Review Essay

Futures of Antitrust

Radical Markets: Uprooting Capitalism and Democracy for a Just Society by Eric A Posner and E Glen Weyl (2018), Princeton University Press, 368 pp, ISBN 9780691177502

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Abstract

Recent developments in American antitrust scholarship anticipate two broad responses to the advent of 'big tech'; namely, a return to the 'structure, conduct and performance' analyses of market power characteristic of the mid-century Harvard School, and a newly uncompromising application of the Chicago School's emphasis on price-based consumer welfare and allocative efficiency. In Australia, as in the United States, both responses have antecedents in extant competition law and policy and each is broadly conceivable as a response to concerns about stalled reforms and stagnant productivity growth. This essay examines each incipient response to the rise of the 'tech titans' and explores the futures each response anticipates for Australian competition law and policy.

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I Introduction

Recent controversy in American antitrust scholarship, responding to the advent of 'big tech' and renewed fears of 'secular stagnation' in advanced economies since 2008, reveals two emergent challenges to the Chicago School paradigm that predominated in the late 20th century, focusing competition law and policy on consumer prices and allocative efficiency in the United States ('US') and beyond.

Lina Khan proposes a renewed emphasis on competitive process and market structure to enable antitrust to recognise and respond to the anti-competitive effects of low pricing and vertical integration at Amazon.com.[1] Khan's analysis recalls the so-called 'structure, conduct and performance' or Harvard School approach, which informed mid-century American antitrust policy and has shaped the creation and refinement of competitive conduct rules in Australia.[2]

Meanwhile Eric A Posner and E Glen Weyl, in *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, sharpen the Chicago School's focus on consumer welfare and allocative efficiency with newly unremitting resolve.[3] They seek radically to augment and extend the use of price signals to remove obstacles to allocative efficiency, including in the new markets for 'data-as-labor' operating unrecognised under the business models of Google and Facebook.

This review essay examines the emergence of these two critiques of the extant paradigm in American antitrust law and policy and considers some implications for Australian competition law and policy.

II The Harvard School and the Chicago School

The Harvard School informed antitrust law and enforcement policy in the US in the 1950s and 1960s.[4] It posited a relationship between market structure and business performance, holding that businesses performed more effectively — allocating resources, undertaking investments, innovating, and keeping prices in reasonable proportion to costs — when subject to effective competition. Its proponents accepted that business performance was not amenable to direct objective measurement and thus lay effectively beneath judicial scrutiny. Accordingly, law and enforcement policy focused on market structure, accepting that there was 'an element of faith in the proposition that maintaining competition substantially improves the efficiency of resource use'.[5] The Harvard School's emphasis on market structure was a key

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1 Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126(3) *Yale Law Journal* 710.

2 Ibid 745.

3 Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018).

4 See generally Arlen Duke, *Corones' Competition Law in Australia* (Lawbook, 7th ed, 2019) [1.210], noting in particular that the Harvard School was an important influence on the *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955).

5 ES Mason, 'Preface' to Carl Kaysen and Donald F Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press, 1965) xx.

reference point for the uptake of competition law around the world in this period, including for early interpreters of part IV of the *Trade Practices Act 1974* (Cth).[6]

The Chicago School formed contemporaneously with the Harvard School, but rose to influence only in the 1980s, in the aftermath of a crisis in US economic performance. Its proponents argued that competition law should focus exclusively on the efficient allocation of resources and use prices as means of gauging whether and where inefficiencies occurred. It was only where market power enabled firms to price above cost (causing purchasers willing to pay prices above cost but below the price imposed to leave the market, and output to drop below socially optimal levels) that such power inhibited efficiency: this was the Chicago School's key contention. In other circumstances, large or vertically-integrated enterprise could actually foster efficiency. The Chicago School was much less hostile to mergers and vertical integration than the Harvard School, arguing that in many cases such arrangements enabled producers to operate more efficiently by achieving economies of scale or controlling opportunism. The Chicago School has informed the evolution of the *Trade Practices Act 1974* (Cth), including the construction of misuse of market power provisions, notably in the High Court of Australia's treatment of predatory pricing in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[7] and of vertical integration in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*.[8] The Chicago School's emphasis on consumer welfare has also affected understandings of the 'public benefit' that particular parts of the *Competition and Consumer Act* are designed to achieve.[9]

III Productivity Problems, Corporate Concentration and the Advent of 'Big Tech'

Continued malaise in productivity growth in the aftermath of the financial crisis of 2008 has precipitated fears that the advanced industrial economies are confronting a period of 'secular stagnation'.[10] The neoliberal compact designed to rescue capitalism in the wake of the crisis of the 1970s — involving deep-reaching deregulation, privatisation, reduction of trade barriers, reduction of the power and influence of labour unions etc — disinhibited inequality on the promise of renewing growth in overall living standards.

