Economic Law and Economic Rationalism

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Introduction

Outside the academy, where post-modernism has had a major impact, economic rationalism is arguably the most influential intellectual movement of the last decade, certainly in the English speaking countries. There are now signs that its influence is on the wane, but it can still be suggested that it has changed profoundly the frame of reference for policy formulation on all sides of politics. Law should be included in this frame, despite its partial distancing from politics, and the aim of this paper is to explore some of the important ambiguities and inconsistencies within the prescriptions of economic rationalism as they impinge upon law formulation.

We should begin by identifying economic rationalism's prescriptions for the state in general. Economic rationalism has been driving a program that is radical, at least in its aspirations: the free economy is to be restored, beginning with the scaling down of public activities and political processes, cutting government spending and taxes, privatizing public assets and services, and abolishing interventionist and regulatory agencies.[1] Generally, the opportunities for special interests to enlist government aid should be limited and corporatist institutions dismantled. The state is to rise above politics, being confined to a minimalist role in upholding the rules of the market order. It will provide, to recall the words of a fully-fledged but ill-fated version of the program - *Fightback! It's Your Australia* - a "framework for

[1] A Gamble, *The Free Economy and the Strong State: The Politics of Thatcherism,* Macmillan Education, London, 1988.

certainty" in securing the fruits of enterprise, supporting voluntary exchanges and promoting open and fair competition.[2]

What are the implications of such a program for law? Within such a program, economic rationalism often assigns to law an unproblematic (and minimalist) role. This is in keeping with one of the general intellectual appeals of the new right's "deregulatory" program - its principled detachment from the mire of particularized resource allocation questions and the mediation of the many conflicts which occur in civil society.[3] Such a claim is likely to strike a sympathetic chord in legal circles. Substantive materiality is said to have undermined the legitimacy of law, by overloading it with tasks, exposing it to error, and tainting it with politics.[4]

Any genuine attempt at implementation of such a program raises basic questions about the state's role in market definition and maintenance. As the purpose of this paper is to provoke discussion in an argumentative way, rather than report any findings or reach any conclusions, several questions might be raised. What is to be taken for granted as part of that framework for certainty and what is to be contested? Are markets to be fair as well as free and what conduct is to be regarded as fair? What, then, is to be regarded as unacceptable intervention and regulation? How might an ideal of the free economy, involving "minimalist" restrictions on civil society, be reconciled with the attractions of a strong state which is seen as necessary to overcome the political opposition to economic, and cultural, change and to extend the conditions of the market order?[5]

These questions lead onto a general point. Is it therefore helpful to think in terms of a fundamental change in the relationship between the state and civil

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[2] Liberal and National Parties, *Fightback! It's Your Australia,* Parliament of Australia, Canberra, 1991, p 26.

[3] M Pusey, *Economic Rationalisation in Canberra: A Nation-Building State Changes Its Mind,* Cambridge University Press, Sydney, 1991.

[4] G Teubner, "How the Law Thinks: Towards a Constructivist Epistemology of Law" (1989) 23 *Law and Society Review* 727.

[5] A Gamble, "Privatization, Thatcherism, and the British State" (1989) 16 *Journal of Law and Society* 1. Witness the Victorian Premier's complimentary remarks about strong political leadership in the Asian Tiger nations; *The Age* 23 February 1993. On the basis of the New Zealand experience, Jane Kelsey suggests the state moves through two stages: the first is a strong state to initiate the changes, converting to a more reticent one in order to convince economic agents that the changes cannot be reversed, see J Kelsey, Globalisation of Trade and the Sovereignty of the Nation-State: Reflections from Aotearoa/New Zealand on the GATT, a paper presented to the Australian Law and Society Conference, Macquarie University, North Ryde, December 1993.

society, and in the character of law specifically, rather than simply in the content and targets of state regulation? After all, even the "free market" may be characterized as a set of rules and institutions which are given crucial backing by government and law.[6] Its constitution raises critical questions about what is to be appropriable and tradeable, how trade is to be conducted, how much competition there is to be and in particular whether that competition is to transcend national boundaries. Ultimately, such a program simply continues the inevitable debate about the particular objects and contents of legal regulation.

Presently, the Russian experience provides perhaps the most graphic reminder of the vagaries of capitalism for those of us in the West who have grown accustomed to the landscape of a market economy. For instance, Hutton has this to say about the "Harvard" prescriptions for reform in Russia:

> ....much of this technical analysis has originated in free market textbook precepts that correspond little to what actually happens in Western economies - or remotely describes how the West arrived where it is. Lack of western self-knowledge about the variety of institutions that dynamise western capitalism, how they were created and how they perform today is almost complete, while the understanding of the role of value systems and a business class in holding the structures together is non-existent. These will follow spontaneously from the inevitable logic of markets and private property, it is thought; their development is certainly not integral to the design of the reform programme.[7]

Today, such issues can no longer be resolved in a purely national context; to these conundrums of national policy must now be added the pressures of globalization. Globalization signifies accelerating interdependence between countries. Interdependence is developing along several dimensions: following the expansion of trade over national borders in finished goods and the internationalization of financial markets, a third wave of international linkage is presently marked by flows of investment, technology and information and

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[6] D Sugarman, "Law, Economy and the State in England, 1750-1914: Some Major Issues", in *Legality, Ideology and the State,* D Sugarman (ed), Academic Press, London, 1983.

[7] *The Guardian Weekly* 4 April 1993. Hutton goes on to observe: "The misconceptions stretch across the board. For example, any Russian who talks in terms of finding a third way between free market capitalism of the Anglo-American variety and state communism is immediately written off as wanting to hark back to statism, nationalisation, and bureaucracy - and is therefore an enemy of reform".

by increased international corporate and research networking. What are its implications for policy formation? Ostry comments:

> Like each phrase of tightening linkage, globalization enhances opportunities for growth but also increases risk and vulnerability. Growth is enhanced by improved efficiency, more rapid production and the adoption of new technology. Risk is heightened because globalization creates growing pressure for convergence of policies, a pressure which touches the sensitive issue of sovereignty. In a globalizing world, competition among transnational corporations in sophisticated products and services (an increasing proportion of world trade) is also competition among systems. A globalizing world has a low tolerance for system divergence - and that is the wellspring of new sources of international friction, system friction....Most of the policies which will be the subject of the new international initiative are in the domestic domain: the new international policy arena.[8]

In describing the domestic domain as the new international policy arena, Ostry identifies a set of national policies that are likely to be affected. Many of these policies have significant legal components. These policies include: intellectual property norms, competition policy (especially merger provisions), research and development supports, foreign direct investment policy, securities and companies regulation (as it affects corporate governance), together with the taxation of transnational corporations and standards and testing procedures in selected leading-edge sectors. To this list we should add at the very least the regulation of labour relations and conditions. Essentially, the drive is to harmonize and unify these policies, along liberalizing lines, so that they do not discriminate against access by "foreign" corporations and that market access generally is enhanced.

