THE LEGISLATIVE FRAMEWORK AND COMPETITION POLICY IN AUSTRALIA

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This article reviews the legislative framework which underlies Australian competition law and policy. First, the Australian Constitution plays a key although often unrecognized role in preventing interstate restrictions on competition. Second, Australia's famed National Competition Policy which comprehensively reviewed and removed unnecessary legislative and other government restrictions on competition over a ten-year period from the mid-1990s is now largely dormant. Third, Australia's Competition and Consumer Act 2010 continues to provide a sound framework for the application of competition and consumer law but requires improvement including the introduction of a divestiture power, greater simplicity, the introduction of compulsory pre-merger notification and, in light of court interpretations of the merger law, a refinement of its statutory provisions.

I. INTRODUCTION

This article briefly analyzes, mainly from an economics perspective, the legislative framework governing competition law and policy in Australia. Competition policy is not just about antitrust or competition law. Competition policy covers every aspect of policy that affects the state of competition whether positively or negatively. For the purposes of this article, I briefly review "meta law" matters; government laws and regulations of any kind affecting competition; and some economic questions about the nature of the competition statute, the Australian *Competition and Consumer Act 2010*.

II. META LAWS

"Meta laws" are constitutional or treaty laws that set parameters for legislation (e.g. the Australian and U.S. constitutions, the Treaty of Rome etc.) play an important part in a nation's competition policy. Although rarely mentioned in competition law textbooks, they are the unsung heroes of the promotion of competition especially in regard to the prevention of interstate or intercountry restrictions on competition.

Section 92 of the Australian Constitution, enacted in 1901, provides that "trade, commerce and intercourse between the states shall be absolutely free." Those words have had a major effect on removing restrictions on interstate competition which were rife before the enactment of the constitution, and they continue to play a role in striking down proposed new interstate trade restrictions. This is notwithstanding the fact that the Court and legal minds have had difficulty in making legal sense of the term "absolutely free." That term was introduced in constitutional debates following delegate dissatisfaction with lengthy seemingly legalistic attempts to spell out what was and what was not meant by restrictions on interstate commerce. However, in the last thirty years or so the High Court of Australia has found an economically rational way of interpreting the provision. Its approach is indeed to prohibit restrictions on interstate commerce generally, while recognizing that some forms of state-based regulation e.g. concerning health, have a legitimate purpose and justification even though there may be side effects on the freedom of interstate commerce.

This has recently been made very clear in recent litigation concerning state-imposed restrictions on interstate movement of peoples in situations where a COVID-free state (Western Australia) prohibited any persons from other parts of Australia from entering the state. The High Court made it clear that even if such restrictions limited the rights of individuals to move to anywhere they wished within Australia and even if in this and other cases there may have been some secondary effects on competition, nevertheless if the legislation served a valid wider purpose, then it was not unconstitutional. Accordingly, Section 92 continues to play a critical role in Australian competition policy.

III. NATIONAL COMPETITION POLICY

Australia was renowned for its world leading approach to national competition policy adopted in the mid-1990s. Under this comprehensive policy, every government law, regulation, and action in every sector from agriculture to health without exception and at every level of government was subjected to an independent review over a ten-year period with a view to removing unwarranted restrictions on competition. This massive exercise led to considerable reforms across the whole economy and, along with a vigorous ACCC approach to law enforcement, is believed to have boosted productivity and GDP significantly. However, since the mid-2000s, "reform fatigue" has led to the policy not being continued even though there is unfinished business from that era and even though new sources of restrictions on competition have arisen. In short, the comprehensive national competition policy applicable to all legislation has become dormant, and governments now are effectively free to introduce anticompetitive elements into their laws and actions. There are no signs on the horizon of a renewed interest in the adoption of a national competition policy and there is less interest in whether new laws enacted by governments are having anticompetitive effects.

IV. THE COMPETITION STATUTE

The Trade Practices Act 1974 (now continued as Australia's *Competition and Consumer Act 2010*) was a comprehensive modern competition law prohibiting cartels and anticompetitive agreements, anticompetitive mergers, and abuse of market power. The law also contained consumer protection provisions, especially prohibiting misleading and deceptive conduct. There was an independent regulator (now the Australian Competition and Consumer Commission, or "ACCC") and an array of sanctions. Substantial regulatory functions regarding such fields as telecommunications and energy were added in the 1990s.

