The Future of Canadian Competition Policy in the 21st Century

Competition Policy: Governance Issues – What are the alternative structures?

Australia's Experience

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1. Introduction

"In 1889, Canada was the first western industrialised nation to enact legislation designed to prevent firms from forming agreements in restraint of trade. More than a century later, the conspiracy provisions remain at the core of competition legislation. The role of competition policy, however, has expanded significantly with the development of the Canadian economy."[1]

Whilst Australia cannot claim to be a pioneer in the area of competition policy, it has been in the forefront in more recent times.

This paper outlines the Australian competition policy regime and its institutions, mainly focusing on the *Trade Practices Act 1974*. This does not greatly differ from Canada's *Competition Act 1986* and the goals are the same. Yet there are sufficient differences for a comparison to be a productive exercise, especially as the two countries have similar population sizes, geographic areas, and legal systems.

Three key differences are that:

(a) Australia's law permits certain anti-competitive behaviour to be authorised by the regulator, if there is sufficient public benefit.

(b) The competition regulator, the Australian Competition and Consumer Commission (ACCC), plays the role of national utility regulator in areas such as telecommunications, airports, electricity transmission and interstate gas transportation.

(c) Australia has an independent Commission (not a single Commissioner who is also an officer of a policy department).

The Australian context is also a little different. People traditionally think of a competition policy in terms of antitrust law but many government policies affect competition both positively and negatively. Australia's antitrust law also needs to be viewed in the context of its attempt to adopt a wider "comprehensive, national" competition policy.

A "comprehensive" competition policy includes all government policies at all levels of government that affect the state of competition in any sector of the economy and includes policies restricting as well as promoting competition. A comprehensive competition policy goes well beyond traditional antitrust law and includes policies on trade, public and private ownership, intellectual property, licensing, foreign investment,

[1] *Canadian Competition Law and Policy at the Centenary*. R.Dobell, The Institute for Research and Public Policy R. S. Khemani and W.T Stanbury. Halifax. 1991.

small business, contracting out, tax, bidding for monopoly franchises, the legal system, competitive neutrality and a host of other subjects.

A "national" competition policy applies to the whole country, rather than to parts of it or to areas only covered by limited federal constitutional powers.

The next section of the paper discusses Australian National Competition Policy. The remainder of the paper, however, then largely focuses on traditional antitrust law.

2. Australia's Comprehensive National Competition Policy

Australia has sought to have a comprehensive National Competition Policy since 1991. Unlike Canada, Australia's Constitution does not give the Federal Government comprehensive powers over economic behaviour and consequently the Federal and States Governments must cooperate on any national policies such as competition policy.

In 1991, the Council of Australian Governments, consisting of the Federal, State and Territory Governments (COAG), agreed to examine a national approach to competition policy. The first step in this process was the establishment in the following year of the National Competition Policy Review by a committee chaired by Professor Fred Hilmer.

The six key elements of Australian National Competition Policy were identified by Hilmer as:

1. Limiting anti competitive conduct of all businesses, mainly via the Trade Practices Act;

2. Reforming laws and regulations which unjustifiably restrict competition;

3. Reforming the structure of public monopolies to facilitate competition;

4. Providing third party access to certain facilities that are essential to competition;

5. Restraining monopoly-pricing behaviour, and;

6. Fostering competitive neutrality between government and private businesses when they compete.

On completion of the Hilmer Committee's report in August 1993, Commonwealth, State and Territory Governments began extensive negotiations on implementation of its recommendations. The recommendations made by the Hilmer committee were generally accepted by COAG in April 1995 and the processes culminated in June 1995 in the *Competition Policy Reform Act* 1995.

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

(1) The Conduct Code Agreement. This sets out processes for amendments to the competition laws of the Commonwealth, States and Territories and for appointments to the Australian Competition and Consumer Commission.

It also sets up a process in relation to any exemptions from national competition law.

(2) The Competition Principles Agreement. This sets out an agreement concerning:

- public, independent and transparent review of all anti-competitive legislation and regulations over a five year period;
- structural reform of public monopolies;
- access to services provided by significant infrastructure facilities; and
- the principles that governments will follow in relation to prices oversight of Government Business Enterprises (GBEs).
- the elimination of any competitive advantage or disadvantage experienced by government businesses when they compete with the private sector (competitive neutrality).

So far as the first element of National Competition Policy, the Trade Practices Act, was concerned, the review concluded that its detailed prohibitions on anti competitive conduct were generally sound and did not require change except for a few quite small matters. However, it was concerned that, in a number of respects, it did not apply to all businesses and so its main emphasis was on extending the reach of the Act, narrowing the scope of any exemptions and making them more difficult to obtain via legislation.

The main reform elements, to be implemented progressively, were as follows:

- the *Trade Practices Act* was amended so that, with enabling State and Territory legislation, the prohibitions of anti-competitive conduct contained in Part IV apply to all businesses in Australia. Constitutional limitations had previously prevented application of the competitive conduct rules to unincorporated businesses operating solely in intra-State trade.
- 'Shield of the Crown' immunity for State and Territory Government businesses was removed, with Government Business Enterprises being subject to the Act from 21 July 1996.
- the scope for exemptions from the Act was sharply cut back (as discussed below).
- a new Part IIIA was added to the *Trade Practices Act*, and came into effect on 6 November 1995, establishing a legislative regime to facilitate access to the services of certain infrastructure facilities of national significance. This is of considerable regulatory significance.

Exemptions

A competition regime needs to operate in conjunction with other government policies. Inevitably, conflict between policies will arise and it will therefore be necessary to determine priorities based on an assessment of national interests. For this reason, a

mechanism is needed to provide for exceptions from the general application of a competition regime.

