Chapter 2

Royal Grants, Trusts and Market Structures
The Historico-legal Development of the Contradiction of Concentration

Three definitions of monopoly that have influenced the development of Australian merger law:

*An institution, or allowance by the King by his grant...to any persons...for the sole buying, selling, making, working, or using of any thing, whereby any person...[is] sought to be restrained of any freedom, or liberty that they had before, or hindered in their lawful trade.*


*[A] combination in the form of trust or otherwise...in restraint of trade or commerce.*

Section 1 of the *Sherman Act 1890* (US).

*A single firm [that] is the sole producer of a good or the sole provider of a service.*

Stephen Corones, *Competition Law in Australia*, 2007.²

The origins of Australian merger law predate Federation. Indeed, the legal foundations of Section 50 of the *Trade Practices Act 1974* (the “TPA”) can be traced to seventeenth-century English common law, as well as nineteenth-century US legislation. These diverse influences produced tensions in the development of the law, which have plagued Australian legislators since their first attempt to regulate competition in 1906. This chapter explains these tensions in terms of the historico-legal development of the contradiction of concentration.³

³ In order to do so, it is necessary to examine the development of competition law more generally. However, this chapter is not intended as a comprehensive overview of Australian competition policy. Rather, competition policy is considered only in so far as it is material to an analysis of how the contradiction of concentration has manifested throughout the historical evolution of Australian merger law.
In this chapter, I advance two main arguments. Firstly, I contend that the diverse historical influences on the law have served to emphasise the contradiction of concentration. The central premise of this argument is that the development of competition law has not been driven by a universal and coherent concern for the competitive process, but rather by the force of pragmatism. Throughout its development, the law has responded to a range of historically specific concerns, and has conceptualised monopoly in various different ways. These various influences have all contributed to the position – which underpins current merger law – that monopolies should be regulated. Yet it is only in the current context, and under the current meaning of monopoly, that merger law articulates the contradiction of concentration. This chapter examines how the influence of the English common law and US antitrust legislation on Australian competition policy has emphasised and entrenched the contradiction of concentration that underlies Section 50 of the TPA.

Secondly, I argue that the contradiction of concentration has conditioned legislative developments in Australian merger law since Federation. In particular, I examine two key components of the law – the threshold for merger regulation and the authorisation regime – and suggest that legal developments in both areas have been generated by the contradictory understanding of competition that underpins Australian merger law.

English Common Law and the Royal Grant of Monopolies

Although philosophical objections to the creation of monopolies were expressed in England as early as the fourteenth century, the first case on monopolies was not considered by a common law court until the early 1600s. At this time, monarchs regularly granted monopolies in specific sectors in exchange for royalties. One type of monopoly grant allowed guilds to make by-laws in restraint of trade by royal authority. These royal grants were attacked in a number of common law judgments, and by various

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7 Darcy v Allen (1602) 77 ER 1260; The Tailors of Ipswich (1614) 11 Co Rep 53a.
legislative attempts to prohibit monopolies. The royal grant of monopolies continued in the face of this opposition until the Bill of Rights was passed in 1689.

During this period, the term monopoly meant something substantially different from its current usage. In mainstream theory, monopoly refers to a market structure in which a single firm is the sole supplier of a particular good or service. By contrast, in the 16th century the technical meaning of monopoly was generally limited to royal grants. There is an important distinction between these two concepts: while the former is a potential outcome of the competitive process and does not, in and of itself, prevent further competition, the latter is an artificial mechanism that, by its very definition, acts as a restraint on the competitive process. In this way, Sir Edward Coke, an English jurist of the period, defined a monopoly as an

allowance by the King by his grant...to any persons...for the sole buying, selling, making, working, or using of any thing, whereby any person...[is] sought to be restrained of any freedom, or liberty that they had before, or hindered in their lawful trade.

