various industries argue at least the following reasons for governmental intervention into "free" trade:

- The market will just not do some things. It will not provide services that no one wants to pay for, even if many may regard them as "essential". So some form of monopoly licence may be given to a particular industry to encourage it to provide the "essential" service.

- In some areas, the "market" is not an efficient rationing system. So, some form of price regulation or price control is necessary to ensure that the consumer is "fairly" treated. Often this control is in respect of basic products or basic industries.

- The market may have plenty of competitors, actual or potential. But such competitors cannot enter the market because a scarce facility or resource, not reasonably able to be duplicated, is withheld from them. Hence a regulatory scheme may be established to allow parties access to such resource and determine the terms of such access.

- Frequently, there are social reasons for intervention. Competition as a resource allocator may be efficient but it is not magnanimous. It allocates to those who can pay. The result may well be, for example, that the rich man's dog has milk whilst

[11] See above n 4 for some of these.

the poor man's child dies of rickets. The government aim is, by market intervention, to prevent this result which is regarded as socially undesirable.

- The government view may be that intervention by regulation is more efficient than allowing the normal competitive processes to flow – for example, regulation may save costly duplication of resources. Judicially, it has been stated in the United States, for example, that: 'the basic goal of direct governmental regulation through regulatory bodies and the goal of indirect government regulation in the form of antitrust law is the same – to achieve the most efficient allocation of resources possible'.[12]

B *What Questions Should be Asked Before a Regulatory Solution is Imposed?*

Given the above, trade in some industries will never be "free" in the sense of not having any government regulation. But I think many questions should be seriously asked before a government regulatory solution is imposed. I believe that all too frequently this is not done. A few of these questions might well be:

- Whether the industry is appropriate for regulation. Is the regulation merely an expression of the syndrome that there is a political solution for everything when there is not? Is the establishment of a regulatory authority merely buck passing the problem?[13]

- Is there a clear identifiable object in the regulation of the industry? Can it be achieved by regulation? Is there an open-ended commitment to regulation or is this regulation to be reviewed? What are the predictable long-range results if there is an open-ended commitment?

- Is reasonable certainty given by the regulation in basic matters such as prices and conditions? If these cannot be prescribed with precision, is a basic formula for evaluation set out? Can the arbitrary nature of regulatory decisions be minimised?

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12 *Northern Natural Gas Co v Federal Trade Commission* 399 F2d 953 (DC Cir 1968).

13 In this regard, I commend the thoughts of Lee Loevinger as follows:
'At this point in our social development, bureaucracy is the problem, not the answer. Turning to bureaucracy as a means of meeting each social problem is a product of what has been called 'the political illusion' – that there is a political solution for everything.
Frequently the establishment of a bureaucracy is not a method of solving social problems at all, but rather a method of evading them. The establishment of an agency with delegated power to take appropriate action in some problem area to serve the public interest, or comply with some other vague standard, is simply a legislative device for avoiding responsibility – a method of passing the buck …
There may be some political advantage in setting up a bureaucracy to deal with troublesome problems, leaving it without any clear policy guides, and then attacking it for inaction when it fails to act or for improper action when it acts in a manner that fails to satisfy a majority of the public or members of the legislative body. However, this is one of the worst methods of dealing with social problems …
By erecting an institutional façade around the problem areas, it tends to hide the problems from the view and prevent them from receiving the attention and discussion that is essential to the formulation of effective and generally acceptable solutions'.
Lee Loevinger, 'The Sociology of Bureaucracy' (1968) *The Business Lawyer* 15-17.

- What are the efficiency factors involved? Is there some way of assessing these and ensuring that they occur?

- Is the true intent of the regulation merely to protect existing industry? If so, why is this necessary? Has the disadvantage of the exclusion of the potential new entrant been evaluated from the viewpoint of that entrant and the community as a whole? Is the true cost of protecting existing industry the thwarting of innovation which, in the long run, is desirable and possibly unavoidable?

- Does the regulatory authority require such an imperious charter? Could the area of regulation be reduced? What are the applicable civil rights questions involved? Is there provision for representation of opposing interests in regulatory decision making? Are there publicly available reasons for decisions made?

- Is impartiality of decision making assured or will the decision maker have, or be perceived to have, other "agendas" which may compromise an impartial evaluation of applications?

- Will it be necessary to extend regulation to other industries or practices not presently the subject of regulation if the regulation is to be effective in the long run? If so, is the better choice not to regulate in the first place?

C *Regulatory Arm Twisting*

If government regulation is not subject to appropriate checks and balances, there is a very real danger that regulation by legal process will be replaced by regulation by arm twisting. *Arm twisting* 'is a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging 'voluntary' compliance with a request that the agency could not impose directly on a regulated entity'.[14]

Arm twisting or, as some may regard it, regulatory bullying, can manifest itself in a variety of ways. The greater the regulatory power, the more credible an arm twisting threat is and the more likely it is that regulators will engage in the practice. No-one can bully from a state of perceived weakness.

Arm twisting is particularly apparent in situations where:

- The regulator threatens widespread legal action against a particular section of the community whereas the truth is that it is never likely to take such action, or at least not take action to the extent threatened. The threat aims to make a particular person believe that enforcement is widespread when it is not and thus to coerce compliance with the regulator's wishes.

- The regulator consistently "talks up" penalty provisions in legislation with the effect that the community believes that even the most minor transgression of the law is likely to involve the maximum of penalties.

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[14] L Noah, 'Administrative Arm Twisting in the Shadow of Confessional Delegations of Authority' (1997) *Wisconsin Law Review* 73.

- The regulator may point *in terrorem* to powers which it has to serve notices which give *prima facie* validity to certain determinations it makes. These determinations may ultimately be court reviewable but the cards are stacked in favour of the regulator both because of presumptions running in its favour and because penalties may run from the date of the regulator's notice.

- The regulator actually misstates the true position – such as claiming that it has certain powers which it does not, in fact, possess. This claim can be backed up by the various other tactics referred to above.

  Alternatively the regulator may state a legal position in its "Guidelines" which accords with its policy but is not the legal position at all. The regulator, by its position, convinces the party involved that the law is as it states and that it will enforce the law according to its view.

- The regulator actually issues court process but, because of doubts in the regulator's own case, then "settles" the matter after lengthy pre-trial proceedings. The party proceeded against has little option but to settle. However, it will have incurred significant costs, legal and otherwise, which will not generally be recoverable. The threat of this action, and the knowledge that the regulator has engaged in such tactics in previous cases, may itself be enough for the regulator to win the day. Further the fact that legal proceedings are pending has a deterrent effect on others who may believe that they can act lawfully but are concerned at the regulator's pending action. In this way, the regulator can often achieve its objective but the legal correctness of its views is never tested.

- In litigation, a regulator may seek to obtain advantage by stonewalling, refusing to provide details of its case, details of its market analysis or details of its evidence whilst obtaining, over time, more evidence and information from a regulated entity which seeks, by divulging information to the regulator, to convince the regulator that no action should be taken against it.

  No doubt all litigation involves "tactics". The regulator is, however, strategically advantaged in litigation, and thus able to "arm twist". In inter-partes litigation not involving a regulator, disclosure is normally bargained on a reciprocal basis, no party being capable of wielding the penalty big stick. In the case of litigation to which a regulator is a party, the threat of the penalty big stick encourages disclosure to the regulator without necessarily there being any bargaining power to ensure that this disclosure is reciprocal. A regulator can use this disparity of bargaining power unfairly to advantage its own position.

- The regulator uses publicity which can often imply, if not specifically state, that a party has breached the law without this fact ever being finally demonstrated, or required to be demonstrated. Any threat of adverse publicity can be a formidable regulatory weapon. The credible threat of such publicity can often coerce acquiescence to the regulator's view.

