

Competition Policy recent developments

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28 August 1996

1. Introduction

A great deal has happened in competition policy in recent years.

- The Trade Practices Act has been extended to cover all areas of business from July 21, thanks to legislation enacted by all Australian parliaments;
- a new access law has been included in the Trade Practices Act;
- the ACCC has been formed from a merger of the former Trade Practices Commission and the Prices Surveillance Authority;
- the merger law has been strengthened from a test of dominance to a test of substantial lessening of competition. At the same time, there were associated changes in the merger law to introduce economic criteria more explicitly into the Act, to improve and speed up the authorisation processes and to make it more relevant to an economy in which globalisation has been becoming more important;
- the penalties under the Trade Practices Act have been lifted by Parliament from \$250,000 to \$10 million;
- the courts have been regularly imposing far higher penalty levels than in the past for breaches of the Act. Examples include \$21m for ready-mix concrete companies and \$15m for overnight freight express companies and, more recently, \$3.5m for Ampol.
- The introduction of legally enforceable undertakings under section 87B has made the Act both more effective and less tied down in court procedures:
- the ACCC has been more active both with respect to competition and consumer protection cases.

Competition policy, however, does not just revolve around the Australian Competition and Consumer Commission.

- The Council of Australian Governments has agreed that all governments over the next five years will review every form of regulation that affect competition in every department of government in every sector of the economy to determine if it is in the public interest. All governments appear to be strongly committed to the review processes and the Commonwealth has provided state and territory governments with a very large financial incentive to do the job properly.
- An important new institution, the National Competition Council, has been appointed to play an important role in reviewing the review process, in administering the access regime and in carrying out other important tasks.
- More generally, the climate of general public and political support for the application of a strong competition policy whether at the level of enforcing the

Trade Practices Act or at the level of repealing laws that restrict competition has greatly strengthened compared with the 1980s.

I should sound one note of warning. The implementation of a national competition policy is not just a matter of passing laws and undertaking reviews of anti competitive laws.

Securing an agreement on regulation review at COAG and enacting reform legislation is just the beginning, not the end, of the implementation of competition policy.

In this respect it is worth comparing competition policy with tariff reforms. Before tariffs are reduced there is usually a very considerable and heated political debate. Many political obstacles have to be overcome before the reform can be introduced. However, once the decision is made to reduce the tariff all that is required is the stroke of a pen by a Minister reducing or eliminating the tariff. After that there is no more work left for government. It is the market not the government which goes to work in bringing about the adjustments in resource use which the change in the tariff will bring about.

Reform of competition policy is quite different. Competition policy involves a paradox: government intervention is necessary to get a free market to work competitively and efficiently and to prevent anticompetitive conduct from occurring in markets which are otherwise competitive. Lawyers, regulators, public servants, economists, courts, tribunals, Commissions, Federal, State and local governments, interest groups and many others become involved. There are complex processes involving hearings, determinations, authorisations, court decisions, appeals and so on. And there are many difficult decisions to be made. It takes time for them to be made. There are transition provisions and it takes further time for the effects of these decisions to be felt.

Implementation is thus a challenging process in national competition policy.

Electricity/Gas

The past 8 months have witnessed the emergence of the genuine, national, co-operative implementation of competition policy to gas and electricity markets.

Genuine in that things are happening.

- COAG has reconfirmed national goals for gas and electricity markets in Australia.
- Victoria commenced competitive pricing of electricity and since May 1996 NSW electricity prices have been set competitively - these have since been reported substantial falls in some key electricity tariffs.
- In WA, SA and Qld access rules have been developed to allow competitive gas haulage in monopoly pipelines.

National in that state boundaries will no longer be an obstacle to free trade in gas and electricity. International gas pipelines will bring competitive pricing to consumers in

Vic, SA, NSW and Qld where interconnection of power lines will ensure more effective use of Australian source industrial resources.

Co-operation in that the ACCC is working closely with state pricing and regulatory agencies to ensure consistency in regulation. This in turn will ensure certainty to investors and competitive prices to consumers.

Already

- state regulators sit as Associate Commissioners on the ACCC.
- Regular staff contact is occurring between state and Commonwealth agencies
- ACCC is closely involved with state officials in developing principles for price setting and asset valuation in monopoly sectors.
- Shortly the ACCC will participate in a national forum of regulatory agencies.