Therefore, at this point in time, the term monopoly presupposed an existing restraint on a person’s liberty. Crucially, the regulation of this type of monopoly does not confront the contradiction of concentration since the royal grant of monopoly is categorically harmful to the process of competition – regardless of whether that process is defined as the free movement of capital or atomistic firms. The problem with royal grants of monopoly was not that they resulted in a single producer supplying a market as such, but that they artificially prevented other producers from competing. Importantly, the first legal objections to the formation of monopolies were protestations to the royal grant of exclusive trading, and not to the formation of market dominance as an outcome of

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8 Monopolies Bill 1601, a Statute of 1604, a Declaration against Monopolies in 1610, and an act in 1624.
9 The term “modern monopoly” will be used to refer to this definition throughout the chapter.
11 The Royal Grant of monopoly is in fact far more analogous to the patent system, which rewards innovation by shielding the innovator from competitive processes, than to the concept of monopoly that is commonly used now. Indeed, grants protecting inventors were the other type of royal grant commonly issued during this period. See Heydon, op. cit., p6.
12 Coke, op. cit., p181. Eighteenth-century English jurist, Sir William Blackstone, employed virtually the same definition of monopoly. According to Blackstone, a monopoly was “a license or privilege allowed by the king for the sole buying and selling, making, working or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading that which he had before.” See William Blackstone ([1769] 1978) Commentaries on the Laws of England, New York: Garland Publishing, Book 4, Chapter 12, Part 9.
competitive processes. Nonetheless, it is those objections that form the earliest foundations of modern competition law.

Alongside this specific attack on royal grants, the more general restraint of trade doctrine was emerging. Early common law decisions prohibited all agreements in restraint of trade, the most common example of which were contracts that limited the ability of one or more parties to compete. However in Nordenfeldt, the House of Lords established that a restriction may be justified if it is reasonable, with reference to the interests of the public and the contracting parties. This disclaimer was necessitated by the ambiguities in the restraint of trade concept.

The restraint of trade doctrine significantly influenced the development of Australian competition law. During the early part of the twentieth century, the doctrine applied to numerous economic arrangements which are now specifically addressed by provisions of the TPA. To a large extent, these provisions developed from the common law doctrine. But by far the most obvious mark of the English common law’s influence on Australian competition policy is the way in which the notion of reasonableness has translated from the restraint of trade doctrine to the authorisation regime of the TPA in order to mediate the contradiction of concentration. In part, this process occurred indirectly through the influence of American jurisprudence. Unsurprisingly, a great deal was lost in translation.

13 The term “dominance” is used in the purely technical sense in this chapter – that is, in reference to a producer’s control of a majority market share.
15 Dyer’s Case (1414) YB 2 Hen 5, Volume 5.
17 Australian authority has since adopted these principles. See Buckley v Tutty (1971) 125 CLR 353; Amoco Australia Pty Ltd v Racca Brothers Motor Engineering Co Pty Ltd (1973) 133 CLR 288; Esso Petroleum Co Limited v Harper’s Garage (Stourport) Ltd [1968] AC 269.
19 Furthermore, under section 4M of the TPA, the restraint of trade doctrine continues to exist concurrently with the TPA, and is free to develop independently of the TPA. See Peters WA Ltd v Petersville Ltd (2001) 205 CLR 126.
US Antitrust Legislation

Economic development in the US after the civil war led to the concentration of capital across industry.\textsuperscript{20} This process resulted in the formation of several monopolies in the late 1800s.\textsuperscript{21} Again, the term monopoly had a distinct meaning in this context. In this instance, it referred to what became known as the trust business structure. ‘Trusts’ operated by vesting the shares of rival firms into trusteeships comprising a few people who were given enormous power to direct those assets.\textsuperscript{22} The trust is similar to the modern monopoly insofar as both structures dominate market share. However, the processes involved in establishing and retaining this position of dominance are very different in the two cases. While the monopoly emerges from the competitive process as a dominant firm, and thereafter remains subject to ongoing competitive pressures, the trust attempts to guarantee dominance through its very structure.

In 1882, the Standard Oil Company (SOC) – one of the earliest and most formidable trusts – controlled 1003 companies and accounted for 90 per cent of the petroleum industry.\textsuperscript{23} However, SOC did not legally own these companies. Instead, stock in these companies was held in trust for a few individuals “who happened to own Standard Oil”.\textsuperscript{24} In this way, the trust maintains the appearance of competition, while concentrating market power in reality. This characteristic makes the trust a particularly harmful force on the competitive process, and a distinct structure to the modern monopoly.

