

Article Information

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Digital markets and the paradigm of competition

This article discusses the implications of current competition law investigations in Australia and overseas for the paradigm of markets and competition which competition laws enforce

Consultant George Raitt discusses the implications of current competition law investigations in Australia and overseas for the paradigm of markets and competition which competition laws enforce. His forthcoming book, The Metaphysics of Market Power: The Zero-Sum Competition and Market Manipulation Approach examines the concept in more detail.

The ACCC in December 2018 released the preliminary report of its year-long enquiry into digital platforms such as Google and Facebook. In summary, the ACCC considers that those corporations have substantial market power, and the ability and incentive to favour associated businesses. The ACCC is investigating some concerns that certain digital platforms may have breached competition laws. It is well known that in 2017 the EC fined Google €2.42 billion for abusing its market dominance as a search engine by promoting its own comparison shopping service in its search results. Similarly, in July 2018 the EC announced it had fined Google €4.34 billion for abusing its market dominance by placing restrictions on Android device manufacturers and network operators to cement the dominance of its search engine. These matters are clearly uppermost in the mind of the ACCC.

The focus of this short article, and the forthcoming book, is the more general matter of the paradigm of competition and the nature of market power. Digital markets bring this issue into high relief. The paradigm of 'zero-sum competition' proposed in the book is closely related to the idea of 'competition for the market' which is noted in the literature to be a feature of markets in the digital economy. The common features with zero-sum competition are that firms compete for the market, ie success of one is achieved at the expense of the other(s), and since firms invest heavily in technology, with consequently high exit costs, they cannot freely leave the market so must compete for survival. The rise and fall of the BlackBerry company provides a powerful example of this kind of dynamic competition. Of course, examples of this kind of competition, such as pharmaceuticals, pre-date digital technologies.

Australian competition legislation has been amended in late 2017 following a controversial three year law reform process. The book has been in preparation before, during and since that process was completed. Review of the Australian and overseas literature indicates enduring controversy about market power in Australia and overseas. The author suggests this arises because our legal concept of market power is insufficiently legally determined. The law and policy has been internationally criticised for lacking clear positive and normative standards that would enable us to distinguish between normal competitive conduct and conduct that should be condemned. The book covers mainly Australian and EU law but also compares key points of US and Canadian law on market power. The issue of market power addressed in the book is of universal significance for competition laws around the world.

The traditional legal concept of market power as the ability to give less and charge more (or the ability to behave differently than a hypothetical competitive market would enforce) is based on a paradigm of the hypothetical competitive market in which no firm has market power. The author suggests that such a benchmark does not provide a useful standard of conduct in real world markets. The book proposes a new approach to both our conception of market power and the paradigm of competition in which we assess the misuse of market power.

The author proposes that market power can alternatively be related to the response of market demand to firms' price/output decisions, and thus can be legally conceived as the power of the market, which cannot be possessed but can be *manipulated*. All firms have this power to some degree. The author derives this concept of market power from the correlation between market power and elasticity of demand revealed by well-known analysis of the Lerner Index, which is used to measure market power. This approach is also supported by analogy with laws prohibiting manipulation of

securities markets, which is theorised without the overlay of conflicting welfare objectives and economic efficiency standards that has troubled competition law over a long period.

The author critically examines the assumptions underlying the paradigm of the hypothetical competitive market and suggests that we can alternatively identify a paradigm of competition, more closely resembling real world competition, in which to assess misuse of market power. The author derives this from the conventional description of real world competition as rivalry for the *same object*. This paradigm is called in the book 'zero-sum', or survival, competition in which one firm's gain is another firm's loss, where firms cannot freely exit the market and so must compete for survival.

When we consider market power as power to manipulate the market we can distinguish firms' price/output decisions and other decisions which respond to market demand from conduct which manipulates the market, distorting the market's efficient operation. It is proposed that by re-conceptualising market power in the context of zero-sum competition, and by developing the legal concept of an efficient market from the law prohibiting manipulation of securities markets, we can develop positive and normative standards to frame our legal theory of liability for misuse of market power.

The recent *Harper Review* in Australia challenged conventional thinking that economic efficiency is not a matter that the courts are competent to assess. The *Review* recommended that the statutory provision be amended to require courts to consider the efficiency effects of conduct when applying the test to assess whether alleged misuse of market power causes harm. Current legislative reform in Australia is based on the traditional legal conception of market power and, despite the *Review's* recommendation, rejects explicit consideration of economic efficiency, so is unlikely to quell the controversy. The author suggests that conventional concepts of economic efficiency cannot be forensically applied and so must be adapted and redefined if we are to apply them in our legal theory of liability. The author suggests that the concept of market manipulation, which distorts the efficient operation of the market, enables us to do this.

The book tests market manipulation theory on the facts of leading Australian cases under past law, using mainly EU, but also US and Canadian law, as a context, to show what difference the new and proposed laws would make. The book compares the application of the market manipulation theory with the *Harper Review's* recommended approach which would consider economic efficiency, and the new law as enacted by Parliament, which prohibits conduct of a dominant firm which has the purpose or likely effect of substantially lessening competition.

The Metaphysics of Market Power: The Zero-Sum Competition and Market Manipulation Approach, is due to be published in the first half of 2019 by Hart Publishing, Oxford.

For further information and to order a copy [click here](#).