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THE AUSTRALIAN COMPETITION POLICY REFORMS

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1. INTRODUCTION

This paper reviews the reforms to Australian competition policy introduced in November 1995.

The reforms have a number of distinctive features including

- the establishment of a comprehensive competition policy
- the establishment of a national policy based on an agreement between the Australian Government and State and Territory Governments
- the establishment of a generic access law embodied in a new part of the Trade Practices Act. This regime applies in principle to all sectors although its main practical application is to public utilities in such areas as communications, energy and transport
- the transfer of substantial economic regulatory functions to the national competition agency
- a strong commitment by national state, and territory governments to an effective policy

This paper begins by reviewing the concept of a comprehensive national competition policy. After describing the Trade Practices Act 1974, Australia's competition law, the paper outlines the reforms which have occurred to that legislation and the other new elements of competition policy since 1995. It concludes with a discussion of the regulatory role played by the Australian Competition and Consumer Commission, the national competition regulator.

2. A COMPREHENSIVE NATIONAL COMPETITION POLICY

Competition policy is sometimes equated with the traditional antitrust, competition or trade practices laws of a country. However, many other policies affect competition. A comprehensive competition policy includes all government policies that affect the state of competition in any sector of the economy including policies that restrict as well as those that promote competition and extends well beyond traditional competition law.

A national competition policy in a federation includes laws and regulations at all levels of government, federal, state and local, that affect the state of competition.

A comprehensive competition policy includes:

- prohibition of anti competitive conduct (traditional antitrust laws)
- liberal international trade policies
- free movement of all factors of production (labour, capital etc) across internal borders
- removing government regulation that unjustifiably limits competition, eg legislated entry barriers of all kinds, professional licences, minimum price laws, restrictions on advertising
- the reform of inappropriate monopoly structures, especially those created by governments
- appropriate access to essential facilities
- a level playing field for all participants, including competitive neutrality for government businesses and an absence of state subsidies that distort competition
- separation of industry regulation from industry operations, eg dominant firms should not set technical standards for new entrants

A comprehensive competition policy therefore includes policy concerning amongst other subjects: international and interstate trade; intellectual property; foreign ownership and investment; tax; small business; the legal system; public and private ownership; licensing; contracting out; bidding for monopoly franchises; and a range of other policies.

It is worth noting that some of the above policies have a very direct effect on competition, whilst others affect the general economic environment and the general climate of competition of the country, eg foreign ownership and investment restrictions.

Where does traditional antitrust law fit into this picture? Traditional antitrust law mainly affects conduct in markets. It prohibits anticompetitive agreements, abuse of market power, anticompetitive vertical trade restraints, resale price maintenance, certain kinds of boycotts etc.

Antitrust law only has a limited direct effect on market structure. Merger policy has a substantial effect on the structure of a market. In some countries divestiture powers are included in antitrust laws, but in many they do not exist or are not used. Sometimes the application of antitrust law to anticompetitive conduct may have structural effects. Nevertheless, the impact of antitrust law on key structural variables, eg entry and the number of players in a market is often relatively small. In particular, traditional antitrust policy does not override anticompetitive laws and regulations eg laws that restrict entry into a particular industry. This is not to say that antitrust law is not a vital element in a comprehensive competition policy.

Traditional antitrust policy does not involve direct regulation of prices or other performance variables, eg quality of service.

Where does regulation fit in? Traditional economic regulation of prices and quality of service can be seen as complementing competition policy. Where market power exists and cannot be curbed by competition policy, regulation may prevent or limit or alter the way in which market power is exercised, eg price control may seek to prevent the use of market power to charge excessive prices. Regulation of the kind above thus directly impacts on performance variables through the control of conduct rather than through seeking to affect structure.

Regulation may, of course, serve a number of legitimate objectives such as environmental, safety or income redistribution goals which may be seen as lying outside the field of competition policy. However, the way in which these objectives are pursued may have effects on competition and to that extent these elements of regulation cannot be excluded from consideration as part of a comprehensive competition policy.

Regulated sectors are becoming an increasingly important part of competition policy. It is often in these sectors that market power is strongest. The processes of deregulation and privatisation (or corporatisation or commercialisation) often create industry structures in which there are powerful dominant incumbent firms at the outset of the process. So powerful may their position be that reliance on traditional antitrust law may be insufficient and may need to be complemented by various forms of regulation designed to protect or bring about greater competition and to curb the abuse of market power.

Whether or not regulation is considered to be a part of competition policy is a semantic issue but because of its close connection with competition policy, it is viewed in this paper as part of a comprehensive competition policy.

In the real world there has been a long history of regulation conflicting with, rather than complementing, competition policy. Much regulation involves restricting entry into industries, setting minimum prices and imposing obligations in an anticompetitive manner. Thus, at the most general level, regulation may

be seen as sometimes being an integral part of competition policy, sometimes as complementing it, and sometimes as conflicting with it.

3. TRADE PRACTICES ACT 1974

Australia enacted the equivalent of the United States Sherman Act in 1906 but conservative High Court decisions on the scope of federal powers to legislate corporations emasculated the law. In 1965 the Liberal and Country Party Coalition Government enacted a trade practices law. In 1974 a Labor Government enacted a stronger law that essentially remains today.

The Trade Practices Act 1974 was based on the power of the Commonwealth (or national or Australian) Parliament to legislate with respect to corporations and with respect to interstate trade and commerce. It did not apply to unincorporated businesses trading within a state. The scope of the interstate trade and commerce power has been interpreted conservatively by the High Court. In addition, there were significant exceptions for state and territory government business activities and all governments had the power to override the Act.

The objectives of the *Trade Practices Act* 1974 were to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and businesses when they are purchaser) in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers and business in its dealings with other business.

Essentially the *Act* was divided into three major parts:

- Part IV which deals with anticompetitive practices;
- Part V which deals with unfair trading practices; and
- Part VII which enables certain anticompetitive practices to be authorised on the grounds that they give rise to public benefit.

There were other subsidiary parts,

- Part IVA which dealt with unconscionable conduct;
- Part VA which dealt with the liability for defective goods;

There are two broad principles which underlie Part IV and Part VII of the *Act*. 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 of the current authorisation tests, chiefly the important test of 'public benefit'.

The main types of anticompetitive conduct which are prohibited include:

- anticompetitive agreements and exclusionary provisions, including primary and secondary boycotts (s.45), with a *per se* ban on price fixing and boycotts;

- misuse of substantial market power, for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct (s.46);

- exclusive dealing which substantially lessens competition (s.47), with third line forcing prohibited *per se*;

- resale price maintenance for goods (ss. 48, 96-100); and

- mergers and acquisitions which substantially lessen competition in a substantial market (s.50).

Firms which breach the Act can incur civil penalties up to $A10million per offence, and individuals up to $A500,000 per offence.

The Australian Competition and Consumer Commission (ACCC), formerly the Trade Practices Commission, is a public enforcement agency and can seek injunctions, penalties, damages and other appropriate remedies from the Federal Court of Australia. Divestiture, however, is not generally available (other than for three years after an anticompetitive merger).

Private enforcement action is possible and is widely used. Only the ACCC, however, can (1) seek fines and (2) injunctions for mergers.

Conduct that may substantially lessen competition under Part IV of the Act may be granted authorisation under Part VII of the Act, which is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act. Such conduct must be authorised in advance.

Authorisation is granted on the grounds of public benefit. Depending on the arrangement 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. Decisions made by the Commission in relation to authorisations can be appealed to the Australian Competition Tribunal (which was recently renamed from the Trade Practices Tribunal). Interestingly the Commission has both an enforcement and an adjudicatory role.

Part V of the Act deals directly with the interests of consumers (and businesses which qualify as consumers in particular transactions). It is a means of promoting fair competition by protecting consumers' rights, especially the right to full and accurate information when purchasing goods and services. It provides a 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.

Part V of the Act 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 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 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).

