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There is clear value in learning from other jurisdictions, as growing international co-operation - and the Harper Report - demonstrate. The High Court warns, however, of the "danger that principles relevant to the laws of other countries may be adopted uncritically and without regard to the context in which they were developed".

This edition of TSoC – the second in our series on policy development – considers some of the often forgotten differences that impact on the adaptability of overseas wisdom. Focusing on the US and Europe, we examine the legal systems themselves, approaches to market definition and the application of the competition test.

the state of COMPETITION

Here there be dragons

The pros & cons of overseas adventures

There's plenty in the Harper Report that seeks to draw from overseas experience. The Panel hosted an expert workshop, drawing on the wisdom of eminent overseas antitrust lawyers and economists, and received submissions from parties as far away as the New Zealand Commerce Commission and the American Bar Association. The interest in and from overseas reflects recent developments designed to enhance international co-operation, most obviously in the form of the International Competition Network (the 14th Annual Conference of which Australia has just hosted).

And so, in the Harper Report, it is no surprise that overseas experience informs its recommendations in relation to matters such as anti-competitive price signalling, misuse of market power, vertical supply arrangements (especially resale price maintenance), the regulation of liner shipping and so on.

But as Gleeson CJ and Callinan J noted in *Boral* so long ago, "there is... a danger that principles relevant to the laws of other countries may be adopted uncritically and without regard to the context in which they were developed". (The irony, of course, is that *Boral* itself draws so heavily on United States' jurisprudence to navigate the morass that is alleged predatory pricing.)

The purpose of this edition of TSoC is to consider some of the often forgotten differences – both institutional and jurisprudential – that impact on the adaptability of overseas wisdom. In particular, we'll look at some key differences arising out of the US and European systems, as well as some different approaches to the law in New Zealand. (Australian and NZ competition law can be a little like our accents: practically identical to outsiders, but distinguishable to those in the know.)

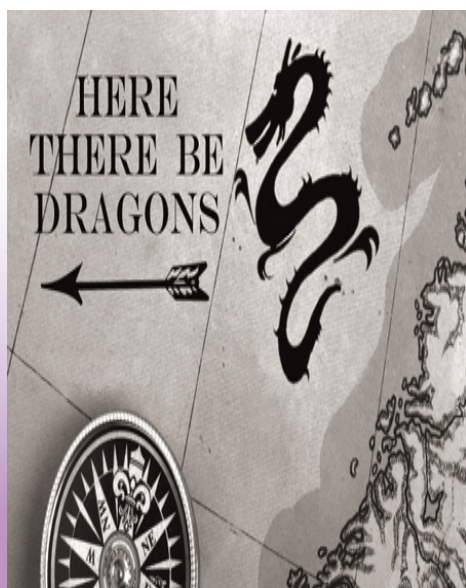
There are in fact many points of difference between the key jurisdictions, and very few (your authors included) are sufficiently "multi-lingual" to articulate all. For this edition, we will examine the legal systems themselves, approaches to market definition and the application of the competition test. We focus most heavily on the United States: we'll be honest, that's partly because we get that system better than Europe. But it also reflects the more significant influence of the United States on our own law – both as written and as administered.

**You who read me,
are You sure of
understanding my
language?**

Jorge Luis Borges,

The Library of Babel

(in translation of course)



Economies of scale

Before getting into the nitty gritty, we should note that both Europe and the United States have significant “economies of scale” in their antitrust regimes that Australia can never hope to replicate.

This has pros and cons: on the one hand, it doesn’t take as long to develop jurisprudence as there is a steady stream of cases to help refine how one should approach a given issue (this in part explains why, for every “new” issue here, we lean so heavily on foreign decisions).

On the other hand, it means that boxes are necessarily created to allow for an efficient assessment of conduct – one sees this most readily in the United States where rules of thumb prevail as against Australia, where a full competition assessment of every issue is par for the course.

