KING&WOOD MALLESONS

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Note: this paper represents the personal views of the author, and not those of King & Wood Mallesons.

Thank you very much to George and RBB for hosting today's conference and for asking me to speak following Rod's Annual Address this morning.[1]

George told me that I could have free rein as to the subjects I wanted to address, and then gently suggested that perhaps I could discuss the state of competition from a private practitioner's perspective. He then even more gently directed me to the paper that was presented by Luke Woodward at last year's conference that he described as excellent and upon review, was indeed so.[2]

Luke covered a range of topics including the codified nature of our competition laws, the impact of the Harper reforms and the substantial lessening of competition test. He also gave a word of caution in relation to market studies, namely that a regulator looking for market failure is bound to find it. Or as writer Jon Ronson has put it, "*since I first heard about confirmation bias, I've been seeing it everywhere*".[3]

I want to take the opportunity to build on some of Luke's comments today, and apply a private practitioner's lens. Specifically, I have three key themes:

1 What private practitioners in this area actually do, and the changes I have seen to that practice over the past few years.

2 The over reliance on transparency as a solution to perceived market failures.

3 What I see as the increasing expansion of the ACCC's role beyond its bailiwick.

Changes in practice

Starting with some possible demystifying of the role of private practitioners. Generally as competition lawyers, the matters on which we are asked to provide advice falls in three categories.

- Conduct that is clearly a breach of the law and should be.
- Conduct that is breach of the law and should be permitted.
- Conduct that is clearly no breach of the law at all.

I think most conduct we see falls into the latter two categories, namely:

- Conduct that is a breach but should be permitted. In other words, it triggers the main prohibition, but should properly or perhaps artfully fall within an exception. Advice of this nature can be torturous and it is a result of the codified and formulistic nature of our competition laws that Luke spoke about last year.
- The third - conduct that is clearly no breach of the law at all - is actually taking up more and more time and I'll explain why I think that is.

Many people think we spend most of our time of the first category of conduct – conduct that is clearly a breach and should be –but in my experience this is actually fairly rare. For example, I can count on two hands the number of times I've been asked to advise on what is, on any measure, hard-core cartel conduct. And certainly, I can count on one hand how often I have been asked to advise on that conduct *before* it occurred.

In theory, we are in a new era of competition law as a result of the Harper amendments. But are we really?

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1 See R Sims speech available at https://www.accc.gov.au/speech/address-to-the-2018-annual-rbb-economics-conference.

2 See L Woodward paper "The New Era in Competition Law", November 2017 available at https://www.gtlaw.com.au/insights/new-era-competition-law-remarks-rbb-economics-conference.

3 This is the only economics joke I know (or, more truthfully, the only one I understand).

Private practitioners, or at least the types of law firms represented here today, could perhaps be justly accused of approaching legislative change with somewhat of a Henny Penny mindset. We are quick to sound alarms that the sky is falling. In fact, history shows that the sky rarely moves an inch – for example, notwithstanding the ill-thought through price signalling prohibitions, we had no proceedings issued and if there were any investigations they were few and far between. The Birdsville amendments fall into a similar category.

I suspect the same will be true of the concerted practices prohibition. This reform has caused a lot of consternation amongst clients, but the reality is that the vast majority of what they are doing is clearly okay. If we get any form of clarity through two litigated cases in the next 10 years we will be doing well.

On section 46, the alignment with the substantial lessening of competition test is overall a good development, but I think the greatest risk remains that it over promises and under delivers, as opposed to it causing true disruption to the operations of most corporates.

For private practitioners, it is somewhat deflating but a good exercise in humility to acknowledge that the greatest practical impact of the Harper reforms for our clients is the removal of the per se third line forcing prohibition.[4]

Changes in practice

Turning to changes in practice. A trend I have observed over the last three years or so is that the vast majority of the advice I used to provide was pre-emptive and given at the request of clients who were keen to ensure that they weren't breaching the Act before they embarked upon a path. Roughly, I would have said around 70% of advice fell into that category and 30% was what I would classify as clients coming to you when 'things go wrong'.