The Australian Competition and Consumer Commission (ACCC) was established in November 1995 from a merger of the Trade Practices Commission (TPC) and the Prices Surveillance Authority (PSA). Its functions now include:

- Apply trade practices law (Parts IV, IVA, etc);
- Adjudicate authorisation applications (anti-competitive behaviour claimed to be in public interest);
- Apply national consumer protection law;
- Apply access regime (this new function is discussed later in the paper);
- Apply prices surveillance laws; and
- Apply certain new forms of regulation eg of interstate electricity and gas transmission systems.

There were some important reforms in the 1990's prior to 1995.

First, the merger law was changed from prohibiting mergers that gave rise to dominance or enhanced dominance to prohibiting mergers that have the effect or likely effect of substantially lessening competition. Second, the fines or "pecuniary penalties" were increased from a maximum of $250,000 per offence to $10 million. At the same time the Commission became more active in enforcing the law and the Federal Court of Australia awarded some very large fines even for behaviour that took place before the new levels were imposed by Parliament. Third, laws regarding unconscionable conduct were made part of the Trade Practices Act thereby giving the ACCC the ability to enforce the laws in appropriate cases.

Although the 1974 *Trade Practices Act* had a significant effect on business behaviour in Australia, it was also subject to a number of limitations.

First, the Act did not apply universally to product markets. Owing to constitutional limitations it did not cover unincorporated business enterprises. There were also significant exceptions, legislated for by the national, state and territory governments. There were also "shield of crown" exceptions which partly protected the state and territory government public utilities. Second, the Act did not override anticompetitive legislation, whether it took the form of an exemption from the Trade Practices Act, or was just anticompetitive. Third, there was (and still is) no divestiture power to break up monopolies. Fourth, there was no law regarding access to "essential facilities". As noted later in this paper, there was some possible limited scope for such a doctrine under the misuse of market power provisions of the Act, but this was not very substantial. Fifth, the Trade Practices Act contained no powers to regulate "excessive" prices. However there was a national Prices Surveillance Act which fulfilled this role and was administered by the Prices Surveillance Authority. Sixth, there were no national, state or territory laws or policies regarding competitive neutrality, ie putting government business operations on a comparable footing to competing private sector operations. Finally, there was very little independent regulation of public utilities.

4 THE PROCESS OF REFORM

The process which gave rise to the adoption of a comprehensive national competition policy began in 1991 with an agreement between the Commonwealth, State and Territory governments that there should be a national competition policy.

The Hilmer Committee (discussed below) saw the imperative for developing a national competition policy as being based upon three main factors:

- The economic significance of State and Territory boundaries was diminishing rapidly, particularly as advances in transport and communications permitted many firms to develop national trade networks. Many more markets were best characterised these days as national rather than regional. While there had been some progress in this area, there was room to increase the momentum to enhance cooperation between governments for the benefit of business and Australian consumers generally.
- Tariff reductions and other trade policy reforms had 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 were sheltered from domestic competition. These important sectors of the economy - mostly governed by State or Territory laws rather than by national laws - faced 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 were felt nationwide and ultimately hindered its capacity to compete effectively in international markets.
- Domestic procompetitive reforms had largely been implemented on a sector-by-sector basis, without regard to a broader policy framework or process. A national competition policy presented 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.

A number of other factors gave rise to this agreement including:

(a) changes of State governments in the early 1990s with at least some of those new governments having a much stronger commitment to competition policy
(b) reaction to the limited effects of competition policy in the 1980s and associated reaction to various corporate excesses during the 1980s (even though many such excesses were the result of failures in the area of corporations law rather than competition law)
(c) high profile publicity concerning the effectiveness of the Trade Practices Act in breaking up cartels during the 1990s

(d) business support for reform. Business was conscious that the Act applied to it but not to public utilities, the professions and other important suppliers,
(e) increased bureaucratic concerns and pressures for reform, and
(f) support for reforms from trade unions, consumer groups and other interest groups and the media

The governments agreed that a national competition policy should give effect to the following principles:

(a) No participant in the market should be able to engage in anticompetitive conduct against the public interest;
(b) As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;
(c) Conduct with anticompetitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;
(d) Any changes in the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:
    (I) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition; and
    (ii) in recognition of the increasingly national operation of markets, to reduce complexity and administrative duplication.

In order to give effect to these principles, the governments agreed to establish in October 1992 an independent review of national competition policy headed by Professor Fred Hilmer, Director of the Australian Graduate School of Management.

In practical terms the establishment of the national competition review was initially seen by many as being mainly concerned to remove the main exemptions from the Trade Practices Act. However, the terms of reference and the broad views of the National Competition Review Group under Professor Hilmer led to a much wider view being taken of the scope of competition policy. There was also a recognition that in a Federation which divided economic powers between the Commonwealth and the State and Territory governments, extensive consultation would be required with all the different governmental interests involved and that mechanisms would need to be established to make the policy a truly national rather than a purely Commonwealth one.

The Committee drafted an early version of its report which set out the elements of a comprehensive national competition policy and suggested some appropriate machinery that would meet the concerns and interests of different governments. It then proceeded to have substantial discussions with all government interests before submitting a final report in August 1993.

Following the publication of the report in August 1993 a number of meetings between all the governments were held. Although some difficulties arose, eventually In April 1995 the Council of Australian Governments (COAG), consisting of the Commonwealth, State and Territory governments, agreed to a national competition policy based on the Hilmer Report. In this paper no attempt is made to distinguish between the Hilmer Report proposals and the policies which were finally adopted as the differences are not especially large in terms of the magnitude of the total policy change.

5. THE POLICY PACKAGE

The national competition policy package consisted of:

(a) the *Competition Policy Reform Act 1995*;
(b) three inter-governmental agreements (the Conduct Code Agreement, the Competition Principles Agreement and the Agreement to Implement the National Competition Policy and Related Reforms); and
(c) State and Territory application legislation.

The Competition Policy Reform Act amended the Trade Practices Act 1979 and the Prices Surveillance Act 1983, which remain the centrepiece of Australian competition law. In addition, State and Territory legislation supplemented the Commonwealth legislation, extending the competitive conduct rules to the entire Australian economy. A number of transitional provisions were included in the Competition Policy Reform Act to allow previously protected sectors of the economy a short transitional period of adjustment.

The Conduct Code Agreement sets out the processes for appointments of persons to the new Australian Competition and Consumer Commission (the ACCC) and for future amendments to competition laws. Essentially appointments and agreements require the support of the Commonwealth and a majority of States and Territories. It also sets out a new transparency process for regulatory exceptions from the competition laws.

The Competition Principles Agreement sets out arrangements for appointments to and deciding the work program of the National Competition Council, another new institution discussed below. It also sets out the principles governments will follow in relation to prices oversight, structural reform of public monopolies, review of anticompetitive legislation and regulations, access to services provided by essential facilities and the elimination of any competitive advantage enjoyed by government businesses when they compete with the private sector.

The Agreement to Implement the National Competition Policy and Related Reforms deals with the Competition Payments. The April 1995 COAG agreement to proceed with the national competition policy reforms also included a consequential revenue sharing agreement which involves the Commonwealth providing ‘Competition Payments’ to the States and Territories. These payments are ongoing, but conditional upon the States and Territories implementing the reforms set out in the package, and related reforms in the electricity, gas, water and road transport sectors of the economy. By the 2005/6 financial year, it is estimated that these annual payments will cost the Commonwealth A$2.4 billion in 1994/5 dollars. The National Competition Council would have an important role in judging whether the reforms had been implemented satisfactorily.

6. INSTITUTIONS

The Competition Policy Reform Act amended the Trade Practices Act to establish a new body, the ACCC, which is essentially a merger of the Trade Practices Commission (TPC) and the Prices Surveillance Authority (the PSA). The existing functions of these bodies were retained, and new functions relating to third party access were added.

A new recommendatory and advisory body, the National Competition Council (NCC), was also to be formed. The Council was to have a legislated role under the access and price oversight regimes. It would also be able to assist governments with other microeconomic reform issues.

