Competition Policy:
Lessons from International Experience

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Abstract

The aim of competition policy is to promote free and fair competition, to increase efficiency and productivity in the economy and promote enhanced consumer welfare. This paper provides an overview of the rationale and justification for having a competition regime, using the Australian experience as an example of how to implement and administer an effective competition regime. It endeavors to draw on some of the lessons learned in Australia that are relevant for any country developing its own competition regime and to highlight some specific lessons that Australia has learned that are of relevance to economies in transition.

ملخص

تهدف سياسة المنافسة ومنع الاحتكار إلى إرساء قواعد المنافسة الحرة والعادلة بما يسهم في رفع الكفاءة الاقتصادية والإنتاجية بغية تحقيق الرفاهية للمستهلك. وتقوم هذه الورقة ببيان الدوافع وراء سن قانون للمنافسة بالاستناد إلى التجربة الأسترالية كمثال على كيفية صياغة وتطبيق سياسة فعالة للمنافسة. كما تستقي الورقة من هذه التجربة بعض الدروس المستفادة الملائمة لأي دولة بصدد صياغة تشريع خاص بها، مع التركيز على ما استخلصته أستراليا من دروس ملائمة للدول المتحولة إلى اقتصاد السوق.

I. Introduction

National competition laws and policies have emerged with increasing frequency over the last decade. Although they ultimately intend to promote economic efficiency and increase social welfare, these complex policies have often been accused of harming those national, business and consumer interests they aim to protect. For this reason, it is crucial that a country's administrators first develop a clear policy and then accrue a sophisticated understanding of how to apply it before unleashing it on the public. But where does one start?

This paper provides an overview of the rationale and justification for having a competition regime, and then discusses how Australia has gone about implementing and administering an effective competition regime. It will endeavor to draw on some of the lessons learned in Australia that are relevant for any country developing its own competition regime and then highlight specific lessons for developing economies.

It is important to keep in mind that this study is not necessarily advocating the Australian model as one that would be most universally suited to other situations. It is vital that countries develop a model that most suits its own needs, which may involve the combination of aspects of a number of different models. Competition policy is an area where, due to the diversity of countries' situations, competition regimes, legal traditions and cultural contexts, one size certainly does not fit all.[1] What this paper will try to highlight are the *key* elements and *essential* considerations that must be taken into account in the development of an effective regime.

II. Why Have a Competition Regime?

Background

Under normal circumstances, a competitive market structure will allocate resources in such a way as to produce the goods and services that consumers value most highly and are prepared to pay for, and it will do so at the lowest possible cost in terms of resource use. Thus, competition policy is based on the belief that a competitive market will result in economic efficiency and increased social welfare. Having a sound competition regime will also create economic opportunities for individuals that would not otherwise arise.

[1] *Report (2000) of the WTO Working Group on the Interaction Between Trade and Competition Policy to the General Council*, 30 November 2000, WT/WGTCP/4, para 76.

In most countries, unrestricted competition is not a goal in itself. Competition generally drives economic efficiency, the effective allocation of resources and ultimately economic growth, which in return will benefit all participants in the economic process. However, the aim of competition policy is not exclusively related to efficiency. Competition policy may encompass a broader set of policy objectives including consumer welfare, more equitable income distribution and encouragement of small business.

Ideally, competition policy would be non-interventionist and non-regulatory. It would leave market forces to operate. In practice, however, this is just not possible. Not all markets are competitive and even those that are competitive initially may change over time as a result of market conduct or other factors.

It follows then that there is concern amongst policy makers about conduct that results in an increase in market power, or conversely, that results in a substantial lessening of competition. Market power may be defined as the ability to "give less and charge more". It refers to a situation where a firm (or group of firms acting jointly) has discretion in its decision-making because it is free from constraints imposed by competition. The type of conduct that may be of concern for this reason can be categorized as:

- *Horizontal arrangements* between competitors, which may result in boycotts, market sharing or price fixing;
- *Misuse of market power* where firms already have significant market power, (most governments would not seek to make such power illegal, rather they would seek to curb its abuse);
- *Vertical restraints*, such as resale price maintenance and exclusive dealing – whilst recognizing that these may, in some circumstances, appear to be efficiency enhancing (usually there are other ways of achieving the same results without a reduction in competition); and
- *Mergers and acquisitions* – these are different in that they are the only conduct that has the potential to directly alter market structure (although other conduct may change structure indirectly).

There is also one other large area of concern in that governments often make decisions and enact laws that restrict competition. A comprehensive competition policy, as discussed in Section III of this paper, is needed to cover all government actions that have the potential to hinder competition.