Now those percentages are flipped. Things are 'going wrong' much more often. What I mean by "things having gone wrong" obviously includes ACCC investigations or the discovery of problematic conduct, but it is broader than that. In my practice at least, corporations would classify 'things going wrong' as any need to engage with a regulator and the reality is those regulatory touch points have increased exponentially over the last three years.

In part, this expansion has taken the form of processes like market studies and price inquiries, resulting in more and more companies being embroiled in the ACCC net as they provide copious amounts of information and documents to the Commission to assist it in these projects.

In the past two years alone, the ACCC has commenced 13 price inquiries or market studies in areas as diverse as electricity, mortgages, dairy, gas, insurance, FX services, new car retailing, cattle and wine grapes.[5] This is in addition to its sectorial reports on airports, stevedoring, petrol, wheat, ports and water.[6] Through these inquiries, the ACCC is trying to understand, and being asked to address, perceived market failure separate to any one individual corporate's conduct.

But I think the ACCC is seeking to shape industry conduct through more informal measures as well, including by expressing its views as to the way companies should behave beyond conduct that is a clear breach of the law. One example of this relates to the NBN and the conduct of retail service providers – earlier this year the ACCC issued broadband speed guidelines which are intended, in the ACCC's words, to "*promote best practice advertising by RSPs*"[7] being conduct that even the Commission implicitly accepts is beyond what is required to comply with the Australian Consumer Law.

Another area in which clients are increasingly been caught up in the ACCC net is mergers, as a result of pre-assessments. The fact that the ACCC pre-assessed 90% and unconditionally cleared 96% of all mergers last year says to me that far too many mergers are being notified to the ACCC 'just in case'.[8]

I think we are witnessing a vicious circle. The lack of transparency around which mergers are being pre-assessed, and the reasons for which the Commission considers that a public review is not required, is in turn triggering decisions to notify the Commission of non-problematic mergers more often, as there is no clear understanding of whether or not the ACCC has reviewed, and had no issues with, mergers in the same or similar industries.

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4 Although I note that, notwithstanding that the removal of notifications at $100 a pop, the ACCC's administered fees and fines revenue last year still went up (see ACCC & AER Annual Report, 2017-2018, Table 1.1).

5 See https://www.accc.gov.au/focus-areas/inquiries and https://www.accc.gov.au/focus-areas/market-studies.

6 See https://www.accc.gov.au/regulated-infrastructure.

7 See ACCC Broadband Speed Claims: Industry Guidance, 21 August 2017, para 1.3.

8 See ACCC & AER Annual Report, 2017-2018, Table 3.10 and page 46.

The time and uncertainty associated with putting any merger before the ACCC even if there are no competition issues is, from a corporate perspective, another example of 'things going wrong'.

So what is really the new era of competition law?

None of what I have mentioned has resulted from legislative changes. Rather, it is stemming from an overall shift in the political winds, with both political parties trying to outdo one another as the stronger consumer champion, in a context of big businesses being seen to be behaving badly as Rod would put it, and the overall loss of trust in institutions generated by events such as the Royal Commission.

With this shift, there are more and more instances being put forward by politicians of perceived market failure, evidenced by nothing more than the assertion that the prices customers are paying are too high.

Rather than the Harper reforms, I think the new era of competition law is one that will see us move away from our current market wide application of a cohesive set of competition law principles into increasing sectorial regulation, with a mismatch of regimes and differing regulatory interventions across perceived problematic industries like energy, telecommunications and banking. I fear we will lose the cohesion that was slowly built back up through the implementation of Harper, and be re-engaged in debates we thought had been comprehensively won, such as the inappropriateness of divestiture powers and the risks of active price regulation. The Government's recently announced energy reforms are a prime example of this 'back to the past' shift.[9]

Turning to my next theme - is transparency all it is cracked up to be?