The Trade Practices Tribunal (the Tribunal) was to be renamed as the Australian Competition Tribunal, maintaining its existing review functions in relation to determinations by the Commission/ACCC under the Trade Practices Act, and gaining new review functions in relation to the new access regime.

Overall responsibility for the law lies with the Commonwealth Treasurer.

7. THE NATURE OF THE COMPREHENSIVE NATIONAL COMPETITION POLICY

There are six main elements in the comprehensive national competition policy. They are:

- a Trade Practices Act applicable to all forms of business virtually without exception
- a process for the review and reform of all laws in Australia at all levels of government that restrict competition to determine if they are in the public interest
- a process for the review and reform of public utility monopoly structures
- a generic law regarding regulating access to “essential facilities”
- a competitive neutrality policy putting government business operations on the same level as competing private sector business operations
- a prices surveillance regime.

Before proceeding to consider these policy elements in more detail, it is worth noting that since 1995 there have been two extensions of this policy approach:

- the new Coalition government somewhat extended the reach of the Trade Practices Act by strengthening its secondary boycott provisions. These mainly relate to secondary boycotts by trade unions although in principle they apply to anyone in the economy who engages in secondary boycott behaviour

- a substantial package of measures to strengthen the protections available under competition policy to small business was also enacted in 1998. The main elements were a strengthening of the unconscionable conduct prohibitions insofar as they relate to relationships between businesses, and the introduction of powers into the Trade Practices Act which enable industry codes of conduct to be enforceable under the provisions of the Trade Practices Act and if necessary to be mandated by governments.

There were also significant changes to the laws in 1997 regarding telecommunications. In essence a telecommunications specific set of changes to the Trade Practices Act were enacted. These largely followed the principles espoused by the National Competition Policy Report but they were specifically expressed in terms directly applicable to the telecommunications industry.

8. UNIVERSAL APPLICATION OF THE TRADE PRACTICES ACT

The Trade Practices Act was amended so that, with State and Territory application legislation, the prohibitions of anti-competitive conduct contained in Part IV were applied to all businesses in Australia; hence constitutional limitations were removed. Moreover, "Shield of the Crown" immunity for State and Territory government businesses was removed. Some clarifications as to the nature of what constituted "government business" were made.

Although the applications legislation was the product of State and Territory legislatures the enactments conferred exclusive public enforcement jurisdiction upon the Australian Competition and Consumer Commission. No State enforcement agencies were established.

The broad effect of these changes was that the Trade Practices Act now covers public utilities, government businesses, the health, energy, communications, transport, education, sport, agriculture sector and so on.

There is a general labour market exemption for employer/employee collective bargaining regarding remuneration and terms and conditions of employment. Intellectual property exemptions remain but face review in 1999.

Transitional Rules

Contracts which were in existence when the new legislation commenced, and which were previously immune from the competitive conduct rules because of the Trade Practices Act's limited coverage, have been 'grandfathered' (ie they will continue to be exempt from the Trade Practices Act and the Competition Code). Such contracts cannot be extended.

Exemptions from the competitive conduct rules

The National Competition Policy reforms do not entirely remove the ability of governments to exempt specific conduct from the competitive conduct rules in the process of establishing regulatory arrangements for particular industries. However, the reforms restrict the manner in which exemptions may be made. New restrictions on the ability of governments to exempt conduct from the competitive conduct rules are:

(a) laws which purport to exempt conduct from the competitive conduct rules must expressly refer to the Trade Practices Act and/or the Competition Code and explicitly authorise the specific conduct.
(b) exemptions from the provisions relating to mergers and acquisitions may only be made by Commonwealth Act.
(c) exemptions made by subordinate regulations will only be effective for two years, and cannot be extended or re-enacted to continue beyond the initial two years.

(d) only those States and Territories that continue to participate in the co-operative scheme for applying the competitive conduct rules will be able to make exemptions. If a State or Territory ceases to participate any existing exceptions will cease to have effect after one year.
(e) exemptions made by States and Territories may be overridden by Commonwealth regulations, as is currently the case.
(f) exempting laws must be notified to the Commonwealth and a listing of all exemptions will be published each year in the ACCC Annual Report.

An important conclusion, however, is that although it is desirable that an antitrust law should apply to all forms of product market behaviour without exception, this by no means covers the whole field of competition policy concerns. Other measures are also needed for there to be a comprehensive competition policy.

9. LEGISLATION REVIEW

Each government agreed 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. All legislation is then to be reviewed at least once every 10 years.

The guiding principle in reviews is that legislation should not restrict competition unless it can be demonstrated that:

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

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

Each government will also ensure that proposals for new legislation that restricts competition are accompanied by evidence that the legislation is consistent with the above principle and will publish an annual report on its progress towards achieving its timetable for review.

An interesting byproduct is that the agreement on legislation review has made it easier to achieve reviews which would not otherwise have happened.

10. COMPETITIVE NEUTRALITY

Each government has agreed to abide by principles of competitive neutrality. The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

These principles:

(a) apply to significant government businesses or business activities undertaken by government for profit and in competition with other firms; and

(b) require the neutralisation of any net competitive advantage arising from public sector ownership.

In order to neutralise this advantage, the agreement sets out a number of measures - corporatisation, imposition of full taxes (or tax equivalents), debt guarantee fees, and imposition of regulation on an equivalent basis to the private sector. In some instances, pricing principles can be used instead of these measures. Each government had to (and did) publish a policy statement on competitive neutrality by June 1996. The policy statement includes an

implementation timetable and a complaints mechanism. Each government will also publish an annual report on the implementation of this principle.

The issue of state aids to industry is less important in Australia than in Europe. However, a report on this subject was subsequently commissioned from Australia's Productivity Commission.

11. STRUCTURAL REFORM OF PUBLIC MONOPOLIES

Each government has agreed to abide by various principles in the reform of public monopolies.

Before introducing competition into a sector traditionally supplied by a public monopoly, governments have agreed to remove from the public monopoly any responsibility for industry regulation, and to re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its rivals.

Also, before introducing competition into a market traditionally supplied by a public monopoly, and before privatising a public monopoly, governments will undertake a review into a range of matters, including: the appropriate commercial objectives of the business; the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly; the merits of separating potentially competitive elements of the public monopoly, and the community service obligations undertaken by the public monopoly; regulation to be applied to the industry; and ongoing financial relationships between the owner and the public monopoly.

12 PUBLIC INTEREST

These principles recognise that competition is not an end in itself but rather a means for improving welfare. With this in mind, the Competition Principles Agreement adopts an holistic approach, setting out other factors (including ecologically sustainable development, social welfare, consumer interests, and efficient resource allocation) which must, where relevant, be taken into account in implementing the principles.

13. ACCESS TO FACILITIES

The importance of access to certain key facilities, such as telephone networks, electricity grids or gas pipelines, in order to encourage competition in related markets in telecommunications, electricity or gas production or distribution is recognised in the National Competition Policy. Vertical separation is generally preferable to regulation of access terms and conditions, but for a variety of reasons vertical separation might not occur, and in these cases regulated provision of third party access might be appropriate.

To a large extent, the Australian public policy debate preceding the introduction of the access regime focussed on the question of whether s.46 of the Trade Practices Act provides a sufficient basis for regulation access to essential facilities or whether more direct regulation of natural monopoly markets is warranted.

The Hilmer Report addressed this issue and concluded that s.46 alone is unable to deal effectively with access to essential facilities. S.46 of the Trade Practices Act prohibits the misuse of substantial market power and provides that “a corporation with a substantial degree of market power can not take advantage of that power for the purpose of:

- eliminating or damaging a competitor in that or another market;
- preventing entry to that or another market; or
- inhibiting competition in that or another market.”