Yet these kinds of pressures also place governments in a quandary. Should they seek to slot into, indeed to promote, international liberal systems of property, competition, free trade and direct investment or should they endeavour to maintain their own characteristic regulatory arrangements, public institutions and cultural traditions which have mediated competition between local producers and foreign traders? How might the attractions of market access and rights of establishment in a multilaterally rule-governed system be weighed up against the evident fact that even the leading Western

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[8] S Ostry, "The Domestic Domain: The New International Policy Arena" (1992) 1(1) *Transnational Corporations* 7.

economies play the policy game strategically, favouring free trade where it suits their strengths, practising neo-mercantilism where it does not?

Comparisons between national legal systems reveal differences, not just in the obvious areas of industry assistance and social regulation, but also in the body of the property, trade and association law itself. Thus far, attempts at multilateral legislation of uniform market laws have tended only to produce international "soft law" and countries have pushed their own favoured models through regional and bilateral initiatives. The potential of the GATT Uruguay Round agreements to change this situation remains to be proved. Furthermore, where national laws do seem on their surface to converge, deeply embedded cultural factors can mean that their application varies considerably.[9] So, in the light of these strategic responses to the pressures of globalization, is it possible to contemplate the success of "economic rationalism in one country"?

This paper now endeavours to explore such tensions within economic rationalism under five relevant legal heads: property, contract, competition, substantive or particularistic regulation, and privatisation. In doing so, the paper's intention is not so much to canvas the merits of such policies (nor of their many alternatives) in terms of their social costs and benefits.[10] Rather, it aims to explore the policies to see whether, on their own ground, they should give rise to any contradictions that might complicate the implementation of such a program. Of course, the manner of implementation is still bound to vary with the distinctive features of the country in question and so with, for example, its economic circumstances, political complexion, administrative ethos and legal culture. The focus here will be on Australia. Australia seems as exposed to the vagaries of liberalization as any country in the world, so empty of traditions, yet the problems being experienced on *both* sides of party politics indicate how difficult it remains to formulate a workable contemporary policy.

Property

The regime of private property rights is commonly treated as a given or taken for granted backdrop to the operation of the free economy. Property can also

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[9] L Thurow, *Head to Head: The Coming Economic Battle among Japan, Europe and America,* Allen and Unwin, Sydney, 1993.

[10] Their costs are beginning to be "rediscovered" as cracks appear in the unity of view on the right; see now J Gray, *Beyond the New Right,* Routledge, London, 1993.

be viewed as a kind of monopolistic restriction on individual or national enterprise, a protection against "excessive" or "unfair" competition, very much defined and enforced by state regulation.[11] Many of the arguments for the economic efficency of a free market are only valid within the bounds of a given set of property entitlements and distributions.[12] As Frug has said, there are in fact as many markets as there are rules to constitute them.[13] But, if there is no such thing as a natural unregulated market, are we then obliged to compare the efficiency of all the conceivable legal frameworks? A lot seems to depend on who has the power to characterize the boundaries of the debate. To give an international example, writing in the context of the debate over the GATT's entry into the field of intellectual property, Raghavan[14] queries whether the lack of adequate and effective enforcement of intellectual property rights should be treated as a free trade issue if, at the same time, the potentially restrictive effects of extending appropriation, especially in the hands of transnational corporations with market power, is not to be so treated.

Of course, it is not difficult to find economic, and broader social, arguments in favour of private property.[15] These clearly have been found persuasive, increasingly right around the world. Still, whatever the prevailing general sentiment may be, economists continue to exhibit doubts about the efficiency of conferring rights in particular settings (quite apart from the logic of any redistributional or social considerations).[16] Within the economic debate over intellectual property rights, the conclusion seems to depend on which of several competing notions of efficiency is adopted, static or dynamic,

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[11] W Cornish and G de N Clark, *Law and Society in England 1750-1950,* Sweet and Maxwell, London, 1989.

[12] C Veljanovski, "The Economic Approach to Law - A Critical Introduction" (1980) 7 *British Journal of Law and Society* 158.

[13] Cited in C Graham, "Regulating the Company", in *Capitalism, Culture and Economic Regulation,* L Hancher and M Moran (eds), Clarendon Press, Oxford, 1989.

[14] C Raghavan, *Recolonization: GATT, The Uruguay Round, and the Third World,* Zed Books, London, 1990.

[15] H Demetz, "Towards a Theory of Property Rights" (1969) 57 *American Economic Review* (papers and proceedings) 347.

[16] Such economics need not be "left-wing". A poignant example was the Prices Surveillance Authority's questioning of the copyright holder's right to prohibit parallel importation of books, records or software. Industry groups have since lobbied to modify or hold up the Authority's proposals for greater competition in these markets. (I thank a colleague, Peter Drahos, for drawing this example to my attention.)

allocative or productive.[17] While most property law seems settled, and reform might create uncertainty, technological and organizational innovations generate new resources, raising afresh questions about the utility of appropriability as a matter of domestic policy.[18] Most significantly for the "post-industrial economy", the appropriability of information causes fundamental problems for economic theory. As Boyle remarks:

> In the private world of the market, information is again a defining feature. The analytical structure of microeconomics includes "perfect information" - meaning free, instantaneous, and universally available - as one of the defining features of the perfect market. At the same time, the actual market structure of contemporary society depends on information itself being a commodity- costly, partial, and deliberately restricted in its availability.[19]

On this point, information economics seems to part company with neo-classical economics. Lamberton[20] argues that too little attention is given over in economic policy to the question of effective use of information rather than to its appropriability. The possession of information does not necessarily signify the command of knowledge or the capacity to exploit it and this insight suggests a shift in the emphasis of policy to support for the kinds of organizational and institutional arrangements that can best assimilate and put information to use (see the discussion of competition policy below).