Increasingly, the ACCC is seeking or being asked to deliver increased transparency to consumers of pricing or other matters. The most recent example is the Commission's advocacy of a standard electricity default offer against which customers can compare market offers.[10] Other examples include the ACCC's residential mortgage and foreign exchange inquiries, which have the express aims of bringing transparency to the way in which banks set and change interest and FX rates.[11]

The perception of transparency as a solution to competition issues is evident in the resolution of the Informed Sources matter where, as part of the withdrawal of those proceedings, the ACCC accepted undertakings from Informed Sources to provide data on petrol prices to the public.[12]

All of these transparency measures are aimed at arming consumers with the information they purportedly need to make informed choices in their best interests and compare their options. And that, in turn, is intended to facilitate greater competition, as customers can choose to change providers if they are not getting the price or service they now know they can get from someone else.

But as Rod himself recognised most recently in his address to the ACMA conference "*Just because you can do something that's in your interest doesn't mean you will*".[13]

What will consumers actually do in the face of all this transparency?

Is more information about prices and products actually a form of less transparency resulting in consumers being overwhelmed by information? Will they even avail themselves of this information at all?

I haven't tested this audience on its views on the legitimacy of the particular discipline I'm about to mention, but I am emboldened by the fact that the Nobel Prize winner for Economics last year was drawn from it.[14] It seems to me that behavioural economics provides a very important perspective on how consumers actually behave and the implications

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9 See Treasury Consultation Paper for the Electricity price monitoring and response legislative framework available at https://treasury.gov.au/consultation/c2018-t337042/.

10 See Recommendation 30, ACCC Retail Electricity Pricing Inquiry Final Report, June 2018 available at https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_Exec%20summary.pdf.

11 See Ministerial Direction to ACCC to conduct a price inquiry into residential mortgage products dated 9 May 2017 and ACCC Issues Paper for the Inquiry into Foreign Currency Conversion Services dated 2 October 2018, page 15.

12 Section 87B undertaking provided to the ACCC by Informed Sources (Australia) Pty Ltd dated 21 December 2015, paragraph 4(b). The public disclosure took the form of the MotorMouth app, which has an overall rating of 3 stars from 56 reviewers (their comments include "*What a totally useless app for fuel. In our little town the servo's been there since 1920s and it doesn't show up*" and "*Would be ok if it were up to date*"). I have not used it so cannot attest to the accuracy or fairness of these reviews.

13 "*Competition & the 5G spectrum*", ACMA RadComms 2018 Conference, 30 October 2018.

14 Richard H. Thaler. See https://www.nobelprize.org/prizes/economic-sciences/2017/summary/.

of that behaviour for the promotion of vigorous competition. It also has a real role to play in assisting regulators as they are tasked with formulating recommendations that risk being a panacea at best, if they exist outside of the real world.

As some of you know, ASIC has been looking to behavioural economics for some time now to guide its regulatory and policy work. It recognised that the policy response of enhanced disclosure of information did not in fact address identified problems in the functioning of financial products and services markets.[15]

We might see ASIC as ahead of the curve, but I was somewhat surprised to come across a report prepared for Treasury almost 10 years ago about behavioural economics and complex decision making implications for the Australian tax system.[16]

The researchers identified a number of common tendencies under the prosaic heading "Things people do". The first was "if in doubt, don't do anything". There is a strong argument that more transparency gives rise to more doubt, which leads to consumers faced with more information taking no action at all.

The second tendency was referred to as "choice overload". The paper reflected that, as tasks become more complex, people are more likely to procrastinate or just keep on doing what they're doing. A contributing factor is the complexity of the number of choices on offer. The researchers found that:

> "*there is growing evidence that too much choice is costly to human decision makers. The greater the range of options, the greater the chances of overlooking the best option. Since potential losses weigh more heavily than potential gains, this can make for a fearful decision maker".*[17]

In these times, it is no longer safe (if it has even been) to assume that consumers are rational players who make decisions relying on all the information available to them to act in their best interest.