The reasons for the conclusion that s.46 could not adequately address the access problem included:

- the inability of s.46 to deal directly with monopoly pricing that is not for a “prescribed purpose”; (the term “purpose” has been important in the Australian law)
- the evidentiary difficulties in proving in court that refusal of access on reasonable terms is conduct for a prescribed purpose;
- the general shortcomings of a process that depended upon a Court finding of a breach of the law;
- the cost, time and risks involved in obtaining a court resolution of commercial access disputes; and
- doubts about the capacity of the courts to determine optimal prices, terms and conditions of access to essential facilities.

The Competition Policy Reform Act inserts a new Part IIIA into the Trade Practices Act which establishes a legal regime providing for third party access to a range of facilities of national importance.

A single facility might provide a number of services, to which access may be essential for enhanced competition in some cases but not in others. For this reason, the legislation focuses on a service provided by means of a facility.

What exactly is covered by this part of the Act? Part IIIA defines "service" as a service provided by means of a facility, including:

- the use of an infrastructure facility such as a road or railway line;
- handling or transporting things such as goods or people;
- a communication service or similar service.

A definition specifically excludes any production processes (eg factories), intellectual property (eg copyright and patents), or the supply of goods, except to the extent any of these is an integral but a subsidiary part of the service in question. Examples of the kinds of facilities which may be covered by Part IIIA clearly include gas transmission and distribution, electricity transmission and distribution, railway tracks, airport systems, water pipelines, telecommunications networks and certain sea ports.

There are three mechanisms for the provision of third party access:

(a) a potentially compulsory process, whereby the service is 'declared' and then is the subject of arbitration if the parties cannot agree on any aspect of access;
(b) a voluntary process, whereby a service provider can offer the ACCC an undertaking which sets out the terms and conditions on which it will offer third party access, and which the ACCC may accept; and
(c) state and territory government laws that regulate access and that are deemed "effective" in terms of their compliance with national policy criteria for access laws. State access laws are not considered further in this paper, although their operation is similar to the national ones described.

Compulsory Declaration Process

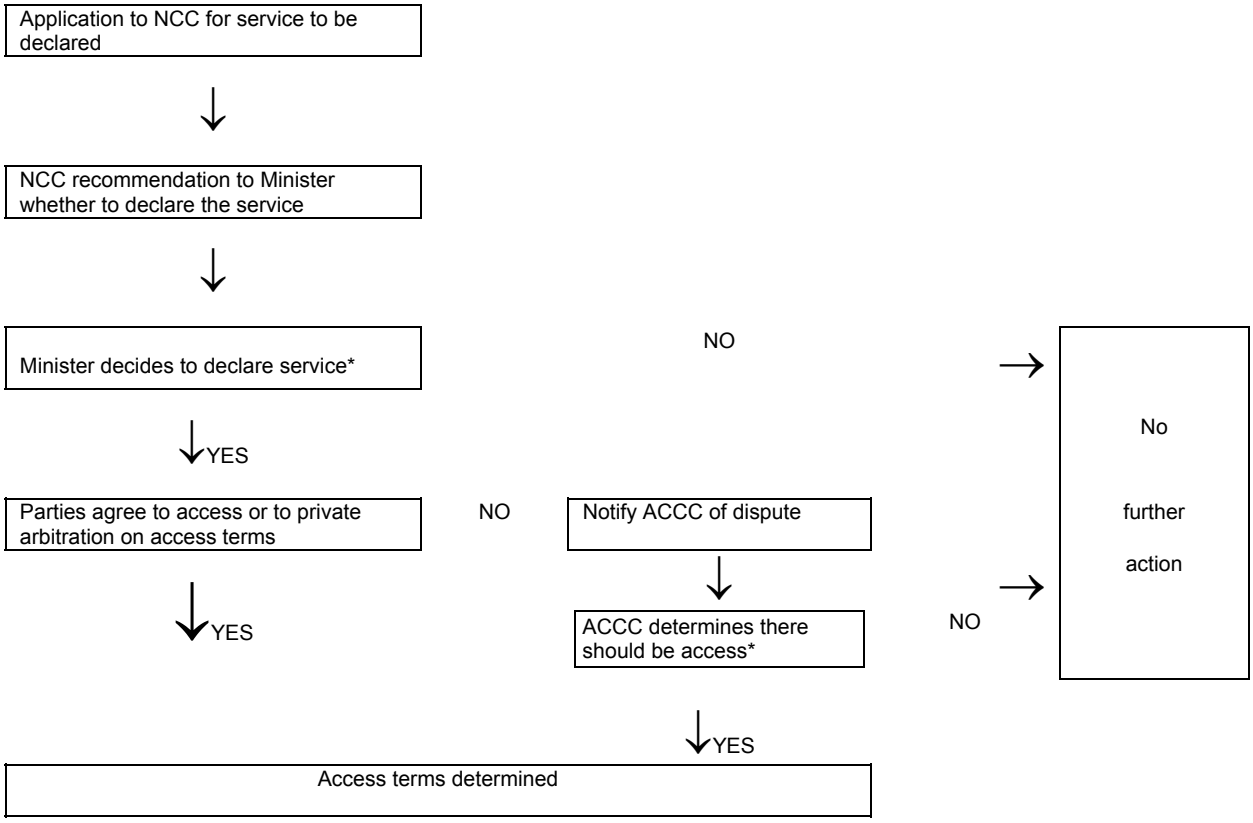
Any person may apply to the Council to consider whether the service should be declared. There are a number of matters, all of which the Council must be satisfied on before it can recommend the declaration of a service. These are:

(a) that access to the service would promote competition in a market (other than a market for the service);
(b) that it would be uneconomical for anyone to develop another facility to provide the service;
(c) that the facility is of national significance having regard to its size, the importance of the facility to interstate or overseas trade and commerce, or its importance to the national economy;
(d) that access to the service can be provided without undue risk to health or safety;
(e) that access to the service is not already subject to an effective access regime; and
(f) that access to the service would not be contrary to the public interest

The compulsory process is shown diagrammatically in Figure 1.

These are threshold criteria which must be met before the Council can recommend that the service can be declared. Mere satisfaction of these criteria does not, however, automatically lead to a recommendation to declare. The Council can consider any other relevant matter. It must then recommend to the 'designated Minister' whether or not the service be declared. (The designated Minister is a State or Territory Minister in the case of a facility owned or operated by a State or Territory government body, and the Commonwealth Minister otherwise). Following receipt of the recommendation, the Minister must then decide whether or not to declare the service, and must give reasons for the decision.

Figure 1 - Compulsory (ie Declaration) Access Process



* subject to review by the Tribunal

The Minister cannot declare the service if the service is the subject of an operative access undertaking. Further, the Minister cannot declare a service unless satisfied of all of the matters set out above. There is a right of review by the Australian Competition Tribunal of Ministers' decisions, exerciseable within 21 days of publication of the decision of the Minister.

Declaration of a service does not mean that there is an automatic right of access to the service for third parties. Rather, it represents a right for third parties to negotiate terms of access backed up by compulsory ACCC arbitration if the parties cannot agree on any aspect of access. Where the parties cannot agree on access (or the terms of access), they may decide to refer the dispute to private arbitration. If they do not agree to refer the dispute to private arbitration, an access dispute may be notified to the ACCC. The ACCC can then determine whether access should be provided and, if so, the appropriate terms for access.

There are rights of review by the Tribunal of determinations by the ACCC, exerciseable within 21 days of the determination.

There are a number of matters which the ACCC must take into account when making a determination including the interests of the service provider, users and the public. Also, there are a number of constraints on the terms of determinations.

