



# **QCMA, forty years on**

**THE 2016 BANNERMAN LECTURE**

11 February 2016



# QCMA, forty years on

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# 1 Introduction

It is a great honour for me to be giving the Second Annual Ron Bannerman Memorial Lecture. I first met Ron when I was a teaching fellow at Monash University – immediately after finishing the honours year of my undergraduate degree. Although I was very junior, I was asked to join Maureen Brunt, Bob Baxt and Jack Fajgenbaum who were teaching a seminar for law and economics students on competition law. Ron was always invited to the Christmas Party which was the last seminar of the course each year.

On the last occasion I met Ron, he reprimanded me. He had been retired for some years; but I encountered him on the Ground Floor of the Federal Court building in Sydney. Even in his retirement, he took a keen interest in decisions by the Federal Court on competition law. Ron expressed dismay at a recent decision by a Federal Court judge (I cannot recall the decision or the name of the judge). I agreed with Ron that the decision was a disaster. Ron urged me to write and publish a criticism of the decision; and I replied too-flippantly that if I wrote a criticism of every bad decision by the Federal Court I would have no time for my academic duties and my consulting. Ron thought this attitude was quite irresponsible and he told me so. As Maureen has mentioned, Ron had many great qualities. One was a strong moral code that he attempted to apply to his own behaviour - and he also used this moral code as a basis for instruction to others whom he thought could do with a little advice.

I have agreed to talk about the decision of the Tribunal in *Re QCMA and Defiance Holdings*.<sup>1</sup> *QCMA* arose from two companies (Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd) applying for authorisation of mutually exclusive merger proposals for control of a third company, Barnes Milling Limited. Each of the applicants had been denied authorisation by the Trade Practices Commission; and they were appealing to the Tribunal. The Tribunal rejected both appeals; however, its reasoning differed markedly from that of the Commission.

QCMA has, of course, contributed much to our jurisprudence in the field of competition law. I shall confine my talk to what I consider to be its key contributions in the fields of competition and market. I shall explain how I think these propositions should be read; and I shall discuss their relevance forty years on.

Most of these key propositions were drafted by Maureen Brunt (and probably on her old typewriter with annotations by hand in green ink). We have two strong pieces of evidence for the proposition that Maureen drafted them. The first is

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<sup>1</sup> (1976) ATPR 40-012. All subsequent references will be to the ATPR Report.

that those of us who have had the privilege of being taught by Maureen will detect her teaching and even her drafting style in much of the decision. Secondly, the President of the Tribunal at the time of QCMA, Sir Edward Woodward, said as much in public. Upon his retirement as Chancellor of the University of Melbourne, Sir Edward confessed that his career as a judge was remembered chiefly for one decision, QCMA – and (furthermore) the bits of that decision that were still being quoted at the time of his retirement from the University were written by an economist – Maureen.

So in giving the Ron Bannerman lecture this evening, I shall be honouring not only Ron Bannerman, I shall also be honouring the person who was my inspiring teacher and who has been my mentor and friend for more than forty years, Maureen Brunt.

## 2 Principles concerning competition

### 2.1 The analysis of effects on competition is central to the test for authorisation

In 1975, section 90(5) stated that the Commission and, on appeal, the Tribunal should not grant authorisation unless it was satisfied that the conduct was likely to result in such a benefit to the public as to justify the granting of the authorisation. Unlike the comparable provisions today, this provision did not mention the word competition. This led to an issue before the Tribunal as to the proper construction of the test.

Counsel for the Commission, Mr Brennan Q.C. (as he then was) submitted that this drafting meant that the Tribunal's task should be primarily that of assessing public benefits and not of assessing competition, whereas Mr McComas (appearing for QCMA) urged that the test in s 90(5) could not be read in isolation from the scheme of the Act, including s 50(1).

The Tribunal rejected the submission of Mr Brennan and adopted that of Mr McComas. It stated: "We shall consider the meaning of sec. 88(7) and 90(5) and their relation to sec. 50 and to the scheme of the Act as a whole."<sup>2</sup> It proceeded to state that it would consider all the claims (as to benefit and to detriment) within the context of its consideration of the effect of the proposed mergers on competition (considered with reference to the structure, conduct and performance of the market):

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<sup>2</sup> Page 17,240.

