SOME REFLECTIONS OF A FORMER COMPETITION AGENCY HEAD

BY ROD SIMS[1]

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After 11 years as Chair of the Australian Competition and Consumer Commission in this article Rod Sims reflects on a range of antitrust issues, emphasising their importance to our economy more broadly. There is much here to promote reflection and discussion within the antitrust community. He takes a broad look at the objective of antitrust, wonders why antitrust takes so little account of corporate strategy logic and experience, and argues competition agencies should bias towards over enforcement if they are to be effective. He then argues that merger laws around the world need to change towards greater focus on the industry concentration flowing from the merger and less on predicting future conduct. He discusses the role of economists in antitrust, what to do about the significant limitations of court processes in antitrust and looks at the different approaches being considered to the regulation of large digital platforms. Finally, he asks why competition law practitioners apparently interested in consumer welfare have such disdain for consumer law, and he argues that competition agencies need to be the champions of competition across all its dimensions.

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I. INTRODUCTION

Antitrust sits quietly to the side of mainstream economic debates yet is so fundamental to them. This is my main take away from 11 years as agency head at the Australian Competition and Consumer Commission ("ACCC"). It prompts me to offer some reflections.

While an economist by training, I came to the ACCC not as a competition economist but as someone who had extensive experience in public policy and corporate strategy — an interesting combination. As the Deputy Secretary (Economic) in Australia's Department of the Prime Minister and Cabinet, I was in charge of macroeconomic, microeconomic and social policy as well as the Cabinet Office; and for two years I was the Principal Economic Advisor to Australia's Prime Minister. For over 15 years I was a senior partner in a commercial corporate strategy consultancy advising companies in virtually all sectors of the economy on where and how to compete.

There is increasing focus in mainstream economic debate about both low economic growth and inequality and the impact of these on our economic direction and our politics. While antitrust does not target such indicators it does, nonetheless, have an important influence on them.

Rising industry concentration and market power are being nominated by influential organizations such as the International Monetary Fund and The Economist newspaper as playing an important role in slowing productivity and so economic growth and rising inequality.

In the introduction to a 2019 book, Martin Wolf, the chief economics commentator for the London Financial Times, and widely recognized as one of the world's foremost economic thinkers, said:

> *"Slowing growth and rising inequality have become a toxic combination in western economies….This combination threatens the survival of liberal democracy itself. Why has this happened? Some blame an excess of free market capitalism…..(but) the precise opposite is the case. What has emerged over the last 40 years is not free-market capitalism, but a predatory form of monopoly capitalism. Capitalists will, alas, always prefer monopoly. Only the state can restore the competition we need…."*[2]

Strong words.

A market-based economy, of course, is one where decisions regarding investment, production and distribution to consumers are guided by the price signals created by the forces of supply and demand. An underlying assumption is that there are many suppliers competing to meet consumer demands. Alternatively put, Adam Smith's "invisible hand" of market forces can only be effective if there is sufficient competition

Market concentration in many economies is increasing, and there is discussion about whether this is technology driven or due to a reduction in competition. But with the usual accompaniments in many countries of the profit share of Gross Domestic Product rising at the expense of the wage share, and productivity slowing, a decline in competition in our economies seems an important contributor. Antitrust, therefore, needs to be more central to the wider economic debate.

My perspectives that follow are driven by this realization. Ten high-level perspectives follow. They are reflections from a well-placed insider, not scholarly analysis, and largely raise questions rather than answers, which I may attempt in future offerings.

II. TEN REFLECTIONS ON COMPETITION LAW

1. What is the Proper Goal of Antitrust?

Over the last century the goal of antitrust has fluctuated from not wanting companies to become too large and influential, to wanting to maintain sound market structures given the likely consequences of unhealthy ones, then to the current dominant focus on the consumer welfare standard. The latter can be interpreted broadly or narrowly and owes much to the Chicago School of economic thinking.

