

The Treatment of Natural Monopolies under the Australian Trade Practices Act: Four Recent Decisions

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This paper examines four recent decisions – *Australian Performing Right Association* and *Review of Declaration of Freight Handling Services at Sydney International Airport* at the Australian Competition Tribunal and *Harbour Services Pty Ltd v Bunbury Port Authority* at the Federal Court and then at the Full Court of the Federal Court – that each involves issues concerning the existence and implications of natural monopolies in their respective markets. We note that findings of natural monopoly are associated with appropriate analyses of markets, barriers to entry, the efficiency of pricing and the impact of independent regulation.

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1. Introduction

Four recent decisions (one by the Federal Court, one by the Full Court of the Federal Court and two by the Australian Competition Tribunal) provide valuable insights into the treatment of natural monopolies under the *Trade Practices Act*. They exemplify the trade-offs that natural monopolies pose. This paper explores some of the key issues of public policy that arise under natural monopolies; it examines how these problems have been approached in four recent decisions under the Act; and it uses the cases to illustrate the issues of public policy that are discussed.

The cases arise in quite distinct industries. The first was an authorisation decision by the Tribunal concerning the rules of the Australasian Performing Right Association (APRA) in *Re Applications by Australasian Performing Right Association*.² The Tribunal's decision was the result of an appeal by APRA of the determination by the Australian Competition & Consumer Commission in *Australasian Performing Right Association Limited*.³

The Australasian Performing Right Association was formed in 1926 to collect royalties from the sale of rights to perform music. APRA collects these royalties for composers of music and for the writers of any associated lyrics. Since the introduction of television into Australia in 1956, television broadcasters have been substantial users of musical works. Since 1973 the relationships between APRA and

² (1999) ATPR 41-701

³ (1998) ATPR (Com) 50-256

the Federation of Australian Commercial Television Stations (FACTS) have been governed by a licence scheme

In 1993 this arrangement broke down. In proceedings before the Copyright Tribunal, FACTS alleged that APRA's activities contravened provisions of the *Trade Practices Act*. On 9 May 1995 Amalgamated Television Services Pty Ltd commenced proceedings against APRA alleging that some aspects of APRA's operations infringed ss 45, 46 and 47 of the *Trade Practices Act*. On 17 November 1995, APRA lodged eight applications for authorisation. Before the ACCC made its final decision, APRA offered to make certain changes in an attempt to persuade the Commission to grant an authorisation. The Commission rejected the changes as insufficient to justify authorisation. In October 1997 APRA withdrew the 1995 applications for authorisation and lodged eight new applications. On 14 January 1998 the Commission gave its final decision in which most of the applications were refused. The Tribunal decision that is discussed in this paper was an appeal by APRA from this decision of the Commission.

The second and third decisions were by the Federal Court (French J at trial, and then Burchett, Carr and Hely JJ on appeal) in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*.⁴ Stirling Harbour Services (Stirling) is owned, as to 50 per cent each, by wholly owned subsidiaries of each of Adsteam and Howard Smith Ltd. Stirling (together with Elder-Prince Marine Services Pty Ltd that was acquired by Stirling in 1986) had supplied towage services in accordance with contracts with the Bunbury Port Authority (BPA) since 1977. Although the contracts did not specify

⁴ (2000) ATPR 41-752 (French J); (2000) ATPR 41-783 (Full Federal Court)

that no other party was to supply these services at the Port, there had been no other tugboat operator at the Port during the period.

On 24 February 1998 the BPA decided to give Stirling two years' notice that the then current contract would not be renewed beyond 30 June 2000. On 17 July 1999 BPA called for tenders for an exclusive licence for a term of five years (with an option of an extra two years) to provide towage services to shipping operators who used the Port. On 6 September 1999 Stirling applied for a declaration that the letting of the proposed tender would be contrary to law in that it would involve a contravention by the BPA of ss 45, 46 and 47 of the *Trade Practices Act* and of the *Competition Code*.

Section 47 was the heart of the case. The applicants claimed that the exclusive nature of the proposed tender would constitute exclusive dealing within the meaning of s 47(4) and that the combination of the exclusivity and the length of the proposed contract would have the effect of substantially lessening competition in the Bunbury towage services market. In a judgment delivered on 28 January 2000, French J dismissed the application. This decision was upheld in the appeal decision dated 29 September 2000.

The fourth decision to be discussed is that of the Tribunal in *Review of Declaration of Freight Handling Services at Sydney International Airport*.⁵ Sydney Airports Corporation Limited (SACL) had applied to the Tribunal to review the decision of the Treasurer on 30 June 1997 whereby he declared:

⁵ (2000) ATPR 41-754

- 1) ...the service provided through the use of the freight aprons and hard stands to load and unload international aircraft at Sydney International Airport;
- 2) ...the service provided by the use of an area at Sydney International Airport to: store equipment used to load/unload international aircraft; and to transfer freight from the loading /unloading equipment to/from trucks at the airport.

The criteria for the review are set out in s 44H(4) that states that the Tribunal cannot declare a service unless it is satisfied of the following matters:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the facility is of national significance, having regard to:
 - i. the size of the facility; or
 - ii. the importance of the facility to constitutional trade or commerce; or
 - iii. the importance of the facility to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime;
- (f) that access (or increased access) to the service would not be contrary to the public interest.

The matters that were principally in contest in this review were (a), (b), (d) and (f).

The Tribunal decided to declare the services that had been declared by the Minister –

although the language used to characterise the services in the order of the Tribunal differed slightly from that of the Minister.

An interesting aspect of each of these four decisions is the manner with which they deal with natural monopolies. In general, competitive processes cannot be relied on to secure good performance in markets that are naturally monopolistic. Indeed, most of these markets require some form of regulation to secure good performance. This paper explores the relationship between competition and regulation that emerges as a result of the various decisions. Following this introduction, Section 2 explains the definition of natural monopoly and how that was applied to the facts of *Stirling Harbour Services*; Section 3 outlines the particular problems associated with defining the markets in which natural monopolies operate; Section 4 examines the particular issue in *Stirling Harbour Services* of competition for the market; Section 5 expounds the particular inefficiencies that can arise in natural monopolies; and Section 6 addresses the interaction between regulation and competition in natural monopoly markets.

