

SUBMISSION TO REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974 BY THE CENTRE FOR COMPETITION AND CONSUMER POLICY, AUSTRALIAN NATIONAL UNIVERSITY

The Centre for Competition and Consumer Policy is a member centre of the Regulatory Institutions Network (RegNet) at the Australian National University. RegNet's primary ambition is to assist regulatory policy in Australia to become more evidence-based. With the very partial exception of criminal justice policy, regulatory policy in Australia has been appallingly free of evidence-based assessment.

The Centre for Competition and Consumer Policy is collaborating with the ACCC on a number of projects to evaluate the operations of the competition provisions of the Trade Practices Act. The Centre for Competition and Consumer Policy wishes to declare that it expects to receive funding support from the ACCC for part of its work.

RegNet believes the ACCC deserves credit for opening up its policy, compliance and enforcement work to independent evaluation by a research group noted for the robustness of its critical evaluations of regulatory practice. RegNet submits to the Review that it should give credit to the ACCC for taking the risk of this collaboration with the ANU and that the Review should lend its authority to the need for a more evidence-based approach in general to settling conflicts over the effectiveness of competition policies.

There is little we can say beyond this in the present submission. The appendix outlines our work program for the next few years. Two of the projects have recently got under way – the evaluation of the effectiveness of ACCC enforcement actions; and the interaction of intellectual property and competition law and policy.

However, members of the Centre have a strong past record of regulatory research in other places and other regulatory fields on questions that are of concern to the Committee, including accountability, consistency, the impact of publicity on corporate offenders, globalization of competition policy, regulatory deterrence and procedural justice in regulation. Members of the Centre would therefore be pleased to meet with the committee or its staff to respond to questions if this would be in any way helpful to you.

Imelda Maher
Director, Centre for Competition and Consumer Policy

CENTRE FOR COMPETITION AND CONSUMER POLICY

Regulatory Institutions Network, ANU

Introduction

The Centre for Competition and Consumer Policy (CCCP) has been established to expand understanding of how and why compliance arises in the regulation of competition and consumer policy; and how to improve the effectiveness of national and international competition regulation in global markets. A specialized research unit, the Centre brings together academics from economics, law, sociology, social psychology, geography and public administration backgrounds as well as non-academic experts, to engage in research on compliance, globalisation and its impact on issues such as international cartels, standard setting, consumer guarantees, parallel importing and intellectual property rights. The work of the Centre examines national competition and consumer policy through the lens of the internationalisation of trade and the implications this has for the direction of policy formation, policy implementation and enforcement. It will examine the needs, values, attitudes and behaviour (1) of those subject to competition policy, from multinationals through to small local businesses, (2) of consumers who are the ultimate beneficiaries of an effective competition and consumer policy regime, and (3) of those responsible for its implementation and enforcement (the ACCC and, to a limited degree, other competition agencies such as those located in the US and the EU).

The Centre represents a three-to-six year research partnership between the Australian National University and the Australian Competition and Consumer Commission (ACCC). The Centre is established as part of the Regulatory Institutions Network (RegNet), a network of regulatory researchers coordinated through the Research School of Social Sciences in the Institute of Advanced Studies of the University.

Under the partnership arrangement, the work of the Centre, in developing a deeper and more systemic understanding of competition and consumer compliance has three main aims:

- to improve the effectiveness and coherence of the competition and consumer policy
- to improve the ACCC's compliance management strategies and processes
- to contribute internationally to scholarship in the field of regulation.

