"Decision Making at the Centre"

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Introduction

This paper discusses decision making at the centre in relation to Australian competition policy. Australia is a Federation which has recently reviewed its national competition and regulatory policy and the outcomes may be of interest in the context of other Federal States or in the context of the European Community. The paper is not intended to be truly comparative. However in order to facilitate any comparisons some analysis of the underlying framework of competition policy is conducted at the outset.

The structure of the paper is as follows:

- Section 1 discusses the framework of competition policy analysis, highlighting a "narrow" view and a "broad" view of competition policy.
- Section 2 discusses issues concerning the question of having a national policy in a Federation rather than a series of policies in differing individual States.
- Section 3 discusses the actual Australian competition law which is based on a mixed European USA system of antitrust law.
- Section 4 discusses recent major reforms aimed at achieving a comprehensive national competition policy which applies to all sectors of business without exception, which is "broad" rather than "narrow" in its character, which embraces necessary regulation as well as traditional competition policy, and which seeks to balance national and state interests.
- The paper ends with some tentative conclusions about "decision making at the Centre".

1. What is Competition Policy?

This section sets out an economic framework regarding the analysis of competition and competition policy in order to emphasise that competition policy is not just traditional antitrust policy but encompasses a much wider range of issues.

1.1. Reasons for Competition Policy

In most countries unrestricted competition is not a goal in itself. Competition generally drives economic efficiency, the effective allocation of resources and ultimately economic growth which in return will benefit all participants in the economic process. There is a presumption in competition policy in favour of competition unless it can be shown that efficiency or some other public goal overrides it. The presumption is seemingly stronger in the USA than in Europe.

Although all real world markets depart from the textbook ideal, most do a far better job of delivering lower prices and better products than would regulators. The task of competition policy should not be to replace the market, but rather to create an environment in which it can function better.

1.2. Competition Policy in the narrow and the wider sense

Traditionally competition policy has been perceived in what may be referred to as "competition policy in a narrow sense", with legal prohibitions on anticompetitive agreements, monopolisation, and anticompetitive mergers. This is known in Europe as competition law and in the US as antitrust policy.

However an analysis of the competitive structure of the economy as a whole indicates that the anti-competitive behaviour of private enterprise is merely one of a variety of factors that constitute an impediment to competition in the economy as a whole. Other major elements preventing free competition include import restrictions, state regulations of professions, the requirement of licenses for the exercise of certain business, price regulations, restrictions on advertising, membership obligations in professional associations and the like; they include some natural, some artificially created, monopolies such as gas, electricity or water grids, or services provided by the state competing with private enterprise on unequal terms.

The tackling of those barriers requires a much wider perception of competition policy. Competition in these areas can not be created by simply extending the existing prohibitions. "Competition policy in a wider sense" can not content itself with defensive mechanisms against undesirable behaviour, but has to actively pursue the creation of competition through new mechanisms. It therefore involves the removal of government imposed impediments to competition and pro-active steps to promote competition for example through the granting of access to certain essential facilities in appropriate circumstances. One example of such steps is the creation of an access regime to a natural monopoly such as an electricity transmission grid in order to create competition in the electricity generation and distribution markets. Another would be the creation of tradeable water rights in order to create competition in a market governed by a scarce resource.

"Competition policy in a wider sense" may also include the introduction of regulation such as price supervision for natural monopolies. Some argue that regulation of this kind should be excluded from the definition of competition policy because it does nothing to promote competition and merely seeks to curb the exercise of market power but this paper includes it.

1.3. Economic Analysis of Competition

In order to discuss these two elements of competition policy fully this section of the paper first briefly sets out the broad analytical approach used in the analysis of competition: it customarily relates to structure, conduct (or behaviour) and performance.

The **structure** of industry is generally thought to affect its conduct and performance. [Although there are differing views of the degree of its importance, most economists

agree on its basic importance as a determinant of the degree of competition.]
Structural features of industry include:

- technical characteristics, eg capital intensity
- economic characteristics, eg. demand conditions, product substitutes;
- entry conditions;
- number, size and distribution of industry participants;
- imports;
- vertical integration;
- product differentiation;

The **conduct** (or **behaviour)** of an industry also affects the degree of competition (and may even, to a degree, have a feedback effect on structure). It includes:

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

Conduct, although influenced by structure, has an independent effect of its own.

The **performance** of an industry relates to its

- efficiency; and
- technical progressiveness.

The **structure** and **conduct** variables of the kind set out above can be affected both by government intervention and by private sector actions.

Thus, the structure of an industry can be influenced by various kinds of **government** intervention, which can either restrict competition or by the same token remove restrictions, thereby stimulating a greater degree of competition. The government can influence behavioural patterns by prohibiting certain behaviour that is deemed to be undesirable, such as anticompetitive agreements between companies.

Private sector actions influence the amount of competition in an industry. Such behaviour may include such matters of policy concern as anticompetitive agreements between competitors, misuse of market power by monopolists and oligopolists, and anticompetitive mergers. It is these actions which are the concern of traditional competition law which prohibits such conduct and thus in turn influences such behaviour by private entities.

1.4. Instruments for a comprehensive competition policy

Traditional competition policy or "competition policy in the narrow sense" only operates on a subset of the variables of concern to a comprehensive competition policy and those are largely the conduct variables of the kind set out above. [Sometimes its application to behavioural variables can have some effects on the structure of an industry eg the prohibition of misuse of market power by predatory pricing practices may facilitate entry into an industry. In addition, merger policy obviously affects the structure of industry. In those few countries where divestiture

occurs, this also affects industry structure. Subject to these qualifications, however, traditional antitrust policy mainly affects conduct.] A comprehensive pro-competition policy must however also include those factors that affect the structural variables. A "competition policy in the wider sense" therefore involves:

- competition law prohibiting anti-competitive conduct by businesses (competition policy in the narrow sense");
- the removal of government regulation that limits competition, eg import restrictions, entry barriers of all kinds, professional licenses, minimum price laws, restrictions on advertising;
- the reform of monopoly structures created by governments; [Many public utility monopolies have been created and been protected by laws. More and more governments are not only removing the protections from competition but are actually splitting up monopolies both horizontally and vertically. Thus in the State of Victoria, Australia, the former electricity monopoly has been split up vertically into separate generation, transmission and distribution sectors. Generation and distribution have each been horizontally separated into several competing companies. Transmission has been considered a natural monopoly. Most of these new businesses have also been privatised. In New South Wales, something similar is happening but without privatisation.]
- the achievement of competitive neutrality; [If government businesses compete with the private sector they should not have any special net advantages, eg tax exemption. By the same token the private sector should not have any advantages, such as government subsidies, not available to other private businesses or government businesses and vice versa.] ;
- access to essential facilities;
- free movement of goods, services, persons and capital across internal and external borders; [This includes including the removal of regulatory impediments due to differing safety standards either nationally or internationally.]
- the separation of industry regulation from industry operations eg Telecom dominant firms should not set technical standards for new entrants;
- (possibly) regulatory powers to curb misuse of market power eg price control.

The implementation of a comprehensive competition policy requires the assessment of a wide range of policy instruments going beyond the traditional legislative prohibitions. They include policy on trade, intellectual property, foreign investment, tax, small business, the legal system, public and private ownership, licensing, contracting out, bidding for monopoly franchises and so on. Some of these policies, such as traditional competition and fair trading law, have an obvious direct effect on competition while others affect the general economic environment and ultimately the general climate of competition of the country. Competition policy in the broad sense requires a seat at many policy making tables.

1.5 What can a comprehensive Competition Policy achieve?

Competition policy, even in the wider sense, and its implementation through the instruments described above, does not make markets perfectly contestable, but it can help the competitive process yield outcomes which come closer to the competitive ideal, and hence allow for durably higher productivity and incomes.

1.6. Role of a Central Agency

It is worth noting that the concept of a comprehensive competition policy or "competition policy in the wider sense" involves many questions about legislation and regulation and inevitably involves political processes. In contrast, in many countries such as Australia, traditional narrow competition policy involves an attempt to use non political, independent agencies - and courts - to administer and enforce competition laws with minimal political processes. For a country moving from a traditional narrow competition policy to a comprehensive competition policy, it is not politically feasible to entrust all decision making to the traditional agency.

In Australia, following the reforms discussed later in this paper, the administration and enforcement of traditional competition laws has remained within a fully independent, nonpolitical Commission - the Australian Competition and Consumer Commission - but broad policy changes remain with legislators and governments.

However, there are questions about which institutional processes should be employed in assisting decision making in a comprehensive competition policy. In Australia, one innovation has been the establishment of an independent non-political National Competition Council to study, recommend, help bring about policy reforms to both the national and state governments.

2. National Competition Policy

Australia, a federal state, has recently been debating the concept of national competition policy. Until now, some elements had been handled - or not handled - at state rather than national level.

According to the Hilmer Committee, the imperative for developing a national competition policy is based on three main factors:

- The economic significance of State and Territory boundaries is diminishing rapidly, particularly as advances in transport and communications permit many firms to develop national trade networks. Many more markets are best characterised these days as national rather than regional. While there has been some progress in this area, there is room to increase the momentum to enhance co-operation between governments for the benefit of business and Australian consumers generally.
- Tariff reductions and other trade policy reforms have increased the competitiveness of the internationally traded sector. Yet, at the same time, many goods and services provided by public utilities, professions and some areas of agriculture are sheltered from domestic competition. These important sectors of the economy - mostly governed by State or Territory laws rather than national laws - face limited exposure to a vital part of Australian competition policy - the *Trade Practices Act*, due to constitutional and ownership limitations. The effects of this exemption are felt nationwide and ultimately hinder its capacity to compete effectively in international markets.
- Domestic pro-competitive reforms have largely been implemented on a sector-by-sector basis, without regard to a broader policy framework or process. A national competition policy presents opportunities to progress reform more

broadly, to promote nationally consistent approaches and to avoid the costs of establishing diverse industry-specific and sub-national regulatory arrangements. This debate may be of some relevance to other federations and the EU.

The broad approach of the Hilmer Report was to regard competition policy as being essentially of national rather than State or Territory character and to propose means by which major gaps in national competition policy could be filled with the agreement of State and Territory governments.

3. Australia

In 1995 in Australia a historic agreement was signed between the Prime Minister of Australia, the Premiers of the States and the Chief Ministers of the Territories defining competition policy of a comprehensive nature. This policy included "traditional competition policy" by not only endorsing the existing competition rules but also providing their extension to areas not previously covered. The policy also created "comprehensive competition policy" by initiating a process of review and structural reform to create and enhance markets across the whole ambit of economic activity.

Since this paper is written from the perspective of a central competition agency it will focus especially on the creation of a national competition authority with universal coverage. In order to do so it is however very important to describe the context in which such a regulator has been created and in which it will operate. The paper will therefore outline the constitutional and historical background of competition policy in Australia and the factors that led to the perception that a national competition policy in Australia was required.

3.1. Constitutional and Institutional framework in Australia

Australia is a federation. The Federation was formed in 1901 by the various former States and Territories that occupied the different parts of the Australian continent. Legislative and administrative powers are divided between Federal and State levels. The Federal level is generally referred to as "the Commonwealth", whereas the State level comprises six States and two Territories [The States are New South Wales, Victoria, Queensland, Southern Australia, Western Australia and Tasmania; the Territories which do not have the same status as a State and are dependent on the Commonwealth are the Australian Capital Territory and the Northern Territory.] .

The Australian Constitution confers no direct legislative power on the Commonwealth to legislate with respect to competition law. The Commonwealth has the legislative power in relation to interstate trade and commerce, [The Australian Constitution, para 51(i).] and in relation to corporations. [Ibid, para 51(xx).] On the basis of that power the Commonwealth has tried since the beginning of the century to establish a competition policy of the traditional kind.