... our appraisal of all the listed claims must depend upon our appreciation of the competitive functioning of the industry, with and without merger. We have said that we are concerned with commercial likelihoods. We have to judge whether, in the absence of merger, the results could be achieved by other means (and means, moreover, permitted by the policy of the Act). And we have to consider, finally, whether the claimed results are truly of benefit to the public .... Every one of these claims contains predictions as to the market behaviour and market performance of the companies involved, with and without merger.<sup>3</sup>

This decision of the Tribunal proved to be of great importance for the future work of the Tribunal.<sup>4</sup> Following QCMA, the analysis of the effects of conduct on competition has been central to the decisions of the Tribunal, whatever tests it has been required to apply. This is consistent with the Tribunal's decision that the tests for authorisation should be read within the context of (as it put it at the time) 'the scheme of the Act as a whole'.

## 2.2 Competition constrains market power

The Tribunal followed the practice of the United States courts in considering competition as constraining market power. It quoted to this effect the 1955 Report of the U.S. Attorney-General's National Committee to Study the Antitrust Laws. The Tribunal then stated:

Or again, as is often said in U.S. antitrust cases, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. That power may or may not be exercised. Rather, where there is significant market power the firm (or group of firms acting in concert) is sufficiently free from market pressures to "administer" its own production and selling policies at its discretion. Firms may be public spirited in their motivation: but if their business conduct is not subject to severe market constraints this is not competition. In such a case there is substituted the values, incentives and penalties of management for the values, incentives and penalties of the market place.<sup>5</sup>

More than a decade after QCMA, the Tribunal (consisting of Lockhart J., Professor Brunt and Dr Aldrich) in *Re Media Council of Australia (No. 2)* (1987) ATPR 40-774 had the opportunity to consider an anticompetitive agreement which it found created net public benefits even though it substituted a system of private regulation for the alternative of the forces of competition:

It is a system of private regulation of the market for advertising messages. It is effective because all significant competitors, on both sides of the market, are either bound by its rules or are induced to conform. The Codes describe

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<sup>3</sup> Page 17,244.

<sup>4</sup> I am grateful to Maureen Brunt for alerting me to this in the course of discussion.

<sup>5</sup> Page 17,246.

attributes of advertising messages which are different from those that would emanate from the freer market alternative. The Codes are collectively implemented and enforced, such that the outcome constitutes an exercise of very significant market power.

Thus, the collective implementation of the Codes is, of its essence, anti-competitive. It places constraints upon the functioning of the market for advertising messages; it changes the quality of the products emanating from that market and the manner in which they are produced. Clearly, also, those different advertising messages change the perceptions and, hence, the demands of consumers and thereby influence the functioning of the markets for advertised products. In thus characterizing the Codes as anti-competitive, we adopt as our general concept of anti-competitive conduct any system (contract, arrangement or understanding) which gives its participants power to achieve market conduct and performance different from that which a competitive market would enforce, or which results in the achievement of such different market conduct and performance.<sup>6</sup>

In my opinion, this contrast between private regulation through collective action and competition is often a handy lens through which to analyse the effects of arrangements on competition.

In *Mc Hugh v Australian Jockey Club Limited (No 13)* [2012] FCA 1441 the Federal Court found that no substantial lessening of competition had been proved even though the rules in question substituted private, collective action for the forces of competition. I shall comment on that case later in the lecture.

## 2.3 The nature of competition is influenced by the structure of the market.

This proposition is one that all Australian competition lawyers will know, repeat and (possibly) even love.

The Tribunal stated:

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

- (1) the number and size distribution of independent sellers, especially the degree of market concentration;
- (2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;

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<sup>6</sup> At page 48,436.

- (3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;
- (4) the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration; and
- (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.<sup>7</sup>

Although these propositions are familiar to competition lawyers, they are embodied in the language of the structure-conduct-performance schema that fashion has passed by. Economics has fashions, just as there are fashions in clothing, food and the practice of medicine.

The structure-conduct-performance schema is merely a way of ordering one’s thinking when analysing competition in markets. One will need to consider the structure of the market, the conduct of the enterprises within the market and the extent to which that conduct is consistent with economic efficiency. Although the language of the structure-conduct-performance schema is not found in today’s textbooks, the proposition that patterns of competition are very much dependent on the structure of markets has been, and remains, perfectly standard economics since the 1930s.