Academic Members

Director

Ms. Imelda Maher, Law Program, Research School of Social Sciences (RSSS)

Members

Professor John Braithwaite, Law Program RSSH

Professor Geoffrey Brennan, Social and Political Theory Program, RSSH

Mr. Robin Brown, Foundation for Effective Markets and Governance (FEMAG)

Mr. Alex Bruce, ACCC/Law Faculty, ANU

Mr. Tony Charge, Australian Tax Office

Ms. Sasha Courville, Regulatory Institutes Network (RegNet)

Dr. Dhammika Dharmapala, Economics Program, RSSH

Professor Peter Drahos, RegNet

Mr. Brent Fisse, Gilbert & Tobin Solicitors, Sydney (representative of Board of Advisory Fellows)

Mr. Howard Hollow, FEMAG

Dr. Christine Parker, University of Melbourne and ANU Research Affiliate

Mr. Colin Scott, Law Program, RSSH

Professor David Soskice, Social and Political Theory Program, RSSH

Mr. Hank Spier, FEMAG

Ms. Vij Vagarajan, Ph.D. student, Law Program, RSSH

Mr. John Wood, FEMAG

Projects

The projects below vary in their scope and intensity with the projects on compliance and on the effects of globalisation being the most ambitious. It is expected that all but the compliance and globalisation projects would be completed within the initial three years of funding while the five elements of the globalisation project will straddle the full duration of the partnership.

All projects are expected to lead to the publication of papers in major international and Australian academic journals, reflecting the backgrounds and expertise of the researchers themselves and the relevance of the work for an international audience. As well as individual members presenting papers themselves at academic seminars, workshops and international conferences, the Centre will also organise a number of workshops and

conferences bringing together academics, policy-makers and regulators with an interest in the research. Where this is an intended outcome, it is referred to specifically in discussion of the project. Some of these projects may also lead to publication of conference papers in the form of edited collections, with at least one monograph forthcoming from the globalisation project.

Project I

Evaluating the Effectiveness of ACCC Compliance and Enforcement Activity

The key researchers are Christine Parker and Imelda Maher. This is an evaluative project where quantitative and qualitative research methods would be applied to assess levels of compliance in different sectors and in market actors of different sizes and in different locations. The aim is to provide a better understanding of compliance behaviour and enforcement methods and their impact, including unintended consequences, if any. Outputs include conference papers and at least one theoretical article and two policy orientated article. The project will run from January 2002 to July 2005.

Initially, there will be a review of the academic literature on compliance, culminating in an in-house seminar for ACCC staff setting out the main findings and trends. The project will move onto the first phase of qualitative interviews.

Senior officers of companies that have been the subject of ACCC compliance and enforcement efforts in recent years will be interviewed. Companies would be selected purposively to include the most likely successful cases, the most likely cases of major failure and some cases where no one knows whether the work has been successful or not (and where it might be particularly instructive to find out). Changes in the nature of the relevant markets would be examined quantitatively and qualitatively.

The second phase of the project will centre on a quantitative survey. Approximately 200 entities will be included, about 100 that have been subject to ACCC enforcement action over the previous 5 years and matched controls of 100 which have not (matched by size, product/service, location (multinational/Australian, urban/rural), form of business (franchise/partnership/company)). A questionnaire will be sent to the senior legal or trade practices compliance officer of the entity. Information would also be coded from the annual reports of the companies and from compliance program documentation. Perceptual deterrence, trust in the ACCC, defiance and resistance to ACCC enforcement, perceptions of ACCC procedural fairness, cooperativeness, belief in the value of the TPA, commitment to invest in internal compliance systems and self-reported compliance will be measured (at a firm and industry level). This project will benefit from the co-location of the Centre with that of the Centre for Tax Integrity that has been engaged in research on tax compliance and contestation since 1999.

Project II Evaluating the Public Benefit Test

The key researchers for this project will be Professor Brennan and Dr. Dharmapala, with Howard Hollow offering advice on it. They will grapple with the economics of

distinguishing public benefit from public detriment in the context of the interpretation of the public benefit test by the Commission and the Tribunal in order to elucidate the interplay of economic and social benefits.