As well as continuing domestic expectations about the extension of property rights, small nation states now experience pressures, both multilaterally and bilaterally, to lock into international intellectual property systems. These pressures have been intensified with, as we noted above, the characterization of a lack of effective intellectual property protection as a distortion of free trade principles and the entry of the GATT into the international intellectual property arena. The longstanding international conventions (sponsored by WIPO) have been more accomodating of different national levels of

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[17] Eg Organization for Economic Cooperation and Development, *Competition Policy and Intellectual Property Rights*, OECD, Paris, 1989.

[18] C Arup, *Innovation, Policy, and Law: Australia and the International High Technology Economy*, Cambridge University Press, Melbourne, 1993.

[19] J Boyle, "A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading" (1992) 80 *California Law Review* 1413 at 1437.

[20] D Lamberton, *Information Economics: Threatened "Wreckage" or New Paradigm?*, Working Paper 1990/1, CIRCIT, Melbourne, 1990.

protection.[21] Another notable development has been the United States' unilateral use of trade sanctions to place pressure on individual countries to institute stronger intellectual property laws.

It can be difficult for individual countries to resist such pressures if the mobility of the transnational producers affords them scope to play off competing jurisdictions for the kind of legal support they desire. Even the larger countries can be threatened with the withholding of technology transfer and investment or retaliation in lucrative export markets if they fail to give reciprocal backing to property rights. But at the same time, legitimate queries may be raised about the net gains to be made from intellectual property protection where a country finds itself to be largely a consumer of high technology goods and services from overseas.[22] The major producer nations, the United States, Japan and Western European countries have all revealed strategic gaps in their own intellectual property coverage at those times when their relevant industries were only at the developmental stage.[23]

In contrast to the evident agonizing in public policy over measures of particularized assistance and direction, property questions are customarily resolved in relatively quiet and select circles. There is a tendency to treat such questions as the domain of "neutral" expertise. Locally, for instance, the commercial law firms and industry associations seem very well-represented in deliberations with government officials.[24] Furthermore, the international developments raise the prospect that property questions will be taken out of the hands of nation states and determined in the transcendental world of international trade organizations.[25]

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21 H Ullrich, "Industrial Property Protection: Fair Trade and Development", in *GATT or WIPO?: New Ways in the International Protection of Intellectual Property,* F Beier and G Schricker (eds), Max Planck Institute, Munich, 1989.

22 A good local example was provided by the reservations of the Commonwealth Government's own economic advisors about the utility of the patent system; see Industrial Property Advisory Committee, *Patents, Innovation and Competition in Australia,* AGPS, Canberra, 1984.

23 S Ricketson, "New Wine into Old Bottles: Technoligical Change and Intellectual Property Rights" (1992) 10 *Prometheus* 53.

24 At least according to J Court, "The Politics of Copyright and the Problem of Hometaping" (1986) 4(2) *Copyright Reporter* 11.

25 Y Dezalay, "The *Big Bang* and the Law: The Internationalization and Restructuration of the Legal Field" (1990) 7 *Theory, Culture and Society* 279; specifically see R Nimmer and P Krathaus, "Globalization of Law in Intellectual Property and Related Commercial Contexts" (1992) 10(2) *Law In Context* 80.

Yet, the concession of property rights deprives government of a great deal of "space" in which it can seek to tailor economic policies to suit social purposes, balance conflicting interests and meet situational demands.[26] Of course, this constraint is, at the same time, one of the attractions of property rights, and the rule of law generally, and a reason why those on the left of politics are also drawn at times to the formulation of claims in terms of rights discourse. So it is necessary to ask whether it is likely property entitlements, like particularized regulation, are to be assessed with an open mind, distanced from the interests which stand to benefit by appropriation? Can property laws be the subject of regulatory "capture" and rent-seeking behaviour? Will conditions and qualifications be attached in a purposive approach to law formulation so as to ensure continuing access to vital resources? Will indeed the succour of static property theory be at times denied to the protection of new economic, intellectual values?[27]

It is worth noting that property entitlements are not necessarily the natural product of timeless and independent common law processes; they are often the result of active, legislative initiative, in some cases to overcome the gaps perceived in the common law. Property entitlements are in this strong sense privileges conferred by the state. Open to question also might be the conditions on which other legal privileges, that also shield economic interests from the disciplines of the market, are awarded. A good example is the limited liability corporate form. Limited liability has been an important reassurance to genuine investors, but there is little doubt the privilege has also been abused.[28] To cite a parochial example: while then in Opposition, the Victorian Coalition pushed through an amendment to a Government bill that had the effect of conferring limited liability on partnerships such as accountancy and law firms. This major change, partly unintended it seems, received little publicity.[29]

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[26] P Hirst, "Law, Socialism and Rights", in *Radical Issues in Criminology*, P Carlen and M Collision (eds), Martin Robertson, Oxford, 1980. See specifically in relation to intellectual property rights, P Drahos, "Decentering Communication: The Dark Side of Intellectual Property", a paper presented to the conference on Freedom of Communication in Australia: A Study in Applied Philosophy, Faculty of Law and Research School of Social Sciences, Australian National University, 6-8 August 1993.

[27] As recommended, for instance, by the OECD's committee of experts in the case of information stored in computers; see Organisation for Economic Cooperation and Development, *Computer Related Crime: Analysis of Legal Policy,* OECD, Paris, 1986.

[28] A Freiberg, "Abuse of the Corporate Form: Reflections from the Bottom of the Harbour" (1987) 10(1) *University of New South Wales Law Journal* 67.

[29] See now *Limited Partnership Act 1991* (Vic).

Contract

Contract is the complementary institution to property and in some analyses of the workings of the economy, it becomes the functionally more important one.[30] Contract is at the same time the legal counterpoint to informal exchange relations: it proves an attractive regulatory mechanism where these relations break down.[31] For Chicago School analysts, contract should be confined to the role of minimizing the obstacles which "transaction costs" (the costs of forming and enforcing agreements) place in the way of markets achieving their own agreements; after all, free market transactions are said to be the most efficient (even the most democratic) expression of individual preferences. But, in engaging even this minimalist function, resort to contract, especially to resolve disputes once they have arisen, bears its own costs, too high to make it a routine practice.

