The Australian Competition and Consumer Commission

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Speaking Notes

I am conscious of speaking at the invitation of the Department of Political Science in a Research School of Social Sciences where there are varying disciplinary interests.

I propose to give a short talk about the ACCC and to let you take the discussion where you like.

One can view the ACCC from many perspectives.

The ACCC is an instrument of economic policy enabling it to contribute to better economic performance in this country through promoting competition in the interests of achieving enhanced economic welfare for all Australians. In doing so it is involved in what some regard as a paradox. It seeks to promote free competitive markets by means of substantial intervention.

The ACCC is an instrument of law. It was decided when the Trade Practices Act was introduced in its modern form in 1974 that legal means and instruments would be used to give effect to an economic policy, competition policy. It is imaginable that a different scheme could have been used. It is imaginable that a broad competition policy would have been adopted with the implementation being left in the hands of politicians, or it could have been placed in the hands of regulators with courts playing little or no role. In fact, it was decided that implementation should be essentially court based, that is to say that certain forms of behaviour would be prohibited by law, that a law enforcement agency (the TPC) would be established to enforce the law in the courts and that final decisions would be with the courts. Essentially, it was decided that the general provisions of the law would
be applied on a case by case basis. As I will discuss later the ACCC also has now acquired a more traditional regulatory role where it makes final decisions in regard to matters such as access and monopoly prices subject to appeal to a Tribunal.

The ACCC is of political significance. Essentially it is an independent body involved in promoting competition and regulating monopoly for the benefit of the public. In carrying out this role it deals with and often is in conflict with major interest groups. The nature of its relationship with the legislation and government of the day is of interest in this context.

As a regulator, the ACCC also is a subject of interest to scholars of public administration.

There is also an international dimension to the work of the ACCC and the Trade Practices Act.

Against this background I am prepared to try to discuss the diverse interests that you may have in this institution.

THE TRADE PRACTICES ACT

The Trade Practices Act in its modern form was enacted in 1974 and its essential structure has not changed since then but there has been considerable expansion and the addition of new functions especially in relation to the regulation of public utilities.

Part IV
The Act prohibits anti-competitive conduct of various kinds. In particular it prohibits price fixing agreements between competitors, collective boycotts between competitors, other anti-competitive agreements, secondary boycotts, misuse of market power, anti-competitive exclusive dealings, resale price maintenance and anticompetitive mergers.

The role of the ACCC is to police this law. It may investigate and litigate in order to achieve injunctions, fines, damages (in some cases) and other possible orders. There is no divestiture power to break up large businesses. The regime is a civil law one in relation to the competition part of the Act.

Private enforcement is also possible and frequent. In other words private actions can be taken by firms and by individuals who have a relevant interest to get injunctions and damages and sometimes other orders. Private enforcement of course does not give rise to fines nor can injunctions be sought by private parties in relation to anticompetitive mergers.

There is a similar regime under Part V of the Act which deals with consumer protection. Essentially the ACCC is involved in national consumer protection issues mainly where there are instances of misleading or deceptive conduct or product safety. There is the possibility of criminal actions involving fines but not jail sentences under Part V of the Act.

In more recent times the Act has been extended to cover unconscionable conduct by business against business as well as by business against consumers.
Unlike in many other countries authorisation of anticompetitive behaviour prohibited under Part IV of the Act is possible for most but not all forms of proscribed anticompetitive conduct. Authorisation is possible if the benefit to the public exceeds the detriment by reduced competition.

Adjudication is by the ACCC with the right of appeal to the Australian Competition Tribunal, a tribunal which is headed by a Judge of the Federal Court but with membership which includes an economist and a person with business experience.

Since the mid 1990s a very substantial extension to the role of the ACCC has been that it regulates monopolies where there are national issues, in such fields as telecommunications, electricity, gas, airports and rail. In fields such as electricity and gas State issues are left in the hands of State regulators. A very large part of this regulation consists of dealing with access issues, that is a competitor may be granted access to use facilities that a monopolist may have in order for that competitor to be able to compete with the monopolist upstream or downstream. Also, there is some direct price control associated with this regulation.

The ACCC also was involved in GST price regulation for a time but this legislation has now ceased. The ACCC also administers the Prices Surveillance Act.

Finally, the ACCC is involved in considerable international work these days.