2. A Natural Monopoly

A natural monopoly is defined in the economics literature as a market that can be served at a lower cost by having only one producer rather than many producers.⁶ Of the four decisions examined in this paper, the finding of a natural monopoly was most straightforward in trial judgment of *Stirling Harbour Services*:

⁶ See William W Sharkey, *The Theory of Natural Monopoly* (Cambridge University Press, 1982), p 2

It was common ground that the relevant market was the market for the provision of towage services and for the right to provide such services at the Port of Bunbury. That question will be considered again later in these reasons. But assuming the relevant markets, for comparative purposes, are to be defined by reference to the provision of towage services or the right to provide them at ports in Australia, port by port, then they are for the most part markets in which the cost of entry and operation and the volume of services required are such that they will support only one provider of the relevant services. Broadly speaking, this can be equated for present purposes to the economic concept of a natural monopoly.⁷

...There was ample evidence, and no dispute, that the Port of Bunbury can only support one provider of towage services. Ronald Fletcher, the consultant used by Monson's company, West Coast Towage Services, was of that view. Export and import statistics for the period 1990-1998 demonstrated that the Port of Bunbury did not have the trade to sustain more than one towage operator equipped with two designated tugs. Commercial ship numbers visiting the Port were low and did not even average one a day over any twelve month period since 1990. The number of tugs used to service each ship visit would be one or two depending upon variable factors such as ship size, bow thruster configuration, environmental factors and the requirement of the pilot and the ship's master.⁸

Because the market was a natural monopoly, competition could not take the form of rivalry between multiple incumbents. For example, if there were two incumbents, the larger incumbent would always be able to price below that of the smaller. If the service offered by the two operators were relatively homogeneous, shippers would

⁷ (2000) ATPR 41-752 at 40,713

prefer the service of the lower-priced operator and so the smaller operator would not be viable. The only viable strategy of a new entrant would be to succeed in replacing the incumbent:

The first consideration [in the Court's conclusion that BPA's granting of an exclusive licence would not substantially lessen competition] is that the market for the provision of towage services at Bunbury is a natural monopoly in the sense discussed earlier in these reasons in relation to the economic evidence. The volume of towage services required at the Port is historically relatively stable and unlikely to undergo any significant increase in the foreseeable future. That volume is incapable of supporting more than one towage operator having regard to the costs of establishing and operating towage services at the Port. There is therefore no competition "in" the provision of towage services which would or could be affected by a decision of the BPA to issue an exclusive licence with a price cap. Nor was the case fought upon that basis.⁹

Or, in the words of the Full Federal Court (per Burchett and Hely JJ):

The characteristics of the market for towage services in the Port of Bunbury make it clear that there will be only one supplier of those services, at least in the longer term. Competition **in** that market is not economically feasible, as the costs and revenues involved will support only one provider of towage services in the port. The same may be said of most other ports in Australia.¹⁰

⁸ (2000) ATPR 41-752 at 40,720

⁹ (2000) ATPR 41-752 at 40,732

¹⁰ (2000) ATPR 41-783 at 41,226 (emphasis in the original)

Because the Court found that the provision of towage services at Bunbury was a natural monopoly, there could be no sustained competition in the market among incumbents. So any competitive pressure on the incumbent had to come from the threat of entry to the market. In deciding whether the contract had the purpose or effect of substantially lessening competition, the Court adopted the future with and without test. This left the Court to address two questions: (i) to what degree was competitive pressure from potential entrants likely to exist in the presence of a non-exclusive contract; and (ii) was such pressure from the threat of entry as would exist in the presence of a non-exclusive contract likely to be substantially lessened if the contract were changed to be exclusive?

3. Defining the Market of a Natural Monopoly

One aspect of market definition that is closely connected with the theory of natural monopoly is the range of products or services that is to be included in the market. This question should rightly be asked prior to the standard questions of substitutability of demand and supply. That is, before one can enquire as to the substitutes, one must answer the prior question: substitutable for what? The answer to the question should constitute a cluster of goods or services among which there are strong complementarities in demand or supply when those complementarities are most-efficiently achieved within a single enterprise rather than by co-ordination by contractual means between enterprises.¹¹

¹¹ David J Teece, "Economies of Scope and the Scope of the Enterprise" (1980) 1 *Journal of Economic Behavior and Organization* 223.

The explanation for these precepts can be found through a consideration of a competitive market. If there are strong complementarities in demand or supply among a range of services and these complementarities can most-efficiently be achieved within a single enterprise, then a competitive market will place strong pressure on any incumbent to include at least that range within the range of the services it supplies. If it included only part of that range and relied on another enterprise to supply the remainder of that range, then a third enterprise which produced the whole of the range could do so more-efficiently than the two enterprises that each produced only a part of the range. So the enterprise producing the whole range would win when competing against the two enterprises with more-limited ranges.¹²

The Tribunal, in both *Sydney International Airport* and in *APRA*, faced an issue of some complexity when defining the boundaries to the market. Although the Tribunal in *Sydney International Airport* nowhere says that the Airport is a natural monopoly, defining the market for an airport involves considerations that are very similar to defining the boundaries to a natural monopoly. Because of the definition of a natural monopoly, the range of services to be included in the natural monopoly answers the same description as the range of services to be included in the market.

Conversely, the Tribunal found that the core of APRA's activities constituted a natural monopoly; but the Tribunal was careful to observe that '...this does not necessarily mean that all aspects of the supply of performing rights are integral to the natural monopoly'.¹³ In the conclusions section of its decision it set out a procedure

¹² See JC Panzar and RD Willig, "Economies of Scope" (1981) 71 *American Economic Review* 268

¹³ (1999) ATPR 41-701 at 42,285

for determining which of APRA's activities were separable for the purposes of authorisation:

We think that the proper approach is that which has been followed in the overseas inquiries and decisions which we have reviewed: Is a particular feature of APRA's Articles and Rules essential to the operation of APRA as an efficient collecting society? ...Only if a particular feature is not essential would it then be appropriate to consider whether that feature, standing alone, has a net public benefit. We have already expressed our view that collective administration of performing rights may not be inconsistent with the public interest.... At the end of the day, whether the conduct of a particular collecting society attracts a net public benefit that justifies authorising its operations should, we think, be decided in this way.¹⁴

This approach to determining which rules can be considered independently from the whole is very similar to the approach that the economics literature adopts to determining the bundle of activities that constitutes a natural monopoly. Recall that a natural monopoly is defined as an activity or group of activities that can more cheaply be undertaken by one enterprise than by more than one. APRA undertakes a range of activities. The applications for authorisation covered four aspects of APRA's operations:

- *Input Arrangements* that governed the conditions on which the writers agreed to join and to assign their copyright to APRA;
- *Output Arrangements* that governed the conditions on which APRA licensed users of musical works;

¹⁴ (1999) ATPR 41-701 at 42,988

- *Distribution Arrangements* that governed the manner in which the licence fees collected by APRA would be distributed to its members and, in particular, APRA's rule that composers would receive at least 50 per cent of the fees collected for works composed by them; and
- *Overseas Arrangements* that governed reciprocal arrangements between APRA and similar overseas collecting societies that ensured that fees collected in one country for works written by the writer of another country will find their way to the writer.