That renewal has not materialised. The financial crash of 2008 was the climax of a credit boom of historic dimensions. Household debt in the US doubled between

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6 See *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 188–9, quoting at 188 the *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955).

7 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 430 [162], 433 [167], 440 [191] (Gaudron, Gummow and Hayne JJ). See also at 478 [312] (McHugh J), citing Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978) 195.

8 See, eg, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, 14 [20] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

9 See, eg, *Qantas Airways Limited* [2004] ACompT 9, [163]–[191], concerning authorisations under the *Trade Practices Act 1974* (Cth) ss 88 and 90.

10 See, eg, Lawrence H Summers, 'The Age of Secular Stagnation: What It Is and What to Do About It' (2016) 95(2) *Foreign Affairs* 2.

1985 and 2007. As economists including Summers and Krugman have pointed out, an expansion of credit of these proportions should have pushed the economy beyond the limits of its capacity, triggering inflation and interest-rate hikes.[11] The boom that ended in 2008 generated no such excess. Instead, it underwrote a 'great moderation'. Prodigious borrowing was necessary to put enough money in consumers' pockets to keep economic activity at normal levels — to stabilise the status quo. The rich enjoyed better access to credit than the rest — more than 50% of US household debt is owned by the top quintile, less than 5% by the bottom quintile — and so inequality of income widened.

Redistribution of income through the tax system could reverse that trend in inequality, but it would not solve the underlying problem of how to get overall living standards rising again. The continual expansion of credit is not a sustainable way of getting economies growing. Recovering the rate of improvement in living standards by reference to which our expectations have been set, means returning to something like the productivity gains of our recent past. At their peak, rates of growth in output per hour worked in the UK and the US exceeded 3%. After 1970 the long-term average dropped below 2% and since 2008 the situation has deteriorated sharply: in the US, labour productivity growth averaged 1.3% per year between 2004 and 2012;[12] in the UK, between 2010 and 2015 it grew at 0.2% per year.[13] Inequality, in other words, may be incidental: the major economic problem is flatlining productivity.

Against this backdrop and in the context of low growth in real wages, corporate profits and concentrations of corporate power have attracted increasing scrutiny. In March 2016, *The Economist* declared: 'Profits are too high. America needs a dose of competition'.[14] Monopoly power has not been without apologists.[15] But the appearance of books, such as the venture capitalist Peter Thiel's *Zero to One*,[16] bespeaks a defensive awareness that the impetus towards a new wave of antitrust enforcement action comparable to the episodes associated with Theodore Roosevelt and the breakup of Standard Oil or the progressive lawyer (and later US Supreme Court justice) Louis Brandeis is growing.[17]

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11 See, eg, Paul Krugman, 'Bubbles, Regulation, and Secular Stagnation', *The New York Times* (online, 25 September 2013) <https://krugman.blogs.nytimes.com/2013/09/25/bubbles-regulation-and-secular-stagnation/>; Lawrence H Summers, 'Have We Entered an Age of Secular Stagnation? IMF Fourteenth Annual Research Conference in Honor of Stanley Fischer, Washington DC' (2015) 63(1) *IMF Economic Review* 277.

12 Robert J Gordon, *Is US Economic Growth Over? Faltering Innovation Confronts the Six Headwinds* (National Bureau of Economic Research ('NBER') Working Paper 18315, August 2012) 13 <https://www.nber.org/papers/w18315>.

13 McKinsey Global Institute, *Solving the United Kingdom's Productivity Puzzle in a Digital Age* (Discussion Paper, September 2018) 3, 7.

14 Quoted in Khan (n 1) 804.

15 Peter Thiel with Blake Masters, *Zero to One: Notes on Startups, or How to Build the Future* (Crown Business, 2014); Robert D Atkinson and Michael Lind, *Big is Beautiful: Debunking the Myth of Small Business* (MIT Press, 2019).