However, for any competition regime to be effective, sectoral exemptions or exclusions from the law must be kept to an absolute minimum. Even where these are considered necessary, mechanisms and timetables must be implemented from the outset for the phasing out of such exemptions by defined dates.

Exemptions from the competition law may be made by:

- *Legislative exemptions*. Such exemptions will only be permitted where it can be demonstrated that "the benefits of the restriction to the community as a whole outweigh the costs; and the objectives of the legislation can only be achieved by restricting competition"[2].

- *Administrative exemptions*. Unlike in Canada, the TPA allows the ACCC to 'authorise' proscribed conduct (other than misuse of market power) on a case-by-case basis, where the public benefits of such conduct outweigh the associated anticompetitive detriment. Parties gaining authorisation may then proceed with the behaviour and are granted immunity from legal proceedings under the TPA in relation to the authorised conduct. Authorisation is, in practice, granted in few cases where the result is a significant lessening of competition. This difference between Australia and many other countries, including the US and Canada, is discussed later in the paper.

It is important, however, to point out that there are relatively few exemptions to the competition law in Australia, and many of them relate to industries in transition, moving from a heavily regulated environment to one that is largely deregulated.

An important outcome of the Hilmer Report was the adoption of a much more restricted approach to legislative exemptions than before.

Institutions

The bodies charged with responsibility for competition policy were:

- the Trade Practices Commission and Prices Surveillance Authority which were merged to form the ACCC; [3]

- a new policy body, the National Competition Council (NCC) was also established. This body has a special monitoring role in relation to the ambitious regulation review process undertaken as part of national competition policy as well as a role in relation to the access laws under the new Part IIIA..

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[2] *Competition Principles Agreement*. Agreed between the Commonwealth, State and Territory Governments of Australia on 25 February 1994, s. 5(1).

[3] Shortly after the merger the Government withdrew most price surveillance. However, several years later the Trade Practices Act was amended to establish temporary price exploitation laws which were part of Australia adopting a goods and services tax, a tax that Canada knows well.

- the Trade Practices Tribunal was renamed the Australian Competition Tribunal.

3. Australian Competition Law

The Trade Practices Act 1974 contains parts which deal with anti-competitive practices, unfair trading practices and consumer protection, access to the facilities of natural monopolies and some regulatory provisions concerning such industries as telecommunications, unconscionable conduct, industry codes of conduct and authorisation, as well as parts about the institutions and remedies.

This paper will largely focus on the traditional antitrust and consumer protection parts of the Act.

Part IV – Anti-competitive Practices

There are two broad principles which could be said to underlie Part IV of the TPA. These principles are:

- that any behaviour which has the purpose, or effect, of substantially lessening competition in a market should be prohibited, and

- such behaviour should be able to be authorised on the basis that the public benefits of the particular conduct outweighs the detriment caused to the public by any likely lessening of competition resulting from it.

These broad principles are, however, expressed in the legislation by way of specific prohibitions of anti competitive agreements, misuse of market power, exclusive dealing, and resale price maintenance and anti competitive mergers,[4] along similar lines to Canada, although there are some per se prohibitions, eg on price fixing and exclusionary boycotts agreed to by competitors and resale price maintenance. There is no efficiency defence.

The system is that if prohibited behaviour is detected by the ACCC, it plays a role analogous to that of police. It must prove its case in Court and, if so, it can win penalties and remedies from the Court.

Various penalties and remedies are available for breaches of Part IV of the TPA, including:

- penalties (civil) of A$10 million for companies and A$500,000 for individuals;

- injunctions;

- damages;

- divestiture in relation to mergers; and

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[4] On the other hand, when Australia amended its merger law in 1993 to return to a substantial lessening of competition test, the Canadian 1986 merger amendments with their criteria relating to the lessening of competition were largely adopted.

- various ancillary orders such as rescission and variation of contracts, orders for specific performance of contracts, and so on.

Unlike Canada and the US, Australia does not have criminal sanctions for hard-core contraventions such as cartels. Civil penalties have some advantages, in terms of the evidentiary tests (the burden of proof is the civil one of balance of probabilities) and a far more economic underpinning. The ACCC, however, believes that criminal sanctions and imprisonment should be an additional option that is available to the ACCC and the Court as in Canada.

Private individuals and companies may also take action under the TPA to obtain remedies against anti competitive conduct. However, only the ACCC can obtain penalties for breaches of the law. Private litigants can only seek injunctions and damages. However, in relation to mergers, private litigants cannot seek an injunction but can seek divestiture and damages once the merger has taken place.

Private litigation is much more frequent than in Canada, and this self-enforcing element of the legislation has worked well. It has given rise to important precedents. It has meant that the regulator can concentrate on issues of broad public impact and not be drawn into inter company conflicts.

Private actions are not as frequent as in the USA. The reason is that the incentives for pursuing cases privately are less strong since, under the cost rules, the loser of a case must pay the costs of the winning side. There is also less scope for contingency fees and treble damages are not available. There are few, if any, frivolous cases, but it cannot be denied that firms make tactical use of the Act in order to deter certain kinds of behaviour by their competitors.

Actions under the Trade Practices Act can largely only be taken in the Federal Court of Australia which has developed specific competition law expertise and being a federal body is more attuned to national issues than would be the State or Territory Courts.

Authorisation

Conduct that may substantially lessen competition under Part IV of the TPA may be authorised under Part VII of the TPA providing that it is applied for in advance. This is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the TPA. Anyone who wishes to take part in prohibited conduct may apply to the ACCC for authorisation on the basis that it can notify the Commission that the benefit to the public of the particular conduct outweighs the detriment to the public caused by any likely lessening of competition.

