Aspects of Trade Practices Regulation in an Era of Globalisation and E-commerce

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The article discusses the impact of globalisation and e-commerce on trade practices regulation around the world, particularly from the perspective of the ACCC. It examines how these developments are causing concerns and real challenges to regulators, and looks at what is being done to meet these challenges.

Introduction

As the new century began, the world had, indeed, become smaller.[1] At a time of spiralling globalisation in trade and commerce (both offline and online) it is perhaps appropriate to consider its impact on the regulation of trade practices around the world, particularly from the perspective of the Australian Competition and Consumer Commission (Commission).

This article discusses:

- the parallel developments of:
  - globalisation (particularly the rise of global mergers); and
  - e-commerce (particularly web sites and business-to-business ("B2B") e-commerce); and
- how these developments are creating trade practices concerns and challenges for domestic regulators around the world, and what steps are being taken to meet these challenges.

Globalisation

Commercial transactions are increasingly conducted not only domestically but between participants in different nations simultaneously. This internationalisation of trade and commerce reflects a broader movement toward:

- liberalising trade and domestic markets through deregulation and removal of barriers to entry; and
- embracing new technologies and ways of conducting business.

It is generally accepted that globalised markets are beneficial to consumers in terms of increased competition, greater choice and price, and to corporations also, in terms of new markets and efficiencies.[2] What is less known is globalisation's impact on domestic regulators such as the Commission. The role and challenge for domestic regulators is to ensure that unscrupulous and anticompetitive conduct by corporations does not undermine the benefits of globalisation.[3] It is questionable whether domestic regulators can fully protect their citizens from these types of conduct.[4]

The "borderless marketplace" has created a new set of challenges, with corporations being subject to overlapping and often conflicting regulatory regimes. This creates uncertainty as to:

- which country has jurisdiction over a transaction;
- which jurisdiction should apply where various countries have jurisdiction; and
- enforcement of domestic laws overseas.

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[1] C Shapiro and Hal R Varian, *Information Rules* (Harvard Business School Press, 1999), p 1.

[2] This aspect of globalisation is consistently recognised by the Commission, for example, Ross Jones, Commissioner, Victorian Commonwealth Executive Forum, "Get Started Today, Tomorrow Starts Now – "Mergers and Competition in a Global Environment", speech delivered on 31 August 2000.

[3] Jones, n 2.

[4] Daniel K Tarullo, "Norms and Institutions in Global Competition Policy" (2000) 94 *The American Journal of International Law* 478.

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Corporations have increasingly taken advantage of such uncertainties through international collusion on prices and other market sharing arrangements.

In Australia, the *Trade Practices Act 1974* (Cth) (Act) is the primary legislation which regulates trade practices and competition. The Commission, as Australia's competition and consumer regulator, is the primary enforcer of the Act and trade and commerce generally in Australia. However, the Commission's legal powers are unclear and much more limited when dealing with international trade and commerce. These restrictions clearly affect the Commission's ability to protect consumers in Australia. The Commission recently acknowledged that "with the expansion of the global marketplace, the Commission faces increasing cross border enforcement difficulties"[5] and that it must react quickly with new strategies.

While the Commission continues to apply the same law, it must now do so in dramatically changing circumstances and ever changing global markets.[6] Decisions made only a few years ago may be quite different today. Accordingly, applying traditional legal solutions to trade practices issues will be increasingly difficult in the face of cross-border transactions.

Global mergers

One interesting aspect of globalisation from a trade practices perspective is the spectacular rise of global mergers, usually involving large multinational corporations. In fact, worldwide merger activity reached $3.4 billion in 1999.[7] Such mergers are a direct response to the forces of globalisation and particularly the need for corporations to reduce costs, increase production, promote efficiencies and generally be internationally competitive. It is common for mergers between two overseas parent companies to result in the merger of their respective Australian subsidiaries. The Commission recognises that such mergers generally make a positive contribution to the Australian economy,[8] but they also pose a number of interesting competition challenges.

The competition challenges are essentially twofold:

- the practical challenge of enforcing domestic competition law on global mergers; and
- the public relations challenge of convincing Australian companies seeking to merge that competition law is relevant and in the interests of such companies.