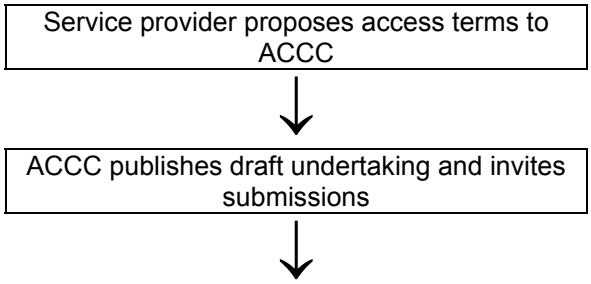
The ACCC must not make a determination that would have any of the following effects:

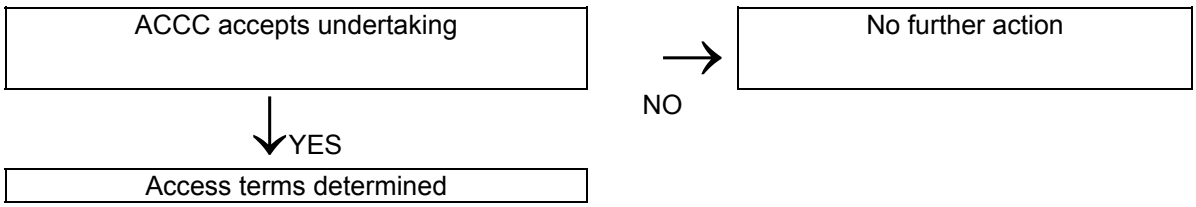
(a) preventing an existing user from being able to obtain its reasonably anticipated requirements for the declared service as at the time the dispute was notified;
(b) preventing a person from using the service by the exercise of a right under a contract or determination that was in force at the time the dispute was notified ('a pre-notification right') in so far as the person will actually use the service;
(c) depriving a person of a protected contractual right under a contract that was in force at the beginning of 30 March 1995;
(d) resulting in a third party becoming the owner, or part owner, of the facility or extensions to it without the consent of the provider;
(e) requiring the provider to bear some or all of the costs of extending the facility to meet the access requirements of the third party.

There is a provision which prohibits anyone from engaging in conduct for the purpose of preventing or hindering another person's access to a declared service under a determination.

Voluntary (access undertakings)
This voluntary approach, which is shown diagrammatically in Figure 2, allows service providers to offer to the ACCC an access undertaking which sets out the terms and conditions on which it will offer access to third parties. If accepted by the ACCC, this will foreclose the possibility that the service will be declared, thus removing uncertainty as to what the access arrangements for the service might be under the declaration route. The reform processes in the telecommunications, electricity and gas industries in Australia are developing access regimes which will most probably be established through this undertakings route.

Figure 2 - Voluntary (Access Undertaking) Process





The ACCC need not accept an undertaking. It might decline to accept an undertaking if, for example, it was uncertain about future conditions and preferred to preserve the possibility of future declaration. Before accepting an undertaking, the ACCC must publish a draft of the undertaking for public comment.

At the end of the period for public comment, the ACCC can decide whether to accept the undertaking. In making this decision it must consider submissions received during the public comment period and have regard to a number of matters including the interests of the service provider, users and the public, and whether there is an existing access regime.

The ACCC can accept an undertaking in respect of services which are already covered by an access regime. This may be desirable where (say) the existing regime is not fully effective. The ACCC cannot, however, accept an undertaking in respect of declared services.

Enforcement

Part IIIA also includes provisions for the enforcement of access determinations, the prohibition on hindering access to a service and access undertakings.

Enforcement action is taken in the Federal Court. In the case of a breach of an undertaking, only the ACCC has standing to sue whereas, for contraventions of determinations, any party may sue.

Recognising that in some instances, once a service has been declared, the third party and the provider may negotiate an access agreement or refer the matter to private arbitration, the legislation contains a provision for registration by the ACCC of access contracts for declared services. The ACCC has a discretion whether to register the contract: in exercising this discretion it must take into account the interests of the public and users. Once registered, the contract can be enforced as if it were an access determination of the ACCC.

It will be seen that Part IIIA of the Trade Practices Act has established a generic access regime applicable in principle to a range of sectors. Clearly Part IIIA is a somewhat complex piece of law. It balances a number of policy variables. These include the benefits to competition of granting competition; the probable detriments to investments if new entrants can use the facilities of an established player, possibly with ultimate detrimental effects on “facilities based competition”; property rights issues (requiring the appeal processes and the involvement of the Courts and Tribunals); federalism issues; and issues about the role of governments (as reflected in the role of designated minister).

Two somewhat distinctive Australian factors have influenced the form of the legislation. First, there is the Federal character of Australia's governmental structures. Second, Australia's constitution requires a rigid separation of judicial from executive and legislative functions. This latter factor has inevitably involved the Courts in playing a role in the access regime. In addition, in any event, the Australian people appear willing to accept relatively strong competition laws which affect property rights substantially providing that the Courts have a role in making many of the final judgements. Thus, whilst the role of the Regulator is very important there is a right of appeal in most of its decisions to a tribunal or to a court.

Since the enactment of Part IIIA of the Trade Practices Act, a significant trend has been the development of tailor made arrangements for telecommunications, electricity, gas and rail which, while reflecting the broad access regulation framework embodied in Part IIIA of the Act, vary the models to be developed in their approach, detail and descriptiveness in the light of different technology, market arrangements and ownership structure of the sectors. It is not considered that these developments reflect a departure from the generic regime provisions of Part IIIA. In some cases it has been taken for granted that certain facilities would be declared and so the declaration process has been bypassed and the emphasis placed upon the terms and provisions of access. In other cases special requirements eg any to any connectivity in telecommunications, have been written into that regime (which in any case has been built on some of the elements of a pre-existing telecommunications industry access regime that applied from 1991 until recently).

There has been some debate as to whether the access regime should only apply where there is both a natural monopoly service which is required in a related market and the facility operator also compete directly in the related markets. While there are some theoretical reasons for confining any access obligation to natural monopoly facilities required for competition in a related market, it is arguable that confining the obligation to facilities that are also vertically integrated is too limiting. Under this approach, an upstream monopolist which also competes in a downstream market would be subject to the access regime but it would not apply to an upstream monopolist that supplies essential inputs to the downstream market without competing in it directly.

The economic policy rationale for excluding the "unintegrated" upstream monopolist is not apparent when such a facility operator can replicate the access pricing arrangements of the "integrated" monopolist by entering into contracts with downstream firms to charge the monopoly price for the essential input. In this situation, the same monopoly rent and associated distortion would be reflected in the downstream market price in the absence of a vertically integrated ownership structure. Thus, if the access obligations to supply the essential input at an "efficient" price are to be incurred only by an "integrated" monopolist, and not by the "unintegrated" monopolist, the resulting disparity of

regulatory treatment simply discourages the monopolist from participating in the downstream market at all. As a result, the access regime would fail to achieve its policy objective. There would also be a regulatory disincentive to engage in efficient vertical integration, where this may be warranted by economies of scale and scope and transaction costs savings, with adverse consequences for productive efficiency and final consumers.

In Australia, the regulation of access to essential facilities is not confined to vertically integrated natural monopolies. Rather it applies to all nationally significant essential facilities whose services are necessary for effective competition in another market.

The preceding is by no means a full discussion of the national access regime.

Some ACCC publications provide a fuller guide.[1]

The actual experience to date it is too early at this stage to provide a useful overview of the actual operation of the access regime. A number of declarations have been sought from the National Competition Council and these are at various stages of completion in terms of appeal processes and the like. The Telecommunications Access Regime is currently in a crucial stage. Electricity, gas, airport matters are currently being resolved. By the end of 1998 a picture will start to emerge of how the regime is working.

How should access conditions be determined?

The COAG access arrangements embodied in Part IIIA of the TPA require that access terms and conditions, including price, for declared essential facilities be determined in the first instance by commercial negotiations between the facility operator and those seeking access. But there is provision for a right of compulsory arbitration by the ACCC to resolve access disputes that cannot be resolved by negotiation between the parties.

The rationale for this approach is that the availability of compulsory arbitration gives third parties seeking access considerable leverage in negotiations with the monopoly facility operator which is expected to contribute to negotiated pricing outcomes closer to “efficient” access prices. The availability of arbitration (which must consider the implications for competition, efficiency and the wider public interest) combined with the cost, delay and publicity of dispute arbitration, is intended to give the facility operator a strong incentive to negotiate more reasonable terms and conditions of access.

