Competition Policy Reforms

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ACT Public Service Seminar - Competition Policy
3 April 1997

1. Introduction

Thank you for allowing me the opportunity of taking part in this seminar on Competition Policy and its effect on your future. There are a great many issues arising out of the Hilmer/COAG process that have raised questions and arguments in relation to changes to competition policy that are currently being implemented. It won't be possible for me to go through all of them today, but I will aim to give you an overview of the main changes and then focus on those issues that are of most interest to you here today.

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 to understanding competition.
- 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

- performance includes:

- efficiency
- technical progressiveness

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

(Reference: R.F. Caves, et al, 1987, Australian Industry: Structure, Conduct, Performance; Second Edition, Prentice-Hall)

3. A Comprehensive Competition Policy (CCP)

A comprehensive competition policy (CCP) involves:

- prohibition of anticompetitive conduct (traditional antitrust and competition laws)
- liberal international trade policies
- free movement of all factors of production (labour, capital etc) across internal borders
- removing government regulation that limits competition, eg legislated entry barriers of all kinds, professional licences, minimum price laws, restrictions on advertising
- the reform of inappropriate monopoly structures especially those created by governments (divestiture)
- appropriate access to essential facilities
- competitive neutrality for government business
- a level playing field for all participants
- 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

- 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)

- 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

- as a matter of terminology traditional antitrust policy does not involve direct regulation of prices or other performance variables, eg quality of output.

These are often the province of separate regulators rather than competition bodies like the ACCC but note the Australian experiment.

- 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. Comprehensive Competition Policy Reforms in Australia

(A) The Hilmer Report, COAG and Competition Policy Reform Act - Overview

- In 1991 the Council of Australian Governments (COAG), being the Prime Minister and Premiers of the Commonwealth, State and Territory Governments agreed to examine a national approach to competition policy, The first step in this process was the establishment in the following year of the National Competition Policy Review by a committee chaired by Professor Fred Hilmer.
- On completion of the Hilmer Committee's report in August 1993, Commonwealth, State and Territory Governments began extensive negotiations on implementation of its recommendations. The recommendations made by the Hilmer committee were generally accepted by COAG in April 1995 and the processes culminated in June 1995 in the *Competition Policy Reform Act 1995*. The main reform elements were:

  - Universal application of the *Trade Practices Act 1974*. The Trade Practices Act was amended so that, with State and Territory application legislation, the prohibitions of anti-competitive conduct contained in Part IV will be applied to all businesses in Australia.
  - Constitutional limitations had previously prevented application of the competitive conduct rules to unincorporated businesses operating solely in

intra-State trade.
- 'Shield of the Crown' immunity for State and Territory Government businesses was removed.
- A new Part IIIA was added to the Trade Practices Act, and came into effect on 6 November 1995, establishing a legislative regime to facilitate access to the services of certain essential infrastructure facilities.
- Also on the 6 November 1995, the Trade Practices Commission and Prices Surveillance Authority were merged to form the Australian Competition & Consumer Commission. A new body, the National Competition Council was also established on the same day.
- The Trade Practices Tribunal has been renamed to the Australian Competition Tribunal and now has the added responsibility for appeals from decisions in Part IIIA access matters.
- A number of changes to Part IV of the Trade Practices Act came into effect on 17 August 1995 and broadly involve:
- provision for the ACCC to authorise price agreements between competitors on goods and repealing the existing exemption of agreements on recommended prices between fifty or more participants (s.45);
- new notification provisions to cover third line forcing (s.47);
- extension of the prohibition of resale price maintenance to cover services and providing for the authorisation of resale price maintenance (s48); and
- repeal of he specific provisions prohibiting price discrimination (s.49).
- New sections were inserted in the Trade Practices Act clarifying what activities of the Commonwealth, State and Territory Governments will not be regarded as 'business' and hence not caught by Part IV. In brief, these activities include:
- the imposition or collection of taxes, levies, or fees for licences;
- a variety of intra-government transactions; and
- the acquisition of primary products by a government body under Commonwealth, State or Territory legislation where such acquisition is non-discretionary.
- There were three main changes to the Prices Surveillance Act:
- The reach was extended to the business enterprises of State and Territory Governments. The amended law sets out strict criteria under which the prices set by those enterprises may be vetted or monitored by the ACCC.
- The ACCC was given a formal monitoring role. This will enable it to use its statutory power to secure the information it requires from a monitored organisation or industry.