- The regulator points to the fact that, in the ultimate, it has decision making powers which it will use and which are unreviewable - in some cases de facto so and in

> others legally so. This is a particular problem in cases where a regulator has a policy implementation role and also a quasi judicial role in relation to the policy it implements. Should the regulator have a particular view or want to implement some particular theory, the citizen can be arm twisted because of the fact that ultimately the regulator is also the decision maker and there is no venue in which the citizen can, as a matter of commercial reality, have the regulator's theory independently evaluated, no matter how wrong the citizen may believe this theory to be.

All of these regulatory tactics are matters of concern. There are many Australian examples of regulatory "arm twisting" and we will later look at telecommunications legislation and enforcement as a case in point. Regulation by "arm twisting" is bad regulation. Perhaps "arm twisting" is the regulatory tactic most resented by regulated industry and, from the point of view of the treasured Australian "fair go", the least justifiable regulatory conduct.

"Arm twisting" is the product of imperious statutory powers which necessarily lead to imperious regulation. The two are intertwined. The more imperious the statutory powers, the greater the capacity to arm twist.

D *The Place of Government Regulation*

Government regulation involves a lot of paperwork. The fact that continuous submissions have to be made to government for decisions often simply outweighs the ability of the organisational structure to cope. This is bad for business in being put to the cost of having to make the submissions. It is bad for the public because only a small proportion of regulatory decisions can be made on careful evaluation and well considered judgments. What follows, I think, is that, even on a cursory evaluation, government regulation cannot be a productive solution to anything but select problems. Government regulation can at best be seen only as a method of curing specified ills. Like medication, regulation should not become the basic norm or diet for an essentially free enterprise system.

E *Government Regulation: The Rules of Engagement*

Perhaps the major difficulty in relation to government regulation is keeping such regulation to the minimum necessary to the curing of specified ills in the economy. If there is governmental regulation, the rules of engagement should be that governmental intervention be implemented in conformity with community views of social justice. In other words, the regulator must adjudicate fairly and impartially. Any regulatory mechanism should be such as to ensure that this result does, in fact, occur.

IV PRIVATE REGULATION

Private regulation can have all the defects of government regulation. There is no reason to believe that private price fixing and private licensing agreements are at all attuned to efficiency considerations. Almost always such arrangements favour present market players to the detriment of new entrants. Private bureaucrats build power bases just as government bureaucrats do.

There is, however, a fundamental philosophical difference between private and government regulation. Government regulation is instituted by the nation's elected representatives for the public benefit. Private regulation is instituted by a private sectional group for private benefit.

I attach as an Appendix to this paper a summary of the types of restrictions which private groups may impose, classified on various bases. These restrictions apply only to arrangements between competitors and, of course, these, though the most usual, are not the only arrangements with which the *Trade Practices Act* is concerned.

The inevitable conclusion from the examples cited in the Appendix is that the absence of government regulation does not ensure the absence of private regulation. Neither does the absence of government regulation ensure the presence of competition. Nor does the absence of government regulation ensure individual freedom of trade. The individual can have his or her freedom of choice curtailed just as much by private regulation as by government regulation. Only the regulator, not the fact of regulation, has changed. In both forms of regulation, the community loses the benefit of individual decision making by persons motivated in their own best interest and responsible for what they decide. In other words, the community, under both forms of regulation, loses the benefit of free trade.

What is needed, therefore, is a law to ensure that, in the absence of governmental regulation, the individual does, in fact, have freedom of trade. This is what the restrictive trade practices provisions (Pt IV) of the *Trade Practices Act* are all about. Pt IV of the Act is not regulatory. It does not, for example:

- control prices;
- control entry to, or exit from, the market;
- control patterns of distribution;
- control other significant aspects of economic activity.

Part IV of the *Trade Practices Act* is aimed at ensuring that these issues are determined by individuals free to make their own decisions in light of the circumstances faced by them. For this reason Pt IV of the *Trade Practices Act* relating to restrictive trade practices is a highly important tool in the promotion of freedom of trade. Philosophically it is de-regulatory, not regulatory. It is a law which sets the background against which economic activity is to be conducted. It is not a law which involves licensing, certifying, ordering, approving or directing in individual cases.

V HOW DO OUR LAWS IN AUSTRALIA MATCH UP TO THE ABOVE PRINCIPLES?

A *The Restrictive Trade Practices Provisions (Pt IV) of the Trade Practices Act*

Australia is fortunate in having a comprehensive competition law which prevents private regulation inhibiting free trade.

4 *Price Fixing and Collective Boycotting Prohibitions*

At the nub of Australia's competition law is a prohibition on price fixing and collective boycotts. Examples of this type of conduct are set out in the Appendix. A fundamental

ban on this type of conduct in Australia is to be commended. In the case of collective boycotts in particular, there can be very fundamental civil rights which are infringed when a group of competitors "bully" another. The expulsion from, or denial of entry to, trade associations, often with consequences impinging upon a party's capacity to sell product are classic examples of this. Cases prior to, and in the early days of, the *Trade Practices Act* show just how severely freedom of trade can be restricted by private collective boycott arrangements.[15]

Both price fixing and collective boycott arrangements are rigorously enforced by the ACCC. Despite odd occasions when the ACCC has mounted hopeless cases,[16] no one can doubt that this enforcement, over all, has considerably benefited free trade and competition.

Of recent times there has been a call by Professor Fels, ACCC Chairman, for the imposition of gaol sentences for "hard core" price fixing and boycotting. Provided that gaol sentences are limited to "hard core" conduct, and this conduct can be defined with

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15 Royal Commissions and court cases are replete with instances of private regulation. Some private cartels have withdrawn supplies from a Canberra liquor retailer who purchased supplies from a non-cartel member at cheaper prices (*A.G. v Dalgety Trading Co. Pty Ltd* [1966] Argus L.R. 194). Private regulatory groups have harassed traders at trade fairs in an attempt to prevent price discounting. (See Trade Practices Commission, *Third Annual Report* (Year Ended 30 June 1977) par. 2.26. The Caravan Trades and Industries Association of South Australia (CTIA) prohibited advertising of discounts at its annual shows. One dealer did so advertise and was subjected to various actions including disconnection of the electric power to his stand at the Annual Show and expulsion from the Association.) Attempts have been made to expel a person from a trade association for price cutting thus denying such person access to market warehousing facilities and therefore taking away his ability to trade as a fruit and vegetable merchant. (*Trade Practices Commission v Bryant* [1978] ATPR ¶ 40-075. A plea of guilty was entered to a breach of s 45 of the *Trade Practices Act*. Actual expulsion from the Association did not, in fact, occur for reasons, one suspects, directly related to the activities of the Trade Practices Commission in bringing the case. A total penalty of $20,000 was imposed for breach of the *Trade Practices Act*.) A trade association has successfully prevented a Dutch immigrant from selling his manufactured furniture. The immigrant was not a member of the Association. He was not eligible for Association membership because membership required Australian residency for ten years. Without Association membership, it was impossible to market the furniture he produced. (See *Adelaide Advertiser*, 30 May 1963. See also the G L Wood Memorial Lecture delivered by Sir Garfield Barwick at the University of Melbourne, 16 August 1963 on the subject 'Trade Practices in a Developing Economy' (reprinted by Commonwealth Government Printer)). The case was a sad one in that it came to notice because the immigrant set fire to his furniture store and was subsequently charged in respect of this offence. Mr Justice Travers of the South Australian Supreme Court commented on the harshness of the Association's rules noting, by way of contrast, that 'a migrant is eligible to become Prime Minister the day after he is naturalised'. Private licensing of business can be the direct object, and stated as such, of some Trade Associations. The Sports Goods Federal of Tasmania, for example, previously had exclusive marketing rights for members in respect of most sporting products. It had the power to refuse association membership to any person wishing to enter this aspect of the retail industry if 'the area where he trades or intends to trade is adequately catered for' (*Report of the Royal Commissioner on Prices and Restrictive Trade Practices in Tasmania* (1965) 11).

