IMPACT OF COMPETITION POLICY REFORMS ON RURAL AND REGIONAL AUSTRALIA

SUBMISSION TO THE PRODUCTIVITY COMMISSION

Ray Steinwall
Solicitor of the High Court of Australia
Adjunct Lecturer in Trade Practices Law, Faculty of Law, University of NSW

Introduction

This submission addresses the extension of Part IV *Trade Practices Act 1974* (Act) through the Competition Code of each State and Territory. It also suggests an approach for determining whether legislation, particularly statutory marketing legislation, contravenes Part IV. It is not intended as an exhaustive treatment of the legal principles involved but rather as a suggestion of how the issue might best be approached.

The application of the Trade Practices Act

The constitution imposes limits on the Commonwealth's legislative power. The Commonwealth has no general power to legislate with respect to competition or trade practices.

The corporations power in s51 (xx) of the Constitution is the primary source of legislative power for competition regulation. However, s6 gives the Act an extended operation to natural persons in reliance on other heads of constitutional power. This includes the trade and commerce power[1], the territories power[2], control of the executive government[3] and the incidental power[4]. These limitations continue to this day. Consequently the Act only[5] applies to a body corporate that is a foreign corporation, a trading or financial corporation formed within the limits of Australia and a body corporate incorporated in a Territory. The

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1 s 51(i) Constitution
2 s 51 (ii) Constitution
3 s 52 Constitution
4 s 51 (xxxviv) Constitution

consequence is that a number of entities are beyond the reach of the Act. This includes bodies corporate that are not foreign, trading or financial corporations, for example certain government authorities. Similarly individuals and unincorporated associations are beyond its reach.

The constitutional implications have for all practical purposes, been overcome by each State and Territory applying the Competition Code. The Conduct Code Agreement signed by jurisdictions in April 1995, required the States and Territories to enact the Competition Code by way of application legislation to all persons within their legislative competence[6]. The Competition Code comprises a schedule version of Part IV. The significant difference between the schedule version and Part IV is that the former refers to the conduct of "persons" as distinct from merely corporations. It is therefore able to apply to any person, regardless of the business structure used. This is because the States and Territories are not subject to the same constitutional limitations as the Commonwealth.

It is quite clear that the Act is intended to operate concurrently with the Competition Code[7]. However, if an act or omission is an offence against the Act and also an offence against the Competition Code and the offender has been punished for the offence under the Competition Code, the offender is not liable to be punished for the offence against the Act. Similarly, if a person has been ordered to pay a pecuniary penalty under the Competition Code, the person is not liable to a pecuniary penalty under the Act in respect of the same conduct[8].

The validity of an authorisation, notification or other thing given or done for the purpose of the Act is not affected only because it was given or done also for the purpose of the Competition Code[9].

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5 Except where the extended operation in s6 is attracted.

6 *Competition Policy Reform (New South Wales) Act 1995; Competition Policy Reform (Victoria) Act 1995; Competition Policy Reform (Queensland) Act 1996; Competition Policy Reform (South Australia) Act 1996; Competition Policy Reform (Western Australia) Act 1996; Competition Policy Reform (Tasmania) Act 1996; Competition Policy Reform (Northern Territory) Act 1996; Competition Policy Reform (Australian Capital Territory) Act 1996.*

7 s150G.

8 s150H.

9 s150J.

The application of the Act to statutory marketing authorities

The issues paper makes the following statement:

> "Practices adopted by some statutory marketing authorities which could be regarded as anti competitive, if not for the exemption from the Trade Practices Act, include price fixing, single desk selling, marketing sharing and misuse of market power (see Table 2)"[10].

A number of points need to be made by way of clarification. First, practices may be anti competitive, though not necessarily in breach of Part IV[11]. It therefore follows that exemptions, authorisations and notifications are not required for anti-competitive practices that do not breach Part IV. This is why there are legislative review obligations on jurisdiction, under Clause 5 of the Competition Principles Agreement, quite separately to the Act.

Secondly, Part IV does not prohibit *practices* per se. Rather, it prohibits practices only when they are performed by persons to whom Part IV applies, and in respect of which there is no relevant exemption, authorisation or notification. It is therefore confusing to ask whether a practice breaches Part IV in isolation to identifing the person alleged to have engaged in the practice.

The question of whether practices carried out under State and Teritory statutory marketing legislation infringes Part IV is best answered by considering the following questions in the following order:

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10 Issues Paper, p8.

11 The same is true for the Competition Codes. However for convenience the submission refers simply to Part IV.

1 ***What is the relevant anti- competitive conduct?***

Legislation establishing a statutory marketing scheme will usually contain provisions which may contravene Part IV. These include:

- the compulsory vesting of products in an authority
- the compulsory acquisition of products
- the fixing of prices at one or more stages in the chain of production
- the maintenance of territorial monopolies
- the appointment of exclusive agents
- compulsory levies
- centralised marketing, advertising and promotion
- single desk selling

2 ***Are the legislative provisions inconsistent with Part IV?***

A State law which is inconsistent with the Act, will be invalid to the extent of the inconsistency[12].