A general concern is that in a world of global mergers, national competition laws and regulators are powerless to stop them.[9] This is simply not true. There are a myriad of competition regulators around the world (particularly in developed countries such as the United States, Canada and the United Kingdom) which are both able and willing to intervene in mergers which breach domestic competition laws. In Australia, the Act prohibits mergers between corporations in Australia that result in a substantial lessening of competition in Australian markets.[10] The scope of the Australian merger provisions is far-reaching, and not necessarily limited to mergers involving an Australian corporation. Indeed, it is quite likely the Act covers most overseas mergers which adversely affect competition in Australia.[11]

The myriad of competition laws also means participants of proposed global mergers face separate examination in each affected country to determine whether the merger breaches its respective domestic laws. Following different merger notification and clearance procedures in affected countries can be both time consuming and costly for the participants (often involving duplicating or conflicting national procedures).

In the wake of globalisation and global mergers, Australian corporations (particularly large corporations) are looking at domestic mergers as a means of obtaining sufficient scale to compete in the global marketplace. It has been suggested that

[5] Allan Asher, Deputy Chairman, *ACCC Update* Issue 3 (March 1999), p 1.

[6] See Jones, N 2.

[7] Merit E Janow, "The Initiative for a Global Competition Forum", Report, p 3, at International Bar Association meeting on 2–4 February 2001 at Ditchley Park.

[8] Alan Fels, Chairman, "The Trade Practices Act after 25 Years: Mergers and the Role of the Australian Competition and Consumer Commission" (1999/2000) (No 2) 4 *Deakin Law Review* 39.

[9] Fels, n 8, at 58.

[10] Section 50 and 50A of the *Trade Practices Act 1974* (Cth) (the Act).

[11] *TPC v Gillette Company* (No 2) (1993) 45 FCR 466. The Federal Court held that there was evidence of Gillette carrying on business in Australia through offshore New Zealand companies, and that this was sufficient to attract the court's jurisdiction under s 50 of the Act

the Act's merger provisions prevent Australian corporations from being internationally competitive[12] and that the provisions should be relaxed in the face of increasingly global competition. The long-running business concern with Commission decisions is that in protecting domestic competition, the Commission is not satisfactorily taking account of Australia's fringe position on the world stage.[13] Although the reality is that few mergers substantially lessen competition so as to require Commission intervention,[14] the challenge for the Commission is one of public perception, for it is perceived that the Commission does prevent many substantial mergers from proceeding.

E-commerce

E-commerce, in narrow terms, represents "all paid transactions of goods and services between business and consumers (B2C) or B2B which take place over the Internet".[15]

The Internet, and e-commerce in particular, has greatly facilitated the reach and impact of globalisation. E-commerce has fundamentally changed the nature of trade and commerce, by creating new:

- distribution and marketing avenues;
- products, services and marketplaces (such as B2B exchanges and auction sites),[16] and
- forms of technology.

Clearly, commercial activity over the Internet is on the rise, with approximately four million Australian Internet users and over 108,000 Australians shopping over the Internet.[17] For the most part the Internet is extremely competitive, offering businesses and consumers boundless opportunities and benefits. While the new technology generally liberates competition, it can create new monopolies and new sources of market power, which have the potential to harm competition and consumer welfare.[18] Accordingly, the development of e-commerce also "brings with it certain competition and consumer protection challenges for market regulators and participants alike".[19] Competition regulators want to ensure Internet markets remain competitive, open and free from unscrupulous operators.[20]

E-commerce represents a new territory of enforcement for the Commission,[21] essentially because it:

- affects the ability of competition authorities to monitor behaviour and enforce domestic laws; and
- potentially facilitates certain types of anti-competitive and collusive behaviour.

The unique features of the Internet, namely its

- ubiquitous and diffuse nature;
- size, speed and anonymity; and
- inherently dynamic nature,

make it extremely difficult for regulators to identify alleged offenders and impose traditional national controls and regulation on the on line supply of goods and services.[22] The challenge for regulators is to ensure statutory consumer rights and normal market forces continue to operate in the fast changing e-commerce environment.[23]

One of the Commission's major concerns is that the Internet provides unscrupulous operators and corporations with a completely new medium in which to operate.[24] Two of the "hot spots" being targeted by the Commission are web sites and B2B e-commerce.