The history of economics, and public policy, is full of pendulum swings. Problems are found and, instead of simply being corrected, we see problems arise in the opposite direction. Concerns about too much focus on market failure, for example, and too little focus on government

2 Jonathan Tepper, *The Myth of Capitalism*, Wiley, 2019.

failure, saw concern with the latter come to dominate debate. Likewise, debate has moved backwards and forwards about how self-correcting markets are: consider Marshall, Keynes, and Friedman for a start.

This issue has profound significance in antitrust as we see with the pre and post Chicago school influence. The Chicago school, at its theoretical height, while bringing many important insights, got to the point where its belief in self-correcting markets was a triumph of hope over experience. Other fields of economics seemed to appreciate this faster than antitrust.

The debate we are now having about the proper goal of antitrust owes a lot to Lina Kahn, the current Chair of the US Federal Trade Commission who, remarkably as a student, argued that the consumer welfare standard was too narrow. As all readers of this article know, in her 2017 article "Amazon's Antitrust Paradox," she argued that:

> *"Antitrust law and competition policy should promote not welfare but competitive markets. By refocusing attention back on process and structure, this approach would be faithful to the legislative history of major antitrust laws. It would also promote actual competition—unlike the present framework, which is overseeing concentrations of power that risk precluding real competition."*[3]

At a high level there is much to be said for this observation. She certainly drew out in her article some of the theoretical arguments of the Chicago School in relation to self-correcting markets that defy commercial reality.

Overall antitrust success should not be measured in the outcomes from cases, however important these may be, but by the contribution antitrust is making to maintaining robust competition in our economies. Antitrust should seek to prevent market power gained by other than competition on the merits. We need to understand whether this objective has been met. There are many observations and some analysis that suggest it has not, but more detailed analysis may be needed.

One concern with the consumer welfare standard is that it demands so much more than identifying harm to the competitive process; it wants considerable proof of harm to consumers. While there is logic to this, and it can encourage useful analysis, it raises issues of evidentiary burden.

In my experience, courts are most reluctant to make commercial inferences and would often accuse the competition agency of being "theoretical" when it did so (see below); courts would place great weight on what the self-interested leaders of the accused companies would say; and any uncertainty would count against the competition agency.

In Australia we had a recent example where the Government of the State of New South Wales ("NSW"), in order to maximize the sale proceeds from the privatization of the State-owned Sydney container port, entered into agreements that saw the port sold to a private company with effective financial prohibitions to there being a competitor container port established in NSW over the following 50 years. The ACCC launched court proceedings arguing the agreements substantially lessened competition. Among other things, the court found that the ACCC did not prove that a competitor port would be viable despite the owners of the Port of Newcastle (some 170 km from Sydney) saying they wanted to build a competitor container port and spending millions of dollars in preparatory work, and even though the Port of Newcastle needed to change its current focus over coming years from being the largest coal export port in the world.

The competitive process was clearly interfered with, another player wanted to compete and had strong reasons for doing so, but the court needed much more to rule the agreements anti-competitive.

Further difficulties arise in merger cases where the competition agency must prove what will happen in the future if the merger were to proceed. Facts about the future are hard to come by, as it has not happened yet, particularly when documents are sanitized, or when the courts allow leaders of the merging companies considerable leeway in explaining why past pre-merger documents are no longer relevant.

In my view, debate about the goal of antitrust is closely linked to the issue of evidentiary burden. Should the goal of antitrust be to prevent harm to the competitive process? Of course, some level of harm to the trading parties on the other side of the market, usually but not always consumers, also needs to be shown. This is to check the analysis of the effects of the conduct on the competitive process and to determine the materiality of the effect.

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3 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710 (2017), 737.

The question, however, is how much evidence of this harm should be needed once harm to the competitive process has been clearly demonstrated?

