THE FUTURE OF COMPETITION POLICY

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INTRODUCTION

There has been a growing recognition around the world amongst business people, policy makers and researchers that competition is the key to economic growth, innovation and the dynamism needed in today's world. In Australia, the key to most markets needing microeconomic reform is the promotion of competition. Competition law is central to ensuring that the benefits flowing from microeconomic reform and deregulation are passed onto consumers.

Competition policy embraces a wide variety of policies, not just trade practices legislation. It includes such matters as trade policy together with a range of policies which have a fairly direct bearing on competition such as foreign investment and tax policies. There are a whole range of other policies affecting the general economic environment and ultimately affecting the general climate of competition in this country. These include such things as small business policy, intellectual property policy, the legal system, public and private ownership, contracting out, bidding for monopoly franchises, and so on. Privatisation and corporatisation policies are also issues but the more important policy in terms of its influence on economic efficiency is competition policy. A private monopoly is just as likely to operate against the public interest as a public monopoly and a publicly owned enterprise operating in a competitive industry will be very likely to operate efficiently.

In Australia, the cornerstones of competition policy are -

(i) international trade policy;
(ii) *Trade Practices Act 1974* (Cwlth); and
(iii) a range of competition policy practices outside the scope of the *Trade Practices Act* decided by federal, state and local governments.

The objectives of the *Trade Practices Act* ('the Act') are:

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- to prevent anticompetitive conduct, thereby encouraging competition and efficiency in business, and resulting in a choice for consumers in price, quality and service; and

- to strengthen the position of consumers in their dealings with producers and sellers.

Effective administration of the Act by the Trade Practices Commission is fundamental to ensuring that these objectives are met and to ensuring that the Act continues to have an important role in a nation where microeconomic reforms have been proposed or are underway.

Priorities of Competition Policy

Non-Traded Goods and Services

National competition policy priorities must be influenced by the government program of gradually reduced protection and the growing exposure every day of Australian business to international competition.

Accordingly, the Trade Practices Commission believes that the priorities of competition policy should focus more than in the past on parts of the economy not engaged in international trade. In other words the Commission sees the need for competition policy to address a new set of issues arising in the domestic sector of the economy. The domestic sector includes areas currently covered by the Act and also numerous exempted areas adverted to in the Government's Industry Statement in March 1991 as 'some Commonwealth enterprises, State public sector business, and significant areas of the private sector, including the professions.'

This must not mean a relaxation in the enforcement of the *Trade Practices Act* in other sectors of the economy including the internationally traded goods and services sector.

Imports, or the potential for imports, strengthens competitive pressures on existing firms. The significance of this is recognised in the Commission's actions and in the last two years the Commission has opposed no mergers where there have been significant imports. The BHP takeover of NZ Steel, for example, was allowed subject to a reduction of tariffs from 10 to 5 percent being brought forward by two years. As well the General Motors/Toyota joint venture to merge both companies' passenger car manufacturing operations in Australia was not opposed because the Commission believes the amount of import and domestic competition in the Australian car industry would prevent the joint venture from acquiring (dominance). There are others examples such as Pacific Dunlop's acquisition of Fitware (producers of socks and hosiery); Lovelock Luke's takeover by Email; the BHP/ICI exclusive dealing arrangements for supply of methanol; Onkarparinga takeover of Milburn Textiles; AMUOR; acquisition MAPPM and many others.

It is Commission policy to proceed with its firm enforcement role of the anti-competitive provisions of the *Trade Practices Act* in *all* of its established fields of operation. Any agreements between competitors to fix prices will be vigorously prosecuted. Amendments to the Act which substantially increased pecuniary penalties will greatly assist the Commission in seeking compliance with the Act. The new maximum pecuniary penalties for contraventions are:

- for Part IV (restrictive trade practices) other than sections 45D and 45E: $10 million for corporations and $500,000 for individuals; and

- for Part V (consumer protection): $200,000 for corporations and $40,000 for individuals.

The Commission will continue its role in seeking compliance with the Act through other actions as well, such as information campaigns, compliance programs, industry-specific guidelines and codes of conduct.

Microeconomic reform

It is generally believed that the benefits of microeconomic reform and deregulation will flow through to the consumer by delivery of a wider choice of goods and services at lower prices. This result is not guaranteed without there being real competition replacing the regulatory controls which formerly constrained markets. Key areas of the economy, such as domestic aviation, telecommunications, the waterfront, and the rural sector have all undergone change or are currently in the process of change.

The application of the competition and consumer protection provisions of the *Trade Practices Act* as well as giving assistance to these important sectors of the economy to adjust to competition is a significant part of the Commission's activities.

Sectors of the Economy Exempt from Trade Practices Act

An environment of deregulation, corporatisation, privatisation and other developments has raised questions as to the Commission's ability to act against anti-competitive and unfair practices in many important areas of the economy such as energy, water, transport, professional services and statutory marketing boards. The principle of universal application of the Act is an issue for public debate and for inquiry between the Commonwealth and State Governments. There is also an important role for the Commission, as the principal competition authority, to examine the nature and extent of apparent exemptions and to clarify where the Act applies and where it does not.