Specific deficiencies have been:

- its lack of coverage of unincorporated businesses not engaged in interstate trade and commerce;
- the Commonwealth Government for political reasons has felt it appropriate to allow State and Territory Government to pass laws which override national competition policies;
- State Government business enterprises have been protected under the "Shield of the Crown" until the recent reforms. and
- finally, in regard to the notion of "comprehensive competition policy", a great deal of decision making takes place at State government level eg regarding most public utilities, professions and agricultural marketing boards.

To overcome the constitutional limitations and to achieve coverage of all economic activity, co-operation of some form by State Governments is clearly required. This point is even more important in relation to a national comprehensive or broad competition policy.

Another feature of the Australian Constitution which influences competition policy is its relatively rigid separation of judicial from executive powers. In general administrative bodies such as the Australian Competition and Consumer Commission are constitutionally prohibited from making judicial decisions, that is decisions affecting rights and obligations of individual persons or corporations. Although the exact boundaries between judicial and administrative decisions are the subject of ongoing controversy and uncertainty, the broad effect of the distinction has been that much key decision making under the Trade Practices Act has been entrusted to courts of law. This partly explains why some of the recent changes to the law eg the law regarding access to essential facilities has led to the involvement of a considerable number of separate bodies in decision making including courts, the Australian Competition Tribunal, and the Australian Competition and Consumer Commission, and the National Competition Council. (A further layer of complexity arises from the need to take account of State political considerations.)

3.2. Evolution of Australian Competition Policy - from Federation to Hilmer

3.2.1. The first efforts

Australia's first competition law based upon the above mentioned constitutional powers was the Australian Industries Preservation Act 1906, which was enacted only five years after Federation. [The Australian Industries Preservation Act 1906 .] The legislation was shortlived, however, because the High Court declared it to be invalid in 1909. In the *Huddart Parker* case, [Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330.] the High Court held that the legislation's attempts to cover intra-state trade and commerce was an invasion of the rights of the States. This decision would now be regarded as conservative.

A further attempt to enact such legislation came in the form of the *Trade Practices Act 1965*, which was successfully challenged in the *Concrete Pipes* case. [Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468.] While the High Court overruled the decision in *Huddart Parker*, and held that a law regulating the trading activities of a trading corporation was within the legislative power of the Commonwealth to

regulate corporations, it held the legislation to be invalid on other constitutional grounds.

Nevertheless the broad outcome of this case was a ruling which essentially upheld the validity of antitrust law applicable to the private sector other than to unincorporated enterprises not engaged in interstate trade and commerce. As a result the more substantial *Trade Practices Act 1974* was made possible.

3.2.2. The Trade Practices Act 1974

In 1974 the Commonwealth adopted the current Trade Practices Act, which has remained in force until today. While it has undergone a few changes over the years its two main objectives remain the same: the prevention of anti competitive conduct, through classical competition law, thus implementing competition policy in a narrow sense, and the assurance of fair trading practices. Under the so called "Hilmer Reforms", initiating "comprehensive competition policy" in Australia, a new part was added to the Trade Practices Act in 1995 relating to access regimes for essential services. These amendments will be discussed below in detail together with the other reforms.

The *Trade Practices Act 1974* was regarded as revolutionary for Australia in its attempt to remove the restrictive practices, which were commonplace in Australian business.

The 1974 Trade Practices Act was also a breakthrough in elevating consumer protection through fair trading legislation to a national level. Although there was State legislation in existence, a national law ensured that fair trading legislation had a common base throughout Australia.

The content of the Trade Practices Act 1974 can be summarised as follows:

3.2.2.1. Provisions of the Trade Practices Act

The Trade Practices Act can roughly be divided into two broad areas - each dealing with one of the main objectives of the law, ie the prohibition of anti-competitive conduct and the enforcement of fair trading:

3.2.2.1.1. Anti-competitive conduct

The first part of the Trade Practices Act prohibits anti-competitive conduct. Although the rules are complex and detailed, they are based on two principles:

- that any behaviour which has the purpose or effect of substantially lessening competition in a market should be prohibited; and
- that such behaviour should be able to be authorised when its anti-competitive effects are offset by associated public benefit.

As will be seen below, the law is based on a mixture of European and North American competition law elements.

The main types of rules governing anti-competitive behaviour can be summarised as follows:

- Anti-competitive agreements are prohibited. These include price-fixing agreements between competitors (a per se ban), exclusionary provisions, including primary and secondary boycotts (section 45), exclusive dealing which substantially lessens competition (section 47), with third line forcing prohibited *per se* and resale price maintenance (sections 48, 96-100). These rules can roughly be compared with the prohibition of anti competitive agreements in Article 85 EC-Treaty.
- Misuse of substantial market power is prohibited. Misuse requires the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct (section 46). These rules can roughly be compared to Article 86 of the EC-Treaty.
- Mergers and acquisitions are prohibited if they have the effect of substantially lessening competition. If they do have that effect they are prohibited. The European Union controls the effect of mergers with specific merger rules.

The initial wording of the rules of the Trade Practices Act governing the misuse of market power and merger control required "dominance" for a prohibition. This was changed to "misuse of market power" for abuse and recently in 1993 to "substantial lessening of competition" for mergers. The Act therefore now also covers the acquiring and exercise of market power under oligopolistic conditions. The new law clearly covers a wider range of mergers and acquisitions than in the past. [The argument that caused the change was that in principle the law should apply to any mergers that were likely to lessen competition in a substantial market, not just those that caused single firm dominance.]

3.2.2.1.2. Fair Trading

The second part of the Trade Practices Act deals with questions of fair trade or with what is also described as consumer protection.

The Act prohibits unfair practices. These practices include unconscionable conduct, misleading or deceptive conduct (section 52), specific prohibitions for false or misleading representations (sections 53-65A), conditions and warranties in consumer transactions (Division 2) and product safety provisions.

These rules are designed to promote fair competition and provide 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. [Following the enactment of the Fair Trading Provisions of the Trade Practices Act in 1974 each State and Territory governments responded in later years by enacting their own separate "mirror" legislation which replicated the national law. This overcame the deficiencies in the constitutional reach of the national law which was again based upon the interstate trade and commerce power and the corporation's power and did not cover unincorporated enterprises trading within the State. However, each State set up its own system of administration and enforcement of its fair trading laws and to this day National and State enforcement of the fair trading laws continues side by side.