The fallback of compulsory arbitration in those cases where the terms offered are considered to be excessive gives third parties an independent forum in

[1] National Access Regime, November 1995; Access undertakings - An Overview July 1997; Access Pricing Principles, Telecommunications - a Guide July 1997. These papers can be purchased from the ACCC, 360 Elizabeth Street, Melbourne Vic 3000

which to have the disputed access terms determined by an objective arbitrator against broadly based public interest criteria.

This declaration/arbitration model has the advantage of limiting the extent of direct intervention to determine access prices and conditions to the (exceptional) cases that cannot be resolved directly by the parties, while at the same time providing strong incentives for the parties to reach agreement on access terms through commercial negotiations rather than resort to final arbitration.

This model is not without its critics, however, and I will mention briefly some of the criticisms that have been made of it.

Some commentators have questioned whether an access regime involving direct intervention by exception (ie only in those cases where disputes remain unresolved) will be capable of overcoming the monopoly pricing/allocative efficiency problem inherent in the supply of essential facility services. There may be (smaller) access seekers who are unwilling or unable to take a dispute to arbitration and will have no choice other than accepting a monopoly access price. For example, they may be constrained by their informational disadvantages, concerns about retaliation by the facility operator which would impair their ability to compete, or simply be unable to withstand the cost and delay of conducting an access dispute. Under this view, access disputes would be rare but that would not necessarily be an indication that the regime had successfully eliminated monopoly pricing and the resulting allocative efficiency distortions.

A variation on this view maintains that access disputes would be unlikely because the threat of arbitration would give the incumbent essential facility operator an incentive to bribe downstream users of the facility to accept the monopoly price without seeking arbitration in return for a share of the resulting monopoly rent. While the contractual arrangements to achieve this outcome would be subtle, these commentators argue that the absence of disputes would simply indicate that the monopoly solution was being maintained by such side deals between the facility operator and its downstream users.

The solution suggested to address these perceived shortcomings is direct access price regulation to cover all of the services supplied by the facility, not just those that give rise to disputes. For example, price or revenue caps could be applied to squeeze out monopoly rents, while providing incentives to pursue efficiency improvements, or alternative approaches to public utility price regulation could be used.

My current position on this debate is that we have no practical experience yet of the effectiveness of the arbitration model or the significance of these potential shortcomings. However, the arbitration model will be implemented with these criticisms clearly in mind. To the extent that they prove to be of substance and

cannot be addressed by administrative means, consideration can be given to the need for some form of direct price regulation in the light of that experience.

14 PRICES OVERSIGHT

In Australia, at the Commonwealth level, there are three levels of price oversight (not control) surveillance, monitoring and inquiries.

Price surveillance is a system whereby firms are declared. Currently around 10 organisations are subject to declaration. The ACCC considers notifications from declared firms and indicates to notifying firms whether it supports the proposed price increase. Firms are not required to comply with the PSA's recommendations, the system relying on moral suasion. Since the inception of the system in 1984, declared firms have on all occasions followed the regulator's recommendations. The outcome of notifications is placed on the public register.

The Prices Surveillance Act has been amended to provide a time limit for declaration and to extend the surveillance provisions to potentially apply to State and Territory government businesses. The PSA is now required to place the reasons for its notification decisions on the public register.

Price monitoring is a less intrusive form of oversight. Previously, the PSA undertook monitoring on an informal basis. The reforms formalise this monitoring role.

The Competition Principles Agreement indicates that price oversight of State and Territory government businesses is generally the responsibility of the particular government concerned. Some States have their own price oversight legislation. For example, the New South Wales Independent and Pricing Regulatory Tribunal (IPART) investigates and reports on the determination of maximum prices for government monopoly suppliers and the pricing policies of such suppliers, including electricity, rail and water authorities in New South Wales. The Victorian Office of Regulator-General is responsible for the economic regulation of a range of government business enterprises, including electricity, gas and water, with the power to regulate prices of prescribed goods and services supplied by or within a regulated industry. These arrangements will continue as part of the national competition policy. Price surveillance under the Prices Surveillance Act will, however, apply to State and Territory Government businesses, where

(a) the State or Territory concerned has agreed; or

(b) the Council has, on the request of an Australian government (Commonwealth, State or Territory) recommended declaration of the business on the basis that the business is not subject to effective oversight and the Commonwealth Minister has consulted the appropriate Minister of the State or Territory concerned. The details of, and information on this process are set out in the Competition Principles Agreement.

15 THE INTERACTION BETWEEN COMPETITION POLICY AND REGULATION

There has been significant debate in Australia as to the most appropriate framework for administering economic, technical and competition regulation. Among the issues debated have been the merits of general *vs* industry specific competition regulators and of integrated *vs* separate administration of economic, technical and competition regulation. There has also been debate about the role of national and state regulation. This section of the paper outlines Australia's approach to this debate and its attempts to improve the interaction between its competition and regulatory authorities.

Before discussing the actual policy outcomes in Australia, it is worth briefly reviewing some of the general debate which has occurred in recent years. The debate originated because of the privatisation, commercialisation and varying degrees of deregulation that occurred in relation especially to public utilities in the communications, energy and transport sectors. The need for some kind of economic regulation that extended beyond the usual bounds of the *Trade Practices Act* emerged. A number of options presented themselves. At one extreme, it would have been possible for each State and Territory of Australia as well as the Commonwealth to establish a separate regulator for each industry. Thus in the State of Western Australia there would have been a gas regulator, an electricity regulator, a rail regulator, and so on and this would have been mirrored in other states. Another approach might have been to combine the regulators in each state so that there was a general regulator in each state as well as at Commonwealth level. Another option would have been to have established regulatory processes for each industry in Australia. There could also have been a general regulatory regime administered by one national regulator. The final option would have been to include all these regulatory functions as part of the role of the national competition regulator.

A further set of issues concerned the relationship between technical and economic regulation - should they be combined or kept separate? For example, should all telecommunications regulation, both economic and technical, have been located in a communications regulatory agency? Or should all of it including technical regulation have been located in the national competition regulator or should the economic and technical regulation of communications have been separated (although hopefully coordinated)? In such a model, conventional competition law and general economic regulation would have been operated by the Australian Competition and Consumer Commission, whilst technical regulation would have been done by a communication agency with a close working relationship between the two agencies, in particular to ensure that the technical regulation did not have anti-competitive effects.

With respect to the debate about whether there should be industry specific or general regulation, the arguments in favour of general regulation have included that general regulation is more suitable in an era or convergence. The process of convergence is occurring in areas such as energy (between gas and electricity), communications (between telecommunications, information

technology and the media), financial services (between different providers of financial services eg. Banks and insurance). There has even been convergence between the energy and communications sectors as energy transmission facilities are seen as providing possible facilities for telecommunications transmission. Likewise, financial services and telecommunications are becoming closely linked. An associated benefit of general regulation is that it permits 'one-stop shopping'. In Australia, for example, a new telephone entrant, Optus, wishing to provide paid television services found itself dealing with the telecommunications regulator, the competition regulator, the broadcasting regulator, the spectrum management allocator as well as the Departments of Communication and of Treasury (the latter is responsible for competition policy). General regulation is also likely to involve some resource saving as there are economies of scale and scope in regulation. There is also a greater likelihood of consistency across sectors or across different industries.

Another point for general regulation is that it is argued that such regulators are less likely to be captured than an industry specific regulator. Whilst on the face of things there are many instances of specific regulators who have proved themselves not to be captured, a further possible concern is that over the course of time industry specific regulatory bodies may distort decisions in ways that are more favourable to the preservation of their own activities than to pro-competition deregulation.

