

# Australia's Competition Policy reforms

**Room Document**

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## 1. Introduction

- Introductory
- Distinctive features of Australian reforms
  - a comprehensive competition policy
  - a national access regime
  - competition agency (ACCC) to be regulator of public utilities
  - a systematic rather than ad hoc basis for competition policy reforms
    - Some other features will be discussed
      - role of ACCC - advocacy institutions - other reforms (change of merger test from dominance to substantial lessening of competition)

## 2. Comprehensive Competition Policy (CCP)

### CCP

- A comprehensive competition policy (CCP) includes all government policies that affect the state of competition in any sector of the economy.
- CCP includes policies restricting as well as promoting competition.
- CCP includes traditional antitrust law (competition law, trade practices law) but extends beyond it.

### SCP

- The traditional structure conduct performance (SCP paradigm) is relevant.
- structure includes:
  - technical and economic characteristics, eg capital intensity, demand conditions, product substitutes
  - entry conditions (includes entry restrictions imposed by government)
  - industry participants
  - imports
  - other factors (vertical integration, product differentiation etc.)
- conduct includes:

- production selling and pricing policies of firms
- information provision to the market eg advertising
- arrangements between firms, eg cartels

- o performance includes:

blockquote> - efficiency  
 - technical progressiveness

- o traditionally, structure viewed as most important determinant of competition
- o structure can be especially influenced by government interventions
- o comprehensive competition policy is concerned with all structure and conduct variables
- o role of regulation in relation to SCP

### **3. A Comprehensive Competition Policy (CCP)**

A comprehensive competition policy (CCP) involves:

- o prohibition of anticompetitive conduct (traditional antitrust and competition laws)
- o liberal international trade policies
- o free movement of all factors of production (labour, capital etc) across internal borders
- o removing government regulation that limits competition, eg legislated entry barriers of all kinds, professional licences, minimum price laws, restrictions on advertising
- o the reform of inappropriate monopoly structures especially those created by governments (divestiture)
- o appropriate access to essential facilities
- o competitive neutrality for government business
- o a level playing field for all participants
- o separation of industry regulation from industry operations, eg dominant firms should not set technical standards for new entrants

A. Comprehensive competition policy includes policy on:

- trade - public and private ownership
- intellectual property - licensing
- foreign investment - contracting out
- tax - bidding for monopoly small business franchises
- legal system - other
- o some policies directly affect competition; others affect the general economic environment and the general climate of competition of the country, eg foreign ownership restrictions

### **Traditional antitrust law (or competition law or trade practices law)**

- o traditional antitrust law mainly affects conduct

- traditional competition law has only limited effects on structure, mainly through merger policy, and in some countries through divestiture
- traditional antitrust policy does not involve direct regulation of prices or other performance variables, eg quality of output. These are generally the province of separate regulators.
- traditional antitrust policy does not override conflicting government regulation.

### **Regulation in SCP framework**

- appropriate regulation of industries with high degree of market power is part of a CCP
- regulation can complement competition policy: where market power exists and cannot be curbed by competition policy, regulation may prevent the exercise of market power, eg by the application of price control for monopolies
- regulation thus directly impacts on performance
- regulation may conflict with competition policy, eg entry regulation, minimum price regulation etc
- regulation may serve other legitimate objectives, eg environmental, safety, fairness, which may or may not conflict with competition policy objectives
- regulation is an increasingly important part of competition policy. As monopoly positions are deregulated and/or privatised the application of traditional antitrust law may be insufficient and may need to be complemented by regulation, especially when there are powerful dominant firms at the outset.

### **4. Australia**

- a federation of States (and Territories) separated by large distances
- one language, relatively homogeneous national culture
- a small population - 18 million
- an integrated economy with national markets often overtaking State markets especially with deregulation
- the constitution separates judicial from other functions, complicating some processes.