The legislation leads to a clear separation of the consideration of competition issues, and of efficiency and other public interest issues.[5] These latter issues can only be invoked in an authorisation application.

[5] Nevertheless the ACCC merger guidelines recognise that efficiencies may promote competition and hence in some cases may be considered as part of the competition analysis in mergers.

Canada has an efficiency exception to mergers and an efficiency test in the Tribunal on certain forms of conduct but does not have the broad public benefit override that is contained in the Australian law. It also does not have such a sharp process separation of the consideration of the issues of competition and efficiency.

Authorisation is granted on the grounds of public benefit. Depending on the arrangement or conduct in question, the ACCC 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 it should be allowed.

Public benefit has been given a broad interpretation over the years and is not restricted to issues of economic efficiency although that is usually the most important factor. There is a substantial body of case law on "public benefit". [6]

Authorisation is not granted lightly nor very often. If it were, the aims of the legislation could be undermined. In the past ten years few mergers have been authorised. More common is the authorisation of anti competitive agreements and exclusive dealing, particularly involving small business and the rural sector. Also, more common is the authorisation of behaviour that is prohibited per se but that does not lessen competition substantially.

Authorisation can be granted for all forms of prohibited conduct except misuse of market power.

The process is very public, with public registers and public decisions. Any interested party has the opportunity to have input.

There is the opportunity of an appeal (de novo review) to the Australian Competition Tribunal. A Federal Court judge and lay members including economists comprise the Tribunal. Each panel must consist of a judge, an economist and one other.

Part V – Unfair Trading Practices

Part V of the TPA contains a range of provisions aimed at protecting consumers and businesses that qualify as consumers by:

- a general prohibition of misleading or deceptive conduct (s.52);
- specific criminal prohibitions for false or misleading representations (ss. 53-65A);
- product safety provisions;
- prohibiting unfair practices (Division 1), including the unconscionable conduct provisions in Part IVA that prevent businesses from behaving unconscionably when

[6] There is not scope in this paper to discuss this body of case law other than to say that the dominant element in "public benefit" is the concept of economic efficiency but that, on occasions, factors such as safety, the environment and so on are taken into account. Developed in a quasi-judicial setting by a Commission and Tribunal with a strong interest in competition, the application of the concept has not proved problematical so far.

they supply goods and services to individual consumers (s.51AB) and when corporations are engaged in commercial transactions (s.51AA); and

- conditions and warranties in consumer transactions (Division 2) and actions against manufacturers and importers (Division 2A).

Various penalties and remedies are available for breaches of Part V of the TPA, including:

- penalties (criminal) of A$200,000 for companies and A$40,000 for individuals;
- injunctions;
- damages;
- corrective advertising; and
- various ancillary orders such as rescission and variation of contracts, orders for specific performance of contracts.
- There are not the same jurisdictional problems with the provinces as there apparently are in Canada. The ACCC is often involved in high profile activity in this area.

Other Features of the Australian Model

- The Australian competition regulator performs both enforcement and adjudication functions as well as regulatory functions discussed briefly below. The integration of these functions in one body, is not an especially controversial issue, partly because the ACCC can not affect the legal rights of any person or business without their consent, unless it successfully prosecutes cases in court. Also, where it makes authorisation decisions, they can be appealed. It is also arguably important in a small economy to have the economic and legal resources in the one body.
- In terms of the distinction made by Judge Howard Wetsten between a birfucated and an integrated model,[7] the model is clearly a birfucated one in relation to the enforcement of the provisions relating to anti competitive behaviour, ie, the ACCC investigates such behaviour and prosecutes it in the Federal Court. The apparent mixture of investigatory, prosecutory and adjudication functions of the Federal Trade Commission referred to in Mr Cavani's paper does not exist either.[8]

  It is especially necessary to make this point clearly about the Australian approach because the ACCC does perform adjudicatory functions in relation to applications for authorisation. Whilst the combining of these functions in one body does give

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[7] Wetsten H *QC*, Iacobucci E, *Is it Time to Give the Commissioner of Competition a Competition Commission?*, Canadian Competition Policy – Preparing for the Future Conference, 5 June 2001.

[8] Calvani T, *Lessons to be Avoided: the Experience South of the Border*. Canadian Competition Policy – Preparing for the Future Conference, 5 June 2001

rise to occasional debate, that debate does not relate to the different debate about the wisdom of linking prosecuarial and adjudication functions in regard to the enforcement of the prohibited provisions of the law.

- It is also important to note that, as in Canada, a very large amount of decision making under the Act is made by the Commission without Court involvement (or with minimal Court involvement via the equivalent of consent orders). In other words, de facto, there has been a strong drift to an informal "integrated model". This is especially the case with mergers.

- The same point applies in relation to the Commission's role in relation to regulatory decision making.

- Australia has a single conglomerate regulator with a pro consumer and pro competition culture.

- There is a system of cross membership between the national regulator, the ACCC, and other Federal, State and Territory industry regulators.

- The Australian regime has high transparency, both through its legislation and by convention. It also has very high visibility.

- Special attention is given to small business issues and the imbalance of power between big and small. Australia is a highly concentrated economy and there is a belief that small business suffers as a result.

- There is significant international focus, including a co-operation Treaty with the US and informal agreements with Canada, New Zealand, Taiwan, Papua New Guinea and others at negotiation stage.

- In 1988, laws were passed in Australia and New Zealand whereby Trans Tasman anti dumping laws were repealed and the misuse of market power laws of both jurisdictions applied in each other's jurisdiction.

