1994 THEMATIC ISSUE UPDATE

COMPETITION POLICY - A STOCKTAKE

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Competition policy is at the heart of micro-economic reform and has been embraced here and elsewhere as vital for the promotion of informed and competitive markets.[1] In Australia, this process gained significant momentum following the commissioning by the Prime Minister in October 1992 of an independent inquiry into national competition policy. That report, chaired by Professor Fred Hilmer (and after whom the report is usually cited),[2] was completed on 25 August 1993.[3] Commentaries on these reforms and indeed other significant developments in competition policy were recently published in a single thematic issue of the *University of New South Wales Law Journal*.[4] The purpose of this article is to review the reform process in the light of the timely release of the Thematic Issue.

The Hilmer Report made a number of wide ranging recommendations for the reform of Australia's competition policies. A number of these were directed at the

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1 See FG Hilmer, "The Bases of Competition Policy" (1994) 17 *UNSW Law Journal* ix and the comments of the Independent Committee of Enquiry, *National Competition Policy*, 1993, chapter 1 (hereafter the "Hilmer Report").

2 The Hilmer Report, *ibid.*

3 For a short summary see the executive overview in *ibid.*

4 The Thematic Issue was devoted entirely to competition policy (1994) 17 *UNSW Law Journal.*

Competitive Conduct Rules.[5] Others related to the introduction of new institutional structures[6] and the establishment of new processes, such as the new access regime. However, as Hilmer himself has identified, the nature and the level of reform is a trade off between competing interests which are accorded the appropriate weight through the political process.[7] This process was endorsed by the Council of Australian Governments[8] which agreed to the following proposals:

- the revision of the Competitive Conduct Rules and their extension to cover state business enterprises;
- the application by individual States of agreed principles on structural reform of public monopolies, competitive neutrality and review of regulations restricting competition;
- the establishment of prices surveillance of utilities and other corporations having monopoly power and a regime to provide access to essential facilities such as electricity, gas, airports and rail networks;
- the establishment of a new Australian Competition Commission[9] and the Australian Competition Council.

These reforms were foreshadowed in a public discussion paper.[10] Their implementation is imminent following the recent tabling of the Competition Policy Reform Bill 1995.[11]

The reform of merger activity under the *Trade Practices Act* 1974 (Cth) ("the Act") is a key component of the reform process and has already commenced. The legislative history of the provision has been comprehensively canvassed by Pasternak in his review article.[12] In 1991 the Cooney Committee[13] recommended that:

- the dominance test be replaced by a substantial lessening of competition test;
- that guidelines be incorporated into the Act providing guidance on the ambit of the new test;
- that compulsory pre-merger notification be introduced.

All of these recommendations, with the exception of the last, have been incorporated into the Act.[14] The transition from the old to the new test has been assisted by the release by the Trade Practices Commission of its draft merger

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5 This was the expression used by the report to identify those matters regulated by Part IV of the *Trade Practices Act* 1974 (Cth).

6 Such as the merger of the Trade Practices Commission and the Prices Surveillance Authority to form the new Australian Competition and Consumer Commission and, the creation of a new body, The Australian Competition Council.

7 FG Hilmer, "The Basis of Competition Policy", note 1 *supra* at xiv.

8 Notably at the council of Australian Governments meeting held on 19 August 1994.

9 To be known now as the Australian Competition & Consumer Commission.

10 The Competition Policy Reform Bill 1994 (Cth). For a more detailed discussion of some of the more specific amendments see R Steinwall, "National Competition Policy: The New Competitive Conduct Rules", presented at *Trade Practices: A New Regime in the Making*, 3 November 1994.