**A Brief History**
Australia enacted a strong antitrust Act at the turn of the century modelled on the US Sherman Act but it was emasculated by the High Court. In 1965 the Coalition Government introduced trade practices law. Modern law however took off in 1974.

Initially, in 1974, there was a very large effect on the behaviour of Australian business. The law prohibited anticompetitive agreements and especially put a quick end to many cartels and to some other forms of anticompetitive conduct and had some impact on marketing through its prohibitions on misleading and deceptive conduct.

After the initial “big bang” things became somewhat quieter and the Commission itself was highly occupied with dealing with numerous authorisation applications. There was not a great deal of encouragement from government for trade practices law after the initial big bang effect.

Since the 1990s however, there has been a vast intensification and expansion of competition law.

There has been vigorous enforcement of Parts IV and V of the Trade Practices Act. The ACCC (named the Trades Practices Commission from 1974 until 1995) stepped up enforcement heavily. In 1990 approximately five cases were initiated per year whereas at present ten times as many cases would be initiated. Substantial results were also obtained. Major cartels were broken up including the freight express cartel between TNT and Mayne Nickless with fines of $13m; the building industry cartel between Boral, CSR and Pioneer in south eastern Queensland with fines of $21m; the vitamins cartel which has already attracted fines of $26m; the transformers case which already involves fines of over $20m.
There was also matching activity in Part V where enforcement lagged somewhat in the 1980s. Major cases included action by the Commission in relation to the sale of life insurance policies to aboriginal people in the early 1990s; refunds by AMP of around $100m in relation to so called 80/20 life insurance policies (where 80 per cent of the investment was said to be capital guaranteed); Telstra refunds of $45m in relation to its wire repair plan; and so on.

Maximum fines under the Act were increased from $250,000 to $10m per offence in 1993.

In more recent years there has been no falling off in litigation and it has extended to such new areas of legislation as secondary boycotts, unconscionable conduct with respect to small business and to GST matters as discussed later.

The Act has also become far more visible and better known. Publicity has been an important instrument.

The combination of strong enforcement and high publicity has had a powerful effect on corporate behaviour, as well as raising public awareness of the Act.

A major change was the adoption for mergers of a “substantial lessening of competition test” in place of “a dominance test” in the 1990s.

The Hilmer Report led to the Competition Policy Reform Act of 1995. This Act, with the agreement of the States, extended the jurisdiction of the Act to cover all areas of business without exception. In particular
new areas such as the professions, agricultural marketing boards, and the utilities were covered.

At around the same time regulation of telecommunications was largely passed to the ACCC so far as competition and economic regulation questions were concerned. Also national aspects of the regulation of electricity and gas were passed to the ACCC. So also with airports although some of this was removed last year. The Commission also has a role in relation to rail. As mentioned earlier State regulators also perform a role in electricity and gas.

The Howard Government also substantially strengthened Sections 45D and E of the Act which prohibits secondary boycotts. The Commission has been quite active in this area. It was involved in major litigation with the Maritime Union of Australia (MUA) in the 1998 dispute and has been involved in a significant number of other cases.

Later in the 1990s the law was extended to prohibit unconscionable conduct by (big) business in relations to small business. To incorporate such laws, (some of them already existed in common law) into the Trade Practices Act gives the ACCC an enforcement role. There is also provision for industry codes of conduct.

When the GST was introduced in July 2000, the ACCC played a very important role in overseeing prices and this was an especially high profile activity. That legislation has ceased.

The Prices Surveillance Act remains intact and has only a small role to play at present, in monitoring of various prices.
Another important area of activity concerns intellectual property. This was a matter which was particularly pursued by the Prices Surveillance Authority prior to its incorporation into the Australian Competition and Consumer Commission in 1995 and has since been vigorously pursued by the ACCC. Its most important issue has been the long running campaign by the ACCC to remove parallel import restrictions in relation to copyright products such as books, compact discs, computer software and a wide range of products which enjoyed protection against unauthorised imports due to copyright being taken out on their packaging and labelling.

Most recently there have been several reports about the ACCC. Essentially, the outcome of the Productivity Commission reports on telecommunications, prices surveillance, airports and access has been to uphold the role of the ACCC with some fine tuning. The Wilkinson Report upheld the application of the Act to the medical profession.