This can be seen by considering the components from which current game-theoretic models are constructed. Three of the most-common components of these models are the homogeneous Cournot model, the differentiated Bertrand model and the joint profit maximisation model.<sup>8</sup>

Each of these models makes certain assumptions about the structure of the market:

- a. The homogenous Cournot model assumes a homogeneous product, a given number of firms (in effect, blockaded entry) and given marginal costs. These assumptions about market structure yield predictions about market performance – in particular, the margin of price on marginal cost (the Lerner index of monopoly power) that will be produced.<sup>9</sup>
- b. The differentiated Bertrand model assumes a given number of enterprises (in effect, blockaded entry), given marginal costs and given patterns of substitution in demand among the products produced. These assumptions yield predictions about market performance – in particular,

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<sup>7</sup> Page 17,246.

<sup>8</sup> For a similar selection, see John Sutton, *Sunk Costs and Market Structure*, MIT Press (1991) p 29.

<sup>9</sup> See, for example, K G Cowling and M Waterson, “Price-cost margins and market structure”, *Economica*, Vol 43, pp 267-274.

about the margins of prices on marginal costs (the Lerner index of monopoly power) that will be produced.<sup>10</sup>

- c. The joint-profit maximisation model assumes that the enterprises can replicate the pricing of a pure monopoly model. Given assumptions about the price elasticity of demand in the market for the products, this will also yield predictions about economic performance – about margins of prices on marginal costs.

Although the structure-conduct-performance schema underpinning much of the language of QCMA acknowledges that market conduct is very-much influenced by market structure, its proponents also acknowledges that market conduct can influence market structure. This was acknowledged by Professor Brunt in her lectures to Trade Practices students at Monash at the time.<sup>11</sup> It was also a component of classic textbook expositions of the structure-conduct-performance schema.<sup>12</sup>

## 2.4 Competition is a rich concept that cannot be reduced to a simple formula

Although QCMA sets out some fundamental propositions concerning the meaning of competition in the context of competition law and the relationship of the structure of markets to the state of competition, it warns against attempts to reduce attempts to reduce competition to a simple formula. The Tribunal stated:

Since we give such importance to the relevance of competitive considerations in proceedings for authorization, we add a few comments on how the Tribunal views competition. However, “competition” is such a very rich concept (containing within it numbers of ideas) that we should not wish to attempt any final definition which might in some market settings prove misleading or which might, in respect of some future application, be unduly restrictive. Instead we explore some of the connotations of the term.

QCMA itself offered a range of ways in which one might think of competition. Even within section 4, “Principles to Guide the Tribunal”, the decision offers a number of phrases that might be quoted as authority for how competition should be considered:

- a. competition consists of an absence of market power;

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<sup>10</sup> See, for example, David Besanko, David Danove and Mark Shanley, *Economics of Strategy*, 2<sup>nd</sup> edition, Wiley (2000) pp 256-258.

<sup>11</sup> Maureen Brunt, “Market Power” and “Competition”, ECOPS/Law, Monash University, from a lecture entitled “Economic Overview” in the Monash Trade Practices Lectures, 1975, 1978 version, p 4.

<sup>12</sup> See, for example, F M Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3<sup>rd</sup> edition, Houghton Mifflin (1990) pp 4-7.

- b. competition consists of the power to raise price and exclude entry;
- c. competition is rivalrous market behaviour;
- d. competition requires flexible prices reflecting the forces of demand and supply; and
- e. competition requires independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

However, a fair reading of the decision as a whole indicates that it is dangerous to adopt a single definition of competition that can be used for all purposes. The danger lies in reducing economic analysis to a simple recipe that can be followed if only the instructions are followed closely.

## 2.5 Competition should be considered over time

After its famous list of structural elements, the Tribunal stated:

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.<sup>13</sup>

A long-term view of competition and public benefit was a key element in the decision of the Tribunal (consisting of Lockhart J, Professor Brunt and Dr Aldrich) when considering the authorization of long-term contracts for the supply of gas in *Re: AGL Cooper Basin Natural Gas Supply Arrangement* (1997) ATPR 41-593.

