

THE MARKET MECHANISM IN REALITY AND MYTH: CORPORATE BUSINESS OVERLORDSHIP OF SMALL BUSINESS

Evan Jones

Small business activity in Australia is perennially dogged by market structures operating to the benefit of larger corporations. Unfortunately, the small business - corporate interaction is little understood because it is little publicised – ignored in academia and marginalised in the media. Worse, the arena is subject to strategic misrepresentation by spokespeople for corporate interests. This misrepresentation has been facilitated by a significant anomaly: the key economic concept of ‘the market’, though presumed to be well understood by those who use it, is vacuous.

The Market: Ideal, but What is It?

The ‘free market’ system is the best form of socio-economic organisation ever devised by humankind, according to the pundits. Moreover, the phenomenon that gives the free market its supremacy is competition. And we all know what the free market is. Except we don’t; likewise for competition.

The ‘market’ as an abstraction is suggestive but almost entirely without substance. To use the word productively, we have to add substance. Consider ‘flea’ markets for secondhand goods, farmers’ markets, the stock market, wholesale and retail fruit and vegetable markets, the wheat market(s), the credit market(s), the labour market(s), and so on. These are institutions of vastly different character. A particular market is constituted and delineated by its particular rules and its institutional detail, dictating the functioning and terms of interaction of sellers and buyers.

Market rules are not impersonal or happenstance but have been consciously and strategically established, over particular spaces. They have been modified over time with experience of their operation. But who sets these rules? The rules privilege some social groups over others – often precisely their intention. Some rules are relatively benign – for example, the parameters of flea markets. For other markets the rules entrench a power relationship between social groups.¹

The evolution of market structures and the attendant rules of exchange with the development of capitalism highlight a shifting balance of forces – from the restrictions on ‘forestalling, regrating and engrossing’ in late mediaeval markets, localised and personalised, to the transcendence of locality (through long term ‘globalisation’) which facilitates the dominance of the most powerful under the misleading rubrics of being impersonal and freer (Lie, 1993).

But here is the curiosity. The rules by which most markets operate are generally opaque. Economists, the discipline for whom the concept is supposedly a specialty, systematically eschew an examination of the constitution of markets.² Worse, there are forces devoted strategically to the secretion or the fictionalisation of the rules that constitute particular markets.

One is reminded of the motif of Downyflake Donuts, iconic Melbourne outlet, circa 1950s: “As you wander on through life brother / Whatever be your goal / Keep your eye upon the donut / And not upon the hole.” Originally devised as a creed of optimism, it provides a useful metaphor for the pursuit of understanding. Figuratively, the hole has been

1 Representative of this latter phenomenon is the labour ‘market’. The humaneness of labour and the distinct discretionary character of its role in the production process makes labour both a commodity and significantly more than a commodity. Apart from other mechanisms of control by both ‘purchasers’ of labour and the state, a massive corpus of law has evolved to ensure that labour ‘markets’ are densely regulated – not least to ensure that contract law, relevant to the exchange of conventional commodities, remains inapplicable (*cf* Merritt, 1982; Forbath, 1991).

2 Economists having treated their own specialty so cavalierly, the field has been ripe for the resurgence of an economic sociology whose brief is the social and institutional context of ‘market’ behaviour. *C/f* Smelser & Swedberg (1994). Unfortunately, much of this genre is both superficial and prolix, and the documentation of real world market activity remains a fertile avenue for scholars unfettered by disciplinary-specific baggage.

privileged over the doughnut; ignorance is fostered as a matter of principle.

Competition: the Market Mechanism's Elusive Guardian Angel

Before elaborating on conflicts over the constitution and representation of markets, a preliminary discussion is necessary on the elusive concept of 'competition'. In 1968, James McNulty wrote: "There is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed, than the concept of competition" (McNulty, 1968). Over 40 years later, the state of academic discourse is, if anything, worse.³

The road to enlightenment has been dramatically impeded by the post-1870 era of dominance of Neoclassical economics and its attachment (for analytical simplicity and ideological purity) to 'perfect competition', a state in which innumerable firms have driven a particular product's price to equality with its marginal cost of production, and above-subsistence levels of profit eliminated. In the Marshallian Neoclassical tradition there is a competitive process leading to the ideal endpoint, but it is off-stage. In the purist Walrasian Neoclassical tradition there is merely a general equilibrium state.