As long ago as 1977, the deficiency was noted by the Swanson Committee* where it was said: 'we believe it to be extremely important that the *Trade Practices Act* should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise.'

The main sources of immunity from the Act are:

- The Shield of the Crown doctrine which may insulate some Commonwealth, State and Territory bodies, although its significance appears to be receding.

- Generally, the Act applies to corporations and other organisations engaged in interstate trade and commerce and not to unincorporated enterprises operating only intrastate.

- Pursuant to s. 51 of the Act any Commonwealth, State or Territory law which specifically authorises conduct that would otherwise breach the Act.

- Also s. 172(2) provides for special exemptions to the Act through regulation.

- Section 51 also makes specific legislative exceptions in relation to such matters as:
  - remuneration of employees;
  - standards approved by Standards Australia;
  - certain clauses concerning termination of partnership, goodwill as well as certain contracts of service; and
  - certain export, patent, trademark and copyright arrangements.

By and large there is little or nothing at the State level to complement the Commonwealth legislation. In recent years all States and Territories have passed laws which mirror the provisions of Part V, the consumer protection part of the Trade Practices Act. This ensures that national consumer protection law applies via State legislation to all business enterprises even if unincorporated and not trading interstate. This precedent has not been extended to Part IV of the Act, the part concerned with anti-competitive conduct.

It is not of course necessarily the case that if one believes that competition should be national and embrace all business activities that the answer is in mirror legislation at State level. There are great advantages in looking at the national picture and in taking a comparative

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* Trade Practices Act Review Committee, Report to *The Minister for Business and Consumer Affairs*, AGPS, Canberra, August 1976.

view in regard to State activities rather than having separate Authorities in each State. Also there is a much better chance that the important role of interstate trade will be properly taken into account in a national rather than a State approach.

In July 1992 the Victorian Law Reform Commission (VLRC) issued a report calling on the Victorian Government to enact legislation to apply the federal *Trade Practices Act* to all sectors of the Victorian economy. The VLRC's report also suggested that the extension of competition law throughout Australian would happen more quickly if Victoria were willing to take the lead.

These recommendations were strongly welcomed by a group of thirteen major business groups including the Australian Chamber of Manufacturers, the Australian Finance Conference, the Business Council of Australia and the Confederation of Australian Industry.

The Trade Practices Commission supports the VLRC's call for an extension of the *Trade Practices Act* to cover all sectors of the economy as playing a major role in helping business become more cost effective, efficient and innovative.

More needs to be understood as to the current nature and extent of the apparent limitations of the Act to reach those areas of economy which appear to be exempt. The picture is clouded by deregulation, corporatisation, privatisation and other developments. To this end the Commission has set as a priority examination of microeconomic reform and the reach of the Act. In operational terms this means:

- in the enforcement area, giving priority to cases which can test how far the Act applies; and

- conducting research into Commonwealth and State laws to determine the limits of immunities.

Consumer Protection Priorities

It is also relevant to mention the consumer protection priorities of the Commission because they are connected with the competition priorities.

The two parts of the *Trade Practices Act* (Part IV dealing with anti-competitive practices and Part V with unfair trading practices) are complementary. They both contribute to the Commission's mission to foster competitive, efficient, fair and well informed markets. The Commission has a national role to play in consumer protection.

Often consumers (be they individuals or business) will gain more real benefits from the control of monopoly power, price fixing and other anti-competitive practices than from the enforcement on a case by case basis of the consumer protection provisions.

Consumer protection policy is largely a matter of a market being made to work whether it be through:

- competition;
- provision of clear, correct and sufficient information, or
- reduced transaction costs.

Principal concern will be to redress market problems in two main areas:

- where certain consumers are disadvantaged by reason of poor language or other skills, impaired bargaining power and/or a lack of information; and

- where consumers as a whole are put at a disadvantage by the unforeseen consequences of new technology or methods of operation.

Prices Surveillance Authority (PSA)

The *Prices Surveillance Act 1983* (Cwlth) seeks to complement competition policy by discouraging and preventing excessive prices based on market power in situations where for one reason or another competition policy is unable to produce a competitive structure in the first place. The main economic role of the PSA is to discourage and prevent prices based on the exploitation of market power, sometimes by regulation or near regulation, sometimes by monitoring, sometimes by public exposure and sometimes by recommending changes in the law.

The Prices Surveillance Authority (PSA) receives notices of proposed price increases from companies declared by the Treasurer to be less than fully competitive and operating in industries which are deemed to be strategic (that is sufficiently important to warrant the PSA's attention) and less than fully competitive.

The Act applies only to corporations and it includes Australia Post and in principle extends to other Commonwealth public enterprises. In fact the PSA used to deal with Telecom's prices but these are now determined largely on the basis of the CPI-X rule and administered by AUSTEL in conjunction with the Minister for Transport and Communications.