- There is no mandatory merger prenotification. An informal system has worked for many years. Consideration has been given to introducing the Canadian type of system but was rejected by Governments as being too interventionist.

- In 1993 the Trade Practices Act was amended to allow the ACCC to accept "enforceable undertakings" in its administration of the law. An undertaking is a commitment to the ACCC by a business to take a particular action eg to sell assets as part of a merger. These undertakings are enforceable in Court if breached but the Commission only has to prove a breach of the undertaking and not any breach of the substantive prohibitions contained in the Act. This provision is now much used by the Commission and has proved a very valuable tool in the day-to-day administration of the law.

- Of considerable short term significance, the ACCC was given extremely strong powers regarding price changes made by business when a 10 per cent goods and services tax was recently introduced. The ACCC also has some limited ongoing prices surveillance roles.

The Role and Functions of the ACCC

The ACCC, as mentioned earlier, was established in November 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority.

The ACCC is an independent statutory authority responsible for ensuring compliance with the whole Act especially with Part IV (anticompetitive practices), IVA (unconscionable conduct), IVB (industry codes), V (consumer protection), VA (product liability), and VB (the New Tax System related pricing) of the TPA.

The ACCC also has responsibilities and powers under other parts of the TPA, notably Parts IIIA (access to nationally significant essential facilities), VII (authorisation and notification) and XIB and XIC (telecommunications industry).

It is responsible for administering the *Prices Surveillance Act 1983*, and also has responsibilities under several other pieces of legislation[9].

The ACCC is the only national agency dealing with broad competition matters and the only agency responsible for enforcing the competition provisions of the TPA.

The mission of the ACCC is "to enhance the welfare of Australians by promoting effective competition and informed markets; encouraging fair trading and protecting consumers; and regulating infrastructure services and other markets where competition is restricted"[10].

The ACCC's corporate direction is focused by three specific objectives:

- to encourage competitive market structures, behaviour and performance;
- to seek compliance with the consumer protection laws and to achieve appropriate remedies when the law is not followed for the long term benefit of consumers; and
- to inform the community at large about the Trade Practices Act and Prices Surveillance Act and their implications for business and consumers.

The ACCC is committed to fostering a competitive culture where individuals and businesses (large and small, at all levels of production) have the opportunity to trade in an efficient and fair way. Effective competition means that purchasers (both business and non-business) can have the means and freedom to make informed choices, and to enjoy the benefits of competitive prices and quality goods and services.

The ACCC's primary responsibility is securing compliance with the competition and consumer protection laws. In doing so, it uses a wide range of responses such as

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[9] These include, the *Broadcasting Services Act 1992*, *Telecommunications Act 1997*, *Telecommunications (Consumer Protection and Service Standards) Act 1999*, *Australian Postal Corporation Act 1989*, *Trade Marks Act 1995*, *Airports Act 1996*, *ASIC Act 1989*, *Gas Pipelines Access (Commonwealth) Act 1998*, and the *Moomba-Sydney Pipeline System Sale Act 1994*.

[10] ACCC Corporate Plan and Priorities: 2001-2002.

litigation, education and consultation. This necessitates a vigilant and responsive approach to complaints and non-compliant behaviour.

The competitive culture that the ACCC seeks is an important element in its economic regulation and pricing activities. The ACCC makes decisions that balance the interests of providers, users and final consumers striving to achieve outcomes comparable to those which occur under competitive conditions.

4. Some Features of Australian Competition Law History

In 1906, Australian introduced law that mirrored the US Sherman Act and the then 1889 Canadian Combines Act. The Australian law was declared largely unlawful by the High Court of Australia in 1912.

In 1965, Australia introduced British style restrictive trade practices legislation. That legislation and the activities of the Office of the Commissioner for Trade Practices led to the creation of the still current 1974 Trade Practices Act. Although the 1974 Act has been reviewed and changed many times since 1974, the fundamentals of the 1974 Act still constitute the current law.

The 1974 Act saw a move from legislation with examination by an enforcement agency to an outright prohibition regime but with the opportunity for authorisation. The Act also saw the introduction of consumer protection law, merger law and mandatory implied conditions and warranties.

The 1974 Trade Practices Act was introduced with a big bang. It was highly publicised in the media and accompanied by major advertising campaign.

Industry was apprehensive and claimed that it would be “the end of the world” as they knew it. To a large degree they were right. The 1974 Act posed an even greater threat than the 1965 Act to the myriad of inter-locking anti competitive agreements that had existed in the Australian economy since the Depression and had been consolidated by the war and post-war eras.

The initial response by business to the 1974 Act was to lodge some 20 000 applications for authorisation. Many were agreements that had previously been registered and hence exempted under the old law. These were relodged in the hope that they would be exempted under the public benefit test.

To some extent the new TPC encouraged business to lodge applications for authorisation by indicating that anyone who lodged by February 1975 would be given automatic interim authorisation. As a result, around 20 000 interim authorisations were granted.

Consequently, the early days of the Commission were dominated by authorisation. There were many public hearings and landmark decisions. In many cases, authorisations were appealed to the then Trade Practices Tribunal (now the Australian Competition Tribunal).

The Commission also conducted a number of court cases. While court successes in the competition area were limited, the Commission was more successful in consumer protection cases.

It is sometimes said that in Australia little has been done in relation to the competition cases. This view overlooks the authorisation role and the role of the Trade Practices Tribunal. In the early days, the matters that went to authorisation in Australia were often the subjects of court cases in other jurisdictions, especially in North America.

The Commission's authorisation work continued for many years. It is a slow process by its very nature and there were some dramatic discussions in relation to issues such as newsagents, stock exchanges, motion picture distributors and IATA.