Myths about the ACCC

Because of its impact in the business world, the ACCC has attracted some myths. Some are amusing, some are misconstrued from actual happenings and some are just plain wrong. Let's look at a few:

Myth 1

The ACCC is all powerful:

- It is the Trade Practices Act which affects legal rights. The Commission plays a role analogous to that of the police in administering and enforcing the law, with the Courts and Australian Competition Tribunal making the final decisions. There are therefore ample tried and tested safeguards for business against ACCC decisions.
- By way of elaboration, the ACCC makes two main types of decisions:
 - (i) determining after proper investigation that behaviour is anticompetitive or misleading, eg price fixing, an anticompetitive merger, deceptive marketing etc. In such cases the ACCC has no power to affect the legal rights of anyone without their agreement other than to take Court action. Having reached its decision it must be able to prove its case to the Federal Court of Australia with actual evidence. In doing so it typically encounters strong, well resourced resistance from large corporations aided by solicitors, barristers, consultants etc typically possessing a more detailed knowledge of the firm and industry and the behaviour of concern than the Commission has. There is also the possibility of appeal to the full Federal Court and even the High Court on these decisions.
 - (ii) the Commission may authorise anticompetitive behaviour if it is satisfied that there is an overriding public benefit. Commission authorisation decisions can be and often are appealed to the Australian Competition Tribunal.

Accordingly the Commission has little power to make final decisions on its own.

- The Commission's position must be measured in relation to the power, scale and resources of the interests - with the largest and most powerful corporations in the country - with which it must deal.
- Competition policy involves a paradox: to achieve free, competitive, efficient markets, a degree of public interaction is involved. Where should decision making occur? In the political sphere, with its susceptibility to interest group pressures and its tendency to swing from extremes of laxity to excessive vigilancy? In the sphere of the Courts with the delays, case by case approach, and legalism involved? Or in the hands of regulators, with the conferral of discretionary power on them? I believe the answer is that the regulator has to play a key role in competition policy administration, subject to adequate safeguards of the kind the Trade Practices Act contains.
- The Commission deals with complex issues. Competition issues under trade practices law typically require fact intensive investigation, not just repeal of government law. It is a matter of investigating matters in depth, assembling evidence necessary for court trials and then advocating solutions in court settings. Moreover recent developments under the Trade Practices Act make the Commission's work more complex eg access issues.
- The Commission's work covers the whole product market. This contrasts with the alternative model in which there would be a range of industry specific regulators. In this respect the Commission may appear more powerful than a specific industry regulator. In other respects it is more weakly resourced than would be the aggregate of a series of industry specific regulators (eg AUSTEL has 130 staff).
- The nature of the matters in which the Commission is involved require that it be reasonably well resourced. A standard complaint about the TPC for many years was that it was under resourced. It has not been my practice to make public comments about the resourcing of the Commission but the fact that its resourcing comes off a poor base from the past is highly relevant to discussions about its powerfulness.

Myth 2

Business does not oppose the Commission in Court or in front of the Australian Competition Tribunal because of the costs, time, delay and public exposure involved.

- There is in fact a considerable amount of litigation. If business thinks the ACCC has interpreted the Act wrongly, it usually challenges it, receiving great encouragement from its legal advisers to do so. At present the Commission is before the Federal Court of Australia in thirty-five cases. There are several appeals pending before the Australian Competition Tribunal.
- The Commission has won 95 per cent of cases in the Federal Court in recent years and the majority of the appeals to the Australian Competition Tribunal. A major reason why business does not go to Court or the Tribunal is that the Commission's decisions are likely to be upheld. The Commission does not lightly decide to go to Court nor to reject an authorisation, and when it does so its decisions are likely to be very carefully and fully considered and to be correct. The chances of winning in the Court or the Tribunal against the Commission are often poor. (Incidentally the Commission acknowledges that

at the present time its rate of success in Courts is rather high by historical standards.)

- It is acknowledged that in some cases cost, delay, and the fear of public exposure deter firms from pursuing court cases but this is not the only reason as some claim. Most often, in my experience, however, it is that they are likely to lose. Firms that think we are overstepping the mark usually choose to fight us in Court.
- In some cases the ACCC would be delighted if firms defended themselves in Court as this enables *additional* evidence to emerge. Comments by some firms that they have not opposed the ACCC in Court for commercial reasons rather than because they have breached the law should not necessarily be taken at face value.