Again, the regulation of this form of monopoly does not give rise to the contradiction of concentration. In essence, the trust is more accurately characterised as a collection of restrictive agreements between firms, rather than a monopoly in the current sense of the word. Consequently, it is not the concentration of market power that makes the trust problematic, but the way in which the trust constrains the competitive process through intricate legal arrangements. Despite this important distinction, the spectre of the trust looms large over the regulation of monopoly market structures through the merger

\textsuperscript{20} Letwin, op. cit., pp 54-60.
\textsuperscript{21} Steinwall, op. cit., p4.
\textsuperscript{24} Ibid., p30.
prohibitions of modern competition policy. Indeed, “antitrust law” is effectively synonymous with “competition law”.

Growing public opposition to the trusts prompted the 51st Congress to pass the *Sherman Act 1890* (the Sherman Act).25 The Sherman Act was predominantly a pragmatic attempt to demonstrate some concerted action against the trust, and it is unlikely that Congress sought to protect the competitive process *per se* in passing the legislation.26 As Neale explains:

> There was little evidence that Sherman and the others had any idea of imposing the economist’s model of competition on American industry. They did not consult the economists of the time; and even if they had done so, they would have found little support for any such course… The economists of the day wanted to retain the advantages of both combination and competition.27

The contradiction of concentration was nascent in the ambivalence of these economists – who were not yet praising the ideal of the perfectly competitive market structure. This ambivalence allowed the common law notion of reasonableness to creep into the Sherman Act. Section 1 prohibited “any combination in the form of trust or otherwise…in restraint of trade or commerce”. The use of language from the common law was intentional; Senator Sherman confirmed that the legislation did “not announce a new principle of law but [applied] old and world recognised principles of the common law.”28 By referencing the common law, Congress believed that courts would not prevent consolidations aimed at more efficient production.29 Indeed, Sherman himself noted that the courts would be required to distinguish between “lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade”.30 In this respect, the law was once again forced to retain a discretionary element in order to manage the ambiguous understanding of competition underlying the legislation.

However, despite these ambiguities, it would be incorrect to conclude that the Sherman Act articulated the contradiction of concentration. At this stage, neither economists nor

legislators were willing to unequivocally support the economic benefits of competitive market structures. Nonetheless, as perfect competition grew increasingly central to mainstream economic theory, these ambiguities in the law were transformed into a clear contradiction: all consolidations necessarily moved markets away from the ideal of perfect competition.

The restraint of trade doctrine in the US developed separately from the English common law.\textsuperscript{31} As such, the Sherman Act’s reference to the common law was misplaced. More confusing still was a provision prohibiting monopoly.\textsuperscript{32} As Areeda explains, although a Senator closely involved with the drafting of the legislation noted that monopoly was a common law term, “the monopoly known to the common law was that granted or held by public or quasi-public authority.”\textsuperscript{33} Thus, even though royal grants were not a feature of the American economic landscape, the inclusion of this prohibition strengthened the legal perception that monopolies must be regulated.

The Sherman Act was a reaction to a particular set of socio-historic concerns – primarily the increasing domination of trusts over economic activity. By adopting the language of English common law – which also developed in a specific socio-historic context – the 51st Congress grossly complicated this early attempt at competition legislation. More problematic still, the Sherman Act was later used to model legislation in Australia; and once again, that legislation was responding to a distinct set of concerns.

**Early Attempts at Australian Competition Legislation**

The growing strength of trusts in American industry was also felt in the newly-federated Australian economy. Trusts commonly sold surplus produce in Australia at prices below those in the US domestic markets. This practice, known as dumping, crippled domestic industry, which could not compete with the cheap imports. In 1905, Parliament introduced a bill in response to this practice. Although the bill contained antitrust provisions similar to those in the Sherman Act, a review of the Parliamentary Debates

\textsuperscript{31} Steinwall, *op. cit.*, p8.
\textsuperscript{32} “Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States, or foreign nations, shall be guilty of a misdemeanor…”; *The Sherman Act 1890* (US), s2.
\textsuperscript{33} Areeda, *op. cit.*, p45.
indicates that the principal aim of the proposed legislation was to protect Australian industry against dumping. In this context, it is likely that the antitrust provisions were included simply because the threat to Australian industry happened to be initiated by trusts, rather than out of any genuine concern for competitive conditions. It is under these dubious pretences that the effect of large firms on the competitive process was first considered by an Australian parliament.