16 Thiel (n 15).

17 Daniel A Crane, 'How Much Brandeis Do the Neo-Brandeisians Want?' (2019) 64(4) *The Antitrust Bulletin* 531.

These developments help to explain why questions about antitrust law and policy, long the preserve of esoteric discussion among technocrats, are becoming matters of increasing public concern.[18] They also explain why the established Chicago School paradigm in antitrust law and enforcement appears to be shifting. If patterns of corporate concentration, excessive profits and especially the arrogation of market power by the 'tech titans' Google, Amazon and Facebook have gone unchecked, is competition law and policy, as presently constituted, fit for purpose? Khan on the one hand, and Posner and Weyl on the other, agree that it is not, and agree that how and why it is unfit for purpose are matters best appreciated by reference to the business models of the new tech titans themselves. They begin from the shared premise that reform is necessary, but their prescriptions for reform vary dramatically.

IV Amazon and the Case for Renewed Emphasis on Competitive Process and Market Structure

In 'Amazon's Antitrust Paradox', Khan argues that the Chicago School's emphasis on price as an index of consumer welfare, and as the only metric of harm relevant to answer the question whether market power is excessive, had denuded antitrust law of any power to reckon with Amazon's dominance.[19] Laws against predatory pricing had been rendered impracticable of enforcement by interpretations requiring plaintiffs to prove recoupment. Laws limiting vertical integration — derided by Chicago scholar and judge Robert Bork as laws 'against the creation of efficiency'[20] — had been truncated during Ronald Reagan's presidency by guidelines narrowing the circumstances in which vertical mergers should be challenged, with rejection of vertical tie-ups growing extremely rare. Both developments were the consequence of acceptance of the proposition that the arrogation and exercise of market power could not harm consumers and justify antitrust intervention unless it resulted in higher consumer prices.

Khan argues that this approach to antitrust law was misconceived in its own terms. Even 'if one believes that antitrust should promote only consumer interests', an exclusive focus on prices as indices of those interests was misguided, because 'consumer interests include not only cost but also product quality, variety and innovation'.[21] Protecting consumer interests thus understood required 'a much thicker conception of "consumer welfare" than what guides the current approach'.[22] In any event, increasing evidence indicates that the 'consumer welfare frame has led to higher prices and few efficiencies'.[23] More broadly, Khan argues that the 'undue focus on consumer welfare is misguided'.[24] Congress had passed antitrust laws 'to promote a host of political economic ends — including our interests as workers,

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18 Khan (n 1) 803. See also Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press, 2020) 228–9.
19 Khan (n 1).
20 Bork (n 7) 234 quoted in Khan (n 1) 735.
21 Khan (n 1) 737.
22 Ibid.
23 Ibid 739. See also 739 n 148.
24 Ibid 737.

producers, entrepreneurs, and citizens'.[25] A focus on consumer welfare, moreover, 'mistakenly supplants a concern about process and structure (i.e. whether power is sufficiently distributed to keep markets competitive' with a calculation regarding outcome.[26]

Khan argues that 'the rise of dominant internet platforms freshly reveals the shortcomings of the consumer welfare framework and that it should be abandoned'.[27] Instead of this focus on consumer welfare, Khan proposes a return to the credo that '[a]ntitrust law and competition policy should promote not welfare but competitive markets.'[28] To this, Khan advocates a renewed focus on 'competitive process and market structure' — not 'a strict return to the structure-conduct-performance paradigm', but renewed analysis of process and structure as offering 'better insight into the state of competition' than 'measures of welfare'.[29]

V 'Data-as-Labour' and the New Chicago School

Adherents of the Chicago School have conceded the inadequacies of antitrust law, but ascribed them to enforcement difficulties.[30]

In *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*,[31] Posner and Weyl radicalise the Chicago School approach to argue that the inadequacies of antitrust law stem not from exigencies of enforcement, but from unwillingness to apply the logic of the consumer welfare paradigm unremittingly. Posner and Weyl accept, and indeed warn with alarm, that allocative inefficiencies persist and portend potentially grave consequences for capitalism and democracy. They insist that Chicago School antitrust is the right cure, but argue that it has been inadequately applied — including to curb the market power of Google, Facebook and Amazon.