Objectives

In Australia, the definitive statement on why countries need a vigorous competition policy was provided by the Trade Practices Tribunal (now known as the Australian Competition Tribunal) in its judgment on the *QCMA* case in 1976, which has subsequently been adopted by all Australian courts:

> Competition may be valued for many reasons as serving economi c, social and political goals. But identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources… There is of course a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pre ssure from alternative sources of supply and the desire to keep ahead.[2]

In other words, a competitive market never stands still. If the competitive process is working properly, there will be a constant quest for static and dynamic efficiency. Efficient production and consumption decisions will be made. Competitive markets are constantly adjusting to the ebb and flow of information and innovation; to changes in government policy; to entry and exit conditions; to each firm making its own decisions independently, free from coercion or predation, but in the face of interactive rivalry in the light of available levels of information on consumer demand and the availability of resources.

The operation of the competitive process is rather like survival of the fittest – except that we need to ensure that those firms that do survive are fit to survive in the broadest social sense of being good social citizens. All firms should have an equal opportunity to succeed in a market – but no firm should be guaranteed success (or even an equality of outcomes), unless it is consistently efficient, innovative and responsive to consumer demands. This was recognized by the High Court of Australia in its famous Q*ueensland Wire Industries* judgment, where Mason CJ and Wilson J stated:

> Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This compet ition has never been a tort… and these injuries are the inevitable consequence of the competition Sec. 46 [3] is designed to foster.[4]

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[2] Re QCMA and Defiance Holdings (1976) ATPR40-012 at p.17,245.
[3] Which prohibits the misuse of market power in Australia.
[4] Queensland Wire Industries Pty. Ltd. v. The Broken Hill Proprietary Company Limited and Anor (1989) ATPR 40-925, at p. 50,010.

Australian government policy recognizes that competition can provide many benefits for all Australians. To maximize the productive potential of Australia, governments in recent years have launched numerous programs to promote the competitiveness of Australian markets. In particular, this has included reforming and reconsidering any remaining industry protection, from whatever source, and ensuring that businesses do not act in an anti-competitive manner, or are at least suitably punished for their wrongdoings.

In fact, there has never been greater recognition than at present of the need for an effective competition policy in Australia. Federal and State Governments, the business sector, unions, resource owners, community groups and the Australian public generally regard competition in markets for goods and services as a prerequisite for both static and dynamic economic efficiency. Furthermore, they acknowledge that markets left on their own can often achieve competitive outcomes, but nevertheless accept that in many cases competition policies need to be actively enforced. Through first-hand experience, they have collectively recognized the broad constituency served by competition policy, and accept that, in many situations, competition can be best achieved by government withdrawal from markets, for example by deregulation, privatization, abolishing licensing and so on.

It is worth noting that the business community is a major beneficiary of competition policy. All firms have a major interest in ensuring that their inputs are supplied competitively, that their output is sold to a competitive buying market, and that their less scrupulous competitors do not engage in predatory pricing or other misuses of market power, or in deceptive or misleading conduct at their expense. A regime to promote free and fair competition within an economy should address and provide remedies for these market failure issues.

A critical part of any regime is its enforcement mechanism. Such mechanisms need to be transparent, available to everyone and binding for everyone. The mechanism may involve a publicly-funded enforcement agency (recognizing the economic benefit and increased social welfare outcomes to the economy as a whole), private rights of action in the courts or a combination of both.

Trade and Competition Linkages

Trade policy and competition policy both have the same fundamental objective of enhancing consumer welfare through more efficient allocation of resources, whether it be by lowering governmental barriers to trade or through promoting competition.

The benefits to be achieved via globalization and enhanced international trade can be undermined by anti-competitive behavior (such as cartels and anti-competitive mergers) occurring on an international scale. This can and does create situations where a national government has difficulties in dealing with anti-competitive behavior taking place in other countries that affect its economy. It is important for a country to have both a strong and well enforced domestic competition regime and for there to be cooperation with other governments in order to achieve effective outcomes at this global level.

In some countries, actions against anti-competitive practices can be less rigorous than others and result in distortions. In addition, anti-competitive practices tolerated in one country may result in reduced access opportunities to the market, even though foreign firms could provide additional competition that would be beneficial to the consumers of that country. Developing countries in particular have an interest in ensuring effective controls on anti-competitive behavior. In the absence of appropriate domestic rules, these countries may be at risk of being subject to extraterritorial application of other countries' competition laws, or being exposed to anti-competitive conduct by foreign firms.

Benefits of Having a Comprehensive Competition Regime

The general aim of having an effective domestic competition regime (such as the *Trade Practices Act 1974* (TPA) in Australia) is to promote free and fair competition, where this is in the public interest, and therefore – as already outlined – increase efficiency and productivity in the economy and promote enhanced consumer welfare.

The benefits of increased competition extend to all participants in the economy:

- to *consumers* – through lower prices, more product choice and better service;
- to *businesses* – through cheaper inputs, better service from input suppliers, greater choice of suppliers and access to improved technology, all of which lead to greater competitiveness both in its domestic market and internationally (a business not exposed to international competition is less likely to be innovative and internationally competitive);
- to *governments* – through increased revenue from expanding the economy, lower expenditure and improvements in government services; and
- to *the economy as a whole* – through lower inflation, increased growth, improved international competitiveness, greater investment, a greater choice of jobs and enhanced employment opportunities, and improved standards of living.