Consequently, the smooth functioning of voluntary exchange processes, and the control of transaction costs in particular, also depend on a basic level of trust and good faith in dealings. The market needs its own morality,[32] but market practices in the eighties did little to engender confidence in this regard, especially among small investors and customers. Both the courts (especially through the principles of equity) and the legislatures (in fair trading acts) have displayed in recent years a greater willingness to vitiate individual contracts and to recognize extra-contractual interests where they consider that "unconscionable" relational conduct justifies so doing.[33] This is another indication, like respect for property rights, that trade is meant to be "fair" as well as free.

For some, given the challenge to the direct protections of particularistic standard setting regulation, this development seems to offer the most potential to ameliorate the harsh workings of the market. The extent to which the courts are prepared to question the integrity of contracts remains an

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30 K Renner, *The Institutions of Private Law and their Social Functions,* Routledge and Kegan Paul, London, 1949 (translation by A. Schwarzchild).

31 S Macaulay, "An Empirical View of Contract" [1985] *Wisconsin Law Review* 465.

32 Writing for the Times Literary Supplement (see *The Australian* 26 January 1994), Ferdinand Mount comments: "The New Right, above all, neglects history and offers an impoverished account of how we came to be as we are. This neglect blinds it, not only to the rich stickiness of our cultural traditions, but also to the fact that the common life which arises out of those traditions precedes and makes possible the free market and not the other way about."

33 P Finn, "Commerce, the Common Law and Morality" (1989) 17 *Melbourne University Law Review* 87.

uncertain question. At the moment, their forays appear tentative. A basic distinction seems presently to be made between procedural and substantive unconscionability,[34] so the courts show concern about the frankness and sensitivity of dealings and the genuineness and quality of assent, rather than attacking the fairness of contractual outcomes head on. In this way, they focus on the micro-morality of individual dealings rather than confronting the structual inequalities of many relationships (which would take us back, in part, to the question of property norms).[35]

Scepticism about the impact of the High Court's recent decisions goes beyond this point.[36] Another vital query must concern the extent to which its attitude, developed in expensive appeal cases and long, multiple judgments, has filtered down to the level of practical day to day commercial dealings. Nonetheless, the potential remains for a major change in the nature of contract law. This potential is revealed by the remark of Deane J, in the key case of *The Commercial Bank of Australia Limited v Amadio and another,* that:

> Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purpose of the principles relating to relief against unconscionable dealing may take in a wide variety of forms and are not susceptible to being comprehensive catalogues. In *Blomley v Ryan* (52), Fullagar J listed some examples of such disability: "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkedness, illiteracy

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[34] The distinction between procedural and substantive standards is an important one in legal theory generally, some seeing an emphasis on the prescription of procedural norms as the law's most effective role, others highly sceptical of the power of procedure to make any difference to outcomes.

[35] The unfairness of the price to be paid may be an indication there was unconscionability, but does not of itself constitute it, cf. *Trade Practices Act,* s 51AB. Neither does inequality of bargaining power. In any case, taking account of inequalities in bargaining power does not broaden the focus dramatically. Discussing the contract of employment, Collins argues that, even if the employee enjoys improved bargaining power, the social dimension of subordination remains. This is due to the organisational structure of production in advanced industrial societies; see H Collins, "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 *Industrial Law Journal* 1.

[36] J Carter and A Stewart, "Commerce and Conscience: The High Court's Developing View of Contract" (1993) 23 *University of Western Australia Law Review* 49.

> or lack of education, lack of assistance or explanation where assistance or explanation is necessary".[37]

How far will the strong, economically rationalist state be prepared to let such a tendency develop? After all, it might not sit well with the notions of "freedom of contract", individual self-reliance, and the predictive certainty of the market order. An indication of recent policy is the Commonwealth Government's cautious response to proposals that the relief afforded by the *Trade Practices Act* 1974 (Cth) against unconscionable conduct in "consumer" transactions be extended to "commercial" transactions.[38] In the event, the Government chose not to open contracts between commercial parties to the same statutory scrutiny as consumer contracts. Rather, it chose to incorporate in the Act the existing doctrine of unconscionability which has been developed by the courts within the law of equity, further emphasizing: "the equitable principles of unconscionable conduct do not embrace conduct, which, with nothing more, is merely unfair or unreasonable, or which merely amounts to a hard bargain".[39] International law may also place a constraint on this recent tendency in Australian contract law. Allan and Hiscock[40] identify another source of resistance as the drive by bodies such as UNCITRAL to internationalize contract law. In particular, this drive will place in question the relief which local courts afford against penalty clauses in contracts because many other major trading nations do not share this concern about such clauses.

The labour relation is shaping as a critical test of contract law's trajectory in the near future. Just when they have achieved some success in rolling back centralized particularistic regulation of employment standards, advocates of a free market in labour have expressed concern about the prospect of the courts' departure from nineteenth century notions of freedom and sanctity of contract.[41] A local example highlights the tension. When presented with the

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[37] (1983) 151 CLR 447 at 474.

[38] Parliament of Australia, House of Representatives Standing Committee on Industry, Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities,* AGPS, Canberra, 1990.

[39] See CCH Australia, *Australian Trade Practices Reporter,* CCH Australia, North Ryde, 1993 at #20-792. It should be noted this law of equity does not itself categorically rule out relief for commercial parties.

[40] D Allan and M Hiscock, *Law of Contract in Australia,* 2nd edition, CCH Australia, North Ryde, 1992.

[41] For example P Brook, *Freedom at Work: The Case for Reforming Labour Law in New Zealand,* Oxford University Press, Auckland, 1990; see latterly R Ryan and P Walsh, "Common Law v Labour Law: the New Zealand Debate" (1993) 6 *Australian Journal of Labour Law* 230.

possibility tribunals and courts might so intervene in the employment agreements made under the *Employee Relations Act* 1992 (Vic),[42] the Victorian Minister for Industry and Employment responded:

> This concern fails to recognize that the Government has created in the Employee Relations Act 1992 a new legal framework for the formation and consideration of employment agreements. The act safeguards "community standards of fairness" by specifying minimum provisions which must be made in employment agreements for fundamental matters such as pay and leave.
>
> By establishing these standards Parliament has said that employment with these entitlements does not amount to exploitation. Tribunals cannot "second guess" Parliament by adding terms which they think are fair to an agreement which meets the standards which Parliament says are acceptable.[43]

Or, for that matter, should they negate terms which have been "agreed". An ironic example from an early employment agreement was a term that *limited* competition (within a certain radius of a beauty parlour chain) for five years after employment ended.[44] Was a court to have jurisdiction to decide whether this term transgressed the common law's doctrine of restraint of trade?