There were signs at this time that the promotion of competition was emerging as a genuine policy concern. For instance, two commissions had been established to investigate anti-competitive practices in Australian industries. Partly because legislators wanted to consult the findings of these inquiries before considering the issue of regulation, and partly because the protectionist foundations of the bill had provoked considerable opposition, the 1905 legislation lapsed and a revised bill was introduced in 1906. In his second reading speech, Sir William Lyne attempted to distance the new bill from the protectionist philosophy of the 1905 legislation, instead emphasising that the central aim of the bill was to regulate the concentration of capital within Australia. The bill was passed as the *Australian Industries Preservation Act 1906* (the “1906 Act”).

Despite the attempts to rebrand the 1906 Act, Steinwall concludes that it ultimately “reinforced the protectionist philosophy of the time and was not a serious attempt at curbing anti-competitive practices as such”. This position is certainly supported by the well-documented hegemony of protectionism in the first decade of Federation, as well as Parliamentary Debates. On a more basic level, it is clear that the overriding legislative imperative for the 1906 Act was the threat posed to certain sectors by cheap imports, and not the concentration of capital across Australian industry. Yet the 1906 Act ultimately did contain provisions modelled on the Sherman Act: Section 4 prohibited contracts in restraint of trade, while Section 7 mirrored the Sherman Act’s prohibition against monopoly. By including these provisions, Parliament had not only introduced an

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36 The Royal Commission on the Tobacco Monopoly (1905-1906) and the Royal Commission on Ocean Shipping Service (1906).
40 Australian Parliamentary Debates, 19 June 1906, 373.
already confused set of legal principles into yet another context, but had also ensured that those principles would influence the future development of Australian competition legislation. In particular, the regulation of private monopolies was now solidified as an important aim of competition policy, even though the term monopoly had been understood in vastly different ways throughout the law’s development. Importantly, unlike under the earlier meanings of monopoly, the regulation of the size of firms within market structures necessarily confronts the contradiction of concentration.

The 1906 Act was the victim of “judicial blocking and government neglect”, and languished on the books until its repeal in 1965. Accordingly, the first half of the twentieth century represents a critical gap in the regulation of competition in Australia. During this period, business structures similar to the US trusts increasingly dominated Australian industry. However, it would be grossly oversimplifying matters to conclude that the absence of regulation singularly and directly lead to the concentration of capital in Australian industry. Such analysis denies the possibility that causality also ran in the opposite direction – that is, that the concentration of capital, and societal responses to that process, helped to shape the nature and extent of regulation. Indeed, the position that consolidation was necessary to promote effective competition in the small Australian economy was fairly common at this time.

Nonetheless, it is uncontroversial to conclude that the lack of strong competition legislation meant that Australian business became acclimatised to less competitive conditions. These conditions prompted a number of inquiries in the late 1950s. Crucially, the subject of these inquiries was restrictive agreements and not the existence of monopoly per se. Similarly, when the then Attorney-General, Sir Garfield Barwick, recommended that competition legislation be passed in 1963, he emphasised that the

44 Steinwall, *op. cit.*, p16.
legislation was primarily needed to control restrictive trade practices.\textsuperscript{46} Less than three years later, Parliament passed the \textit{Trade Practices Act 1965} (the “1965 Act”).

Although the 1965 Act was replaced within a decade, it played an important role in the development of Australian competition law. Notably, it was the first piece of Australian legislation which recognised that the protection of the competitive process was a desirable goal in and of itself. In 1962, Barwick proclaimed that “the maintenance of competition is, in the broad, indispensable to our economic growth”.\textsuperscript{47} Nonetheless, the 1965 Act maintained the discretionary element of the English restraint of trade doctrine and the US Sherman Act. The purpose of the new legislation was to “preserve competition…to the extent required by the public interest” (emphasis added).\textsuperscript{48} This discretionary element was largely included because there was no clear consensus at this stage on what competition actually meant, and the best way of achieving it.