“We shape our buildings; thereafter they shape us” (Churchill)

The influence of the architecture of the respective systems cannot be understated when considering how competition law has developed in Europe and the United States. The significant impact that institutional arrangements can have on the operation of a regime overall is indicated by the following observation by former ACCC head, Allan Fels. *Speaking in the context of establishing new systems in Cambodia, Myanmar and Laos, he said:*

In general, adopting European laws makes some sense as the weak court systems in those countries makes the adoption of the US prosecutorial model unlikely to work.

So, how can it be that the institutions themselves impact on the laws you might adopt?



The significance of architecture in shaping our thinking has long been understood.

Europe: the power of the administrative process

In the European model, the vast majority of decisions are made administratively. Ian S Forrester, of White & Case, states:

The Directorate-General for Competition... of the European Commission (EC) is unique within that institution in that its officials have the power to investigate, raid business premises and private homes, question witnesses, reach conclusions, demand concessions, impose penalties and enforce those penalties, in court if necessary.

Indeed, the EC can levy substantial penalties – witness the €1 billion fine for Intel in 2009 and €1.7 billion for participants in a price fix involving the LIBOR and other financial derivatives.

A Statement of Objections issued this month seeks €6 billion against Google for abuse of dominance relating to alleged search engine bias. This Statement is a formal investigative step which allows the target to examine the investigative file, make written submissions and request an oral hearing.

The hearing, however, is conducted (privately) before an official of the Commission itself. This person does not formally decide the matter, but rather reports to an Advisory Committee which – according to Forrester – has not “in living memory” gone against a Commission decision. So the odds of Google getting off via this process are not high!

While Intel appealed its €1 billion penalty to the EC’s General Court (an appeal which it lost) and Google, if fined, will have the same option, remarkably few of the Commission’s decisions are reviewed judicially. It blows the mind that an administrative agency can levy fines equivalent to a small country’s GDP, so unsurprisingly concerns are sometimes expressed about the many faces of the Commission: police officer, judge and executioner.

With so much power vested in the Commission, the legal process takes place in quite a different way. For example, while Europe has provided the model for Harper’s approach to “concerted practices”, the EC effectively enforces that law as a quasi per se prohibition. Its guidelines have much greater significance, as they reflect how the Commission – as the primary decision-maker – interprets the law. This is vastly different from ACCC guidelines, which Australian courts go out of their way to ignore, presumably to avoid any hint of favouring the Act’s most frequent litigant.

The US: a whole different ball game

The US system could hardly be more different. Indeed, whether comparing it with Australia or Europe, there are so many significant differences in the overall framework that it is hard to say where the impact of one factor begins and another ends. For present purposes, we will look at three key issues affecting the legal process: juries and the use of rules of thumb, the role of experts and finally, judge-made law. As will soon be clear, however, these issues are closely intertwined.

Juries & rules of thumb

The US system is clearly a court-based process; indeed, a merger cannot be blocked without court approval. But it is the involvement of juries that has led to many distinctive practices in the US.

Until the introduction of criminal sanctions for cartel conduct in 2010, there was no provision in Australia’s competition regime for jury trials: rather, all alleged contraventions were (and, so far, still have been) heard at first instance by a single

judge of the Federal Court. However, in the United States, breaches of the *Sherman Act* and other legislation dealing with anti-competitive conduct are assessed by a jury.

This appears to have had a significant impact on the process for addressing such conduct. Antitrust legislation brings together law and economics and requires an understanding of how firms operate: a daunting task for non-specialists. (It's also unclear what a "jury of its peers" would look like if, for example, the *Microsoft* case ever made it to that stage!) To address this problem, practices have developed to simplify the task. One such process is the use of summary judgments, relying on lines in the sand that have been drawn by the courts over the years.

Another is to provide tests and "defences" that enable a judge to instruct a jury whether certain conduct is anti-competitive. Thus, conduct that is treated as per se requires only that the jury find that specific evidential boxes have been ticked. For other types of conduct, a legitimate business rationale, for example that the conduct was efficiency-enhancing, provides a defence. We'll return to per se vs competition tested contraventions shortly.