With the high-status theorists 'off with the fairies', it has been left to those concerned with the construction of competition regulatory regimes (mostly Institutional and 'industrial organisation' economists and the legal profession in various guises – academic, commercial, judicial) to develop pragmatic definitions and regulatory rules, the evolution of which has been poorly charted.

The 'practitioners' in turn have differed among themselves, generating the debate in which competition is defined not *a priori* but as a by-product of the attempted establishment of a functional regulation framework. Traditional Institutional and industrial organisation economists, plus some regulatory lawyers, have had sympathy for the petty bourgeois (in the US, 'republican') vision, in which business size *per se* is a threat to market integrity. The tension arises with the rise in

3 The issue is covered at greater length in Jones (2006).

scale facilitated by the joint-stock corporation, which potentially spawns economies and lower prices. Yet there exists the seemingly inevitable growth of the representative corporation beyond technical and logistic necessity. The practical regulatory imperative is to impede this trajectory where it is likely to result in the acquisition of ‘market power’, where there is no compensating public benefit (*i.e.* regulatory attention to market structure); if having failed in the first ambition, to inhibit the ‘unfair’ taking advantage of that power (*i.e.* regulatory attention to market conduct). The criteria for determining an appropriate market structure (especially in the face of a prospective takeover) are not straightforward but elaborate and problematic on the margin (*c/f* Australian Competition & Consumer Commission, 2008b). To distinguish between conduct that is ‘unfair’ and that which is legitimate is also problematic.

Those sympathetic to corporate imperatives have pushed for more accommodating regulatory structures. This grouping naturally includes big business lobbies – for example, the American Chamber of Commerce and the Business Council of Australia. It also includes the bulk of the commercial legal profession, which draws its revenue from corporate coffers. The Law Council of Australia has been assiduous in lobbying for corporate capital (Jones, 2007b).

Thus the differences hinge on the attitudes of the various players towards the perils/bounties of the large corporation. The substantial ambiguities associated with the determination of appropriate deliberative rules for both structure and conduct enhances the opportunities for differences of opinion.

The pro-corporate camp has been greatly strengthened by the development in the 1950s and subsequent influence of the ‘Chicago School’ (Jones, 2010). For the Chicago School, the corporation, with the presumption of a monopoly of efficiency, is the last word in satisfying social demands on the market mechanism. The Chicago School was complemented in the early 1980s by the Contestability School, for which the absence of market entry barriers is the fundamental force for competition. From these perspectives, a couple of firms (or even one) can satisfy social objectives as long as their market presence is ‘contestable’.

This benign treatment of big capital by the Chicago and Contestability Schools has had substantial influence on the culture underpinning US antitrust policy. The mentality has also filtered dangerously into

Australian policy culture. It is implicit in both the Campbell Report (Committee of Inquiry into the Australian Financial System, 1981), recommending comprehensive financial deregulation, and the Hilmer Report (Independent Committee of Inquiry into Competition Policy in Australia, 1993), recommending a comprehensive competition regime for all economic activity and public services in Australia. Both reports place competition at the centre of their ideal worlds, decline to define what they mean but hint that a marketplace dominated by large corporations would gain their approval. Thus the two most important economic inquiry reports in the last forty years are built on deception.

The leverage of the pro-corporate camp is further manifest in the fact that the competition regulator, the Australian Competition & Consumer Commission, has (notably under the 2003-11 chairmanship of Graeme Samuel) betrayed the spirit and letter of the Trade Practices Act in kowtowing to corporate imperatives. This inaction is especially reflected in the tolerance of takeovers (with the attendant acquired market power) in the retail sector by Coles and Woolworths and in the banking sector resulting in the current dominance of the 'Big 4' (Jones, 2006; Jones, 2009b).

From the dawn of the Neoclassical era and since, 'competition' has been analysed predominantly from an industry sectoral perspective. By contrast, Classical economics analysed competition as a system-wide phenomenon, a vehicle for the equalisation of profit rates across the economy (Eatwell, 2008). Mobility of capital is the crucial mechanism. The Classical economics tradition reached its fruition in Marx, for whom "competition is synonymous with the generalisation of capitalist relations of production" (*ibid.*). Capital is thus a revolutionary agent that "eliminates all the legal and extra-economic impediments to its freedom of movement in the different spheres of production" (*ibid.*). Moreover, the concentration and centralisation of capital is an integral dimension of this process.