There has been little suggestion that there should be one National regime as there has been in regard to the competition provisions of the national competition law. It has generally been deemed more sensible that each State should administer its own fair trading laws.]

3.2.2.1.3. Enforcement

A contravention of the Trade Practices Act can be pursued in two ways:

· The Trade Practices Act can be enforced by means of public enforcement through the Australian Competition and Consumer Commission (previously Trade Practices Commission); or

· through private enforcement by persons who have suffered loss or damage as a result of conduct that contravenes the Trade Practices Act.

More than half of the litigation under the Act is private and this has a powerful impact on the effectiveness of the Act.

Generally, the Australian Competition and Consumer Commission will seek to recover "pecuniary penalties" (fines) or a remedy that will benefit the market place as a whole, whereas a private litigant will normally only be concerned with recovering the loss or damage flowing from the contravention. [S G Corones, Restrictive Trade Practices Law, 1994, pp. 419.] Both may seek injunctions to stop anticompetitive behaviour.

Monetary penalties can be as high as ten million Australian dollars for anti-competitive conduct by a corporation and 500,000 Australian dollars for a breach of these provisions by an individual. Breaches of the unfair trading provisions have a maximum limit of 200,000 $ AUS for corporations and 40,000 $ AUS for individuals per offence. There are no criminal sanctions. The burden of proof is civil.

3.2.2.1.4. The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission has been created by the Trade Practices Act. It is an independent statutory body whose major function is to ensure compliance with the Trade Practices Act and to administer and enforce the Act.

The Australian Competition and Consumer Commission is required to investigate complaints relating to matters regulated in the Trade Practices Act. If it finds evidence of a breach of the Act the Australian Competition and Consumer Commission has the power to seek monetary penalties, injunctions, damages on an individual basis or via class actions, and other orders.

The Commission does not have the power to impose these remedies itself and leave it up to the parties concerned to fight those decisions in the courts. Any remedies provided for by the Trade Practices Act have to be ordered by a court at the initiative of the Australian Competition and Consumer Commission. This largely follows from

the constitutional division of powers between the administration and the courts in Australia.

3.2.2.1.5. Authorisation

A decision the Australian Competition and Consumer Commission may make in its own right is the granting of *authorisations* for behaviour that is prohibited under the Trade Practices Act. In such cases reasons of public benefit are required to justify such an authorisation. Depending on the arrangements 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. Appeals on these decisions can be made to the Australian Competition Tribunal, a quasi judicial body headed by a Judge of the Federal Court assisted by two lay persons, typically an economist and a business person.

Authorisation grants immunity from legal proceedings for the conduct that has been authorised.

Several features of authorisation are worthy of interest:

· the fact that authorisation grants immunity from competition law has been cited in debates about national competition policy as a reason for the removal of any legislation which confers immunity from competition law. The argument has been that it is better for immunities to be granted by means of a public process of independent evaluation by a non political body rather than by political processes where interest groups may exert undue influence;

· the Australian Competition and Consumer Commission in considering authorisation applications ceases to be a law enforcer with a prosecutorial mentality and instead adopts an adjudicative role. Academics sometimes query whether there is a conflict between these two functions. However, although in Anglo-Saxon countries there is some aversion to the mixing of such functions in one body, in practice there has been very little concern about this issue, possibly because all authorisation decisions can be and frequently are appealed to the Australian Competition Tribunal; and

· the authorisation process requires the Australian Competition and Consumer Commission to take into account a wider range of factors than it would in most other areas of its work where it is restricted to interpreting the law and where its enforcement decisions are governed largely by the single minded pursuit of competition as a goal. The term "public benefit" in the Act embraces the widest range of possible considerations. For example the Commission is currently involved in a merger case where it considers the merger would be anticompetitive but the merging entities claim that the competitive disadvantages are offset by the public benefit in this particular case of enhanced Australian ownership.

3.2.2.1.6. Divestiture

The power to seek divestiture of a business enterprise is practically non existent in the Australian Act. [There are two minor exceptions. First, the Australian Competition

and Consumer Commission can take divestiture action for the first three years after a merger has taken place. Second, individuals with an economic interest in a merger can also seek divestiture in relation to that merger for the first three years after it occurs. There provisions are not heavily used. There are also some constitutional doubts about their validity.] The absence of a substantial divestiture power underlines the point that the Trade Practices Act is mainly concerned with the regulation of anticompetitive behaviour rather than with seeking structural alterations in the economy. Of course over the long term merger law can have a significant effect on the structure of an economy.

3.2.2.1.7. Exclusions

As noted above, the scope of the Trade Practices Act is limited because of limitations in the constitutional powers of the Commonwealth. It does therefore not apply to unincorporated businesses that only trade within the boundaries of one state and thus leaves a significant part of the business community outside the regulation of classical competition law.

Until the recent "Hilmer Reforms" the Trade Practices Act did not cover corporations owned and operated by State Governments. This included all the major utilities such as railways, electricity, gas and water corporations. There were also significant areas of the economy such as doctors, lawyers and other professionals as well as statutory agricultural marketing boards - institutions similar to those well known within the European Union and its agricultural policy - that were not fully or at all covered by competition law.

3.2.2.1.8. Anticompetitive Regulation

A fundamental limitation of the Trade Practices Act as an instrument of comprehensive competition policy arises from certain forms of anticompetitive government regulation. If a group of incorporated farmers trading on an interstate basis reached a private agreement about minimum prices, this would be an illegal cartel under the Trade Practices Act. However suppose that the group of farmers instead persuaded the government to enact a law setting a minimum price for a product. This would be likely to have the same effect as a private cartel. However, the farmers would no longer be involved in reaching an anticompetitive agreement and therefore merely by adhering to a law enacted by the government the farmers would not be involved in any breach of the Trade Practices Act.

