Review of the *Prices Surveillance Act 1983*

Submission to the Productivity Commission

Introduction

This submission is in response to the Productivity Commission's Issues Paper.[1] It addresses three issues:

- The objectives of the *Prices Surveillance Act 1983* (PSA)
- The price oversight mechanism in the Competition Principles Agreement
- The relationship between prices oversight and Part IIIA *Trade Practices Act 1974* (TPA)

Objectives of the Act

Section 17(3) of the PSA directs the Commission to have regard to three considerations which may be broadly stated as:

- maintaining investment and employment
- preventing an abuse of market power
- discouraging wage cost increases.

As the issues paper indicates, these criteria are of course not expressed as objectives of the PSA but can perhaps be viewed as defacto objectives. As the issues paper also indicates, it is reasonable to assume that the PSA was enacted in response to broader policy issues including to address inflationary trends in the market.

The consequence is that the PSA has a number of policy aims, some of which may conflict.

Discouraging a company that is in a position substantially to influence a market from taking advantage of its market power in setting prices is a feature of the competition law[2] in Australia and elsewhere[3]. For instance s46 of TPA provides:

> "A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of –
>
> (a) Eliminating or substantially damaging a competitor ….

---

[1] *Review of the Prices Surveillance Act 1983*, March 2000.

[2] The competition law refers to Part IV of the *Trade Practices Act 1974* and the Competition Codes in each State and Territory.

[3] For example s2 *Sherman Act 1890* (US), Article 82 EC Treaty.

(b) Preventing the entry of a person into that or any other market; or

(c) Deterring or preventing a person from engaging in competitive conduct in that or any other market".

Section 46 applies to any circumstance in which a corporation with substantial market power inappropriately takes advantage of that power. It does not require a monopoly or near monopoly situation. It is true that the existence of substantial market power is often considered as the ability of a firm to *raise prices* above the supply cost without rivals taking away customers in due time: Supply cost being the minimum cost an efficient firm would incur in producing a product.[4] However s46 is not itself limited to conduct relating to the setting of prices. The section applies for example to refusals to supply and exclusionary behaviour.

Subject to some minor qualifications, s46 applies uniformly to all entities regardless of the business structure employed or the goods and services they produce.[5] It is therefore hard to justify the inclusion in the PSA of a criterion (prohibiting a misuse of power) which already exists as part of Australia's competition law. Indeed to justify inclusion of this criterion in the PSA requires some cogent evidence that the goods and services to which the PSA applies are some how different to other sectors of the economy and warrant special attention. There is little doubt that most of the organisations currently declared under the PSA are already subject to s46 of the TPA.

Another feature of s46 is that is does not deprive an organisation the freedom to set the price that it wishes, even prices that are well above competitive levels. There is no contravention of s46 unless the price setting decision of the organisation is for one of the prohibited purposes. Absent this, there is complete freedom on pricing.

There are a number of objectives of the competition law. Two important objectives are the promotion of economic efficiency and the protection of consumers. Indeed economic efficiency is viewed by some as the sole objective of competition law. If this is accepted, then it follows that the inclusion of a competition criterion in the PSA (misuse of market power) must similarly be justified on efficiency grounds. However, the defacto objectives of the Act are clearly driven by considerations other than efficiency or efficiency alone.

Clearly it is difficult to develop a meaningful and coherent model for the PSA unless its objectives are clear and expressly articulated. The nature and form of regulation is invariably dependant on the policy approach adopted.

---

[4] *Queensland Wire Industries Pty Limited v Broken Hill Pty Co Limited* (1989) ATPR 40-925 at 50,008; *Trade Practices Commission v Pioneer Concrete (Qld) Pty Limited* (1994) ATPR 41-317; *Photo-Continental Pty Limited v Sony (Australia) Pty Limited* (1995) ATPR 41-372; *Regents Pty Limited v Subaru (Australia) Pty Limited* (1998) ATPR 41-647 at 41,175.

[5] This results from the National Competition Policy and the enactment in the States and Territories of the Competition Code which mirrors Part IV TPA.

Part 4 of the TPA

The issues paper notes:

> "In addition, Part IV of the TP Act seeks, amongst other things to prevent monopolies forming, through the prohibition of mergers that lead to a substantial lessening of competition".

Section 50 of the TPA prohibits the acquisition of shares or assets if the acquisition would have the effect or likely effect of substantially lessening competition in a market. However monopolies may form despite s50. For instance, s50 will not apply where a position of monopoly is created through innovation or the exploitation of exclusive rights, perhaps intellectual property rights. Section 50 will also not apply to creeping acquisitions. These are smaller acquisitions each of which do not have the capacity to substantially lessen competition in a market. However, taken together they may result in the creation of monopoly or near monopoly. Section 50 and indeed the competition law itself does not prevent the formation of monopolies in this way.

Once formed, these monopolies are free to implement their own pricing decisions, as long as those decisions do not infringe, among other things the prohibition on misuse of market power in s46. Therefore reliance on s50 alone to prevent the formation of monopolies and to control the pricing decisions of those monopolies may not be effective.