Freedom of contract is generally taken to mean freedom of individual contract. What role, then, is to be envisaged in a "free" labour market for collective action and agreement? With its individualist, competitive focus, the common law has found it very difficult to accommodate this dimension to labour relations and in particular either to afford the collective agreement a workable legal status or to excuse collective action from tortious liability. The Victorian *Employee Relations Act* favours individual employment agreements and makes it difficult to take collective industrial action legally. In its desire to promote enterprise bargaining and in particular agreements within non-union workplaces, the Commonwealth government has too had to face the issue of whether it would impose procedural or substantive standards upon such "contracting"; controversy has also surrounded the issue

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[42] In a letter from a lecturer in law at Macquarie University, John Gava, to *The Age* newspaper, 14 January 1993.

[43] *The Age* 21 January 1993.

[44] *The Age* 20 February 1993.

of the extent to which its new scheme should immunize unions against the industrial torts and the secondary boycott provisions of the *Trade Practices Act*.[45]

In the market labour relation, the other side of the equation is represented by the law's conceptualization of the "enterprise" or other employer bargaining unit. In a major qualification on the notion of individual contract, the law has been prepared to treat the company as an individual legal person. While conveying a sense of formal equality between the parties (often of quite different strengths), it has allowed capital to collectivise behind the veil of the corporation. This conceptualization has also given rise to many problems of locating responsibility. They are compounded today by the fact the real patterns of power are often to be found within larger corporate groups which cross over the formal lines of legal demarcation.[46] Only slowly does the common law (or legislation for that matter) adjust its doctrine to these organizational realities. Yet location of effective power is the key to the success of procedural standards, such as the provision of meaningful information on matters such as corporate performance, capacity to pay wages, and the authority to make changes, for example to ensure safety.[47] The problems are compounded of course by the fact the groups now often range over competing national jurisdictions.

All this might be said to be part of a broader challenge to traditional contract law concepts arising out of the recognition of "relational contracting" as distinguished from "transactional contracting": "the social world of semi-autonomous contracting cultures, governed by relations of cooperative organic solidarity and of pervasive hierarchial domination" as Gordon[48] describes it. A related challenge lies in the preparedness to transcend the public/private divide and recognize private organizations as well as public institutions can also be involved, within a contractual framework, in the

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[45] See now the *Industrial Relations Reform Act* 1993.

[46] D Sugarman and G Teubner (eds), *Regulating Corporate Groups in Europe,* Nomos Verlagsgesellschaft, Baden Baden, 1990.

[47] H Collins, "Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration" (1990) 53 *Modern Law Review* 731. Similar problems have arisen in the regulation of relations between corporations and creditors, leading to common law as well as statutory moves to "pierce the veil". But major conceptual and political changes are needed before the realities of many economic associations, for example the relations between family members in bankruptcy cases, are effectively encompassed.

[48] R Gordon, "Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law" [1985] *Wisconsin Law Review* 565 at 575.

regulation and administration of their rivals, suppliers, employees and customers.[49]

Competition

Such developments in the law of contract place faith in the power of procedural standards to steer markets in the direction of balance and fairness. But might it be necessary also to keep the structure of markets under scrutiny as we saw in the case of property entitlements? Competition law has had to grapple with this issue as it moved from the prescription of specific market conduct rules onto the control of market power and the examination of mergers and takeovers.

An idealized free market economy is a perfectly competitive one. Promoting the conditions for competition means in part breaking down public monopolies. In Australia, the States' energy utilities and marketing authorities are a prime target of this strategy, spurred by the Trade Practices Commission (now Australian Competition and Consumer Commission) itself and subsequently adopted by the Hillmer report.[50] But these public monopolies are not just public enterprises, they are also created by rationing entry to lucrative markets among private businesses, for example through selective licensing. With its intellectual origins in Northern American public choice theory, economic rationalism is at pains to deny any industry players legislative immunities.[51] But can government resist the importunities of its own powerful constituencies, for example in the broadcasting industry, for protection from open (not partial) competition? Pay TV provides an indication - from a free market point of view, why should there be any restriction on market entry at all?[52]

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[49] B Bercusson, "Economic Policy: State and Private Ordering" in *Law as an Instrument of Economic Policy: Comparative and Critical Approaches,* T Daintith (ed), Wallter de Gruyter, Paris, 1988.

[50] National Competition Policy Review, *National Competition Policy: Report of the Independent Committee of Inquiry,* AGPS, Canberra, 1993. The States have since agreed with the Commonwealth to implement the recommendations of the Report: *The Age 26* February 1994.

[51] I McLachlan, *Government and the Competitive Process: The Stan Kelly Memorial Lecture,* Parliament of Australia, Canberra, 1991.

[52] Padraic McGuinness writing in *The Australian,* 6 May 1993. Casinos might be another. This rationing also brings into relief the public/private divide. If a company is floated after it has received an exclusive licence to run a casino, should the broker be free to allocate the shares privately to its own select, regular customers; see *The Sunday Age* 27 March 1994?

Competition policy has international dimensions too. There is a push, reflected in bodies such as the OECD[53] to replace all selective trade and investment controls with a generalist competition regime. But competition policy can be invoked by foreign producers and investors as a means to obtain greater access to local markets and businesses. Some sections of the local economy benefit from this influx of foreign goods and capital but others are of course displaced. On one view, anti-dumping procedures, for example, are as much discriminatory as more classic trade restrictions. A threshold issue for competition policy is what to characterize as pro-competitive rather than anti-competitive. Are foreign suppliers engaging in predatory pricing or just taking advantage of superior "efficiency" (including cheaper and disposable labour or the externalization of environmental harm) when they undersell local food producers? In the sugar industry, for example, strengthening anti-dumping relief was the necessary political trade-off for the elimination of tariffs. Ultimately, government has to decide to what extent untrammelled competition is to extend over national boundaries. As Ostry recognizes,[54] the regulation of flows of foreign direct investment and the freedom for foreign take-over of national enterprises is the increasingly critical issue, even in countries like the United States which have had a relatively open policy in the past. While the GATT agreement on liberalization of trade in services was meant to increase the pressures to remove quantitative restrictions on market access, countries continue to resist in key sectors such as shipping, telecommunications, audio-visuals and finance, even after the general conclusion of the Uruguay Round.