Ironically in its early days the ACCC's role was somewhat more regulatory as most of its work was not responding to market place conduct but to applications for approval of specific conduct.

The second half of the 1970s was a rocky time for Trade Practices law. It was the era of the business dominated Swanson Committee[11], which recommended cutbacks, and the generally unsupportive Government which issued formal directions on what the ACCC could do. The political environment at the time was generally hostile towards trade practices law, particularly within the Commonwealth and State bureaucracies. Business was also opposed the law.

Nevertheless, the Act stayed alive and there were continuing major authorisation issues such as Stock Exchanges[12] and IATA[13] in the early eighties. Major court cases such as Glucose case[14] and the first TNT case[15] were conducted. The Act's consumer protection provisions had been so successful that States and Territories adopted them in a mirror fashion in the early 1980s.

The heady days of 1974 were long gone and there was a clear fight to survive.

The 1980s was a period of consolidation and reconsideration of some of the previous ideas and influence. The 1980s saw a review of but no change to the merger test.[16]

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[11] Parliament of Australia. Committee to Review the Trade Practices Act 1974 (1976), *Report to the Minister for Business and Consumer Affairs*, Australian Government Publishing Service, Canberra.

[12] Trade Practices Commission Annual Report 1981-82 at p48-50.

[13] Trade Practices Commission Annual Report 1980-81 at p52-53.

[14] Allied Mills Industries Pty Ltd (1980) ATPR 40-178; (1981) ATPR 40-204; (1981) ATPR 40-241; (1981) ATPR 40-252.

[15] TNT Management Pty Ltd & Ors (1983) ATPR 40-366, (1984) ATPR 40-446, (1984) ATPR 40-483.

[16] Parliament of Australia. House of Representatives. Standing Committee on Legal and Constitutional Affairs (1989), *Mergers, takeovers and monopolies: profiting from competition?*, Australian Government Publishing Service, Canberra.

The 1980s also saw consolidation in the consumer protection area through mirror state legislation and consolidation in relation to the ACCC's enforcement and adjudication role generally.

A new merger wave emerged in the 1980s and the ACCC was heavily involved in a number of significant cases but blocked few mergers. In 1977 the merger test had been changed from substantial lessening of competition to dominance or increased dominance**.** In the 1980s, the ACCC assessed and did not oppose a number of well known cases using this new test.

Not only was the merger test changed but the ACCC lacked the power to seek enforceable undertakings or other methods of controlling merger outcomes.

The 1980s set the foundation for some of the future developments. It was late in the 1980s that discussions started which eventually resulted in the formation of the Hilmer Committee which reported on National Competition Policy.

The 1980s did not have the drama of the previous decade. From the mid 1980s there started to be more sympathetic political support for the Commission's role. A number of reviews enhanced some of the Act's and the Commission's powers.

The 1990s

The 1990s saw a considerable deepening and broadening of the Trade Practices Act. Indeed, the scope of competition policy was broadened significantly to include issues which went well beyond the application of the Trade Practices Act.

During the 1990s, the Commission (both as the TPC and the ACCC) took a number of successful landmark actions.

In particular, two cartel cases stand out as being significant.

The first concerned the TNT/Mayne Nickless/Ansett Freight Express market sharing agreement. In preparing for this case, the ACCC was mindful of its failure in the similar Tradestock case in the mid 1980s. Consequently, in the freight case the ACCC made extensive preparations taking several years and eventually launched the case with 165 witness statements ready to prove the existence of a major market sharing arrangement between TNT and Ansett Freight Express and Mayne Nickless. The ACCC alleged that the arrangement had existed for many years and had been sanctioned by high level staff in each organisation. TNT and Mayne Nickless ultimately did not oppose the ACCC's action.

Moreover, the TPC and the parties presented agreed penalties of around $6 million for TNT and around $7 million for Mayne Nickless to the Federal Court which accepted

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Parliament of Australia. Senate. Standing Committee on Legal and Constitutional Affairs (1991), *Mergers, Monopolies and Acquisitions: Adequacy of existing legislative control,* Australian Government Publishing Service, Canberra.

them as reasonable.[17] The Court also clearly indicated that it was prepared to countenance agreed penalty proposals and to accept them if they were within a range that the Court judged to be reasonable. The magnitude of the fines (levied when the maximum penalty per offence for companies was $250 000) had a significant deterrent effect on anticompetitive behaviour by many firms in Australia and indeed alerted corporate Australia to the far-reaching implications of the vigorous application of the Act.

The second cartel case involved the concrete industry. In 1995, the newly formed Australian Competition and Consumer Commission secured a total of $21 million in penalties against Boral, CSR and Pioneer for market sharing and price fixing arrangements[18], reinforcing the significance of the provisions of section 45 for the whole of corporate Australia and, incidentally, putting the newly formed ACCC on the maps of both corporate and consumer Australia.

Authorisations became much fewer, and were granted much more infrequently than in the past, often in relation to conduct that technically breached the law rather than serious anti-competitive effects.

There were also landmark cases under Part V (consumer protection) of the Act. Prior to the 1990s, there had not been a great deal of litigation under Part V of the Act. The ACCC's first substantial consumer protection action was against life insurance companies which had sold life insurance policies in an unconscionable and deceptive and misleading manner to approximately 3000 aboriginal consumers in far north Queensland and the Northern Territory.[19] This high profile case was followed by the AMP case in 1994, in which the ACCC secured refunds of around $100 million for over 275,000 consumers who had purchased life insurance policies on the basis of misleading and deceptive promotional material.[20] The promotional material claimed that 80 per cent of their investment would be guaranteed against any adverse movement in the stock market when in fact none of the investment was so protected.