Although there have been amendments to the law since then, the underlying framework has stood the test of time. Before considering some of the details, two points should be made.

First, it was decided in 1974 that the Act should specify in considerable detail the kinds of behavior it envisaged would be prohibited. One reason was to aid judges who had had no exposure to competition law in understanding what sorts of behavior the law was concerned with. As a result, the competition provisions are very lengthy. For example, the prohibition on resale price maintenance ("RPM") occupies many pages and spells out most imaginable forms that RPM takes and various forms of behavior that do not constitute RPM. There is a similar lengthy provision about what constitutes exclusive dealing and since the enactment of criminal cartel provisions in 2011 the nature of a criminal cartel is spelt out in great detail.

The result is that the competition provisions of the Act are about 20,000 words long, compared with the few words that constitute the U.S. Sherman Act and the EU competition provisions.

Despite the very detailed specification of the elements of anticompetitive behavior, most parts of the statute have an explicit or implicit competition test as a requirement for an offence. The exclusive dealing prohibitions for example apply only if the behavior substantially lessens competition.

The abuse of market power provision has also had this flavor until recently. They listed a number of forms of behavior where competitors were harmed. However, the Courts drew on other parts of the wording of the abuse of market power provision to read into it a requirement that any breach of the abuse of market power law could only occur if there was a substantial lessening of competition.

The original justification for such a detailed approach is much less strong now that the Courts have had nearly 50 years of experience of the law.

There is a case for now shortening the Act considerably with the underlying principle being simply that any behavior that substantially lessens competition should be prohibited, save for a few per se provisions relating to price fixing, market sharing, bid rigging, and collective boycotts. One effect of the detailed wording is that it often focuses the attention of judges on these specific forms of behavior that are occurring rather than on the competition principle.

In fact, the current detailed wording creates something of a diversion of attention away from the key principles about behavior that substantially lessens competition. Courts need to wade through very detailed provisions to ensure that the behavior is captured by the provision of the statute, and this tends to distract attention from the underlying competition questions.

Some recent progress has been made in the process of "simplifying and shortening" the law, but more needs to be done.

Second, in common with many competition statutes around the world, some of the most fundamental economic features that one might expect in a comprehensive statute addressing competition do not exist. As economics 101 courses state, the heart of monopoly is a high degree of concentration in a market and its principal undesirable outcome is higher prices. Yet Australia's competition statute does not explicitly contain any divestiture provisions (other than in the special case of unlawfully consummated mergers), nor does it contain price regulation provisions (although there are some residual prices surveillance powers that remained buried in the legislation).

The lack of a divestiture power needs reconsideration. There has been considerable and successful use of divestitures in the United States in regard to oil, tobacco, chemicals, and telecommunications. There has also been some use of this power in the UK and elsewhere. In Australia, there has been heavy use of divestiture powers in regard to public utilities but not in regard to the private sector.

In the United States, the divestiture power under antitrust law is only applicable if it is preceded by breaches of the monopolization or other provisions of the law. There is a strong case for introducing this element into Australian law as part of the abuse of market power provisions or perhaps more generally in relation to any possible breaches of the competition provisions. The application of a divestiture law would depend upon a Court determining that there has been a breach of the competition law (especially abuse of market power) and that the best remedy is divestiture.

One of the important benefits of this provision would be to strengthen the sanctions and thereby to strengthen the abuse of market power law. The abuse of market power provisions need to be taken more notice of by business. The current sanctions available under the provisions

of the market power law are quite weak. Rarely or ever are fines imposed. Damages follow up cases are rare. Cases are difficult to win and take many years. Private actions are few. While there has been some improvement in the formulation of the law as discussed below this has at most marginally strengthened its impact. The incentives to comply with this law would be greatly strengthened if there was a possibility of divestiture.

The abuse of market power provisions have recently been changed. Under the new provisions a firm with a substantial degree of power in a market is prohibited from engaging in conduct that has or is likely to have the purpose or effect of substantially lessening competition.

The new provisions contain two important changes. The previous law was only applicable if a Court determined the behavior had the purpose of substantially lessening competition. The fact that the behavior may have the effect of lessening competition was legally irrelevant. Now an effect test has been added. Moreover, it had to be established that a firm with market power was "taking advantage" of its market power before a breach could be established. The term "take advantage" gave rise to many fanciful interpretations of the law that enabled some forms of anticompetitive conduct to survive. The words "substantial lessening of competition" have been injected in place of the former "take advantage of" provision. This proviso places faith in the ability of Courts to apply a competition test properly. We return to this matter when discussing merger law. We also note that the section has long used the term "substantial market power" to avoid any limitations that might arise from the use of the term "abuse of dominance." In addition, the precedent of using the term "substantial market power" has some relevance to debates discussed below about changing the Australian merger law.

