

FOREWORD

THE BASES OF COMPETITION POLICY

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I. INTRODUCTION

Competition policy is being used by many governments to spur the microeconomic reform seen as necessary for the success of firms and nations in a more open, contestable world economy. In Australia, the Independent Committee of Inquiry into National Competition Policy was established in October 1992 to examine how the nine Australian governments, each of which influences what are increasingly national markets, ought to deal with competition policy. The results of the Committee's work are set out in its report, *National Competition Policy*, August 1993.¹ The recommendations of this report were adopted in principle by the Council of Australian Governments in February 1994, and work is currently under way on the drafting of legislation and detailed design of processes and institutions.

The initiative of the *UNSW Law Journal* in devoting its 1994 thematic issue to competition policy is thus timely. Many of the articles deal directly with particular recommendations of the National Competition Policy Report. These

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1 Independent Committee of Inquiry, *National Competition Policy*, AGPS (August 1993).

recommendations were shaped by the Committee's view on what constitutes competition policy and its overall approach to developing the policy in the Australian Federal system. This article, written as a foreword to the issue, thus sets out the main bases of the Committee's report. In summary, the report rests on three main propositions, each of which is discussed in turn:

- Competition policy covers a broad set of laws, policies and government actions that should be seen as an integrated whole. This set establishes the guidelines that determine the nature and extent of competition and the ways in which possible conflicts between the results of competition, economic efficiency and other social goals are to be handled.
- The main elements of competition policy dealt with by the review were the processes, institutions and broad principles that would generate specific guidelines for various sectors of the economy. A national competition policy could not, in our view, sensibly prescribe detailed guidelines for competition in every sector, ranging from electricity generation to farming and professional practice.
- The recommended processes and institutions leave much of competition policy squarely in the political domain. While parts of competition policy, such as the conduct rules of the *Trade Practices Act 1974* (Cth) and the administration of access and pricing regimes, lend themselves to administrative and at times judicial processes, most of the other areas of policy require trade-offs between the interests of different groups in the community. Economics rarely provides clear answers to these kinds of issues, though economic analysis can and should be used to make the trade-offs more transparent.

II. THE DOMAIN OF COMPETITION POLICY

In the early stages of the Committee's review, the view was expressed that the main element of competition policy was Part IV of the *Trade Practices Act* and that the issue for a national policy was whether and how to extend laws of this type to all sectors of the economy, many of which were exempt in whole or part from the Act. The areas where extension of the Act was argued to be of most benefit were public utilities such as electricity, gas, transport and communication, agricultural marketing and the professions. However, as the Committee began to examine these and other sectors it became apparent that extending the reach of Part IV would not necessarily change the nature and extent of competition in these sectors. We found that in most cases the factors that either encouraged or limited competition were not the result of the *Trade Practices Act* but of other regulations, market structures that resulted from the actions of governments in establishing and operating businesses over many years, and/or the direct actions of governments

themselves. For example, applying the *Trade Practices Act* would not affect agricultural marketing arrangements embodied in specific legislation. Nor would it lead to a more competitive structure for the generation and transmission of electricity, place government businesses on an equal competitive footing with private businesses, or deal with regulatory barriers to entry in many fields, such as prohibitions on the carriage of certain freight by road or restrictions on the practice of conveyancing by other than legal practitioners.

Against this background, and mindful of the second of our Terms of Reference,² the Committee defined competition policy to include six main elements, as set out in Table 1.

Table 1 - Elements of Competition Policy

	Policy Element	Example
1	Limiting anti-competitive conduct of firms	Competitive conduct rules of Part IV of the Trade Practices Act
2	Reforming regulation which unjustifiably restricts competition	Deregulation of domestic aviation, eg, marketing and telecommunications
3	Reforming the structure of public monopolies to facilitate competition	Proposed restructuring of energy utilities in several States
4	Providing third-party access to certain facilities that are essential for competition	Access arrangements for the telecommunications network
5	Restraining monopoly pricing behaviour	Prices surveillance by Prices Surveillance Authority
6	Fostering "competitive neutrality" between government and private business when they compete	Requirements for government businesses to make tax-equivalent payments

Source: Report by the Independent Committee of Inquiry, *National Competition Policy*, AGPS (August 1993) p xvii.

In defining competition policy this way, we were explicitly recognising that competition policy was not about the pursuit of competition as an end in itself. Instead, we saw competition as an important and powerful force for economic efficiency, and we saw that economic efficiency generally was of great benefit to consumers. However, we recognised that competition might not always be

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- 2 The Committee was to inquire into, and advise on, appropriate changes to legislation and other measures in relation to:
- whether the scope of the *Trade Practices Act* should be expanded to deal with anti-competitive conduct of persons or enterprises in areas of business currently outside the scope of the Act;
 - alternative means for addressing market behaviour and structure currently outside the scope of the *Trade Practices Act*; and
 - other matters directly related to the application of the principles above: *ibid*, p 362.

effective in achieving this end or that it might lead to conflicts with other social goals. Competition policy thus aims to produce guidelines that determine the nature and extent of competition and the ways in which possible conflicts between the results of competition, economic efficiency and other social goals are to be handled.

III. PROCESSES AND INSTITUTIONS VERSUS ANSWERS

Many of the submissions received by the Committee argued for quite detailed competition guidelines with respect to particular sectors (see Annex B of the report for a list of submissions). In considering these submissions we soon discovered that to develop detailed guidelines for each sector would require years of work. However, we were also struck by the commonality of issues with respect to competition policy across each of the sectors. The six elements of competition policy outlined above could be identified in many sectors, and the principles and processes required to deal with the six elements appeared common to most sectors.