In Marxian hands, 'competition' does not carry the post-Classical presumption of social benevolence. Although Marx's orientation was analytical, and his ideological commitment post-capitalist, one may draw from it a 'moral economy' perspective.⁴ From that latter perspective, the

4 The 'moral economy' vision is pre-capitalist, opposed to the imposition of the pecuniary imperative on economics relationships, emphasising the 'just price',

‘competition’ that is preferred is of a highly regulated character and is conspicuously concerned to inhibit the acquisition and use of power by private capital. The fight over market rules outlined below is to be understood in that light.

Corporate Capital versus Small Business: a Case Study in Conflict over Market Forms

The historic fight over market forms (*c/f* Lie, *ibid.*) reflects basic conflicts over fundamental issues: what kind of socio-economic system will predominate (and dictate our lives)? The 19th Century in some white settler societies (the USA and Australia) provides case studies in such fundamental conflicts – in particular, over a neo-serfdom (indentured labour), petty commodity production (own labour) and capitalism (wage labour). In the US, the conflict erupted into a bloody civil war; the rest of the Century witnessed ongoing conflict between the victorious coalition partners (including wage labour). The drawn-out fight between petty commodity populism and corporate capital (*c/f* Ritter, 1997), a conflict of enormous significance for the trajectory of the American socio-economic system, is redolent of the story outlined below.

In Australia, the fight between big and small capital to establish a commercial regime that entrenches their particular interests is conveniently explored through the prism of the history of trade practices legislation. Big business resented the belated significant legislation, the 1974 Trade Practices Act, and moved immediately to undermine it.⁵ The Act is a crucial site for key ‘rules’ that underpin the market in Australia. Of special importance is s.46 (misuse of market power, originally

customary work patterns, moral restraint, etc (*c/f* Owen, 2009). Marx himself was derisive of this vision as utopian. But the moral economy vision survived the rise of capitalist imperatives, represented (for example) in petty-bourgeois, craft union and co-operatives forces and politics, and even in the reformist forces that have served to curb the excesses of capitalist hegemony.

5 The parlous early years under the 1974 Act are dissected by then Commissioner, George Venturini (Venturini, 1980). The history of legislative impasse before the Act is covered in Hopkins (1978).

‘monopolisation’), and the subsequently legislated sub-sections of s.51 (unconscionable conduct).⁶

From the viewpoint of corporate capital and its ideologues, s.46 should not exist. But corporate capital has possibly a preferred alternative – a formal statute heralding fair play but one reduced to inoperability. The one notable success of s.46 was a 1989 High Court judgement against steel monopoly BHP for refusing to supply Y-bar to Queensland Wire for the manufacture of fence posts (Queensland Wire Industries v Broken Hill Pty, 1989).⁷ Big capital had its revenge in *Boral v Australian Competition & Consumer Commission* (2003) when a High Court majority declared that Boral’s actions, in initiating fierce price cutting following the early 1990s recession, did not breach s.46. It is a mere coincidence that the robust defence of Boral’s practices was handed down by Chief Justice Murray Gleeson, in 1989 senior counsel in BHP’s defence against Queensland Wire.⁸

Coinciding with the Boral decision, the Dawson Report on ‘reforming’ trade practices regulation appeared (Trade Practices Act Review Committee, 2003). The reign of Allan Fels as ACCC chairman (1991-2003) was resented by corporate business, especially with respect to Fels’ often hard line against takeovers and mergers. Treasurer Peter Costello was lobbied to liberate takeover regulation (Davey, 2003), and to ensure that Fels’ replacement would be more business-friendly. In October 2001 Costello duly appointed ex High Court judge Daryl Dawson as head of a review committee, which delivered a proposed takeover regime effectively bypassing the ACCC.⁹ The small business community was appalled by the bias transparent in the Dawson Report;

6 The Trade Practices Act has been replaced by the Competition and Consumer Act 2010, effective 1 January 2011. The previous Act’s s.51 is now replicated in the new Act’s Schedule 2, ss.20-22.

7 That big capital resented this judgement was highlighted over twenty years later at a Law Council of Australia trade practices workshop. Federal Court Chief Justice Patrick Keane, in 1989 junior counsel for BHP, launched into a tirade against the judgement (Eyers, 2010).

8 Big capital’s revenge was reinforced later in the same year in *Rural Press v ACCC* (2003).

9 Costello appointed Graeme Samuel (investment banker and previously head of the pro-big business National Competition Council) to replace Fels in July 2003.

and a Senate inquiry was established to examine what Dawson had been instructed to ignore (Senate Economics Committee, 2004).¹⁰

A political stalemate ensued. Costello then attempted to legislate the Dawson provisions while ignoring the Senate Report. Small business dug in its collective heels. This is the backdrop to the subsequent propaganda onslaught by corporate business and its spokespersons that is the dominant focus of this article. Before the character of this onslaught is outlined, it is desirable to summarise the relations between corporate and petty bourgeois capital ('small & medium enterprises', or SMEs).