2. Why is the Discipline of Commercial Strategy So Little Regarded?

On my very first day of corporate strategy training I was told that while having good products, services and systems was necessary for commercial success it was by no means sufficient. Some form of market power was needed. I was told that too much competition would harm returns, profits from a competitive market were insufficient, and high entry barriers were crucial (Warren Buffet calls them "moats"). This was all common sense and was summarized in Michael Porter's 1979 article describing his Five Forces.[4] Because it is simply common sense, at a high level it is as relevant today as it was when it was written in terms of how so many businesspeople and their strategy advisers think and behave. The Porter model has been refined, but not in too many ways relevant to businesspeople.

What struck me on joining the ACCC was that competition lawyers and economists, particularly those working for companies alleged to have breached the law, and businesspeople wanting ACCC approvals, appeared to completely ignore commercial corporate strategy. It was as if in contemplating a merger the benefits of reduced competition never occurred to anyone. In my commercial strategy days it was often one important driver of the transaction.

Of course, from my private sector days I knew that care was taken to ensure these benefits were never written down to be discoverable by the ACCC.

While I was at the ACCC, conversations with companies generally had an air of unreality about them.

To be clear, just because a merger or some form of exclusive dealing reduces competition does not mean it should be opposed by a competition agency. There is much else to consider, such as the level of competition remaining and the height of entry barriers to new entrants.

Companies do wish to be in markets with less competition rather than more, they do seek to construct entry barriers, they want a dispersed range of suppliers, they do seek ways to lock in consumers, they will leverage market power from one market into another, and so on. All this behavior is commercially rational. It is not, as seems often assumed, an aberration.

This is not to decry this behavior, as it is part of what makes businesspeople and companies succeed. You cannot pick and choose how businesspeople seek to succeed.

What is striking, however, is the following:

- First, absent difficult-to-get facts, suggestions that companies will act in a way fitting Porter's framework are often treated by the courts as "mere theory," "speculation" or, worse, "fanciful." Comments such as these can seem naive to those from the commercial world.

- Second, it is sometimes said that the competition agency's explanation for what drove certain behavior is wrong and that there are good commercial reasons for what happened. But this suggests wanting to reduce competition or raise entry barriers is not commercial behavior; it is indeed the very essence of commercial behavior.

The line between acting commercially and breaching the law can be quite thin. Corporate strategy and competition policy are often pulling in opposite directions.

3. A Surprising Question; Are We Trying Too Hard to Avoid Benign Conduct Wrongly Being Considered Illegal?

Coming to the ACCC from over 15 years in the private sector I was surprised at how often concern was expressed about "chilling" investment or innovation. Often it seemed as if the speaker had never worked in the private sector; that is, in the room when business decisions are taken. Being a competition lawyer or economist consulting to the private sector may not count in this regard as often they come in when the business decision has been taken and the issue is how to gain regulatory approval.

4 Michael E. Porter, "How Competitive Forces Shape Strategy," Harvard Business Review, May 1979 (Vol. 57, No. 2), pp. 137–145.

The “animal spirits” mentioned by Keynes always seemed more apt. Businesspeople pursuing profit are not easily disturbed or dissuaded.

It therefore seemed to me that wrongly considering conduct illegal that turns out to be benign conduct, while to be avoided wherever possible, will rarely be disastrous for the business or the economy.

Allowing anti-competitive conduct to go unpunished, however, will more often do harm as market power is usually hard to unwind once gained, say, through a merger. And businesspeople have every incentive and will work hard to ensure it is not unwound. Likewise, anti-competitive agreements or unilateral conduct can see competitors lost forever and new ones dissuaded.

There is another consideration. The cost of gaining competition agency approval is often trivial to businesses in comparison to the financial consequences of the issue at hand. Businesses can employ way more resources than the agency can on each specific matter, and there is often no limit to the per diems that can be afforded. These facts, all else equal, mean the system is more likely to generate situations where anti-competitive conduct goes unpunished than the reverse.