Suppose that a group of medical specialists reached an agreement that they would exclude from membership of their association (which had a monopoly on the supply of those specialised services to hospitals), persons with foreign or otherwise totally suitable qualifications. This behaviour again would breach the Trade Practices Act. However if that group of specialists succeeded in persuading the government to pass a law excluding those other specialists from entry into the profession unless approved by the association, no breach of the law would be involved. Thus, a far reaching limitation of the Trade Practices Act is its inability to override the effects of anticompetitive regulation.

3.2.2.1.9. Prices Policy

The Trade Practices Act does not contain any provisions for the regulation of maximum prices, nor for other forms of regulation of monopoly eg quality, service etc regulation, the imposition of cross-subsidy requirements.

The omission of price control powers from most competition laws around the world appears to be unusual because the main concern about market power is that it may be exercised to charge excessive prices. Even though certain industries are characterised by natural monopoly conditions - and in others market power may exist because of political unwillingness to apply competition policy to the full - the "lore" of antitrust policy is one of deep distrust of regulatory approaches.

In Australia there has been a separate Prices Surveillance Act, administered until 1995, by a Prices Surveillance Authority, and now by the new Australian Competition and Consumer Commission. This law gives some powers - though well short of powers of control - over prices, mainly of a monitoring kind.

3.2.2.1.10 Regulation

Unlike in the USA, Australia has not had a significant history of public regulation of monopoly. Publicly-owned monopolies were either self-regulating or directly regulated politically by Ministers. With the partial deregulation of telecommunications in 1990, an industry-specific regulator AUSTEL, based on the UK OFTEL model, was established. Basically it applied a mixture of competition law (eg an access regime), public utility regulation (price control by a CPI-x regime), imposition of cross-subsidies, and technical standards.

With the deregulation of electricity in Victoria in 1995, a Victorian Regulator General was established with a role similar to that of the UK electricity regulator. A particular role was the establishment of rules regarding the working of newly created electricity markets.

4. The "Hilmer Reforms"

The exclusion of such a significant part of the economy from traditional competition law and the existence of the other major barriers to competition outlined above, which were not included in a comprehensive competition policy, led to unsatisfactory results. As a result the Australian Heads of Governments requested a report on national competition policy in 1992. A committee chaired by Professor Hilmer was set up with the purpose of producing such a report.

A key challenge faced by the Hilmer committee was to devise a system which brought about a truly national and comprehensive competition policy but which enjoyed the support of the State and Territory government as well as the National government since it was neither legally nor politically possible to implement such a policy without the co-operation of States and Territories.

4.1 A Single Australian Market

The request for such a report has to be seen in the light of a number of reforms which the Governments of the Commonwealth, of the States and of the Territories had

undertaken to eliminate the various barriers to trade within Australia created by State borders. While the European Union is dealing with the elimination of such borders between its Member States, Australia had not dissimilar trade barriers within its own territory.

Again, the legislative and administrative power to solve these problems were divided between the Commonwealth and the States. As a consequence the Council of Australian Governments (COAG) was set up as a forum in which the heads of all Australian Governments could meet. It is not a formal institution recognised by the constitution but an informal forum where the Prime Minster of Australia, The Premiers of the States and the Chief Ministers of the Territories meet and give policy directions which can then be implemented at the appropriate levels. In this way COAG is not unlike the European Council before its formalisation in the Single European Act.

The reforms that were initiated by COAG include legislation on mutual recognition, designed to eliminate trade barriers between the States and Territories, including barriers to the free movement of services and persons. The purpose of this legislation is similar to the purpose of the so called "four freedoms" in the EC-Treaty. Other reforms are a national transport policy and a national agreement on the environment. Of particular importance to competition policy COAG sought agreement on a national gas policy and on a national electricity policy with a central element being the establishment of a national market which for the first time enabled competition between individual State suppliers of electricity and gas. This was to be brought about by the establishment of a national grid or transmission market which linked various States and enabled competition between generators and distributors in different States. A similar approach was taken with respect to gas. The Australian Competition and Consumer Commission will be the regulator. Promotion of interstate competition in public utility areas is of key importance. [Posts and telecommunications have always been the subject exclusively of a national approach to policy. Member State considerations have been irrelevant. The question of the exact nature of the regulatory approach to adopt to telecommunications and postal liberalisation, however, has been the subject of much debate.] In the context of the creation of a single Australian market the development of a national competition policy was therefore of vital importance.

4.2 The "Hilmer Report"

The report presented by Professor Hilmer, the so called "Hilmer Report", concluded that a comprehensive approach to competition policy was needed. Competition policy in Australia should not only include the competition law of the Trade Practices Act and its extension to previously uncovered areas of the economy , but also the micro-economic reforms necessary to open up markets previously closed to competition and to create new markets with competition.

According to the Hilmer Committee, the imperative for developing a national competition policy is based on three main elements:

- The first element concerns the traditional competition law. The Hilmer Report proposed that the Trade Practices Act (with slight modifications) should be universal,

and thus apply to all business activity in Australia, including such areas as unincorporated businesses and State and Territory government business enterprises. The power of governments to exempt specific anti competitive behaviour from the application of the Act should be drastically cut back. All of this required legal and political co-operation from State Governments.

- The second element relates to the barriers to competition which are outside of the scope of the traditional concept of competition policy. They include:
- review and reform of anti-competitive regulation by governments (such as domestic aviation, agricultural marketing boards);
- review and reform of anti-competitive structures (of public monopolies such as gas, electricity and water);
- in appropriate cases providing third party access to certain facilities that are essential for competition (for example access to the telecommunication network);
- restraining monopoly pricing behaviour;
- fostering "competitive neutrality" between government and private businesses when they compete.
- The third element concerns issues associated with the implementation of the proposals of the "Hilmer Report", including institutional and resource matters. In this respect the Hilmer Committee recommended the creation of the Australian Competition and Consumer Commission (ACCC) and the National Competition Council (NCC).

4.3. The Reforms implemented on the basis of the "Hilmer Report"

The legislative and administrative power necessary to implement these reforms is divided between the Commonwealth and the States. Accordingly COAG became the key body which decided on the measures that needed to be adopted to implement the proposals of the "Hilmer Report".