A further concern with adopting Part IV TPA is the difference in its focus when compared to the PSA. The PSA applies to declared goods and services. By contrast the TPA does not apply to goods and services per se, but rather competition in relevant *markets* for goods and services. The concept of a market in the TPA recognises the existence of goods and services and substitutes for them[6]. A focus on specific goods and services (such as those that may be declared under the PSA) may result in a narrower market than that which actually exists. The reason is that there may be available substitutes for the declared goods and services so that the relevant market encompasses those goods and services together with their *substitutes.* Too narrow a market definition will severely overstate the market power of the incumbents and their corresponding ability to influence price.

If real and effective substitutes exist, the potential for that substitution imposes a competitive discipline on organisations wishing to take advantage of their market power, for example by pricing substantially above competitive levels.

[6] Section 4E TPA.

One conclusion which may be drawn from the declaration of goods or services under the PSA, is that the supplier of those goods and services is not constrained in its pricing decisions. By definition this can only occur if there are no other suppliers of competing goods and services or if those suppliers lack the market power to influence the supplier of the declared goods or services. It this is not so, then a case needs to be made for why these declared organisations should not simply be subject to the competition law. If this is so, then one must accept that as a matter of policy it is considered appropriate to regulate their pricing decisions, beyond that of the competition law. For example in a similar way that state bodies regulate the pricing decisions of utilities and government monopolies by fixing maximum prices or setting maximum revenues.[7]

[7] For example, The Independent Pricing and Regulatory Tribunal of NSW and the Office of Regulator General Victoria

Part IIIA of the TPA

The Hilmer committee report was the impetus for the enactment of Part IIIA[8]. In general terms, Part IIIA enables parties to obtain access to services provided by means of a facility (whether in public or private ownership) provided that certain criteria are met.

Access may be sought through a process of declaration or the provision of an undertaking to the Australian Competition and Consumer Commission (ACCC).

Critical to the declaration process is s44G. The National Competition Council (NCC) cannot recommend to the Minister that a service be declared unless it is satisfied of all of the following:

(a) That access to the service would promote competition in at least one market, other than the market for the service;

(b) That it would be uneconomical for any one to develop another facility to provide the service;

(c) That the facility is of national significance;

(d) That access to the service can be provided without undue risk to human health or safety;

(e) That access to the service is not already the subject of an effective access regime.

In deciding whether to accept the recommendation, the Minister is obliged to consider the same matters as the NCC. Part IIIA incorporates a negotiate/arbitrate model. That is, the parties may negotiate the terms and conditions of access or failing agreement the matter will be resolved through arbitration by the ACCC.

The service must be provided by a facility. Although the expression "facility" is not defined it clearly extends to significant infrastructure facilities like a pipeline. There is further support for this in the requirement that the facility be of *national* significance.

The uneconomic to duplicate requirement has been interpreted by the NCC as requiring a monopoly or near monopoly situation[9]. Access must also promote competition in a market other than the market for the service. For instance a market upstream or downstream of the supplier.

There are therefore a number of difficulties in extending the declaration process to those sectors currently declared under the PSA. First, the PSA is concerned with the

[8] Report of the Independent Commission of Inquiry, National Competition Policy, AGPS, Canberra August 1993.

[9] National Competition Council, *The National Access Regime*, August 1996.

end product or service of the declared organisation. It does not necessarily concern itself with access to the facility by which those products or services are produced. Second, the organisation whose products or services are declared under the PSA may not be a monopoly or near monopoly supplier.

In any event, if the declared organisations meet the criteria for declaration under s44G, their services may be declared under the current provisions of Part IIIA. However it is unlikely that some of those organisations would satisfy the criteria in s44G.

Part IIIA permits arbitration of an access dispute by the ACCC. However, the right to arbitration applies only in relation to a declared service. As indicated, the criterion in s44G must first be satisfied before a service can be declared.

Alternatively, a person who expects to be the provider of a service may provide a written undertaking to the ACCC in relation to access to the service. However, the service must be a *service* that is provided by a *facility* and therefore, the considerations noted above continue to apply.

Prices Oversight

Clause 2 of the Competition Principles Agreement (Agreement) requires that the States and Territories establish independent sources of price oversight.[10] The independent source of price oversight should have, among other things the following characteristics:

- Its prime objective should be one of efficient resource allocation but with regard to any explicitly identified and defined community service obligations imposed on a business enterprise by the government or legislature of the jurisdiction that owns the enterprise;
- It should apply to all significant government business enterprises that are monopoly, or near monopoly, suppliers of goods or services.

Although clause 2 of the Agreement does not expressly apply to the Commonwealth, the Commonwealth is nevertheless a party to the Agreement. One option is to consider amending the PSA so it is the independent source of price oversight for the Commonwealth, in much the same way as the States and Territories have implemented price oversight mechanisms.

One consequences of this approach is that Clause 2 of the Agreement will require that the PSA's prime objective relate to efficient resource allocation with due consideration to community service obligations. The other feature is that it need only extend to significant government business enterprises. At present, those organisations that are declared under the PSA are not necessarily government business enterprises. Also those government business enterprises must be

[10] Competition Principles Agreement, 11 April 1995.

monopoly or near monopoly suppliers of goods or services. Again, this is not a requirement for declaration under the PSA.

An amendment to the PSA in this way would represent a consistent treatment of price oversight by the States, Territories and the Commonwealth. It also goes some way towards more clearly articulating the objectives of the PSA and the policy basis under which it should proceed.

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