Competition agencies should aim always to arrive at the right answer. But if agencies aim at never stopping what turns out to be benign behavior they will under enforce, which brings higher costs to the economy than over enforcement.

Competition agencies need, therefore, to put most effort into avoiding leaving anti-competitive behavior unpunished if they are to be effective at maintaining competition.

4. Do We Need a New Approach to Mergers?

Let’s start with a thought experiment. The usual commercial logic, to which most businesspeople would adhere, is that some form of pricing power comes when there are less than four players in a market. Coordinated conduct is more likely to increase prices, and there is much less chance of one business seeking to gain share by reducing prices as they know this will only lead to retaliation, not extra share, and lower profits all round. Obviously, there are exceptions to this general rule, particularly in high fixed cost businesses.

Such well-accepted commercial logic, of course, appears to have no place in a courtroom. It is seen as “theoretical.” But it is so strongly based in commercial experience and economic logic that it can form the basis of a strong starting structural presumption in merger laws.

Suppose, for example, that further concentration from when there are four main players in the market is going to see market power exercised, likely in the form of higher prices, 90 times out of 100. Analysis by John Kwoka is consistent with this assumption.[5] A case-by-case approach, based on detailed analysis and evidence as happens now in most jurisdictions, could see, say, 9 of these anti- competitive mergers cleared by the courts, or 10 percent of the 90. Stronger merger laws based on some structural presumption, on the other hand, could see 1-2 of the 10 benign mergers blocked. So, in this clearly made-up situation we have 9 mergers approved under the current case-by-case approach that were anti-competitive, compared to 1-2 prevented when they were in fact benign or perhaps even pro-competitive under stronger merger laws based on some form of structural presumption.

Is our economy better off with merger laws with a strong structural presumption, based on commercial experience and logic, or an approach based on no starting presumption and detailed arguments in court each time trying to determine if competition will be substantially lessened? The answer with my made-up numbers is clear, but competition regimes do not take this more commercial economy-wide approach into account.

What makes all this more of a problem is that competition issues in the future are hard to prove with facts rather than commercial logic. As previously mentioned, most businesspeople know not to write down the full commercial rationale for a merger lest it be used against them in court. Having to prove what has not yet happened loads the dice towards anti-competitive mergers gaining approval.

Another problem is creeping acquisitions, where market power is gained in small increments such that it is hard to find the market power tipping point. Supermarkets, say, making continuing small acquisitions, have been difficult to oppose in Australia such that we now have the two main supermarkets having 70 percent of the grocery market. Many 1-2 percent acquisitions were hard to oppose except where there would be a monopoly in a narrowly defined local market.

5 John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America*, Competition Policy International, 2020.

Related to this is the enormous number of acquisitions undertaken by the large digital platforms. Small companies are constantly being purchased for a complex mix of reasons; to gain skill and ideas, to gain access to new markets, and to take out potential competitors early. Acquisitions of so-called nascent or potential competitors requires even more imagining by courts of what an uncertain future world would look like.

While the large digital platforms innovated their way to their initial success, they have expanded and entrenched their market power through acquisitions which competition agencies have not been able to prevent except in the UK CMA's very recent *Facebook* (now *Meta*)/*Giphy* case.

Where would Google be today without DoubleClick, Android, YouTube and so on, which were all acquired?

It is fair to say that competition agencies are struggling everywhere to deal with notions of "potential competition" from the continuing massive number of early acquisitions by the large digital platforms. Unless competition agencies can deal with issues of potential competition effectively then market structures may be entrenched as new entrants do not get the space to grow.

Perhaps the recent *Facebook/Giphy* court decision in the UK can help address this issue.

There is also the difficult issue of conglomerate effects. Businesses with significant positions in many markets which can seem largely unrelated, but which can bring the ability to extend and entrench market power.