Myth 3

The ACCC power has grown by stealth

- The growth in the ACCC's power and influence has allegedly received little discussion "it sort of happened by stealth" says Brian O'Callaghan a partner in the law firm Phillips Fox in Canberra and a former senior officer in the Attorney-General's Department. (BRW page 44, June 10, 1996.)
- The establishment of the ACCC was discussed at several meetings of the Council of Australian Governments attended by all Australian Governments and at several further separate meetings of Premiers and Chief Ministers and was ultimately endorsed by COAG.
- The establishment of the ACCC was the result of legislation enacted by eight Parliaments, with Western Australia soon to follow.
- The powers of the ACCC are not very different from those of the Trade Practices Commission. The only changes are that its jurisdiction has been extended; it is given a role, albeit significant, in determining access disputes, although its decisions can be appealed; and that the ACCC has taken over the functions of the Prices Surveillance Authority.

Myth 4

The Commission prevents firms from achieving the economies of scale necessary to be internationally competitive.

- The ACCC has not opposed any mergers in the past five years where imports are significant eg more than 10 per cent of the market. A **few** examples include:

BHP/ Tubemakers

Amcor/APPM

Amcor Ltd/Leigh-Mardon Pty Ltd

Spicers Paper Limited/Edwards Dunlop

Pacific Dunlop Limited/Fitwear Limited

Gillette (Australia) Pty Ltd/Parker Pen (Australia) Pty Ltd

Cargill Australia Limited/Continental Grain

Alcan Australia Ltd/Comalco Australia Ltd

Alcoa Australia/Comalco Australia Ltd
Ford Motor Company/Mazda Motor Company
Godfrey Hirst/Homfray Carpets Australia Pty Ltd and Hycraft Carpets Pty Ltd
GNB Battery Technologies Ltd/Australian Battery Co Pty Ltd
Heinz/Farex brand
Queensland Cotton Holdings Ltd/Namoi Cotton Cooperative Ltd
Southcorp Holdings/Hoover (Australia) Ltd
Email Ltd/Atlas Steel Ltd

There are many more examples.

- It is in the trade exposed sector that the arguments about the need for Australian firms to grow large and achieve scale economies are most often made.

The Act provides no real obstacle in these areas.

- Even where there are no imports, the ACCC opposes relatively few mergers. Consider the following mergers which have not been opposed:

Australian Gaslight Co/Moomba to Sydney Natural Gas Pipeline
Boral/Sagasco Holdings
David/Composite/QIW/IHL
AC Nielsen Australia Pty Ltd/AGB McNair Pty Ltd
Adelaide Brighton Ltd/Northern Cement Ltd
QUF Industries Ltd/Port Curtis Co-operative Dairy Association Limited
Howard Smith Ltd/BBC Hardware Division from Burns Philp
Village Roadshow/Austereo
Simsmetal Ltd/Affinity Metals Pty Ltd
Woolworths Ltd/Cannons Food Stores
Otis Elevators/Boral Building Technologies
Westpac Banking Corporation/Challenge Bank
Advance Bank Australia Ltd/State Bank of South Australia
Bank of Scotland/Bank of Western Australia
Austereo Limited/Radio Newcastle Pty Ltd
Unilever/Helene Curtis Industries

- However it is a fact that the ACCC opposes something like five mergers a year on the grounds that they are likely to substantially lessen competition and that in some such cases the objections cannot be overcome by providing undertakings.
- In such situations authorisation is possible. The Australian law differs from that in the USA which simply prohibits anticompetitive mergers. In recognition of the small size of the economy, Australia allows such mergers if the ACCC (and on appeal the Tribunal) is satisfied that the public benefit outweighs the anticompetitive detriment. Over the years 26 out of 46 applications have been successful.
- The Act was amended in 1993 explicitly to refer to additional exports, import-replacement or contribution to international competitiveness as a public benefit.
- The ACCC has 30 or 45 days to consider these matters, and the Tribunal normally has 60 days.
- Notwithstanding this, the ACCC has been addressing the issue of the impact of globalisation in its revised general merger guidelines.

- A weak merger policy can damage our international competitiveness by facilitating anticompetitive mergers that raise input costs to exporters and import competitors.