The Committee therefore decided to concentrate on processes and institutions in order to apply broad principles rather than develop detailed *answers* for every sector. The processes and institutions were designed to be sufficiently flexible to cover the main issues raised in submissions and other work of the Committee. The recommendations are in three parts:

- Part I deals with the generally applicable conduct rules, including the content of those rules, their sphere of application and aspects of the enforcement regime. It argues that a slightly modified version of the rules currently contained in Part IV of the *Trade Practices Act* should apply universally to all business activity in Australia.
- Part II outlines specific policy proposals and mechanisms for the five additional policy elements the Committee proposes should form part of a national competition policy. These include principles and processes governing the reform of regulatory restrictions on competition, the structural reform of public monopolies, and competitive neutrality between government and private businesses; a general access regime; and a more focused prices oversight mechanism.
- Part III outlines issues associated with the implementation of the Committee's policy proposals, including institutional, legal, transitional and resource matters. Two new institutions are proposed: a National Competition Council, formed jointly by Australian governments to assist in progressing cooperative reforms, and an Australian Competition Commission, which would administer the competitive conduct rules and some other aspects of the new policy.³

3 *Ibid.*, p xxi.

Two particular difficulties had to be dealt with in the recommendations. First, the processes had to recognise the actual and potential roles of nine governments in many of the areas to be covered by a national policy. The National Competition Council was designed to fulfil this function. Its composition and its powers, for example, in the areas of access or pricing declarations, ensure that competition policies affecting multiple governments are limited to significant areas of the national economy and take account of the interests of all involved parties. Second, the processes had to be designed to cope with the various segments of the economy without creating a number of industry-specific regulators. The main arguments against industry-specific regulators included concerns with 'capture' of the regulator by the regulated, potential inconsistencies between industries that themselves were or might be competing given rapid technological advances, and the unnecessary costs of maintaining multiple agencies. We were also concerned that the key skills needed by competition policy regulators were extremely scarce and that the regulatory demands of any one industry in terms of competition policy would be relatively small and infrequent. The small number of authorisations and cases handled by the Trade Practices Commission confirmed this view. Finally, we designed the general institution to be able to co-opt members or retain consultants on those occasions when deep industry expertise was found to be essential.

IV. A POLITICAL APPROACH

Many of the areas of competition policy are not amenable to simple answers based on the application of proven principles. The economic logic on which competition policy is based is still being formulated. Academic reviews of the effectiveness of anti-trust are at best equivocal.⁴ The application of economic theories to issues such as access to a so-called "essential facility" produces much learned though conflicting expert evidence, as seen recently in the New Zealand *Clear Communications* case.⁵ Economic theory is also quite unclear with respect to the relative weight to be given to domestic versus international competition.⁶

Nor are there well established moral principles on which a community can rely to determine when commercial activity ought to be considered *wrong*. Is it *wrong* for Nike's management to seek to energise their staff by adopting the slogan "crush Reebok"? Is it *wrong* for a firm that discovers a gas field to aspire to construct a pipeline for its own use? Is it *wrong* for a group of farmers to seek a regulated cooperative marketing scheme for their products? What each of these examples

4 H Demsetz, "How Many Cheers for Antitrust's 100 Years?" (1992) 30(2) *Economic Inquiry* 207.

5 Note 1 *supra*, p 245.

6 P Yetton, J Craig, J Davis and F Hilmer, "Are Diamonds a Country's Best Friend? A Critique of Porter's Theory of National Competition as Applied to Canada, New Zealand and Australia" (1992) 17(1) *Australian Journal of Management* 89.

illustrate is that what is at issue is more often a trade-off between the interests of groups - Nike versus Reebok, the owner of the pipelines and the community who would like others to find and pipe in competing gas, or the farmers and their customers.

In practice then, with the exception of the kinds of rules in Part VI of the *Trade Practices Act*, formulating and applying competition policy often requires political decisions. As Bernard Crick wrote:

Politics is too often regarded as a poor relation, inherently dependent and subsidiary; it is rarely praised as something with a life and character of its own. Politics is not religion, ethics, law, science, history, or economics; it neither solves everything, nor is it present everywhere ...⁷

Politics arises then ... in organised states which recognise themselves to be an aggregate of many members, not a single tribe, religion, interest, or tradition. Politics arises from accepting the fact of the simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under a common rule. It does not matter much how that unit came to be - by custom, conquest, or geographical circumstance. What does matter is that its social structure, unlike some primitive societies, is sufficiently complex and divided to make politics a plausible response to the problem of governing it, the problem of maintaining order at all.⁸

While others would often prefer a 'more expert' or 'less biased' approach to these decisions, in democracies such as Australia, politics can be defended as an appropriate, if not the most appropriate, process.

The mechanisms that the Committee developed were designed to facilitate and improve the political process by emphasising transparency and providing political decision makers with high quality, expert, pragmatic advice that highlighted the trade-offs to be made. And since these are most often trade-offs between the interests of different groups - firms, groups of consumers, industries, investors, or regions - we took the view that at least the most significant trade-offs should be made by elected representatives, not administrators or judges. We were thus comfortable with legislators taking a broad view of 'public interest' but preferred to see a narrower approach taken by the Australian Competition Commission. For competition policy is not fundamentally about right or wrong, good or bad, but about the incentives to invent and produce efficiently, the benefits and costs of creating these incentives, and the ways in which the resulting benefits and costs are to be distributed.

7 B Crick, *In Defence of Politics*, Penguin (1964) p 15.

8 *Ibid*, p 17-18.