Web sites

Web sites represent the visible front end of the Internet. The majority of users' dealings with the Internet occur through web sites. As such, web sites represent a fertile ground for fair trading and consumer protection issues. With the massive volume of information (including personal information) freely available on the Internet, it is not surprising that web sites give rise to problems such as information deficiencies, fraud and unethical conduct and privacy issues.

Accordingly, the Commission is increasing its efforts to educate corporations in relation to:

- the prohibitions under the Act which apply to both offline and online businesses, such as:
  - misleading or deceptive conduct or false representations;
  - false claims about products;
  - pyramid selling;
  - inertia selling (unsolicited goods); and
- the minimum statutory obligations relating to goods and services under the Act (such as warranties and refunds).

Operators of web sites (and anyone else involved with the web site) are potentially subject to these prohibitions as well as overseas consumer protection laws.

One of the Commission's main concerns with web sites is the potentially misleading and deceptive nature of information presented or not presented to the user.

A general concern is the use of web site technology and web site features such as hyperlinks (links which take users from one web page to another), framing (in which a web page is opened from another web site whilst appearing to be inside the original web site), and meta-tags (words within the source code of a web page which contain information about a web page). Clearly, if such features are misused by web site operators, users may become confused as to what or with whom a corporation is associated. For example, a misleading meta-tag consisting of a competitor's name could draw a user to a particular web site rather than the competitor's web site (often when a user enters the name into a search engine).[25]

A more specific concern relates to web site operators who present certain information but deliberately omit or under-emphasise other information so as to confuse users. This might include information relating to fees, conditions and legal disclaimers. For example, Internet service providers which generally provide Internet connection to users may market free software and installation or free Internet access as part of their product. However, without providing other information such as the fees involved, any restrictions on Internet usage and telephone charges, such "free" claims may be misleading and deceptive and in breach of the Act.

Accordingly, with the sheer number of web sites and trade practices issues that are raised, the Commission has the near impossible task of monitoring web sites (both local and overseas-based) and enforcing the Act's consumer protection provisions.

B2B e-commerce

The Internet has facilitated the development of new types of industry alliances such as B2B procurement hubs which provide, among other things, centralised exchanges for buying and selling business inputs.[26] There are an estimated 900 B2B exchanges worldwide, a figure which is growing daily.[27] It has been suggested that B2B exchanges will be a normal way of conducting business in the next couple of years,[28] although the hype surrounding B2B exchanges appears to have declined, with some exchanges even closing down.[29] One of the earliest and most anticipated B2B exchanges in Australia, Corprocure, involves 14 of Australia's largest corporations.[30] Corprocure is expected to facilitate around $8 billion in annual buying of goods and services.

B2B exchanges potentially benefit both buyers and suppliers of products by:

- providing access to new customers and supply channels;

[12] *ACCC Update* – Issue 4 (June 1999).
[13] Mark Todd, "Corporate Australia waits to see if the ACCC takes a world view", *The Age*, 15 May 2001.
[14] The Commission in recent times has approved many domestic mergers, subject to the acquiring company providing certain court enforceable undertakings. For example, Qantas and Impulse Airlines, Woolworths and Franklins, and Mayne and Australian Hospital Care.
[15] UK Office of Fair Trading, "E-commerce and its implications for Competition Policy" – Discussion Paper, 1 August 2000, p 9.
[16] UK Office of Fair Trading, n 15, p 1.
[17] *ACCC Update* – Issue 1 (May 1998). The National Office of the Information Economy estimates e-commerce will add 2.7 per cent to the GDP (over $10 billion) by 2007.
[18] Alan Fels, "Competition Policy and the Internet", speech delivered on 8 March 2001.
[19] The Commission, "Existing Framework for Consumer Protection in E-Commerce: An Australian Perspective", 20 July 2000.
[20] Christopher Vajda QC and Anders Gahnstrom, "EC Competition Law and the Internet" [2000] ECLR 95 at 106.
[21] Vajda and Gahnstrom, n 20.
[22] Richard Cousins, Internet Industry Association, *ACCC Update* – Issue 3 (March 1999).
[23] UK Office of Fair Trading, n 15, p 8.
[24] *ACCC Update* – Issue 1 (May 1998), p 4.
[25] Shelby Clark, "What a Tangled Web We Weave, When First We Practice to Deceive: Frames, Hyperlinks, Metatags and Unfair Competition on the World Wide Web" (1999) 50 *Hastings Law Journal* 1333.
[26] Ross Jones, n 2.
[27] UK Office of Fair Trading, n 15.
[28] Phil Kiely, Oracle Australasia, cited in Paul Brockhuyse, *The Australian*, 10 October 2000, p 53.
[29] Ben Potter, "E-Commerce: The Calm after the Storm", *The Australian Financial Review*, 2 May 2001.
[30] AMP, ANZ Bank, Australia Post, Amcor, BHP, Coca-Cola Amatil, Coles Myer, Fosters Brewing Group, Goodman Fielder, Orica, Pacific Dunlop, Qantas, Telstra and Westfarmers.