It also seems to me that the ACCC, and all of us, are very much focussed on the behaviour and incentives of suppliers, and far less on the behaviour and incentives of consumers. Policy interventions aimed at working with, rather than ignoring, customer biases and behaviours, are likely to have a much greater impact in terms of increasing competition than, for example, preventing any one merger.

Behavioural economics may also have some very interesting things to say about the motivations of consumers and their views on data. As we know, a focus of the Digital Platforms inquiry is not just the information that customers receive, but the data they provide. The ACCC has said it is looking whether "*consumers are selling data too cheaply in exchange for convenience?*".[18]

That is a great question – but it is more than that –it is truly a wicked problem that requires greater minds than mine to solve. I'll come back to this point, but it leads me to my third observation, being the expansion of the ACCC's role beyond, in my view, its proper or reasonable bailiwick.

In other words, has the ACCC burst its banks?

It is well established that there is a clear link between the need to protect consumers and the operation of functioning competitive markets. Yet the ACCC's role as the consumer protection regulator does not mean that all things consumer related should be within its purview.

Again, the digital platforms inquiry is a fascinating example. Of the six key issues that are being looked at, only two have a strong connection to competition policy. They are:

- whether the digital platforms have an unfair competitive advantage as a result of unequal treatment and regulation; and

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15 See for example, "*ASIC and behavioural economics: Regulating for real people*", speech by Peter Kell at The Impacts of Behavioural Economics on Financial Markets and Regulations Symposium (Brisbane, Australia), 18 October 2016, available at https://asic.gov.au/about-asic/news-centre/speeches/asic-and-behavioural-economics-regulating-for-real-people/.

16 "*Behavioural Economics and Complex Decision-Making Implications for the Australian Tax and Transfer System*", Andrew Reeson and Simon Dunstall, CSIRO, 7 August 2009, available at http://www.taxreview.treasury.gov.au/content/html/commissioned_work/downloads/csiro_afts_behavioural_economics_paper.pdf.

17 As above, page 13. To support this proposition, the paper discusses at some length a study of customer choice between six or 24 different jams, which seems to me a complete waste of time as clearly there is only one choice of jam – raspberry.

18 "*When and how to intervene in markets*" speech by Rod Sims to Australian Conference of Economists, 12 July 2018, available at https://www.accc.gov.au/speech/when-and-how-to-intervene-in-markets.

- whether they have substantial market power in their dealings with media content creators and advertisers and the implications of this for competition.[19]

The other four issues include:

- how digital platforms have changed media markets and the ability to produce quality news and journalistic content for Australians; and

- how the use of algorithms affect the curation of news for digital platform users.

As part of the Inquiry to date, the ACCC has thrown up issues of real significance for this country, such as:

- whether Facebook's algorithmic selection of news in the news feed is creating an echo chamber and whether Apple News and other digital content aggregators create a filter bubble; and

- whether consumers think this is a problem or conversely is it something they value?[20]

But is the ACCC the right body to be answering these rich and complicated questions? Is it really best placed to be analysing, assessing and making recommendations on matters like the quality of news and journalism. On what basis is it credentialed to assess what is or is not "quality journalism" and the risks, benefits and impacts of filter bubbles?

The ACCC's role is expanding as a direct result of its own effectiveness and track record in achieving outcomes and being a vocal and credible advocate in what otherwise masquerades as policy debate in this country.

But I think its success is distracting our politicians from focussing on what should be its core areas of expertise: that is, competition and consumer education, investigation and enforcement. It should not be asked to act as the Dumbledore[21] of our economy, able to fix with the flick of a wand matters of complex social, public, political and philosophical complexity with material implications for our democracy and systems of government.