The Dawson Report has supported in principle the introduction of criminal sanctions to enforce the collusion provisions of the Trade Practices Act. It supported no change to the misuse of market power provisions of the Trade Practices Act, an area in which the Commission has had little success in litigation. There has only been one case since 1991 which it has won and that is on appeal. The Dawson Report also upheld the current merger test but has introduced a number of procedural changes with greater emphasis on access to the Australian Competition Tribunal both as a means of appealing merger decisions under Part IV by the Commission and also for granting authorisations for anticompetitive mergers. Some facilitation of collective bargaining by small business is also proposed. Proposals by business for greater oversight of the Commission by an Inspector General or by a Review Board were rejected and in place a consultative mechanism that
already exists is to be strengthened. We await the Uhrig report which will discuss similar issues. There is considerable discussion of the role of the Commission in dealing with the media and it was proposed, with the agreement of virtually all parties including the ACCC, that there should be a media code of conduct. A number of other detailed changes concerning joint ventures and collective boycotts and so on were also proposed by the Committee. The government has adopted the report and the next step will be the introduction of legislation.

SOME GENERAL ISSUES

Some Economics Issues

Competition law differs from some other forms of economic policy which remove government intervention and the distortion that may go with it. Competition law involves active intervention by governments in order to achieve “free” competitive markets.

Also, when governments deregulate, there is often, paradoxically, a need for greater regulation under the Trade Practices Act. Where deregulation involves the horizontal and vertical separation of the different elements of a former monopoly, there needs to be a merger law to prevent reintegration and the application of collusion laws also in case the new businesses seek to collude. Where there is no disaggregation, government monopoly may be replaced by a private (or public) monopoly or dominant firm which, although exposed to new entry, still enjoys a very high degree of market power. Some regulation of access to its facility may be required. Some price control may be required and the provisions of section 46 concerning the misuse of market power may be especially relevant.
Further economic questions concern the kind of competition law application which should occur in order to promote competition. Where there are problems, should there be structural measures? Should we have a divestiture power in Australia, for example? In the United States it has been used in relation to steel, oil, chemicals, tobacco and telecommunications to name a few (and it looks like it will now not be used in relation to Microsoft). The Hilmer Report emphasised a preference for structural measures, rather than regulatory measures, in relation to public utilities.

If, however, there is to be regulation, should it be “light handed” or otherwise? How compatible is “light handed” regulation with the existence of a high degree of market power?

Another general economic issue about competition law concerns the impact of economic change in the form of globalisation, new technology, domestic and international liberalisation and deregulation and ongoing structural change. Many and, indeed, most of these changes, have significant implications to the application of competition law. They often widen consumer choice, create business opportunities and reduce the need for intervention to protect competition. However, these processes can also give rise to new forms of anti competitive conduct (such as sharp rise in international cartels in recent years), new sources of market power (Microsoft), challenging global mergers and new forms of consumer scams often operated on an international scale using new technology.

As the economy changes, there will need to be a continuing application of competition law as new issues arise. Generally speaking, the legislative framework for competition law seems broadly adaptable to these new situations as the underlying legislative
concepts such as “substantial lessening of competition” enable continual reassessments and redefinitions of market power and competition in light of economic change.

Regarding globalisation, the main requirement is to take account of the greater role of import competition in relevant markets and to factor this into decisions about competition including merger decisions. It should also be noted that in Australia’s small economy, there is provision for authorisation of anticompetitive behaviour, especially, anti-competitive mergers, if there is an argument for them based on economies of scale. On the other hand, there is also an important need, as export and import competitors become more exposed to international competition, to ensure they are supplied competitively and efficiently. This is contributed to through effective competition law.

**Politics**

Many of the tensions concerning competition law arise from a contradiction between the interest of the individual, especially the individual corporation and the community. The community, including the business community, wants and needs competition law. Everyone needs to be supplied competitively and efficiently. On the other hand, corporations resent the application of the law to them individually and have the maximum interest to weaken its application to them. They often seek exemption or softening of laws that are likely to apply particularly to them.

The calculus of cost and benefit from the application of competition law varies from consumers and small business (which generally benefit from it with little cost) to big business who generally wanted to water
down competition law and its application to them while extending its reach to many others. The support of big business organisations for competition law has been equivocal over the years.

From the point of view of political analysis, it is worth noting that support for competition law and its application may be thought of in relation to a matrix.