Posner and Weyl begin from the proposition that price is the most effective means of allocating capital to its most productive use. Second-price auctions are Posner and Weyl's model allocative mechanism. In a second-price auction, bids are sealed so that no one participant knows what any other is offering. The highest bidder pays what the second-highest bidder was willing to pay. The method was once used by Goethe to sell a poem — he wrote a number on a piece of paper sealed inside an envelope and then asked his publisher to make an offer for the poem. Goethe would sell at his own nominated price if the publisher outbid him, but would hold onto the poem otherwise. Such an auction is now used by Google and Facebook to sell advertising space. Advertising on Google and Facebook is sold by staging second-price auctions in the microseconds between click and loaded result. Each time a query is entered into Google, an algorithm takes the sealed bids that advertisers have made for placement of their advertisement amid results of specific keywords,

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25 Ibid.
26 Ibid.
27 Ibid 738.
28 Ibid 737.
29 Ibid 745.
30 Richard A Posner, 'Antitrust in the New Economy' (2001) 68(3) *Antitrust Law Journal* 925, 933.
31 Posner and Weyl (n 3).

ranking the ads according to their quality and relevance, and allocating the available slot to the top-ranked bidder. The prevailing advertiser pays not what they bid, but what the next-highest bidder for the same keyword was offering. A similar mechanism is used by Facebook.

Whoever prevails in a second-price auction is likely to pay less than they would have, so the mechanism has advantages for advertisers. Facebook and Google have their own reasons for favouring this procedure. They could make more money on each individual ad by making the highest bidder pay what they bid, but the tech titans are playing a longer game. The amount the second-priced bidder is willing to pay represents the opportunity cost of the winner's triumph. The winner, in effect, declares to the vendor, 'I can make better use of this ad space than anyone else. Make me prove it. Take my money, the cash value of the use the next-highest bidder proposed. Force me to go and make that money back and more.' If a seller (such as Google or Facebook, in the market for online advertising) cares whether scarce resources are put to good use, a second-price auction offers reassurance. Google and Facebook care about how advertising space on their platform is used. They want advertisers to reach consumers with precision. They want users to feel that they are being informed, not harassed. They believe that the pollution of their platforms with junk would make the virtual ecosystems they support less habitable, and they do not want users seeking out other virtual worlds.

Having explained the superior allocative efficiency of adequately designed price mechanisms by reference to second-price auctions, Posner and Weyl proceed to point out a number of sectors of modern capitalist economy in which allocative efficiencies are left unrealised by unwillingness to name and honour prices, and suggest that implementing second-price auctions in these sectors could save capitalism. The first is the labour market. Some (few) workers are fortunate enough to be able to name their price and refuse to work for less, but most have to accept what is offered. Posner and Weyl propose that labour markets be reconstituted as second-price auctions, with the aid of the tax system.[32] In their model, individuals will put a price on their labour. I declare that my services can be retained, say, for $500 per day. That price becomes the basis upon which my income tax is assessed. In that regard, I have an incentive to keep my price low: if I declare that I am worth $10,000 per day, I will be taxed as though I earned that much, even if in fact I earn scarcely that much in a month. I have a countervailing incentive to fix a high price, in that I will only have to work for employers willing to pay that price. (In Posner and Weyl's market utopia, everyone will receive some kind of universal basic income, which tax savings and additional income will modify but not displace). It will be possible, in other words, to price one's self out of the daily grind. But the tax system will disincentivise that, because society does not want human capital sitting idle. Others will set low rates for their labour and pocket tax savings. But the low-bidding individuals concerned risk being press-ganged into unattractive forms of work. In a labour market run as a second-price auction, an offer for your services that exceeds the price you have named is an offer you cannot refuse. Society is compensated for lower tax receipts by increased labour force participation.

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[32] Ibid ch 5.

Posner and Weyl also propose to use second-price auctions as a basis to reconstitute property markets.[33] A system of land tax can be implemented on the basis of self-assessed property prices. Low prices will attract low tax bills — and high prices, heavier taxes. The catch is that any price you name is one you have to accept, whenever a buyer comes along offering more. Every home would thus be permanently up for sale.

Most contemporary competition policy regimes recognise that efficiency is only one economic objective to which others must yield according to properly constituted canons of social choice duly exercised. For example, even in agitating for more consistent application of competition principles to Australian societies, the *Hilmer Report* recognised that seeking 'to facilitate effective competition to promote efficiency and economic growth' must accommodate 'situations where competition does not achieve efficiency or conflicts with other social objectives'.[34] Posner and Weyl insinuate that those other social objectives (that is, objectives other than efficiency) are luxuries we can no longer afford. Land and labour must now be recognised as base commodities indistinguishable from any other article of commerce, priced for efficient allocation without any sentimental regard for their social and human significance.

