Chapter 4

Competition Policy

This chapter is a summary of the background report Competition law and policy in Australia available at www.oecd.org/regreform. *It describes competition policy and law enforcement. It explains the integrated National Competition Policy reforms of the 1990 and the strengthening and modernisation of competition law and enforcement that accompanied it. The basic elements of the main competition law, the Trade Practices Act, are explained, and recent amendments about cartel enforcement and predatory pricing are analysed. It also describes sector-specific competition issues and special regimes, some of them based on laws of States and Territories.*

Foundations

The progress of reform in Australia has tracked the evolution of the economy. Once protected, it is now comparatively liberal. For most of the 20th century, competition policy in Australia was weak. Stable domestic cartels kept inefficient firms healthy enough to support generous labour conditions. By the 1980s, though, deteriorating economic performance showed that this policy approach would no longer support prosperity. To reverse the decline in Australia's economic standing, Australia embarked on a wide-ranging programme of fundamental reforms, beginning with financial markets and international trade and investment. Substantial productivity gains since the mid-1990s have been due to a range of pro-competitive reforms, including ones that have made infrastructure services such as telecoms, energy and transport more efficient.

The major competition reform programme of the 1990s was achieved by a complex re-articulation of the commonwealth-state relationship. A committee chaired by Professor Fred Hilmer recommended substantial reforms to the competition policy framework. In February 1994 the Council of Australian Governments ("COAG") agreed to the principles of competition policy articulated in the Hilmer Report, and in April 1995, all Australian governments reached agreement on a National Competition Policy. Implementation of the National Competition Policy rested on the political agreement of all Australian governments, because under Australia's federal constitutional structure, the Commonwealth is limited in the extent to which it can legislate in areas reserved constitutionally for the States and Territories.

Three intergovernmental agreements underpin the National Competition Policy. The Conduct Code Agreement and Competition Principles Agreement led to creating a uniform national Competition Code, incorporating the substantive principles of the TPA and applicable to all businesses, including government business. The Implementation Agreement provided for payments from the Commonwealth to the States and Territories for satisfactory progress in implementing their reform commitments. The payments were a recognition that all of the governments should share the benefits of stronger economic growth and thus higher tax revenue resulting from the reform programme to which they contributed. The Implementation Agreement set conditions for the payments, the fulfilment of which were monitored by the newly established National Competition Council.

The structural changes brought about by the National Competition Policy reforms have not been free from controversy. Commonwealth decisions to withhold payments have been a particular source of intergovernmental tension. There has also been public criticism of the social consequences of the reform agenda, particularly in relation to the effects on rural and regional areas. This led to Parliamentary inquiries in the late 1990s, as well as a reference to the Productivity Commission in 1998 to report on the impact of competition policy on rural and regional Australia. While each of these inquiries affirmed widespread support for the beneficial effects of National Competition Policy, they also recognised concerns about the nature and rate of change and for the need to ensure that the reform agenda was properly communicated.

Box 4.1. **Competition Reforms under the National Competition Policy Programme**

General reforms

- Extension of the anti-competitive conduct provisions in the Trade Practices Act (1974) to unincorporated enterprises and government businesses.
- Reforms to public monopolies and other government businesses:
  - structural reforms – separating regulatory from commercial functions, reviewing the merits of separating natural monopoly from potentially contestable service elements and separating contestable elements into smaller independent businesses; and
  - competitive neutrality – corporatised governance structures for significant government enterprises, similar commercial and regulatory obligations to those faced by competing private businesses (such as liability for taxes or tax equivalent payments, dividends and rate of return requirements) and independent mechanisms for handling complaints.
- Independent authorities to set, administer or oversee prices for monopoly service providers.
- Third-party access to essential infrastructure services with natural monopoly characteristics, on reasonable terms and conditions, under a general national regulatory regime.
- Review of legislation to assess whether regulatory restrictions on competition are in the public interest and, if not, what changes are required. Legislation reviewed has dealt with professions and occupations, statutory marketing of agricultural products, fishing and forestry, retail trading, transport, communications, insurance and superannuation, child care, gambling and planning and development services.

Sector-specific reforms

- Electricity: Structural, governance, regulatory and pricing reforms to introduce greater competition into electricity generation and retailing and to establish a National Electricity Market in the eastern states.
- Gas: A similar suite of reforms to facilitate more competitive supply arrangements and to promote greater competition at the retail level.
- Road transport: Implementation of heavy vehicle charges and a uniform approach to regulating heavy vehicles to improve efficiency, enhance safety and reduce transactions costs.
- Water: Institutional, pricing and investment reforms to achieve a more efficient and sustainable water sector, and implementation of arrangements that allow for the permanent trading of water allocations.

Source: Productivity Commission (2005a), p. XV.

The National Reform Agenda succeeded the National Competition Policy. This process, launched in 2006, is also based on agreement among governments, selecting priority areas for reform. Three streams of this programme are human capital, competition and regulatory reform. A COAG Reform Council reports to COAG annually on progress in implementing the National Reform Agenda, playing a role similar to that of the National Competition Council in the National Competition Policy reforms. The National Reform Agenda programme involves a system of payments, to recognise costs and revenue forgone by the states and to reward them for reaching reform milestones.

Modernising competition law and enforcement to create an integrated, national system was a key element of the National Competition Policy. The first national legislation

to regulate anti-competitive conduct dated from 1906. The current law, the Trade Practices Act (TPA), came into force on 1 October 1974, replacing legislation that had been adopted in 1965. Legislative change in the 1970s was prompted by accelerating inflation, increasing consciousness of consumer welfare and growing recognition that competition, rather than protectionism, was more likely to promote economic growth and efficiency. The TPA adopted the American system of general prohibitions supported by penalties enforceable by courts of law, and it introduced a system for authorising arrangements on the grounds that their public benefits outweigh anti-competitive effects.

Since its enactment the TPA has regularly been the subject of review or inquiry. The Hilmer Committee report in August 1993 recommended creating the ACCC to enforce the law and widening the TPA's scope of application. The 2003 report by the Dawson Committee supported continuing the broad, uniform application of competition law and recommended improvements in merger review, a notification procedure for collective bargaining by small business, stronger penalties and measures to make the ACCC more accountable. Most of the Dawson Committee recommendations were accepted by government. Key recent changes include formal merger clearance procedures and amendments to the abuse of dominance prohibition. The Dawson Committee also recommended "the introduction of criminal sanctions for serious, or hard-core, cartel behaviour". Legislation establishing cartel offences commenced on 24 July 2009.

The TPA deals with competition, fair trading and consumer protection. Australia takes an integrated approach to the relationship between competition and consumer policies, recognising their mutually reinforcing roles. The object of the TPA is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". It is concerned with protection of the process of competition. The distinction between promoting competition and protecting competitors – small business competitors particularly – has been an ongoing and divisive theme in debates about the TPA's prohibition of abuse of dominance.

Competition is recognised as a means to an end, the enhancement of welfare. Decisions applying the TPA have treated welfare in this context principally in economic terms. The Australian Competition Tribunal favours the "total welfare" standard, which recognises both producer and consumer welfare, but observes that benefits to producers should weigh less than benefits to end-consumers. In Australian practice, competition and efficiencies are treated as separate concepts. Separation results from the structure of the TPA and the different roles of the courts and of the administrative bodies. In assessing contraventions of the core prohibitions, the courts are charged with determining the competitive effects of conduct, and questions of efficiencies are not considered. In assessing applications for authorisation, the ACCC and Australian Competition Tribunal are entrusted with the economically more complex and resource-intensive task of weighing efficiencies against effects on competition.

Substantive issues: Content of the competition law

The TPA covers all of the familiar areas of competition law: restrictive agreements, abuse of dominance and mergers. The prohibitions employ a combination of a substantial lessening of competition (rule of reason) tests and strict liability or *per se* tests, with exemptions and defences to balance policy interests. There is a considerable body of case

law in which the provisions have been interpreted and applied; however, after recent amendments there may be some uncertainty about certain areas.