First, though, we should note the significance of rules of thumb. The SSNIP test – where market definition is based upon the impact of a (generally) 5% change in price – is probably the most famous example, but market share percentages can be used to determine the impact of horizontal mergers, the potential foreclosure created by a vertical arrangement and whether a party has market power. This reliance on percentages – driven by an urge to simplify matters for the poor souls in the jury box – places enormous importance on market definition; again, this is a topic to which we'll return soon.

The role of experts

Every now and then, we see US jurisprudence which has clearly been generated in this context of rule of thumbs cited in Australia: frequently in the evidence of experts (often foreign but occasionally local), and sometimes even in judgments.

During the *Universal*, *Safeway* and *Boral* cases, where substantial market power was alleged notwithstanding apparently low market shares, it was common to see reference to the US position that market power was not possible for a party with less than 30% market share. For example, Hill J in *Universal* noted:

Professor Hausman was of the opinion... that low market share implied low market power and said that this was accepted by all reputable economists... He asserted that a market share below 30% could not be consistent with a substantial degree of market power.

This précis of Hausman's evidence is interesting: he is in fact putting forward the US legal position (which has its origins in the famous *ALCOA* decision), not an economic opinion as such. See for example McHugh J in *Boral*:

In AA Poultry Farms, summarising the United States decisions on market power, the United States Seventh Circuit Court of Appeals said that "as a matter of law single-firm shares of 30% or less cannot establish market power ...".

Ordinarily, the citation of legal principles from one jurisdiction – especially by a non-legal expert – would have little or no influence on the interpretation of the law in another jurisdiction. Indeed, particularly in the early days of the *Trade Practices Act* (now *Competition and Consumer Act*), the citation of any legal principle by an economist was considered beyond the pale (see eg early judgments by Wilcox J). But Hausman's contention has the appearance of being economic in origin:



Exactly what you are permitted to ask an expert is just one of many differences between the Australian & US court systems

after all, Hausman was appearing as an expert economist. But it is hard to say where his expertise in economics begins, and his accommodation of existing (US) legal principles ends.

In large part, this confusion – on our part, not Hausman's! – reflects the very different role of the expert in the United States as compared with Australia. In the US, the economist is not an independent expert, but rather a member of the advocacy team for one side or the other. She or he is entitled to go on fact finding missions (so not allowed here!), and the citation of legal principles to support an economic opinion is common and indeed expected.

This difference in approach may reflect the enormous role of economists in the development of US antitrust law, for which Richard Posner is surely the poster child. A judge on the US Court of Appeals Seventh Circuit, Posner is both an economist and the most cited US legal scholar of last century.

Posner's life's work is an exemplar of the crossover of expertise that occurs in the United States, as distinct from our much more segmented approach which has the lawyers performing one specific role and the economists another much more confined role. (To this end, it should be noted that the role of the economist in Europe is different again, driven by the generally administrative nature of the process – in Europe, economists are employed in a manner more akin to an economist involved in an informal clearance process here.)

Judge-made law

Finally, there is the interaction between the legislation and judges to consider when looking at US jurisprudence. How exactly do we know that resale price maintenance is per se prohibited? Because section 48 clearly tells us so: "A corporation or other person shall not engage in the practice of resale price maintenance". True, one needs to read a whole part (Pt VIII) of the Act to understand what the practice is, but all the key information is set out in the legislation.

Harper considered (but rejected) changing resale price maintenance to a competition test. As with the oft-recommended change to third line forcing, there would be several ways to achieve this. Every single one, though, relies on legislative amendment.

In considering the appropriate test for resale price maintenance, Harper was drawing upon recent international consideration of the issue. Notably, this included the United States, where the test has recently changed – although Congress had nothing to do with it. Rather, the US Supreme Court in *Leegin* decided that, given the apparently ambiguous economic effect of the practice, it was no longer appropriate for the courts to deem it per se.

The role of judge-made per se again occurs in large part because of juries – it simplifies a jury’s task if it need only decide that certain conduct occurred, without having to then apply a rule of reason test over the top. Thus, a judge can direct the jury that – if certain facts are established – it follows that the conduct was anti-competitive and therefore illegal.

A clear upside of this approach is the very careful consideration of why something should be per se:

The rationale for per se rules is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct (Jefferson Parish Hospital District No 2).