Real World Market Forms Facing Small Business

An inquiry established by the Fraser Coalition Government in 1978 (Trade Practices Consultative Committee, 1979) eventually led to a formal strengthening of s.46 under a Labor-initiated 1986 amendment. The test threshold was lowered from a 'corporation that is in a position substantially to control a market' to a 'corporation that has a substantial degree of power in a market'.

The Business Council of Australia, then only three years young, attempted to counter this move with a diversionary claim that the BCA's membership and SMEs were all just one big happy family, in which 'constructive interdependence' prevailed (Business Council of Australia, 1986). In 2004, in the context of ALP Opposition leader Mark Latham expressing support for pro-SME measures, then Wesfarmers' CEO Michael Chaney claimed "The success of many small businesses depends on the strong performance by large business"¹¹ (Hanrahan, 2004).

10 The Dawson Report did recommend the improvement of procedures to facilitate 'collective bargaining' by powerless small suppliers with corporate purchasers. This recommendation, out of character with the thrust of the report, appears to have been a political fix to get small business support for the Dawson report. The complex trajectory of collective bargaining procedures, very difficult to implement because contrary to basic 'anti-competitive contracts' conventions, will not be pursued here.

11 Chaney is now chairman of both Wesfarmers and the National Australia Bank. The exploitative relationship between Wesfarmers (holding company for Bunnings and Coles) and the NAB with their small business suppliers and customers respectively is far removed from relations of 'constructive interdependence'.

On the contrary. The major industry sectors in which such SMEs operate are characterised by market forms of structured exploitation, rooted in asymmetric power (Jones, 2005; 2006; 2009a). These sectors include: shopping centre tenancies (cross-subsidisation of the corporate ‘anchor tenants’; insecurity of tenure), franchises (master-servant relationship), suppliers to corporate processors or retailers, and bank borrowing (engineered defaults; unfettered corruption). The structured exploitation is often embedded in the contracts, some of which are innately unconscionable. More, corporates can break contracts with SMEs without retribution.

These relationships are rarely documented or acknowledged.¹² The fact that this reality is veiled provides a convenient starting point for the propaganda warfare whenever the fragmented small business lobby groups attempt to highlight their memberships’ situation.

The Big Business Version of the Appropriate Market Form

The central fiction of corporate business is that a competitive market requires big business as the natural player, an axiom that merely needs to be stated to be held as true. The more highly concentrated the industry the better.¹³ Big business is presumed to be synonymous with the drive to efficiency. In this presumption it is implicit that efficiency is achieved via greater scale/scope (in turn achieved only via honourable means) and/or corporate managerial farsightedness. Greater efficiency and (long-term) lower prices are two sides of the same coin. The consumer is the king of the market and the corporation is its loyal servant.

From Ray Steinwall, sometime academic lawyer (Steinwall, 2004):

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- 12 A rare exception is the evidence embodied in a bipartisan Parliamentary report, *Finding a balance*, following an inquiry in which SME personnel were (atypically) guaranteed confidentiality with respect to their submissions and evidence (House of Representatives Standing Committee on Industry, Science and Technology, 1997).
 - 13 The finance media regularly lectures on the dysfunctionality of multi-firm industries, inferring the desirability of ‘rationalisation’ and ‘consolidation’. Sometime Fairfax journalist Stephen Bartholomeusz has regularly written on this theme – c/f Bartholomeusz (2002).

Whether or not the Senate has realised [re the post-Dawson 2003 Senate Economics Committee Inquiry], it had embarked on a new competition philosophy, one that is as keen to embrace a market of many competitors as it is the competitive process itself.

On the contrary; the philosophy that ‘embraces a market of many competitors’ is embodied in a centuries-old ‘moral economy’ or ‘populist’ antagonism to business monoliths, a vision simplified and purified in the 140-year old Neoclassical economics tradition.

From general reportage (O’Loughlin, 2004a):

Some business representatives accused Labor of failing to understand the damage its competition policy would inflict on large companies.