The TPA, as a federal act, must be linked to heads of power in the Commonwealth Constitution, in this case the corporations' power. The TPA prohibits anti-competitive conduct by corporations, in Part IV. Each State and Territory government has enacted a schedule version of Part IV, identical to Part IV except that it applies to persons and unincorporated entities. The collection of substantively identical laws is generally referred to as the Competition Code. To apply the same law throughout Australia in each of its jurisdictions, the States and Territories agreed that the ACCC, the Australian Competition Tribunal and the Federal Court would be given powers to enforce the Competition Code.

Application of competition provisions of the TPA takes two forms: prohibitions enforced in court, with significant penalties and remedies for breach, and administrative authorisation and notification to obtain exemption or immunity from the prohibitions on the grounds of public benefit. For matters other than mergers, authorisation is granted by the ACCC, with review on the merits by the Australian Competition Tribunal. "Public benefit" is construed broadly, but primacy is given to the achievement of economic goals of efficiency and progress. Other public benefits that have been recognised include environmental benefits, improved public safety, promotion of industrial harmony and expansion of employment opportunities.

Separate Parts of the TPA deal with regulation of access to declared essential facilities, telecommunications and liner shipping, unfair trading and consumer protection. The government and the ACCC repeatedly emphasise the integrated and mutually reinforcing nature of competition and consumer policy. Integration is reflected in the approach taken to enforcement. Except for access regulation, the Commission does not separate the staff working on enforcement in competition and consumer matters and does not distinguish between the two areas in statements on enforcement policy. Combining competition, access regime, regulation, fair trading and consumer functions at the ACCC enables enforcement to be flexible, varying according to the economic, social and market situations.

Horizontal agreements

Section 45 is the TPA's general prohibition on restrictive agreements. Contracts, arrangements or understandings among competitors are prohibited if they contain a price fixing provision or an "exclusionary provision", or if they have the purpose, effect or likely effect of substantially lessening competition in a market within Australia. The prohibition of exclusionary provisions was aimed at primary boycotts, in which competitors conspire to exclude another competitor.

Extensive amendments in 2009 add new cartel offences and a new set of parallel civil *per se* prohibitions. It is now an offence or a civil violation to make a contract, arrangement or understanding that contains a cartel provision – that is, price fixing, output restriction, market allocation or bid rigging – or to give effect to a cartel provision. The offences differ from the civil prohibitions in requiring proof beyond reasonable doubt and proof of mental (fault) elements associated with criminal law. The general provisions of Section 45 about restrictive agreements remain, except for its *per se* prohibition.

The scheme of prohibitions in relation to cartel conduct appears complex and duplicative. The existing prohibition on "exclusionary provisions" overlaps substantially with the new output restriction and market allocation prohibitions. The new prohibitions

are wide ranging in scope and so may catch legitimate or pro-competitive or efficiency-enhancing activity. To some extent this risk is offset by provision for exceptions and defences. Nevertheless, as a result of the breadth of the new prohibitions, the *ex ante* protection of the authorisation procedure may be sought to a greater extent than has previously been the case.

A range of exceptions, exemptions and defences can apply to horizontal agreements that otherwise would be subject to the offences and prohibitions. These deal with overlaps, joint ventures, collective bargaining and acquisitions. Notification is available only for collective bargaining contracts that do not exceed a threshold of duration and value. Overlap between prohibitions is reduced by assigning some conduct to specific sections of the TPA rather than the general prohibition of Section 45. Some potential ambiguities remain, however.

The joint venture exception covers a cartel provision that is for the purposes of a joint venture for the production or supply of goods or services. This arguably would expose joint buying, marketing and research and development collaborations to criminal liability. Some concern had been expressed that prospective joint venture parties would need to put their preliminary negotiations into contractual form or even seek prior authorisation simply to negotiate. These concerns were substantially addressed by amendments and explanations during the final Parliamentary consideration of the legislation. Joint venture parties may be able to rely on other exceptions, too.

Policy and enforcement outcomes will depend on the exercise of discretion by enforcement agencies, the ACCC and the Commonwealth Director of Public Prosecutions (DPP). The agencies have a Memorandum of Understanding, under which the Commission is responsible for investigating cartel conduct and gathering evidence, managing the immunity process in consultation with the DPP, and referral of serious cartel conduct to the DPP for consideration for prosecution, while the DPP is responsible for prosecuting the cartel offences in accordance with the DPP's *Prosecution Policy of the Commonwealth* and seeking remedies, including under "proceeds of crime" legislation. The general Commonwealth Government policy of bifurcated enforcement reflects the value attributed to independence of prosecution from investigation and from the political process as well as consistency in prosecutorial decision-making across all federal offences. The effectiveness of the bifurcated system will depend on shared philosophy and priorities and good communication between the two agencies.

Australian attitudes about co-operation between competitors have changed dramatically since the tolerant approach of the 1950s. The shift to a punitive attitude toward hard-core cartels is probably best traced to the mid to late 1990s when the ACCC secured victories and penalties against cartels in the express freight, fire protection, concrete, and electrical transformer industries. Some, such as the animal vitamins cartel, related to the Australian operations of international cartels. As early as 1994, the Trade Practices Commission, the predecessor of the ACCC, called for criminal sanctions for cartels.

At least since the mid-1990s, cartels have been a high priority in the agency's enforcement agenda. In 2005 the ACCC substantially amended its Immunity Policy for Cartel Conduct to align it with international best practice. Since then, the Immunity Policy has been credited with a substantial increase in cartel detection rates. The most significant case to date involved a price fixing and market sharing cartel between Australia's two largest cardboard manufacturing companies, Visy Ltd and Amcor Ltd. Amcor secured

immunity, while Visy settled the case based on admissions of liability and agreement to submit to record-level penalties. The corporate penalty of AUD 36 million was more than double the previous record penalty levied in Australia and the individual penalties were equally unprecedented.

The ACCC has sought changes to the law to facilitate enforcement against collusive practices where the communication between competitors is tacit and it is difficult to prove that the parties have committed to parallel action. The call for amendment was made in a 2007 general inquiry by the ACCC into petrol pricing, following a narrow judicial interpretation of "understanding" that resulted in findings of no liability. The government released a discussion paper in early 2009 on this subject and it is now reviewing the submissions about it.

Vertical agreements

The TPA also contains prohibitions relating to vertical restraints. Restraints that are not related to price are all called "exclusive dealing" in Australia. Most exclusive dealing practices only breach the general prohibition, in Section 47, if they have the purpose or effect of substantially lessening competition. This is most likely if there is insufficient interbrand competition because of market power at the level of the supplier or buyer.

There is no competition test involved, though, for practices involving third line forcing. Requiring that the purchaser acquire goods or services from a third party is illegal *per se*. The Hilmer and Dawson Reviews called for reinstating a competition test, pointing out that there are instances in which third line forcing may be beneficial and pro-competitive; however, the Act has not yet been amended.

Section 48 prohibits minimum resale price maintenance regardless of its effect on competition. A price may be "recommended", but only genuine non-obligatory recommendations will escape Section 48. There is also a loss-leader defence, which has been little used. This prohibition was inserted in 1971 in response to concerns about rising inflation and has had bipartisan political support. The economic case for relaxing the prohibition is not strong, given the concentrated structure of Australian industry, in which resale price maintenance could more easily be used to support horizontal co-ordination.

All forms of exclusive dealing may be authorised if they confer sufficient public benefits to outweigh the anti-competitive effects. The streamlined "notification" procedure is available. Nearly all notifications involving exclusive dealing are about third line forcing, for which only the public benefit element is relevant. The ACCC receives hundreds of these every year and opposes only a few. There is yet to be an application for authorisation for resale price maintenance.