- streamlining procurement processes and reducing production costs by 10 to 30 per cent;[31] and
- generally improving customer service standards.

While such exchanges can provide these pro-competitive outcomes, they can also:

- entrench market power within industries;
- lead to lower output and investment if prices are too low;
- force suppliers to join (or exclude suppliers from participating) by restricting all purchasing through the exchange; and
- lead participants to collude on prices and other matters.

A particular concern is that B2B exchanges benefit large corporations at the expense of smaller corporations.[32] Joining such exchanges may require scale and expenditure (such as proprietary software to run the portals) beyond the reach of many smaller corporations. If smaller corporations are unable to join B2B exchanges, they may be at a significant commercial disadvantage.[33]

The Commission has recently expressed public concern over the rise of B2B exchanges in Australia. Depending on who and what is involved in B2B exchanges, the participants potentially risk breaching the Act by:

- agreeing to fix the prices at which products are bought or sold (if the participants involve competitors) through access to competitors' confidential pricing information and purchasing strategies;[34]
- restricting supplies of products to or from particular persons (if the parties are competitors);[35]
- exclusively dealing with particular suppliers in a way which substantially lessens competition,[36] for example, by restricting the ability of participants to deal with persons outside the exchange, or otherwise entering into an arrangement which substantially lessens competition;[37]
- requiring participants to deal with third parties;[38] and
- misusing market power (for example, if a corporation representing the collective interest of buyers has a substantial degree of market power and uses that power to discriminate against particular buyers or suppliers).[39]

Accordingly, two key issues will be:

- decide whether exchanges involve "competitors" for the purpose of the Act; and
- distinguishing anticompetitive from pro-competitive behaviour, which will be difficult. It has been suggested the only real way to determine a corporation's intent is in its boardroom.[40]

As Professor Fels recently said, "competition regulators see that when a group of competitors get together to create a central communications centre (that is, an electronic 'hub') for trading then this can raise competition issues".[41]

Interestingly, the United States' Federal Trade Commission approved the B2B exchange COVISINT (an Internet purchasing exchange among various firms in the United States automotive supply chain).[42] While no party in Australia has yet to seek authorisation for any B2B exchange, the Commission is having ongoing discussions with a few exchanges, particularly following the establishment of various industry-specific exchanges (such as Ausmarkets.com, an exchange combining the wholesale banking activities of the four major Australian banks).[43]

The Commission is unlikely to issue guidelines in relation to B2B exchanges but rather look at B2B exchanges on a case-by-case basis (particularly industry-specific exchanges which are more likely to involve competitors) to determine whether there are any potential breaches of the Act.[44] It will be