In this instance, Labor might be smarter than we generally give it credit for. More general reportage (O’Loughlin & Hepworth, 2004):

The BCA is launching a major research project [Access Economics] to highlight what it says are strong levels of competition in highly consolidated industries such as the retail grocery, petrol and banking markets, a move designed to debunk claims by small business that mergers and alliances are reducing competition. “We have to be strong internationally, that means there is pressure on our companies to consolidate within their industry sectors”, said BCA chief executive Katie Lahey. “If we don’t have strong competitors in Australia it just encourages more overseas entrants because we’re just ripe for being picked off,” she added.

Two dimensions of the retail duopoly’s operations are pertinent here. First, the dominant source of Woolworths’ and Coles’ revenue is from extractions (due to their market power) from suppliers (Jones, 2006), complemented by low shopping centre rentals cross-subsidised by other tenants. Second, grocery prices at Woolworths and Coles are not consistently lower than elsewhere; further, pricing competition historically has come from other competitors (IGA, Aldi) rather than from between the duopolists (*ibid.*).

Another axiom from the corporate lobby is that competition is essentially subject to the law of the jungle – might makes right. This declaration is contradictory to the prior general story, but is displayed only to select audiences. Thus, claims Mark Christensen, ‘economic consultant, ex-

adviser on economic reform at the Queensland Treasury & Productivity Commission' (Christensen, 2005):

The confusion over [the attempted definition and measurement of] market power arises from its inextricable link with all that is positive about the free market. ... Accepting private sector autonomy as necessary for our success also means accepting the potential for this freedom to be abused. The discretion needed to make commercial decisions cannot be divided into good and bad parts. Ultimately, the free market is an all-or-nothing policy proposition.

Ditto the High Court's Chief Justice Gleeson, in *ACCC v Berbatis* (2003), with the competition regulator unsuccessfully acting for the tenant in litigation against the landlord (*Berbatis*):

A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests. Parties to commercial negotiations frequently use their bargaining power to "extract" concessions from other parties. That is the stuff of ordinary commercial dealing.

The Big Business Propaganda Schema to Reinforce Its Story

The large corporates and their apologists are persistent in the dissemination of propaganda, seeking to obfuscate their power and render illegitimate any attempts to constrain it. Reproduced below is an array of statements, suitably categorised, that illustrates these self-serving processes.

Assume away or deny as non-existent the structural imbalance of power and its abuse

Here is Hugh Morgan, then BCA President (Morgan, 2004a):

The recommendations in the [Senate Economics Committee Report, 2004] are framed under the guise of protecting small

from large business. In fact, they are about protecting inefficient businesses, and in the process seek to undermine fundamental principles of competition.

Morgan again, in response to the Senate Committee Chair claiming that he is ill-informed (Morgan, 2004b):

The result of all these changes will be to restrain the ability of larger corporations to engage in legitimate commercial competition. Less efficient firms may benefit from lower competition, but consumers will pay the price.

Ray Steinwall on a similar theme (Steinwall, 2004):

Lower prices quintessentially reflect competition at work. Incorrectly condemning conduct that delivers these benefits risks anti-competitive price rises. In theory [*sic*] cost savings are delivered through aggressive competition, weeds out less competitive and less efficient firms, which ultimately fail.

In short, those who die (small business by definition) are those who deserve to die; small business is constitutionally fated to die. Big business dominance is claimed to be achieved by legitimate means, foremost of which is greater efficiency – neither of which can be presumed.

Mislead or dissemble

From general reportage regarding the SME lobbies' push to strengthen s.46 (O'Loughlin & Winestock, 2003):

Big business lawyers [the Law Council of Australia's trade practices committee] warned yesterday that the ACCC's call for tougher laws to stop unfairly aggressive competition would result in higher prices ... [by impeding] the ability of companies to compete by lowering prices.

From an *Australian Financial Review* Editorial (Editorial, 2004):

... mistaken findings of predatory pricing deprive consumers of low prices resulting from healthy competition and impose heavy costs on the community. The conventional wisdom that the Boral case exposed flaws in s.46 is also wrong.

From general reportage (O'Loughlin, 2004b):

Specifically, [BCA-sponsored Access Economics] warned that legitimate marketing strategies such as discount pricing could be outlawed if the Senate proposals were implemented.

These claims are simply wrong. No proposals for amending s.46 preclude price competition; rather they preclude predatory pricing based on the misuse of market power. More, the High Court's decision in Boral effectively neutered s.46 in all but the most extreme possession of market power and most blatant of abuses.

From a later *Australian Financial Review* Editorial (Editorial, 2007):

[The small business lobby labours under a misconception] that the section exists to protect small firms from nasty competitive behaviour by large players. But [s.46] is there to protect competition itself.

