Australian Competition and Consumer Commission

Promoting Competition and Fair Trading

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COMPETITION LAW AND AUSTRALIA'S CONSTRUCTION AND INFRASTRUCTURE INDUSTRIES

Thank you very much for inviting me here today, in what has been a very auspicious week for engineers across Australia.

I refer of course to the broadcast this week, after a gap of more than 20 years, of the reincarnation of The Inventors, now imaginatively titled by the ABC as "The New Inventors".

I was delighted to learn that the judging panel of the program that will search for Australia's best innovations and inventions includes Young Engineers Australia chairman James Moody.

After years of seeing every half decent chef in the English speaking world turned into a TV star with a three book deal in the ABC shop, it now appears to be time for Engineers to enjoy their time in the spotlight.

I'm not sure if James looks like Jamie Oliver, or has a pony tail like Neil Perry, or even whether books on great engineering feats are going to be quite as sexy as cook books, but if the show is a hit it can't be too long before we start seeing sell out stage shows featuring engineers explaining how to build a road or a bridge.

The Trade Practices Act, the ACCC and Professions

The Commission's basic philosophy is that prevention is better than a cure. It is eminently more sensible to have business comply with the Trade Practices Act rather than try to undo the damage later through enforcement.

We understand that every profession and trade is affected by the Act in different ways, and to this end we work with various industry and professional groups to help them understand the law and comply with it. I am pleased to say that as far as engineers go this approach is clearly succeeding.

But those who ignore this advice do so at their peril. For example, recently the Commission successfully took legal action against a doctor who had attempted to induce other doctors who wished to work at a particular medical centre to agree that they would not participate in bulk-billing or offer after-hours services.

There are cases where the Commission is prepared to allow professional bodies to engage in what might be regarded as anti-competitive conduct under a process known as authorisation, if we deem this to be in the public interest.

All of this raises the question of what's so special about professionals, and why should they be exempted from competition laws?

First, the work carried out by professionals is usually restricted to professionals. For example, heart surgery may only be performed by an appropriately qualified surgeon for fairly obvious reasons.

There are also very good reasons why only engineers should be responsible for building certification.

At other times, however, the restriction may seem more arbitrary. Why is it that in some states only lawyers may do conveyancing, while in others it is not necessary to be a lawyer to provide these services?

The effect of restricting professional work to professionals is that it creates a relatively small group of people who are the only providers of a particular service and who face no external competition.

Second, the sophisticated and often highly technical knowledge required of a professional often means that those who engage their services find it difficult to assess the quality of the work.

Third, professionals often work in highly regulated environments. This may be due to government regulation, or to high levels of industry self-regulation, or a combination of the two. Regardless, it affects the way that professionals carry out their work and may impede competition.

For example, rules preventing members from advertising their services make it very difficult for them to compete for business by offering lower prices or better services.

Concerns such as this have led the Commission to examine the 'rules' imposed by various industry bodies in a number of instances.

Engineers and the TPA

I should say at the outset that we receive relatively few complaints about the conduct of engineers.

This may be because engineers are not as regulated as other professionals such as doctors or lawyers.

This makes the role of industry bodies like Engineers Australia, who have responsibility for registering engineers, that much more important.

Generally, the Commission accepts that there may be a need for the registration or professional recognition of practitioners for the purposes of public safety, but this must not be used as a de facto method of restricting competition by preventing suitably qualified and competent professionals from practising.

As such, where an industry body is responsible for determining who can practice, it is crucial that its determinations be transparent, objective and contain adequate provision for resolving disputes.

Of course, the Commission isn't the only government body to take an interest in the interaction between the professions and competition. The National Competition Council has noted that: *"Planning, planning approvals, and building and construction regulations and approvals can have a significant impact on building costs. Occupational licensing of building service providers has benefits, but also can have an impact on building costs. Legislation in all of these areas can have anticompetitive effects."*

The Council's latest assessment of governments' progress in the implementation of national competition policy and related reforms found that reforms were yet to be implemented in some important areas, including building-related trades and professions.

Queensland is the only state to regulate its engineers directly, and in 2002 enacted new legislation regulating engineers, following a review of previous legislation that had several anti-competitive aspects.

The NCC considered that the new legislation met the obligations of national competition policy in several ways, including by no longer requiring that engineering companies be registered, and by adopting the approach of co-regulation. Broadly, co-regulation means that the engineering profession is regulated both by the government and by the profession itself.