Then we have the issue of vertical mergers. I was surprised to find that many antitrust regimes currently treat mergers that involve vertical integration as usually benign. Of course, vertical integration is often commercially justified by eliminating inefficient transaction costs in the vertical chain, or by bringing synergies that are hard to gain through contracts. But vertical integration is also often justified by the ability to leverage market power from one market into another and to foreclose competitors.

It is not at all clear why vertical mergers are not treated in the same way as horizontal ones. The analysis will be different, but there is no reason I can see why competition agency scrutiny and appropriate skepticism should be different.

So, what might a strong structural presumption look like to deal with all of the above? In a speech I gave in August 2021 as Chair of the ACCC I proposed "that a new deeming provision should apply specifically to acquisitions where one of the merger parties has substantial market power and, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased or materially extended."[6] That is, the acquisitions would then be deemed anti-competitive.

Under Australian law more than one firm in a market can have "substantial market power." The test is their ability to act to some extent independently of competition by being able, say, to raise prices above competitive levels.

This suggestion was made to promote a debate. But what should be put in place in terms of future merger law reform around the world must involve some focus on the concentration that is occurring as a result of the acquisition, rather than simply seeking to prove what conduct will occur in the future.

A focus on concentration in merger assessment would, of course, only affect a small minority of mergers. Further, the ACCC blocked several mergers only to see the vendor sell to another party that did not raise competition concerns. Such a possibility was often specifically ruled out by the merger parties when seeking merger clearance.

Finally, think of the benefits to our economy if more firms sought to grow by competing with their rivals rather than by buying them.

5. The role of Economics: Are We Being Ruled by Exceptions?

As an economist by training, I have taken a particular interest in the role of competition economics and its difference from other areas of economics. What follows is some high-level generalizations; there are clear exceptions.

Much competition economics comes from defenses to allegations of anti-competitive behavior. It often seeks to explain why, say, a three-to-two merger in a given market is not an issue, when usually it is. It is, therefore, not seeking to explain what usually happens, but why, with assumptions, what might seem like problematic behavior is in fact in this particular case benign.

6 *Protecting and Promoting Competition in Australia*, ACCC, August 27, 2021.

Competition economics, in general, gets into considerable detail, which is a result of the case-driven workload. Such detailed analysis can bring benefits, but it also risks missing the bigger picture, can raise uncertainty, and increase the risk of not challenging anti-competitive behavior.

I was in a meeting with agency head colleagues some months before I left the ACCC and the issue of structural presumptions in mergers was raised. One agency head surprised me by saying that economists would consider this bad economics. Why, I asked? As discussed in section 4 above, there can be sound economic reasons for such an approach. Different economists will have a range of sensible views on this but it is not inherently bad economics. Is competition economics so focused on case detail that it can miss the bigger picture?

A final point. Sometimes I see economic arguments which defy commercial reality. When this happens, I think the economics is wrong. You cannot change commercial reality; it should be integral to economic thinking and models.

I must, of course, add immediately that there are many economists, usually academics but sometimes economic consultants, who do focus on the bigger picture. Their output needs to be absorbed by competition agencies.

6. How Can We Focus on the "Right" Answer When Preparing for the Courtroom?

This might seem like a strange question, certainly to lawyers who think that courts do provide the right answer.

Courts cannot always provide this. Who wins the case will depend on the range of admissible evidence, how witnesses perform on the day, and the talent of the legal representatives on either side, for starters. Courtrooms can be a search for truth, but trumping this is the desire of both sides legal representatives to win.

Competition law is economic law involving complex economic concepts. Lawyers understandably can struggle to understand the concepts but perhaps more so to fit them into the legal process. Economists are often in a worse position as their approaches and logic struggle with the legal setting. Having courts rule on antitrust matters is a bit like democracy; it is a flawed system but there seems no better alternative.

Those agencies with administrative decision-making think they are in a better position than those with prosecutorial regimes, such as we have in Australia. Prosecutorial regimes see endless arguments on disclosure, often some years before a matter gets to court, and then intense argument and considerable deliberation before there is a court ruling. And then we have the old argument of "justice delayed is justice denied." How many unilateral conduct cases, for example, see the would-be entrant disappear before we have the outcome of the case?

