Australian Competition and Consumer Commission

Promoting Competition and Fair Trading

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Advance Australia Competitive and Fair:
A perspective of the Australian Competition and Consumer Commission

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Introduction

These days there exists lively debate about the purpose, administration and effect of public policy.

I want to contribute to that debate today.

I assert here that in the area where I am best qualified to comment - competition and consumer law, and the development of national competition policy - the clear effect of policy has been to advance the public interest.

Competition and consumer law – the *Trade Practices Act 1974* - and competition policy have contributed to the making of a modern dynamic Australian economy.

To explain why we should regard the Act so well, I want to outline some of the key issues facing the Commission at the present time.

In part, these issues can be considered under the heading of making a good Act better and include:

- the clarification of section 46, which is a key pillar of the Act in protecting firms against anti-competitive behaviour
- the need for criminal penalties against hard core cartel behaviour, and
- the Commission's leniency policy.

Scope of Competition Law: Who Benefits?

The fundamental purpose of competition law is to provide benefits to consumers - the community at large, and business itself, which is a beneficiary of competition law. Competition benefits those businesses that are able and motivated to take advantage of opportunities in particular markets. Both consumers *and* businesses benefit.

It is generally agreed that competition is not a goal in itself, but something that is often associated with increased economic efficiency and sometimes other goals equating with a balanced society.

But that said, it has to be made clear that competition law is not intended to prevent individual companies from going under or to protect individual concerns from failure.

Necessarily, failure by some is an inevitable part of the competitive process.

Innovation, higher levels of efficiency, keener pricing, better products and improved standards of service, are the devices by which firms will make their mark, and their profit.

As Schumpeter identified back in 1942, the competitive market is both creative and destructive, and can never be stationary:

> '… The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers, goods, the new methods of production or transportation, the new markets, the new forms of industrial organisation that capitalist enterprise creates.'[1]

Schumpeter identified that innovation in the market would necessarily render prevailing ideas and products obsolete and that this process competes away the profits of rivals.

In fact, sometimes, this process competes away rivals themselves. Competition should be thought about in terms of efficiency gains and other benefits it brings – not about competition in terms of the number of competitors.

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[1] Schumpeter,J.: *Capitalism, Socialism and Democracy*, (New York: Harper, 1975, orig. pub. 1942, pp. 82-85).

Competition law should operate in a manner indifferent to the fate of individual competitors. The important objective contained in the Act is to enhance the welfare of Australians through the promotion of competition and fair trading.

The Commission should not interpret its responsibility to promote competition as to mean the protection of individual companies and the proscription of vigorous, legitimate competition – a competition that sometimes causes difficulties for individual firms.

Vigorous competition is not market failure and it is inconceivable to me that such competition would require of government, or of the Commission, a legal or regulatory intervention.

That said, there is a world of difference between vigorous competition and anti-competitive behaviour.

One leads to clear public benefit; the other results in public detriment.

The task of differentiating between the two needs to be undertaken independently, rigorously, transparently and objectively. In this way the primary focus remains on the interests of consumers - that is to say, the community at large - and is not diverted to protect certain sectors of business from normal competitive disciplines.

This approach was most recently endorsed by the High Court in the Boral case and by the Dawson Committee in its review of the competition provisions of the Act.

In the Boral case, the High Court said:

> 'The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor.'

The Court referred to the danger of confusing lawful, vigorous competitive behaviour, with aggressive intent on the one hand, with anti-competitive behaviour, in the context of alleged predatory pricing behaviour on the other hand.

It may or may not be the case that to protect and nurture competition in a market, it is necessary to take steps to protect competitors or a class of competitors in that market from substantial damage or indeed elimination as a result of a course of behaviour by

another competitor. The provisions of Part IV of the Act are designed to permit that intervention by competition regulators to take place.

It may be, however, that in a set of circumstances where it is appropriate that regulatory intervention take place to prevent an anti-competitive impact of a course of conduct, the regulatory tools available to the competition regulator are inadequate. This of course has been the claim of certain sections of the small business sector since the decision of the High Court in Boral and the publication of the Dawson Committee Report.

It may be that the law, as interpreted by the courts, is not adequately framed to achieve clear economic objectives. If this is demonstrated to be the case, it is appropriate for our legislators to consider modifications while being careful to ensure that the economic integrity of the objectives of the Act are maintained.

Section 46 – Misuse of Market Power

This brings me to the one of the hotly debated provisions of the Act - Section 46.

Section 46 applies to the misuse of market power. Businesses are prohibited from taking advantage of market power for the purposes of eliminating or substantially damaging a competitor, preventing entry into markets or deterring a person from engaging in competitive conduct.

Broadly, the objective of section 46 is to protect the competitive process by preventing firms with substantial market power from engaging in illegitimate, unilateral, anti-competitive conduct. As such, small businesses are assured a measure of protection from the predatory actions of powerful competitors.