If one of these activities could be contracted out without APRA's incurring any extra cost then two enterprises would be able to undertake APRA's activities with the same cost as could APRA itself. That is, the whole of APRA's activities would not constitute a natural monopoly. That activity that could be contracted out at no extra cost should not be included in the bundle of activities over which there is a natural monopoly.¹⁵ To adapt the language of the Tribunal, the activity that was not essential for the natural monopoly, should not be included in the definition of the market that is naturally monopolistic.

Perhaps the most-important single paragraph in the decision of the Tribunal in *APRA* is that numbered 293, under the heading 'Benefits and Detriments':

The existence of only one collecting society in virtually all member countries of CISAC, except in the unusually large United States market, appears to confirm that a collecting society is a natural monopoly in these circumstances. However, this does not necessarily mean that all aspects of the supply of performing rights are integral to the natural monopoly. Therefore, the Tribunal has considered the benefits and costs of changes to

the APRA system as well as the benefits and costs of the existing system. It should also be pointed out that while a natural monopoly may be anti-competitive, such anti-competitive behaviour may not necessarily constitute a public detriment. Since average costs decline as output increases, society is best served by the single monopoly. The key issue is regulation of its operations to ensure that it does not take advantage of its monopoly position.¹⁶

The decision of the Tribunal quotes without endorsement the proposition put by the economist who gave evidence for APRA (Philip Williams) that this particular natural monopoly had “...substantial barriers to entry due to the economies of centralised administration.” The substantial barriers to entry existed because:

... many of the aspects of copyright enforcement contain a high proportion of fixed costs...[including] establishment of the systems for monitoring users and registering works. By contrast, once these systems are in place, the incremental cost of accepting another composer or new work into the system is insignificant. If these fixed costs are high enough over the relevant output range, then the average costs of enforcement will be also declining and the lowest costs are incurred by society by being served by a single collecting society.¹⁷

The decision of the Tribunal adjourned the proceedings to allow APRA to devise ways of complying with certain conditions that will be discussed in Section 6 below. To make its decision, the Tribunal had to find that the public benefits arising from

¹⁵ See Sharkey, *op cit*, p.2

¹⁶ (1999) ATPR 41-701 at 42,985

¹⁷ (1999) ATPR 41-701 at 42,984

APRA's collective administration of performing rights exceeded the anti-competitive detriments flowing from its operations.¹⁸

In the light of the Tribunal's care in considering which rules were essential for the operation of APRA as an efficient collecting society, it is surprising that the Tribunal abandoned its customary practice of specifying the market with which it was concerned. As we have explained in the preceding paragraphs, defining the market that was naturally monopolistic would have involved a procedure closely analogous to that which the Tribunal chose to adopt in deciding whether a particular rule was separable. Indeed, one can readily reconstruct what the reasoning of the Tribunal would have been had they been inclined to specify the market.

The market that APRA has monopolised is the natural monopoly. It is in the business of enforcing the performing rights of writers. Indeed, the Tribunal states that the natural monopoly is over the enforcing of copyright in music composition.¹⁹ The input and the output arrangements are essential parts of the set of functions that constitutes this market.²⁰ One might add that it must also be essential that APRA distribute the licence fees in some way.

If the Tribunal had chosen to define the market along these lines, it would then have been able to make explicit its analysis of barriers to entry. One can only analyse the condition of entry if one makes clear the definition of the market to which entry is being contemplated. That is, the definition of the market is not of any great value in itself; but it does clarify the condition of entry and, in this case, it would have clarified precisely what bundle of activities constituted the natural monopoly. In brief,

¹⁸ (1999) ATPR 41-701 at 42,997

¹⁹ (1999) ATPR 41-701 at 42,985

the product dimension of the market is the bundle of activities that constitutes the natural monopoly.

A similar set of issues arose before the Tribunal in *Sydney International Airport*. A key difference between these two cases was that, because *Sydney International Airport* concerned declaration under Part IIIA, the Tribunal was obliged to consider under s 44H(4)(a) the market in which the services which were the subject of the declaration were supplied. In addition, the Tribunal was obliged to consider under s 44H(4)(b) the closely-related question of the dimensions of the facility which provided the services.

After a careful consideration of the facility and the market for the services provided by the facility, the Tribunal opted for a wrapped-up notion of both the facility and the market in which the services yielded by the facility were provided. The reasoning is closely analogous to that of the range of activities that is explored by the Tribunal in *APRA*. The facility is characterised as:

...a “facility” that comprises the minimum set of physical assets necessary for international aircraft to land at SIA, unload and load passengers and freight and depart in a safe and commercially sustainable manner, that is, all the basic air-side infrastructure, such as the runways, taxiways and terminals and the related land-side facilities integral to the effective functioning of air-side services. This is, in practical terms, the whole of the airport.²¹

A similar wrapped-up cluster of services is embodied in the definition of the market in which the services yielded by the facility are provided:

²⁰ (1999) ATPR 41-701 at 42,988

²¹ (2000) ATPR 41-754 at 40,773

...a market, controlled by SACL, for the provision of the complete suite of physical assets necessary to service international airlines flying into and out of the Sydney region: - these assets exhibit very strong monopolistic (or bottleneck) characteristics because of pervasive economies of scale and scope and barriers to entry derived both from high sunk costs and the market size and location.²²

The definition of this market and the finding of strong economies of scale and scope strongly suggest the economists' notion of a natural monopoly. The Tribunal found that, even if a second airport needs to be developed in the future in Sydney West, the complementarities between the services offered by the two airports will most-efficiently be realised within a single enterprise of SACL:

From an economic perspective ... the option to develop another facility is foreclosed because the relatively small size of the Australian freight market would not support the development of another separately-owned airport. The realities are reflected in the Government's decision that SACL will be responsible for the development of Sydney West as a supplement to, rather than a replacement for, SIA.²³

The definition of the market and the findings of strong economies of scale and scope that would be most-efficiently realised within a single enterprise led inexorably to the Tribunal's conclusion that the criterion in s 44H(4)(b) "that it would be uneconomical for anyone to develop another facility to provide the service."