VI How 'Big Tech' Business Models are Reshaping Antitrust

What these rival programmes have in common and what sets them apart both from each other and from what they see as the regnant antitrust paradigm is best illustrated by reference to their respective analyses of the nature and the wider economic import of the power that the tech titans (Google, Facebook and Amazon) wield.

The proposition that big tech abuses market power appears counterintuitive from within a consumer welfare paradigm. Google (not only search, but also Google Maps and Gmail and Google Scholar) is free to use, so too Facebook. They charge the consumers of their services nothing. Amazon is not free, but it is cheaper than any alternative. If abuse of market power only becomes apparent when prices rise, how could these companies be said to be abusing their dominance? Rocketing share prices may or may not presage a recoupment of losses on below-cost prices in the future, but antitrust as presently constituted will not intervene unless and until recoupment can be proven.

Khan argues that Amazon's business model confounds an antitrust paradigm in which price rises are the only available metrics of abuse of dominance.[35] Amazon's below-cost pricing of e-books lay beyond the reach of antitrust regulators because Amazon's pricing trends are obscure (making a recoupment analysis of the kind required under extant predatory pricing jurisprudence unworkable). Antitrust's capacity to protect Amazon's competitors from predatory pricing and consumers from future price rises was accordingly doubtful. Amazon's dominance in e-book sales and the pressure this placed on publishing houses was jeopardising the

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33 Ibid ch 1.

34 Frederick Hilmer, *National Competition Policy* (Report, August 1993) ('*Hilmer Report*') xvi.

35 Khan (n 1) 755.

traditional publishing model in which best-selling titles cross-subsidised riskier books. This trend risked adversely affecting the quality and diversity of e-books available to consumers. This was the category of non-price concern that Khan argued antitrust had once harboured (if implicitly), but which had been driven out by the Chicago School's price-focused consumer welfare model.

Khan further argues that the integration of Amazon's business across distinct business lines in retail and delivery is anti-competitive in ways current antitrust doctrine cannot recognise. Amazon's dominance as a platform is such that competitors in manifold product lines are effectively forced to 'ride Amazon's rails' and market their products through Amazon.[36] Third party sellers bear the risk of innovation. Amazon uses data gathered from this position to identify profitable product lines and then replicates them at prices below those offered by competitors, capturing revenue without incurring the costs of identifying opportunities.[37] Meanwhile, Amazon also used its dominance in retail to leverage discounts out of logistics and delivery providers, UPS and FedEx. These companies hiked prices for independent sellers to recover margins squeezed by Amazon. This, in turn, gave Amazon's upstart logistics arm an opportunity to capture market share from UPS and FedEx by offering independent sellers better prices. The consequence of these developments is that Amazon 'increasingly controls the infrastructure of online commerce'[38] — the platform where buyers and sellers meet and the logistics networks that deliver orders. Unless and until consumers face demonstrably higher prices, antitrust regulators informed by the Chicago School's traditional consumer welfare focus are unperturbed by this. Khan argues that antitrust doctrine should look beyond price — and should look, specifically, at the structure of the markets reshaped by Amazon and the competitive process operating in those markets — to determine whether Amazon's conduct is anti-competitive.

Posner and Weyl analyse the other giants, Google and Facebook.[39] Governments have struggled to bring Google and Facebook within the remit of competition policy because they do not charge users for their services. As Posner and Weyl see it, however, the users of Google and Facebook's services are not buyers, but sellers. What looks like a market for search and social networking — the users getting bargains, the tech firms dispensing convenience for free, the only ones really losing out being the advertisers who pay above the odds for their slots — is actually a market for data rigged to favour Facebook and Google. Unwitting sellers (that is, users, or 'data-workers' as Posner and Weyl refer to them, borrowing the term from the writer Jaron Lanier)[40] get ripped off by the big tech firms, who pay them nothing for their 'labour', or for the data it produces. You might argue that data-workers are getting payment-in-kind for their services: search, navigation and social networking applications function as a form of remuneration. And it is generally supposed that your data or mine, taken in isolation, do not have very much value. For basic machine-learning purposes, once you have 10,000 people's data, each additional individual's cache adds little value. Marginal valuation determines

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36 Ibid 780.
37 Ibid 782.
38 Ibid 780.
39 Posner and Weyl (n 3) ch 5.
40 Ibid 208.

the price: the buyer will pay, for each additional increment of a given commodity, no more than the marginal value of that additional increment. That is why water (very useful, not very valuable) and diamonds (mostly useless, highly valued) command such different prices. In the case of data used to teach machines, the marginal theory of value dictates that each individual's data has negligible value: it is only at scale that data becomes lucrative.