The purpose of a competition regime is to ensure that free markets work. Overall, this requires competition among producers and accurate information in the hands of consumers.

Competition between producers selling to informed consumers will lead to the best prices and the best quality (or perhaps the best value, being a combination of quality and price). Competition spurs efficiency and innovation. It gives firms the motivation to strive to lower costs, lower prices, increase quality and provide better back-up services. It drives producers to produce what consumers want.

Competition is about ensuring that no producer can ever take its customers for granted. It is about ensuring that producers are always looking for better ways of doing business.

However, effective competition always makes producers feel uncomfortable. Producers can never sit back and admire their achievements in a competitive market because they always fear being overrun by the opposition if they stop striving to do things better. This provides a powerful incentive for producers to seek ways of stopping the competitive process. Competition laws are required to counter that incentive by providing a strong disincentive to anti-competitive conduct.

The development of an effective competition regime is also a key element in achieving good governance and creating greater financial stability.

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 to provide for exceptions from the general application of a competition regime needs to exist.

However, for any competition regime to be effective, it is imperative that sectoral exemptions or exclusions from the law be kept to an absolute minimum. Even where these are considered necessary under current circumstances, mechanisms and timetables must be implemented from the outset for the phasing out of such exemptions over set time periods.

In Australia, exemptions from the competition law may be made by legislative or administrative exemptions. Legislative exemptions are only 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."[5] Administrative exemptions are enacted when the TPA allows the ACCC to 'authorize'

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

proscribed conduct (other than misuse of market power) on a case-by-case basis, where the public benefits of such conduct outweigh the associated anti-competitive detriment. Parties gaining authorization are granted immunity from legal proceedings under the TPA in relation to the authorized conduct.

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

III. Elements of a Comprehensive Competition Policy

A comprehensive competition policy (CCP) includes all government policies that affect the state of competition in any given sector of the economy, including those that restrict as well as promote competition. A CCP will include traditional antitrust law (competition law, trade practices law) but extends beyond it.

The Structure–Conduct–Performance Paradigm

The traditional structure-conduct-performance paradigm (SCP paradigm) is relevant to understanding competition.

Structure consists of the relatively stable features of the market environment that influence the rivalry between the buyers and sellers operating within it.[6]

The structural features of the market include: technical and economic characteristics, e.g. capital intensity, demand conditions, product substitutes; entry conditions (including entry restrictions imposed by government); the number, size and distribution of industry participants; imports; and other factors such as vertical integration, product differentiation, etc.

The *Conduct* (or behavior) of market participants includes: the production, selling and pricing policies of firms; information provision to the market (e.g. advertising); and arrangements between firms such as cartels and vertical restraints.

The *Performance* of an industry relates to its efficiency and technical progressiveness.

A comprehensive competition policy is concerned with all structure and conduct variables. The structure and conduct variables of the kind set out above can be affected by government intervention. This can either restrict competition, or by removing restrictions, may stimulate a

[6] Richard Caves, Ian Ward, Philip Williams and Courtney Wright (1987), *Australian Industry: Structure, Conduct, Performance*, Prentice-Hall, p.11.

greater degree of competition. The government can influence behavioral patterns by prohibiting certain behavior that is deemed to be undesirable, such as anti-competitive agreements between companies.

Elements of a Comprehensive Competition Policy

In essence, a comprehensive competition policy (CCP) involves:

- Prohibition of anti-competitive conduct (traditional antitrust and competition laws);
- Liberal international trade policies;
- Free movement of all factors of production (labor, capital, etc.) across internal borders;
- Removing the government regulations that limit competition, such as legislated entry barriers of all kinds, professional licenses, minimum price laws, and restrictions on advertising, etc.;
- The reform of inappropriate monopoly structures, especially those created by governments (divestiture);
- Appropriate access to essential facilities;
- Competitive neutrality for government business;
- A level playing field for all participants; and
- Separation of industry regulation from industry operations (for example, establishing that dominant firms should not set technical standards for new entrants).

At the minimum, a comprehensive competition policy should include policies on trade, public and private ownership, intellectual property, licensing, foreign investment, contracting out, taxation, bidding for monopoly over small business franchises, and the legal system.

Some policies should directly address competition. Others should affect the general economic environment and the general climate of competition of the country. Foreign ownership restrictions are a good example of this latter type.

Traditional Antitrust Law (i.e. Competition Law or Trade Practices Law)

Traditional antitrust law mainly affects conduct. It has only limited effects on structure, mainly through merger policy, and in some countries through divestiture.

As a matter of terminology, traditional antitrust policy does not involve direct regulation of prices or other performance variables, e.g. quality of output. These are often the provinces of separate regulators rather than competition bodies like the ACCC, although one should note the Australian experiment where economic regulation of public utilities at the national level is done by the competition regulator. Traditional antitrust policy does not override conflicting government regulation.