On the question of hipster anti-trust, its seeds are starting to sprout in the rhetoric of our politicians. The Opposition's spokesman for Competition, Andrew Leigh, delivered the Lionel Murphy Lecture in October this year, entitled "Competition Policy & Inequality".[22]

In it, like Rod today, he talked through his perceptions of the influence of the various schools of economic thinking on competition law, including on our Courts in Australia. In my view, it is very difficult to conclude that any particular school of economics has had a material influence on our Courts, given the paucity of decisions on sections 46 and 50, and even fewer decisions of the High Court.

John Durie is not the only journalist asking questions about the future of competition law.[23] Peter Hartcher in an article in The Age on 3 November wrote about the anger at rising prices for petrol, electricity, road tolls, and health insurance. He asked:

> "*What's the common element? There are two. First, they are all about the cost of living, the topic that Australians list as their biggest concern, ahead of health care, crime and the economy… Second, they all have a common cause. They're all caused, in part, by a lack of competition*".[24]

He referred to Andrew Leigh's speech and an international survey on profit margins which indicated that the average prices charged by public listed companies in the 1980s were not far above the cost of production, but they had risen to 50% above cost by 2010.[25] He also referred to Mr Leigh's own research into market concentration, which showed that

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19 As summarised by Rod Sims in his Address to the Law Council of Australia Annual General meeting, 3 August 2018, available at https://www.accc.gov.au/speech/address-to-the-law-council-of-australia-annual-general-meeting.

20 "*Regulating for competition: stepping up for platforms & stepping back from media?*" speech by Rod Sims to International Institute of Communications - Telecommunications and Media Forum, 3 July 2018.

21 A fictional character from the little known Harry Potter series by J.K Rowling, see https://en.wikipedia.org/wiki/Albus_Dumbledore.

22 Available at http://www.andrewleigh.com/competition_policy_and_inequality_building_on_lionel_murphy_s_legacy.

23 "*Should the ACCC's Sims look beyond competition at wider issues?*", The Australian, 21 September 2018.

24 "*A solution to the high price of living in the Land of the Ozzigolopy*", available at https://www.theage.com.au/national/a-solution-to-the-high-price-of-living-in-the-land-of-ozzigopoly-20181102-p50dln.html.

25 De Loecker, J. and Eeckhout, J. *Global market power. NBER Working Paper Series*. WP 24768. NBER (2018).

more than half of Australia's industries are concentrated – by his measure, where the top 4 players control more than one third of the market.[26]

So we seem to have a situation where, on the one hand, commentators are arguing for an expansion to our competition laws on the basis that concentration is an anathema to competition, and that because we are witnessing *greater* concentration, competition laws have failed us. This is the essence of the hipster anti-trust argument.

Yet, on the other hand, as evidence of a competition crises in Australia, these same critics are pointing to higher prices and higher profit margins. However, preventing higher prices for consumers is the very focus of the consumer welfare standard, which is the antithesis of hipster anti-trust.

In the article that started it all, the Amazon Anti-trust Paradox in the Yale Law Journal[27], the argument being put was that the current framework of anti-trust in pegging competition to consumer welfare, does not enable and entrust regulators to deal with the problem of Amazon's dominance. The article states "*due to a change in legal thinking and practice in the 1970s and 1980s, anti-trust law now assesses competition largely with an eye to the short term interest of consumers, not producers or the health of a market as a whole; anti-trust doctrine views low consumer prices alone to be evidence of sound competition*".

By my measure, the commentators in Australia who are arguing that competition laws have failed us are adopting exactly that doctrine – in that *high* consumer prices are being used as evidence of a *lack* of sound competition.

And, in focusing on higher profit margins, they are expressing a view directly contrary to that set out in the Amazon article – that argument being that modern anti-trust fails to account for Amazon's willingness to forego profits in order to establish dominance.

The Amazon article advocates that competition in the 21st century requires an analysis of the underlying structure and dynamics of markets, and a renewed focus on the competitive process itself.