The 1990s also saw some high profile cases concerning the telecommunications industry. Telstra was required to publish major corrective advertising for misleading price comparisons[21] and in another case, the ACCC obtained refunds for consumers from Telstra of $45 million for a misleadingly marketed wire repair plan which imposed charges (to the magnitude of $45 million) on many hundreds of thousands of consumers and small businesses without their consent.[22]

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[17] Trade Practices Commission Annual Report 1993-94 at p12-13 and Trade Practices Commission Annual Report 1994-95 p13-15.

[18] ACCC Annual Report 1995-96 at p11-13.

[19] Trade Practices Commission Annual Report 1992-93 at p27-29.

[20] Trade Practices Commission Annual Report 1994-95 at p26-28.

[21] Trade Practices Commission Annual Report 1993-94 at p27.

[22] ACCC Annual Report 1996-97 at p59-60.

These and other actions sharply lifted the profile of both the ACCC and the Trade Practices Act. This in turn had significant deterrent effects on businesses which otherwise would have ignored the Act. Public support for the Act and the ACCC was strengthened. The actions also had some political side effects in that they helped generate greater public support for competition policy. This eased the way for the general public acceptance of the work of the Hilmer Committee.

The ACCC made no secret of its interest in having a high profile. It believed that this would contribute to effective enforcement of the law and better compliance because of its wide educational effects and also because few firms like negative publicity. The ACCC's high profile was clearly justified by the benefits of educating the business community, as well as the general community, about the Act and its requirements.

In 1993 Parliament steeply increased the penalties under Part IV of the Act from a maximum of $250,000 per offence for companies to a maximum of $10 million per offence. Since 1993 there have been a number of cases conducted under the new penalty provisions and penalties in the millions are now commonplace.

Another important change in the first half of the 1990s was the change in the merger law from a test of dominance to a test of substantial lessening of competition. The criteria to be considered to establish a substantial lessening of competition were incorporated into section 50. As indicated earlier much of the amendments were taken from Canada.

From July 1991, the Commission strongly and unambiguously had supported a change in the merger law at every opportunity. The Commission believed that a change to the merger test made economic sense and was especially appropriate in the forthcoming era of the deregulation.

The first major case under the new merger test concerned Coles/Myer's attempt to acquire Foodland in Western Australia via Rank Commercial, a New Zealand company.[23] Although the case did not proceed beyond the early procedural stages, there were signs that the Federal Court attached great importance to the fundamental aim of the merger law which was to protect the public interest in competition.

Another very important set of changes arose following the decision of the Heads of Government (the Prime Minister, State Premiers and Chief Ministers of Territories) to establish the Hilmer Review of National Competition Policy. I have already referred to the lead up and adoption of National Competition Policy.

The Hilmer report also strongly emphasised the fact that the Act only applied to private sector anti-competitive behaviour and not to many government operated business, particularly those embodied in legislation. Further, the Act did not apply to the numerous forms of Federal and State legislation which had anti-competitive effects.

Key points of history of Australian competition and consumer law and administration are at Attachment A.

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[23] Trade Practices Commission Annual Report 1993-94 p37-39.

5. Institutional Issues from the Australian Experience

The 'ACCC' Model, Including Independence

Canada has a single Commissioner and the Commissioner is also a senior officer of the policy department, currently Industry Canada.

The ACCC is an independent statutory authority. Members are appointed by Government for a set of period between 3 to 5 years and can be re appointed. The Commission consists of at least three members, with a Chairman, Deputy Chair and members. The number of Members differs over time but has ranged from three to seven. The membership is to reflect both expertise and broad community experience and by law one must have consumer experience and by administrative decision one is to be appointed to be specifically involved in the small business aspects of the enforcement of the Trade Practices Act.

Commissioners are not bureaucrats and the ACCC is not part of any Department.

The Government appoints the members including the Chairman and Deputy Chairman, after consultation with the State and Territory Governments. Further, they are appointed for set terms and are not affected by a subsequent change of Government. The Parliament has no role in relation to the appointments. Appointments are not political.

The earlier predecessor, the Office of the Commissioner for Trade Practices, had a different structure with a Commissioner and two Deputies but not having any statutory powers. The Commissioner was the only decision-maker. The change in 1974 was very deliberate.

It was the view of the then Government and this has continued that there is a need for a spread of membership to reflect community views and to enhance independence. This also adds different skills to the organisation. An independent regulatory agency's effectiveness depends crucially on the skills of its members[24] In a Federation such as Australia geographic spread or at least not all members coming from the major towns is also an important factor. This is all the more important today with National Competition Policy where the States and Territories are part of the regime and in fact have input to appointments.

As mentioned above, appointments to the ACCC are generally non political and the history of appointments is that they are invariably people with relevant experience and have added to the independence of the ACCC and its skill base. This seems to be quite different from the political base of appointment to the FTC, upon which the ACCC was loosely based.[25] Commissioners are the front line for the Commission and are very much its public face.

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[24] *Report of the American Bar Association Section of Anti trust Law* Study to the Federal Trade Commission- (1989) 58 Anti Trust L.J 43

[25] ' *The Quality of Appointments and the Capability of the Federal Trade Commission"* William .E. Kovacic. Administrative Law Review, Volume 49, Number 4, Fall 1997.

The ACCC's authorisation role is a critical one and it was felt that this role had to be carried out by an independent body and all the structures needed for independence were built into the organization and its legislative regime. The authorisation role involves many more issues than simply competition analysis and hence the need for a cross section of experience on the Commission. A similar point can be made about the ACCC's more recent role in regulation.