In such debates, we sometimes seem to forget it is not just government which creates barriers to competition. Left to its own devices, the free market seems to move inexorably in the direction of concentration and control. Purist competition policy requires action against private restrictive trade practices, cartels and market dominance. Most topically, it seems from overseas evidence the current wave of privatization carries the risk of simply replacing public with private monopolies and oligopolies.[55]

Competition law is itself a kind of regulatory intervention in the free workings of the market, a forceful one if tools like injunctions and divestiture

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[53] Organization for Economic Cooperation and Development, *Competition and Trade Policies: Their Interaction,* OECD, Paris, 1984.

[54] Ostry, above, n 8.

[55] M Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77. See further the discussion of privatisation below.

orders are employed. Recent Chicago School thinking has somewhat undermined right-wing faith in competition as a process, preferring to recognize the economies of scale and scope which accrue from vertical and even horizontal integration to the benefit of the ultimate consumer.[56] Certainly work in the realm of institutionalist economics has stressed the importance of all sorts of industry linkages and clusters to success in developing the core or strategic high technology industries. A particular concern with the effects of "disorganized capitalism"[57] has been the detachment of the financial markets from the system of production, especially in the English speaking countries and the consequent lack of venture capital and patient money for long-range industry development. This work recognizes that capitalism assumes different organizational forms throughout the world (consider the fascination with the Japanese model of corporatist market capitalism or, appropriating a word from a different context, "communitarian" capitalism). Generally, it marks a revival of interest in producer (as contrasted with consumer) economics in the science policy centres,[58] the management schools[59] and now within the discipline of economics itself with the emergence of "new growth theory" and strategic trade theory.[60] Ambivalence about the virtues of competition per se, and the desire to assess restrictive practices according to the particular situation, have led to greater departures from a framework of certainty and the rule of law. Competition law authorities are invested with practical discretion to reinterpret and prioritize offences, clear or authorize restrictive practices, and negotiate partial compliance.[61] Many practices are now assessed on a cost-benefit basis, their anti-competitive effects weighed against their economic and perhaps social benefits. It is possible the replacement of industry-specific regulation with one generalist competition regime, far from reducing regulation, will create a giant regulatory agency. This agency is likely to be invested with considerable discretionary power, increasing the opportunities for executive interference in individual cases.

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[56] H First, E Fox, and R Pitofsky (eds), *Revitalizing Antitrust in its SSecond Century: Essays on Legal, Economic and Political Policy,* Quorum Books, New York, 1991.

[57] S Lash and J Urry, *The End of Organized Capitalism,* Polity Presss, Cambridge, 1987.

[58] C Freeman and B Lundvall (eds), *Small Nations Facing the Technological Revolution,* Pinter Publishers, London, 1988.

[59] Thurow, above, n 9.

[60] Bureau of Industry Economics, *Recent Developments in the Theory of Economic Growth: Policy Implications,* Occasional Paper 11, AGPS, Canberra, 1992.

[61] K Hopt, "Restrictive Trade Practices and Juridification: A Comparaative Law Study" in *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Anti-trust, and Social Welfare Law,* G Teubner (ed), Walter de Gruyter, Berlin, 1987.

Have Australian governments the inclination to break up private (in Australia often foreign) centres of economic power or control their restrictive practices? Despite the interest now in state monopolies, no shortage of private targets remain if competition is the goal: retailing provides an example. And of the areas so far exempted, unlike the New South Wales Government, the Victorian Coalition has not moved urgently to reform the restrictive practices of the legal profession.[62] So too, while competition between workers is certainly the intention of labour reforms, if labour relations is to be subsumed within a market model, are governments likely to follow their logic through and apply, for example, anti-discrimination or equal opportunity laws vigorously to employers to overcome labour market segmentation? Is discrimination to be regarded as the preference of a competitive or an imperfect market? Theoretically, too, a free market would involve the lifting of all controls on labour migration, but this is a very sensitive area in which governments display considerable ambivalence. At the international level, the GATT also reveals this ambivalence, the agreement on the liberalization on trade in services being confined to the temporary movement of personnel providing such services and not extending to access to labour markets generally and permanent residence.

Looking to the international level generally, it is notable the United Nations attempts to institute a multilateral set of binding rules to regulate restrictive business practices have so far failed. After the war, competition policy was built in to the charter of the International Trade Organization but was dropped from the brief of the body which was eventually established, the GATT. The OECD is now working hard in this area, but, while globalization of the economy alters the perspective of domestic legal policy formulation, motivating explicit attention to the regulatory systems in other countries, it does not necessarily lead to international harmonization along liberal lines. Countries may strive to promote the opening of other economies to foreign competition while readjusting their own arrangements to neutralize a regulatory advantage in a rival state or to gain one for local industry. There may be an injection of internationalist liberal biases into some areas of domestic policy while others remain subject to protectionist and mercantilist approaches. Considerable doubt remains as to whether competition regulation will reach the agenda of the post-Uruguay Round World Trade Organisation.

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[62] Law Reform Commission of Victoria, *Competition Law: The Introduction of Restrictive Trade Practices Legislation into Victoria,* Report No. 49, LRC, Melbourne, 1992.

Substantive Regulation

The crisis of the social democratic state has already led to some roll-back of regulation of a substantive kind, especially in the fields of "social regulation" such as environment protection. But to take an example from the heart of the market, despite the experience of the eighties, proposals for more specific and intense regulation (for example of directors' remuneration) are still being opposed as the means to check corporate misconduct. Out of a concern with over-inclusive or ill-directed regulation, "fuzzy law" has been recommended, with open-textured standards leaving application to the judgment of the courts.[63] On this model, criminal prosecutions are to be confined to extreme cases, self-help through civil litigation being a better measure of dissatisfaction with conduct and a more cost-effective avenue of relief. There is a view dishonesty cannot be prevented by legislation. Yet securities markets also run on trust and confidence, and the "cowboys" of the eighties and their institutional sponsors are said to have discouraged many local small investors and even some foreign investors from participating in domestic markets.