COAG agreed on a national competition policy reform package. This package includes competition policy reform legislation by the Commonwealth, the States and the Territories as well as a number of agreements between the heads of governments.

The three elements recommended by the "Hilmer Report" and outlined above are being implemented as follows:

4.3.1. Universal Application of the Trade Practices Act

The Trade Practices Act will now apply universally to all businesses regardless of their organisational form or whether they are engaged in inter-state trade. As discussed above the constitutional division of power between the Commonwealth and the States prevented the Commonwealth from adopting a universally applicable competition law by itself.

COAG managed to overcome this problem and avoid disputes about the exact extent of the constitutional powers of the Commonwealth and the States, by agreeing that the States adopt legislation that is identical to the competition rules in the Trade Practices Act but will apply to hitherto uncovered persons.

In order to ensure that any future changes in the legislation will be identical as well as safeguarding the rights of all parties to their constitutional powers, an agreement between the Australian Heads of Governments provides that the legislation can only be changed when agreed by the parties. In case of a vote the States and Territories have one vote each and the Commonwealth two votes plus a casting vote.

The Australian Competition and Consumer Commission would be the sole enforcement agency: the States and Territories did not set up their own enforcement agencies. [As noted in footnote 13, Section 3.2.2.1.2, this was not the way in which a national uniform approach to fair trading law was implemented.]

The Commonwealth has further amended the Trade Practices Act in order to remove a number of exceptions it contained:

- This includes the so-called "Shield of the Crown" doctrine, which exempted certain businesses run by the States and Territories from the application of the Trade Practices Act by virtue of being attached to the state and thus the Crown.
- The ability of Governments to grant exemptions from the provisions of the Trade Practices Act has been significantly reduced. Prior to the reforms, section 51(1) of the Act provided that legislation can be adopted by either the Commonwealth or the States that authorises behaviour that would otherwise be in breach of the Act. The procedure that has been introduced for granting such exceptions makes their adoption more difficult and creates an appropriate balance between mutual cooperation and the sovereignty of individual governments

Despite the removal of these exemptions and the achievement of universal applicability of the Trade Practices Act to all forms of business enterprise, the weaknesses of limiting competition policy to the extension of the Trade Practices Act were recognised and further measures set out below were adopted.

4.3.2. Micro-Economic Reform

The Competition Policy Reform Package agreed by COAG also includes the elements of "comprehensive competition policy" identified in the "Hilmer Report", which deals with such issues as regulation by governments, public monopolies, access to essential facilities, monopoly pricing and competitive neutrality. The agreement sets out a certain process to be followed in implementing the micro-economic reforms that are necessary to create universal competition.

4.3.2.1. Review and Reform of Anti-Competitive Regulation by Governments

The Heads of Australian Governments agreed to a review of legislation by all parties to the agreement. The guiding principles for this review are:

- that legislation of any kind should not restrict competition unless it can be demonstrated that the benefits of the restriction as a whole outweigh the costs; and,

- the objectives of the legislation can only be achieved by restricting competition.

Each party is required to develop a timetable by June 1996 for the review, and where appropriate, reform of all existing legislation that restricts competition by the year 2000. Proposals for new legislation that restrict competition will have to be accompanied by evidence that the legislation is consistent with the principles set out above. The legislation will have to be reviewed once every ten years.

This is an extremely ambitious project. It covers all legislation by all departments of Governments Federal and State and applies to all sectors including health, education, transport, defence, the environment and so on. There are relatively strict requirements that proper independent review processes be followed. Moreover, in order to ensure that the reviews are done properly, the Commonwealth, as noted later in this paper, will pay the States approximately $2.4 billion per annum in coming years providing the job is done properly. If it is not done properly the payments will not be made.

4.3.2.2. Review and Reform of Public Monopolies

The Heads of Australian Governments also agreed to review and reform public monopolies. Unlike in the legislative review, here the parties are free to determine their own agenda. The agreement gives however a framework in which these monopolies should be reviewed and reformed. They include:

- the appropriate commercial objectives, including financial and pricing considerations;
- the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly or separating potentially competitive elements from the monopoly;
- the most effective means of ensuring the separation of regulatory functions from commercial functions and of ensuring competitive neutrality of the public monopoly; and
- the merits of any community service obligation to the public provided by the public monopoly and the best way of funding and delivering that service to the public.

4.3.2.3. Providing Third Party Access to Essential Facilities

A new part has been introduced to the Trade Practices Act governing the access of third parties to infrastructure facilities of national significance that can not be duplicated in a economically viable way, but access to which is necessary to ensure effective competition in a downstream or upstream market.

The access regime provides for two alternative ways of ensuring for third party access to a facility as described above:

- the owner or operator of such a facility can offer an undertaking to the Australian Competition and Consumer Commission about the terms and conditions under which it will provide access to third parties, which will then be vetted by the Commission; or

- the newly formed National Competition Council will consider applications by third parties to declare certain facilities open to access. The decision about the declaration rests with the designated minister. In order to take account of the delicate balance between Commonwealth and State competences the designated minister is the Commonwealth minister unless the facility is owned or operated by a State. The terms and conditions of access under this alternative will be negotiated with the parties. In case of a conflict the Australian Competition and Consumer Commission can decide the dispute and set the terms and conditions of access.

Some other features of the Act are:

- The Act contains economic and procedural criteria regarding appropriate circumstances in which to grant access. A key component of the legislation is its attempt to balance two potentially conflicting considerations. On the one hand granting access to essential facilities can stimulate competition upstream or downstream from the natural monopoly facility. Second, on the other hand, granting access readily can both inhibit investment by the incumbent monopolist and discourage possible investment in "essential facilities" by a new entrant which finds it cheaper to take a free ride on the investment activities of the incumbent.
- At this stage where access is required to a national market the matter is dealt with nationally by the Australian Competition and Consumer Commission. Where however there are purely intrastate issues it may be dealt with at State or Territory government level providing an independent regulator does the job and does so in accordance with general economically valid principles laid down by the National government.