However, it's not just direct regulation that affects the work of engineers. For example, the NCC noted that the introduction of private-sector building certifiers in some jurisdictions had established a competitive market for building approval and inspection services.

All jurisdictions have commenced the process of reviewing their building regulations, and most have already enacted new legislation reducing the anti-competitive effect of

previous regimes. This is good news for consumers, and for those whose livelihood depends on the building industry

Professional indemnity issues and the TPA

A major issue for many professional groups in recent years has been the difficulty that some professionals have experienced in obtaining professional indemnity and public liability insurance.

As you are all too aware, in recent years the cost of professional indemnity and public liability insurance has increased at a rate that many professionals consider to be unsustainable. Some professionals have found it impossible to even obtain insurance at any price for some of their activities.

In response, state and territory governments are in the process of implementing a series of changes to the common law, including the capping of compensation pay-outs and the imposition of minimum claims thresholds.

Whilst these reforms should go some way towards making professional indemnity and public liability insurance more affordable and accessible, concerns have been expressed that this may simply drive people to switch from the common law to using the Trade Practices Act – undermining the intent of the reforms.

It's been suggested, for example, that sections of the Act that prohibit misleading, deceptive or false conduct or representations could be used to gain unlimited damages from professionals whose advice has caused their clients to suffer a loss. These sections do not require any finding of negligence to be made, and so plaintiffs could also, arguably, find it easier to get a verdict in their favour.

Amendments are currently being considered by Parliament that try to prevent such a course of action being used to undermine the insurance reforms. However, the final form that these amendments will take, if indeed they are passed, remains unclear.

Following some pretty vigorous debate, proposed amendments that would limit both the amount of damages that can be awarded for personal injury or death under certain provisions of the TPA, and the time period in which actions for personal injury damages may be commenced, were introduced into the Senate.

However, whilst both sides of politics support the general idea of closing what some see as a 'loophole' that may undermine state and territory law reform in this area, just how this is to be achieved is still up in the air.

Despite this, a number of other reforms have been implemented. To help ensure the full benefits of these reforms are passed on to business, the ACCC has also been given responsibility for monitoring their impact.

The Commission's most recent report found that average professional indemnity premiums rose by five per cent last year, while the average size of claims for professional indemnity insurance rose by 19 per cent.

It should be noted, however, that most of the reforms implemented by state and territory governments have, so far, been directed at personal injury claims which represent only a small proportion of the claims absorbed by professional indemnity insurers, with the exception of course of medical indemnity insurers.

To tackle the particular problems faced by professionals and their insurers, commonwealth, state and territory governments have agreed to implement uniform professional standards legislation.

Under this approach professional bodies will develop self-regulation schemes that require members to adopt insurance and risk management schemes that will be approved and monitored under the legislation.

In return, the legislation provides for the capping of liability. It is intended that these caps are high enough to protect most consumers and corporations in their claims for economic loss, whilst limiting the possibility of extraordinary claims.

Mergers

I'd now like to turn to the Commission's views on the future of the building and construction industry, and in particular mergers.

As I'm sure everyone here is well aware, it is the task of the Australian Competition and Consumer Commission to bring about greater competitiveness in every sector of the economy.

It is not the job of the ACCC to preserve competitors or protect individual companies from vigorous, legitimate competition – even where that competition causes difficulties for individual firms.

Section 50 of the Trade Practices Act generally prohibits mergers or acquisitions that would substantially lessen competition, so in considering mergers or acquisitions, the Commission is therefore required to make an assessment along the following lines:

- Are there any barriers to entry – that is, how difficult is it for new companies to enter the market?
- How concentrated is ownership within the industry?
- How exposed is the industry to imports?
- The degree of countervailing power, that is, to what extent can governments and big firms counteract any defects through purchasing power?
- How dynamic is the industry and what are its prospects for future growth, innovation and new products? and
- What impact will the loss of a vigorous and effective competitor have on all of this?

In other words, an industry dominated by one or two companies controlling the supply chain that faces little competition from imports, is going to have a hard time persuading the Commission that its major players should be allowed to merge.

Mergers and Acquisitions in the Building and Construction Industry

Given that the construction industry is characterised by large companies controlling the supply of raw materials, manufacture of products and distribution, the Commission pays particular attention to all levels of production to determine the extent of vertical integration.

A critical tool for us here is the notion of substitution, that is, the ability for firms in similar industries to switch production into the industry in question.