However, section 150G provides that the Act is not intended to exclude the operation of any State or Territory law that applies the Competition Code, to the extent that the application law is capable of operating concurrently with it. Similarly, s51AAA expresses Parliament's intention that a law of a State or Territory should be able to operate concurrently with Part IV unless directly inconsistent with it.

The effect of these provisions is that no issue of "covering the field" inconsistency arises. That is, Part IV is not intended to represent an exhaustive statement of the law in this area. Therefore, it is only in cases of direct inconsistency that Part IV will prevail over State legislation[13].

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12 s109Constitution.
13 *General Motors Acceptance Corporation v Credit Tribunal* (1977) 137 CLR 545;14 ALR 257.

3 *Who is engaging in the relevant conduct?*

Part IV prohibits persons engaging in specific conduct. A breach of Part IVexposes a person, to among other things, pecuniary penalties under s76. The Court may order a person to pay a pecuniary penalty if it is satisfied that a person has contravened a provision of Part IV[14]. However, liability extends not only to a person who has contravened but also to anyone involved as an accessory[15]. Therefore in each case it is necessary to ask whether a person has contravened Part IV or has been involved in an contravention as an accessory.

In the case of a statutory marketing scheme, the potential contravenors include the relevant statutory authority, the producers and others to whom the Act applies.

The liability of a statutory authority

Statutory marketing legislation will generally indicate the legal status of the relevant statutory authority. For example the *Dairy Industry Act 1979 (NSW)* provides for the establishment of a corporation under the name of the New South Wales Dairy Corporation[16]. It also provides that the corporation is a statutory body representing the Crown[17].

Until 1977, the Act made no reference to the Crown. The "Crown" refers to the executive arm of government[18]. It is separate from the legislative and judicial arms of government in keeping with the separation powers doctrine under the Constitution. Following the recommendations of the Swanson Committee in 1976[19], s2A was inserted. It provides that the Act binds the Crown in right of the Commonwealth insofar as the Crown carries on a

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14 s76(1)(a).
15 s76(1)(b).(f).
16 s76(1).
17 s7(4)(b).
18 Hogg P W, *Liability of the Crown*, Law Book Company Limited, 2nd Edition 1989, p9-10.

business either directly or by authority of the Commonwealth. Following the passage of the *Competition Policy Reform Act 1995,* s2B was inserted to apply in a similar way to the Crown in right of each of the States, the Northern Territory and the Australian Capital Territory, so far as they carry on a business.

In the absence of an express statement, it will be necessary to determine whether the authority represents the Crown. If the authority represents the Crown, it will be liable to the Act only if it carries on a business. Business is defined in s4 to include a business not carried on for profit. However, the Act is silent on what constitutes a business activity. In *Fasold v Roberts*, the Court undertook a useful review of the previous authorities and the characteristics of a business activity[20].

If the authority is not involved in a business, then it is not subject to the Act, regardless of its conduct. However, the protection may not only extend to the authority, but also to those with whom the authority deals – what I term "derivative immunity". Derivative immunity attaches to persons with whom the Crown has an interest because the application of legislation to them would prejudice the interests of the Crown[21]. For example, persons with whom the authority has contractual relations may benefit from the derivative immunity if the enforcement of Part IV against those person would prejudice the authority.

4 *Is there any relevant conduct?*

A distinction needs to be made between persons who are subject to the Act and those who are liable under the Act. In general terms, every person (except the Crown involved in non business activities) is *subject* to the Act. However, a person will only be *liable* under the Act if their conduct contravenes any of the prohibitions in Part IV.

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19 Trade Practices Review Committee,*Report to the Minister for Business and Consumer Affairs*, Australian Government Publishing Service, Canberra, 1976.

20 (1997) 145 ALR 548; (1997) ATPR 41-461.

21 *Braken Consolidated Limited v Broken Hill Proprietary Company Limited* (1979) 145 CLR 107 per Gibbs ACJ.

The issue is more easily addressed in the case of the per se offences, namely collective boycotts, price fixing, misuse of market power, third line forcing and resale price maintenance. There are enormous difficulties identifying whether such conduct is in breach of the non per se offences, particularly anti-competitive contracts, arrangements and understandings and exclusive dealing. This is because a contravention is not established unless it is proven that the relevant conduct had the purpose or effect of substantially lessening competition in a market. A market is defined in s4E as a market in Australia comprising substitutable goods and services. Although the legal principle can be stated simply, determining the boundaries of a market involves complex factual issues.

5 Is the relevant conduct protected by an exemption, authorisation or notification?

Part IV will not apply to conduct protected by a relevant exemption under s51. Similarly the conduct may be the subject of an authorisation by the Australian Competition and Consumer Commission or notification, in the case of exclusive dealing practices under s47.