From this perspective, good search functionality and a convenient way of keeping in touch with friends may look like fair remuneration for the data you provide. It is no longer clear, however, that the value of data accumulates in this way. In the machine-learning processes that generate transformative artificial intelligence capability, the marginal value of each additional increment of data may become very valuable indeed. Posner and Weyl give the example of speech-recognition software.[41] Decades-old programmes can recognise speech with 95% accuracy, which may sound impressive, but is effectively useless — the time taken to go through and correct a 95%-accurate text negates the advantage of dictating in the first place. Getting closer to complete accuracy requires a vast upscaling of the dataset from which the machines learn. Given that each additional step at this stage portends potentially huge increases in utility, each additional dataset that becomes available for processing adds high marginal value — and is worth a lot more to the data-masters than the free use of some app (even a handy one) is to the users. The holy grail in machine-learning is to understand action, which is orders of magnitude more complex than recognising faces. The value of data in that endeavour does not diminish at the margins; on the contrary, it appreciates.

Posner and Weyl believe that our failure to appreciate the value of our data is depressing living standards. As long as the price of data-as-labour is suppressed, its potential productive capacity will be dissipated in the form of inflated profits for the big tech firms. Like landowners leaving blocks undeveloped as prices rise around them, the tech firms have secured control of vast reserves of data and now they are sitting on them, capitalising on gains in their value. They claim that the tech firms are the ones in the best position to do the innovative work of making this data into a new source of economic vitality. Posner and Weyl think it is time to make them prove it. As things stand, the value we as users place on our data is effectively zero. In accordance with the principles of the second-price auction, this is the price the tech companies pay. Posner and Weyl want us to raise our reserve. This would not spontaneously enrich individual households, nor eliminate inequality overnight. But it could make a substantial dent in the productivity problem. Suppose that industries reliant on data grew to 10% of the economy over the next 20 years (the current figure is about 2%), and that firms began to pay something like 30% of their revenue to data-labourers (Facebook's current wage bill is 5% of its revenue; most firms pay more like 60% of revenue to workers). Posner and Weyl calculate that these changes would 'increase the size of the economy by about 3% and transfer about 9% of the economy from the owners of capital to those of labor'.[42] The median income for a

41 Ibid 228–9.
42 Ibid 247.

household of four data-labourers would rise 'by more than $20,000, as much as during the thirty years following the world wars'.[43]

These calculations are provisional, but the logic behind them is unmissable. Posner and Weyl are proposing that in order to unlock a new round of productivity gains and ward off the political problems that follow from stagnation, we should apply the second-price auction mechanism to reappraise what everything is worth to us — the data we sell for a song; security of tenure in our homes; the sweat of our brows — in order to price it and put it up for sale. They also propose that we use the same principles to reform democracy. Attributing equal value to all votes is not an optimal way of allocating scarce resources between rival public goods like sanitation or defence, because it ignores the intensity with which some people hold certain preferences. A system under which voters could store up 'voice' for crucial votes by opting out of ballots on issues of lesser concern to them would improve on this.[44] Applying second-price principles, voters wishing to wield more voice in a given case would have to pay a social cost. Posner and Weyl put forward a formula to quantify that cost: the number of votes stockpiled for the future should be the square root of the number of votes foregone today — one vote foregone yields one for later; 16 votes foregone yields 4 votes for later; four hundred votes foregone yields twenty, and so on.[45]

The idea here, as with Posner and Weyl's other proposals, is to use the second-price auction to ensure that resources gravitate towards their most productive uses, advancing the utilitarian ideal of securing 'the greatest good for the greatest number'. To make the weightless world work properly, they believe, nothing can be allowed to interrupt the movement of capital towards its most prolific applications. Every sentimental obstruction must be put aside. The result might well be a dispersal of the market power the tech giants have accumulated, but it would also put the family home up for permanent auction and leave anyone and everyone liable to be press-ganged into whatever work needed doing. Posner and Weyl sum all this up mildly: their purpose is to 'fix the bugs in the market's code and enable it to generate more wealth that is distributed more fairly'.[46] But at least some of the practices they see as 'bugs', others will recognise as bulwarks against the degradation of human beings into articles of commerce.[47]