²² (2000) ATPR 41-754 at 40,773

²³ (2000) ATPR 41-754 at 40,793

4. Competition for the Naturally Monopolistic Market

Competitive pressure may come either from other incumbents or from potential entrants. As the literature on contestable markets in the late 1970s and early 1980s made clear, it is at least theoretically possible for there to be a natural monopoly market with no barriers to entry or exit. An incumbent in such a market may be constrained to operate as if the market were highly competitive. A particular example of such a natural monopoly would be one where potential operators were able to bid competitively for the exclusive franchise to operate the natural monopoly for a particular period. If the contract were to be awarded to the firm that tendered to supply at the lowest price, competition in the bidding process (that is ‘competition for the market’) may be a good substitute for competition within the market. This idea to introduce competition in bidding for the rights to operate natural monopolies was proposed in the late 1960s by Harold Demsetz²⁴ among others. If capital is mobile, it may work well; but the scheme would entail problems of incentives to invest if participation in the market were to involve significant sunk costs.²⁵

The deregulation of public utilities in Europe and Australia has led to a number of proposals and, indeed, disputes involving the bidding for the rights to operate a natural monopoly when a key criterion for the award of the contract is the price that will be charged the purchasers of the service. In Australia, the Gas Code²⁶ has provision (clauses 3.21 to 3.36) for determining reference tariffs through a competitive tender process. The provisions apply to the conduct of the tender to build

²⁴ Harold Demsetz, “Why Regulate Utilities?” (1968) 11 *Journal of Law and Economics* 55.

²⁵ See Oliver E Williamson, “Franchise bidding for natural monopolies – in general and with respect to CATV” (1976) 7 *The Bell Journal of Economics*: 73.

a new pipeline. The relevant Regulator must approve the process in advance; and clause 3.28(f) provides in part that the Relevant Regulator can only approve a Tender Approval Request if satisfied that:

...the selection criteria to be applied in conducting the proposed tender will result in the successful tender being selected principally on the basis that the tender will deliver the lowest sustainable tariffs (including but not limited to Reference Tariffs) to Users generally over the economic life of the proposed Pipeline:...

The competitive tender process of the Victorian Gas Code was used for both the Mildura and East Gippsland gas distribution systems. However, neither process utilised the Office of the Regulator General to vet the initial tender proposal.²⁷

Debate over the applicability of competition for the market was perhaps the central issue in *Stirling Harbour Services*. The applicant argued that, in the absence of an exclusive contract, the market for towage services in the Port of Bunbury is contestable. The threat of entry would be sufficient to ensure that the incumbent would behave in a competitive manner, even if no competitor actually entered the market. The respondent argued that this was not the case. The BPA argued that alternative entrants would only emerge to challenge the incumbent if the BPA were to establish a process to bid for the market. Furthermore, it argued that more alternative

²⁶ *National Third Party Access Code for Natural Gas Pipeline Systems* (1998).

²⁷ Victoria, Office of the Regulator General, *Access arrangement for EastCoast Gas Pty Ltd in respect of the proposed East Gippsland natural gas distribution system: final decision* (1999)

Victoria, Office of the Regulator General, *Access arrangement for Envestra Limited in respect of the proposed Mildura natural gas distribution system; final decision* (1999)

For a discussion of recent European cases involving bidding for the market, see Simon Bishop and Mike Walker, *Economics of E.C. Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell, 1999), chapter 13.

entrants would emerge if the contract to be awarded to the successful bidder were exclusive. The Court accepted these propositions put by the BPA.

The Court found that... “the applicants have failed to show that the market is other than weakly contestable at most.”²⁸ This was so for a number of reasons. In the first place, there were significant sunk costs associated with entry. Tugs (both new and second-hand) could be acquired on the international market; but the resale of these tugs upon exit could entail significant loss or substantial transaction costs. Furthermore, any entrant would be likely to incur significant losses:

... in providing a service in direct opposition to a powerful determined and well established incumbent. That such losses are likely to be incurred is emphasised by the clear determination of Adsteam to protect its position in the market. Its ability to do so is enhanced not just by the absence of a sunk cost component to its competitive resistance but also its established connection with shipping operators particularly through its volume rebate agreements.²⁹

In addition, Mr Weber of Riverside Marine gave evidence that the possibility of another operator entering on other than a non-exclusive basis was very remote:

As he put it, an incumbent seeing a new operator coming over the horizon can instantly drop its prices. The reality is that the Australian market is so stable now that nobody actually comes over the horizon because most of the ports are non-exclusive.³⁰

²⁸ (2000) ATPR 41-752 at 40,732

²⁹ (2000) ATPR 41-752 at 40,733

³⁰ (2000) ATPR 41-752 at 40,722

Mr Weber's point about the incumbent being able to delay reducing prices to a competitive level until the new entrant appears on the horizon was made by Brock³¹ in an early critique of the contestability literature. Brock showed that the proof that a natural monopoly would price at a competitive level required not only an absence of barriers to entry but also that the incumbent be prevented from reducing its price when the new entrant appeared. Only if the incumbent is prevented from reducing its price upon entry will the incumbent be forced to price at a competitive level at all times.

The Court found that the calling for tenders for an exclusive licence would enhance competition compared with the granting of a non-exclusive licence, because one of the principal criteria for awarding the exclusive licence was the schedule of prices that the licensee would charge for its towage services during the five years of the licence:

The process of calling for tenders for an exclusive licence with or without a price cap is likely to have a pro competitive effect in relation to the market for the right to provide towage services. It removes or reduces a disincentive to new entrants bidding for the licence in that the successful tenderer will be assured of a degree of security of tenure to enable entry barriers by way of sunk costs including the costs of "on the water" competition which it would otherwise face in head to head competition with a natural monopolist, to be avoided or reduced. There is, of course, a competitive process associated with the grant of the exclusive licence. That process encourages competitive price and service proposals from new entrants.³²

³¹ William A Brock, "Contestable Markets and the Theory of Industry Structure: A Review Article" (1983) 91 *Journal of Political Economy* 1055

These findings at the trial were reinforced by the decision on appeal. The appeal judgment of Burchett and Hely JJ picks up the suggestive words of the Tribunal in *QCMA* when it speaks of competition as a process of discovery:

Competition is the process by which market participants are forced to offer products on the best prices and terms possible. Competition is both the mechanism for discovery of the manner in which goods may be supplied in the cheapest way possible, and the mechanism of enforcement producing the “peril” of business failure for those who fail to supply goods at prices and on terms that match their rivals: *Re Queensland Co-operative Milling Association Limited* (1976) 25 FLR 169 at 187-188.³³

The judgment of Burchett and Hely JJ notes that the particular licence in question was designed both to discover the cheapest way possible and to lock the cheapest provider in to provide at the prices that were bid in the tender process:

The competition **for** the market stops at the point of award of the licence, subject to the incentive to keep prices low if extension or renewal of the term is desired. However, the competitive effect of the tender process endures for the term of the licence, notwithstanding the fact that rivals are prevented from entering during the term, because the successful tenderer is bound to continue to supply at prices and conditions set under the influence of the disciplining mechanism of competing tenders.³⁴

³² (2000) ATPR 41-752 at 40,733

³³ (2000) ATPR 41-783 at 41,271

5. Inefficiencies Associated with Natural Monopolies

As can be seen from the discussion in the preceding section, the Court in *Stirling Harbour Services* found that prices in a natural monopoly (towage services in the Port of Bunbury) could be reasonably competitive if a tender were to be awarded to the bidder who would offer to charge the lowest prices. Because the resulting prices would be competitive, they would not cause the allocative inefficiency that results if prices are above the competitive level and, as a result, demand for a service is restricted below the competitive level.

APRA also involved an argument over whether a natural monopoly (APRA) would charge prices above the competitive level. The Tribunal concluded that the Copyright Tribunal (which has power over all of APRA's licensing, blanket licences and any others) operates as an effective constraint against APRA's ability "to give less and charge more" in its dealing with major users.³⁵ Immediately following this conclusion, the Tribunal stated its requirement that APRA develop an ADR process to handle user disputes that are too small to justify recourse to the Copyright Tribunal. See Section 6 below.

Unlike the Tribunal, which characterised APRA as essentially a collecting society, which collected licence fees for performing rights, the Commission in its determination had characterised APRA as 'essentially a joint venture of composers, which replaces direct supply by composers to users.'³⁶ That is, the Commission viewed APRA as a composer cartel.

³⁴ (2000) ATPR 41-783 at 41,270 (emphasis in the original)

³⁵ (1999) ATPR 41-701 at 42,989

³⁶ (1998) ATPR (Com) 50-256 at 57,848

Like the Tribunal, the Commission did not define the relevant markets with any degree of precision. However, the Commission was impressed by the ability of APRA to segment users into groups and price discriminate among the groups according to their willingness to pay.³⁷ In effect, the Commission viewed writers as producing music that gave them certain rights. APRA was the collective by which they colluded to extract prices that were higher than they would have been able to secure if the market had been more competitive.

Instead of the monopoly of APRA being the natural result of economies of scale and scope in the enforcement of performing rights, the Commission saw the practices of APRA as substantially lessening competition. According to the Commission's decision, the practices of APRA lessened competition in a number of ways.

1. By providing a framework for collective negotiation, APRA increased concentration of sellers of performing rights. Instead of many bilateral negotiations, users were confronted with a monolithic seller that made all-or-nothing offers. These offers were generally in the form of blanket licences by which APRA demanded as a condition of buying a licence to perform one composition, that the user buy a licence to perform all the works in APRA's repertoire:

For those users who do not or do not always require a blanket licence, a potentially competitive market of individual composers and/or publishers has essentially been replaced by a monopoly or cartel whose membership rules currently prevent 'cheating' in the form of direct dealing.³⁸

³⁷ (1998) ATPR (Com) 50-256 at 57,848

³⁸ (1998) ATPR (Com) 50-256 at 57,849

2. By its overseas arrangements, APRA ensured that imported music was ensnared in its anticompetitive network:

...APRA's reciprocal arrangements with overseas collecting societies have the effect of preventing or discouraging those societies from competing in Australia by providing access to their repertoire directly to Australian users. This limits the need for the overseas societies to enter the Australian market for the purpose of collecting fees for use of works in their repertoires. In addition, the overseas arrangements severely limit the ability of users or other potential service providers to go direct to overseas societies to acquire rights. This decreases the likely entry of new collecting societies or creation of alternative mechanisms because access to overseas repertoires would be denied. In effect, there is an international cartel which prevents overseas societies from competing against one another and new societies from developing outside the existing cartel.³⁹

3. The Commission found that APRA's system inhibited the development of alternative arrangements for the provision of the various performing rights to users.⁴⁰ It did this, the Commission found, by requiring members to give three year's notice of termination (this was later reduced to six months),⁴¹ by insisting on blanket licences so that users have little incentive to by-pass APRA and deal direct with composers and by limiting the ways in which members themselves can opt out of the APRA scheme for part of the rights that they would otherwise assign to APRA.

³⁹ (1988) ATPR (Com) 50-256 at 57,850

⁴⁰ (1998) ATPR (Com) 50-256 at 57,851

⁴¹ See Tribunal (1999) ATPR 41-701 at 42,943.

The decisions of both the Commission and the Tribunal found that APRA had significant market power. There were some differences in how they characterised the power. The Commission characterised the power as a writers' cartel. The Tribunal characterised the enforcement function as a natural monopoly; but acknowledged that this monopoly was also used to conduct joint negotiations on behalf of the writers. That is, the difference between the Commission and the Tribunal was not as to the existence of the monopoly but rather as to whether the monopoly was good or bad.

In contrast to the Commission, the Tribunal placed weight on APRA's role as an enforcer of copyright law. In so doing, it recognised APRA's function in terms of allowing composers to appropriate more profits from their creative activity. It also recognised the value of this and the particular difficulties faced by enforcing property rights over goods that have a 'public good' nature.

To see the main force of the Tribunal's logic in more detail, note, as it did, that the enforcement of property rights is a legitimate activity that may be undertaken by the government or by private citizens, and in some cases, by both. In many cases, it is inefficient for individuals to enforce all aspects of their property rights. Consequently, the government may step in to fulfil this role on behalf of individuals. For example, with respect to the enforcement of private property and civil liberties, it is generally more efficient to have a single, cohesive police force providing enforcement services rather than individuals investing in their own separate private policing arrangements.

There are also circumstances where individuals will be willing to pay for higher levels of enforcement than that provided by government and will, therefore, seek to supplement the services provided to the general public. For example, some

banks employ private security guards to provide protection services for their offices. The decision to engage in private enforcement turns on a cost versus benefit analysis of the incremental private investment required for additional property right enforcement. Following this, it is likely that where property rights are extremely valuable (for example, bank deposits, art works), then some form of additional enforcement (security) is likely.⁴²

In the case of intellectual property rights, enforcement is largely left in private hands. However, in many cases, individual private enforcement of copyright is generally infeasible, leading to some sort of collective administration to overcome these difficulties.