The range of pricing and quality can also be crucial in determining the number of competitors for the project as can cost constraints such as the location of raw materials and transport and distribution costs.

Early last year, in considering a merger between two producers of cement, fly-ash and furnace slag, the Commission found that there was minimal geographic overlap. One firm, Australian Cement Holdings, operated principally in Tasmania, Victoria and NSW, the other (Queensland Cement) in Queensland and both faced competition locally and from imports.

We therefore decided not to intervene, and to let the merger proceed.

The Commission is currently considering the proposed acquisition of Adelaide Brighton by Boral. As Boral and Adelaide Brighton are vertically integrated, the Commission will consider the impact such a merger would have on areas such as cement, aggregates, flyash/slag, concrete and concrete masonry and the geographical locations in which these companies operate.

Barriers to entry

This brings me to the issue of contestability, that is, how difficult is it for competitors to enter the market or expand in a sustainable way.

In considering this we look at the recent history of the industry, the costs of investment and capital, how much excess capacity there is and the effect that

established brands and reputations as well as marketing and supply have on locking in existing customers.

The critical point is that new competitors have to not only be able to enter the market they must be able to survive as a long term competitor.

Concentration

In every merger we look at the number of significant players to determine how market share will be impacted by the merger.

For example, in allowing the merger between QCL and ACH, the Commission also noted the presence of Adelaide Brighton Limited in the market. The Commission had previously granted Adelaide Brighton authorisation to acquire Cockburn Cement and Adelaide Brighton Cement Limited in 1999. One of the reasons the application was granted was that the authorisation was likely to make ABL more competitive.

We also consider industry practices and developments. For instance, it is common with large construction projects for firms which might otherwise be competitors to combine their expertise, management and finances in joint ventures or consortia to strengthen their bid.

The ACCC is aware of concerns in the industry about the increasing concentration of ownership among construction firms, particularly through common ownership and corporate linkages. One example that has been cited is the Leighton Group, which now includes such companies as Leighton, John Holland, Transfield and Thiess.

As recently as late last year when we considered the acquisition of Abigroup by Bilfinger Berger, known here as Baulderstone Hornibrook, we noted that significant industry rationalisation has occurred in recent years that had made segments of the industry highly concentrated.

As a result of this concern, we undertook to carefully assess any future proposed acquisitions to ensure they did not lead to a substantial lessening of competition.

At the same time we recognised that the Abigroup/Baulderstone merger may have the effect of making the new merged entity better able to compete for large projects against the Leighton Group.

We also recognised that both the Leighton Group and Abigroup/Baulderstone would face continuing vigorous and effective competition from a range of other players in the market.

We have noted the argument that, despite the various linkages within the industry, there are arms-length arrangements to minimise conflicts of interest and ensure independent competition between firms.

I hope that continues to be the case but the Commission has not shied away from investigating and prosecuting anti-competitive cartels in the building industry in the past and will take action, if necessary, in the future.

Imports

The potential for imports to compete against local industries is another crucial factor in considering proposed mergers.

For example, the Commission considers that imports are unlikely for low value goods such as aggregates and flyash. Cement is another product where the Commission has concerns about the viability of imports for a number of reasons.

Imports must provide real and ongoing competition if we are to accept that they will offset any loss of competition caused by the merger of two locally based suppliers.

Countervailing power

It is often put to us – and we have accepted in the past – that, as the major buyers in this industry, government authorities and major building companies are well-placed to constrain any exercise of market power or anti-competitive behaviour by their contractors.

The Commission is always open to arguments as to whether or not this countervailing power of major buyers continues to be effective.

But in other parts of the industry, it would appear that the customer base is fragmented, small-scale and diverse.

In such cases, and in the absence of viable imports, customers will have little bargaining power if a merger leads to a substantial increase in market power.

Conclusion

It would be quite wrong to leave you with the impression that, as a regulator, I believe the first best solution to a competition problem is regulation.

It is not.

It is better, cheaper and more efficient for markets themselves to be robustly competitive.

But, if significant markets fail, if they are too highly concentrated and if barriers to entry are high, then it is the job of the ACCC to step in, and ensure both business and consumers get a fair go.

We will not be afraid to take action through the courts, where necessary, but in all cases we would much rather work with business to achieve compliance, instead of seeking to undo the damage later, at much greater cost to business and the community.

If a company or a profession comes to the Commission and says "we've got a problem and we'd like you to help us fix the problem quickly", I can assure you, you will find us very receptive.