Abuse of dominance (misuse of market power)

In Australian practice, abuse of dominance is described as "misuse of market power", which is prohibited by Section 46 of the TPA. A corporation with a substantial degree of market power may not take advantage of that power for specified purposes, such as substantially damaging or eliminating a competitor or competitors or preventing or deterring competitive conduct. It is not possible to avoid the prohibition through the authorisation or notification process.

The scope and application of Section 46 has been the subject of significant controversy. In its original form, it was headed "monopolisation" and dealt, in effect, with

monopoly power. In 1986, the threshold was lowered, to a "substantial degree" of power in a market, and the heading was changed to "misuse of market power". Proposals to make enforcement easier by incorporating an "effects" test, to replace the "purpose" element, have been considered on at least 10 occasions but virtually always rejected. The real challenges associated with proving a breach are establishing the requisite degree of power and that the respondent had taken advantage of it.

A Parliamentary inquiry into TPA protection of small business made several recommendations in 2004. Most of these have now been implemented. Amendments in 2007 made it clear that more than one corporation may have substantial power, that market power does not mean absolute freedom from constraint, that a corporation with substantial power in one market may not engage in conduct in another market for a proscribed purpose and that power may arise from contracts or arrangements.

Another amendment dealt with the critical element of "taking advantage" of power. The possession of substantial power is not prohibited *per se*; rather, the law is concerned about the use of that power for an illegitimate purpose. The test of "use" is not a moral judgment, but a causal connection between the power and the conduct. An amendment in 2008 codified aspects of this connection, such as whether the firm would have acted in the same way in a competitive market or whether its conduct was materially facilitated by the firm's power.

Two recent amendments add uncertainty to the law applied to predatory pricing. At the behest of Parliamentary advocates for the small business sector, the former government introduced a new provision that prohibits sales below cost, for a sustained period for an impugned purpose. The prohibition in this "Birdsville amendment", so-called after the remote pub in which it was supposedly penned, is based on market share rather than market power, and it does not require showing a connection between market share or power and the offending conduct. The intended relationship between the Birdsville amendment and the general prohibition of misuse of market power is not clear. Another recent amendment aggravates the uncertainty, by denying that a predatory pricing violation should depend on the alleged predator's ability to recoup its losses from supplying below cost. The true extent of the amendments will be tested if a firm is found liable for below cost pricing in circumstances where it is unlikely that the firm would be found to have substantial market power and there is little prospect of recoupment. The ACCC is ready to take action if an appropriate case arises, and private litigation is also possible.

Remedies for breach of Section 46 typically include declaratory and injunctive orders and financial penalties. A remedy of divestiture has been considered in the past, but it has not been accepted. Problems of access to or abuse by a network monopoly or infrastructure provider are addressed by a separate section of the TPA, which prescribes a regulatory system for defining and regulating an "access regime", described below.

Mergers

Mergers or acquisitions that would have the effect, or likely effect of substantially lessening competition in a substantial market in Australia or in a State or Territory or region are prohibited by Section 50. Factors taken into account include import competition, barriers to entry, concentration, countervailing power, likelihood of higher prices or margins, extent of likely substitutes, dynamic characteristics of the market such as growth,

innovation and product differentiation, risk of loss of a vigorous and effective competitor and vertical integration.

This list of factors does not include efficiencies. The ACCC does recognise the relevance of efficiency effects in examining a merger proposal. Where a merger is likely to achieve significant efficiencies but the efficiencies do not prevent a substantial lessening of competition, the merger may only proceed if authorised by the Australian Competition Tribunal. It applies a net public benefits test, and efficiencies are given primacy in assessing claimed public benefits. Other public benefits could include a significant increase in the real value of exports or a significant substitution of domestic product for imported goods. The Tribunal is required to take account of matters that relate to the international competitiveness of Australian industry.

The ACCC has detailed guidelines about how it applies the "substantial lessening of competition" test. The most recent version of the Merger Guidelines was published in November 2008. A lessening of competition is considered substantial if it confers an increase in market power on the merged firm that is significant and sustainable. The Commission considers and compares two possible future states; one with the merger and one without it. The commission then asks whether there is a real chance that the difference between them in competition terms will be substantial. The "without" position is not necessarily the status quo, but rather the expected position of the market in the foreseeable future (generally 1-2 years) without the acquisition. The Commission is likely to have competition concerns warranting investigation in the case of any merger generating a Hirschman-Herfindahl index (HHI) greater than 2000. After concentration, which is taken as a starting point for analysis, the most important merger factor is the height of barriers to entry. Entry is considered effective if it is likely to have a market impact within a 1 to 2 year period by deterring or defeating an attempted exercise of market power. The Commission will regard imports as likely to provide an effective and direct constraint where they have represented 10% of total sales in each of the previous three years.

There has been long-standing debate in Australia about whether Section 50 adequately deals with "creeping acquisitions", that is, a sequence of acquisitions which are individually unlikely to lessen competition substantially but which may have that effect when taken together. The most recent call for reform followed an ACCC inquiry into competition in the grocery industry. In June 2009 the government issued a discussion paper proposing options to address creeping acquisitions concerns, such as a new prohibition on an acquisition by a firm with substantial market power that would have the effect of enhancing its market power. Further comment has been solicited, about potential unintended consequences and about the costs and benefits of alternative ways to deal with the concerns.

The three avenues for merger review in Australia are informal clearance by the ACCC, formal clearance by the ACCC and authorisation from the Australian Competition Tribunal. Informal clearance is a non-statutory procedure in which the ACCC assesses the competitive effects of the merger proposal and either "clears" it, undertaking not to oppose the transaction, or refuses to clear it and thus leaves open the possibility of opposing it if the parties decide to proceed. The ACCC clears most of the mergers it reviews.

The second option, introduced from 2007, is to apply to the ACCC for a formal clearance, which would be binding on the ACCC and third parties and subject to statutory

deadlines. The third option is to seek authorisation directly from the Australian Competition Tribunal, which applies a "public benefit" test. No one has yet made an application for a formal clearance by the ACCC or for authorisation by the Tribunal. This is because the informal system is more flexible than formal clearance and affords greater scope for preserving confidentiality, and in addition, the ACCC made substantial improvements to the informal clearance process, responding to criticisms about timeliness and transparency.

Where a firm involved in a merger is in failing condition, the test that is applied is whether the future state of competition with the merger would be substantially less than the future state of competition without the merger in which the firm fails. The counterfactual may not always be that the firm fails and its assets exit. If parties sought authorisation from the Australian Competition Tribunal, it would apply a net public benefits test, having regard to broader stability concerns and other issues that the ACCC may not consider when applying the substantial lessening of competition test. But the authorisation process may take up to six months, too long for transactions where timing is often crucial.

There is no compulsory pre-notification requirement for mergers in Australia. Parties could proceed with a transaction without notification or indeed seeking any regulatory consideration. The ACCC could then investigate and take enforcement action, such as an injunction or divestiture order and pecuniary penalties. In its 2008 Merger Guidelines, the ACCC has advised that parties should bring transactions to the attention of the Commission if their products are substitutes or complements and the merged firm will have a post-merger market share over 20%. Except for minor acquisitions that clearly raise no competition issues, the usual practice is for parties to voluntarily notify the ACCC.

Unfair competition and consumer protection

The long-standing policy in Australia has been to recognise competition, fair trading and consumer protection as inter-related and mutually reinforcing. Thus, the TPA also deals with fair trading and consumer protection. It prohibits unconscionable conduct in business transactions. It prohibits a business from contravening an applicable industry code of conduct; the four mandatory codes of conduct dealing with franchising, oil, horticulture and unit pricing. It prohibits misleading or deceptive conduct and some other practices. And it establishes several basic protections for consumers, including laws against pyramid selling, a range of implied warranties in consumer transactions and provisions dealing with product information and safety standards. There are equivalent statutory provisions in State and Territory fair trading and consumer legislation. In addition, Australia's consumer policy framework includes a range of industry-specific legislation administered by federal or state and territory fair trading agencies, as well as ombudsmen, co- and self-regulatory arrangements and consumer education initiatives.