Part of the virtue in introducing world class economists like Brennan and Dharmapala to this challenge would be to build the currently thin cadre of outstanding Australian economists with an interest in trade practices economics. The Centre would convene a "Trade Practices Economics" conference at which Brennan and Dharmapala would present the fruits of their research on the public benefits test, along with other economists like Soskice and Pitchford presenting the work they are doing on the economics of competition law. One aim of this project would be for the ANU to foster the creation of a network of trade practices economists.

Project III Competition and Consumer Policies in a Global Market

This project contains five inter-related projects with the first two (international cartels and competition tests and globalisation) having a predominantly competition policy focus, the last two (product safety regimes and consumer law jurisdiction over off-shore firms) with a consumer policy focus and the third project (parallel importing and intellectual property rights) raising issues which straddle the two.

Research will explore the impact of globalisation from a competition and consumer policy perspective for the relatively small and isolated Australian market. Given the domination of the United States and European Union in international competition regulation and debates surrounding it, a key concern is what role does and should Australia play? What would be the costs and benefits of its potentially catalyzing/educating role for the majority of countries, especially in the Asia-Pacific region that have no, or under-developed, competition regimes? To some extent the ANU and the ACCC is already involved in this catalyzing and educating role through the work of the Foundation for Effective Markets and Governance (FEMAG), which is co-located with the Centre in RegNet. The project will run for six years with intermediate deadlines for some components indicated below along with relevant outputs.

A. International cartels

Key researcher: Imelda Maher. This enquiry has three elements: jurisdiction, substance and enforcement i.e. who should police these cartels, what test should be applied to their behaviour, and what range of sanctions are required to ensure compliance? If a cartel is international, then Australia is not likely to be the only country investigating. An expanded network of bilateral agreements on exchange of information and even enforcement, is one way forward, combined with an educative role with countries in the process of developing competition rules. A multilateral response is also possible and much debated though it founders in the light of American opposition and concerns of developing countries though the presence of competition norms in e.g. the GATS provides a potential model for the future. That such cartels are not in the public interest is one of the few points of agreement in current debates of the WTO working group on competition. However the debate advances internationally, the question of how to retain

power to act locally e.g. when a cartel has a greater adverse effect on the Australian economy than elsewhere remains important. Issues to be examined here are both the ability to apprehend those in breach of the competition rules and the range of deterrents that can be deployed to create disincentives for breach (specifically, the possibility of punitive damages or even imprisonment).

The aim of the project is to develop a better conceptual basis or understanding for what is –and is not – happening at the regional and international level, and the role and interests of Australia within these policy networks and initiatives. The method would be literature work exploring current debates both in academic and policy circles internationally and in Australia. In addition, there will be interviews with key figures in international bodies and in the US and EU to establish what are currently regarded as the key issues. The EU in particular is a driving force in internationalization of competition norms in the face of globalisation. It would be useful to conduct at least one case study and to compare responses by the national authorities involved.

The main outputs of this work will be papers by Ms. Maher on the internationalization of competition norms and a book on that topic due for completion in January 2006. Papers will also be presented at international conferences such as the prestigious annual European University Institute Forum on Competition Law in Florence, hosted by Claus-Dieter Ehlermann.

B. Competition tests and globalisation

Imelda Maher will also be the key researcher on this closely related topic that will be developed in conjunction with the first project above. How the market is defined is changing in the light of globalisation where competition from outside the jurisdiction may be as, if not more, significant than competition within. This makes evaluation more dependent on information from rivals unless there is effective co-operation with authorities in other jurisdictions. While globalisation may be significant, the existence of sub-markets (of which Australia may be one) becomes important – as does the test for barriers to entry. With international mergers Australia can be only one of 16-20 authorities dealing with the matter. This topic will be explored through a workshop designed to bring together academics, policy makers and legal advisers in the third year of the project.