11 In this paper the 1995 Bill will be referred to as the Reform Bill.

12 L Pasternak, "The New Merger Guidelines and Section 50 of the *Trade Practices Act*" (1994) 17 *UNSW Law Journal* 73.

13 Senate Standing Committee on Legal and Constitutional Affairs, *Cooney Report*, 1991.

14 With effect from 21 January 1993 by the *Trade Practices Legislation Amendment Act* 1992 (Cth).

guidelines.[15] Pasternak makes the following observations in relation to this new test:

> The lowering of the threshold, when coupled with significantly increased monetary penalties means that it is significantly more difficult for firms to proceed on best available advice if there is any degree of uncertainty. Such uncertainty could be exploited by competitors or competing bidders.[16]

The legislature has introduced a list of directory, but non-exhaustive factors to negate this uncertainty.[17] This certainty is further facilitated as these factors have their origins in early antitrust judgments which have subsequently been endorsed and approved by numerous Federal Court decisions.[18]

Although the guidelines do not have any legal basis, they reflect the Commission's views and procedures on merger activity[19] The Commission's evaluation involves a five-stage process, commencing with market definition. If the market is substantial, concentration ratios are used as a filter to eliminate further review where a merger is unlikely to give rise to competitive concerns.[20] Those five stages are:

1. Market definition, including the finding of a substantial market.[21]
2. The Commission is only likely to take further action if:
   - the merger results in the four largest firms having a market share of 75 per cent or more and the merged firm having a market share over 15 per cent; or
   - if the merger results in the four largest firms having less than 75 per cent and the merger resulting in the merged firm having 40 per cent or more;[22]
3. Whether imports are an effective offset against market power.[23]
4. The nature and height of barriers to entry.[24]
5. Other qualitative factors likely to determine the effect of a merger on competition.[25]

It remains to be seen what impact the new test will have on both the administration of merger activity and its influence on the structural make up of Australian industry. In Pasternak's view:

> ...despite the debate and rhetoric concerning the suggestion that the movement from the dominance test to the substantial lessening of competition test represents a change

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15 Trade Practices Commission, *Merger Guidelines - A Guide to the Commission's Administration of the Merger Provisions of the Trade Practices Act*, draft for comment November 1992. The draft is yet to be finalised.

16 Note 12 *supra* at 86.

17 Section 50(3) provides for a number of factors which a court must consider.

18 Their genesis is perhaps the Tribunal's decision in *Re Queensland Co-Operative Milling Association v Defiance Holdings Ltd* (1976) 25 FLR 169. It has been subsequently endorsed in a number of Federal Court decisions including *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305; *Outboard Marine Australia Ltd v Hecar Investments Pty Ltd (No 6)* (1982) 66 FLR 120; *Queensland Wire Industries Pty Ltd v BHP Company Pty Ltd* (1988) 167 CLR 177.

19 Note 15 *supra* at 1.

20 *Ibid* at 19.

21 *Ibid* at [4.22], p 19.

22 *Ibid.*

23 *Ibid* at [4.53], p 28.

24 *Ibid* at [4.57], p 30.

25 *Ibid* at [4.61], p 31.

> in focus from analysis of structure to one of conduct, in practice there will be very little difference in the analysis to be undertaken in determining whether s 50 has been breached.[26]

Rich also believes that the change to a substantial lessening of competition test will not fundamentally alter the qualitative nature of the enquiry.[27] It does perhaps justify a shift in the policy focus from one of mere efficiency to one of international competitiveness through the promotion of domestic competition.[28] Of course, these are not the exclusive aims of merger policy or indeed competition policy. The promotion of broader consumer welfare and the freedom to compete are amongst others.[29] Whatever these other objectives might be, Rich believes, the current merger regulation represents a fundamental divergence from Chicago school thinking.[30]

Like s 50, s 46 of the Act has received a great deal of attention, not so much from legislative review, but through judicial scrutiny[31]. The High Court's decision in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[32] remains the foundation for both the approach and interpretation of s 46. The decision is significant among other things because it confirms that the taking advantage of market power equates with the use of that power in a neutral sense without any moral implication. The High Court observed:

> Pincus J suggested that the phrase 'take advantage' requires that the defendant be doing something reprehensible... It is unclear precisely what the phrases are supposed to mean, but they suggest some notion of hostile intent. For our part, we have difficulty in seeing why a difficult, unexpressed and ill-defined standard should be implanted in the section. The phrase 'take advantage' of s 46(1) does not require a hostile intent inquiry - nowhere is such a standard specified.[33]

The decision has also been construed as imposing a duty to supply or, more generally, a duty to deal where the refusal would be the exercise by a company of substantial market power for a proscribed purpose.[34] Viewed more critically, it becomes apparent that the duty to deal is not absolute and is constrained by a number of considerations. As Hay and McMahon identify, the particular concern is the situation in which a firm refuses to supply an input to a firm that is competitive with it in a downstream segment of the market.[35] They conclude:

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26 Note 12 *supra* at 99.

27 M Rich, "Sons of Uncle Sam: Have They Grown up in his Image? - A Comparative Analysis of the Merger Laws and Policies of Australia and the European Union in the Context of US Antitrust Theory" (1994) 17 *UNSW Law Journal* 109 at 125.

28 *Ibid* at 121. See also the discussion in the Cooney Report, note 13 *supra* at 24-35.

29 Note 27 *supra* at 122. See also the comments of the High Court in *Queensland Wire Industry Pty Ltd v BHP Company Ltd*, note 18 *supra*.

30 Note 27 *supra* at 154.

31 Section 46 was amended by the *Trade Practices Legislation Amendment Act* 1992 (Cth) by inserting subsection 1(a). That amendment provides that a reference to a competitor includes competitors generally or a particular class of competitors, and a reference to a person similarly includes persons generally, or a particular class of persons.

32 Note 29 *supra*.

33 (1987) 167 CLR 177 at 190-9.

34 That is, a purpose identified in paragraph (a), (b), or (c) of s 46(1).

35 GA Hay, K McMahon, "The 'Duty to Deal' Under Section 46: Panacea or Pandora's Box?" (1994) 17 *UNSW Law Journal* 54.

> ...there is a fundamental incompatibility between the general principle that an unintegrated monopolist can charge a monopoly price but an integrated monopolist must sell to its potential downstream competitors at some price other than what it would unilaterally choose. The incompatibility can result in the courts having to take on a price control function they are ill-equipped to handled and in serious distortions in the incentives of firms to participate in vertically related markets.[36]

Indeed it was this very process that would have faced the trial judge in the *Queensland Wire Industries* decision had it not been for a negotiated settlement.

In the current climate of deregulation, corporatisation, and privatisation, the concern has shifted to refusals to deal by monopolists that deny access to a facility on which competitors are dependent.[37] The Hilmer Committee recognised the potential inherent in s 46 for dealing with these "essential facility" situations subject to some concerns.[38] First, there are the difficulties inherent in satisfying the threshold requirement of s 46 and in demonstrating that the taking advantage of market power was related to a proscribed purpose. Secondly, there is the difficulty in courts determining the terms and conditions on which access will be granted.[39] Thirdly, the United States "essential facility" doctrine has not been adopted by the High Court and has indeed been rejected by the full Federal Court.[40]

The development of the "essential facility" doctrine, its reception in Australia, and the problems of accommodating that doctrine within the current framework of s 46 were addressed by Pengilley in his review article.[41]

The Hilmer Committee's concerns as to the court's ability to determine the terms and price at which access should be granted are well founded. They are best highlighted by the difficulties encountered by the New Zealand High Court in the *Clear Communications* case[42] in determining interconnection prices for Clear's access to the NZ Telecommunications Network.[43] The case demonstrates the sophistication necessary in determining access terms and the Court's inability and, in fact, its reluctance to do so.[44] The Hilmer Committee recommended that access to essential facilities be dealt with under a national competition policy by a new legal regime that would create access rights in certain circumstances.[45] That recommendation is reflected in the Reform Bill.[46]

Under the proposal, the new Australian Competition Council may, following request by an applicant, recommend that a service be declared if it is satisfied of all of the following matters:

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36 *Ibid* at 61.