A long-term consideration of competition was also a key element in the decision of the Federal Court (per French J) in *Australian Gas Light Company v ACCC (No 3)* (2003) ATPR 41-966. That case involved the proposed acquisition by AGL (a major retailer of electricity) of an interest in the Loy Yang Power Station Business (LYP - an electricity generator). Key issues in the case was whether Loy Yang had power to raise the price of electricity on hot days in summer when demand was high and (if it could) whether its incentive to do so would be enhanced as a result of the proposed acquisition. The Court found that, even if LYP could increase the price on hot summer days by withholding supply, these short-term effects on price were not the kind of market power that concern the statute. In particular, if barriers to entry were low (as the Court found) any attempts to increase prices on hot days in summer would raise the average price and lead to entry to the market so that (average) price would fall back to long-run marginal cost (LRMC).

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<sup>13</sup> Page 17,246.

The Court stated:

The LRMC estimates derived by Mr Ergas appear to fall close to or perhaps on the upper bounds of a debatable range. They are consistent with the proposition that LYP does not have market power defined by reference to pricing relative to LRMC. His evidence taken with that of Dr Price and the market response to the Summer Bidding Strategy of 2000/01, leads me to conclude that LYP does not have market power in the sense of an ability to secure price increases free of competitive response. I might add that success at 'gaming' in the market during limited period of high demand does not reflect market power even if it results in a high forward contract price.

The ACCC has made subsequent submissions about price spikes said to derive from economic withholding by LYP. I am prepared to accept that there are periods of high demand where a generator may opportunistically bid to increase the spot price. I do not accept that such inter-temporal market power reflects more than an intermittent phenomenon nor does it reflect a longrun phenomenon having regard to the possibility of new entry through additional generation capacity and the upgrade of interconnections between regions. It does not amount to an ongoing ability to price without constraint from competition.<sup>14</sup>

The decision of French J (as he then was) in this case is widely acknowledged as a tour de force. However, the long-term view of competition urged by the Tribunal in QCMA, adopted by the Tribunal in the AGL Cooper Basin case and adopted by French J in the AGL Loy Yang case is not necessarily appropriate in all proceedings under the Act. As the Tribunal stated in QCMA, one should not reduce competition to a simple formula. In particular, it would be wrong to say that competition problems cannot exist if barriers to entry are low.

Consider the Net Book Agreement in the United Kingdom – under which all publishers agreed to determine the retail prices of books and retailers agreed to abide by the prices determined by the publishers. This agreement was successfully implemented for just over a century starting in 1890 with the publication of the first edition of Alfred Marshall's *Principles of Economics*.<sup>15</sup> The high retail margins allowed under the collusive arrangements between retailers encouraged entry into book retailing in the UK. The net result was that prices were higher than they should have been (resulting in allocative inefficiency in the form of too few books being sold) and book retailing was divided among too many bookshops (because free entry eliminated excess profits not by lowering prices but by raising unit costs). Free entry was no antidote to price-fixing.

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<sup>14</sup> Paragraphs 492-493.

<sup>15</sup> C W Guillebaud, "The Marshall-Macmillan Correspondence Over the Net Book System", *Economic Journal*, Vol 75 (1965) pp 518-538.

## 2.6 The identification of competition is assisted by considering the performance of a market.

As I have observed earlier, the decision of the Tribunal in QCMA is based on the structure-conduct-performance schema. This schema points to links between market structure and patterns of competition; it also points to links between the structure and conduct of markets and how they perform in terms of economic efficiency. These links suggest that considerations of economic performance may, on occasion, provide insights into patterns of competition. As Frank Fisher has written:

Often an examination of the actual activity of firms in the market and the results of their interaction can reveal whether the market is effectively competitive. Economists, however, have traditionally undertaken the analysis of the competitiveness of a market by an examination of indicia of competition and monopoly categorized under the headings of market structure, market conduct, and market performance.<sup>16</sup>

A key element of economic performance is allocative efficiency. The standard measure of allocative efficiency is the extent to which price is raised above marginal cost – commonly measured by Lerner’s index of market power. As Motta states:

Market power is a crucial concept in the economics of competition law. It refers to the ability of a firm to raise price above some competitive level – the benchmark price – in a profitable way. Since the lowest possible price a firm can profitably charge is the price which equals the marginal cost of production, market power is usually defined as the difference between the prices charged by a firm and its marginal costs of production.<sup>17</sup>