Accordingly, governments have to determine whether strict legislative standards of corporate behaviour are to be part of their framework for certainty. But, at the same time, they experience the pressure of competition from other regulatory systems in their efforts to attract corporations to locate here. In company law, the national code has alleviated some of the dangers in a federal system of a Delaware strategy,[64] but Australia may in some financial and securities markets also be competing with other countries in the region. The agonizing over News Corporation's proposals for shares with super voting rights provides a recent example. According to many, standards ought to be simple and straightforward so foreign business finds Australia an attractive place to locate and local business proves to be cost-competitive.[65] But will the standards also have to be fair? Governments' attitude to corporate tax evasion through transnational transfers provides another test.[66]

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[63] R Baxt, "Opening Address to the 1992 National Corporate Law Teachers Workshop" (1992) 2 *Australian Journal of Corporate Law* 6.

[64] I Ramsay, "Company Law and the Economics of Federalism" (1990) 19 *Federal Law Review* 169.

[65] P Costello, "Is the Corporations Law Working?" (1992) 2 *Australian Journal of Corporate Law* 12. See now M Lavarch, "Corporations Law Reform in the 1990s", Corrs Chambers Westgarth Guest Lecture, Melbourne, 4 August 1993, reproduced in Commonwealth Government, *Ministerial Document Service,* no 19/93-94, 5 August 1993.

[66] Which the Australian Taxation Office continues to concede, see *The Age* 30 November 1992.

The problems facing regulation are immense. At the very time when the rationality of those acting privately in the market is again being questioned,[67] cognitive overload, political controversy and regulatory failure in the public sphere have created an argument for scaling down the ambitions of the law. On this view, the law should concentrate on constructing more decentralized and responsive relationships. In achieving social goals, such an approach will rely to a greater extent on the resources of the regulated and allow them more choice in the manner of adjustment to social demands. Systems theory has had an influence here.[68] The renewed interest in business ethics is another symptom of this disillusionment with substantive regulation.

There is always room for more informed and creative thinking on instrument design.[69] But is this emphasis on process the best strategy? The potential of these relationships depends very much on how they are constituted and in particular on which interests are included in their deliberations and on how their processes of communication and negotiation are ordered.[70] We have foreshadowed this issue in the discussion of labour relations reforms above; corporate regulation provides another good example. Will all the current, voluntary reform of internal company processes (codes of conduct, audit committees and so on) make a lasting difference? In the move away from central regulatory directives, are governments prepared to re-regulate with innovative kinds of corporate government structures, or are in effect untrammelled market forces to be allowed free rein? In particular, with the collapse of centralized arbitration, will worker participation on the European model become part of the enterprise's modus operandi?[71] In Europe, resistance from transnational business is placing pressure on this institutional tradition.

Demands for regulation of some kind will continue to come from such quarters as small business, local industry, the individual investor and labour

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67 R Lane, *The Market Experience,* Cambridge University Press, New York, 1991 . See specifically R Ellickson, "Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics" (1989) 65 *Chicago-Kent LawReview* 23. I am indebted to a colleague, Judith Grbich, for this latter reference.

68 Teubner, above, n 4.

69 I Ayres and J Braithwaite, *Responsive Regulation: Beyond the Deregulation Debate,* Oxford University Press, New York, 1992.

70 D Kettler, "Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy" (1987) 21 *Law and Society Review* 9.

71 C Arup, "Labour Law, Production Strategies and Industrial Relations" (1991) 9(1) *Law In Context* 36.

unions. With its understandable concern about capture, economic rationalism would have government resist any claims by special interests for public preferment and regulatory control. But governments find it hard to remain detached in the long term. With the roll-back of legislative regulation, there may be a temptation to seek informal compacts with industry when problems arise.[72] This forms part of a broader question: is the "framework for certainty" to include strict, rule-based constraints on the government's own executive action, including the observance of procedural standards in decison making on the award of state favours?[73]

Furthermore, while industry may not wish to be directed by government, it does continue to seek assistance from time to time in the form of concessions. Despite the differences in their core ideologies and political traditions, all Western states find it difficult to avoid involvement with industry.[74] Again, it may only be the case the guises and targets of regulation change from time to time. For example, we may now be seeing a shift only in the nature of the instruments of protection from foreign competition in the local market, from negative defensive measures like tariff barriers to "positive adjustment measures" such as tax concessions, production bounties, and public purchases; on the external front, the "grey" measures of voluntary export restraints and orderly marketing arrangements may even be overtaken by explicit managed trade strategies with sector-specific quotas. It is true industry assistance may have to be legitimized as national security or regional development in certain countries but the same levels of support appear to be achieved. To invoke a local example, the "dries" of the National Farmers Federation did not seem inclined to reject the many kinds of financial assistance the wool industry now requires.[75] Again, the most likely international instrument, the GATT, failed to keep control over these multifarious forms of support for domestic industries.

Yet the demands on the state go beyond occasional support into the need for overall coordination. The "deregulated" financial sector provides the crucial example. Boom and bust, inflation and unemployment cannot simply be attributed to inappropriate government intervention. To the contrary, they

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[72] N Lewis and P Wiles, "The Post-Corporatist State?" (1984) 11 *Journal of Law and Society* 65.

[73] In attracting a Grand Prix race, a State government might promise to suspend all normal planning processes and provide the participants with immunity from review in the courts, see *The Age* 16 March 1994.

[74] S Wilks and M Wright (eds), *Comparative Government-Industry Relations,* Clarendon Press, Oxford, 1987.

[75] *The Australian Financial Review* 6 May 1993.

create demands for government vigilance before the event and for the bailing out of the private sector afterwards. In the United States, the Government has had to pledge a staggering amount of public money to meet the guarantees to investors in the savings and loans banks, private pension funds and insurance companies that failed so spectacularly in the eighties.[76] It is unlikely any Australian State government, whatever its political persuasion, would find it easy to divorce itself from a crisis like the Pyramid one. Eventually, the ability of a government to manage particular economic processes is called into question again, and it is required to demonstrate more than an abstentionist purity of principle. The fickleness, the anarchy, of global financial markets also give rise to calls for coordination. In order to attract the financial business associated with these markets, some countries have been prepared to offer a permissive regulatory climate while seeking to offload the burden of financial failures onto other countries. Transnational markets afford users an easier access to a multitude of financial innovations (such as securities and derivatives), some designed to circumvent national regulation of particular kinds of financial institution or instrument.[77] But such financial failures can threaten the stability, indeed the essential viability of a national economy.[78] If unilateral national controls are truly no longer feasible, then commitment to regulatory coordination at the international level is necessary to ensure responsibility for prudential supervision and insurance against failures is to be effectively shared.[79]

Paradoxically, the move to promote decentralized enterprise bargaining, employment flexibility and lower unit labour costs may also require the state to be strongly interventionist. The policy may involve restricting the freedom of trade unions to organise various workplaces and to govern their internal affairs (which is after all one of several competing versions of freedom of contract and association).[80] Certainly, in Victoria, by criminalizing breaches of contract, enforcing voluntary unionism, and limiting industrial action, the

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[76] Thurow, above n 9.