The usual way in which producers force consumers to pay for a product is to exclude them from consumption unless payment is made. For example, the milk bar proprietor will usually not hand ice-cream to the child until the child hands over the money. Economists say that the retailer is excluding the choice from consumption of the ice-cream until the child pays. It is difficult to enforce intellectual property rights because it is difficult to exclude potential users from consuming those assets.

The reason is that intellectual property rights are, in effect, over information rather than a physical commodity. Information is what economists term a *non-rival* good. One child's consumption of a particular musical composition does not prevent others from such consumption. In contrast, a child's consumption of an ice-cream, necessarily precludes others from consuming that same ice-cream. This means that it is difficult to exclude someone from using information by 'constructing a fence

⁴² H Demsetz, *Ownership, Control and the Firm* (Basil Blackwell, Oxford, 1988)

around it.’ As soon as you have allowed others access to the information you create the potential for them to pass that onto others without your permission. The control afforded by actual possession of a physical commodity is far more difficult with information; especially to the extent that you intend to sell that information.

It is costly to exclude others from using information. For musical works, this is a constant concern as they can be readily copied and performed in locations all over the world without the owner’s consent. The APRA system enables writers to enforce the performing rights in their works. The Tribunal made it clear that this benefit to composers is an element of public benefit:

The Tribunal gives a wide interpretation to public benefit, to include benefits to participants in the market as well as benefits to society at large. Therefore, the benefits to writers from the formation of a collecting society and the consequent reduction in the transaction costs of monitoring performance of their works and enforcing payment, and to users from being able to gain access easily to the right to perform music in the whole repertoire, are recognised as part, indeed a large part, of the public benefit of APRA.⁴³

APRA’s practice of issuing blanket licences led to a second important difference between the Commission and the Tribunal in assessing the goodness or badness of APRA’s conduct. Most of the licences issued by APRA gave the user access to all the works in the APRA repertoire at a price that APRA tried to fix in accordance with what the user could bear.⁴⁴ The Commission found that this was classic monopoly pricing:

⁴³ (1999) ATPR 41-701 at 42,985

⁴⁴ (1998) ATPR (Com) 50-256 at 57,804-57,805

As a monopoly supplier not constrained by import competition or the threat of entry, APRA is able to ‘give less and charge more’. In the case of public goods, such as musical works, giving less does not mean restricting the production of new musical works, but rather limiting access to musical works, both new and old. For public goods, where there are not opportunity costs of consumption, this represents a misallocation of resources. Indeed, APRA’s ability to charge monopoly prices will tend to encourage excessive production of new works and membership of APRA. Hence, there is both a short run and long run misallocation of resources: in the short run, use of existing works is restricted, but in the long run, there is excessive production of new works.⁴⁵

In the proceedings before the Tribunal, these criticisms of the efficiency of APRA’s blanket licences were the subject of vigorous disagreement among the economic experts. In the end the Tribunal rejected the Commission’s criticism of blanket licences:

Blanket licences have been criticised by certain users as requiring users to pay for music that they do not want. ... this is a misplaced criticism arising from a misunderstanding of the blanket licence. The blanket licence format is offered by collecting societies worldwide, and is generally recognised as the essential device for efficient licensing of the use of music in all but a few circumstances. The Tribunal agrees with this view of blanket licences.⁴⁶

So not only did the Commission and Tribunal disagree as to the extent of the public benefits arising from APRA’s rules, they disagreed on the magnitude of potential anti-competitive detriment. It is, therefore, worthwhile to explore the details of their disagreement on this latter point in more detail.

⁴⁵ (1998) ATPR (Com) 50-256 at 57,852

The decision of the Commission criticised the blanket pricing because of its impact on the use of compositions. Usually, in economics, when suppliers coordinate their pricing, this can give rise to a monopolisation effect. That is, suppliers will restrict the quantity of their goods and services so as to receive a monopoly price. This reduction in output has a negative social impact – a reduction in consumer and producer surplus – the so-called ‘dead-weight loss’. Simply put, this means that there are units of output not being supplied for which the (opportunity) cost of supply was less than a user’s willingness to pay for that unit. This is not efficient, as the supply of such units would confer greater benefits on users than the costs of their production.

Such inefficiencies are really an artefact of the way in which such products are marketed. The textbook picture is of a monopolist (or cartel) who posts a price per unit and then sells as much output as possible at that price. In many industries, however, this type of price setting is not an accurate representation of the marketing process. Instead, a supplier negotiates directly with a user. In such settings, suppliers and users have a mutual interest to negotiate directly over value and its division rather than simply price per unit.

In direct negotiations, suppliers and users have an incentive to avoid the inefficiencies that might be associated with simple monopoly pricing. They recognise that all units that a user values more than the costs of its supply should be traded. They can devise more innovative methods of pricing to divide the bargaining surplus. For example, they can negotiate separate prices for each purchaser in accordance with that purchaser’s willingness to pay. The upshot of this process is that the output

⁴⁶ (1999) ATPR 41-701 at 42,992

traded is socially optimal (maximising consumer plus producer surplus) while the benefits of trade are divided between the supplier and user.

In this light, it can be seen that APRA (and its members) will not find it desirable to restrict composition use. This is because the costs of supplying an additional unit of composition – that is, allowing someone to play an additional song – are zero to the composer. Indeed, this is a consequence of the public good nature of compositions. Therefore, we see that APRA and users negotiate over price of unrestricted access rather than over the price paid every time a composition is used. Hence, there is no textbook monopolisation effect of a restriction of output and no resulting social inefficiency.

The pricing issues discussed above, can arise in markets other than those that are naturally monopolistic. In contrast to *APRA* and *Stirling Harbour Services*, *Sydney International Airport* involved no issues of pricing. The dispute was over the declaration of services provided at the Airport. The decision for the Tribunal was, of course, whether it was satisfied as to the criteria listed in s 44H(4). The final item in this list is the reference to the public interest; and this criterion is the obvious place for the Tribunal to consider economic efficiency. The economic inefficiency that was, in effect, alleged against SIA was that it was using its monopoly control over the facility to restrict competition in the markets for ramp handling and cargo terminal operator services at the SIA.