Myth 5

The Commission adopts a narrow approach to market definition

- Any serious study of this topic would investigate the following alternative hypotheses:
 - (a) that the Commission is usually right;
 - (b) that the Commission makes mistakes but these are evenly distributed between taking an excessively narrow and an excessively broad view of the market;
 - (c) that the Commission consistently or frequently applies too broad a definition of the market; and
 - (d) that the Commission consistently or frequently applies too narrow a definition of the market.
- In the past five years the Commission has dealt with over 500 mergers.
- There have been no reviews (other than internal ACCC reviews) of these 500 cases (which are listed in the Annual Reports of the Commission), or of say 50 or even 10 of them that would allow conclusions to be drawn.
- Contrary to some opinions issues of market definition have only been crucial in a small fraction of cases where proposed mergers have been opposed.
- Public comment on market definition is dominated and somewhat distorted by firms (and lawyers working for them) who have an interest in the Commission taking the broadest possible view of markets.
- The Industry Commission has recently implied that the Commission may take an excessively narrow view of markets but the evidence that it has produced is somewhat weak:
 - No Commission decisions in the 1990s are referred to. [With the exception of banking where the signs are that it did not fully understand the ACCC's position. The report contains an inaccurate version of ACCC policy. See Myth 10 in this speech.]
 - a 1975 court decision concerning Datsun is discussed but this was a well known extreme one-off decision that has never been followed;
 - the Trade Practices Tribunal's broad views on market definition in the Tooth/Toohey case of 1979 are quoted with approval but the Industry Commission appears to be unaware that in that case a very regionalised, NSW "narrow" market definition was adopted; and
 - The IC appears to disagree with the Federal Court's view that there was a market for biscuits in the Arnotts matter. This decision was made some years ago. It should be noted that the fullest evidence for both points of view was presented to the former

Trade Practices Commission and to the court and this requires consideration before reaching a verdict.

Myth 6

The Commission has been inconsistent in market definition

- This is not a general myth but one which has some currency as on some seven or eight occasions in *The Australian* Mark Westfield has asserted that the ACCC adopted a national definition of the market in the David's/QIW authorisation case. This incorrect assertion has been the basis of his frequent claim that the ACCC has been inconsistent in dealing with mergers.
- Mark Westfield is simply wrong and keeps being wrong in article after article! The error is made very clear in the published report where the market issue is discussed at some length, and also in the associated executive summary and media release.
- We know of no other commentator who has made the same error.
- The mistake which he repeats is: In looking at the **benefit** from the merger the ACCC took into account benefits in markets other than the Queensland and Northern NSW regional market. This does not mean that in defining the market **for the purposes of competition analysis** those other markets were included. This is of course a basic distinction. By ignoring it, he has repeatedly erred in claiming that in analysing the state of competition in wholesaling and in banking the Commission has been inconsistent.

Myth 7

The business community opposes merger law.

- A recent *Business Review Weekly* survey of Chief Executive Officers found that 43 per cent supported the current substantial lessening of competition test whilst 57 per cent were opposed. The majority of CEOs in the services sector (something like 57 per cent) supported the current test. This is a remarkable finding, since one might think that the CEOs of Australia's top businesses would unanimously support the weaker test.

There has been strong support from the Council of Small Business Organisations of Australia (COSBOA) for the new test reflecting widespread attitudes of small business.

Business is a major beneficiary of an effective merger law. It has a strong interest in all its inputs being supplied competitively and efficiently and in its outputs being supplied to a competitive buying market.

Myth 8

"There are doubts whether the authorisation process is currently fulfilling its proper role...despite efforts by the ACCC to encourage firms to apply for authorisation the IC understands that the authorisation process has not applied to over 99 per cent of mergers considered by the TPC/ACCC" (Industry Commission)

- 95 per cent of mergers are not initially opposed by the Commission, therefore 95 of the 99 per cent referred to above do not need to apply for authorisation (of course it would be highly wasteful of resources were they to do so).
- Of the remaining 5 per cent a significant number do apply for authorisation or overcome their difficulties by providing undertakings.

Myth 9

"The ACCC should release more public information on the operation of the public benefit criteria, including details of past cases where ... authorisations have been approved and rejected" (Industry Commission)

- All authorisation decisions are, and always have been, published.
- There are 46 such authorisation cases on record. They provide full public information on the operation of the public benefit criteria.
- It follows that there are no past cases where authorisations have been approved or rejected that have not been published.

Myth 10

The ACCC has changed its approach to bank mergers

There has been much discussion of possible bank mergers in recent times. I would like to remind you of what the Commission said on this subject in September 1995 when it announced it would not oppose Westpac's acquisition of Challenge. It said: "... the TPC's approach was to examine each case individually on its merits in the circumstances prevailing at the time of the acquisition".

The Commission also indicated that it was only considering the competition issues under section 50 of the Act when it made its statement and said: "The TPC approach is dictated by the provisions of the Trade Practices Act relating to mergers and acquisitions and does not take into account possible increases in business efficiency or other public benefits (unless they affect competition), as these are only available when an authorisation is sought for a merger."

At that time the Commission made it clear that it was well aware of arguments that the nature of banking and of the financial services sector was changing rapidly. At the time of that decision, however, it believed it was appropriate to use a regional bank market definition in respect of transactions banking and in respect of lending to small business, farmers and possibly consumers, but made it clear that as circumstances changed its case by case approach would enable it to assess any material changes of circumstances.