In her lectures to her students around the time of the QCMA decision, Professor Brunt preferred to define market power in terms of market structure. However, she acknowledged that considerations of market performance could assist in consideration of the likely effects of market power:

Let us now make the link between structure-conduct-performance and market power. Market power in itself – its acquisition and extension – is a structural matter, although to be sure it may be influenced by market conduct. On the other hand, it is to market conduct and performance that we turn when examining market power’s use and likely effects. However, there is this complication, that how we “read” market conduct (e.g. the significance of some information agreement) may be influenced by the evidence with respect to market structure (e.g. the height of barriers to new firms who would not be bound by the agreement).

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<sup>16</sup> Franklin M Fisher, John J McGowan and Joen E Greenwood, *Folded, Spindled, and Mutilated, Economic Analysis and U.S. v. IBM*, MIT Press, 1983, p 39.

<sup>17</sup> Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge University Press (2004) pp 40-41.

Now, any trade practice in itself constitutes “market conduct”. Nevertheless in formulating standards of liability under antitrust laws – in establishing tests for breach – we may choose to focus on market structure, market conduct or market performance (or a combination of these). Further, the *standard* is one thing; what is relevant in evidence and argument (as just indicated by the information agreement example) is another.<sup>18</sup>

It is notable that the relevance of economic performance to the identification of the state of competition is stated more tentatively in QCMA:

Competition may be valued for many reasons as serving economic, social and political goals. But **in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society’s resources.** Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.<sup>19</sup>

The reason for this, rather tentative, statement seems to have been that the Tribunal was aware that:

- a. although QCMA was an authorisation case, it was laying down principles that courts may apply in later cases concerning liability; and
- b. some were arguing that the peculiar dual enforcement structure of the new Australian statute demanded a peculiarly narrow concept of competition.

Professor Brunt was aware that the dual enforcement structure of our statute may narrow the tests of anti-competitive effect so as to exclude considerations of market performance. However, she was aware that this would create conceptual difficulties. She stated in her lectures:

... it may be that the existence of the dual enforcement system (judicial enforcement coupled with provision for case-by-case administrative exemption on grounds of public benefit) will serve to narrow the tests of anti-competitive effect before the Court. It may be that, where authorization is available, the Court will be drawn to a standard of pure market power (in association with the

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<sup>18</sup> Maureen Brunt, “Market Power” and “Competition”, ECOPS/Law, Monash University, from a lecture entitled “Economic Overview” in the Monash Trade Practices Lectures, 1975, 1978 version, p 4.

<sup>19</sup> QCMA, p 17,245.

evidence bearing on market rivalry). But monopolization and price discrimination are not subject to authorization, and hence the Court might find it difficult to strike down practices which make some obvious contribution to good economic performance. Indeed the very terms of s. 46 make it plain that the possession of market power is no offence, only its use and possibly its extension. And the requirement for breach, that a firm be found to have taken “advantage of the power in relation to that market that it has by virtue of being in that position,” it may be thought, calls for a consideration of whether a firm’s practices stem from sheer market power – or from something more, viz their association with enhanced efficiency and progressiveness.

Turning to the third consideration (bearing upon choice of a relevant concept of competition), some practices of their very nature are more likely to have mixed results in terms of economic performance (e.g. merger and exclusive dealing versus some kinds of horizontal agreements): it may then be conceptually difficult to *isolate* a concept of competition that takes no account of resulting efficiencies.<sup>20</sup>

The idea that the dual enforcement system of our statute may prevent considerations of market performance when assessing effects on competition has not troubled the Tribunal in recent years. For example, in *Application by Chime Communications Pty Ltd (No 2) (2009) ATPR 42-296*, the Tribunal rejected an approach to competition based on contestability theory. It then stated:

In the Tribunal’s view a market is sufficiently competitive if the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors (actual and potential) and from customers. The criteria for such competition are structural) a sufficient number of sellers, few inhibitions on entry and expansion), conduct-based (eg no collusion between firms, no exclusionary or predatory tactics) and performance-based (eg firms should be efficient, prices should reflect costs and be responsive to changing market forces.<sup>21</sup>