The Role of Government Regulation

Appropriate regulation of industries where there is a high degree of market power is a key element of achieving a comprehensive competition policy.

Regulation can complement competition policy. Where market power exists and cannot be curbed by competition policy, regulation may prevent the exercise of market power, for example, by the application of price control for monopolies. Thus, regulation directly impacts performance. However, one should also consider that regulation may conflict with competition policy, for example, in terms of entry regulation, minimum price regulation, etc. In addition, regulation may also serve other legitimate objectives, such as those addressing the environment, safety, or fairness, which may or may not conflict with competition policy objectives.

Regulation is an increasingly important part of competition policy. As monopoly positions are deregulated and/or privatized the application of traditional antitrust law may be insufficient and may need to be complemented by regulation, especially when there are powerful dominant firms at the outset of deregulation.

IV. Australia's Competition Law

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

Essentially, the TPA is divided into two major parts: Part IV, which deals with anti-competitive practices; and Part V, which deals with unfair trading practices. In addition to these two major sections, there are three key subsidiary parts that discuss more specific issues. They include: Part IIIA, which deals with access to natural monopolies; Part IVA, which deals with unconscionable conduct; and Part VA, which deals with liability for defective goods.

Anti-competitive Practices - Part IV

The two broad principles that underlie Part IV of the TPA are a) that any behavior that has the purpose or effect of substantially lessening competition in a market should be prohibited; and b) such behavior should be able to be authorized on the basis of a net public benefit test.

The main types of anti-competitive conduct which are prohibited include:

- *Anti-competitive agreements*. These include price fixing agreements between competitors; other agreements which substantially lessen competition (such as market sharing and bid rigging); and exclusionary provisions, including primary and secondary boycotts (Sect.45), with a *per se* ban on price fixing and boycotts.[7]
- *Misuse of substantial market power*, for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct (Sect.46), such as predatory pricing and refusal to supply.
- *Exclusive dealing* which substantially lessens competition (Sect.47), with third line forcing[8] prohibited *per se*.
- *Resale price maintenance*[9] for goods (Secs. 48, 96-100), also prohibited *per se*.
- *Mergers and acquisitions* that substantially lessen competition in a substantial market (Sect.50).

For offences of this nature, the ACCC can seek injunctions, penalties, damages, etc. Private enforcement action is also possible.

Authorization

Conduct that may substantially lessen competition under Part IV of the TPA may be granted authorization under Part VII, which is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the TPA.

Authorization is granted on the grounds of prevailing 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 the conduct should be allowed to occur. Decisions made by the ACCC in relation to authorizations can be appealed to the Australian Competition Tribunal.

Various penalties and remedies are available for breaches of Part IV of the TPA, including penalties of A$10 million for companies and A$500,000 for individuals; injunctions;

[7] In respect of *per se* breaches of the TPA, there is no requirement to prove that there has been a substantial lessening of competition as a result of the conduct, this is deemed to have occurred by the very nature of the conduct.

[8] Third line forcing involves the supply of goods or services on condition that the purchaser acquires goods or services from a particular third party.

[9] Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for sale. A supplier may recommend a resale price for goods or resupply of services, provided that the document setting out the suggested price makes it clear that it is a recommended price only and that the supplier takes no action to influence the reseller not to sell or resupply below that price.

damages; divestiture in relation to illegal mergers; and various ancillary orders such as rescission and variation of contracts, orders for specific performance of contracts, and provision of repairs or spare parts as examples.

Unfair Trading Practices – Part V

Part V of the TPA 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 an important safety net in markets where vigorous competition might tempt some businesses to cut corners in order to gain a competitive advantage over their rivals, for example, by making misleading claims about a product's value, quality, place of origin or impact on the environment.

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 (Sect.52);
- Specific prohibitions for false or misleading representations (Sects. 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 (Sect.51AB) and when corporations are engaged in commercial transactions (Sect.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 of A$1 million for companies and A$200,000 for individuals; injunctions; damages; corrective advertising; and various ancillary orders such as rescission and variation of contracts, orders for specific performance of contracts, and provision of repairs or spare parts.

V. The Role and Functions of the ACCC

The Australian Competition and Consumer Commission, or ACCC, 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 Parts IV (anti-competitive 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 (authorization 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.[10]

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."[11]

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

- To encourage competitive market structures, behavior 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 their 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 litigation, education and consultation. This necessitates a vigilant and responsive approach to complaints and non-compliant behavior.

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[10] 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*.

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

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

VI. Overview of the ACCC's Regulatory Role

The ACCC has significant responsibilities in the telecommunications, energy and transport industries associated with the competition policy reforms that have taken place in Australia over the past few years. Under these reforms, the ACCC has responsibilities that involve the promotion of competition as well as regulatory roles.