37 See the discussion in the Hilmer Report, note 1 *supra*, chapter 11.

38 *Ibid* at 243.

39 *Ibid* at 243.

40 *Queensland Wire Industries Pty Ltd v BHP Company Ltd* (1988) 10 ATPR [40-841].

41 W Pengilley, "Hilmer and Essential Facilities" (1994) 17 *UNSW Law Journal* 1.

42 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (unreported, High Court of New Zealand, Ellis J and Professor M Brunt, 22 December 1992) and subsequently by the Privy Council in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1995) 1 NZLR 385.

43 See also the discussion in W Pengilley, note 41 *supra* at 30-2.

44 See also W Pengilley, "Determining Interconnection Prices in Telecommunications: New Zealand Lessons on the Role of a Regulator (1995) 2 *Competition & Consumer Law Journal* at 147; V Korah, "Charges for Interconnection to a Telecommunications Network (1995) 2 *Competition & Consumer Law Journal* at 213.

45 Hilmer Report, note 1 *supra* at 266.

46 New Part III(a) Access to Services.

- that access (or increased access to the service) would promote competition in at least one market (whether or not in Australia) other than the market for the service;
- that it would uneconomical for anyone to develop another facility to provide the service;
- that the facility is of national significance having regard to:
  (a) the size of the facility;
  (b) the importance of the facility to constitutional trade or commerce; or
  (c) the importance of the facility to the national economy;
- that access to the service can be provided without undue risk to human health or safety;
- that access to the service is not already the subject of an effective access regime; and
- that access (or increased access) to the service would not be contrary to the public interest.[47]

This prescription lends support to the views expressed by Pengilley that the courts are incapable of adequately dealing with these issues and that the new regime has effectively negated the possibility of an "essential facility" doctrine being developed by Australian courts[48].

Despite the desirability of a separate access regime, Hay and McMahon have expressed concerns that it should not extend beyond two limited circumstances - upstream regulation, where the upstream monopolist is a natural monopoly, or where an upstream firm regularly sells to buyers at a particular price but chooses not to sell to one particular firm or type of firm.[49] They express the view that:

> [f]ailure to limit the scope of the duty may result in the order [imposing a duty to deal] being ineffectual or working unfairly and inefficiently with respect to the vertically integrated monopolist.[50]

One of the challenges for competition policy is its ability to address deregulated markets in the area of telecommunications, broadcasting, and more generally rights in intellectual property conferred by developing technologies. In the area of telecommunications, competition reform has commenced as a staged introduction rather than as full scale deregulation.[51] Here the competition goals are shared between the telecommunications regulator Austel and the Trade Practices Commission.

One of the principal objectives of telecommunications regulation is the promotion of network competition and the subordinate area of telecommunication services. In her review article, Anne Peters has observed that these reforms have had significant effects, although publicly available information is limited[52]. The continuing challenge in telecommunications is to promote wider consumer welfare

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47 Proposed s 44(G)(ii).
48 Note 41 *supra* at 35.
49 Note 35 *supra* at 64-6.
50 *Ibid* at 72.
51 A Peters, "From One Horse Race to Competition: The Telecommunications Marathon - Will the Winners Step up to the Podium Please?" (1994) 17 *UNSW Law Journal* 190 at 195.
52 *Ibid* at 247.

in terms of access to services, quality, and pricing.[53] This is particularly so in a climate of greater concentration of ownership. Hardy, McAuslan, and Madden have recognised that a model for regulation of the telecommunications industry is vital to meet these competing interests. They have cautioned, however, that whatever model is adopted, legislators should be reluctant to give courts regulatory functions.[54]