16 In *ACCC v Mobil Oil Australia Ltd* (1997) ATPR ¶ 41-568 alleging price fixing collusion between two oil companies. The ACCC was unable in its pleadings to identify any specific instance of collusion to back up its pleadings. The court held that the ACCC had relied upon speculative and tendentious theorising and the case was struck out as being an abuse of process of the Court.
In *ACCC v Amcor Printing Papers Group Ltd* (2000) ATPR ¶ 41-749 the ACCC alleged collusion between two paper recycling companies. The Court dismissed the ACCC's case without requiring the defendant companies to give evidence.

precision, I support the call. Price fixing and collective boycotting have been shown, around the world, to be totally lacking in public benefit and to be engaged in purely for self interested reasons. The law is clear and there can be no excuses for such conduct based on doubts as to how the law will be interpreted. Above all, however, this conduct is such a basic restriction on an individual's freedom to trade as he or she wishes that it must necessarily be condemned in the strongest possible terms. A gaol sentence is such a condemnation. It also encourages, if coupled with a sound policy of immunity from prosecution, the reporting of collusion to the ACCC for appropriate action to be taken by it.

5 *Resale Price Maintenance*

The ban on re-sale price maintenance has also had the benefit of permitting resellers to price and advertise as they wish. Resale price maintenance law prohibits a supplier disciplining a reseller for advertising or selling below a price specified by the supplier. In most cases, it is the small reseller businessperson seeking to obtain a competitive pricing edge who is subject to "disciplining" by a powerful supplier for seeking to do so. Preventing suppliers from disciplining those who wish to sell or advertise below a supplier's specified price is, in my view, a very considerable protection to a reseller's "freedom" to trade as such reseller wishes.

6 *Misuse of Market Power*

Section 46 of the *Trade Practices Act* prevents a party having a substantial degree of power in a market from taking advantage of that power for the purpose of hindering market entry or hindering competitive activity. It is intended to underwrite the freedom of weaker entities to trade as they wish without being disciplined by the powerful in the market.

I think the jury is still out on s 46 – not because of its wording or the purposes it seeks to serve but because of the court interpretation of the section. Still the leading case is the High Court judgment in *Queensland Wire Industries Ltd v BHP*.[17] This case imposed severe restrictions on an entity's freedom to deal as it wished and on the prices which a market participant could charge. In effect, the court was imposing a regulatory, not a "competition" decision on Australian industry by this judgment. One of the real fears as a result of this case was that the court could be placing itself in the position of steel industry regulator.[18] However, the *Queensland Wire* decision has been recently ameliorated by the High Court decision in *Melway*[19] which, in the circumstances of that

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17 (1989) ATPR ¶ 40-925. As to the "regulatory" nature of this decision, see above n 1.

18 See above n 1. For further elaboration of the writer's views see W J Pengilley, 'Misuse of Market Power: Present Difficulties – Future Problems' (1994) 2 *Trade Practices Law Journal* 27; W J Pengilley, 'Misuse of Market Power: The Unbearable Uncertainties facing Australian Management' (2000) 8 *Trade Practices Law Journal* 56. For brief comments on the "regulatory" nature of this decision see above n 1.

19 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) ATPR ¶ 41-805. For the writer's view of the impact of this decision see W J Pengilley, 'Misuse of Market Power: The Courts speak on distribution arrangements and Predatory Pricing' (Paper given to the Australian Competition and Consumer Law Conference, 23 June 2001 – published since writing this article under the title "Misuse of Market Power – Australian Post Melway and Boral" 9 *CCLJ* 201-240) and W J Pengilley, 'The Impact of Melway on Distribution Arrangements' (Paper given at IIR Conference, 25-27 June 2001).

case, confirmed the right of a supplier to establish its own selective distribution network and to refuse to deal with persons not in that network.
One hopes that s 46 will, in due course, be interpreted as a section which protects freedom of trade and freedom of decision making rather than one which leads to regulatory solutions, be the regulator the ACCC or the Federal Court of Australia. The trend to interpreting the section as being one protecting freedom of trade is apparent. But this result is far from assured.

7 *Merger Law*

Without authorisation from the ACCC on "public benefit" grounds, mergers are not permitted in Australia if they result in a substantial lessening of competition in a State, National or (since 26 July 2001) Regional market. The reason for a merger law is said to be that a merger represents the ultimate price fixing arrangement. If price fixing arrangements are to be controlled, then activities which permit the same result without arrangement (that is achieve the same result structurally) should also be controlled. Another rationale for merger law is that it prevents the misuse of market power by preventing the acquisition of the relevant market power in the first place.

The ACCC believes that merger law with a substantial lessening of the competition test is a crucial aspect of competition law. However, consistent with this basic stance, the ACCC is anxious to point out that it opposes very few mergers. Of those opposed by the ACCC, a large proportion are ultimately cleared by way of public benefit authorisation or by undertakings given to the ACCC. By way of example, five mergers were opposed in 1997-98 and six were resolved by undertakings. Seven mergers were opposed in 1998-99 and 10 were resolved by way of either undertakings or authorisation. In 1999-2000, the Commission objected to nine mergers. In five of these mergers, undertakings were given which allowed the merger to proceed. In four other cases, the merger did not proceed.[20]

There is no doubt that there are heated views, one way and the other, in relation to mergers. One view is that there is no point in having a merger regime that is purely domestically focused. The view asserts that the e-commerce world is not interested in borders. The ACCC Chairman, Professor Allan Fels, asserts that global arguments are an always invoked rationalisation by companies seeking to defend mergers which radically increase their domestic market power. The job of the ACCC, in his view, is to sort out the merits of each case by a careful case by case evaluation.[21]

In theory, merger law aims at the same protection of freedom of trade as do the other aspects of Pt IV of the *Trade Practices Act* previously discussed. In reality, it is a very unusual merger which needs any trade practices attention.

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[20] In relation to 1997-98 and 1998-99 figures, see *ACCC Merger Assessment: Informal Notification and Timing Issues* (December 1999) 67. In relation to 1999-2000 figures see ACCC Annual Report 1999-2000 40. It must be expected that the ACCC will receive many more merger applications in future than previously in light of the 2001 legislative extension of merger law to cover regional markets.

[21] For a good encapsulation of these views see FEATURE, *The Australian Financial Review* (Sydney), 13 April 2000. See also A Fels, 'Mergers and Market Power' (A speech to the Australian-Israel Chamber of Commerce, 15 March 2001) (Published in the *ACCC Journal* Issue 33 (June 2001)).

It is interesting to note that the two mergers which Professor Fels regarded, up to 1991, as the most heinous permitted mergers to that date (but ones which could not be then touched because of the then (in his view) inadequate "dominance" test) were the Coles/Myer and Ansett/East–West Airlines mergers. This shows the inability of anyone to predict the future accurately. Even though both these mergers went through and gave, in Professor Fels' view at the time, unwarranted market power as a result, it is common knowledge that now each of these companies is suffering because of the competitive pressure each has had to bear. [Author's note: Since writing this article, Ansett has ceased carrying on business and its assets are subject to administration to pay its creditor's.]

8 *Part IV of the Trade Practices Act and Freedom of Trade: Conclusions*

Part IV of the *Trade Practices Act* promotes freedom of trade. This is most noticeable in its prohibitions on price fixing, collective boycotting and resale price maintenance. Prohibition of these practices is fundamental to the protection of an individual's freedom of trade. The misuse of market power and merger provisions are theoretically aimed at the same objectives but the jury is still out in relation to their actual performance. Whatever that performance is, it is likely that there will continue to be differing views expressed by the ACCC and various industry groups in relation to it. Though some regard protection from misuse of market power and anti-competitive mergers as basic to trade practices protection of free trade, I am more circumspect. Both could significantly fail and yet free trade would still be protected so long as there is strong enforcement of the prohibitions on price fixing, boycotting and resale price maintenance.