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 the responsibility of enforcing the TPA, the ACCC has now become the principle economic and competition regulator in the telecommunications sector. Prior to 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 only a relatively short period of time. Already, however, the ACCC has taken a number of major actions in its new regulatory role. The ACCC is committed to vigorously administering the new telecommunications laws.

Electricity

The reforms introduced, or being considered, in most States and Territories of Australia to facilitate competition in the electricity industry have involved the separation of integrated electricity authorities into independent bodies with responsibility for generation, transmission, distribution and retail. A National Electricity Market (NEM) is also being developed (at least for the eastern States of Australia), for the wholesale trade of electricity.

The reforms have also involved the separation of regulatory and commercial functions of the electricity authorities (generation and retail becoming part of the competitive market, while transmission and distribution 'wires' will be regulated). The goal is freedom of choice of electricity supplier for all customers.

Gas

The Australian gas industry is characterized by monopolies in production, transmission and distribution. The majority of Australian population centers, including Sydney, Melbourne and Adelaide, are therefore subject to monopoly power in the supply of gas. The monopoly characteristics associated with the supply of gas in Australia are attributable to a combination of the high capital sunk costs and risks associated with exploration and production, the absence of gas-on-gas competition and transmission pipeline interconnections, the lack of maturity of the Australian gas market, and the prevalence of long-term supply contracts.

Transport

The ACCC's work in the transport area primarily covers the airport, rail and waterfront sectors. This note specifically relates to the ACCC's work on airports.

Airports

Airports are increasingly coming under the scrutiny of the ACCC. The government has put in place arrangements for economic regulation of the 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. In doing so, it has established a regulatory regime that gives the ACCC a range of tools to assist it in its new regulatory role.

An important element of the new measure is the price cap. It ensures significant reductions in aeronautical charges over the next five years – 20 percent or more at Melbourne, Brisbane and Perth airports, which have all reduced these charges in line with their price caps.

Access arrangements will be central to the regulatory arrangements applied to the privatized 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.

VII. Lessons for Developing Economies

There are a number of key elements that are necessary in designing an effective regulatory regime. These principles are equally appropriate and relevant to the development of competition, consumer protection and economic regulatory models.

Economic Governance

Effective governance ensures that sound fiscal, monetary and trade policies are instituted to create an environment for private sector development. A dynamic private sector creates jobs and incomes, generates wealth and ensures that resources are used efficiently. The importance of appropriate economic policies and institutional arrangements in maintaining the confidence of investors is well known, including in recent times in regional financial markets. Transparent decision making and effective institutions ensure that countries can best respond to rapid movements of international capital and ensure that they continue to attract long-term investment.

The three key factors in the achievement of good economic governance include encouraging responsible fiscal and monetary policies and creating the environment for efficient production through appropriate trade, exchange rate and pricing policies; promoting deregulation and competition; and creating an appropriate and effective legal, judicial and regulatory environment.

Effective Legislation

An effective competition regime needs to be applied universally to all businesses and enforced consistently and diligently.

In order to minimize distortions and the misuse of market power across industry sectors, it is important that a single competition regime apply universally across all industries and apply to all market participants. The adoption and implementation of separate competition regimes in specific industry sectors raises the possibility that anti-competitive conduct can take place in some sectors and have anti-competitive effects in others.

In relation to the development and implementation of a new competition regime, it is relevant to note the observations of two key experts in the field, who state that:

> Competition law and policy can be seen as just one of a broad set of policy tools required to create an efficient market economy. … Experience suggests that in the process of transition to a less regulated and more open economy the existence and application of competition law can usefully support other policy.[12]

and

> …The new competition law program [should] be introduced in phases to correspond to the development of institutional foundations on which robust, substantial competition law systems rest. The first phase should emphasize the construction of the new agency …In the second phase the agency would begin pursuing an enforcement agenda that concentrates on redressing readily proven, publicly imposed impediments to rivalry .[13]

Institutional structures

Significant debate exists around the globe as to the most appropriate framework for administering economic, technical and competition regulation. Among the issues considered have been the merits of general *versus* industry-specific competition regulation and of integrated *versus* separate administration of economic, technical and competition regulation.

General vs. industry-specific competition regulation

Sector-specific regulation risks regulatory 'capture' and, by definition, creates a need to define jurisdictional boundaries. That in turn can create problems relating to regulatory uncertainty and inconsistency in the application of laws. It can also bring about competitive distortions and misallocation of resources caused by competing firms being subjected to different regulatory regimes, as well as competitive distortions arising from regulators trying to preserve their jurisdiction over firms by restricting the businesses that regulated entities can engage in.

The seriousness of these regulatory risks is significantly increased if sector-specific regulators also acquire competition law enforcement functions and proceed to elaborate different competition laws for different sectors.

A general competition agency is likely to have a number of key advantages over sector-specific regulators. In general, they are more attuned to pursuing economic efficiency, which is arguably the principal reason for introducing competition. Furthermore, they are more convinced that competition truly will produce significant benefits, and have a greater self-interest in demonstrating this in as many sectors as possible. A general agency is also more

[12] *Competition Law for Developing Economies*. APEC Trade and Investment Committee 1999.