### **5. Comprehensive Competition Policy reforms in Australia**

#### **(i) Universal application of Trade Practices Act**

- Trade Practices Act (TPA) now covers whole of markets for goods and services
  - extended constitutional reach (with agreement of State and Territory governments)
  - shield of Crown immunities removed
- TPA now covers all sectors including health, public utilities, energy, communications, transport, government businesses, education, sport, agriculture etc

- TPA does not cover normal employee/employer labour market behaviour; but covers most labour actions affecting product market competition eg secondary boycotts
- some intellectual property exemptions

complementary state laws to cover Federal constitutional gaps but ACCC to be enforcement agency even in relation to newly filled gaps ie no State enforcement agency

- transitional arrangements
- future amendments by agreement of Commonwealth and States and Territories
- pre-existing legislative exemptions to go by 1998
- such exemptions may be reinstated by governments
- no exemptions for mergers by State governments
- Commonwealth may override State exemptions
- exemptions must be visible (must explicitly override TPA)
- exemptions to be published in annual report ACCC
- a universally applicable TPA only covers traditional behaviour the subject of antitrust laws
- achieving universal coverage only a part of competition reforms

## **(ii) Laws that restrict competition**

- numerous laws in every government department in every sector restrict competition
- all Australian laws - Federal/State - that restrict competition to be reviewed by 2000
- all retained laws to be re-reviewed at least once every 10 years
- governments to conduct reviews
- guiding principles - legislation should not restrict competition unless:
  - (a)** demonstrable that benefits to community outweigh costs; and
  - (b)** objectives only achievable by restricting competition
- new legislation restricting competition to conform with above principles.
- each government to publish annual reports on progress towards achieving its timetable for review
- transparent reviews
- financial incentives (several billion) to do reviews properly
- NCC to adjudicate on general progress
- this agreement has made it easier to achieve reviews which would not otherwise have happened
- recognition that public interest prevails and competition not an end in itself.

## **(iii) Structural reform of public monopolies**

- Removal from public monopoly of any responsibilities for industry regulation, and relocation of industry regulation functions to prevent former monopolists enjoying a regulatory advantage over its rivals
- government to review:

- appropriate commercial objectives of business
- whether to separate natural monopoly from potentially competitive elements of monopoly
- relevant community service obligations issues
- appropriate regulation to be applied to industry
- ongoing financial relationships between owner (government) and public monopoly
- Victoria has split electricity monopoly into:
  - five generating units
  - various distribution units
  - transmission monopoly
  - Victoria has appointed a Regulator for State issues.

## **6. Competitive neutrality**

- Each government to apply competitive neutrality principles
- competitive neutrality: eliminate resource allocation distortions arising from public ownership of business entities
- government businesses not to enjoy any net competitive advantage due to public sector ownership
  - coverage
  - significant government businesses
  - business activities undertaken by government for profit and in competition with other firms
- agreed measures to neutralise any net competitive advantage from public sector ownership
  - corporatisation
  - full taxes (or tax equivalents)
  - debt guarantee fees
- regulation on equivalent basis to private sector
- pricing principles can sometimes be used instead
- complaints mechanism
- public implementation timetable
- annual report

## **7 State aids to industry**

- policy under review.

## **8. National Access Regime**

- Access to key facilities
- examples:

- telecommunications networks
- electricity grids
- gas pipelines
  
- vertical separation generally preferable to regulation of access
- view that existing laws regarding abuse of market power inadequate
- access occurs where there is no vertical separation and where access is appropriate
- new part to Trade Practices Act (TPA) regarding access
- Act establishes a legal regime providing for third party access to a range of facilities of national importance
- access to "a service provided by means of this facility". A single facility may provide a number of services, to which access may be essential in some cases but not others
- two mechanisms for access:
  - declaration of a service. This is (potentially) compulsory.
  - voluntary provision of undertaking by service provider to ACCC setting out terms and conditions of access

### **Compulsory declaration process**

- application to National Competition Council (NCC)
- Council must be satisfied:
  - (a)** access would promote competition
  - (b)** > uneconomical to develop another facility to provide the service
  - (c)** facility is of national significance (size, importance to interstate trade, or to national economy)
  - (d)** no undue risk to health or safety
  - (e)** not already subject to an "effective access" regime (that is a State government regime)
  - (f)** access not contrary to public interest
- NCC may take account of other factors
- Minister may accept or reject Council recommendation
- Ministers decision appealable to Australian Competition Tribunal
- no declaration if undertaking (see below) exists.

### **Disputes following declaration**

- if parties disagree on access terms and conditions and if private arbitration does not work, ACCC settles dispute (right of appeal to Australian Competition Tribunal)
- ACCC must not:
  - (a)** prevent existing user from being able to obtain reasonably anticipated requirements
  - (b)** prevent exercise of contractually acquired rights acquired before the dispute (insofar as that person will actually use the service)

(c) deprive persons of pre-existing contractual rights existing before 30 March 1995

(d) resulting in a third party becoming owner or part owner of the facilities or extensions to it without the consent of the provider

(e) requiring the provider to bear some or all of the costs of extending the facility to meet access requirements

• no-one may engage in conduct to prevent or hinder another person's access to a declared service under a determination.