[31] Goldman Sachs analysts, November 1999, "Investment Research", "B2B or not 2B".
[32] Fleur Anderson, "Watchdog to probe growth of B2B pacts", *The Courier Mail*, 8 November 2000.
[33] Bloomberg, "B2Bs not anti-competitive says US Body", *The Australian Financial Review*, 16 October 2000.
[34] Section 45 and 45A of the Act.
[35] Sections 45 and 4D of the Act.
[36] Section 47 of the Act.
[37] Section 45 of the Act.
[38] Section 47(6) and (7) of the Act.
[39] Section 46 of the Act.
[40] Anderson, n 32.
[41] Fels, n 18.
[42] Participants included General Motors Corp, Ford Motor Co, Daimler-Chrysler, Renault and Nissan Motor Co Ltd, all competitors in the US car market.
[43] Other industry-specific exchanges which are likely to be closely examined by the Commission include ewin exchange, an unnamed building products portal involving CSR Ltd and Boral, and Quadrin (a minerals and metals exchange).
[44] David Uren, "ACCC's fix: to be or not to be: The competition implications of B2B exchanges are starting to emerge", *The Weekend Australian*, 11 November 2000.
[45] Uren, n 44.
[46] The UK Office of Fair Trading considered it possible to distinguish between the physical sale of books in stores from a market of so called "distant selling" of books which includes book clubs, mail order and Internet-based sales: *Bertelsmann/Mondadori Case* IV/M 1407 22.4.1999.
[47] Although the Internet is universal and borderless in nature, the OFT recently accepted that the markets for residential Internet access, Internet advertising and paid for content provision were confined to a national market: *Home Benelux Case* IV/36.237 TPS [1999] OJ 1.9016.
[48] Ross Jones, Commissioner, "Anti-Trust in Cyberspace", speech delivered on 23 February 2001.
[49] The Commission, "The Global Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Marketplace", Discussion Paper, August 1997.

interesting to see "whether B2B exchanges merely oil the wheels of commerce or whether they herald the wholesale reorganisation of the competitive landscape".[45]

Other competition issues

The Internet and e-commerce raise other issues relating to competition law analysis such as:

- market definition;
- analysing market share; and
- access issues.

How a market is defined is often crucial in determining whether a breach of the Act has occurred. For example, whether an arrangement or a restrictive condition substantially lessens competition significantly depends on what the relevant market is. The Internet (given its ubiquitous and fast moving nature) is causing unprecedented confusion and uncertainty over market definition. In particular, it is unclear:

- whether sales on the Internet should be regarded as a segment of the broader market or as a separate market entirely;[46] and
- what the geographical scope of the market is, in particular, whether the market extends beyond a particular country.[47]

These issues are specifically acknowledged by the Commission.[48]

A corporation's market share will continue to be important in assessing market power (if any), but the characteristics of e-commerce make it difficult to analyse market share information. These difficulties include:

- collecting reliable sales data;
- comparing traditional operators and e-commerce operators (for example, some e-commerce operators do not charge for their products but rather receive alternative revenue streams); and
- the highly speculative methods of valuing e-commerce corporations (for example, the highly successful Internet retailer Amazon.com is valued at many millions of dollars but is yet to realise a profit).

E-commerce markets also give rise to potential access issues. Part IIIA of the Act provides a statutory access regime whereby participants can apply for a declaration of a nationally significant "service" (and therefore access that "service") if it meets certain specified criteria. This may be relevant where small firms seek to enter a nationally significant e-commerce market such as the market for price information or access to particular B2B exchanges. If these markets are declared "services", then a firm generally cannot be refused access to them. What will be extremely difficult is applying the strict criteria under Pt IIIA to dynamic e-commerce markets in determining whether to declare a particular "service".

With few precedents or reliable information to work with, the Commission will need to undertake careful inquiries of participants and dedicate more resources to understand and resolve these issues. Until such matters are clarified by Australian courts, any competition law analysis of e-commerce markets is likely to be speculative and contentious.

Meeting the challenges

The trade practices and competition challenges posed by globalisation and e-commerce appear to derive primarily from three sources:

- jurisdiction and enforcement;
- the relevance of competition law in the new global (and online) environment; and
- applying traditional competition analysis to e-commerce.