[13] William E. Kovacic. Getting started – Creating new Competition Policy Institutions in Transition Economies. 1999.

likely to be familiar with what constitutes a competitive market and what threatens it. Thus, it would favor structural remedies that would probably prove to be a better instrument for developing competition than dependence on a set of rules.

The importance of having a generic competition law administered by a single regulator is emphasized even more in the current climate of convergence in various sectors, such as information technology and telecommunications. This environment places even greater reliance on general competition laws rather than industry-specific regulation.

Integrated vs. separate administration of economic, technical and competition regulatio n

Separation of regulatory duties between competition, technical and economic regulators entails the risk that competition regulators will not always have the same level of technical knowledge that can be achieved by an integrated industry regulator. Where such separation occurs, cooperation and coordination is obviously vital to avoid inconsistent decisions and discourage investment that will otherwise result through the application of inconsistent sets of policies. In order to avoid this problem, cooperative links must be forged between competition offices and sector-specific technical regulators.

Transparency and Accountability

Transparency and accountability are essential to ensure that businesses and consumers know what legal conditions they operate under and to facilitate inter-governmental cooperation. This applies both *ex ante* (formulating clear rules for potential economic operators) and *ex post* (making those concerned aware of enforcement decisions).

The actions most essential to promoting the transparency and accountability of the competition policy system (both in terms of the laws and its regulators) essentially entail vigorous publication. Foremost, laws and regulations should be made publicly available. Second, any current gaps in coverage should be specified and consideration should be given to a 'standstill' or 'roll back' of such gaps. If any special rules exist for certain sectors, they should also be specified. All exceptions to laws and regulations should be publicly stated and justified. Where exemptions exist, exemption criteria – whether predetermined or through rule of reason analysis – should be set out in the published regime or guidelines, or judicial opinions. Third, provisions should be made to ensure that modifications to the regime are regularly published. Finally, transparency of the enforcement policy should also be established through the publication of priorities, guidelines, case selection criteria and exemption criteria. Case decisions should be publicized and explained, particularly where

competition authorities make a negative decision on a case, publication/explanation of such decisions by the competition authorities should be pursued where possible.

Yet, in order to fully gain consumer and business confidence, additional measures must be taken to ensure the transparency and accountability of the enforcement agency and the body that sees appeals to the competition laws.

The Enforcement Agency

The mission of a general competition enforcement agency could be expected to enhance the total welfare of the economy's people by achieving comprehensive compliance with the competition legislation and its objectives. Compliance is attained by timely and efficient enforcement action, competition policy advocacy, information dissemination and increasing market transparency.

For a competition agency to provide timely and efficient administration and enforcement of the competition legislation, it is important that it adopt a predictable and transparent approach – both internal and external to the organization.

Internal openness can be created by regularly communicating management goals and objectives, minimizing reporting layers, developing efficient IT systems and providing the necessary support and empowerment to employees to establish an interested and motivated workforce.

External openness would include the development of easily readable brochures concerning the legislation and the creation of a web-site on the Internet which could explain the purposes and structure of the organization, facilitate complaint handling, provide information on the various provisions of the competition legislation and public notices of decisions.

A regulator should be required to protect commercial secrets and other confidential information, in order to secure confidence in its impartiality and to encourage frank and complete disclosure.

Competition Appeal/Adjudicative Body

In order to promote transparency and accountability for decisions, it is considered important that an appeal body exist to consider matters that are dealt with by the competition enforcement agency. An appeal body is necessary to protect the integrity of the decision making process. It is also important that this level of accountability is both real and perceived in the wider community.

Independence

The need for independence ties in with several others issues that have already been mentioned, namely institutional structures and transparency. It is important that the competition regime is administered both functionally and operationally independent of government – even though it is likely to be publicly funded. If this independence is not achieved, both in actual fact and in the perception of the community, then decisions made under the regime will be, or be seen to be, influenced by the politics of the government of the day, and therefore subject to other political agendas, which obviously need not necessarily be in the best interests of competition and achieving competitive market outcomes.

Enforcement

A comprehensive regime and a well-structured institutional framework for competition, consumer protection and economic regulation are only part of the equation. Even with the right 'systems' in place, these systems will be worthless unless the implementation, administration and enforcement of these systems are also effective. Enforcement is therefore a vital part of any regulatory regime.

Regardless of whether competition regimes have been put in place, developing countries in particular face special challenges in establishing *effective* competition laws and policies. This is often attributable to problems of developing a culture of competition, weak enforcement capabilities and court systems, as well as markets that may be characterized by high degrees of concentration and histories of state intervention that tend to facilitate lobbying by vested interests against the introduction of new competition.[14] More generally there is the special challenge of developing the political will to see competition law enforced against powerful economic and business interests.