The arguments in favour of industry specific regulation are that the industry specific regulators may have better technical economic knowledge and expertise; that it is generally easier to combine industry specific economic regulation with detailed technical regulation in one organisation which is likely to lead to more enlightened economic decision making. There are also some dangers in relying upon a general regulator. There is something to be said for ensuring a degree of diversity in regulation and in not putting 'all the eggs in one basket'. There may also be a better prospect for adequate funding of an industry specific than a general regulator.

It is difficult to carry this debate too far. Whichever solution is chosen there are ways of overcoming its limitations. Australia has tendered, however, on balance, to favour general rather than industry specific regulation. At national level there is the Australian Competition and Consumer Commission which does the major national economic regulation. At state level the Regulator General in Victoria and the New South Wales Independent Pricing and Regulatory Tribunal (IPART) perform general rather than industry specific regulation.

The next element in the debate has concerned national versus local regulation. The general arguments for national regulation have included that most markets are national these days; indeed the process of deregulation itself tends to break down barriers between states and create national markets; there are economies of scale and scope in having national rather than local regulation, and national regulation avoids inconsistencies which can occur between many local

regulators in different states. There is also a shortage of regulators at local level. The argument for local regulation is that it is often more politically acceptable than national regulation. Moreover, some markets may be local. Local regulators may have a better local knowledge and feel. Again, it is difficult to generalise in the abstract. In Australia the pattern has been to give regulatory matters with national elements to the national regulator. Where, however, there are purely state issues, these are left to the local regulator. Some states say that in the long term they expect local regulation to gravitate to a national level.

On the basis of the above debate, it is concluded that there is a case for national regulation. The question then arises as to whether there should be a separate national regulator or whether it should be integrated with the competition regulator. The arguments for integrating national regulation with competition regulation are that regulation has significant effects on competition and is therefore best linked with the regulation competition; that regulation on its own is often anti-competitive and tends to down play competition and replace it with other values. If however, regulation is done by the competition regulator, then a healthy competition culture will pervade regulatory decision making; there are also substantial benefits from close coordination of regulatory and competition policy decision making. The arguments for separate regulation include that this avoids confusing the competition regulator's role; that the competition regulator does not become distracted and overwhelmed with messy regulatory details; and that a regulatory mentality may actually swamp the competition mentality rather than the opposite because of the sheer number of persons that are required to conduct regulation. Again in Australia, the argument has tended to go in favour of integrating regulation and competition policy in one agency.

Against this background the paper now reviews the position that has been achieved at this stage in Australia.

Australia has a general competition law that applies across all industries and is administered by a single competition authority, the Australian Competition and Consumer Commission (ACCC).

The ACCC and the newly established National Competition Council (NCC) also perform several important economic regulatory functions. For example, the ACCC has various responsibilities in relation to the terms and conditions (including setting prices) of access to certain essential infrastructure facilities such as telecommunications, gas and electricity and in monitoring prices in industries where competition is weak. It also has a quality of service monitoring role in respect of airports. These responsibilities reflect a government view that there are advantages in placing these economic regulatory functions with the general competition agency. In the case of the NCC, the main regulatory function is in relation to establishing rights of access to the services of certain essential infrastructure facilities. Other significant aspects of economic regulation such as the granting of licences are typically administered by industry specific regulators or by more general government regulators. Technical regulatory issues that do not have a significant competition element are typically

administered by industry specific regulators or may be subject to goods and services standards set by Australia's principal standards organisation, Standards Australia.

General v specific competition regulation

Australia has a national competition law that is consistently applied across all industries and is administered by a single independent agency. This general approach promotes consistency, certainty and fairness in the universal application of the competition law. It also enhances the regulator's ability to take an economy-wide perspective; reduces the risk of regulatory 'capture' by industry; and minimises duplication. There may also be administrative savings.

There may be advantages in having industry-specific competition regulation in industries characterised by complex technology or having natural monopoly or other special elements. In the case of telecommunications, specific competition laws are contained in Part XIB of the *Trade Practices Act 1974* (TPA), which is administered by the ACCC and which complements rather than replaces general competition law.

Industry specific competition provisions are also contained in Part X of the TPA, which provides a regime for regulating the conduct of those international liner cargo shipping companies which collaborate as conferences under agreements registered with the Department of Workplace Relations and Small Business (which has responsibility for maritime policy). Part X provides special (but conditional) exemption for exporters from the competitive conduct provisions of the TPA without the need for authorisation by the ACCC. Failure on the part of conferences to meet Part X conditions and provide efficient and economical services can result in an investigation by the ACCC and a recommendation to the Minister for Workplace Relations and Small Business. The Government will be reviewing Part X as part of its legislative review program during 1998-99.

Integrated vs separate administration of economic, technical and competition regulation

Technical regulation and some significant aspects of economic regulation are administered in Australia by industry specific bodies or more general government regulators. This recognises that the national competition authority should focus on anti-competitive conduct and not become embroiled in overly detailed or complex regulatory matters unless they have a clear connection with competition issues in, for example, network industries.

Separation of regulatory duties between competition, technical and economic regulators does entail the risk that competition regulators will not always have the same level of technical knowledge that can be achieved by an integrated regulator. This has not been a serious problem to date in Australia and the risks are less in industries where the ACCC has both an economic regulatory role as well as its normal competition role. In addition, various mechanisms are in place to improve coordination between regulators (see below).

Role of the ACCC

In addition to its core 'competition' function, the ACCC has a number of key 'economic regulatory' functions. Under the general or 'economy wide' access regime for essential infrastructure facilities established in Part IIIA of the TPA, the NCC advises the Government as to rights of access and, where these are established, the ACCC acts as an 'arbitrator of last resort'. That is, the ACCC has the power to arbitrate access disputes and determine the final terms of access (including price) if access seekers and owners of essential facilities fail to reach a commercially negotiated settlement.

More specific 'economic regulatory' functions are performed by the ACCC under the access regimes for telecommunications (discussed below) and for gas transmission pipelines (with the exception of those in Western Australia). The gas role includes monitoring compliance with ring fencing obligations and approving access arrangements (covering services, reference tariffs, trading and expansions) in accordance with an industry code. In addition, from 1999 the ACCC will assume the role of transmission regulator for the electricity industry. This will involve setting a revenue cap for electricity transmission networks.

There is a strong emphasis in all these areas on the desirability of commercially negotiated outcomes. Generally speaking the regimes establish frameworks within which industry participants operate commercially and the role of the regulator is as light-handed as possible.

State regulators

Economic regulation of State based markets mainly occurs at the State government level. This State based regulation is moving toward more general regulators such as the New South Wales Independent Pricing and Regulatory Tribunal (IPART) and the Victorian Office of the Regulator General (ORG). These bodies have responsibilities, including technical ones, across a range of industries and, as discussed below, have a close association with the ACCC.

Addressing regulatory uncertainty

With the 'division of labour' between various regulators, there is potential for some degree of overlap of functions between the ACCC, which administers competition regulation across all sectors of the economy, and those technical and economic regulators that operate within specific industries or within certain States across a number of industries. For this reason, a number of steps have been taken to minimise uncertainty regarding the jurisdiction of particular regulators and avoid confusion for consumers and the business community.

For example, the ACCC has frequent information exchanges with a variety of economic and technical regulators through regular liaison meetings and the exchange of publications and other information. The ACCC also has a significant public and business education role. In addition, chairpersons of various Commonwealth and State economic regulators (such as the Australian

Broadcasting Authority, the New South Wales IPART and the Victorian ORG) are associate members of the ACCC; and certain members of the ACCC are appointed as associate members of the Australian Communications Authority and the Australian Broadcasting Authority. This helps to bridge the 'knowledge gap' that can arise when competition, economic and technical regulators are separate bodies.

Further, in conjunction with a number of Commonwealth and State regulatory agencies and policy advisers, the ACCC publishes a quarterly newsletter titled the *Public Utility Regulators Forum.* The Forum was established in recognition of the need for cooperation among the various state-based regulators. It aims to focus understanding of similar issues and concepts faced by different regulators; minimise regulatory overlap for large users operating across jurisdictions; provide a means of exchanging information; and enhance the prospects for consistency in the application of regulatory functions.