Responses to the advent of 'techno-feudalism' and the challenges of poor productivity growth in American antitrust thinking can thus be seen to be diverging. From a common premise — namely, that the extant antitrust paradigm is inadequate to the task of tackling these problems — Khan, on the one hand, and Posner and Weyl, on the other, set off in different directions. Khan's approach has evidently found favour with the current US administration. Posner and Weyl's book

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43 Ibid.
44 Ibid ch 2.
45 Ibid.
46 Ibid 286.
47 Cf, eg, Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Strauss & Giroux, 2012).

meanwhile has drawn comparisons with Milton Friedman,[48] the economist whose simplification of neoliberal orthodoxy became the lodestar for reformers like Ronald Reagan and Margaret Thatcher.

VII Implications for Australian Competition Law and Policy

Australia's *Competition and Consumer Act* aims 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[49] A working hypothesis as to how competition enhances the welfare of Australians was articulated in the *Hilmer Report*, the influential 1993 report recommending the implementation of a national competition policy that significantly extended the scope for competitive markets in Australia. 'The relationship between competition and community welfare', the report stated, 'can be considered in terms of the impact of competition on economic efficiency and other goals'.[50] Competitive rivalry can be seen to enhance technical, allocative and dynamic efficiency (by stimulating improvements in managerial performance, or allocating resources to their highest-valued uses, or incentivising investment). Efficiency increases. The productive base of the economy grows, returns to producers increase and real wages rise. The quality of goods and services improves. Innovation is encouraged, bringing forth new jobs and new industries. The economy grows more robust and resilient and 'better able to adjust to changes in global economic conditions'.[51]

This conception of how competition augments welfare attests to the continuing influence of Harvard School thinking on Australian competition law and policy. It also expressly recognises that efficiency in the allocation of resources may yield to other social imperatives. This might indicate that competition law and policy in Australia is better placed to recognise and respond to the anti-competitive features of the new economy than American antitrust, where the influence of the Chicago School has been more pronounced. At the same time, interpretations of the *Competition and Consumer Act* in general, and the misuse of market power provisions in particular, have proven appreciably receptive to the influence of developing American antitrust jurisprudence. And where Khan would have antitrust return to its modern roots in the Harvard School's emphasis on structure and process, Posner and Weyl's work indicates other ways forward, to still more trenchant focus on achieving allocative efficiency through price signals.

The aim of the *Hilmer Report* and the National Competition Policy it designed, was 'to maintain and improve living standards' in a period of perceived adversity.[52] The result of those reforms is said to be an 'impressive surge in

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48 See Kenneth S Rogoff quoted at 'Radical Markets: Uprooting Capitalism and Democracy for a Just Society', *Princeton University Press* (Web Page, 2021) <https://press.princeton.edu/books/hardcover/9780691177502/radical-markets>.

49 *Competition and Consumer Act 2010* (Cth) s 2.

50 *Hilmer Report* (n 34) 3.

51 Ibid 4.

52 Ibid 1.

productivity'[53] in 1990s Australia which added 2.5% to GDP by 2005.[54] But since that time productivity growth in Australia, as elsewhere, has abated.[55] This deterioration 'coincided with a stalling in Australia's microeconomic reform effort'.[56] A mining investment boom and favourable movements in Australia's terms of trade have muted the effect of this decline in productivity growth upon living standards. But of those two tailwinds, one has subsided and the other is intrinsically cyclical. In this context, it would be surprising if new queries about the adequacy of Australian competition law and policy to the task of renewing productivity growth were not soon being posed. It would be consistent with past experience if American antitrust informed any major renovation of Australian competition law and policy. Neither Khan nor Posner and Weyl cover the field of possible innovations,[57] but between them they may indicate how the extant antitrust paradigm is being tested and what may replace it.

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53 Organisation for Economic Co-operation and Development ('OECD'), *OECD Reviews of Regulatory Reform: Australia 2010* (2010) 14 cited in Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan, *Competition Policy Review* (Final Report, March 2015) 19 ('*Harper Report*').

54 Productivity Commission (Cth), *Review of National Competition Policy Reforms* (Report No 33, 2005) xviii, cited in *Harper Report* (n 53) 16.

55 See *Harper Report* (n 53) 19.

56 Ibid.

57 Other approaches are exemplified by European competition law and policy: see Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart Publishing, 2020).