It is vital to keep in mind that enforcement is not an end in itself, but rather a tool to achieve the primary objective of achieving compliance with the law in order to foster competitive, efficient, fair and informed markets. Enforcement action should be taken, not simply to win in court, but to achieve results in the market place. These results include:

- *Stopping* anti-competitive conduct quickly;
- *Compensating* any person who has suffered loss or damage as a result of the contravention of the law;
- *Undoing* the effects of the contravention;

[14] OECD *Trade and Competition Policies, Exploring Ways Forward* (1999), pp 13 – 24.

- *Preventing* a future contravention of the law, both immediately and in the longer term;
- Providing a *deterrence* in the community at large and in particular in the industry concerned by means of publicity; and
- *Punishing* the offender.

A private right to litigation or the establishment of an independent agency to enforce the regime, alone, are unlikely to achieve all of the results listed above. To do so, there probably needs to be both a right of private action and an enforcement agency.

It is important in any enforcement action that investigations and any resulting litigation are well planned, working towards the identified objectives of the enforcement action while working within stated priorities. Effective investigation planning allows the achievement of timely and fair outcomes in an efficient manner.

Review and Access to Remedies – Due Process

In order to promote transparency and accountability for decisions and to provide natural justice, it is considered important that both merits and process review mechanisms exist. Such mechanisms will protect the integrity of the decision-making process. It is also imperative that this level of accountability is both real and perceived to be such in the wider community.

In addition, firms should receive effective access to domestic judicial or administrative remedies on a non-discriminatory basis. Consideration should be given to implementing the following types of provisions in a competition regime:

- *The rights of complainants to petition* the competition authority and seek explanations for inaction on matters;
- *The rights of complainants to bring complaints before the competition authority* ;
- *The rights of private parties to access the judicial system* to seek remedies for injury suffered by anti-competitive practices;
- *Due process for all parties* in administrative or judicial procedures including protection of confidential information;
- Where the competition authority makes dispositive case decisions, *the publication/explanation of such decisions by the competition authority* ; and
- *Appropriate access to avenues of appeal* on merits and process.

Non-discrimination and National Treatment

It is expected that the principles of non-discrimination and national treatment would be applied in the substance of any regime as well as to administrative processes or

procedures, including enforcement. This would mean that competition laws and their enforcement, *de jure* or *de facto*, would involve no discrimination between foreign and domestic firms' products, services or investments, or among foreign firms' products, services or investments.

Special and differential treatment for developing economies?

The question of whether developing economies should be afforded special or differential treatment is one which has been debated at length in forums such as the WTO and the OECD, amongst others.

It has been argued that it is not realistic to expect developing countries with fragile economies to compete on a level playing field with established industrial countries. However, the protection of domestic industry via import substitution policies and infant industry protection was increasingly challenged within the WTO framework as evidence mounted suggesting that rather than increasing their integration into the trading system, the industries that developed behind punitive tariffs were not internationally competitive.[15]

Therefore, instead of creating protectionist regimes for developing economies, it is considered much more effective to allow transitional arrangements in the move to fully liberalized and competitive economies and to place emphasis on the need for technical assistance to help developing economies during this period of transition. A competition regime that is flexible and progressive is considered appropriate in the context of developing economies.

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

Under the *Competition Principles Agreement* signed in 1994 all Australian Governments have undertaken to apply the competitive neutrality principle to their business activities.

[15] See M. Pangetsu, "Special and Differential Treatment in the Millennium: Special for Whom and How Different?", World Economy 2000, Vol. 23:9, at 1289.

VIII. Building Consensus and Achieving Compliance

The ACCC places a high priority on its information, compliance and media strategies in order to achieve compliance with the law and to build consensus in the community on the value of having a comprehensive competition regime. In order to gain the greatest levels of compliance with the *Trade Practices Act 1974* (the TPA), the ACCC also seeks to integrate its enforcement activities with alternative means of gaining compliance. A principle objective of the ACCC's guidance and information activities is to increase knowledge of rights and obligations under the Trade Practices Act and other legislation under which the ACCC has responsibilities. The ACCC further strives to increase public understanding of the ACCC's own procedures and policies; and contribute more generally to public awareness of competition and consumer protection and utility regulation issues.

A degree of flexibility is necessary in planning guidance and information programs in order to ensure a prompt response to new or unexpected issues.

Education and Information

Education and information activities play a vital role in the ACCC's work. As a result, the ACCC devotes considerable resources to programs and activities designed to improve community awareness of the TPA's requirements. In general, the objective of these programs is to improve compliance with the law and thereby to reduce the need for enforcement. The ACCC does this in several ways. Most directly, it responds to individual inquiries about the application of the TPA (by phone or correspondence) and informs the community at large about the TPA and its specific implications for business and consumers. The ACCC also develops information programs specifically for identified groups of consumers or specific areas of industry. In addition to meeting this public demand for knowledge, the Commission reports to the government on relevant and important matters and conducts research into matters that affect consumers.