The one court case that seems to rely on the effect of the impugned conduct on performance is *McHugh*. That case was brought by a breeder of thoroughbreds who claimed that giving effect to provisions in the Australian Rules of Racing that prevented horses that have been bred by artificial insemination being registered to race in thoroughbred races substantially lessened competition. The Court found that this claim was not made out. I have to be a little careful in commenting on the case because I was called to give evidence by the applicant. A key passage in the Court’s reasoning was:

It follows from my findings that the applicant has failed to establish the claimed increase in competition in the breeding market from the removal of the

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<sup>20</sup> Maureen Brunt, “Market Power” and “Competition”, ECOPS/Law, Monash University, from a lecture entitled “Economic Overview” in the Monash Trade Practices Lectures, 1975, 1978 version, p 8.

<sup>21</sup> Para 48. A similar statement appears in *Application by Fortescue Metals Group Limited (2010) ATPR 42-319*.

restrictions in that market that the applicant has not established there would be the flow on effects in the acquisition market, leading to an increase in competition in that market, for which he contended. Further, I am not satisfied that if AI were permitted in Australia there is likely to be an increase in the number of high-quality yearlings put up for sale or that prices were likely to be lower for high-quality yearlings. I am not satisfied that there would be significant demand for AI-bred thoroughbreds in the thoroughbred acquisition market or that international and domestic purchasers seeking to breed or race in Australia only would be likely to purchase AI-bred thoroughbreds.

I am therefore not satisfied that giving effect to the impugned provisions has the effect or is likely to have the effect of substantially lessening competition in that market.<sup>22</sup>

It appears that the Court found that any lessening of competition was not substantial because the Applicant had failed to prove its claims as to the damage that the rules inflict on the performance of the market. This finding was made even though the rules in question substituted private, collective action for the forces of competition.

## 3 Markets

### 3.1 Markets are analytical devices

The structure-conduct-performance analytical schema relates to the structure, conduct and performance of markets. In order to proceed with its analysis of likely effects on competition, the Tribunal found that it had to identify markets for the basis of this analysis. However, the Tribunal issued a warning against those who believe they can find, or avoid the finding of, a violation simply by defining a market in a particular way:

Yet we stress that market definition can be but a first step; and we agree with Mr. Brennan when he said that mere specification of markets cannot be determinative by itself of some ultimate issue.<sup>23</sup>

According to QCMA, markets are the analytical devices within which one analyses market power:

We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of

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<sup>22</sup> Paragraphs 1443-4.

<sup>23</sup> Page 17,246.

actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.<sup>24</sup>

### 3.2 Markets and sub-markets take into account substitution in both demand and supply

Because markets are merely analytical devices, the Tribunal was comfortable to deal with sub-markets:

It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: from which products and which activities could we expect a relatively high demand or supply response to price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?<sup>25</sup>

It followed from the Tribunal's insistence that defining markets cannot be determinative of any ultimate issue, the defining sub-markets also cannot be determinative of any ultimate issue.

This approach to markets and sub-markets was adopted, and developed further, by the Full Federal Court (per French J) in *Singapore Airlines Limited v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159.

## 4 The future of QCMA

The rule of law means that key decisions continue to be referred to for many decades. In the jurisprudence of the United States Sherman Act, *Addyston Pipe* and *Trenton Potteries* are still good law.

However, fashions come and go in economics; and the economics of competition policy generally reflects the current fashions. For this reason, one would be foolish (Sir Humphrey would say, courageous) to predict the future of QCMA.

Nevertheless, QCMA contains key lessons concerning economics and markets which I have summarised this evening. Most of these lessons were not new at the time of QCMA:

- a. Some of them derive from Cournot's famous book of 1838;

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<sup>24</sup> QCMA, p 17,247.

<sup>25</sup> QCMA, p 17,247.

- b. Most of them were established by the time of Marshall's *Industry and Trade* of 1920; and
- c. A few extra were added in Kaysen and Turner's classic *Antitrust Policy* of 1959. (Carl Kaysen was one of the supervisors of the Professor Brunt's Ph D.)

QCMA distilled these classic propositions of economics into a form that could serve as a foundation for the economic analysis of antitrust in Australia or, indeed, in any other jurisdiction. This foundation has remained rock-solid for forty years. It should be of no surprise if it remains the foundation for the next forty years.

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