The priorities of the PSA over the past year have moved towards enhancing the competitiveness of markets to restrain prices, and using prices surveillance only as a last resort. This means that the PSA has adopted a broader focus which encompasses its contribution in the microeconomic reform process. Another feature of this is the greater emphasis the PSA is now giving to the demand side of markets and the behaviour of buyers. In many cases, the performance of markets can be lifted by strengthening the competitive search behaviour of consumers. In this respect one of the outcomes of the PSA's investigation into the funeral industry has been the production of literature aimed at ensuring consumers are better informed.

However, while raising consumer awareness might be effective in some markets, other markets require structural reform. The PSA found this to be the case in the book and record industries where import restrictions prevent competition and inflate prices. On 11 November 1991, Parliament approved amendments to the *Copyright Act 1968* (Cwlth) to improve the availability and pricing of overseas books in Australia and in 1992 the Government accepted the PSA's recommendation to remove import restrictions on records and introduced appropriate legislation although this has not so far been passed. This draft legislation, if enacted, is likely to lead to a significant fall in prices for Australian consumers and to an increase in competition throughout the industry.

The long and detailed public inquiry process into records and CDs which was carried out by the PSA recommended the removal of important provisions of the *Copyright Act 1968* (Cwlth) and turned the national spotlight on this significant issue of microeconomic reform. The PSA also welcomes the adoption of its key recommendation for stronger piracy laws and the Government's announcement of an Industry Council. It is also significant that the Government is now seriously considering the 'in principle' adoption of performers copyright. This is a very important and far reaching reform that will benefit Australian performers, not only in the music industry but in a range of other areas.

Issues for the future

Finally, many questions are raised regarding the form of prices and competition policy as sectors of the economy, such as public utilities, undergo transition through a corporatisation and deregulation process. Ideally they will undergo a transition from having a high degree of market power with ability to raise prices at consumer expense to a situation where they are mainly governed by competition. This transition may take many years in some cases.

The transition to competitive market structures may mean that utilities which had operated within a heavily regulated monopoly environment may possess substantial market power which could be used against new entrants. The removal of regulations limiting competition will not serve consumers in the longer term if, after the initial period of competition, anti-competitive private structures are allowed to develop which replace the earlier regulations.

The advantages of incumbency are one of the most powerful (but underrated) sources of market power. This has been shown in countries like the United Kingdom which were active in privatising their utilities in the 1980's. A common thread which has emerged is the need for a strong pro-competitive approach to counteract incumbency.

A nationally applied approach to oversight competition would overcome some of these problems. A national competition policy would

have, as its basic aim, to create and safeguard market structures and behaviour which ensures that organisations and consumers are not subject to anti-competitive practices. This should see markets operate as intended, promoting efficient resource allocation and reducing the ability of powerful market entities to exploit weaker groups such as consumers.

In the case of public utilities, the alternative to regulation by a general body spanning a number of industries is some form of specific regulation. In considering whether regulatory oversight of industry structure and competition issues should be industry-specific, or whether general provisions and administrative structures should be used, the following considerations are relevant:

- a general approach creates an environment where policy neither works against nor in favour of specific firms or industries;
- it avoids the imposition of inconsistent or different regulatory approaches and the duplication of regulation;
- it is less open to influence or capture from sectional interests;
- it avoids the need to create separate administrative arrangements; and
- there is a need to monitor industry-specific regulation to avoid the risk that it becomes entrenched and has outlived its usefulness.

However, there may be industries or aspects of industries where the issues are very specific and where governments decide they require for a time, special treatment. Industry-specific regulators overseas have achieved some success. However, they have done so by having a competitive charter, not dissimilar to trade practices law, by emphasising the role of competition and by having leadership which is aggressively pro-competitive and avoids regulatory capture.

Irrespective of the precise approach to change which is ultimately adopted in Australia, industry monitoring and oversight will have a role to play during and after periods of industry transition. Furthermore, an essential requirement is that policy makers take as paramount the need to strengthen market competition and thereby improve the position of consumers.

Postscript

A significant recent event has been the Independent Committee of Inquiry into National Competition Policy (the Hilmer Committee).*

The National Competition Policy Review emphasised that competition policy is the key to achieving greater efficiency in the Australian for the remainder of the 1990s - and no doubt in the first

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* National Competition Policy, *Report by the Independent Committee of Inquiry*, AGPS, Canberra, August 1993.

decade of the new millennium that follows. The Hilmer Review viewed competition policy as much broader than just the *Trade Practices Act*, important though that is. The Hilmer Committee recommended a substantial redesign of competition policy by an extension of its coverage and the use of new policy tools and institutions in the newly covered areas. The Committee stressed that competition policy needs to have a national focus but, at the same time, to be based on Federal-State cooperation. Furthermore, it considered that competition policy needs to apply universally to all forms of business enterprise, and that competition policy needs to be general, not industry specific, in its rules and administration.