The 1965 Act was ultimately a watered down version of Barwick’s vision of rigorous competition legislation, as Parliament yielded to substantial business opposition.\textsuperscript{49} Despite forming part of Barwick’s original proposal, a provision prohibiting monopolisation and another dealing with mergers were both omitted from the 1965 Act. These omissions are often cited as important factors in the eventual failure of the 1965 Act. Yet the omission of the monopolisation provision was cathartic, regardless of how it came about. The omission temporarily halted the incorrect application of a legal principle that had originally developed to prevent the royal grant of exclusive trading in seventeenth century England. Nonetheless, the regulation of private monopoly had already taken root in the ideological framework of Australian competition policy.

The 1965 Act did not fail because it neglected to deal with monopoly and mergers. It failed because it made considerable concessions relating to the original focus of

\textsuperscript{46} Garfield Barwick (1964) \textit{Attorney-General, Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies}, Canberra: CGPS. Barwick catalogued these practices in a submission to Cabinet in 1962. In particular, he identified “wholesale and resale price maintenance agreements…; systems of exclusive dealing; economic pressure…; price discrimination, usually in the form of discriminatory discounts; and collusive tendering and bidding.” Cited in Allan Fels (2000) “Watersheds, Minefields and the Role of the Commission”, in Ray Steinwall, ed., \textit{25 Years of Australian Competition Law}, Sydney: Butterworths, p25.

\textsuperscript{47} Garfield Barwick, Submission to Cabinet, 23 March 1962. Cited in Fels, \textit{op. cit.}, p25.

\textsuperscript{48} Australian Parliamentary Debates, 19 May 1965.

Barwick’s proposal – restrictive trade practices. As such, the 1965 Act was unable to stymie the culture of restrictive trade practices that Australian business had grown accustomed to since Federation. It is for this reason that the legislation was replaced in 1974;\(^{50}\) the failure to regulate mergers was relatively insignificant. It is important to emphasise that the contradiction between accumulation and a structural conception of competition is not apparent in the regulation of restrictive trade practices, as such practices serve as artificial restraints on the competitive process, regardless of how that process is conceptualised. By contrast, the dominance of a firm in a market structure is a potential outcome of the process of accumulation. Accordingly, the regulation of this outcome always confronts the contradiction of concentration.

**The Trade Practices Act 1974**

Under the TPA,\(^ {51}\) the regulatory emphasis shifted from examination by an enforcement agency to an outright prohibition regime.\(^ {52}\) For the purposes of this thesis, the most significant element of the new legislation was that it was the first Australian act regulating mergers. Under the TPA, a merger would be prohibited if it was likely to have the effect of substantially lessening competition in a market for goods or services (the “SLC test”). The reference to “market” in this provision was indicative of an overarching emphasis placed on mainstream economics by the TPA. For the first time, Australian competition legislation was overtly supported by economic theory, as opposed to the more general and fragmented concern for competition that underpinned the 1965 Act. By employing a structural conception of competition consistent with these mainstream economic foundations, the TPA was the first piece of Australian legislation to explicitly articulate the contradiction of concentration.

Walker argues that Australia’s long history without merger regulation meant that many Australian markets were already characterised by oligopoly, and thus the TPA was “closing the door after the horse had already bolted”.\(^ {53}\) This analysis is problematic as it

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\(^{50}\) The 1965 Act was actually replaced by the *Restrictive Trade Practices Act 1971* as a result of the High Court of Australia’s decision in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. However, the 1971 Act was not materially different from the 1965 Act.

\(^{51}\) Which commenced as law on 1 October 1974.

\(^{52}\) Fels, op. cit., p26.

presumes that the relationship between concentration and regulation is a uni-directional one, whereby industry passively reacts to the existing level of regulation. By contrast, the relationship is complex and dialectical, such that process of concentration may help shape the nature and extent of regulation. So, to carry on Walker’s analogy, perhaps the door was open because the horse was bolting.