B *"Pro-Competitive" Regulatory Schemes*

1 *The Rationale for Pro-Competitive Regulatory Schemes*

There is now much of the *Trade Practices Act* which is not, like Pt IV, based on establishing background rules of the game but upon regulating industry. The major areas of the *Trade Practices Act* in this regard are:

- a general access regime under Pt IIIA of the Act. This part sets up the method by which a party may seek access to an essential service of national importance; and

- Telecommunications specific legislation under Pt XIB and Pt XIC of the Act.

Each of these parts gives the ACCC a power to set prices and conduct arbitrations on access terms and conditions. Although these parts of the Act are established in the name of competition, they provide for regulatory solutions to competition problems (given the definition of "regulation" which we have adopted[22]). Such provisions are established to control monopolies and/or permit access to resources not reasonably capable of being duplicated but to which competitors need to have resort in order to

[22] See above Pt I.

participate in the market. To permit access to "essential facilities" is one major justification for the establishment of regulatory regimes.[23]

2 *The Trade Practices Act Pt IIIA Access Regime*

The Pt IIIA Access Regime is set up to enable parties to have access to essential services which are of national importance.

As we have seen,[24] the main issue of "free trade" in relation to regulatory regimes is a consideration of whether such arrangements are administered fairly and impartially. Fairness, in my view, also covers matters such as timeliness and efficiency in handling matters.

In my view, the Pt IIIA Access Regime has not succeeded in fulfilling the above objective. This is not to deny that there may well be considerable merit in what the Regime seeks to achieve. It is simply to assert that the Regime has not been successful in achieving these objectives. Above all, because of the way in which the regime is set up, it cannot deliver fairness in even the most basic elements of trading ie in relation to the price that has to be paid for a commodity. This issue is determined, without legislative guidelines, by the ACCC in a way which has de facto retrospectivity and which cannot be predicted by an infrastructure investor at the time of budgeting its project.

The following are some of the reasons for the above view:

- The Access Regime gives substantial and divergent discretions to the ACCC. Not only this but the proliferation of decision making bodies, administrative, quasi judicial, judicial and political, spread over the Commonwealth and the various States and Territories and the absence (other than in one case) of any prescribed time periods within which decisions have to be made make the access regime the epitome of the adage that a camel is a horse created by a committee. There has, to date, been only one case which has run the gamut to the stage of an access declaration. This is the application of Australian Cargo Terminal Operations Pty Ltd for access to certain airport facilities owned by the Federal Airports Corporation at Sydney and Melbourne Airports. The application was lodged on 6 November 1996. Whether access should be granted was finally determined on 1 March 2000. Of course, this is only the beginning of the regulatory path should the applicant proceed further (which it is not going to do). In fact in excess of a three year effort of Australian Cargo Terminal Operations has put it about halfway down the track. Should it have wished to proceed further down the Access Regime track, there would still be negotiations to be carried out between the access provider and Australian Cargo Terminal Operations as to the terms of access, an arbitration in the event of disputed terms of access (most likely by the ACCC as arbitrator), the possibility of an appeal to the Australian Competition Tribunal on the terms of access, and the further possibility of an appeal to the Federal Court on issues of law. Indications would seem to be that a final access decision from start to finish under the Pt IIIA regime could take the best part of a decade.

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23 See above Pt IIIA of text.

24 See above Pt I and Pt IIIF.

- The regime was set up to cover access to *all* services of national significance. It does not do this. The first test of the ability of Pt IIIA to cope with complex access issues arose when telecommunications were made subject to it. In order to provide for telecommunications access, Pts XIB and XIC of the *Trade Practices Act* were, however, enacted to supplement the inadequacies in the basic Part IIIA Access Regime. Parts XIB and XIC are nothing if not prolix. On my count, Pt XIB consists of 13 Divisions and 67 sections. Part XIC contains 11 Divisions and 120 sections. Many sections are subdivided into a prolific number of sub-sections and sub sub-sections, the number of which defies accurate mathematical determination. If legislation of this kind is necessary every time the service to which access is sought is complex, it surely would be better to abandon the myth that Pt IIIA has any general application and regulate by specific statutory enactment for each industry in which an access regime is considered appropriate. It is to be noted that, at the time of writing, equally prolix legislation is intended to supplement Pt IIIA in relation to access to postal facilities. No doubt this trend will continue and demonstrate how inadequate Pt IIIA is in achieving its basic objective.

- The ACCC is given powers in arbitration proceedings to set access prices and to determine access conditions. The chief problem with this is that no person is able to know, when constructing a facility, the price at which subsequent access may be ordered. Not surprisingly, the Chairman of the ACCC sees this as a regulatory plus in that in allows 'flexibility'. However, those who construct facilities do not see things this way. [25]

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[25] At the time of debate on the Access Regime, various suggestions were made that pricing guidelines should be laid down generally or in relation to certain industries. Professor Fels, ACCC Chairman, argued that legislative pricing guidelines were 'not appropriate' as this might deny flexibility to the ACCC in relation to price determinations in accordance with market standards. [See *The Australian Financial Review*, 7 April 1995]. This is, in my view, an "appeal to authority" argument by the regulator claiming that the regulator knows best. Even worse, it is based on the fact that those constructing facilities should not be entitled to know the basis on which their investment return will be calculated and upon a belief that this should be able to be retrospectively and arbitrarily imposed. It is apparent that even generally worded legislative pricing guidelines are of value, can give some certainty and can prevent regulators acting in a totally discretionary manner (or as the ACCC Chairman puts it, 'flexibly'). (See, for example, above n 41 and related text re US telecommunications access pricing formula.)
Recognising the problems involved in there being no method, at the time of constructing a facility, of ascertaining the price of access to such facility, the Productivity Commission, in its Draft Report reviewing the operation of Pt IIIA concluded that the regime should specify that access prices should:
'generate revenue across a facility's regulated services as a whole that is at least sufficient to meet the efficient long-run costs of providing access to these services, including a return on investment commensurate with risks involved'
'not be so far above costs as to detract significantly from the efficient use of services and investment in related markets'
'encourage multi-part tariffs and allow price discrimination when it aids efficiency'; and
'not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations unless the cost of providing access to other operations is higher'.
Productivity Commission *Review of the National Access Regime Position Paper* (March 2001). No doubt the above terms can be subject to debate. However, in the writer's view, this formula inserted in the Pt IIIA Access Regime would be far superior to the present Regime which contains no access pricing principles at all.

- Many of those industries which will be subject to Access Regime Orders are corporatised or privatised industries. The question of access prices would not be a problem if an access price formula or pricing principles had been legislatively included as part of the corporatisation or privatisation process. Investors would then invest in the facility on a known basis and facility construction could be undertaken with future certainty as to access prices, or at least with certainty as to the formula or principles upon which access prices would be calculated. Investors may invest on one expectation as to returns to be allowed and the ACCC may take a quite different view. The whole return on investment capital may be jeopardised by the fact that the relevant access price, or the basis on which it is to be calculated, cannot be known at the time an investment is made. This has already been shown to be a problem issue in relation to telecommunications access.[26]

- Indications are that investors in future large national assets are likely to bypass the Pt IIIA Access Regime and demand future pricing certainty as a pre-requisite to their investment. A classic example of this is the pricing arrangements in relation to access to the Tarcoola to Darwin Railway.[27]

- Like all other forms of regulatory activity, the Access Regime's impact has a capacity to expand, and the ACCC has sought to expand it, into areas other than those to which it should be confined. The Regime's justification is that it furthers competition. However, it has been drafted to apply in areas which have nothing at all to do with competition principles.[28] Also, as has already been seen,[29] the ACCC regards the setting of Access Prices as a springboard to the setting of end product prices. The setting of end product prices, says the ACCC, would be a 'useful and important adjunct to access reforms'.