There has always been an uneasy tension between competition law and the exercise of intellectual property rights.[55] On the one hand, intellectual property rights purport to confer some limited monopoly on the holder and therefore insulate them from full competition. On the other hand, they encourage development and innovation - vital ingredients in the promotion of efficiency. These competing interests have been accommodated to a limited extent in the exemptions provided under s 51(3) of the Act. The Hilmer Committee saw merit in removing the current exemptions and subjecting them to the authorisation process under the Act.[56] In their review article McKeough and Teece have examined the regulation process through the role of collecting societies.[57] Here there is need to guard against the abuse of economic power in the bare exploitation of copyright and indeed other intellectual property rights.[58] The debate has just begun. The Hilmer Committee's call for a re-examination by relevant officials in consultation with interested groups has yet to be explored.

One of the more significant outcomes of the Reform Bill will be the universal application of the Competitive Conduct Rules. The universal application is constrained by two distinct issues. First, the Act extends principally to trading and financial corporations and interstate and overseas trade and commerce, relying respectively on the corporations power and the trade and commerce power in the Constitution. Hence, a number of entities including unincorporated bodies, such as the professions and some government owned businesses are beyond reach of the Act.[59]

Secondly, the construction placed on s 2A of the Act, is that the Act will not bind the Crown in right of a State or Territory.[60] In view of the activities carried on by government instrumentalities, it is hard to justify the retention of that doctrine. Under the Reform Bill these obstacles will be overcome in two ways.

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53 See the review article by C Hardy, M McAuslan, J Madden, "Competition Policy and Communications Convergence" (1994) 17 *UNSW Law Journal* 156.

54 *Ibid.*

55 The reference to intellectual property rights includes the full range of rights recognised at law which grant some form of exclusivity over the manufacture, use or sale of a product, process label or packaging and encompasses patents, copyright, registered designs, and confidential information. See Trade Practices Commission Background Paper, *Application of the Trade Practices Act to Intellectual Property*, July 1991 at 5.

56 Hilmer Report, note 1 *supra* at 151.

57 They discuss copyright enforcement through aggregation of individual copyright in the hands of collecting societies.

58 See the conclusions of J McKeough and S Teece in their review article: J McKeough, S Teece, "Collectivisation of Copyright Exploitation: Competition Issues" (1994) 17 *UNSW Law Journal* 259 at 284.

59 For a discussion of the constitutional impediments see the Hilmer Report, note 1 *supra*, chapter 5; Law Reform Commission of Victoria Discussion Paper No 22, *Competition Law - The Introduction of Restrictive Trade Practices Legislation in Victoria*, April 1991.

60 See the review article, R Steinwall, "The Liability of the Crown and its Instrumentalities under the *Trade Practices Act* 1974 (Cth)" (1994) 17 *UNSW Law Journal* 314.

Participating State legislatures will incorporate a Competition Code.[61] It will be modified to encompass the broader constitutional reach for States and Territories, notably by extending to actions of *persons* as distinct from corporations. Secondly, the Act will be amended to apply to the Crown in right of the States and Territories so far as they carry on a business.[62]

Apart from its obvious application to government agencies and instrumentalities that carry on business, the proposals will also impact on the professions. There has been a plethora of reports into the legal profession.[63] The reform of the legal profession comprises at least two distinct segments: (i) the application to the legal profession of the Competitive Conduct Rules; and (ii) the removal of more localised restraints, such as restrictive rules and work practices which stifle the competitive process.

One of the more controversial proposals is what Farmer describes as the "central plank of the reforms" proposed by the Trade Practices Commission that lawyers not have a statutory legal monopoly over the provision of legal services.[64] The Commission selected the areas of conveyancing, taxation, wills and probate, simple incorporations, and uncontested divorces as areas which could be opened up to competition by licensed persons that are not lawyers.