4.3.2.4. Restraining Monopoly Pricing Behaviour

Prices oversight over State and Territory Government business enterprises is and will remain the responsibility of the State or the Territory that owns the enterprise. The agreement provides however for cooperation mechanisms in order to resolve conflict that might arise between the various States of the Commonwealth. These mechanisms include subjection of such businesses to prices oversight by the Australian Competition and Consumer Commission or the price oversight body of another jurisdiction.

The Trade Practices Act and the Commonwealth's Prices Surveillance Act have been amended to take these agreements into account. A major institutional consequence is the merger of the Prices Surveillance Authority, a Commonwealth agency, with the Trade Practices Commission to form the Australian Competition and Consumer Commission.

4.3.2.5. Fostering "Competitive Neutrality"

The objective of competitive neutrality is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government business should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles apply

only to the business activities of the publicly owned entities, not to the non-business, non-profit activities of these entities.

Significant government enterprises have to be subjected to full taxes, debt guarantee fees and other regulations in the same way as private businesses.

The agenda for the implementation of competitive neutrality principles is set by each government individually, but each government has to publish a policy statement on competitive neutrality by June 1996 containing an implementation timetable and complaints mechanisms.

The removal of exemptions from the Trade Practices Act as explained above, such as the privilege of the "Shield of the Crown", also serves to ensure competitive neutrality.

4.3.3. Institutional Reforms

The "Hilmer Report" recommends that an economy-wide body be charged with administering the competition reforms (as opposed to separate regulators for individual industries). In line with these recommendations the Trade Practices Act has created the Australian Competition and Consumer Commission by merging the existing Trade Practices Commission and Prices Surveillance Authority.

The report also recommended the creation of an entirely new body, the National Competition Council, to play a key role in policy decisions regarding micro-economic reform. The National Competition Council has been created under the Trade Practices Act, however with a slightly modified role than the one envisaged by the "Hilmer Report" due to constitutional reservations by the States.

4.3.3.1. The Australian Competition & Consumer Commission

The Australian Competition and Consumer Commission, which was set up in November 1995, is responsible for the enforcement of the rules on anti-competitive conduct and fair trading in the Trade Practices Act, a role fulfilled previously by the Trade Practices Commission, and described above in more detail. It is also responsible however for enforcing the identical rules adopted by the States in this area. The enforcement of the rules emanating from various authorities by one agency is designed to avoid any conflicts between government about the exact extent of the rules emanating from State or Federal level.

A new set of functions assigned to the Australian Competition and Consumer Commission under the Trade Practices Act are its functions with regard to the access regime described above.

It also takes over the functions of the Prices Surveillance Authority with regard to prices surveillance, inquiries and monitoring under the Prices Surveillance Act, including the new pricing surveillance functions agreed in the context of the micro-economic reforms.

Unlike the Trade Practices Commission, the Australian Competition and Consumer Commission is not a Commonwealth agency, but an agency which can be described as "national", ie representing the States and the Commonwealth interests equally. The reason once again, is to safeguard the constitutional equilibrium between State and Federal level. The Australian Competition and Consumer Commission is not only administering the competition rules in the Commonwealth Trade Practices Act but also the equivalent State legislation. It has an increased role in determining exceptions from the Trade Practices Act granted by the States (and the Commonwealth) and a number of new functions in the context of micro-economic reforms such as arbitrating in disputes arising from the new access regime, which all require the Australian Competition and Consumer Commission to act within the domain constitutionally reserved to the State level.

The character of the Australian Competition and Consumer Commission as a "national" agency is reflected by the participation of both levels of government in the choice of the members of the Australian Competition and Consumer Commission and in precluding the Commonwealth Minister from giving directions relating to the provisions of the Trade Practices Act that were subject to changes under the "Hilmer Reforms". Furthermore the heads of certain state agencies are ex officio members of the Commission, such as the Chairman of the Government Pricing Tribunal of the State of New South Wales and the Regulator General of Victoria. The Commission is nevertheless financed from the national budget.

4.3.3.2. National Competition Council

In line with the recommendations of the "Hilmer Report" the Heads of Australian Governments agreed to create a National Competition Council. While the Australian Competition and Consumer Commission is an enforcement agency the role of the National Competition Council is that of a policy adviser.

The National Competition Council will make recommendations about access declarations and prices oversight over State and Territory government businesses. It may also conduct or provide assistance with reviews of micro-economic reforms. The reviews it undertakes will be in accordance with a work program determined by the participating governments.

While its role, as it was agreed between the Australian Heads of Government, may not be as prominent as recommended by the "Hilmer Report" - it is not the competition policy maker, a role governments reserve to themselves for reasons that are easily understood - the National Competition Council has an important role in reviewing whether payments under the Competition Policy Reform Package are to be made to each jurisdiction (see below for details).

Like the Australian Competition and Consumer Commission the National Competition Council is a "national" agency. Its members are appointed and its functions are determined by cooperation of all participating governments.

4.3.4 General versus Industry Specific Regulation

There has been a vigorous debate in Australia about the merits of general as opposed to industry specific regulators. Australia initially established an industry specific telecommunications regulator - AUSTEL, based on similar lines to the UK's OFTEL - but from 1997 its economic and competition regulatory functions will be taken over by the Australian Competition and Consumer Commission whilst its purely technical functions will be absorbed into a wider body which makes a range of technical decisions regarding the broadcasting, communications and telecommunications sector. As attention turned to the likely deregulation of electricity, gas, water, ports, airports and post it became apparent that one possible scenario was the emergence of a plethora of industry specific regulators established in each of the eight States and Territories. The possibility of as many as fifty new regulatory institutions emerging in coming years was noted. The Hilmer Report and the Council of Australian Governments have basically supported the establishment of general rather than industry specific regulators in this situation. The reasons for this preference include, the desire for consistency, resource saving, and a fear that industry specific regulators are more likely to be captured by the interests they regulate than are general regulators. Industry specific regulators may also be more interested in making decisions that build up their own empire than general regulators who have a wider range of preoccupations. A lot of industries are converging eg the energy industry, the communications industry, the financial services industry and it is especially appropriate that a consistent general approach with one stop shopping should occur.