The decisions of the Commission are of a collegiate nature although minority decisions are possible but unheard of in recent times. This is critical for a permanent body and one that deals daily with important business decisions.[26] At the ACCC there are currently 6 members and each has an area or areas of expertise and responsibility. There are 'nominated Commissioners' for various areas of ACCC jurisdiction. This is all the more important as the ACCC is now a conglomerate regulator with a very broad jurisdiction.

Members are very much involved in the day-to-day operations. They do not sit in an adjudicative body as happens in other jurisdictions, yet they do sit as such in the weekly ACCC meetings.

The Commission has created a number of Committees to act as a filter for matters that go to the Commission itself and act as an expert group on various issues. These Committees also spread the enormous and varied workload of the Commission. These Committees are: Enforcement, Telecommunications, Energy, Transport, E- commerce, Tax exploitation, Mergers and Corporate Governance.

Generally these Committees do not make final decisions but refer matters to the Commission for final decision**.**

Each Committee is chaired by a Commissioner and has other Commissioners including in some cases Associate Commissioners as members. These Associates are usually ex officio members from other regulators in areas such as energy and telecommunications.

The Commission can also sit in Divisions to decide specific issues. The Chairman creates divisions. These have to involve either the Chairman or Deputy Chair. Divisions can make final decisions. Some Committees occasionally sit as Divisions.

The Chairman has a general delegation from the Commission to decide matters without others Commissioners in urgent situations. The Chairman has a casting vote at Commission meetings but votes are rare. Consensus is the norm.

There are arguments for and against a single Commission model. The arguments for a Commission, however, are especially strong having regard to the informal emergence of a de facto integration model for many areas of decision making.

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[26] For a discussion on the benefits of a board structure over single member see *The British Prices and Incomes Board*, Allan Fels, 1972, Cambridge University Press.

Commission processes are generally informal; there is a great deal of interface between the Commission and staff and the Commission and business. Commissioners have there own identities. There is no front office structure such as the FTC and Commissioners meet weekly formally and more frequently informally.

However, the Chairman is the main media spokesman and is very accessible to the media. The ACCC has a very high media profile. This is part of the ACCC compliance strategy.

The ACCC culture is one of aggressive enforcement, high transparency and accountability. The community accepts it as the unparalleled national consumer and competition "watchdog".

Policy Role

Unlike Canada, the ACCC does not have a formal policy role. In Canada the Competition Commissioner is also a senior officer of the policy department, namely, Industry Canada.

In Australia there has always been a clear line between the roles of the relevant policy departments and the ACCC and its predecessors when it comes to policy.

The ACCC can make submissions on policy to the Government, both publicly and private but at the end of the day it does not have an involvement in the final decision.

The ACCC does some competition advocacy (this is more the role of the National Competition Council, the Productivity Commission and others) and by its very nature gets involved into some issues and does actively promote pro competition issues. An example is the removal of laws restricting parallel imports of CD's and removal of parallel import restrictions generally.

Portfolio

The ACCC is part of the Treasury portfolio. Traditionally the ACCC and its predecessors were part of the Attorney – General's portfolio. At no time was an industry department the portfolio department.

When the agency part of the Attorney General's department it was treated as an independent agency but not totally in the department mould as it was too economic and outcomes orientated.

The move to Treasury in 1993 was welcomed as it was seen as more relevant and in any case more powerful. Treasury has been very supportive both in policy issues and funding. Treasury tends to understand the broad economy wide need for competition law more than most. Further, in Australia, most business regulation is now within the Treasury although most came after the ACCC.

Treasury is more able than most to look at economy wide issues. It is not beholden to any one sector and is sensitive to the global ramifications as well. Treasury is the natural home.

Role of the Practitioners

There have been comments that competition law administration in Canada is influenced by practitioners. The following are some brief comment from the Australian context.

The ACCC works closely with practitioners and there is a group (fondly known as the trade practices "Mafia") consisting of lawyers, economists and regulators. They have constant close contact as a group and individually with the ACCC on particular matters.

However their influence is limited, more so in recent years. They have relevant expertise but due to the broad jurisdiction of the ACCC and the community and business interest in its work no group has special influence. Further they tend to be seen by politicians as largely representing big business interests.

Furthermore the ACCC in its dealings on matters encourages business to be actively involved and not leave it to practitioners. This speeds up proceedings and at the same time educates business in a real live situation.

Compliance Strategies

In Australia the ACCC or its Chairman and Commissioners appear in the financial press daily and the popular press weekly, or more, and the electronic media many times per week.

The reasons for this are the wide role of the ACCC and it is often doing something of community interest but, importantly, there is an active policy of seeking media stories and comment as part of a compliance strategy.

This was greatly boosted by the recent role of the ACCC to ensure that there was no price exploitation during last year's introduction of a goods and services tax. All governments gave the ACCC strong additional powers and resources for the particular task.

As a result of this and the ACCC's previous work the agency and its head are very well known.

Joel Klein made anti trust law a major news item during the Microsoft case. In Australia we have done similar things frequently for some time. Through the use of all the media we have made competition and consumer and pricing issues a household issue.

This is supported by many forms of publications, website and so on

However it needs to be remembered that the media is of little effect and the compliance message is hollow if the agency does not actively enforce the law, take and win court cases and generally be seen as effective. The media can be very savage. They welcome regulators being accessible and open but they will also turn on them if they are seen to be ineffective or less than open.

6. Why the Australian Model Works Well

After some 26 years of comprehensive competition and consumer law and administration Australia has a very good model. That is not to say it cannot be improved particularly in the areas of remedies and process to make it even more effective and speedier.