A review in 2007-08 by the Australian Productivity Commission found weaknesses in the consumer policy framework, many traced to the multitude of bodies and jurisdictions involved. Based on the Productivity Commission's recommendations, in October 2008 all Australian governments agreed to a new consumer policy framework, comprising a new national consumer law – the Australian Consumer Law – based on relevant provisions of the TPA. Like the Competition Code, the Australian Consumer Law will be implemented by a scheme of State and Territory legislation that adopts the provisions of the TPA. Streamlined enforcement will be based on formal agreements among the enforcement agencies in each

jurisdiction. The national consumer law will also regulate unfair terms in consumer contracts, establish a new regime for product safety and strengthen enforcement powers and redress options. Legislation including the new unfair contract provisions and enhanced enforcement powers was introduced into Parliament on 24 June 2009, and the Australian Consumer Law is intended to be fully implemented by 1 January 2011.

Institutional issues: Enforcement structure and practices

Competition law and policy institutions and enforcement

The Treasury advises ministers on competition policy, including the TPA, economic regulation of infrastructure and broader product markets. The Competition and Consumer Policy Division is in the Markets Group, which is also responsible for corporate law, financial services regulation policy and foreign investment policy. The ACCC, the Productivity Commission, the National Competition Council and the Australian Competition Tribunal are Treasury portfolio agencies.

The Australian Competition and Consumer Commission is an independent, national statutory authority. The Minister for Competition Policy and Consumer Affairs cannot give the ACCC directions regarding its functions under the competition provisions of the Act. The ACCC's Chairperson and Commissioners are appointed for up to five years by the Governor-General. Appointments must be supported by a majority of the State and Territory governments. Commissioners are independent and do not report to the Chairperson. Decisions are by majority vote.

The ACCC has a wide range of roles and responsibilities. It enforces the competition provisions of the TPA and decides about clearances, notifications and authorisations, and it administers the Competition Code's associated State/Territory legislation. It has a role in the regime governing access to essential facilities. It handles sector issues in telecoms and ocean shipping. In fair trading and consumer protection, its application of the TPA complements the consumer protection role of State and Territory consumer affairs agencies. The ACCC also has responsibilities for oversight of prices.

In deciding about taking enforcement action, the ACCC takes account of the harmfulness of the conduct and the culpability of the businesses and individuals involved, as well as the likely educative or deterrent impact of enforcement action. It applies a "compliance pyramid", with education, information and liaison at the base, moving through voluntary compliance and self-regulation to enforceable undertakings to court proceedings at the tip. As a part of a move away from a complaints-driven enforcement model, the ACCC has a branch that performs research, intelligence and analytical tasks on information from external sources.

The ACCC also detects infringements through its co-operation and immunity policies. The general Co-operation Policy applies to civil contraventions. Under the Immunity Policy for Cartel Conduct, full amnesty from prosecution and penalty will be granted to the first eligible cartel participant to report its involvement and co-operate fully with the investigation and prosecution of other participants. Since its introduction in 2005, the ACCC credits the Immunity Policy with a substantial increase in its detection of cartel activity, exposing potential cases at the rate of about one a month.

The ACCC can issue statutory demands for information. Failure to comply is an offence. The Commission has recently brought several proceedings for non-compliance. The ACCC may also enter premises and search for and seize evidence, pursuant to a search

warrant issued by a magistrate. With the criminalisation of serious cartel conduct will come additional surveillance and telecommunications interceptions powers to apply in the investigation of such conduct.

The ACCC may accept formal administrative settlements or enforceable undertakings, but it must go to court to obtain penalties. Civil penalties against corporations may be up to AUD 10 million, three times the value of the illegal benefit or 10% of annual turnover. A civil penalty of up to AUD 500 000 can be imposed on an individual. The highest civil penalty imposed on a corporation for breach of the competition provisions to date is AUD 36 million, and on an individual, AUD 1.5 million. Penalties are yet to be imposed applying the maxima involving three times the gain or 10% of turnover. For the cartel offences, individuals face imprisonment for up to ten years and fines of AUD 220 000, while criminal fines for corporations mirror the penalties for the civil provisions. The maximum individual fine is less than half of the individual civil penalty, but it is consistent with the maximum fines for the TPA's criminal consumer offences.

The constitutional separation of judicial and administrative powers requires that only a court can determine whether a contravention has occurred and issue orders against offenders. For the TPA, the relevant court is the Federal Court of Australia. A fairly well-established pool of judges on the Federal Court have experience or expertise in competition law. There has been a concerted effort on the part of judges, practitioners and experts to develop innovative ways to make the most effective use of economic evidence. One of these, known as the "hot tub", was pioneered by the Trade Practices Tribunal (as it was then known). At the conclusion of all the evidence, all of the experts give their opinions and then their views about the opinions of the other experts. Other steps to make expert testimony more useful and effective include relaxation of the rule against experts giving evidence of the issues that are ultimately for the court to determine and providing for experts to give evidence by way of submission. The court may appoint its own expert, but this procedure has rarely been used.

The Australian Competition Tribunal can review determinations of the ACCC granting or revoking authorisations. For mergers, the Tribunal can review ACCC decision about formal clearances and can decide on applications for authorisation. The Tribunal also has powers to review or inquire concerning access matters, exclusive dealing and market power in ocean shipping. The President and Deputy Presidents of the Tribunal must be judges of the Federal Court of Australia. Tribunal proceedings have been like those of a court, in the level of formality and procedures and in observance of rules of evidence. The current President is examining ways to make proceedings less formal and to streamline procedures and reduce the volume of documents, the number of experts and the time taken in witness examination.

Other means of applying competition law – private actions

The TPA provides private litigants with a right of action to recover damages. Private litigants may also seek injunctions, divestiture (in the case of mergers) and other orders such as a declaration that a contract is void or an order for specific performance. Some aspects of the law might help private plaintiffs. For example, a plaintiff can submit a court's finding of fact in an enforcement action brought by the ACCC as *prima facie* evidence (Section 83). And the law also enables a party (or prospective party) to certain proceedings at the ACCC, the Tribunal or the court to ask the Attorney-General for a grant of financial or legal assistance (Section 170). Where the Commission decides not to take action in

respect of a private party complaint, the reasons for the decision will be outlined in a letter to the complainant. When the ACCC concludes a matter with a settlement, the agreed set of facts may give private party plaintiffs a foundation on which to build a case. The ACCC also has the power to bring representative actions seeking compensation on behalf of victims but to date has only done so in consumer protection cases.

Few private actions have been pursued concerning the competition law provisions, particularly the cartel provisions. Some of these have been significant, though, in terms of developing jurisprudence. Reasons for the small number of competition cases could include expense and uncertainty (with losing litigants required to pay the winner's costs), the lack of financial incentives (with only single damages available), the relative ease of obtaining adequate injunctive relief, the difficulties of proving damage and the fact that many victims may not be aware that they have been affected by illegal anti-competitive conduct.

Concerned that private litigation could jeopardise ongoing investigations or undermine the efficacy of its immunity policy for cartel conduct, the ACCC has not voluntarily provided witness statements and transcripts of interviews conducted relating to an immunity applicant. The ACCC has also sought to protect the confidentiality of information provided by cartel participants who came forward under the immunity policy, despite criticism of non-disclosure from the Federal Court and complaints from lawyers for plaintiffs. Legislation was recently introduced to strengthen further the ACCC's capacity to protect information provided by immunity applicants, by limiting substantially the circumstances in which the ACCC can be compelled to produce or disclose immunity information. This legislation gave effect to Recommendation B.2.b: the OECD's 1998 *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process). The ACCC need not give reasons for a refusal to disclose, and the role of the courts in reviewing such decisions is curtailed.