### **Voluntary (Access Undertaking) by Service Provider**

- undertaking sets out terms and conditions of access
- undertaking forecloses the possibility of declaration. This mechanism is likely to be the main one for telecommunications, electricity and gas
- ACCC can decline to accept an undertaking
- ACCC must take into account interests of the service provider, users and the public and whether there is an existing access regime
- balance pro-competition effect and deterrent to investment by incumbent and new entrants
- facilities competition versus services competition.
- no undertakings for declared services
- undertakings enforceable in court
- effects of Australia's constitutional requirements on role of courts
- role of NCC
- some balancing of Federal and State interests has influenced processes
- State access regimes
- regime shortly to be tested

### **Misuse of market power law insufficient for access disputes**

- court based litigation processes unsuitable
- an offence has to be found
- courts not good at setting prices
- law regarding misuse of market power not adequate for cases where market power very strong.

## **9. Regulation**

### **Regulation**

- Hilmer Report took view that economic and competition regulation should be located in ACCC rather than in industry specific bodies or in State bodies
- telecommunications, national electricity and national gas regulation are being transferred to ACCC in 1997
- some States interested in progressively transferring State-level regulation to ACCC in coming year
- general issues re location of regulation:

(1) industry specific versus general (2) national versus State (3) separate regulator or part of competition agency?

### **Industry Specific v. General Regulation**

Points for general regulation:

- general regulation more suitable for convergence, eg energy, communications, financial services
- general regulators less likely to be captured
- specific regulators more interested in decisions that build up or preserve their own empire
- consistency
- resource saving and economy
- one stop shopping.

### **Points for specific regulation**

- general regulators may not acquire the necessary technical expertise
- if the technical regulation were integrated into general regulation the regulator's size would be mammoth and its activities diffuse
- general regulation may become divorced from detailed technical regulation with loss of technical knowledge by the general regulator
- ensures some diversity in regulation
- specific regulation may be better resourced.

### **National versus local regulation**

For National Regulation:

- most markets are national or soon will be
- national markets stimulated by deregulation
- local regulation less economical of resources
- shortage of regulators at local level
- inconsistencies of a variety of local regulation

For Local Regulation:

- appropriate where markets local
- local regulation seems more politically acceptable than national
- closer to local markets and more knowledgeable

### **Separate Regulation or Regulation to be part of Competition Regulator for Integration?**

Points for Integration:

- regulation has significant effects on competition
- regulatory activity is best linked with competition regulation
- regulation on its own often pursues an anticompetitive course



- regulation left on its own may pursue values other than competitive ones for reasons of organisational survival.

For Separation:

- industry regulation kept separate avoids confusing the competition regulator's role
- the competition regulator does not have to become embroiled in messy regulatory details (price setting, access conditions, technical regulation etc)
- a regulatory mentality may swamp the competition mentality

## **10. Delivering reform**

- . public education
- . education of key players
- . an independent inquiry
- . political leadership
- . research
- . federalism problems
- . commitments to processes
- . establishing institutions for achieving on-going reform
- . monetary incentives.

## **11. Implementing**

The implementation challenge of competition policy is very large compared with trade policy reform.

## **12. Public utility reform: The agenda**

Ownership

- commercialisation
- corporatisation
- privatisation
- Liberalisation of international and intranational trade
- horizontal and vertical divestiture (restructuring of monopolies)
- application of competition law
- national access regime
- other pro competitive policies
- consumer issues
- community service obligations
- other policies.

## **13. International dimensions**

This paper does not address international dimensions.

## **14 Role of Australian Competition and Consumer Commission (ACCC)**

- apply trade practices law

- adjudicate authorisation applications (anti-competitive behaviour claimed to be in public interest)
- apply national consumer protection law
- apply access regime
- apply any prices surveillance
- ACCC formed from merger of the Trade Practices Commission (TPC) and the Prices Surveillance Authority (PSA). Prices surveillance has been cut back since.

### **State Regulation**

- This now exists but is heading to ACCC in long term.

### **Competition advocacy institutions**

- Competition policy is now the responsibility of Treasury
- National Competition Council (NCC) and Productivity Commission (PC) play major competition advocacy roles
- ACCC plays law enforcement role with only limited policy advocacy.

### **15 Changes in price policy**

- cease control of oligopoly prices
- strengthen monopoly price control