Clearly, the international nature of globalisation and e-commerce is at odds with domestic regulation. In particular, the jurisdictional issues surrounding e-commerce are increasingly complicated. Realistically, alternative solutions for competition and consumer protection will be required to supplement black letter regulation.[49] It

has been suggested that the "patchwork of national competition laws and the often parochial attitudes of their enforcers impose costs on economic actors today".[50] The importance and urgency of this issue is reflected in the number of cooperative multilateral conferences and bodies that are now specifically dealing with this issue.[51] The OECD Guidelines for Consumer Protection, and efforts to put competition on the agenda of the next round of World Trade Organisation talks, represent a movement toward a global approach to competition and consumer protection.[52] Similarly, the recent formation of the Global Competition Initiative (GCI),[53] a collection of competition law officials and professionals from around the world (including the Commission's Alan Fels) discussing the impact of economic globalisation on competition policy, is recognition of the need for such a global approach. The GCI is designed to facilitate consultation, dialogue and consensus-building on matters concerning global competition.[54]

The Commission recognises the need to supplement "black letter" regulation with new strategies such as:

- increased cooperative arrangements with overseas agencies in relation to all aspects of competition and consumer protection (such as a gradual sharing of enforcement techniques and reciprocal assistance), possibly leading to a gradual harmonisation of global competition and consumer standards;
- supervised industry self-regulation and codes of practice, where possible providing for flexible industry-based solutions;
- corporate-based compliance strategies; and
- increased education awareness programs (the Commission regularly publishes information guides for both consumers and business as to their respective rights and responsibilities under the Act).

The Commission, in particular, is a strong proponent of increased cooperation between countries and increased harmonisation of competition laws and processes, having entered cooperation agreements with Chinese Taipei, the United States, New Zealand and Canada. The Commission is cooperating closely with overseas regulators to assist with monitoring international price-fixing and market sharing arrangements. In fact, the number of overseas calls for the Commission's assistance has prompted the Commission to make international price-fixing cartels its new focus for enforcement.[55]

The Commission is also seeking more e-commerce experience with overseas regulators, having already been involved in various coordinated international projects including the 24 hour Internet Sweep Day which identified unscrupulous web sites lacking basic consumer information or offering "get-rich-quick" schemes.[56]

The greatest potential for cooperation and harmonisation may lie in the information provided by potential merger participants to competition authorities.[57] In an environment of global markets, an increasing number of mergers are reviewed by multiple authorities. Domestic merger laws tend to vary in procedural requirements, substantive standards and approaches to enforcement.[58] Uniform procedures would increase certainty, and reduce transaction costs, duplication and delay. The United Kingdom, Germany and France have already made some progress in this regard, by creating a common merger notification form. The Commission favours "a basic set of questions which the merger parties would need to provide to all relevant competition agencies".[59] This would perhaps lead to greater harmonisation of merger provisions. A more general set of global competition rules would potentially improve the stability of the international economy and overcome jurisdictional issues, but the idea is unlikely to be realised in the short term given:

[50] Tarullo, n 4, at 482.
[51] The recent global commerce conferences held in Sydney (November 1998) and South Africa (2000) involving enforcement agencies and consumer organisations from around the world are two good examples.
[52] Allan Asher, Deputy Chairman, "APEC – Electronic Commerce Steering Group Workshop on Consumer Protection", 20 July 2000. Katherine Murphy, "Why the ACCC is turning to the world arena", *The Australian Financial Review*, 3 January 2001.
[53] The first Global Competition Initiative was held at Ditchley Park in England in February 2001.
[54] Janow, n 7.
[55] Murphy, n 52.
[56] *ACCC Update* – Issue 6, (May 2000).
[57] Tarullo, n 4, at 502.
[58] Janow, n 7, p 3.
[59] Fels, n 8, at 50.

- the divergent views of countries;[60]
- the current patchwork of institutions which deal with transnational legal issues; and
- the relative infancy of competition laws in developing countries.

Along with the globalisation of trade and commerce has come the questioning, particularly by large corporations, of the relevance of applying traditional competition laws in the new global environment. Scepticism has particularly been directed to global mergers and e-commerce. The Commission, in recent times, has not only defended the relevance of competition laws but has stressed their importance to a productive and efficient Australian economy.

In relation to mergers, the Commission consistently maintains (quite validly) that:

- global mergers are generally positive and rarely cause competition concerns in Australia;[61]
- strong domestic competition rather than domestic dominance is the most effective way a domestic corporation can attain international competitiveness;
- if a global merger does cause competition concerns, an overseas regulator will often intervene;
- some global mergers affect overseas markets only and not Australian markets;
- if a global merger does adversely impact on Australian markets, the merger participants can seek authorisation from the Commission to allow the merger to proceed in Australia[62] or otherwise look at other ways of satisfying the Commission's concerns;[63] and
- the Commission's handling of mergers and observance of its Merger Guidelines provides parties with a degree of certainty and consistency.