SACL submitted that the principal rationale behind the Hilmer Committee's recommendation of an access regime was the need to control vertically-integrated

monopolists.⁴⁷ This clearly did not apply in this case: SACL was not in the business of providing ramp handling or CTO services. But the Tribunal was reluctant to infer the purpose of the declaration procedure of Part IIIA from the stated purpose of the rather-different procedure that was proposed by the Hilmer Committee. Nevertheless, the Tribunal did accept that declaration may be particularly appropriate in cases of vertical integration:

... the Tribunal is prepared to accept that an access declaration may be particularly appropriate where a facility, by means of which a service is provided, is controlled by a vertically integrated monopolist. But the provisions in Pt IIIA of the Act are not limited in their application to a vertically integrated organization, and we cannot see anything in the Hilmer report to suggest that the Hilmer Committee intended its proposed new legal regime would be limited to facilities which are vertically integrated with potentially competitive activities in upstream or downstream markets.⁴⁸

Although the criteria provided in the statute did not require vertical integration, the Tribunal did acknowledge that the behaviour of SACL in, effectively, limiting competition in downstream markets was difficult to explain:

In this matter the issue is not the prices SACL charges ramp handlers but rather whether SACL should be granting wider access to the services which are provided by means of SACL's facility. The Hilmer Committee also noted that where the owner of a facility was not competing in upstream or downstream markets, the owner usually had little incentive to deny access, because maximising competition in vertically related markets maximised its own profits. In the present matter SACL does want to deny access, or at least

⁴⁷ (2000) ATPR 41-754 at 40,755

⁴⁸ (2000) ATPR 41-754 at 40,756

regulate access, because it appears to want to control and decide itself who shall operate ramp handling activities at the airport.⁴⁹

This passage in the decision raises an important question of public policy that will arise when Part IIIA comes to be reviewed. The question is whether declaration should not be explicitly restricted to cases in which the controller of the facility is operating in the market in which competition will be promoted by means of the declaration.

6. Regulation of the Natural Monopoly

Each of the three decisions considered in this paper involves a natural monopoly that operates within a mix of competition and regulation. There is a sense in which each of the natural monopolies is, to varying degrees, itself operating as a regulator.

In *APRA*, the Tribunal was concerned about antagonism towards APRA by certain users. In particular, APRA's compliance program in 1996 and 1997 caused many small businesses to resent the tactics employed by APRA to force them to acquire licences.⁵⁰ The Tribunal also referred to evidence before the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1998 inquiry. The Tribunal was impressed by the efficiency with which APRA was enforcing the rightful claims of its members. On the other hand, the Tribunal felt that APRA's position as a natural monopoly private enforcement agency also entailed some wider social responsibility:

⁴⁹ (2000) ATPR 41-754 at 40,756

⁵⁰ (1999) ATPR 41-701 at 42,968-42,969

The Tribunal considers this evidence to be important as illustrating a distinction that lies at the heart of this matter. On one hand, APRA is conducting a function that is directed to worthy ends, and that is consistent with public policy on copyright. On the other hand, the manner in which APRA recently performed its role in a particular but significant respect has received damaging criticism. The parliamentary inquiry's conclusions suggest that, in today's circumstances, assessment of the public interest in regard to the conduct of APRA's function will necessarily look beyond administrative efficiency and the achievement of compliance. For the Tribunal, two very different questions emerge ---whether a function that is perhaps most efficiently performed by a monopoly can nevertheless in theory be performed in the net public interest, and whether the manner it in fact bears on others is in the net public interest. The proceedings, in the opinion of the Tribunal, very properly focussed more on the second question than the first.⁵¹

Concern by the Tribunal at APRA's exuberance in pursuing its enforcement function caused the Tribunal to adopt for itself a quasi-regulative role. A natural monopoly is a market that (except in special circumstances) cannot be regulated by competition. The Tribunal acknowledged the regulatory role of the Copyright Tribunal; but it also felt that regulation of some dimensions of APRA's conduct was needed.

The Tribunal adjourned the proceedings to permit APRA to make two changes that the Tribunal required as a condition of authorisation. First, APRA was to devise a simple mechanism for the resolution of disputes between itself and users.⁵² Second, the Tribunal required an amendment to the conditions on which writers

⁵¹ (1999) ATPR 41-701 at 42,969

⁵² (1999) ATPR 41-701 at 42,989-42,992

agreed to join APRA. In essence, the rules for which APRA sought authorisation required members to give APRA an exclusive assignment of all their works. The Tribunal required a change that would permit members to take a non-exclusive licence-back of any of their works so that they could deal with those works outside the APRA system.⁵³

Collective schemes that confer market power have been frequent candidates for authorisation. The statutory test for authorisation requires that the Tribunal be satisfied that the conduct for which authorisation is sought is likely to result in a benefit to the public that outweighs its detriments. This is the "net public interest" test articulated by the Tribunal in the passage above. In the past, the Tribunal has been ready to require modifications to collective schemes as part of this exercise of balancing benefit and detriment: *The Locksmiths' Case*⁵⁴ and *Re Media Council of Australia (No 2)*.⁵⁵ In the case of APRA, the Tribunal has gone further. It seems to have gone beyond its legislated mandate.

In *Locksmiths*, the Tribunal saw public benefits in a restricted locking system devised by the Master Locksmiths Association. However it did not authorise the system in the form in which it was presented. It withheld authorisation from trade restraints that prevented competition between participating locksmiths in after-sales service of systems already installed. These restraints did not qualify for authorisation because the Tribunal was not satisfied that they contributed to the security of the system.⁵⁶ Further, the Tribunal required the association to extend access to the system to a wider class of locksmiths than the association proposed. The costs to

⁵³ (1999) ATPR 41-701 at 42,997

⁵⁴ (1980) ATPR 40-176

⁵⁵ (1987) ATPR 40-774

competition of confining access to the narrower class did not outweigh the public benefits in the restricted system.⁵⁷

In *Media Council (No 2)* the Tribunal analysed the Media Council's rules relating to advertising codes. The Media Council was, in effect, a joint venture of all the television licensees, radio stations and newspaper publishers in Australia. The parallels with the private enforcement function of APRA are striking. As the Tribunal in *Media Council (No 2)* said of the code system:

It is ... a system of private regulation (as opposed to public regulation) with the media (in contrast to the advertisers and the advertising agents) largely formulating the policy of the Codes and organizing its implementation and enforcement of the advertising industry as a whole.