Despite the emphasis on outright prohibition, the TPA included an authorisation mechanism under which anti-competitive arrangements would be permitted if there was sufficient public interest. It is important to recognise that the authorisation regime – which is still an integral component of the TPA – is a modern derivative of the element of reasonableness in the restraint of trade doctrine. Then, as now, the discretionary element was needed because there was no ideological consensus on the meaning and purpose of competition. Although the TPA signalled the increasing hegemony of mainstream theory in Australian economic policy, the discipline was plagued by the contradiction of concentration.

The contradiction was clearly apparent in the new merger laws. The provisions were underpinned by the theory that markets with a large number of competitors deliver the best outcomes. However, the well-trodden principle of economies of scale militates towards consolidation, particularly the context of the small Australian economy. Consequently, since the TPA’s inception, there has been considerable concern that the legislation would prevent Australian industry from maximising efficiency – particularly through its regulation of mergers. In this context, the authorisation mechanism attempts to mediate between the imperative of protecting competition (as it is understood by mainstream economists), and increasing efficiencies. Put differently, the authorisation regime is necessitated by the contradiction of concentration. This tension was a large factor in Parliament’s decision to change the merger threshold in 1977.

54 According to the long-run average cost curve of a firm, economies of scale are the costs saved by a firm expanding its scale of operations.
In 1976, the Swanson Committee recommended that the SLC test for mergers be replaced, such that only mergers which resulted in, or strengthened, a position of market dominance would be prohibited (the “dominance test”). This recommendation was implemented by the Trade Practices Amendment Act 1977. By increasing the threshold for merger regulation, it was generally felt that the new test would allow the Australian economy to benefit from the growth of firms, while still promoting competitive markets. In other words, the dominance test attempted to strike a balance between the process of accumulation and the structure of competition. In this sense, the amendment was generated by the contradiction of concentration implicit in Australian merger law.

In the 1980s, the Commission assessed a number of important mergers in the Australian economy. Applying the dominance test, the Commission was unable to prevent the following significant consolidations: Coles/Myer, News Ltd/Herald and Weekly Times, and Ansett/East-West Airlines. For this reason, it has been argued that the dominance test did nothing to prevent the emergence of oligopolistic markets in Australia. By placing so much emphasis on the role of regulation, this perspective ignores the fact that expansion is in the very nature of capital. Thus, although Parliament reverted back to the SLC test in 1993, the process of concentration continued across Australian industry.

In 1991, the Cooney Committee recommended that the dominance test be replaced by the SLC test, and the recommendation was incorporated into the TPA in 1993. An important factor contributing to the decision of the Cooney Committee was the perceived inability of the Australian Competition and Consumer Commission (the “ACCC”) to control oligopolistic mergers under the dominance test. In this sense, it was presumed that the SLC test would enable the government to more effectively

56 Trade Practices Act Review Committee (1976) Report to the Minister for Business and Consumer Affairs, Canberra: AGPS.
61 Senate Standing Committee on Legal and Constitutional Affairs (1991) Mergers Monopolies and Acquisitions: Adequacy of Existing Legislative Controls, Canberra: AGPS.
regulate the concentration of capital across Australian industry. However, the 1993 amendment ultimately did not arrest the process of concentration. 63

This scenario is partly explained by the fact that, despite having an increased scope for merger regulation under the SLC test, the ACCC has generally been reluctant to oppose mergers, consistent with a free market ideology. 64 Indeed, this reluctance has recently been given the force of official policy: the current Merger Guidelines state that “the vast majority of mergers” leave consumers and competitors “no worse off”. 65 Furthermore, the persistent concentration of capital across Australian industry in spite of a more rigorous regulatory regime is a further indication that the process of concentration is an inherent feature of capitalist accumulation.

The controversy surrounding the determination of an appropriate threshold for merger regulation has been even more pervasive than this account suggests. 66 The number of inquiries that have addressed the specific issue of the merger threshold since the introduction of merger law in the TPA is indicative of that controversy – as is the way in which these inquiries have divided opinion. 67 Indeed, there are still vocal supporters of the dominance threshold, even though the current test in Section 50 has been in place for nearly 17 years. 68 Consequently, the issue remains unresolved, and will continue to be contested by legal practitioners and academics in an attempt to finally reach a consensus on which is the correct threshold.