Now, several recent judicial decisions, particularly the *Boral* appeal in the High Court, have raised issues as to the application and operation of section 46.

It appears that section 46, as drafted and as interpreted by the courts, does not appropriately implement the stated policy intentions of Parliament. There is not sufficient time to cite the fine detail of our arguments here, so I will just stand one example up for inspection.

It seems that, in supporting a restrictive interpretation of the requirement for a corporation to hold a 'substantial degree of power in the market', the *Boral* decision

of the High Court may result in a narrower application of section 46 than was intended by Parliament.

In 1986, section 46 was amended. The heading of the section was changed from "Monopolisation" to "Misuse of market power". Significantly, the application threshold was intended to be lowered from substantial control to 'a substantial degree of power in a market'.

The majority judgements in *Boral* indicate that the threshold test for the purposes of section 46 has been effectively restored to monopoly or near monopoly, contrary to Parliament's intention in 1986.

The Commission takes the view that it is desirable to provide guidance to the courts and certainty to market participants. The policy intention behind section 46 should be given effect by amending the provision to clarify the following principles:

- the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control
- the substantial market power threshold does not require a corporation to have an *absolute* freedom from constraint – it is sufficient if the corporation is not constrained to a *significant* extent by competitors or suppliers
- more than one corporation can have a substantial degree of power in a market, and
- evidence of a corporation's behaviour in the market is relevant to a determination of substantial market power.

As well as misuse of market power, the Commission has suggested that other desirable modifications to section 46 be considered. The main changes include:

- the clarification of the 'take advantage' element of the provision
- in cases of predatory pricing, an amendment that a finding of recoupment be not required to establish contravention, and
- clarification of whether or not section 46 applies to any use of market power with a proscribed purpose, irrespective of where the conduct occurs.

You will find the reasoning that supports these brief conclusions in our submission to the Senate Small Business inquiry itself.

Criminal Sanctions

You will be aware that the Dawson Committee recommended the introduction of criminal sanctions for serious, or hard-core, cartel behaviour. It was recommended that penalties include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.

The current penalty regime is based on the imposition of pecuniary penalties and does not allow for criminal sanctions.

The Commission views cartel behaviour as an extremely serious offence.

Collusion, price fixing and cartel behaviour exist as forms of silent extortion.

For this very reason, the extremely serious impact hard-core collusion can have on competitive forces, the Commission pushed for the possibility of criminal sanctions as an effective deterrent, not achievable under a civil regime.

The view of the Commission is that the possibility of jail is a far more effective deterrent for the wrongdoer who is considering wrongdoing – even more so, when leniency practices in relation to whistleblowers are working well.

Tax cheats who defraud the Commonwealth of revenue may be subject to criminal liability depending upon the seriousness of their offence. Similarly, pensioners who defraud the Commonwealth's system of social security may be and are sent to jail.

Why should executives who deliberately enter secretive cartel arrangements to defraud their customers, or consumers generally, be treated any differently.

Aside from important considerations of equity in the law, criminal liability, including jail, provides a deterrence not achievable under a civil regime.

Simply put, jail, like death, clarifies the mind marvellously well.

Because of the seriousness of cartel behaviour and the need for an effective regime of deterrence, I am pleased that the Treasurer announced recently that a working party would examine matters identified by the Dawson Review that should be resolved before criminal sanctions can be introduced, and that it would report by the end of this year.

Leniency Policy

In concluding that tougher sanctions should be introduced for hard core cartels, the Dawson Review also concluded that an effective leniency policy would be a potent means of uncovering cartel behaviour.

The Commission recently launched a leniency policy aimed at exposing and stopping secret corporate cartels operating in Australia. The policy encourages corporations and their executives to reveal the most serious contraventions of competition law such as price-fixing, bid-rigging and market sharing.

It was prepared with reference to leniency policies that have been successfully used to break cartels in other jurisdictions such as the UK, the US, Canada and the European Commission.

The policy makes corporate lawbreakers and their executives an offer to cease the unlawful conduct and report it to the Commission. In return they receive a clear, transparent and certain offer of leniency. The catch is, that the policy only applies to the first cooperative company or executive to come forward. The others will be exposed, investigated and if the evidence permits, brought before the Courts.

Importantly, the leniency policy will only apply to the existing regimes under the Act that give rise to several penalties. When criminal penalties are introduced for certain offences, the leniency policy will need to be re-examined to determine its appropriateness, with or without modification, to criminal regimes.

Conclusion

To sum up, it is not the role of competition law to favour one business over another - competition law is not about preserving competitors; it is about promoting competition, and protecting consumers.

The competition test for the courts and for the Commission is set to determine if a course of conduct is likely to substantially lessen competition in a specific market for goods or services.

The task for the Commission is to enforce the Act, rigorously and efficiently.

The task for government is to ensure that Australia's body of competition law remains effective and relevant: specifically in areas like section 46 and in range and scope of sanctions that apply to breaches of the Act.

That way we guarantee that we advance Australia competitive and fair.