So, what to do? One suggestion is that agencies, particularly in prosecutorial regimes, must always initially seek to determine the right answer from all the facts they get and analysis they do, taking economic and commercial considerations into account, and only then seek to work out the court strategy. The latter is crucial, of course, but overly focusing on it initially can limit an agency's assessment of the issues.

It may also be that the logic of taking the case is strong even if it will be difficult to prove in court. Messages can be sent to the corporate sector even if the case is lost.

7. How Much Market Power can There be in Data?

Competition occurs across many dimensions. This issue arises significantly in relation to digital platforms and data.

Google and Meta, for example, have devised clever business systems. They provide services without monetary cost, which is attractive to consumers, but then they harvest an enormous amount of user data from first- and third-party sources and use this to sell highly targeted advertising. This business model has yielded trillion-dollar companies in a short period of time.

Potential competition issues abound. At its most basic, Google pays what is thought to be around $10 billion annually to be the default search engine on Apple devices, and also pays large sums for this on Android devices.

How much competition could be being blocked? As the easiest example, DuckDuckGo competes with Google by offering a search engine which does not engage in data-driven targeted advertising, so promising greater privacy, something that an important number of consumers value.

Google's dominance may also see it increasingly offering paid search results rather than organic results. And it may limit innovation so as not to cannibalize the value from its current business model.

Google and Facebook have cookies on an enormous number of third-party apps as well as huge amounts of first party data directly from their own services. What can be done with so much data about individuals and what constitutes anti-competitive unilateral conduct in relation to data?

How concerned should we be, for example, with discriminatory pricing which decreases consumer surplus and increases the producer surplus? How concerned should we be with a company using its overall data position to dominate a particular market in ways no other player can?

Some argue that data does not confer market power, and that it is available everywhere for those who want to seek it out and combine various sources. To me this ignores the large quality and quantity differences between data sets.

These are all complicated issues that need a lot of new thinking and analysis. The use of data will only grow, particularly with advances in artificial intelligence and the so-called metaverse. Data has been described as the "new oil." Not only can we not dismiss non-price and particularly data issues in competition analysis, they must also now play a central role in what all competition agencies do.

There is a further point. Data is not just a competition issue; it is also a consumer, a privacy and a political (think Cambridge Analytica) issue. Companies who know all about your internet activity can paint a picture of you that can bring benefits, but also has scope for enormous harm. Competition agencies need to work with other agencies on these complex issues and not in a silo.

8. How Should We Go About Ex Ante Regulation of the Large Digital Platforms? Are There Wider Lessons Here?

The current debate largely centers around the EC's Digital Markets Act ("DMA") approach versus the UK's Special Market Status ("SMS") legislation that will, when passed, allow the UK's CMA to set Codes that will guide digital platform behavior in particular markets. The German ex ante regime applying to digital platforms is somewhere between these and, of course, is more advanced. Other countries have some specific ex ante laws, such as Korea and Japan, and the U.S. has several relevant Bills before Congress.

The DMA could, for example, be seen as turning its unilateral conduct provisions into a series of per se prohibitions, with no need to prove a substantial lessening of competition. Much like cartel provisions. They will, of course, need to be enforced just like existing competition law, albeit there may be more up-front discussion about obligations and compliance.

The SMS's Codes will be more akin to traditional regulation, and will follow extensive consultation. Just like other forms of regulation, enforcement will also be necessary.

Despite these differences, what has driven both initiatives is the view that the traditional competition law enforcement tools cannot address the many competition issues in a range of dynamic digital markets where market power is entrenched and achieved in many ways.