Wrong again; and a long-standing and serious misrepresentation. S.46 attempts to protect fair trading (*i.e.* competitors), through which competition is served, as evident in the wording itself:¹⁴

s.46: (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; etc.

From John Durie, journalist (Durie, 2004a):

A Whitehall Associates report [Spencer, 2004] on price determinants in the food industry has noted retail competition in Australia is intense ... There is also no documentary evidence to show the big retailers are killing competition and controlling prices.

14 This perennial misrepresentation has been given succour by the fact that even the judges in *Queensland Wire v BHP* reproduced this misstatement of s.46's wording and intent.

Rather, what retail competition exists is coming from businesses other than the retail duopoly. Further, the latter claim is wrong. The Baird Committee inquiry (Joint Select Committee on the Retailing Sector, 1999) exposed blatant predatory pricing by Woolworths, subsequently ignored by the authorities.

From Graeme Samuel, ACCC Chairman, in a speech later in 2004 (Samuel, 2004):

The [Whitehall] Report notes that a 'highly competitive retail sector combined with the strong presence of national and international brands has resulted in a low margin, by world standards, grocery sector' – hardly the sign of a rampant duopoly extracting monopoly profits.

Wrong again. The Whitehall report confused the duopoly retailers' low margins on turnover with their margins on capital employed, which are substantial. Moreover, the Whitehall report claimed wrongly that a 2002 ACCC report (requested by the Baird inquiry) which had assumed away retailer market power had actually denied its existence (Australian Competition & Consumer Commission, 2002). Here is a scandalous phenomenon in which official reports engage in circular citation, each denying the existence of large retailer market power although each avoided an examination of the issue. The reputed absence of retailer market power thereby acquires definitive status, although the grounds for its declaration are absent. Wishful thinking is converted into tangible reality.

The ACCC subsequently presided over a massive whitewash report (Australian Competition & Consumer Commission, 2008a) which claimed, again without proper investigation and denying confidentiality to submitted evidence, that market power was not abused in the retail grocery sector.

Claim the support of authority

Examples abound. From Hugh Morgan, then BCA President (Morgan, 2004a):

Yet the Senate wants to tamper with a system which expert opinion has repeatedly endorsed.

From Ray Steinwall, sometime academic lawyer (Steinwall, 2004):

The dilemma is that successive reviews, including last year's Dawson Review, have endorsed the judgement of other industrialized countries that economic efficiency is the ultimate goal of competition policy.

From John Durie, journalist (Durie, 2004a):

[Samuel, ACCC Chairman] has long argued that big retailers, while dominating the industry, might actually promote competition. ... Many in the legal community still support the view that the section [s.46] is fine and legislative changes may come with unintended consequences.

It is a mark of desperation to rely on authority, indeed unnamed authority, to underpin one's argument. Yet the Steinwall claim is wrong, and the Morgan and Durie claims merely implicitly highlight that much of the legal establishment is party to the corruption.

Lay on the chutzpah

From general reportage with respect to the stance of Woolworths (O'Loughlin & Winestock, 2003):

Woolworths, owner of the Safeway supermarket chain, which is fighting a section 46 case against the ACCC, is also resisting any change. "Most large businesses in Australia ... meet their obligations under the Act", Woolworths said in a submission to the Senate inquiry.

It is instructive that this claim of corporate high-mindedness comes from a company that was found to have misused its market power in attempting to prevent bread price discounting by its small competitors during the mid-1990s (and which consumed significant public resources in litigation costs). Woolworths was again (with Coles) found guilty in misusing its market power with respect to comprehensive objections to liquor license applications by independent liquor retailers (Jones, 2006). The then Woolworths CEO Roger Corbett remained unrepentant.¹⁵

15 Journalist Stephen McMahon commented (with respect to the bread pricing case, and on the occasion of Corbett's appointment to the Reserve Bank board): "For

This from Hugh Morgan, then BCA President (Morgan, 2004a):

The Business Council recognises the important role that small business plays in the Australian economy. ... The prosperity of many of these businesses, however, depends on the fortunes of Australia's largest companies.

This claim is consistent with those outlined above. Yet this claim is made in the same breath (albeit to different audiences) as the claim that meaningful 'competition' is to be understood as that which is justly wiping out such small businesses.

Morgan again, in response to the Senate Committee Chair claiming that Morgan is ill-informed (Morgan, 2004b):

... this lower threshold [for attributing 'market power' under s.46] will mean many more medium and smaller companies risk being captured by the [A]ct ...