With judges making this call, it allows a degree of flexibility over time, with decisions made for more “pure” legal/economic reasons than as part of a frequently messy political process. In *Leegin* for example, the Supreme Court decided it was no longer obvious that – drawing on *Northern Pacific Railway v US* – resale price maintenance had such a “pernicious effect on competition and lack of any redeeming virtue [that it should be] conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use”.

Enough on the institutions – what about the law itself?

There are many points of distinction between the laws of the various jurisdictions. One of your co-authors in fact wrote an article addressing differences between Australian and US

approaches to exclusionary conduct ((2007) 31 MULR 1099). While we’d give a double thumbs up to Harper’s suggested adoption of Europe’s block exemption model, for present purposes we are just going to focus on two issues: market definition, and the application of the competition test.

Approaches to market definition

Overseas approaches to market definition vary both in relation to the significance of market definition and the method.

The significance

Market definition facilitates competition analysis by enabling key analytical measures to be assessed: clearly market shares and measures of market concentration require identification of the relevant market; import penetration must be determined for the relevant group of products; and barriers to entry are considered in the context of a specific market and cannot be identified in the abstract.

Thus, market definition assists in assessing whether conduct has, or is likely to have, anti-competitive consequences, and informs an assessment of the extent of the market power of particular firms.

Generally it is accepted as necessary to define a market in the context of the particular issue in question so that the most immediate constraints on the firm’s relevant decision-making processes are captured. In this sense market definition is purposive. As a consequence, different market definitions may be used in relation to the same industry because the alleged conduct is different, or because the competitive environment has changed.

In the United States, however, at least in merger cases, market definition plays an additional role. Merger challenges typically follow a burden shifting framework, under which the government bears the initial burden of establishing a prima facie case of likely anti-competitive effect (typically based on market share) which can be rebutted by the defendant, for example, by an efficiencies argument (discussed in further detail shortly).

Does Australia have a place for attempted monopolization [sic]?

An aspect of US law that we here at TSoC look upon enviously is section 2 of the Sherman Act and its capacity to address unilateral conduct which creates market power via the prohibition on attempted monopolization. As we have previously observed, a timing gap is the only structural problem with section 46 to have been identified by the courts (see McHugh J in *Boral*, as discussed in Issue 14).

But attempted monopolization is a classic example of the difficulty of adapting an excellent idea in one jurisdiction for use in another. Strictly speaking, it is possible to attempt to contravene section 46 (using section 76), although how that would play out in practice bends the brain.

That said, we thought that the draft Harper report provided an interesting starting point for attempted monopolization (even though the Committee demonstrated no interest in such a prohibition). If one were to tweak the Committee’s proposed amendment to section 46, one could devise a prohibition along the following lines (mark-ups are shown against the draft Harper proposal, as formalised by the Law Council of Australia):

A company ~~that has a substantial degree of power in a market~~
shall not engage in conduct which has the purpose, or has or is likely to have the effect of substantially lessening competition
UNLESS THAT CONDUCT (a) would be a rational business decision or strategy by a corporation that
(a) did not have and
(b) did not have a specific intent to achieve
substantial market power and (b) ~~It is in the long term interests of consumers~~

Such a prohibition contains enough familiar concepts to allow businesses and the ACCC to interpret, and for the courts to develop over time.

Sadly, Harper showed no appetite to pursue this path. Perhaps we can get it up and running for the next government inquiry (you know there’ll be one!).

Unsurprisingly, this makes getting the “right” market definition crucial. In Australia, we can rely on the self-correcting nature of our competition analysis: if, for example, a market is defined too narrowly, the barriers to entry will be commensurately low, encompassing those firms (or products etc) that should have been included in the original market boundaries. This means that market share – while significant – is never determinative (contrary to Hausman’s assertion). But, in the US, if the market is defined too narrowly, the market share of the merging parties will be overstated and so they become responsible for the harder task of proving that the merger will not be anti-competitive.

Consequently, while Australian cases regularly posit a market definition at the same time as stating it’s not all that important to the final outcome, American cases can turn almost entirely on this issue.