The chief objection to general regulators carrying out these tasks were that they would not acquire the necessary technical expertise and also that there was in any event a large amount of purely technical regulation to be undertaken. If this technical regulation were integrated into a general regulator its size would be mammoth. On the other hand if it were kept separate the regulator would be cut off from the benefit of expert technical knowledge. A counter argument is that the general regulator simply needs to devote adequate resources of its own to ensuring that it had the required technical knowledge of each new industry that comes under its jurisdiction.

The second issue concerned whether regulation should be on a National or State basis. The Hilmer Report argued in principle that most markets were national or soon would be and that this was particularly likely to be stimulated by deregulation. However, as a pragmatic political matter it was accepted that for the time being there was scope for States to do their own regulation of the within State elements of the public utility industries providing these did not involve the erection of any barriers to interstate trade and providing that acceptable economic principles were followed as judged by the National Competition Council. In the longer term many issues would eventually move to the centre.

A further reason for the establishment of State regulators was that the national competition law was considered by many States to be inadequate to cover the range of regulatory activities required in newly deregulated public utility industries. Newly established regulators in areas such as electricity and gas and so on seem to need a far wider range of powers than just the application of traditional competition law. [New Zealand has experimented with the scheme of simply applying antitrust law to deregulating industries however.] The national government was not ready with such legislation. Accordingly States have set up their own legislation generally indicating that as reforms start to take effect in the fullness of time there will be less need for

industry specific regulatory laws and they will be able to hand over jurisdiction to the national regulator.

A final important issue has concerned the relationship between industry regulators and competition regulators. Some argue that industry regulation, whether industry specific or general, should be kept away from the competition regulator which has a clearly defined pro competitive role and typically does not become embroiled in messy regulatory details such as setting prices, determining terms and conditions of access and overseeing technical regulation.

However a counter argument prevailed in the Hilmer Report and has generally been adopted in principle by governments. This was the view that given that regulation was needed in certain areas where competition was weak, non existent and not likely to occur because of natural monopoly circumstances or for other reasons it was best that this regulatory activity be linked with the activities of the national competition authority. Regulation has significant effects on competition. Indeed left on its own it often pursues a highly anticompetitive course. It is better to bring it within the framework of a national competition policy based approach. There is also a fear that regulators left on their own may pursue values other than competitive ones partly for reasons of organisational survival, since the emergence of competition will limit the eventual need for them.

4.3.5. Financial Provisions

It is estimated that the increased competition following the implementation of the "Hilmer Reforms" will not only lead to a better economic performance, but also to increased tax revenues. It is estimated as well, however, that this income will accrue mainly to the Commonwealth, while the States may lose income following the reforms of their government businesses.

The States therefore required to receive a share of the increased tax revenue. The protracted discussions between the Heads of Australian Governments on this issue resulted in a compromise according to which States that maintain the pace of the micro-economic reforms described above qualify for payments by the Commonwealth which amount to AUS $ 2.4 billion per annum by 2005/2006. A Competition Payment will also be made amounting to AUS $ 4,200 million in 2005/2006. As noted above, payment is conditional upon satisfactory performance of the regulation review by States and Territories.

5. Conclusion

The establishment of a national competition policy in Australia has encountered considerable obstacles due to the fact that Australia is a federal state and that the powers for the establishment of such a competition policy were divided between the Commonwealth and the States. The decision makers in Australia have decided to overcome these obstacles by "pooling" their powers and establishing a truly "common" national competition policy based on cooperation.

In defining a national competition policy Australia was led by similar considerations to those operating in the European Union in establishing its competition policy: the

establishment of common rules for a common market where goods, services, persons and capital can flow without barriers created by state borders. In Australia the definition of such a national competition policy by consensus of all levels of government was, however, facilitated by the fact that no fundamental differences of opinion on the policy objectives were present amongst the partners. This may to a large extent be due to a certain homogeneity in institutions, traditions and legal principles which will not be so easily found in a Union of 15 countries, which are much more diverse in these and other respects.

The implementation of competition policy in the traditional sense, ie the enforcement of the prohibitions of anti-competitive conduct, is left to an independent central agency, the Australian Competition and Consumer Commission. The definition of a comprehensive competition policy is not one of the tasks of this central agency however. In Australia the generally held view is that policy making and enforcement should be carried out by institutionally separate entities in order to avoid enforcement that is tainted by policy aims, not to mention policy that is unduly influenced by the interests of regulators. The definition and implementation of the elements of the wider competition policy is not however left to the newly created policy body, the National Competition Council either. This body has merely an advisory role, while the policy decisions remain with the governments.

In view of the wide ranging policy decisions that a comprehensive competition policy requires, it is unlikely that such decisions ever would should or could be transferred to an independent body in any constituency. There is a good case to be made for leaving such wide ranging policy decisions to policy makers which are directly accountable within the constitutional framework within which they are operating.

In relation to the topic "Decision Making at the Centre" this paper suggests that this topic is best discussed after making a distinction between narrow and broad conceptions of competition policy. These have different political decision making requirements. Narrow anti-trust policy can be handled by an independent apolitical enforcement agency. A broad policy has elements which require political decision making although these can in turn be assisted by study, public reporting and policy brokering by independent apolitical public institutions such as the National Competition Council in Australia.

A further dimension concerns the issue of whether from an economic viewpoint decisions are best made on a federation wide or on a local basis. These days more and more markets are becoming federation wide. Moreover this becomes apparent as some industries which have operated purely locally become deregulated throughout the member states of a federation and the possibilities of interstate competition within the federation emerge and as the case for a national system for regulating this new form of competition becomes apparent.

A further issue concerns the distinction between the competition policy functions and functions of a more regulatory kind eg setting prices, determining terms and conditions of access and so on. Once again questions arise here as to whether decision making should be industry specific or general, whether national or local and whether or not linked with or separate from competition policy decision making.

In all these matters a balance is necessary between national and local decision making. The economic considerations in Australia have tended to point towards a national approach but this has been tempered by a political need to take local sensitivities into account.*

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