From Doug Shireffs, former 'regulatory economist', then at Minter Ellison (Shireffs, 2004):

[The 2004 Senate Economics Committee Report's] Recommendation 8 [opposing unilateral variation of contract by corporates] is about distorting the market in favour of businesses such as dealerships and franchisees.

This proposition is equally instructive regarding the insouciance of pro-corporate ideologues. A contract is a contract, the sacred foundation of the common law, except that the more powerful party should have the right to break it unilaterally. Claims such as these, which fall into the realm of the blatantly dishonest, highlight that corporate protagonists have confidence that they can pronounce that black is white without adverse repercussions.

almost 10 years, Woolworths' senior management fought the case at every turn, leading some analysts and shareholders to wonder if [they] needed a refresher course on what constitutes a breach of the Trade Practices Act" (McMahon, 2006).

Resort to abuse and denigration

From John Durie, journalist (Durie, 2004b):

A populist politician selling trade practices reform as a cure-all for small business is unlikely to let the facts get in the way of a good sales pitch, and Mark Latham's effort yesterday [as Labor Party leader] was true to form.

Durie again (Durie, 2005):

Trade practices reform is now stuck in a classic deadlock between a badly misinformed senator (Barnaby Joyce) and the Treasurer, who rightly has no plans to give in to his demands.

From Robert Shilkin, academic lawyer (Shilkin, 2005):

[Senator Barnaby] Joyce's position on competition law already cracks the trifecta: Dumb law, Dumb economics, Dumb politics.

Both ex-Labor MP Mark Latham and National Party Barnaby Joyce have their weaknesses but, in respect to the issues under discussion, they had a better understanding of the issues than do their opponents. Several key words in the Establishment's rhetorical lexicon are prominent here. A favoured emotion-packed label to denigrate the enemy is 'populism'. Populism reflects the ignorance of the masses, unfortunately endowed with voting rights. By contrast, 'reform' is the magical word to bolster Establishment opinion, out of the mouths of the corporate lobby and its satraps. Personal abuse is the refuge for the opinion-maker dependent on unexamined prejudices.

Claim that uncertainty and anarchy will prevail unless corporate business rules

From Stephen Bartholomeusz, journalist (Bartholomeusz, 2004):

... there is a significant risk that uncertainty about the line between legitimate and illegitimate behaviour would inevitably reduce competitive intensity.

From Doug Shireffs, former ‘regulatory economist’, then Minter Ellison (Shireffs, 2004):

The [2004 Senate Economics Committee Report] majority’s proposal ... would help transfer wealth from large businesses to small ones by restricting large businesses’ ability to manage risk.

From general reportage (O’Loughlin, 2004b):

Access Economics [report commissioned by the BCA] warned that ‘while not radical’ the proposed changes would ‘create an unwarranted risk that pro-competitive conduct will be captured’.

From Mark Poddar, Malleson Stephen Jaques (Poddar, 2007):

If the standards are too uncertain, enterprises will be reluctant to undertake ordinary business activities and competition will be stifled. ... We must all be vigilant against any more proposals to amend the Act that risk stifling competitive activities of business and therefore ultimately to the detriment of Australian consumers.

Given that competition is supposed to be encapsulated in the law of the jungle, this claimed fear of the unknown, of the challenge of the battle for supremacy, is rather too precious.

Claim that economic growth and welfare in general will suffer unless big business rules

From an *Australian Financial Review* (Editorial, 2004):

... making it easier for small firms to attack the market conduct of large ones will not add to community welfare; it could subtract from it by inhibiting healthy competition.

From John Durie, journalist (Durie, 2004a):

... without the pro-market reforms [promulgated by big business and instigated by Paul Keating, Latham’s pro small business TP Act amendment plan] is a recipe for a dismal government, if, indeed, economic growth and welfare is an aim.

From general reportage (O'Loughlin, 2004a):

Yesterday, corporate bosses were once again doubting the party's economic credentials. Caltex chairman Dick Warburton, who has led big business' campaign for competition law reform, said [Latham's] plan was "going back 20 years". "It was the Labor party that actually led us out of the protectionist years," he said.

From the micro to the macro, the right to rule of corporate business is now indispensable for the general wellbeing of the community.