International issues

The TPA applies to conduct that is engaged in outside of Australia if the party engaging in the conduct is an Australian incorporated entity, a body corporate carrying on business in Australia, an Australian citizen or a person ordinarily resident within Australia. Ministerial consent is required to proceed with private actions that involve conduct outside Australia. In actions for damages, consent must be obtained before the conduct can be relied upon at a hearing. In actions for other remedial orders, consent must be given before proceedings are instituted. The Minister must give such consent unless, in the Minister's opinion, the conduct was required or specifically authorised by the law of the country where it occurred and consent is not in the national interest. Ministerial consent is obtained in most cases.

The ACCC has formal co-operation agreements with numerous counterpart agencies, including two treaty-level agreements with the United States, an agreement covering consumer protection with the European Community, and agreements with New Zealand,

Taiwan, Korea and Fiji. These agreements generally contain provisions about notification of enforcement activities that may affect the other party's interests and about avoidance of conflict provision to minimise adverse effects of one party's enforcement activities on the other party's interests. The TPA authorises the ACCC to exchange confidential information with domestic and foreign regulators, although the ACCC can impose conditions on disclosure so as to protect the confidentiality of the information provided.

Resources and priorities

The ACCC is one of the largest competition agencies in the world, reflecting the breadth of its portfolio and the range of its sectoral responsibilities. The ACCC has 727 staff budgeted in 2008-09, of which 320 work in competition and consumer protection. One-third of the ACCC's expenditure on staff goes to enforcement and compliance about competition and consumer protection. After enforcement and compliance, the next largest allocation of the staff budget, 10%, is for the work of the Australian Energy Regulator, which was established in 2005 as a constituent part of the ACCC but operates as a separate legal entity.

Most recent ACCC investigations relate to horizontal agreements. Cartel cases also have usually drawn the highest levels of penalties. Total penalties in 2007 exceeded previous years due to the record AUD 38 million in the Visy/Amcor price fixing case. Relatively few investigations into abuse of dominance lead to legal proceedings. This low ratio probably reflects the legal and economic complexity of such matters.

Limits of competition policy: Exclusions and sectoral regimes

A principal task of reform since the 1990s has been to correct the government-business relationship, in several dimensions. Removing "exemptions" was closely related to rationalising infrastructure regulation, because infrastructure services and regulation provided by states were, by virtue of the state involvement, not subject to Commonwealth competition law. Changing the conception of state-provided services required means to ensure competitive neutrality between the commercial operations of governments and private providers. Reform about exemptions and special treatment involving non-government activities called for reviewing laws and regulations to remove impediments to competition and establishing a common, coherent scheme for assessing and regulating sectoral monopoly problems of access to essential facilities. Removing and discouraging exceptions from competition law was an important element of the Competition Principles Agreement among the Australian governments in the 1990s. The scope of exceptions has shrunk since then, as many were reformed in the course of the review. But many remain.

General principles of exclusion or special treatment

General provisions define how other legislation can create an exemption from the TPA. The Commonwealth and any state or territory can authorise or approve conduct that would otherwise violate the TPA. Legislation must be explicit and specific about the conduct that is to be exempted and about the creation of an exemption. Regulations that implement an exemption are subject to a two-year sunset. The TPA does not otherwise define or limit the substantive criteria or scope of such exemptions. Under the National Competition Policy plan, review under the Competition Principles Agreement framework is required at least once every 10 years, and legislation is not to be retained unless benefits of

the restriction to the community as a whole outweigh the costs. The government enacting it must notify the ACCC.

The list of enactments and regulations that confer exemption is long. The ACCC publishes the list on its website and in its annual report. Many of these exemptions are narrow and technical. Some are commonly encountered in other jurisdictions, where they are also difficult to reform. Most arise at state and territorial levels of government.

Government entities and operations

Exemptions for state-related enterprises have been eliminated. One element of the NCP deal was to extend the TPA prohibitions to government businesses and unincorporated enterprises such as partnerships. Competitive neutrality of government-related commercial operations was also implemented in the mid-1990s. Governments at all levels adopted generally similar frameworks of principles and institutions. The policy goal is to eliminate inefficient distortion of resource allocation, by eliminating any commercial advantage that public ownership might confer on entities engaged in significant business activities. Governments agreed to use a corporatisation model for significant business enterprises, so the prices they charge are calculated on the same basis as their private sector competitors. Formal arrangements were set up to investigate complaints from private sector businesses about how government businesses implemented the reforms.

De minimis *and other small-business exclusion*

Authorisation for small businesses to engage in collective bargaining is facilitated, in order to equalise their bargaining positions with larger firms. This is not a blanket exemption, but a simplification of the procedure for obtaining an authorisation from the ACCC, that is, a decision that a practice which is formally prohibited is nonetheless permissible. The *Dawson Report* recommended making this a negative option process of notification, putting the burden on the ACCC to take action if it objects. The regime was introduced in 2007.

Common general exclusions

Agreements about wages, hours and terms of employment are not covered by the basic prohibition of restrictive agreements in Section 45, but the TPA applies to some other labour issues. The TPA was amended in 1996 to authorise the ACCC to take action against secondary boycotts. This prohibition was aimed principally at the conduct of trade unions and its effect on third parties.

Conditions in agreements licensing patents, design copyrights and trademarks are exempted from the TPA, so long as they are limited to permitted topics. Terms in patent and copyright licences must relate to the invention or design or items made with it. Terms in trademark contracts must relate to the kinds, qualities or standards of goods bearing the mark.

Access regime and structural reforms

The TPA's novel system for defining and regulating "access regimes" applies the notion of essential facilities across sectors. The purpose is to promote economically efficient infrastructure use and investment and competition in markets upstream and downstream

from the service. Use of common principles and procedural frameworks is intended to encourage consistent regulation of access in each industry and across industries.

The first step, when a user applies to subject a service to the access regime, is a recommendation by the National Competition Council about whether the statutory criteria are met. The principal criteria for "declaring" a service are that access would promote a material increase in competition in some other market and that it would be uneconomical for anyone else to develop another facility to provide it. The decision to declare the service is made by a minister. Terms and prices for access are then to be negotiated commercially with the provider, in principle. But if the parties cannot agree, their disputes are resolved by an "arbitration" proceeding at the ACCC. The outcome of that proceeding can be an order of access or interconnection and specification of terms and charges for it. Access pricing regimes should give parties an incentive to reduce costs or improve productivity. A state or territory may set up an access regime. If it is certified by the NCC as in compliance with the statutory principles, services covered by that state regime are not subject to the declaration-arbitration process.

Since 1995, there have been over 40 applications for declaration to the NCC. Services at issue include rail, airports, water and sewer, natural gas transportation, electricity transmission and data processing. About a third of these have been declared, in rail, airports and water and sewer services. Despite the availability of a general rule and process, in practice special regimes have been set up for gas, water, electricity and telecoms. Contested actions under the general procedure are mostly about access to railway lines. Some of these disputes have been time-consuming and costly. Suggestions for reform have included eliminating the recommendation stage at the NCC or the declaration decision by the minister, or simplifying the process of appeal about the merits of the declaration decision.

In April 2009, the government announced an intention to revise aspects of the access regime procedures. Key features include binding time limits for decisions and some limits on the merits review by the Australian Competition Tribunal. These proposed reforms follow some of the points of the Competition and Infrastructure Reform Agreement of 10 February 2006, in which governments committed by 2010 to incorporating consistent regulatory principles in access regimes for significant infrastructure facilities. The principles include limiting merits reviews to the information before the original decision maker and binding time limits of six months for regulatory decisions.