The establishment of a regulatory access regime in relation to nationally significant and non duplicatable facilities can result in significant benefits in permitting more parties to participate in the competitive process. Such a regime can be seen, therefore, as one method of removing private restraints on trade and of encouraging freer trade. If the

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26 See below Pt V B3(c).

27 See J Zaverdinos, 'Certification of the Access Regime for the Tarcoola to Darwin Railway' (2000) 8 *Trade Practices Law Journal* 171.

28 In this regard, the writer has noted:
'Unfortunately, our access regime also has aspects which have nothing to do with competition law at all.
The sole rationale of our access regime is that it is something which enhances competition. However, we have overkilled and the overkill is a matter of concern. The essential facilities doctrine in the United States results from the denial of a facility by one competitor to another, actual or potential. The Australian access regime has no such limitations. If a railway company wishes to deny access to lay telecommunication wires next to its rail tracks, this is not a competition issue at all. It is a vendor/purchaser issue - the railroad company is the vendor of the access asset and the telecommunications company is its purchaser - and the access price, or whether access is granted at all, should be determined by market bargaining. What is not generally recognised is that the Australian access regime goes far further than competition law demands and, wrongly, in the name of competition, opens up considerable areas for regulation which should not be under any regulatory regime at all'.
[See W J Pengilley, 'Comment on PART IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *The Twenty Fifth Anniversary of the Trade Practices Act: A Celebration and Stocktake* (Federation Press) 223-234.]

29 See above Pt IIG2.

regime has inherent certainty built in and parties make decisions based on available and known criteria, then the most important aspects of fair play in competition are preserved. But the access regime in Pt IIIA of the *Trade Practices Act* does not have these factors. Further, the multi roles fulfilled by the ACCC, a body with a significant consumer oriented role, makes some facility owners believe that their interests will not be adequately considered in the process of determining access conditions. Whether or not this is so is not material. It is part of industry perception. For centuries, a cardinal rule has been that justice must not only be done but be seen to be done. The Pt IIIA scheme does not, in the minds of many, fulfil this basic requirement which is just as important in the case of regulatory justice as in the case of any other form of justice. There is, therefore, in my view, a strong case for reducing or eliminating the ACCC from all arbitration and adjudication functions in relation to the Access Regime.

The brief conclusion in relation to the Access Regime is that the Rules of Engagement need a fundamental re-vamping.

There is, however, one consolation. On 10 October 2000, the Assistant Treasurer, Senator Rod Kemp, announced that the Productivity Commission had been asked to undertake a review of Pt IIIA of the *Trade Practices Act* and report within 12 months. The Productivity Commission issued a position paper in March 2001. This paper expressed concern at a number of matters in the Pt IIIA Regulatory Regime. Hopefully, this Review of the Access Regime will sort out the many problems in it, some only of which have been here discussed.

3 *Telecommunications Specific Legislation – Pts XIB and XIC of the Trade Practices Act*

Telecommunications is an essential area for study in relation to regulation. It is an important model for regulation which is claimed to be "de-regulatory" and "pro-competitive" in nature. It appears to be the model which the government is presently inclined to adopt in relation to other projected legislation in this area - notably in relation to legislation to regulate Australia Post. If we have got it wrong in relation to telecommunications regulation, we should not perpetuate error.

As has previously been noted, telecommunications is subject to a specific regulatory regime under Pts XIB and XIC of the *Trade Practices Act*. Special legislation was enacted because of the technical nature of telecommunications which means that it cannot be readily accommodated into the general access regime under Pt IIIA.[30]

If such regulation is necessary (and it may well be on the basis that parties, in order to compete, require access to the Telstra communications network) then the system imposed should be fair and free of imperious legislative requirements.[31] This appears to be far from the actuality.

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30 Pt IIIA of the *Trade Practices Act* is discussed above in Pt VB2.

31 See suggested criteria above in Pt IIIB.

(a) Telecommunications legislation

Parts XIB and XIC of the *Trade Practices Act* cover the regulatory powers given to the ACCC in relation to telecommunications though the general restrictive trade practices provisions are also applicable to the telecommunications field. The additional powers given to the ACCC are immense in their scope. They are additional to any powers conferred under the general Pt IIIA Access Regime.[32]

The relevant provisions are:

- Under s 151AJ of the Act, a carrier or service provider is not to engage in anticompetitive conduct. In addition to the standard breaches of Pt IV of the Act, the definition of misuse of market power has been changed to incorporate not only purpose but also 'effect or likely effect'.

  1999 amendments to the Act have amended the Pt IV provisions even further. Alone in commerce, conduct of an entity in the telecommunications market can be considered along with the 'engaging in other conduct with the combined effect or likely effect' of substantially lessening competition.[33]

  The above conduct, if breached, is known as a breach of the competition rule.

- Part XIB provides that the ACCC may issue a 'competition notice' if there is a breach of the competition rule. The ACCC does not have to be satisfied that, in fact, there has been a breach of the law before it issues such a notice. All that is required is that the ACCC has 'a reason to believe' that conduct breaches the competition rule.

  The effect of this notice is to act as a "cease and desist order" without conferring judicial power. (The conferring of judicial power on other than courts not being permitted under the Constitution.) The maximum penalty for engaging in conduct of the kind described in a competition notice is $10 million plus $1 million per day for each day that the conduct continues whilst the competition notice remains in force.

- A competition notice is *prima facie* evidence of the matters in the notice (s 151AN). The competition notice may state that the carrier or service provider has contravened or is contravening a competition rule (s 151AC). The onus of proof of a contravention of a competition rule is on the accused party. It must disprove the ACCC's assertions.

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32 For a general coverage of the *Trade Practices Act's* telecommunications regulatory provisions the writer commends a paper by Roger Featherston entitled 'Competition in Telecommunications : Pt XI B and XI C of the Trade Practices Act'. This Paper was delivered at a Competition Law and Regulation Conference conducted by the Faculty of Law of the University of New South Wales on 24 – 25 August 2000. The writer relies significantly upon this Paper in his comments.

33 Section 47(10) of the *Trade Practices Act* provides that, in assessing competitive effects in exclusive dealing conduct, one may take into account 'other conduct of the same or a similar kind'. There is no restriction in relation to telecommunications, however, as to what 'other conduct' may be considered.

- 1999 amendments reduced the need for the ACCC to particularise the conduct the subject of a competition notice. One would, in any other circumstances, find it appalling that consequences follow upon non-compliance with a notice, the statute governing such notice saying: 'To avoid doubt, a Pt A competition notice ... is not required to specify any instance of anticompetitive conduct'. (s 151AKA(5)).

  The effect of all of this is that the ACCC can now assert its own evidence based on its belief, reverse the onus of proof in relation to this evidence, not specify any instances of actual anticompetitive conduct and seek a penalty of $10 million plus $1 million per day for continuing conduct after the issue of the notice. One must be forced to wonder what has happened to Magna Carta and basic concepts of legal due process. As we have previously noted,[34] all of this is, however, still not enough for the ACCC which is pressing for the power to compel telecommunications carriers to install technology which it dictates.

  Not surprisingly, all these ACCC powers, actual and potential, give a very strong basis for regulatory arm twisting. That this has happened in relation to Telstra is clear from the discussion following.

(b) Telecommunications: Arm Twisting in the Commercial Churn Case

An example of regulatory arm twisting is shown by the "commercial churn" case. The commercial churn case was a complaint by the ACCC in relation to the transfer of a telecommunications service to a new provider.

Roger Featherston, who acted for Telstra in that case gives the following history of it:[35]

- Telstra had, in fact, briefed the ACCC on its commercial churn arrangements in August 1997. In February 1998, the ACCC issued a Media Release expressing its concerns as to Telstra's arrangements.