It is a system of private regulation of the market for advertising messages. It is effective because all significant competitors, on both sides of the market, are either bound by its rules or are induced to conform. The Codes describe [evidently "prescribe"] attributes of advertising messages which are different from those that would emanate from the freer market alternative.⁵⁸

In *Media Council (No 2)* the Tribunal indicated that it required changes to the membership of the various bodies that formulated and implemented the codes. Representatives of the media dominated those bodies. The Tribunal required greater involvement of advertisers, advertising agents, and especially the public.⁵⁹ Without this wider input, the Tribunal said that it was not convinced that the system could be relied upon to generate advertising standards that reflect community values, or to

⁵⁶ (1980) ATPR 40-176 at 42,445

⁵⁷ (1980) ATPR 40-176 at 42,445-42,446

⁵⁸ (1987) ATPR 40-774 at 48,436

apply those codes even-handedly against entrenched firms and new firms alike.⁶⁰ Without the changes, any public benefits from the system would not outweigh its detriments

In *APRA*, the Tribunal's requirement that APRA permit its members to take a licence-back of any of their works is consistent with standard authorisation practice. As in *Locksmiths*, the Tribunal was limiting its authorisation to those aspects of APRA's input arrangements that were causally connected with the public benefits of the system.

The Tribunal identified the capacity to offer blanket licences for a comprehensive repertoire as central to the operation of APRA's system.

Unless the collecting society is able to obtain and maintain the ability to licence (sic) a comprehensive repertoire of works, the many benefits which have maintained the viability of collecting societies will be lessened. Licensees will not simply obtain comprehensive protection against infringement, transaction costs for licensees will increase, administration costs of the society in respect of recording input information, monitoring use, and effecting distribution will increase significantly, and monitoring and enforcement will become difficult.⁶¹

It followed that the rule under which APRA acquired exclusive rights to its members' works could be authorised only to the extent that that rule was necessary to enable APRA to grant licences for a comprehensive repertoire. To permit a member to *withdraw* individual works from the system (a proposal contended for by the Commission and FACTS) risked harming the essential structure of APRA by leaving

⁵⁹ (1987) ATPR 40-774 at 48,453

⁶⁰ (1987) ATPR 40-774 at 48,451

a hole in repertoire. However, provision for a non-exclusive licence-back was seen as a less restrictive alternative that would not detract from the benefits of the system.⁶²

The other change required by the Tribunal can be reconciled neither with precedent nor with the statutory test for authorisation. According to the Tribunal, a dispute resolution mechanism was necessary to provide a buffer against the possibility of APRA exercising market power against small users for whom the Copyright Tribunal is too expensive a forum. Such a process would:

... lessen one potential anti-competitive consequence of the APRA system.
[It] ... would encourage APRA to be more receptive to the complaints of its users, and lessen the types of complaints we heard about APRA's inflexibility and resistance to modifying licences to meet changing circumstances.⁶³

The Tribunal imposed this requirement although it found that the public benefit arising from APRA's collective administration of performing rights exceeded the anti-competitive detriments flowing from its operations.⁶⁴ Thus the extra layer of regulation was not necessary to ensure that the system delivered a net public benefit. So the APRA system is essentially different from the advertising code system before the Tribunal in *Media Council (No 2)*. Further, the Tribunal's requirement that APRA set up a dispute resolution process is not an instance of excising from the conduct for which authorisation is sought some aspect that plays no part in delivering the public benefit, as in *Locksmiths*.

⁶¹ (1999) ATPR 41-701 at 42,995

⁶² (1999) ATPR 41-701 at 42,996

⁶³ (1999) ATPR 41-701 at 42,990

⁶⁴ (1999) ATPR 41-701 at 42,997

Thus, in *APRA*, the Tribunal strayed from its statutory task. Between its statement about “net public interest” (above) and its conclusion, the Tribunal redefined the “key issue” in the case of a natural monopoly as “regulation to ensure that it does not take advantage of its monopoly position.”⁶⁵ In doing so, it forgot its own observation in *Media Council (No 3)*, the final decision on the advertising codes:

[T]he Tribunal’s function is not to require the design of an ideal system ... but to determine whether the proposed Codes within the Media Council system fulfil the statutory tests prescribed by s.90 of the *Trade Practices Act*.⁶⁶

The Tribunal’s decision in *Sydney International Airport* is, to a large extent, coloured by its view of the regulatory function of SACL and, more particularly, its predecessor, the Federal Airports Corporation (FAC). Qantas and Ansett were allowed to continue to handle freight on the ramps of SIA as they had within a framework of regulated entry under the FAC. The SIA, in the opinion of the Tribunal, deregulated this arrangement only to a limited extent by permitting a limited number of new entrants to the activity of ramp handling. Indeed, if one seeks to infer from the decision the Tribunal’s explanation of why SACL elected to restrict entry to ramp handling, this seems to be it: SACL was still very much influenced by the regulatory culture of the old FAC:

...it is clear that the treatment of the incumbents (Qantas and Ansett) biases the selection criteria towards entities with similar operating characteristics and economics as the main incumbents. This in turn effectively precludes competitive entry by lower cost operators offering a markedly novel or

⁶⁵ (1999) ATPR 41-701 at 42,985

different mix of service and price. SACL's witnesses challenged the economic value of such entry on the basis that it had failed to erode Qantas and Ansett dominance in the past.

The Tribunal makes two observations here. First, as noted earlier, as a seemingly lazy monopolist, FAC did not see its role to promote competition. Secondly, and more importantly, from an economic perspective new entrants can be a source of innovation and therefore competitive pressure. This is not a matter of the number of entrants but the variety of the competitive behaviour that wider entry would generate.⁶⁷

In effect, the Tribunal seems to be saying that, if SACL had properly adjusted to a deregulated environment it would not have operated as it did. So the declaration under Part IIIA may have the effect of facilitating the move of natural monopolies from lazy, inefficient behaviour to behaviour that facilitates competition in upstream and downstream industries.

7. Conclusion

APRA, Sydney International Airport and Stirling Harbour Services are landmark decisions in trade practices jurisprudence in Australia because they are the first extensive analyses of the trade practices of a natural monopoly. In a world of deregulated public utilities, the courts and the Tribunal are certain to revisit similar problems in the future. These decisions provide important pointers as to how the courts and the Tribunal are likely to approach the difficult issues of competition and regulation that consideration of a natural monopoly inevitably raises.

⁶⁶ *Re Media Council of Australia (No 3)* (1989) ATPR 40-933 at 50,123

⁶⁷ (2000) ATPR 41-754 at 40,777