The law is very good, it is flexible for a small economy and in this regard the authorisation process is important.

Other factors are the comprehensive national competition policy and the acceptance by most of the need for such a policy, even though there may be some differences at the margin. It is a major achievement in a Federation to get all levels of Government to adopt such a policy, let alone business. We have more to do to sell the policy and perhaps to compensate some of the losers but generally it has been a great step forward.

The independent and collegiate nature of the ACCC has been important along with the high profile it has adopted in the community.

The Australian model is now being looked at and in some cases adopted by economies in transition and of course has largely been adopted in New Zealand, with many improvements as it is not hampered by being a Federation nor having an Upper House of Parliament.

Finally, no model will be effective if there is not a strong enforcement and compliance culture. As an agency we look at the desired pro competition and pro consumer outcomes and then use the tools we have to achieve these. This requires Commissioners and staff to think positively and for the community to accept what the agency is seeking to do is what it should be doing.

Competition regulators can no longer be faceless. Their role is to protect the public benefit and the public must see this.

ATTACHMENT A

History of Australian Competition and Consumer Regulation

1906	▪ Australian *Industries Preservation Act 1906*, Australia's first competition law. (Emasculated by the High Court)
1965	▪ *Trade Practices Act 1965* (UK Style model).
1960's	▪ States and territories introduce consumer protection laws
1974	▪ *Trade Practices Act 1974* introduced including competition law, national consumer protection law, product standards, merger law and consumer warranties. ▪ Trade Practices Commission (TPC) was established. ▪ *Prices Justification Act 1974* was introduced. ▪ Prices Justification Tribunal established. (Predecessor to Prices Surveillance Authority (PSA)).
1976	▪ Commonwealth, states and territories enter into an agreement on national consumer protection administration.
1977	▪ *Trade Practices Act 1974* reviewed and amended. Merger law changed and secondary boycotts prohibited.
1982-1983	▪ States and territories enact mirror consumer protection legislation based on Trade Practices Act –1982-83. Administered by the states and territories.
1983	▪ *Prices Surveillance Act 1983* enacted and Prices Surveillance Authority established.
1986-1989	▪ *Trade Practices Act 1974* amended to lower threshold on misuse of market power and to introduce manufacturers warranties.
1990	▪ Trans-Tasman Misuse of Market Power legislation introduced.
1991	▪ Hilmer Committee Report on National Competition Policy Reports.
1993	▪ *Trade Practices Act 1974* amended to change merger law back to 1974 law, enforceable undertakings and higher penalties introduced. ▪ National Competition Policy adopted by Commonwealth, states and territories.

1995	▪ Australian Competition and Consumer Commission created in 1995. TPC and PSA merged to create ACCC. ACCC has additional roles in relation to utilities and universal application of the Trade Practices Act. ▪ National Competition Council created to advise governments on competition issues –1995
1996	▪ States and territories pass complementary competition legislation to the Trade Practices Act 1996. To be enforced by ACCC.
1997	▪ Economic regulation in telecommunications enacted into the Trade Practices Act.
1998	▪ Unconscionable conduct between businesses enacted in Trade Practices Act 1998. Mandatory codes of conduct introduced.
1999	▪ ACCC given critical role in relation to the New Tax System (GST) and exploitation. This role continues until 2002.
2001	▪ ACCC provided with substantial additional resources to carry out its work. ▪ Possible substantial amendments to the Trade Practices Act to streamline processes and meet current challenges, including globalisation

APPENDIX B

ACCC's Regulatory Role

The ACCC has significant responsibilities in the telecommunications, energy and transport industries associated with the competition policy reforms of the past few years. Under these reforms the ACCC promotes competition and regulates.

Telecommunications

The ACCC's involvement in telecommunications stems from the introduction of new legislation on 1 July 1997, which brought the regulation of telecommunications in line with the more general regulatory provisions of the TPA. As the main statutory body charged with enforcing the TPA, the ACCC has become the principal economic and competition regulator in the telecommunications sector. Before this, telecommunications was subject to industry specific regulation (by Austel), while regulation of many other public utilities fell under the general provisions of the TPA. It can be seen, therefore, that the legislative changes made in mid-1997 have had the effect of moving telecommunications away from industry specific regulation and into the realm of more general competition law.

The ACCC has been the primary regulator of this industry for a short time. But already the ACCC has taken made major decisions in its new regulatory role. The ACCC is committed to vigorously administering the new telecommunications laws.

Electricity

The ACCC applies the Trade Practices Act to regulate some aspects of the industry. The ACCC has authorised the national industry code of conduct and it sets national transmission prices. The States set local distribution prices.

Gas

The Australian gas industry has been characterised by monopolies in production, transmission and distribution. The ACCC role in gas is similar to that in electricity. The ACCC has a significant role in relation to access where monopoly power exists.

Airports

Airports are coming under increasing ACCC scrutiny. The Government has put in place arrangements for the economic regulation of privately leased airports and has given the ACCC primary responsibility for implementing them. The regime comprises a package of measures under the Airports Act, the Trade Practices Act and the Prices Surveillance Act. The main measures are a price cap on aeronautical services and access arrangements. The package also includes a number of complementary measures including formal monitoring, quality of service monitoring and a review of regulatory arrangements. The Government has given the ACCC primary responsibility for the economic regulation of airports.

An important element of the new measure is the price cap. It ensures significant reductions in aeronautical charges over the next five years - 20 per cent or more at Melbourne, Brisbane and Perth airports in line with their price caps.

Access arrangements will be central to the regulatory arrangements applying to the privatised airports. They provide a framework in which airport operators and their customers are encouraged to negotiate directly and resolve terms and conditions of use of airport services.