In markets that competition law usually deals with, effective enforcement can often stop the behavior. In the ad tech market, as just one example, Google's market power is so multifaceted that action in one area will not address the competition issues. Cases take a long time from start to finish and, more importantly, must narrow down on particular behavior to be successful. Numerous cases would need to be taken, likely beyond the capacity of any agency. In any event, at completion, Google could then find new ways to keep its dominance. So, the new tools are needed.

Considering new tools is not new. All countries have regimes for specific industries; energy and telecommunications quickly come to mind. In Australia, for example, the ACCC has the power to declare a communications asset and then to regulate the price and other terms on which it sold. This can apply to the copper wire, exchanges, and some messaging traffic. So new ground is not being broken here.

Also, I do not think we should be concerned that different approaches are being taken in Germany, Japan, Korea, the EC, the UK, soon Australia and potentially the U.S. Our grasp of the economics of digital platforms is still not sufficient to know what the best approach is. Countries will collaborate and learn off each other.

Finally, thinking about digital platforms has enlivened the debate about having divestiture as part of competition agency toolkits. It will come into play if the U.S. antitrust agencies win some current cases, and the UK can call on this also. Whether other countries consider divestiture as a way of dealing with entrenched digital platform issues remains to be seen.

An interesting issue is whether other competition areas need more explicit rules, or strong starting presumptions, for example with mergers in general as discussed above. Much depends on whether we think we are succeeding in achieving the level of competition our societies need.

Whenever we have entrenched market power traditional competition law may not be able to deal adequately with the problems that arise. Regulation to promote competition or even divestiture may be required, and it is a key role of competition agencies to point this out to governments. See point 10 below.

9. Why do Competition Practitioners Look Down on Consumer Law?

One of my great surprises on arriving at the ACCC was the disdain often shown towards consumer law by competition law practitioners.

Misleading behavior can be every bit as damaging to consumers and the economy as anti-competitive behavior. For example, there were instances of prices doubling when consumers were misled about the qualities of a product, yet we rarely saw prices double as a result of a cartel.

Competition law is supposed to follow a consumer welfare standard. The focus is on consumers, just as with consumer law. We are worried about companies gaining market power by anti-competitive means and charging higher prices as a result. Why are we not equally concerned by companies gaining an unfair advantage over their competitors and causing consumer harm by misleading consumers about the characteristics of what they are buying?

In Australia in recent years we achieved legislative change so that penalties for breaches of consumer law are now equal to those of competition law, a change of which I am most proud; that is, consumer law penalties can now be the higher of $10m, three times the profit gained or, if this cannot be determined, 10 percent of turnover. In addition, the companies the ACCC takes to court under consumer law are usually larger and more influential than those taken to court for competition law breaches.

All our economies would be much better served if penalties were aligned between competition and consumer law. This would be a major change in virtually all countries, but particularly in the U.S. and the UK who currently have no penalties for consumer law breaches. This surely must change if the concern is with the welfare of consumers.

10. Who is the Champion for Competition if not Competition Agencies?

Protecting and promoting competition must always be about more than enforcing competition law. Anti-competitive laws can sometimes cause more problems than anti-competitive behavior, and existing poor market structures may see damaging economic outcomes that are beyond existing competition law's ability to deal with.

Competition advocacy and market studies are essential tools for competition agencies. While central government policy departments are concerned with competition, they have much else to focus on and, of course, they rarely have a public voice.

Ranged against promoting and maintaining competition are businesses and other sections of the community seeking to gain from reduced competition. Governments can also want to make changes which damage competition, as for example when they are privatizing assets and see that selling an entity with market power will increase the sale proceeds.

Competition is vital to the success of a market economy. Promoting or protecting it also requires specialist expertise. What seems obvious to a competition agency may not even occur to others without the appropriate expertise.

If governments want successful market economies, they should empower their competition agencies to be explicit competition champions.

III. CONCLUSION

I hope these reflections are helpful to others. The work of competition and competition agencies is never ending. It is a noble cause with wide implications for our economies and societies.

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