Sectoral issues and special regimes

Telecommunications and media

Telecoms is subject to special competition rules, in separate Parts of the TPA. The ACCC is the regulator that applies these sector-specific competition rules. The sector-specific competition regime regulates a historic monopoly that delayed the usual reform steps, of privatisation and vertical separation, in part because there was resistance to complete privatisation. The principal services remain highly concentrated. The sector-specific competition regime was designed to aid the transition from a historic monopoly to an openly competitive market where the privatised incumbent, Telstra, would be one of many carriers. But Telstra has been able to retain considerable market power in the new environment, despite measures such as the unbundling of the local loop and the

imposition of accounting and operational separation on its functions. It remains one of the most vertically integrated providers in the world, with dominant positions in the fixed-line, mobile, broadband and pay TV segments. Much of the ACCC's enforcement has been about access to Telstra's wires by other providers of DSL data service. Cable TV is a less competitive alternative to DSL in Australia, because Telstra has a controlling share (50%) in the largest cable TV provider.

The government has recently announced the establishment of a company to build a national broadband network, to operate on a wholesale-only basis. This will effectively supersede Telstra's copper network. The government has also commenced a wide-scale review of the regulatory regime, examining ways of promoting greater competition across the industry, including measures to better address Telstra's vertical integration, such as functional separation. It is also considering addressing competition and investment issues arising from horizontal integration of fixed-line and cable networks, and telecommunications and media assets.

Media ownership and control are regulated by limiting concentration of ownership in broadcasting sectors and of ownership across different media. Transactions are prohibited where they result in an "unacceptable media diversity situation", defined in terms of the number of media groups in an area. Rules set limits on common control of broadcast and newspaper outlets nationally or in broadcast areas. Despite the goal of encouraging viewpoint diversity, the number of providers is small and stable. There are three significant free over-the-air television broadcasters, and the pay-TV market is also concentrated. Foxtel, with a substantial majority of metropolitan area subscribers, is owned 50% by Telstra. The outcome of measures to promote viewpoint diversity has been to limit the number of providers and protect the incumbents against entry.

Energy: Electric power and natural gas

Sector-specific access regimes are applied in a structure that ensures co-ordination with the ACCC's administration of analogous principles of competition law. Restructuring these industries and rationalising regulatory structures to create coherent national markets and policies is a major accomplishment of the long-term reform process. The move toward integrated national regulation was a COAG priority, which required establishing several new regulators. Some steps remain, and one of the key institutions is being set up in 2009.

The Australian Energy Regulator (AER) is a constituent part of the ACCC, which operates as a separate legal entity. The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks. The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules. The Australian Energy Market Commission (AEMC) is responsible for rule making and market development. The rules AEMC develops deal with the operation of the systems, not with prices. The Australia Energy Market Operator commenced operations on 1 July 2009, as a single national electricity and gas market operator. Its responsibilities will include a new national transmission planning function.

Structural separation of transmission, distribution, production and retail and third-party access to power lines and pipelines were achieved long ago in most areas. Retail contestability is also in place in most areas. Prices for power are comparatively low. Retail

prices are capped in all jurisdictions except Victoria, where the caps were removed after an AEMC study concluded that competition there was sufficient.

Postal services

The TPA's access regime rules do not apply to services provided by Australia Post. The ACCC has several regulatory responsibilities in the postal sector, about prices and cross-subsidies, and the Australia Post is subject to the TPA's competition prohibitions.

Liner shipping

Ocean shipping conferences are regulated by a separate section of the TPA, which exempts agreements about rates, capacity levels and liner scheduling. A review by the Productivity Commission released in 2005 recommended repealing this exemption and relying instead on the general provisions of the TPA for authorising joint actions if they would be beneficial to the Australian economy. The Australian Government decided to retain the separate section but to clarify its objectives and narrow its scope; however, these amendments have not yet been implemented. A further review is scheduled for 2010-11.

Railways

Reforms over the last 15 years have addressed the long-standing problem of co-ordinating among States and Territories to create an efficient national rail system. The principal regulatory tool for access to key infrastructure is the TPA access regime rules. The ACCC's roles in this sector include assessing codes and undertakings about rail infrastructure access, arbitrating disputes between operators and infrastructure providers and analysing mergers and authorisations.

Financial services

Merger or acquisition proposals involving banks are subject to a process in addition to the ACCC's competition assessment. A national interest test is applicable only to mergers and acquisitions involving financial institutions. This is administered by the Treasurer of the Australian Government. Mergers of insurance companies are also subject to additional regulatory reviews.

Disposals of distressed banking assets can be done quickly, without merger-control review by the ACCC, where the stability of the financial system or the interests of depositors could be jeopardised by delay. This exclusion from the TPA was enacted in response to the financial sector crisis of 2008. The amendment enables the Australian Prudential Regulation Authority to intervene quickly. The ACCC is consulted about these transfers, but it does not have power to take action about them under Section 50 of the TPA.

Agriculture

Until recently, there has been an exclusive monopoly over bulk wheat exports. In 2008, a system for accrediting exporters of bulk wheat was established. After October 2009, accreditation will require formal access undertakings under the TPA, assessed by the ACCC, or a state or territory access regime that is certified as effective after recommendation by the National Competition Council. Some monopolies and marketing boards involving agriculture are authorised at the level of States and Territories. Products subject to these competition constraints include sugar, rice and potatoes.

Professional, service licensing (state)

A number of professions and services are subject to licensing requirements under state laws and regulations. Some states that recognise the qualifications of providers licensed in other states nonetheless require them to pay separate licensing fees to practice. Reform may require compensation payments, because states use the funds for other, sometimes related purposes, such as insurance to protect consumers against defaults. The COAG National Reform Agenda programme recognises disparities in state regulation of licensed services as one of the problems it seeks to correct, in order to establish a seamless national economy. A step in that direction was COAG's April, 2009 announcement of a project to establish uniform national regulation of the legal profession.

Pharmacies (state)

Entry into the retail pharmacy business is limited. A national review was undertaken in 2000, which produced recommendations to COAG to remove the restrictions on the number of pharmacies that pharmacists could own while supporting regulations prohibiting non-pharmacists' ownership or control. No jurisdiction implemented the recommendations, which were abandoned as a result of organised opposition to a major chain's proposal to enter. There is evidently no current plan to renew the reform effort. The restraints are probably raising consumer prices or limiting services. *Ex post* studies have found that removal of similar restraints on retail competition in other jurisdictions, such as Italy, has led to significantly lower prices.

Taxis (state, local)

States still impose numerical limits on the number of taxis allowed, despite the National Competition Policy review process. Queensland, for example, did a National Competition Policy review of its rules in 2000 and determined to retain them and even to extend the controls so that "limousines" could not compete with taxis. In 2004, the Queensland Government stated that it would release new licences in response to performance criteria related to waiting time. As the number of taxis in many markets has declined or held steady despite increasing demand, the cost of a licence has increased. That cost represents the value of preventing competition, and hence it is a measure of the cost that the monopoly imposes on the consumer and the economy. Reform in this sector in other countries has often involved compensating licence holders for the loss of some of that value.

Competition advocacy and policy studies

A key role in policy analysis and recommendations for improvement is performed by the Productivity Commission, the Australian government's principal policy review, research and advisory body on microeconomic policy and regulation, including competition. The National Competition Council also played a role in policy formulation and monitoring in the early years following the implementation of the Hilmer reforms, but its role is now more limited, concerned with declarations of facilities for the purposes of the TPA access regime.

The Productivity Commission was created in 1998. Its work has been key to the "political economy" of promoting reform, providing evidence and measures to counter the claims of special interests and explain to the community what is at stake and quantify

likely gains from reform. Its remit covers all sectors of the economy, including all levels of government. It operates as an independent advisory and educative body. Inquiries with recommendations for policy action must be done in response to a request from government. The government responds in detail to its recommendations. The Productivity Commission consists of a chairman and up to eleven other Commissioners, supported by 80 professional and support staff. It publishes about 40 reports and studies per year.