[77] H Cavanna (ed), *Financial Innovation,* Routledge, London, 1992.

[78] In such sensitive sectors, globalisation may challenge the whole notion of a unified national interest. So, the French sought to take the audio-visual services sector out of the GATT trade liberalization negotiations because of its role in shaping a basic cultural identity.

[79] S Picciotto, "The Internationalisation of the State" (1991) 43 *Capital and Class* 43. These calls might be situated within a broader movement for international substantive regulation so that individual countries do not gain a competitive advantage by undercutting on consumer, labour, environmental and like standards or free riding on other countries' adherence to such standards.

[80] K Wedderburn, "Freedom of Association and Philosophies of Labour (1989) 18 *Industrial Law Journal* 1.

Coalition's industrial relations policies have a very prescriptive look to them. Now, as we noted above, the Commonwealth Government must determine the extent to which it allows free rein to union recruiting and bargaining tactics when it implements a new framework for workplace agreements.

Another quandary, this time in criminal law, is whether to break from the conservative tradition and treat matters of sex and culture as free market commodities rather than as part of the essential social framework.[81] Arguably, the most powerful opposition to controls are commercial media interests, rather than the popular target of state school teachers lost in the sixties.[82] The treatment of pornography and portrayals of violence is a key issue on which some right and some left (and some feminist) opinion seems currently to be converging. But this quandary does not simply give rise to the possibility of making an exception to free market principles. As David Marquand points out in a response to the British Government's "back to basics" campaign: "the free market is itself the enemy of tradition, of stability, of establishments, of deference - of anything that restrains individual appetites".[83]

Criminalization is another dilemna for economically rational governments. Social deprivation leads to crime of a marginal kind, and free market policies can have negative impacts here. Yet the response is often to weigh in with stronger, more coercive "law and order" measures rather than to reconsider the economic and social causes.[84] On the other hand, some kinds of criminalization can generate an industry, indeed a very large one in economic terms. By rendering certain practices illegal and sending them underground, government provides organized crime with a competitive advantage in a lucrative market, free of safety, consumer, labour or tax standards, or indeed any legal obligations. Consistently, deregulation would extend to the lifting of such prohibitions. Prostitution and the drug trade are longstanding examples; theoretically, there are many others such as trade in bodily organs for transplant or even in babies for adoption.[85]

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[81] Gamble, above, n 5.

[82] For an extreme view, see M Medved, *Hollywood v America: popular culture and the war on traditional values,* Harper Collins, New York, 1992.

[83] *The Guardian Weekly* 23 January 1994.

[84] R Hogg and D Brown, "Violence, Public Policy and Politics in Australia", in *The Social Effects of Free Market Policies: An International Text,* I Taylor (ed), Harvester/Wheatsheaf, London, 1990.

[85] P Swan, "Is Law Too Important to be Left to the Lawyers?: A Critique of Two Law Reform Commission Reports, Human Tissue Transplants and Insurance Agents and Brokers", in *Law and Economics*, R Cranston and A Schick (eds), Australian National University, Canberra, 1982.

Privatisation

Privatisation encapsulates many of the general issues already identified. Again, the paper is not so much concerned here with the merits of the policy as its internal consistency. It is not always conceded that the implementation of a privatisation program can involve close relationships with business and the conferral of public benefits on private interests. Adherence to a competition policy would at least require the lucrative work of selling the state enterprises be open to scrutiny. Large fees can be earned by private managers (in Britain some 4 per cent of the capital raised), and profits can also be taken if the shares are offered at less than market price. In Australia, this process was underway under Labour governments, but how much awareness was there of the conditions on which Qantas, for instance, was privatized?

A longer term concern is the destination of the enterprises. Here, a free market principle may come into conflict with other objectives. For example, in the United Kingdom, some effort was made, at least symbolically, to limit the concentration of shareholding and provide opportunities for small investors and the enterprises' employees. A related question is the freedom of the shareholders to then sell their shares on the open market. "Golden shares" can also be retained by government to enable it to prevent foreign take-overs and keep the industries in local hands.[86] Yet such objectives may conflict with the government's desire to obtain the best and the quickest price for the business in order that it might be relieved of its current deficit problems.

Government also faces the question of the regulatory relationship with industry after privatisation. Privatization may simply replace a public monopoly with a private one, subject in fact to less control than its predecessor as all the accountability mechanisms attached to state-owned enterprise are stripped away.[87] Questions here include whether industry-specific regulation is instituted to protect dependent groups, at least in the transition to open markets, and whether, to recall the discussion above, the industries are subjected finally to the full rigours of open (not guided)

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[86] C Graham and T Prosser, "Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques" (1987) 50 *Modern Law Review* 16.

[87] Taggart, above, n 55. See further J Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand,* Bridget Williams Books, Wellington, 1993.

competition under a generalist trade practices regime.[88] Buyers may be deterred by the prospects of competition. A real quandary lies in the "natural monopolies" within the energy sector; does a small country like Australia need more or less combination of efforts in this area? If monopolies are to be allowed, what sort of regulation is envisaged to safeguard the interest of local suppliers, employees and consumers.[89]

Conclusion

One of the intellectual appeals of the new right program, at least to its adherents, is its principled detachment from the mire of particularized resource allocations and the mediation of conflicts in civil society. Once we begin to say some values are to be part of the mandatory framework and not subject to the preferences of the market, and we also say the market must be fair as well as free, we are really just discussing again the particular objects and contents of regulation. To concede this opens up a whole range of alternatives to consideration, while failure to do so only exposes the contradictions within the program. If, as seems to be the case at the end of the twentieth century, capitalism has triumphed over all rivals, this is no reason for government to abdicate. After all, there are many variations on the capitalist theme possible, and even that great champion of the free market, Friedrich Hayek, stressed the need to take great care with the design of its legal institutions. This is the debate Australia now needs if it is not, because of a failure of imagination, simply to slide into a kind of default position of laissez-faire.

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[88] C Veljanovski, *Selling the State*, Weidenfeld and Nicolson, London, 1987.

[89] *The Australian* 3 May 1993.