The method

In Australia, section 4E of our Act requires markets to be defined based on substitutability, either in demand or supply. Similarly, the practice in Europe is to take supply side into account when defining the market upon which the competition analysis is to be based.

In the United States and Canada, however, markets are defined on the basis of demand side substitutability only. Once this has occurred, firms are included in the market if they are able to supply the relevant product/s. Nevertheless, although supply side may not form part of the market definition when assessing mergers, the courts tend to take it into account when assessing other forms of potentially anti-competitive conduct. But even where all the same evidence is taken into account, changing the point at which it is considered can have consequences – particularly if, as noted above, certain presumptions apply when a market share threshold is crossed.

Meanwhile, across the ditch, the NZ *Commerce Act* provides slightly different legislative direction for defining a market. It requires one to take into account “commercial common sense” – ultimately, this does not seem to have resulted in a significant difference in approach, but it has certainly saved the Kiwis some of the tortuous discussions that we see in Australian decisions about whether a Kylie Minogue album can comprise an antitrust market in its own right.

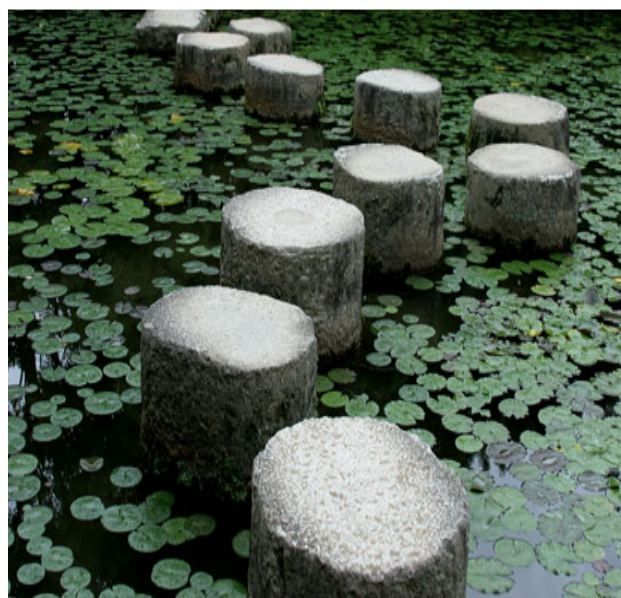
The competition test

Most jurisdictions around the world use – at one point or another – the SLC or competition test: asking whether particular conduct has the likely effect of substantially lessening competition. Given Harper’s championing of the SLC test as the test of choice across the developed world, it’s critical to realise that it is not applied elsewhere in the same manner as here.

In Australia (and New Zealand), we are used to bespoke competition analysis – every case before the courts is examined in great detail, even to the point of limiting the value of decisions as precedent. Other jurisdictions, as noted above, can rely on rules of thumb and the swing of the evidential burden to work through an issue. This can occur even when, in US terms, a case calls for a “full” rule of reason analysis.

Efficiencies

Even when a rule of reason analysis looks like our own competition assessment, it doesn’t necessarily operate in the same way. In the US, efficiencies that accrue only to the benefit of the relevant parties (eg the target of an investigation or merger



Rather than working through each issue painstakingly, US competition analysis relies on a series of stepping stones, allowing certain details to be skipped over

parties) can properly be taken into account... sometimes. Indeed, the very recent merger decision, *St Alphonsus v St Luke’s* seems to expand the potential use of the efficiencies defence in US merger cases.

Historically in Australia, consideration of such efficiencies was postponed – we didn’t look at them at the time of the SLC analysis, rather they become incorporated into the public benefit test for authorisation (a process which, of course, most other jurisdictions don’t have): see further [Issue 12](#). But while the ACCC’s approach to efficiencies has developed over time to be more in accord with international approaches, a lack of cases leaves our jurisprudence stuck in the last century. This issue may go some way to explaining the concerns regarding the proposed incorporation of an effects test in section 46.