- Telstra then found itself subject to ACCC competition notices in relation to commercial churn, the first competition notice being issued in August 1998 to come into effect in September 1998. ACCC Competition Notices can lead to a potential penalty of $10 million plus $1 million per day for each day of default. The ACCC's Notice was accompanied by an ACCC Media Release headed "TELSTRA FACES $10 MILLION PLUS OVER CUSTOMER TRANSFER PROCEDURES". The ACCC apparently thought that six weeks was long enough for Telstra to comply with this Notice. The Telstra view was that for it to comply with the ACCC's requirements, it would need to adopt new software systems which, at that stage, had not been developed and were not available.

The subsequent sequence of events was:

- Telstra amended some aspects of its conduct which caused the ACCC to revoke its prior competition notice and to issue a second notice alleging breach of the competition rule between August 1997 and September 1998.

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34 ACCC Submission, above n 9 and related text.

35 R Featherston, above n 32 and comments made during the delivery of the paper there referred to.

- The ACCC investigated revised terms of the commercial churn service and issued three more notices in December 1998.

- On Christmas Eve 1998, the ACCC commenced proceedings in the Federal Court for penalties for breach based on the third and fourth notices.
- The parties prepared for proceedings giving discovery and filing evidence. The earliest available court date for hearing was March 2000.

- In February 2000, the ACCC discontinued proceedings and revoked the outstanding competition notices.

At no time was Telstra held to be in breach of the competition rule. However, the commercial pressure to accede to the ACCC's demands was enormous. In the case of Telstra, a breach of a competition notice that commenced in December 1998 and involved a hearing in March 2000 with judgment after that date could have given rise to a maximum penalty in the order of $500 million. At one stage, it was even suggested by the ACCC that the penalty provisions ran in respect of *each* notice.

Featherston has concluded in relation to the ACCC's arm twisting tactics (my phrasing not his) in the commercial churn case that:

- the ACCC prefers to apply the commercial pressure of huge and continuing penalties and to seek a commercial resolution of disputes rather than seek a quick interlocutory injunction;

- the ACCC is not keen to have a Court determine the scope of Pt XIB or XIC of the *Trade Practices Act* or to have its decisions reviewed by the Australian Competition Tribunal; and

- the ACCC is constantly seeking greater powers under Pt XIB at the expense of natural justice and competition law. This is shown by the 1999 amendments to the *Trade Practices Act* and by the ACCC submissions to the Productivity Council which is currently reviewing Pts XIB and XIC of the *Trade Practices Act*.

Certainly the ACCC achieved its objective in the "commercial churn" case and Telstra settled the matter with it (without admission of liability). However, we will never know whether the ACCC's wishes that Telstra spend significant sums in assisting access to its network was a wise or efficient use of those funds or whether the ACCC, in demanding such expenditure, was involved in regulatory error. The possibility of regulatory error is greatly enhanced by the ACCC's extreme powers in relation to telecommunications and will be even more greatly enhanced if the ACCC obtains the power to mandate technology - as the ACCC has submitted it should have.

The Productivity Commission in its Draft Report in relation to Industry Specific Telecommunications Regulation recommended the repeal of Pt XIB. The Productivity Commission regarded the provisions providing for a reversal of the onus of proof as likely to increase the possibility of regulatory error and overreach. It is clear that the substantial penalties which follow from a breach of an ACCC competition notice, the possibility that such penalties may well de facto preclude any effective use of appeal

rights and the experience of the commercial churn case outlined above were prime reasons why the Productivity Commission reached the conclusions it did.

(c) Telecommunications: The ACCC Total Service Long Run Incremental Cost (TSLRIC) Formula

The ACCC's charter is to regulate the telecommunications industry by promotion of the 'long term interests of end users of carriage services or of services provided by means of carriage services'.[36] In assessing the extent to which any particular thing is likely to result in the achievement of this objective the ACCC must have regard, amongst other things, to the technology that is in use or available, whether costs are reasonable and the effect or effects which supplying or charging for services would have on the operation or performance of telecommunications networks. The ACCC has also to take into account the legitimate commercial interests of the supplier of services and any incentives for investment in the infrastructure by which services are supplied.

The regulatory approach has been for the ACCC to impose on Telstra a costing model it describes under the acronym of TSLRIC – Total Service Long Run Incremental Cost. Costing on this basis is difficult to apply as it requires assessment on a hypothetical forward looking basis. It also requires an assessment of a hypothetical world efficient network which, for a number of reasons, Telstra does not have. Telstra argues that costing should be based on the network and facilities which Telstra does, in fact, have. The different assumptions and methodologies can produce very different results. In many cases, the ACCC's preliminary figures are only about half of Telstra's costs as calculated by Telstra.

The ACCC's media release of 27 April 2000 announcing its draft report rejecting Telstra's proposed charges to competitors using its fixed line telephone network was headed '$250 MILLION WIN FOR TELECOMMUNICATIONS CUSTOMERS'. Of course, the draft report does not finally determine the issue[37] though one would be inclined to believe from the Media Release headline that it did. The ACCC said that Telstra calculated its costs on a basis which would have placed it at the high end of international charges. The ACCC on the other hand calculated Telstra's costs on a TSLRIC basis which would allow Telstra's costs at the bottom of the international range. The ACCC urged Telstra seriously to consider giving an undertaking in line with its assessment.

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36 *Trade Practices Act* s 152AB setting out the objectives of Pt XIC of the Act.

37 When a draft determination is made after an arbitration between parties, it may be in effect for a period of up to one year. A draft determination cannot be appealed to the Australian Competition Tribunal (s 152DO) though a final determination can be so appealed. The position of Telstra in all of this is somewhat difficult. The Telstra problem is summarised in the following words:
'Telstra has again attacked the telecommunications regulator, the Australian Competition and Consumer Commission, vowing to challenge the ACCC's final decision on fees for competitors to connect to its network – even though that ruling has not been made. Telstra cannot challenge the ACCC's pricing levels or methods for determining interconnect rates until the ACCC makes a final determination.
At present the ACCC fixes the rate using draft determinations.
Telstra's legal and regulatory group managing director, Mr Bruce Akhurst, said yesterday the ACCC did 'not take into account real world Australian conditions'.
'The effect of the ACCC's use of hypothetical models is that competitors get to use Telstra's structure at below the cost of building and maintaining the network', Mr Akhurst said.'
The Australian Financial Review, 8 September 2000.

Who is right depends no doubt on whether the ACCC's hypothetical world most efficient model for cost calculation is sustainable or whether Telstra's view that costs should be calculated on the efficient use of actual resources wins the day. The regulatory legislation, however, ensures that the ACCC wins the debate for a considerable period of time, even if not finally.[38]

Some of the issues which arise from the imposition of a TSLRIC formula on Telstra are:

- Should a regulator have the power to impose its regulatory price formula in the way in which the ACCC did? It is to be noted that the ACCC's decision is, by law, not reviewable by an independent tribunal for a period of 12 months.[39]

- Is the imposition of the theoretical TSLRIC formula based on a hypothetical infrastructure an indication of the ACCC's mixed functions not giving rise to a fair evaluation? As much of the ACCC's charter is based around consumer protection, has its price setting role not been biased to this end to the detriment of valid Telstra interests? Telstra is certainly of the view that the ACCC has not taken into account real world considerations and that its use of hypothetical models has resulted in access being granted to its structure at less than the cost of building and maintaining it.[40]

- Should not a regulatory formula have been devised and placed in legislation when Telstra was partially privatised? At the time Telstra was partially privatised there was no indication of the approach the ACCC would take in relation to rates of return. Nothing is more basic to an investment decision than the rate of return which it will make. Surely this is something which should have been decided prior to Telstra's partial privatisation so that investors could make decisions based upon all relevant facts. Why was this not done? One answer which readily comes to mind is that the Government did not itself want to make any decision on the Telstra rate of return for fear of jeopardising the Telstra float. Investors thus made decisions at the time of their investment without being aware that their rate of return would be pegged under the theoretical TSLRIC formula. Even the broadest rate of return formula would have been of assistance. In the United States, a broad interconnection formula has prohibited the Federal Communications Commission doing there the very thing that the ACCC, not constrained by any pricing formula at all, has done in Australia.[41]

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38 Ibid.