Consistent with the view expressed by Rod today, I think this is exactly what the ACCC does consider in its competition and mergers work. Examples of the types of mergers given in the article that should be able to be considered by anti-trust but in the author's view are not include:

- horizontal deals where two direct competitors operate in the same market and the merged entity would gain a large market share – a recent example of a deal in which the Commission raised this very concern was MYOB's proposed acquisition of Recon's Accounting Group;[28]

- vertical mergers that would foreclose competition – again, the ACCC looked closely at these issues in Cabcharge's acquisition of Mobile Technologies in which there was no horizontal overlap, but the Commission considered whether Cabcharge would have the ability and incentive to foreclose rival taxi networks;[29] and

- policing not just for size but also conflicts of interest – this is the essence of the issues considered by the Commission in the Brookfield Asciano deal, namely the existence of incentives to favour or discriminate between below-rail operators as a result of ownership of above rail assets.[30]

The article further expresses the view that modern anti-trust does not properly recognise economies of scale, capital requirements and product differentiation as forms of entry barriers.

To the contrary in Australia – over the past two years, the Commission has identified a wide range of barriers to entry including the time and investment to develop software product features, regulatory requirements, an established presence, economies of scale and production, excess capacity and customer stickiness.

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26 Leigh A. and Triggs A. *Markets, monopolies and moguls: The relationship between inequality and competition policy*. Australian Economic Review, Volume 49, No. 4, pp.389-412 (2016).

27 "*Amazon's Antitrust Paradox"* Lina M Khan, Vol 126, No 3, January 2017 available at https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

28 See ACCC Statement of Issues dated 29 March 2018, available at https://www.accc.gov.au/system/files/public-registers/documents/MER18%2B2989.pdf.

29 See ACCC Mergers Public Register at https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/cabcharge-australia-limited-proposed-acquisition-of-mobile-technologies-international-pty-ltd.

30 See ACCC Statement of Issues dated 15 October 2015, available at https://www.accc.gov.au/system/files/public-registers/documents/MER15%2B10579.pdf.

The most curious thing in the Amazon article to me is the statement that "*the undue focus on consumer welfare is misguided… It also mistakenly supplants a concern about process and structure (i.e. whether the power is sufficiently distributed to keep markets competitive) with a calculation regarding outcome (i.e. whether consumers are materially better of). Anti-trust law and competition policies should promote not welfare but competitive markets.*".

I think this begs a question - what is the point of protecting a process if it does not generate any outcomes that benefit consumers and society as a whole?

And how does structure and the distribution of power (by which I take it to mean there are more rather than fewer competitors) operate in an online world? To take media diversity as just one example of what the authors consider anti-trust should be able to protect, how would more players providing online news content prevent the problem of the echo-chamber in a world of algorithms? If all content is curated via algorithms to reflect my previous searches, it is irrelevant if that curated news is being delivered to me via multiple platforms - the algorithms will simply operate to create an echo-chamber on each platform.

I think those who are advocating most loudly for competition policy reform in Australia are in fact wanting to *embed* the consumer welfare standard, not move away from it, by assessing market failures solely by reference to prices that are "too high".

Profit – bad in and of itself?

My final comments relate to a potential shift in the Commission's view on the pursuit of profit.

This was a key theme in Rod's speech "*Companies Behaving Badly*".[31] In that speech Rod talked about internal incentive structures and how they might lead to executives ignoring the risks of reputational damage over the longer term to achieve short term gain.

Consistent with the ACCC's views in the past, it was noted that there is nothing wrong with pursuing profits in and of itself. Rod referred to his favourite Adam Smith quote regarding the self-interest as opposed to benevolence of the butcher, brewer and baker who contributed to Adam's dinner, and he acknowledged that the profit motive is at the heart of a market economy. For a slightly different perspective and as an aside, I give an unpaid plug for the feminist theory of economics explored in the book "*Who cooked Adam Smith's Dinner?"* by Katrine Marcal.