In general, there are lies, damned lies and corporate propaganda. None of the claims quoted above bear any resemblance to typical market relations between corporate business and SMEs or the function of the Trade Practices Act in enforcing sustainable pro-competitive market structures and behaviour. The claims complement each other in forging a mythical world of undiminished bounty behind which the corporate sector can engage in almost any anti-competitive and unethical practice with impunity.

The Outcome of the Battle

A succession of amendments to the Trade Practices Act implicitly reflects the drawn-out conflict over the Act. In 2006, Treasurer Costello went ahead with legislating the Dawson report recommendations while ignoring the Senate Economics Committee recommendations in favour of small business.¹⁶ In 2007, Costello set about successfully 'smooching' the key small business lobbies (and National Party Senator Ron Boswell, whose support was crucial) to gain support for a cynical amendment to s.46 that did little more than elaborate on the existing wording (Jones, 2007a). Senator Joyce remained outside the fold. At the eleventh hour, with a federal election pending, Costello uncharacteristically agreed to an amendment to s.46 proffered by Joyce; the amended Act was assented to

16 National Party Senator Barnaby Joyce refused his vote, but Costello just garnered the numbers by gaining the support of Family First Senator Steve Fielding.

in September 2007.¹⁷ The crucial element in Joyce's 'Birdsville' amendment is in s.46(1AA) (emphasis mine):

A corporation *that has a substantial share of a market* must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of [etc.]

The 'substantial market share' was seen by its proponents as complementing and strengthening the existing 'substantial market power' criterion. The legal establishment was (and remains) appalled and attacked the amendment with claims comparable to those outlined above. Federal Labor readily joined the opposing forces, and the repeal of 'Birdsville' was a high priority upon attaining office in November 2007.

Labor duly legislated for a repeal, but the Senate (the Coalition plus Senators Fielding and Xenophon) overturned the repeal, and Birdsville remains in the Act. With then ACCC Chairman Graeme Samuel also unsympathetic to the amendment and to the intent of s.46 in general (and little prospect of the incoming Chairman, economist Rod Sims, reversing this stance), the implication is that there will be no test of the amended s.46 for the indefinite future. In practice, s.46 will remain inoperative in spite of its formal strengthening.

Noteworthy is that the prestigious OECD has been brought into the battle against Birdsville. Always touted as a detached research organisation of high repute, significant sections of OECD nation-specific publications are effectively drafted by that country's establishment nationals. The OECD's *Reviews of regulatory reform Australia 2010* labels the Birdsville amendment 'politically motivated' and cries repeatedly for its repeal (OECD, 2010: 18, 82, 164, 180), using the same inaccurate or misleading language used by Australian opponents.¹⁸

17 The amendment was drafted by Frank Zumbo, University of New South Wales academic, a rare lawyer in Australia actively sympathetic to small business interests.

18 The report's preface acknowledges the Deregulation Group of the federal Department of Finance and Deregulation, and special consultant Caron Beaton-Wells, the latter an integral member of the pro-corporate business Law Council of Australia.

The Market Rules OK but Don't Ask How it Works

The period 2004-08 witnessed a long propaganda war against SMEs achieving some redress through sympathetic amendments to the Trade Practices Act, especially to s.46. Via this propaganda, content-less abstractions have been reified. Symbolic fictions have thus become reality and reality is suppressed. Power is exercised and reproduced opaquely behind reified fictions. The hole is privileged over the doughnut. Structured exploitation prevails in an ideological environment committed to its denial.¹⁹

It is instructive to contemplate the role of intelligence, evidence and analysis in this process – notable by their absence. Is it possible that the legendary ‘power of the pen’ is vitiated by the pen in the service of power? The arguments of the big business lobby are without substance – worse misleading and dishonest. Yet the big business lobby has prevailed in this arena.

Do bad arguments drive out good? Or does power make reasoned argument irrelevant? This issue is of significance to the academic/intellectual community, which formally dwells in the world of ideas, evidence and analysis. Are academics/intellectuals irrelevant and thus wasting their time? Is even Gramsci's ‘pessimism of the intellect / optimism of the will’ an added self-delusion? At the very least, if academics/intellectuals want to maintain their relevance, the analysis of power *sui generis* should be the centerpiece of all the social ‘sciences’.

Evan Jones is Honorary Associate in Political Economy at the University of Sydney.

evan.jones@sydney.edu.au

19 A parallel situation has long existed with respect to the capital-labour relation. Ironically, the ‘Chinese walls’ of expertise, especially in the legal profession, have resulted in the interpretation of inter-capital conflict learning nothing from a long-standing and elaborate tradition in the interpretation of capital-labour conflict.

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