Since then, the Treasurer has ruled that the big six of the financial services sector cannot merge before the completion of the Wallis Inquiry and has given no indication of what his view would be after that time. Accordingly bank mergers are not on the ACCC agenda at this time.

The Commission's general approach however remains unchanged from a year ago. It will look at each case on its merits at the time, in the light of the circumstances and it

will take account of the nature of the particular transaction involved at the time of making any decision on any future bank mergers.

Myth 11

"The Act deters Australian ownership of business".

- the main causes of the high degree of foreign ownership of Australian business are:
 - (a) Australia is a capital importing country on a long term basis
 - (b) its foreign debt has risen in recent times due to macroeconomic policy
 - (c) governments have not used the Foreign Investment Review Board to restrict foreign acquisitions (I am not critical of this)
- if the benefits of such ownership outweigh the anticompetitive effects of an acquisition, it may be authorised
- the TPA should not be unduly distorted by new forms of protectionism.

Other Merger issues

I would like to conclude by mentioning some other merger issues.

The Australian Competition and Consumer Commission has recently issued revised guidelines on how it assesses mergers.

They reflect the ACCC's experience in assessing over 500 mergers since the publication of the draft Merger Guidelines in 1992, just before the "substantial lessening of competition" test was introduced (in place of the dominance test).

Experience shows the basic approach, which follows overseas practice and Court and Tribunal decisions, to be sound. There has been little or no change in the core analytical approach adopted in 1992. However, some changes have been made in the application of the guidelines in the light of experience in the past four years. There has been greater recognition of (a) the role of merger law in deregulating sectors and (b) the increased exposure of business to global markets.

Merger policy makes an important contribution to the achievement of a competitive and productive Australian economy. Regulation of anti-competitive mergers is an important part of national competition policy. Trade practices merger law conforms with the principles of national competition policy agreed to by all Australian Governments when the Hilmer Review was established. These principles included:

- No participant in the market should be able to engage in anticompetitive conduct against the public interest;
- Conduct with anticompetitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and evidence of the public costs and benefits claimed.

Regarding globalisation, the ACCC has as indicated above not opposed any mergers in markets with substantial import competition in the past five years.

Merger policy is critical to ensure competitive input markets for trade exposed sectors. The ACCC's priorities remain with mergers in the non-traded goods and services sector.

Merger policy is of special importance to sectors undergoing privatisation and deregulation.

It is essential that the pro-competitive effects of deregulation not be undone by anti-competitive mergers.

One hypothetical example would occur if an electricity generation monopoly is split up into a number of competing generating businesses. A subsequent merger of them could be anticompetitive and inefficient. Similarly if the monopoly is split up "vertically" so that generation, transmission and distribution are run as separate businesses, a vertical reintegration merger could be anticompetitive and inefficient.

There are potentially many examples where the positive effects of de-regulation could be undone through mergers, in sectors such as energy (electricity, gas etc), communications (telecommunications, broadcasting etc) transport (ports, airports, rail, etc), water, health, primary industry (agricultural marketing boards such as sugar, milk, eggs etc).

Increased exposure to global markets is placing pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive in those markets. Mergers can play an important role in achieving such efficiencies. These factors are reflected in the revised Guidelines, which:

- provide clear guidance on the Commission's assessment of import competition; and
- place greater emphasis on the relevance of efficiency in merger assessments.

Specific steps taken by the ACCC include:

- greater emphasis on the relevance of efficiency considerations under section 50. Traditionally when firms argue that a merger may lead to greater efficiency this has been regarded as most relevant to applications for authorisation of mergers. The Guidelines now expressly recognise that in certain circumstances a merger that reduces costs may contribute to improved competition and that this may be taken into account at the stage of considering whether or not a merger is likely to breach section 50 (which prohibits mergers likely to substantially lessen competition).
- adoption of an indicative position of not opposing mergers where a sustained and competitive level of imports exceeds ten per cent of the market.
- a review of other less direct impacts of internationalisation of trade and commerce on domestic competition to see whether any further general revisions should be made to the Guidelines.
- adoption of the Industry Commission's suggestion to consider the implications of liberalising the market share thresholds below which mergers will not be scrutinised.

The ACCC will in 1996-97 review all mergers against both the current thresholds and those suggested for consideration by the IC and publish the results of that review.

- in the (many) cases where mergers are notified but fall below the existing thresholds there will be a fast track review process. The same may apply to mergers falling below the threshold suggested for consideration by the IC.

A number of other changes are detailed in a media release accompanying the new guidelines.