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Competition policy wins its strongest support from those who favour markets and can tolerate intervention. Libertarians are uncomfortable with competition law even if they like markets. Some people dislike big business and intervention and for this reason support the ACCC even though they do not like the working of markets. Those most opposed, presumably, are opposed to both competitive markets and intervention.

Politicians have a dilemma. There are demands from the public to rein in corporate misbehaviour, corporate excess, overcharging and the abuse of market power. Small business also demands protection. The property rights disputes are very large. Governments are responsible for the efficient operation of the economy and, for this reason, they also need competition law but it can cause stresses in their relationship with big business.
The usual solution to the dilemma is to establish independent regulators accountable to Courts. Generally, the competition regulator is not given final power, at least not in Anglo-Saxon countries. Rather the regulator has to act as a police force whose task is to investigate and then prosecute a case before a court. Court processes are thought to provide good safeguards to those accused of breaking the law and they are probably more acceptable to the community than is conferring substantial final power of decision making on regulators (although in Europe regulators have decision making power that is subject to the possibility of appeal through the Courts). At the regulatory end of the Trade Practices Act spectrum, we have something like this in Australia with the regulator making binding decisions which can be appealed.

The independence of the regulator creates some interesting political dynamics. On the one hand, politicians are able to ward off interest group pressures by conferring decision making power on independent regulators and courts and, on the other hand, they sometimes believe that they are ultimately held responsible for these decisions by the public and by business and come under pressure to try to influence them.

In the area of competition law, the approach has been for Trade Practices Act matters to be handled independently of government. It is up to the ACCC, for example, to determine its priorities as to litigation, adjudication and so on. With price regulation on the other hand, under the Prices Surveillance Act, it has long been accepted (since the early days of the Whitlam government), that governments should set the general direction for prices policy. They should, for example, decide which industries are to be regulated, leaving only
decisions about the price level in the hands of the independent regulator.

Politicians can have differing attitudes to regulation. When it goes wrong, they want the regulator to bear the blame. This is all care, no responsibility. Of course, in fact, the politician can be the target (often not justified) of criticism when a regulator in his or her portfolio is seen not to be doing the job well. On the other hand, if the regulator is seen to be doing the job well, the politician rarely gets credit and may, in some cases, resent the success of the regulator.

The nature of the independence of the regulator requires some analysis. Broadly speaking, decisions about individual matters are left in the hands of the regulator. However, the government can still influence outcomes by its legislation and associated regulation, by appointments, by setting budgets and, in some cases, by informal pressures.

Another issue concerns the accountability of the Commission. Some say that it is not accountable. This is wrong. Under Parts IV and V the Commission can not affect legal rights against anyone’s will without having the sanction of a Court order. It must prove its cases in Court. It may face strong resistance from well resourced defendants. Where there are adjudications, ie, where authorisation is sought from the Commission, there is a right of appeal to the Australian Competition Tribunal and it is frequently exercised. Some claim that for commercial reasons, businesses will not challenge Commission decisions. My own experience has been that the reasons they do not challenge the Commission are that the Commission is usually right and that serious legal challenges would be fruitless. Moreover, my experience has
been that where the Commission has made a mistake, most firms will challenge in Court.

In this regard, the Dawson Committee rejected business proposals that there should be an oversight committee or an inspector general for the ACCC. It did propose some stepping up of our consultative arrangements and this is something the Commission supports. We will also have a Parliamentary Standing Committee. Again, this is welcome to the Commission. We now await the Uhrig report.

There is also the issue of publicity. The considerable publicity surrounding the Commission’s activities does not occur in a vacuum. The media will attend a media conference once, and only once, if the Commission calls it and has no news to announce. A principal reason for the high degree of publicity concerning the Commission in the last decade has been its high level of activity. Most of the things it does are newsworthy.

The Commission has made a point of publicising its activities as much as possible because this has an educational effect on business and consumers and makes the achievement of the Commission’s ultimate goal, compliance with the Trade Practices Act, more achievable. Claims that the Commission engages in trial by media are incorrect. Nearly all the Commission’s publicity relates to matters that have already happened. The Commission does not publicise its investigations, although sometimes these become known as a result of the complainant going to the media and also when it goes to Court the Commission announces that fact. This practice has received the endorsement of the Courts.
Publicity has also been a powerful antidote when dealing with behind closed doors criticisms made by businesses to politicians and bureaucrats.