To achieve the widest possible dissemination of information, the ACCC uses a variety of means, including: the mass media; seminars and speeches delivered by ACCC Commissioners and staff; publications; articles published in trade and industry association journals; Internet exposure; contact with business, professional and consumer organizations; and telephone advice and information.

Compliance Education

An important facet of ACCC guidance work is its assistance to associations and other agencies developing programs in improving compliance with the TPA through both education and training. Compliance programs help to foster and promote a national business environment of competitive conduct and consumer orientation.

The ACCC used to provide tailored compliance programs for businesses devised on the basis of a risk analysis of a business to determine its particular compliance training needs. The ACCC decided to discontinue this aspect of its compliance education however, due to complaints of potential conflicts of interest and competitive neutrality.
Nonetheless, the ACCC does continue to respond to requests from companies over particular compliance questions and present compliance talks to companies of a general nature (e.g. a general presentation about compliance by electricity generators but not based upon a prior analysis of that particular company's needs). In addition, it continues to provide compliance training for industry associations and speak at general conferences.

The ACCC encourages businesses to install effective compliance programs in-house to prevent breaches of the TPA. Under Australian trade practices law, a company is responsible for the conduct of employees undertaken with actual or apparent authority of the company. In addition, individuals can also be liable for breaches of the TPA. This is further reason for employers to take all reasonable steps to inform relevant staff about the provisions of the TPA so as to avert misconduct by staff.

There are essentially eight forms of damage that can result from a breach of the TPA and thus be possibly avoided or minimized by an effective compliance program. They are: penalties; cost of litigation; damages; poor publicity and public relations; disruption to management; poor staff morale; unwanted disclosure of information; and ACCC supervision.

While the implementation of a compliance program therefore represents good business sense, the large penalties involved for breaches of the TPA are also, in Australia, a very compelling reason for adopting and maintaining a compliance program. Australian courts will take into account the fact that a company has a compliance education program when assessing whether or not a penalty against it should be mitigated.

The ACCC has developed its own compliance training package, called *Best and Fairest*, to assist business and government business enterprises in developing their own compliance programs.

Industry Co/Self-Regulation

Another important aspect of the ACCC's compliance role is its work in developing mechanisms for industry co-regulation and self-regulation.

The ACCC is increasingly looking to codes of conduct, charters and voluntary standards as light handed, market sensitive means of gaining compliance with the TPA. The ACCC has found that many trade practices issues can be dealt with on the spot by the businesses concerned and that in some industries, disputes between businesses or between a business and its customer(s) can be effectively resolved through industry-based schemes such as mechanisms contained in codes of conduct.

The ACCC has two roles in relation to codes of conduct. Its main role in the past has been to authorize industry codes, the application of which would otherwise be prohibited under the competition provisions of the TPA. For example, if the code of conduct provides for expulsion from the industry in the event of a breach of the code. In such cases, the ACCC has a statutory duty to assess whether the public benefit of a code submitted for authorization outweighs any detrimental effects on competition.

The ACCC is also involved in developing codes of conduct. The ACCC helps an industry formulate a code of conduct where it is satisfied that the code will provide cost-effective and industry-wide fair trading outcomes and that the industry concerned has the capacity to regulate its own affairs. In some cases the ACCC does more than establish a code. It may for example, send a representative to observe and advise meetings of the committee or body administering the code to advise on and participate in the evaluation of a code's performance.

Contribution to Legal Reform

Another important aspect of the ACCC's work involves contributing submissions to public and parliamentary inquiries. Of particular importance were the Hilmer, Wallis and Reid reports, which all reflect the rapidly evolving environment in which the ACCC operates.

The Hilmer Inquiry of 1993 was a public inquiry which instigated the development of a national competition policy in Australia; the Wallis Inquiry involved a comprehensive examination of the Australian financial system; and finally, the Reid Report involved an inquiry into business conduct issues arising out of commercial dealings between firms concerning particularly the vulnerability of small businesses to exploitation and abuse in certain contexts.

IX. Conclusion

In conclusion, it is relevant to emphasize again that effective competition is the key to efficiency and productivity in businesses. However there will also be exceptions to the competition model, hence the Australian law which allows for exceptions where there is countervailing public benefit. Competition is a factor that encourages innovation, cost and production efficiency and enhanced consumer satisfaction by businesses striving to keep ahead of their competitors.

However, intense competition does create incentives for unethical traders to 'cut corners' to beat their rivals, and this is where the competition regulator is essential. Recent trends have shown that a culture of healthy and legal competition between businesses has developed in Australia since the introduction of the Trade Practices Act in 1974.

However, in addition to traditional enforcement activities, the competition regulator plays an important part in developing and maintaining industry compliance and awareness of the competition law. There is increasing awareness by business of the need to educate staff to promote compliance. It is an important role of the competition authority to encourage an attitude of compliance to continue to deter breaches of the law.

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