Telecommunications Case Study

On 1 July 1997, the Commonwealth Government introduced a new legislative reform package designed to introduce full and open competition in the telecommunications industry in Australia. These reforms substantially increased the ACCC's regulatory role in the telecommunications sector.

Background

Prior to 1992 Telstra (formerly Telecom) was the wholly Government owned monopoly provider of telecommunications services. Telecom also performed the role of regulator prior to this function being transferred in 1989 to an independent industry regulator, AUSTEL. In 1991 the Government decided to issue a second carrier licence (to create a 'managed duopoly') and to expand AUSTEL's role to include telecommunications industry competition matters. During this time the ACCC's role was for the most part limited to consumer protection issues.

Optus acquired the second carrier licence and began providing services in competition with Telstra in November 1992. Soon afterwards a legislated triopoly in mobile telephony was formed with Vodafone commencing services in October 1993. Limited opportunities for resale of Telstra's services were also allowed from 1991.

With the introduction of full and open competition in Australia on 1 July 1997, telecommunications was brought within the reach of the general anti-competitive provisions of the TPA. Because of uncertainty, however, as to whether these general provisions would deal effectively with the complexity and limited level of competition in some telecommunications markets, it was also decided that additional industry specific provisions should be introduced into the TPA to regulate anti-competitive conduct in the industry. The industry specific

provisions in Part XIB of the TPA give the ACCC powers to issue competition notices to carriers and service providers engaging in anti-competitive conduct. These notices are enforced through the courts and, if carriers are found to have contravened the provisions, they face significant pecuniary penalties and restitution orders.

The ACCC is also responsible for administering an industry-specific access regime for telecommunications under Part XIC of the TPA. The aim of this regime is to provide for the long term interests of end users of telecommunication services through ensuring 'any-to-any connectivity' (maximising positive network externalities); promoting diversity and competition in the supply of carriage, content and other services; and promoting the efficient use of, and investment in, network infrastructure. The new telecommunications access regime provides a framework for regulated access rights to be established for specific carriage services and related services, and establishes mechanisms within which the terms and conditions of access to the network service can be determined.

There will always, however, be a primary reliance on commercially negotiated outcomes. Arbitration by the ACCC is a fall back option.

The TPA provides extensive information gathering powers and the ACCC is able to make record keeping rules for specified industry participants to assist it in the administration of the telecommunications specific provisions. It is intended that these industry specific anti-competitive provisions will eventually be aligned, to the fullest extent practicable, with the general trade practices law. Finally, it should be noted that the ACCC is responsible for administering price cap arrangements applying to Telstra.

Technical regulation for telecommunications, such as spectrum management, has been transferred from AUSTEL to a new independent regulator known as the Australian Communications Authority (ACA). The ACA also administers economic regulation in respect of licensing, carrier and service provider rules, numbering and universal service arrangements.

Reasons for regulatory changes in telecommunications

As noted above it was considered that the special nature of the telecommunications industry warranted adoption of non-generic competition regulation for a transitional period. As competition in the telecommunications sector increases over time, there is an expectation that the need for special provisions will decline and reliance on the general competition law will be more likely to suffice. To assist this movement towards reliance on general competition law, it was decided to have the industry specific competition provisions administered by the ACCC under the TPA and to leave technical and licensing issues to the ACA. It should be emphasised that the industry specific competition provisions are broadly consistent with the general provisions of the TPA and complement rather than replace the general law.

The ACCC's role in telecommunications brings an 'economy wide' perspective to competition regulation in a sector experiencing rapid integration or 'convergence' with other industries such as information technology, financial services, broadcasting and, more recently, participants in the energy reticulation markets. This convergence has seen new service forms develop, while existing forms are merging to create new hybrid services. Hence, it is increasingly difficult to categorise services in traditional terms which may involve a simple linkage between a particular service and a particular technology used to deliver that service. Clearly, the convergence phenomenon has implications for the roles of different regulators and increases the arguments for general rather than industry specific regulation**.**

Interaction between the ACA and ACCC

Some telecommunications issues involve areas of overlap between the ACA and the ACCC. In general, where one agency has responsibility for a particular issue that may overlap with the other agency, there are legislative requirements for consultation and notification. For instance, while the ACA is generally responsible for specifying technical standards, where such standards are integral to competition within the market, the ACCC may assume primary responsibility for their issue. Moreover, given the telecommunications access regime is inextricably linked to technical matters within the industry, the ACCC must consult the ACA on various matters, such as the model terms and conditions to apply to telecommunications services subject to an access regime.

The chairperson of the ACA is currently an associate member of the ACCC, which enables the ACCC to call on relevant technical expertise when dealing with complex competition issues in the telecommunications industry. Further, as already mentioned, a member of the ACCC is an associate member of the ACA, which further reduces the possibility that conflicts or overlaps will exist or develop to any significant degree.

Personnel changes in the ACCC

When the new telecommunications regime commenced in July 1997, a number of AUSTEL's experienced personnel were moved to the ACCC, along with its competition functions, so that the ACCC would have sufficient technical expertise to deal with the 'specifics' of the telecommunications industry. In addition, the ACCC has appointed a full time Commissioner responsible for telecommunications issues.

Experience to date

Reform of the telecommunications market since July 1997 has seen a number of new carriers commence operations and offer competing services.

Two aspects of the regulatory regime have contributed to their success. Firstly, the ACCC has additional powers to intervene if necessary in the marketplace and respond to anti-competitive conduct. Secondly, the legislated access

regime provides the ACCC with discretion, after public consultation, to declare network services that it considers should be made available to all market participants. A number of basic network services essential for competition were declared from 1 July 1997, including originating and terminating access for fixed and wireless services, certain trunk transmission services, digital data access, and a conditioned local loop service. Further, the mere threat of regulatory intervention through mandated arbitration by the ACCC provides an incentive for access providers and seekers to come to a negotiated settlement. Recently, the ACCC has (amongst other things) raised the issue of declaring ISDN access services and sought public input into whether it should also declare local call resale as a service to which the access regime applies.

As noted above the new regulatory regime has seen the entry of a number of new carriers. There have also been price reductions and service enhancements for consumers and Telstra's market shares in international, domestic long distance and mobile telephony have declined. Notwithstanding these successes, Telstra retains a near monopoly position in local telephony and controls a large proportion of the telecommunications infrastructure. Reflecting this situation, there have been calls in the industry from new entrants for some additional regulatory initiatives to further assist in the development of competition. The issues most commonly raised are the need for improved cost information disclosure requirements by the incumbent (to assist access seekers in the access negotiation process) and the need for an improved form of regulatory scrutiny of the incumbent's internal cost allocation. The question of whether these proposals should be accepted will require the Government to balance the claims of new entrants for additional regulatory assistance with the need to ensure that Telstra is not unreasonably constrained in responding to its competitors. The benefits to consumers from the new regime come as much from the actions of Telstra in responding to competition as from the initiatives of the new entrants themselves.

16. CONCLUSION

Australia has generally adopted a 'mandated' division of labour approach to regulation on the basis that having a general competition law administered by a single independent statutory body, the ACCC, promotes consistent application of competition regulation across all sectors of the Australian economy. However, governments have recognised the desirability of the ACCC having 'economic regulatory' roles in some industry sectors, in particular, essential infrastructure and network industries. Industry specific competition regulation has been employed sparingly (currently telecommunications and conference shipping).

In the longer term, as competition increases in industries previously exempt from the TPA or otherwise benefiting from legislative barriers to competition, and convergence between industries such as information technology and telecommunications continues, greater reliance will be placed on general competition laws rather than industry specific regulation. This will mean that the ACCC will need to continue to develop its in-house expertise in relation to a

number of industries and continue to consult frequently with industry-specific regulators to assist in the smooth operation of competition, economic and technical regulation.