However, Rod has ventured somewhat further than this – in comments earlier this year, he noted that it is not the case that the motives of digital platforms are malicious – rather, as with all companies, they seek to maximise profits.

But he went on to say this: "*It is important that governments examine the role digital platforms are playing in society and, as with other companies, determine if policies are needed to curb their pursuit of profit given the problems such pursuit will cause*".[32]

This raises a troubling spectre – is pursuit of profit legitimate in one sector, but problematic in another? Is it to be curbed even if such pursuit involves no breach of the law, no misuse of market power, no misleading of consumers? Is the accumulation of profits as a result of providing a service that is valued by customers, essentially for "free", an evil that is properly to be cured by amendments to competition law? Is this a departure from the position that competition policy is concerned about the exercise of market power, and not with a business being successful on its merits?

The purported failure of anti-trust policy is being linked to matters more diverse than just increased profits. Andrew Leigh referred to it as contributing to weak wages, reduced employment, greater costs of living and social inequality more broadly.[33] These issues are real, but like the role and risks of digital platforms for our society, they are truly wicked problems. Wicked problems have been defined as ones that:

- are difficult to clearly define; with different stakeholders having different versions of what the problem is;
- are multi-causal with many interdependencies;

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31 2018 Giblin Lecture, 13 July 2018, available at https://www.accc.gov.au/speech/companies-behaving-badly.

32 "*Regulating for competition: stepping up for platforms & stepping back from media?*", International Institute of Communications - Telecommunications and Media Forum, 3 July 2018.

33 "*Competition policy and inequality*", Lionel Murphy Lecture, 31 October 2018, available at http://www.andrewleigh.com/competition_policy_and_inequality_building_on_lionel_murphy_s_legacy.

- are unstable and evolving – they are moving targets;
- have no clear solutions, and those solutions that are posited risk leading to unforeseen consequences; and
- are socially and politically complex.[34]

If these issues are wicked problems, how can the ACCC ever be expected to resolve them alone? Why should anti-trust be seen as the appropriate philosophy in which to solve them?

In a paper by the Australian Public Service Commission called "Tackling wicked problems: A public policy perspective", the APSC said:

> "*Wicked problems hardly ever sit conveniently within the responsibility of any one organisation. ... they cannot be dealt with at any one level of government. They require action at every level— from the international to the local—as well as action by the private and community sectors and individuals.*"[35]

I will quote from the conclusion of this paper, as I think it is particularly pertinent to the argument that the ACCC alone cannot possibly be expected to solve all of the issues being placed before it.

> "*Wicked policy problems are difficult to tackle effectively using the techniques traditionally used by the public sector. Traditional policy thinking suggests that the best way to work through a policy problem is to follow an orderly and linear process working from problems to solutions…*
>
> *The consensus in the literature, however, is that such a linear, traditional approach to policy formulation is an inadequate way to deal with wicked policy problems. This is because part of the wickedness of an issue lies in the interaction between the causal factors, conflicting policy objectives and disagreement over the appropriate solution.*
>
> *…By their nature, the wicked issues are imperfectly understood, so initial planning boundaries that are drawn too narrowly may lead to a neglect of what is important in handling them. It is in this unfortunate interconnection that policy problems grow and policy failures arise. There is an ever present danger in handling wicked issues that they are handled too narrowly*."[36]

So – to sum all this up – how do I see the current state of competition law in Australia?

True to the Henny Penny in me, I see it as at risk. At risk of:

- becoming the servant of political expediency;
- being used as tool to over-promise what can only ever be under-delivered;
- losing the cohesion achieved by the Harper reforms, and its cross-sector application; and
- being expected to solve problems that can only ever be tackled through a cohesive, bi-partisan, long term and multi-disciplinary approach to policy development and setting in Australia.

I hope to be proved wrong.

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34 "*Tackling wicked problems: A public policy perspective*", Australian Public Service Commission paper, available at https://www.apsc.gov.au/tackling-wicked-problems-public-policy-perspective.

35 As above.

36 As above.