Through its series of conferences and papers, the Commission is increasingly recognised for its role in consumer protection[64] and is meeting the challenge of convincing the business community that it is not a barrier to the global aspirations of domestic corporations.[65]

The contrary argument made is that competition law should not apply to e-commerce and other new technology areas. Anticompetitive conduct is displaced by new technology and new technologies quickly become superseded by newer technologies. Regulators are not in a position to understand or foresee the effects of technology.[66] The challenge for the Commission is not only to defend the merits of competition law but to balance the costs and benefits of intervention. According to the United Kingdom Office of Fair Trading (OFT):

> "anti-competitive behaviour over the short term can deliver significant long term effects ... on the other hand, the area of e-commerce is highly innovative. Premature intervention by competition authorities could in some cases inhibit innovation and the development of new markets..."[67]

The OFT suggests that competition authorities may wish to apply a light regulatory hand for the time being but raise awareness of the large penalties that might occur later if the law is found to be breached.[68] It is unclear how the Commission will approach e-commerce and new technology areas, but it has suggested that it will examine B2B exchanges on a case-by-case basis.

A third challenge facing the Commission is the application of traditional competition law analysis in new e-commerce markets. While traditional competition law concepts might not easily fit into the on-line environment, there is no reason why such analysis cannot be applied. There will always be:

- a relevant market for goods and services; and
- corporations which have a significant share of that market.

[60] Alina Kaczorowska, "International Competition Law in the Context of Global Capitalism" [2000] ECLR 117; Tarullo, n 4, at 502.
[61] In the three years to 30 June 2000, the Commission only opposed 25 of more than 500 merger proposals examined: Ross Jones, Commissioner, "Retaining a Competitive Environment", speech delivered on 27 July 2000.
[62] The Commission may grant authorisation to a merger if it satisfies certain public benefit tests (s 88 of the *Trade Practices Act*).
[63] The Commission may accept a court enforceable undertaking from the parties (s 87B of the Act) or require a divestiture of the parties' assets in Australia (s 81 of the Act).
[64] Katherine Murphy, "Price fixing: Fels to blitz companies", *The Australian Financial Review*, 3 January 2001.
[65] Ross Jones, Commissioner, "Retaining a Competitive Environment", speech delivered on 27 July 2000.
[66] Alan Fels, Chairman, Sydney, 27 May 2000.
[67] The OFT, "E-commerce and its implications for Competition Policy", Discussion Paper, 1 August 2000, pp 3–4.
[68] The OFT, n 67.

Common sense and a clear understanding of the new online environment should help to determine these matters.

Recognising these difficulties, the Commission has committed more resources in this area to understand the new markets and the activities being conducted by e-commerce participants. Just as in other jurisdictions, the time will come when the Act's application to e-commerce markets and new technology areas will be tested in court. In the meantime, the Commission should strive to understand these areas (with the assistance of the participants) as much as possible.

It is worth noting that the Commission has released a discussion paper entitled "E-commerce and competition issues under the Trade Practices Act".

The discussion paper acknowledges the potential benefits of e-commerce to competition and consumers, but also explores some of the primary competition issues which arise from e-commerce. In addition, the Commission:

- engaged CoRe Research to provide economic
- analysis of the competition implications of B2B exchanges; and
- organised an e-commerce conference in November 2001 for consumers, businesses and regulators where the "challenges that lie ahead and how these are being addressed" were discussed.

Conclusion

Globalisation and e-commerce have impacted on trade practices and competition regulation in an unprecedented and fundamental way. Clearly, the same issues apply as before, but monitoring and enforcing regulations in this new global environment are proving difficult, if not problematic for domestic regulators. As the Commission has said, it is not afraid of the new environment and welcomes its pro-competitive effects, but at the same time it is aware of the new challenges it raises.[69] To keep pace and address the challenges posed by the dynamic global environment (both offline and online), regulators such as the Commission must continue to find innovative and common sense ways of dealing with the novel problems that that environment has engendered.

[69] Jones, n 48.