Even in New Zealand (which does have authorisation), a broad class of efficiencies is taken into account as part of the SLC analysis. In the context of the Harper Committee’s review of section 46, the NZ [Commerce Commission](#) submitted:

We consider that there is a legitimate role for firms to put forward efficiency and other justifications for their conduct as this helps to sort the pro-competitive effects from the anti-competitive effects. We consider that these arguments (or defences) can, and should, be captured in the round of a substantial lessening of competition test (as they are in other sections of the Commerce Act).

A concern that the judicial application of the SLC test in Australia might *not* adopt this approach appears to drive Harper’s recommendation for a gloss to be added to an amended section 46. Amongst other things, this gloss requires the SLC test to consider efficiency issues. In passing, however, we wonder how the SLC test is thought to be working now in sections 45, 47 and 50: if section 46 requires this gloss, don’t these sections as well? Alternatively, if we’re adopting the test because we already understand it so well, why have a gloss at all?

A rule of reason analysis rarely looks like Australian competition analysis - example: the McWane decision

Last year, the US Federal Trade Commission made a decision (which was just upheld) in relation to alleged anti-competitive exclusive dealing.

The target of the complaint, McWane, required its distributors to acquire all of their supplies from McWane in order to qualify for a loyalty discount. Whilst the majority found that the program harmed competition based on its impact on a particular entrant, Commissioner Wright dissented.

In doing so he spelt out the method for distinguishing harm to the competitive process rather than just to a competitor. To establish the former, it was necessary to provide evidence that the alleged conduct caused higher prices or reduced output. Commissioner Wright quoted Bork J to the effect that exclusionary conduct is only profitable because it drives competitors from the market or prevents entry or because rivals cease to be an effective constraint, thereby enabling the firm to obtain monopoly profits. Nevertheless, if the firm is able to offer a pro-competitive rationale for its conduct, those effects should be balanced against any anti-competitive effects. The assessment of the monopolist's conduct must be based on the effect of the conduct, not the intent (which is only relevant to the extent it informs the likely effect).

Although Commissioner Wright regarded direct evidence of higher prices and reduced output as the most convincing form of evidence, he also accepted the utility of indirect evidence of foreclosure. He sought an estimate of the extent of foreclosure (not a mere assertion) but only as a screening device: information about the duration of the relevant contract/s, the ease of terminating them and the market share of the party instigating the contracts should also be assessed. Wright observed: "A final category of indirect evidence is evidence regarding the ease of entry into the industry purporting to be monopolized through exclusive dealing arrangements."

Examining this process from an Australian perspective, one can see why econometric evidence is so vital in the US. It is also striking that barriers to entry appear to be an afterthought, rather than the decisive factor. Ultimately, though, there are more similarities than differences in Wright's approach and how we would address the key issues. But Wright's detailed assessment of how to undertake the necessary analysis is very rare in American decisions. So while we rightly look to the US (and Europe) for guidance on many points, Australia is in fact one of the few jurisdictions to conduct a full competition analysis as a matter of course, rather than as the exception.

Conclusions

The issues we have highlighted here are just the tip of the iceberg. There are many differences – subtle and not so subtle – that have shaped the development of competition law overseas. Shopping in a foreign country for precedent (or indeed experts) is not altogether different from shopping for physical items: the DVD cover might look like what you're after, but is it compatible with your system?

So when picking through the overseas texts, it's not enough to read the fine print. Many of the key differences are so built into the legal framework that they literally go without saying. All we can do is try for a more rounded understanding of the various jurisdictions that we turn to for guidance. In competition law, as in life, a little knowledge can be a dangerous thing.



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FYI

The Conversation is running a series of articles on Adam Smith by Roland Boer - the first two are available via www.theconversation.com (search "Roland Boer")

Treasury is undertaking a consultation process, seeking feedback on the Harper Report. Submissions are due 26 May. See <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Competition-Policy-Review-Final-Report> for further details

Rhonda & Alex's long-running Masters subject, *Market Power & Competition Law*, is on again in Melbourne this October - more information at <http://www.law.unimelb.edu.au/masters/courses-and-subjects/subject-details/sid/11703> (or email us!)

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