Of this process, Farmer concludes:

> It is my clear and unambiguous view that, if the measures proposed by the Commission for allowing non-lawyers to compete with lawyers are introduced and if the identity of barristers is diminished in the manner proposed by the Commission, the losers will be users of legal services. While in theory, the introduction of a greater number of people providing legal services may have an effect on reducing the price of legal services in some areas, it will be at the cost of lessening - and probably very considerably - the quality of legal services.[65]

Despite this caveat, the reforms have been set in train and there is unlikely to be any recapitulation.

The legal profession, litigants, and the courts themselves also have a part to play in the reform process. The efficient operation of the court system is equally important in the delivery of timely and cost-effective solutions.[66] In his review article, Justice Lockhart has provided a practical review of the proper handling of Trade Practices litigation.[67] The care and the conduct of the discovery process, the use of telephone and video link conferences, the reception, and use of expert

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61 The competition code will in fact be a schedule to the Reform Act and will incorporate Part IV of the Act in a modified form.

62 Paragraph 76 of the Competition Policy Reform Bill 1995 (Cth) inserting a new Section (2B).

63 Office of Legal Information and Publishing, Attorney-General's Department, *Justice Statement*, 1995; Trade Practices Commission, *Study of the Professions Final Report*, March 1994; Trade Practices Commission, *The Legal Profession, Conveyancing and the Trade Practices Act*, November 1992; "Inquiry into the future organisation of the legal profession in Western Australia" 1983 (the Clarkson Report); Senate Standing Committee on Legal and Constitutional Affairs Discussion Paper 8, *The Legal Profession: A Case for Micro-Economic Reform*, 1992.

64 J Farmer QC, "The Application of Competition Principles to the Organisation of the Legal Profession" (1994) 17 *UNSW Law Journal* 285 at 288.

65 *Ibid* at 297.

66 The delays that can thwart the competitive process are best highlighted by the recent Santos and Sagasco litigation. For a review of the problems encountered in that litigation, see A Kwong, A Year in Santos: Litigation under Part IV of the *Trade Practices Act* (unpublished).

67 The Hon Mr Justice JS Lockhart, "Handling Trade Practices Cases" (1994) 17 *UNSW Law Journal* 298.

evidence and survey evidence are but some of the areas where streamlining can translate into significant efficiencies. The crux of the issue is to "get to the essence of the...case as quickly as possible, discard procedural points that do not lead anywhere, and concentrate on the proof of the crucial issues".[68]

Despite early concerns following the release of the Hilmer Report, the National Competition reforms have not stalled. Indeed the release of the Reform Bill is a clear recognition of the success of the co-operative arrangements between the Commonwealth and the States which will soon translate into the most significant reform of Australia's competition policy.

These reforms have been strengthened by two further developments. In May this year, the Prime Minister released the Justice Statement[69] which addresses a wide range of social policy issues, including the role of competition in the legal profession, the simplification of legislation, and the protection of consumers via reforms to the Act. Secondly, the Government has responded[70] to the report of the Australian Law Reform Commission's report on compliance with the Trade Practices Act.[71] The Report has recommended, among other things, that new consumer remedies be incorporated into the Act.

It is an exciting time in the development of competition policy in Australia. In no small way, the 1994 Thematic Issue of the *University of New South Wales Law Journal* has focused attention on these important developments. It is hoped that the views expressed by the many authors in that Thematic Issue and this review article will inspire further debate.

Editor's Note:

The *Competition Policy Reform Act* 1995 (Cth) was passed in June and received the Royal Assent on 20 July 1995. New South Wales has passed application legislation, namely the *Competition Policy Reform (NSW) Act* 1995. It was assented to on 9 June 1995.

68 *Ibid* at 313.

69 Attorney-General's Department, *Justice Statement*, May 1995.

70 Government response to the Report of the Australian Reform Commission, *Compliance with the Trade Practices Act*, May 1995.

71 The Law Reform Commission Report No 68, *Compliance with the Trade Practices Act 1974*, 1994.