C. Intellectual Property

Key researchers: Peter Drahos and Imelda Maher. This project explores the balance between consumerism and IP protection through an economic and legal analysis. The issue is not whether there is a conflict but more how to balance innovation with competition and choice. What criteria should be used and in what order of priority? The legal environment beyond narrow competition and consumer concerns are relevant – notably the IP rules themselves – with issues such as standard setting also significant. This will necessitate a disaggregation of the various IP rights, in particular having regard to technological development and the key issue of reciprocity which has been highly

influential in the EU context. The Centre also will look at the impact of the WTO TRIPS Agreement on national competition regulation (for example, what limits does TRIPS impose on the use of compulsory licences?)

Through a review of the literature the ongoing uncertainty as to the relative merits/demerits of e.g. parallel importing will be set out. The way the debate has developed in legal and policy terms in the EU and internationally will be explored. Interviews with companies, trade bureaucrats, consumer associations at the EU, OECD and US levels will be conducted. The aim of the project is to elucidate those aspects of the international debate on the relationship between competition and IP norms that are most relevant to the Australian economy and to suggest how competition rules can be used most effectively to achieve the appropriate balance between innovation and competition.

Outcomes will be a workshop on IP and competition law and policy convened by Professor Drahos and Ms. Maher in August 2002 leading to an edited collection (either a special issue of an academic journal or a monograph).

D. Are internationally inconsistent product safety regimes workable in a global economy?

This is a regulation issue with a key question: who would set and police international standards? The Centre could look to the EU example where much standard setting is common throughout the EU and is effectively private standard setting within a loose legislative framework. In other words, standardization can be industry driven, with appropriate consumer and government input and monitoring. The EU regime effectively creates a hierarchy of standards under which vertical legislative rules at EU or national level take precedence, followed by EU or national private standards and only in the absence of such specific standards do enforcement officers and the courts have the broader discretion to determine whether products comply with safety standards against the criteria of general safety requirements which balance risk and practicality in reducing risks. The bias of the EU regime is towards harmonization through EU legislation and privately set standards and it would be instructive to compare this with the more diffuse pattern in APEC. Greater diversity in standards in a selection of the APEC standards could yield a variety of different results in theory. A race to the bottom might be observed as countries competed to attract mobile manufacturing firms with lower standards, or there might be evidence of international policy entrepreneurship through NGOs and international organisations creating a pattern of de facto harmonisation. A third possibility is that the capacity to operate diverse standards results in some policy innovation with higher standards than the norm across some product fields. Differing standards can act as form of trade protectionism and hence the matter is at the interface of trade/competition and consumer policy. The Hong Kong approach to toy safety standards, which recognises EU, US and ISO standards explicitly in its law may be an interesting model to examine in its practical operation.

The major research objective is to develop contrasting typologies of methods of coordinating consumer standards - international public harmonisation; international private harmonisation; regulatory competition and mixes thereof. This research is intended to provide a better conceptual basic for understanding contrasted approaches observable internationally as a guide both

to policy makers and to further scholarly research.

Outputs - conference paper to an appropriate major international conference (preferably linking policy makers and academics) and a short article in a policy journal and a longer theoretical article in an international refereed journal.

E. Jurisdiction

Key researchers: Sasha Courville, Imelda Maher, Colin Scott. The aim is to explore different legal regimes to protect consumers from off-shore companies, with a particular emphasis on enforcement and compliance mechanisms which minimise, if not remove, the need for litigation, while recognising that jurisdictional limitations will probably always be exploitable by the determined maverick firm. The key issue is whether the consumer can secure rights to repairs and refunds where the supplier is off-shore? Exploring co-regulation and self-regulation approaches, the project would interview trade associations to see how they envisage protection and goodwill being established and maintained. For example, there is the option of voluntary certification systems where members have a well-recognised logo guaranteeing minimum protection. RegNet member, Sasha Courville, is working with the FAO and international certification agencies on this in relation to food. International development of brands may also be part of the attempt to use reputational effects to enhance market position. Linked to this some multinationals operate international guarantee schemes which have the effect of creating a private legal regime. Outputs will include a workshop in March 2004 on "Applying Australian Laws to International Companies".