39 Ibid.

40 Ibid. Note also the view of the Productivity Commission in its *Draft Report on Telecommunications Industry Specific Regulation* that it believed that the access prices of PSTN interconnect charges may have been set too low and various cost components underestimated by the ACCC. The Productivity Commission, however, could not be precise in its conclusion. In any event, regardless of the actuality, it is difficult to *perceive* the ACCC as balancing the scales impartially in light of Press Releases trumpeting '$250 MILLION WIN FOR TELECOMMUNICATIONS CONSUMERS' (See ACCC Press Release, 27 April 2000).

41 In the United States, for example, interconnection charges are to be based on 'the just and reasonable rate for the interconnection of facilities and equipment'. This rate:
'(A) shall be
(i) based on cost (determined without reference to a rate of return or other rate based proceeding) of providing the interconnection or network element (whichever is applicable); and
(ii) non discriminatory; and

Telecommunications regulation has led to investors making decisions on inadequate information as to what will actually occur. The government has buck passed to a regulatory authority decisions which it should have made itself. The telecommunications regulatory arrangements thus impinge upon investment decision making in a manner which is quite inconsistent with the principles of free trade choice, these principles demanding that the maximum information should be available in order that informed decisions can be taken.

C *The Application of Competition Law to Government Monopolies and the Statutory Review of Legislation in Order to Assess its Competitive Impact*

As part of the State/Federal Competition Principles Agreement signed on 11 April 1995, the Commonwealth and the States are:

- to establish independent prices oversight of government business enterprises;

- to establish a competitive neutrality policy to eliminate resource allocation distortions arising out of the public ownership of entities engaged in significant business activities. The competitive neutrality principle should permit freer trade by permitting parties to compete on a "level playing field" undistorted by the advantages held by government businesses because of their public ownership (such as tax exemptions, debt guarantees and favourable legislative treatment);

(B) may include a reasonable profit.'
(s 252(d) *Telecommunications Act 1996* (USA)).
The Federal Communications Commission promulgated various pricing rules, the details of which are not here important. One of these rules permits returns calculated on the basis of the most efficient technology available to the industry regardless of the technology actually used. The Iowa Utilities Board and others argued that this view was arbitrary and capricious decision making by the FCC and contravened the plain language and purpose of the Act. The 8th Circuit Court of Appeals upheld the Utilities Board case holding that costs must be based on the access providers actual network and not on some hypothetical idealised network (*Iowa Utilities Board v FCC* 120 F 3rd 753 (1997); on remand – case 96-3321 (8th Cir. 18 July 2000)). This decision cannot be precedent in Australia because there are no legislative pricing guidelines in the Australian telecommunications legislation and the issue was determined in the United States as a matter of statutory interpretation of legislative guidelines. However, the case does show the treatment of this issue in another jurisdiction. In an illuminating analysis of the case Geoff Edwards concludes:
'Whilst based on statutory interpretation, it is arguable that the judgment reflects an underlying economic concern to emphasise the importance of recognising and rewarding actual investments in infrastructure. It is unlikely that any firm, incumbent or otherwise, can attain the hypothetical ideal implicit in the current application of … TSLRIC cost models. Given this is so, failing to fully reflect the actual costs of a network provider's infrastructure sends a signal that it is likely to discourage future investment in such infrastructure. This is a particularly dangerous signal to send in an industry as inherently dynamic, and as fundamental to an economy, as telecommunications.'
G Edwards, 'Implications for Australian Telecommunications Access Pricing of *Iowa Utilities Board v Federal Communications Commission and United States of America*' (2000) *Competition and Consumer Law Journal* 185, 192.
Legislation has now been introduced into Parliament (The Trade Practices Amendment (Telecommunication) Bill 2001) which requires the ACCC to specify pricing principles at the time of, or as soon as practicable after, the declaration of a telecommunications service. Given what has occurred in Australia, this may be one partial solution to the pricing predicament. Nonetheless, it is hardly long term guidance to investors and does not overcome the problem of whether the ACCC can be seen to be acting impartially in carrying out its price setting functions.
For a suggested access pricing formula in relation to the Pt IIIA Access Regime see that proposed by the Productivity Commission in its Position Paper (above n 25).

- to remove responsibility for any industry regulatory functions from public monopolies when introducing competition in any industry which has traditionally been supplied by a public monopoly.

  This is commendable. It promotes freer trade by ensuring that a monopoly entity cannot enjoy a regulatory advantage over its rivals;

- to act on the guiding principle that legislation should not be enacted which restricts competition unless it can be demonstrated that:

  - the benefits to the community as a whole outweigh the costs; and

  - the objects of the legislation can only be achieved by restricting competition;

  Clearly this is a major step in implementing freer trade and is to be commended for this reason;

  - to review existing legislation in light of the above principles.

  This, too, is a major step in implementing freer trade;

  - the Commonwealth is to put forward legislation providing access to infrastructure activities which are of national significance, are necessary to permit effective competition in a downstream or upstream market and cannot economically be feasibly duplicated.[42] State access regimes may also be established provided they conform with akin laid down principles;

  - each State agrees to apply the principles of the agreement to local government.

One can but applaud the principles of this agreement. Clearly the agreement opens up significant areas to freer trade and many prior regulatory shackles will disappear because of it.

VI FREE TRADE AND REGULATION IN AUSTRALIA: CONCLUSIONS

A *It is a Curate's Egg: The Conclusions on Regulatory Policy Vary Depending upon the Issue Being Evaluated*

Competition is the antithesis of regulation. We need the *Trade Practices Act* to ensure that free trade eventuates in fact and that trade freedom is not subverted by private regulators. The competition provisions of the *Trade Practices Act* have, by and large, served Australia well in this regard.

Government regulation of trading activities (in the sense used in this paper of "licensing", "certifying", "making orders", "approving" or "directing") is, however, something which has to be kept to a minimum for three reasons. These are that it necessarily inhibits freedom of trade and the benefits which freedom of individual

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[42] The Commonwealth Access Regime is embodied in Pt IIIA of the *Trade Practices Act*, discussed earlier in this Paper see above in Pt VB2.

decision making brings; that excessive regulation leads to the outweighing of the governmental decision making apparatus to cope and to only a small number of regulatory decisions being, therefore, made on the basis of careful and well considered judgments; and that there can be a huge cost to business itself in it having to make continuous submissions to government for permission to take certain action. There is, as we have seen in the case of telecommunications legislation, also the real risk that regulatory statutes will be cast in imperious terms which infringe our societal views of justice and a "fair go".

In Australia, the record on government regulation is a checkered one depending upon whether we look at the deregulation of industry under the *Competition Principles Agreement* entered into between all Australian governments; whether we are looking at the regulation of enterprises which have been deregulated or whether we are looking at the Access Regime under Pt IIIA of the *Trade Practices Act*.

Undoubtedly the *Competition Principles Agreement* will result in much trade formerly the province only of government, and administered by those untouched by the forces of competition law, becoming far freer. This demonstrates a philosophy of free trade implementation which is to be commended.

The situation has, however, been different when some government enterprises have been floated. The example of Telstra shows that regulatory decisions which should have been made prior to its float have not been so made. Investors, therefore, have been faced with de facto retrospective decisions which vitally affect their returns. Telstra also illustrates the fact that a good deal of regulation involves "arm twisting" when regulators are given imperious powers. Further, it must be a matter of concern that the ACCC may well have made decisions in relation to telecommunications legislation wearing its consumer hat rather than a hat balancing all interests.

The Pt IIIA Access Regime has many problems as a legislative scheme aimed at giving access to essential services and, by doing so, encouraging competition. This regime is highly inefficient and it lacks fundamental price certainty for those wishing to engage in building facilities of national importance.