Productivity Commission recommendations carry weight with all Australian governments and all sides of politics. While governments do not always accept the Commission's advice, most of its recommendations are typically accepted and its findings are generally endorsed. Some of the Productivity Commission's recent projects that are directly relevant to competition policy include:

- Review of the Copyright Act 1968: Parallel importation of books (2009);
- Review of Price Regulation of Airport Services (2008);
- Inquiry Report into Road and Rail Freight Infrastructure Pricing (2007)
- Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping (2005); and
- Research Report on the Australian and New Zealand Competition and Consumer Protection Regimes (2005).

The ACCC does not have a competition advocacy role. However, it acts to achieve compliance through a range of mechanisms, including enforcement, education and through the administration of the TPA. The ACCC sometimes does studies related to enforcement. Thus, concerns about rising food prices led the Federal Government to commission an inquiry from the ACCC, in 2008, which focused on ways to remove any remaining restrictions on competition in the grocery sector, including planning (zoning) barriers that affect new entrants.

Review of legislation was an important, and controversial, element of the National Competition Policy programme. That programme effectively ended when the last payments were made to the States in 2005. The National Competition Council's final assessment report in 2005 indicated that 22% of the priority legislation review and reform task remained incomplete. Had the programme continued, with on-going assessments by the Council and associated payments, some of the difficult areas (such as taxis) may have been dealt with in the second round of reviews. The legislative review component of the NCP programme was contentious, in part because it was the aspect where the National Competition Council recommended the majority of the deductions from competition payments. Nonetheless, most legislation was reviewed and many important reforms were implemented. Notable examples included the national dairy industry, shop trading hours, bakeries, podiatry, veterinary services and liquor licensing.

The COAG National Reform Agenda builds on some aspects of the NCP process. The National Partnership Agreement to Deliver a Seamless National Economy, aimed at reducing unnecessary and inconsistent regulation, includes some competition issues among its 27 identified priority areas. The programme retains a link between meeting targets and a budget incentive, which includes a "reward" component with payment contingent on independent assessment that milestones have been achieved.

Systems for requiring regulatory impact statements are well established in Australia. Such statements are mandatory for decisions by all government bodies. A checklist similar

to the one in the OECD competition assessment "toolkit" is incorporated into the preliminary assessment guide used in the Office of Best Practices Regulation.

Conclusions

A generation of reform to stimulate competition has laid a strong foundation for resisting backsliding. The National Competition Policy programme, building on the trade, fiscal and monetary reforms in the 1980s, has produced clear economic performance benefits, largely from correcting substantial weaknesses in important infrastructure sectors and eliminating inefficient constraints on competition. The Productivity Commission, in its current form a product of the reforming drive of the national competition policy era, is a model for institutionalising evidence-based policy-making. Strong institutions and political support for competitive reform should help Australia preserve the gains and the process that produced them even in the current difficult economic conditions.

The transition from a "national competition policy" to a "national reform agenda" suggests decision makers felt that the competition problems have been resolved. Australia is certainly in a much better position than it was 20 years ago. But restructuring government-provided network services and reviewing legislation to eliminate restraints have put Australia into the mainstream. It faces the same issues that are found in many, if not most, OECD member jurisdictions. Infrastructure reform is incomplete. The extent of the derogations from competition law, from liner shipping to taxicabs, pharmacies to agricultural marketing boards, that survived the process which supposedly would cull them reveals the incorrigibility of some issues. Australia's experience shows that even a comprehensive reform programme will have trouble with these familiar hard cases. That does not mean they should be ignored, though.

After 15 years of experience, some aspects of the National Competition Policy package may need more thought. The access regime system has not quite been a general system. Rather, in most of the usual network-industry settings, the regime has been tailored by legislation to fit sectoral considerations and interests. In less obvious settings, the complex, time-consuming process has become a source of concern. The current proposals to streamline the process can do no harm, but they may not end the controversies. Any process can be gamed; where much is at stake, parties and their lawyers will find ways to string it out as a negotiating tool.

The substantive content of Australia's competition law has been subject to major review in the last six years. Most of the amendments recommended in the Dawson Review and in a subsequent Senate Committee review have been implemented. Some are recent, such as the cartel reforms. Australian competition law is thus now in a transition period and it will be some time before proper assessment can be made of the advances. Nonetheless, some of the changes have raised particular questions.

The priority given in Australia in the last 10-15 years to anti-cartel law and enforcement is in line with international trends. Whether the recent amendments achieve the right balance will become evident as they are implemented in the next few years. Assessments will be influenced by how the ACCC approaches enforcement, including how it distinguishes between criminal and civil cases and the outcomes in the early cases that are prosecuted. Penalties for breach have been low by international standards. This may now start to change with the 2007 amendment to the civil penalty maxima (allowing for calculation based on the gain from the contravention or 10% of turnover). For serious cartel

conduct, the introduction of criminal sanctions is a significant step, and the 10 year maximum jail term is a clear signal that the legislature expects custodial sentences to be imposed when convictions are secured.

The ACCC is generally highly regarded as an independent and effective enforcement agency. Well resourced, it is a model for combining complementary functions of sector regulation, consumer protection, market oversight and competition enforcement. Reflecting a formal government decision on the separation of policy and enforcement functions, the ACCC eschews any formal or substantial role in competition advocacy or policy development, and it is perhaps for this reason that it allocates relatively few resources to its research and analysis division and has limited engagement with external academia.

The Australian Competition Tribunal plays an important role as a merits review body, and the economic content in its determinations has made a significant contribution to both the legislative and judicial development of the law. On one view, it could do more – for example, all non-merger authorisation applications could be made directly to the Tribunal. On the other hand, since the *Dawson Review* there have been improvements made by the ACCC in response to concerns about timeliness in the authorisation process. There is no longer a good case in Australia for a specialised competition court. Appreciation of the performance of the Federal Court has grown considerably in recent years. Each of these institutions appear to strive for continuous improvement in substantive calibre of their decision-making and the efficiency of their processes.

Cartel criminalisation brings a new agency into the enforcement arena in the form of the DPP. There are potentially substantial benefits for objectivity and independence in decision-making by virtue of the separation of investigatory and prosecutorial functions between the ACCC and DPP. However, reaping such benefits is contingent on a smooth and close working relationship between the two agencies. The preparedness of the DPP to amend its Prosecution Policy to accommodate the ACCC's policy on immunity is an early good sign in this respect, as is the considerable effort being made by senior ACCC and DPP representatives to participate together in conferences and explain the approach that they propose to enforcement of the new regime. The true test lies ahead in the decisions that will need to be made in connection with actual cases.

As compared with the high public profile and strong government backing of the enforcement activity of the ACCC, support for private enforcement of competition law, specifically cartels, is less clear. The reasons for the lack of private enforcement relate in large part to the lack of financial incentives for such actions. There are also significant impediments to obtaining the information required for proof of liability and damages. In other countries private enforcement has been recognised as making an important contribution to enforcement, and regulators have led the way in exploring avenues for facilitating private actions while ensuring at the same time that public enforcement is not undermined.

The Treasury is responsible for advising the Minister on proposals for amendments, and does so in consultation with businesses, consumer groups and the ACCC. The Treasury is currently consulting with the public on possible amendments to deal with creeping acquisitions and possible amendments about the meaning of "understanding" under Section 45. The extent of consultation on law reform with the business sector and profession has increased recently.

The recent amendments to the TPA follow the detailed, prescriptive and complex style of statutory drafting that is a hallmark of the TPA and many other pieces of Australian legislation. This style seeks logical clarity and completeness, through precise definitions and explicit listing of possible applications, perhaps in an effort to close loopholes in advance. But a disadvantage of this style is that it encourages parties and judges to focus on logical analysis of the words of the statute rather than on the legislation's fundamental concepts and purposes.