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64 Fels, op. cit., p55.


66 Indeed the debate predates the TPA. In discussing the 1965 Act, the then Attorney-General, Billy Snedden, explained the omission in the legislation of any provision regulating mergers by highlighting the “complexity… of devising a satisfactory criterion for deciding whether a [merger] should be permitted or prohibited.” See the Australian Parliamentary Debates, 19 May 1965.


However, this problem cannot be solved by simply picking one test or the other because it is grounded in a fundamental theoretical contradiction which is articulated by merger law – the contradiction of concentration. When the SLC test was reintroduced in 1993, the then Attorney-General, Michael Duffy, explained the reason for Parliament’s decision: “in an Act which seeks to preserve competition, it is appropriate that the merger test should focus on the effect on competition in a market rather than on the dominance of a particular firm” (emphasis added).\(^6\) Yet, as Chapter 1 demonstrated, “the effect on competition in a market” is ultimately also contingent on an analysis of the number and size of firms in that market, according to the structural conception of competition implicit in the TPA. Consequently, legislative changes to the merger threshold will be relatively insignificant in resolving this contradiction, which is embedded in the conceptual foundations of Australian merger law.

Conclusion

Australian competition law has been highly influenced by the common law of England, as well as US legislation. Yet legal developments in all three countries were primarily made in response to specific socio-historic conditions, and only in recent times has there been evidence of a common and coherent ideal of protecting the competitive process. Nonetheless, legal principles have been transferred between jurisdictions and inappropriately applied to new contexts. In this respect, emphasis has been placed on the distinct characteristics of three historical arrangements that have each been characterised as monopoly: the royal grant of monopolies in sixteenth-century England, the US trust structure common in the late 1800s, and the large firms of contemporary capitalism. Despite the fundamental differences in the form of these arrangements – as well as their implications for the competitive process – they have all contributed to the position that private monopolies should be regulated by the law. This position underpins the current Australian merger laws, which are only concerned with the modern monopoly: a market structure dominated by a single producer. Unlike the other two arrangements, the modern monopoly is a direct result of the process of concentration inherent in accumulation. Consequently, this chapter has demonstrated how the historical development of merger law has emphasised and entrenched the contradiction of concentration.

\(^6\) Hansard, House of Representatives, 3 November 1992, p2404.
Furthermore, this chapter has illustrated how the contradiction has conditioned legislative developments in Australian competition policy. On one hand, the chapter has demonstrated how Australia merger law has fought against itself on the issue of an appropriate threshold for merger regulation. This debate is generated by the contradictory forces of competition (as it is understood in the TPA) and accumulation, which have forced legal practitioners and academics to seek out an adequate compromise between the two. Yet ultimately the tension will not be resolved by legislative changes, as it is engrained in the conceptual foundations of the TPA. On the other hand, the chapter has examined how the common law notion of reasonableness has been appropriated by the TPA in the form of the authorisation regime. This discretionary element of the law has been preserved and developed in order to mediate between the conflicting pressures of (perfect) competition and accumulation – in other words, in order to reconcile the contradiction of concentration.

In addition to these two central arguments, this chapter has told two important “side stories”. Firstly, the chapter has illustrated that, despite the nature and extent of prevailing regulatory regimes, the concentration of capital is a persistent feature of Australian capitalism.70 This conclusion builds on the conceptual framework established in the introduction to this thesis, in suggesting that the concentration of capital is an inherent feature of capitalist accumulation. As such, theories that situate competition outside of a theory of accumulation are generally confronted by the contradiction of concentration.

Secondly, the chapter has traced the rising dominance of mainstream theory in the conceptual foundations of Australian merger law. There is no clear evidence that the 1906 Act aimed to protect the competitive process as such, while the 1965 Act at best presented a fragmented conceptual position on competition. By contrast, the TPA was clearly supported by mainstream economic theory, and since 1974, these theoretical foundations have been consistently reinforced.71 Applying these observations to the framework established in the previous chapter, it may be concluded that Australian

70 Jacobs, op. cit., p146.
merger law’s articulation of the contradiction of concentration has become progressively clearer as mainstream theory has increasingly influenced the TPA.