The saving grace for both Pt IIIA and telecommunications specific regulation is that both are currently being reviewed.

When regulation is in place, the best guarantee of free trade is fairly administered trade. At least in the case of Telstra, this does not appear to have occurred. We should learn from telecommunications regulation that legislation in imperious terms is to be deplored. There is a strong case for changing the more draconian parts of the telecommunications legislation. At the very least, it is to be hoped that such regulatory provisions will not be repeated.

B *The Need for More Detailed Consideration Before Embarking on a Regulatory Path*

Much regulation is not fully evaluated prior to being enacted. There is much to be said either for legislation or a code of practice to be instituted which would require detailed and public consideration of important regulatory issues as a pre-requisite to the establishment of any regulatory regime. This consideration should cover wider aspects

of any proposed regulation in addition to an evaluation of the initial question of whether the government should regulate at all. I have previously set out some of the considerations which might be included in such legislation or code of practice.[43] Both the Access Regime and telecommunications regulation would, I believe, have been much fairer and more acceptable if consideration had been specifically given to "non economic" factors such as:

- whether there was a need for an imperious regulatory charter;
- whether more certainty could have been provided in the regulatory regime – in particular, in relation to pricing principles;
- what provisions should there have been for representation prior to the issue of notices;
- whether reasons should have been publicly available not only for final decisions but also for decisions made to issue notices;
- the role of the ACCC – in particular, whether the ACCC's role is appropriate in relation to telecommunications regulation. Might it not have been more appropriate to establish an independent adjudication and arbitration body, which body could make decisions without also having policy roles to fulfil?

It follows from what I have said that no two industries will be the same. This makes one doubt the wisdom of general regulation by one body. There is a good case for believing that industry specific regulation is more effective and efficient regulation for this reason.

Having said the above, both the Access Regime and the telecommunications regulation regime do have inbuilt external review procedures. Perhaps these reviews will ameliorate some of the matters which are presently of concern.

C *Free Trade is Not Totally "Win/Win". It Creates its Share of Losers as Well.*

Free trade and competition concepts are frequently misunderstood and misrepresented. It is common to hear free trade expressed in terms that indicate everyone is a winner. But, of course, this is not correct. Free trade means that competition forces some enterprises to close. Employees are laid off and regional areas may become economically stagnant if this occurs. There will, of course, be positive effects – probably in the form of cheaper products. But these are often slow in eventuating and not recognised even when they occur. To government, the closure of a factory and the unemployment of a large work force in a local area is an immediate political problem. It is also an immediate economic problem. For this reason, many find detailed regulation and industry subsidy and protection to be the preferable path notwithstanding the inefficiencies which such regulation notoriously produces.

There are a number of lessons to be learnt from freeing up trade. Some of these are:

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43 See above Pt IIIB.

- there will be gains and losses in income by virtue of competitive pressures. Everyone will not be a winner;

- gains and losses will be spread over time. Some will lose initially but be better off in the long run. Some will suffer loss for the rest of their lives – for example, the middle aged unskilled worker who is laid off and faces little prospect of re-employment;

- frequently losses will precede gains. Immediate losses are certainly far more observable than long term gains;

- losers are usually easier to identify than winners.

It is, therefore, perhaps strange that the general consensus seems to be that we win by having a free trade economy. However, I, for one, believe that competition is a winning policy and that it, overall, brings about a far better result than any regulatory alternative.[44] What we must look at is the net effect. Overall, I believe it is clearly demonstrated that competitive economies perform better than regulated ones. Even if this were not the case I would join American jurist Oliver Wendall Holmes in proclaiming that 'free competition is worth more to society than it costs'.[45]

D *The Limitation of Free Trade*

There are two fundamental limitations on competition policy which seem to be increasingly unrecognised.

One of these is for government to consider competition policy as applicable in areas where it is not. Competition works only in relation to commercially traded goods and services. It is, in my view, a great mistake to believe that it can ever work in areas such as public health and public education. No doubt we all want more efficiency in these areas. But it is a mistake to think that competition principles will necessarily achieve this result. Neither public health nor public education are commercially traded goods or services.

The second is for government to "leave it all to the market to decide". The market is an efficient and ruthless allocator of resources. But Adam Smith, the Bible, Koran and "Confucius Says" of supply and demand theory noted that whilst mechanisation of pin factories through competitive forces may produce more pins, society is incomplete if it does not turn its attention to the plight of those made redundant by pin making machines.

A free enterprise "pro-competition policy" does not make governmental policies any easier. Though the economy as a whole may be better off with such a policy, free enterprise leaves in its tracks a variety of hardships which must be ameliorated if we are to have a society which is not only efficient but which is also caring and kind. We need

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44 Note that in this Paper I discuss only domestic policy.

45 Justice Oliver Wendall Holmes Jnr in *Vegelahn v Guntner* 44 NE 1077 (Mass. 1896). In this regard, note in particular that delegating a problem to a regulator can mean that the problem never receives appropriate attention – see Loevinger, above n 13.

not only competition policies but also policies to soften the hardships which competition can cause. Both are necessary if we are to function properly as a community worth living in.

VII

APPENDIX[46]

A POSSIBLE CLASSIFICATION OF RESTRICTIVE AGREEMENTS ENTERED INTO BETWEEN COMPETITORS

Basis of Classification		Examples of Classification	
A.	***Classification of Restraint by OBJECT of Restraint***	***A1. Restraints on Uses of Economic Resources***	
		A1.1	Minimum Price Agreements
		A1.2	Market Division Agreements
		A1.3	Restraints on Quantities Produced (Quota Agreements)
		A1.4	Obligations to Supply Data (Information Agreements)[47]
		A2. Restraints on Entrants and Dealing	
		A2.1	Fixed Distribution Lists
		A2.2	"Black Lists"
		A2.3	Collective Boycott
		A2.4	Mutual dealing between groups with members of other groups to the exclusion of non-members of other groups (Reciprocal Group Trading Agreements)
B.	***Classification of Restraint by TYPE of Agreement***	B1	The Unwritten Agreement
		B2	The Written Agreement without sanctions (moral sanction only)
		B3	The Written Agreement with sanctions

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46 The above is a possible classification only. Some agreements will have more than one characteristic. No classification can hope to be complete in this area. In the words of Sir (then Mr) Billy Snedden, Restrictive Trade Practices Arrangements show 'refinements which are as exotic as the fire from a cut diamond. Tailored by master craftsmen to suit their own needs, no greater labour has produced such artistry of result'. (Commonwealth, *Parliamentary Debates*, House of Representatives, 16 August 1962).

47 Not all "Information" agreements breach the *Trade Practices Act*. For some relevant principles see *American Column & Lumber v U.S.* (1921) 257 U.S. 377; *U.S. v American Linseed Oil Co.* (1923) 262 U.S. 371; *Maple Flooring Manufacturers Assocn v U.S.* (1925) 268 U.S. 563; *U.S. v Container Corpn of America* (1968) 393 U.S. 333; *Information Circular No. 14* (28 April 1976) issued by Trade Practices Commission.

	B4	Trade Association “recommendation” arrangements (may be either with or without sanctions though generally there is a strong moral sanction)
C. Classification of Restraint by STRUCTURAL METHOD OF ACHIEVEMENT	C1	The casual meeting
	C2	The cartel
	C3	The Trade Association (which may or may not be incorporated – probably traditionally more usually not so but this has changed markedly in recent times)
	C4	The Incorporated entity (which may or may not be a Trade Association)
D. Classification of Restraints by METHOD OF ENFORCEMENT	D1	Agreement providing for methods of detection and informing
	D2	Trade “courts”
	D3	Fines
	D4	Expulsion from the Trading Group
	D5	Collective refusals to deal
	D6	Restitution of surplus profits to a cental pool