Section 50 prohibits mergers which have the effect or likely effect of substantially lessening competition. In the mid-1990s this law replaced a prohibition on mergers that gave rise to dominance or enhanced dominance. The dominance test was generally seen as applicable only if a single firm emerged as dominant in a market. If there were four players in a market each with twenty-five percent market share and there were two mergers resulting in two players with a fifty percent share each, the merger might well have lessened competition but would not have given rise to single firm dominance. The purpose of the change of test to substantially lessening of competition was to cover any mergers that gave rise to a substantial lessening of competition. However, in recent years the ACCC has lost a number of merger cases in the Courts. Several explanations of these losses have been proffered. One is that the case selection by the Commission was poor and/or that its litigation skills were weak. Another is that compared with the 1990s the defense bar is much better and more skillful than it used to be.

My own view, and that of the outgoing Chair Rod Sims, is that the problem lies in the Court's interpretation of the words "substantial lessening of competition." Compared with the former dominance test, two changes have occurred. The first is that the wording has tended to encourage a move away from the emphasis on structural conditions in the market. Under the dominance test, the Court first looked at whether the effect of the merger was to increase concentration and dominance. The new words, however, have an implied emphasis on behavior or conduct in the market and open the door more to speculative reasoning about the nature of the conduct that might arise following a merger. Defendants are able to paint sometimes fanciful pictures of possible competitive outcomes despite the increase in concentration.

Second, the test tends to make Courts look more into the future than they did under the dominance test. The dominance test has a focus on the immediate impact on concentration and dominance even if in theory at least a longer-term view is required. The substantial lessening of competition test, however, tends to point to the need for a much longer-term view of the impact of the merger. Once that happens, this opens a range of speculative outcomes which make it more difficult for the Courts to determine with sufficient certainty that the merger may be harmful. There is much to be said for injecting additional terminology, such as wording prohibiting "mergers that substantially lessen competition or that create or enhance substantial market power."

There was a sustained battle over a period of thirty years about whether the abuse of market power law should be changed. One outcome of the very substantial pressure from small business, farmers, and others for changing the abuse of market power law was that politicians were concerned not to change this part of the Act because of heavy pressure from big business interests. This diverted much of the pressure into the development of legislation that is peripheral to market power abuse concerns, but is still substantial in its effect. The most important set of changes related to the introduction of a prohibition on unconscionable conduct that was enforceable by the ACCC. There was also provision for industry codes of conduct to regulate some vertical relationships between for example oil companies and service stations, franchisors and franchisees, grocery providers and retailers etc. and there is currently debate about the introduction of an unfair contracts law which goes a step further than an unconscionable conduct law.

Australia is one of the very few countries that does not require compulsory pre-notification of mergers, at least those that are substantial. The system of informal notification does not work badly. Most firms pre-notify and provide the information that the ACCC wants. However, some exploit the informality by not submitting mergers or by withholding information that the regulator wants or by engaging in various forms of gaming behavior e.g. providing last minute information. There is a strong case for introducing compulsory pre-merger notification. The costs of

this would not be high, since most firms already notify properly. It is also true that the benefits, although tangible, are not very large, but it would be better to put the notification scheme onto a proper statutory footing.

V. SHOULD THE STATUTE BE CHANGED?

Should the statute be changed?

Outgoing Chairman Rod Sims has proposed that it should be. In retrospect, it would have been preferable in the 1990s to have changed the dominance test to a prohibition on the acquisition or strengthening of substantial market power. This would have retained the more structural and immediate flavor of the test than the words "substantial lessening of competition." Another lesser point is that the new provision is less applicable to acquisitions by firms with substantial market power of very minor but potentially significant potential competitors (e.g. digital platforms' acquisition of small startup firms that could be future rivals).

The 1974 Trade Practices Act provided a sound foundation for the application of modern competition law. Despite considerable pressures to weaken the law, it has survived with some changes and improvements. There continues to be a need to make some changes to convert the law from a good one to an excellent one.

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