- The price vetting procedure was refined. The declaration of a business organisation will no longer by open-ended: the Minister has to specify a period. The threshold above which price rises have to be notified has been narrowed to the peak price for the preceding twelve months. The addition of a twelve month limit removes a former anomaly. Finally, the ACCC must provide a public account of the reasons for each decision.

- The reform legislation was complemented by two inter-governmental agreements:

- The Conduct Code Agreement. This sets out processes for amendments to the competition laws of the Commonwealth, States and Territories and for appointments to the ACCC.

- The Competition Principles Agreement. This sets out arrangements for appointments to, and deciding the work program of, the NCC. It also sets out the principles governments will follow in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulations, access to services provided by essential facilities and the elimination of any competitive advantage enjoyed by government businesses when they compete with the private sector.

(B) Comments on Particular Features of Reforms

(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/Territory laws to cover Federal constitutional gaps but ACCC to be enforcement agency even in relation to newly filled gaps ie no State/Territory 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/Territory governments
  - Commonwealth may override State/Territory exemptions
  - exemptions must be visible (must explicitly override TPA)
  - exemptions to be published in annual report of 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/Territory - 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

(iv) 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
- three 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
  - 'effective' State access regime

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/Territory 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/Territory interests has influenced processes
- State/Territory access regimes
- regime shortly to be tested

Misuse of market power law (Section 46 TPA) 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
- Section 46 still applies

5. 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

6. 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/Territory bodies
- telecommunications, national electricity and national gas regulation are being transferred to ACCC in 1997
- some State and Territories (?) interested in progressively transferring State/Territory-level regulation to ACCC in coming years
- general issues re location of regulation:

  (1) industry specific versus general
  (2) national versus State/Territory
  (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

Separation or Integration?: Separate Regulation or Regulation to be part of Competition Regulator?

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

7. 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.

8. Trade Practices Act 1974

- The objectives of the *Trade Practices Act* are to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and business when they are purchaser) in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers and business in its dealings with other business.
- Essentially the *Act* is divided into two major parts:

  · Part IV which deals with anti-competitive practices; and
  · Part V which deals with unfair trading practices;

plus three subsidiary parts,

- Part IVA which deals with unconscionable conduct;
- Part VA which deals with the liability for defective goods;and
- Part IIIA - which deals with access to natural monopolies.
- There are two broad principles which underlie Part IV of the *Act*. These principles are:

  · That any behaviour which has the purpose, or effect, of substantially lessening competition in a market should be prohibited; and · Such behaviour should be able to be authorised on the basis of the current authorisation tests, including the important test 'public benefit'.

  The main types of anti-competitive conduct which are prohibited include:

  - anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts (s.45), with a *per se* ban on price fixing and boycotts;
  - misuse of substantial market power, for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct (s.46);
  - exclusive dealing which substantially lessens competition (s.47), with third line forcing prohibited *per se*;
  - resale price maintenance for goods (ss. 48, 96-100); and

- mergers and acquisitions which substantially lessen competition in a substantial market (s.50).

- The ACCC is a public enforcement agency and can seek injunctions, penalties, damages etc.
- Private enforcement action is possible.
- Conduct that may substantially lessen competition under Part IV of the Act may be granted authorisation under Part VII of the Act, which is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act.
- Authorisation is granted on the grounds of prevailing public benefit. Depending on the arrangement or conduct in question, the Commission must be satisfied that the arrangement results in a benefit to the public that outweighs any anti-competitive effect; or that the conduct results in such a net benefit to the public that the conduct should be allowed to occur. Decisions made by the Commission in relation to authorisations can be appealed to the Australian Competition Tribunal which was recently renamed from the Trade Practices Tribunal.
- **Part V** of the Act deals directly with the interests of consumers (and businesses which qualify as consumers in particular transactions). It is a means of promoting fair competition by protecting consumers' rights, especially the right to full and accurate information when purchasing goods and services. It provides an important safety net in markets where vigorous competition might tempt some businesses to cut corners to gain a competitive advantage - eg by making misleading claims about a product's value, quality, place of origin or impact on the environment.
- Part V of the Act contains a range of provisions aimed at protecting consumers and businesses that qualify as consumers by:

  - a general prohibition of misleading or deceptive conduct (s.52);
  - specific prohibitions for false or misleading representations (ss. 53-65A);
  - product safety provisions;
  - prohibiting unfair practices (Division 1), including the unconscionable conduct provisions

in Part IVA that prevent businesses from behaving unconscionably when they supply goods and services to individual consumers (s.51AB) and when corporations are engaged in commercial transactions (s.51AA); and
- conditions and warranties in consumer transactions (Division 2) and actions against manufacturers and importers (Division 2A).