Policy options for consideration

- ***Consider more vigorous action to promote competition in telecoms and electric power***

Considerable progress has been made toward setting up a competitive market for electric power on a national scale. Nonetheless, continued public ownership and retail price control may be hindering competition. To be sure, competition assessments have concluded that there is now adequate competition in Victoria and South Australia. Further privatisation and removing the ceiling on retail prices should be considered. Since the creation of the National Electricity Market, prices have risen faster in New South Wales, where there is still a public monopoly, than in other states in eastern and south-eastern Australia, yet productivity gains have been smaller (OECD, 2008). Removal of retail price controls would depend on the state of competition in retail markets. As markets increasingly connect and competition expands, the need for retail price regulation to control market power should decline. States and Territories may be using their price-control powers to support other policy objectives. As the retail market becomes competitive, though, those other objectives should then be achieved by less inefficient means.

Similarly, the continued, albeit indirect, public ownership interest in the historic telecoms monopoly and the failure to separate completely the network-monopoly elements from its competitive operations may be dampening competition and complicating regulation. Consideration should be given to separating infrastructure management from service provision, notably between the management of broadband Internet access infrastructure and marketing activities, in order to encourage construction of a fibre optic network without impairing competition. The plan for a separate fibre optical network is a promising approach. The government has announced that this network will be wholesale only. The government may invest up to AUD 43 billion with the private sector. Its financial involvement in constructing a fibre optic Internet system should not end up strengthening the dominant position of the incumbent. Competition and diversity of programme sources could also be enhanced by divesting Telstra from its ownership relationship with pay-TV providers.

- ***Finish the unfinished business of the NCP legislation review***

Some exemptions and special regimes remain, despite the 10 year programme of review and revision. These include liner shipping, at the national level, and state-level items such as taxis and pharmacies. The economic performance benefits of removing these remaining constraints may well be less than those of reforming utility infrastructure services. But a principle of equity, of eliminating special privileges and the rent-seeking abuse of regulation, as well as the prospect of some additional efficiency benefit justifies taking action. These special-interest protections are common in other jurisdictions, of course, and they have proven to be difficult to remove there too. Incumbents that benefit

organise to retain their advantages, and overcoming that influence may require motivating competing interests. For example, consumer complaints in Ireland about poor taxi service achieved little; instead, open entry followed a lawsuit by would-be competitors who argued successfully that regulations limiting the number of licences denied them a constitutional right to engage in the business. Pharmacists' efforts to prevent entry have been countered by mass market retailers. Doubt about the effects of reform can be met by citing successful experience from countries such as Italy, Norway and New Zealand that have relaxed or eliminated controls on pharmacy chains or on entry by other firms.

- ***Maintain the regular review to identify and correct constraints on competition***

Competition issues are less prominent in the current COAG National Reform Agenda than they had been under the National Competition Policy. The new themes, of harmonisation and co-ordination across jurisdictions to achieve a seamless national economy, are important, and if achieved they will support healthier competition. Eliminating inconsistencies about regulations such as construction codes, the environment and workplace health and safety will encourage entry. But the institutions supporting these efforts should also follow through on the NCP plan of regular reviews of the constraints that were nonetheless retained, to check whether the reasons for retaining them are still valid and to require rent-seekers to justify their special treatment.

- ***Eliminate the special prohibition of predatory pricing, or remove the market share element***

The scope and effectiveness of the prohibition against misuse of market power may be even less clear now than it was before the recent amendments. To some extent, this reflects the significant influence of small business "politics" in Australian competition law. The TPA now includes a prohibition aimed at predatory pricing that could curb discounting by large corporations. Replacing a market power criterion with a market share threshold invites inefficient outcomes, promising protection of the interests of smaller firms but potentially resulting in higher costs to the consumer. Elaboration of ways to interpret "taking advantage of" market power may add complexity and uncertainty, too.

The general prohibition of misuse of market power can deal with predatory pricing. The new dedicated prohibition risks creating uncertainty about pricing decisions. The current government has been thwarted in the Parliament in its attempts to address these concerns. The government should take advantage of future opportunities to remove at least the market share aspect of the "Birdsville amendment". A consistent legally principled and economically robust approach to interpretation of this new prohibition by the courts over coming years will be critical to its prospects.

- ***Clarify the scope of the* per se *prohibitions on cartel conduct and the approach to exemptions***

The statutory regime applicable to cartel conduct appears complex and duplicative. The design of the cartel offences raised questions about their relationship with the civil prohibitions. Amendments and further explanations have addressed concerns that were expressed about coverage of "joint venture" activity. As a step toward rationalising the regime, the existing *per se* prohibition on exclusionary provisions could be repealed, given its substantial overlap with the new *per se* prohibitions on output restriction and market allocation. Alternatively it could be amended to narrow its application to collective boycotts and thereby minimise the overlap with the new prohibitions. The Dawson Committee recommendations for amendment of the exclusionary provision prohibition could be re-examined in light of the recent reforms.

The new *per se* prohibitions are generally consistent with the guidance of the OECD 1998 Recommendation, with respect to the categories of conduct that should be regarded as the most serious of antitrust violations. The OECD also recommended that prohibitions not extend to conduct that is "reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies" (OECD, 1998). Australian competition law relies on the authorisation procedure to recognise efficiencies and offer protection correspondingly. The availability of this ex-ante protection has been relied on in answer to concerns about the breadth of the new cartel prohibitions, as has the assurance that prosecutorial discretion will be exercised conservatively. But it will be costly, and perhaps inappropriate, to require economic actors to apply for prior authorisation of conduct that as a matter of policy should not be prohibited. Whether this is an optimal approach in light of the imposition of criminal liability is a matter that could be revisited once there has been some experience with enforcement of the new regime.

- ***Make third line forcing subject to a competition test***

Third line forcing should not be subject to a per se prohibition. *Per se* prohibition is difficult to justify on economic grounds. This is borne out by the large number of notifications received by the ACCC for such conduct each year, almost all of which are considered to raise insufficient competition issues to concern the Commission. The Dawson Committee recommended removing *per se* liability for third line forcing and subjecting it to a competition test, consistent with other forms of exclusive dealing. It is inefficient and overly burdensome to require firms to notify conduct that in the majority of cases has been shown to be either benign or even pro-competitive. Australian competition law is in a state of flux, with amendments having recently been made or under consideration for most of the prohibitions under the *Trade Practices Act*; thus, review of whether Australia's particular economic conditions continue to justify strict liability for third line forcing would be timely.

- ***Consider including economic efficiency in competition analysis, rather than something outside it***

The separation of competition and efficiency considerations is a long-established feature of competition regulation in Australia, reflecting initial concerns about judicial capacity to deal with efficiency analysis. In some other jurisdictions, efficiency considerations are incorporated into the test for infringement, such as in assessing vertical restraints under a "rule of reason". Given the significant development in Australian competition law jurisprudence over the last 35 years, there may be an opportunity to reflect on and possibly reconsider the two-tier approach to adjudication in the future. Any such reconsideration should acknowledge the substantial practical benefits associated with the way in which the authorisation procedure currently works for non-merger conduct, as well as the effectiveness of the informal clearance process for mergers.

- ***Support private enforcement of competition law***

Private enforcement has the potential to complement and strengthen public enforcement of competition law. Where private litigation has had a low profile, raising that profile requires a champion who will take an impartial principled position and consult widely and meaningfully with all stakeholders. The Australian Law Reform Commission might be given a reference to hold an inquiry into the subject. The ALRC has previously held inquiries into matters of trade practices law and is a highly regarded independent body. The issues are likely to range across areas of evidence and procedure, and thus the

ALRC may be better positioned and skilled for this purpose than a body like the Productivity Commission. As part of such an inquiry, impediments to private litigation, in particular the requirement for ministerial consent where the relevant conduct has occurred outside Australia, could be reviewed.

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