Submission to Trade Practices Act Competition Provisions Review

Does the Trade Practices Act:

- Provide sufficient recognition for globalisation factors and the ability of Australian companies to compete globally?

The Trade Practices Act does not operate in isolation. The impacts of National Competition Policy are a combination of the contents of the TPA and the impacts of the COAG Agreements and the associated expectations associated with those agreements.

Many of the chages associated with the public sector in association with National Competition Policy relate firstly to the changes and assumptions associated with accrual accounting and then later to the implementation of the priciples of "competitive neutrality". The concept of "competitive neutrality" is deeply flawed. In many cases, public services have become more expensive, less accessible, less accountable and fail to meet the basic expectations of the community in terms of the public interest. Although the concept of competitive neutrality has been used to judge whether the private sector is being prevented from competing with government in the provision of certain services, this term is not defined in legislation – and it is not to be found in economics texts here or overseas to my knowledge.

A major theme in my experience is that no-one is prepared to take any responsibility for any negative consequences associated with the major policy shifts associated with the whole package of legislative change and the COAG Agreements.

The "globalisation factors" which clearly have not been factored in are how GATS may affect the public interest in the provision of privatised or corporatised public services and how the extension of the TPA in conjuntion with the COAG NCP Agreements makes us far more vulnerable to international corporate takeover and control of our basic public services, including health and education.

Is the Trade Practices Act:

- Sufficiently flexible to respond to the transitional needs of certain industries, and especially those in regional and rural Australia?

In my opinion, the answer is no. The reports from the Senate inquiry into the impacts of the socio-economic impacts of National Competition Policy, with special reference to rural and regional Australia flagged particular difficulties for particular sectors. An example of that was the concern of dairy farmers in places like Western Australia. Milk is a low value, high volume commodity. Milk production CAN be associated with considerable environmental stress to the land in terms of increased salinity or even groundwater conamination especially where intensive irrigated farming and feedlots are concerned. Western Australia has indeed lost many of its dairy farmers, milk prices, if anything have risen and more and more of the milk on Western Australian shelves has been carried long distances from Victoria or New Zealand. The energetics of this are apalling.

At the same time as the small family dairy and other farmers are feeling bullied and squeezed, they can see the supermarkets gaining in market power and strength because use or abuse of market buying poer is NOT currenely illegal pe se under the Trade Practices Act, although collective bargaining from almost anyone else in the community or farm sector appears to be a no-no!

These aren't just "transitonal issues". Many small farming business have been obliterated, and these are not just "inefficient" farms. Wa has lost some of their best dairy farmers and may lose its entire fresh milk industry – and for what?

In addition, the environmental impacts of increased feedlotting and use of irrigated pastures may make Victoria's environmental problems in terms of river flows ans salinity worse.

In WA the privatisation of water, including groundwater has created major problems. The process which was also set up under the COAG agreements, was supposed to help remediate certain environmental and distributional problems with the market as a blunt instrument. Instead of reducing water use for irrigation, in WA it has been a factor encouraging a mass water grab and overuse of groundwater in a number of areas, in particular the Gingin Groundwater area.

Once again, nothing, zip, nil has been done to deal with these types of equity and environmental problems. The question here is if mistakes have been made in the past in the implementation of NCP, can any of these problems be reversed without coming into conflict with the TPA and the wrath of the ACCC? That is, could the Rights in Water and Irrigation Act be amended to de-privatise groundwater, for instance?

Does the Trade Practices Act:

- Promote competitive trading?

This is one of the most interesting questions to be considered. What does this really mean in practice? Does more competition mean more companies competing? In Australia's case, in many sectors, as in many other places in the world, there have been so many corporate takeovers that arguably we are becoming less competive in any real sense, that is there are less real competitors. In the airline industry, ironically, the push to promote competition may have achieved exactly the opposite result. Less competition and choice with only one major carrier left.

Think of insurance, supermarkets and banks. What has the Trade Practices Act really been able to do or say unless it can be claimed the markets were uncontestable? Abuse of market power (as a buyer or seller) is not illegal per se under the Trade Practices Act. The predatory oligopolistic buying powers of supermarkets have done more to destroy small business competitors than almost anything else in the supermarket sector in Australia, in my view. For instance, soft drink suppliers discount their goods so much to the supermarket giants that small shops can buy cartons cheaper from Coles than from their "suppliers". That is wrong.

If a measure of the level or effectiveness of competitive trading is the outcome for consumers that is also an interesting question. Do we have access to a greater range of goods and services? I think that is, at best, questionable. There may be a large range of mobile phones and PCs but there are many consumer items which are simply not available because smaller specialty shops have gone under and the larger stores only sell those items with guaranteed large volume turnover. Ever tried to buy a kettle for a gas stove in recent times?

There is also clealrly an argument that consumer outcomes in terms of service, convenience and availability have deteriorated, especially in the more labour intensive areas.

"Competitive trading" does not equate to "contestable" in my view.

Does the TPA:

- Provide an appropriate balance of power between small and large businesses?

Once again, the proof of the pudding is in the eating – how have small businesses faired since the changes to the TPA, especially in regional areas?

The evidence given to the Senate Select Committee on National Competition Policy clearly indicated that the smaller providers of services to the public sector have been hard hit by the combination of changes associated with National Competition Policy. In the move to open out utilities and other trading arms of the public sector to competition contracts for goods or services have frequently gone to statewide, nationwide or even international tenders rather than the local provider. This has not always resulted in reduced costs at the local level and has often been associated with problems of quality and service. For instance, the provision of bulk, frozen meals to WA hospitals rather than using a local provider who can meet the needs of the individual patients at the time flexibility is required.

And finally, does the TPA provide sufficient protecion to the position of individuals and corporations?

The answer to this question depends on what or who is being protected. The onus of proof of collusion to exclude competition means the potential for successful prosecutions are limited.

However, it has to be asked whether the current public interest test under the TPA affords sufficient protection anyway.

In my MPhl thesis, which I am providing as part of this submission, I argue strongly that the public interst test under the Trade Practices Act (and under the NCP Principles Agreement) require urgent review. They assume the public interest and contestible markets are one in the same unless proven otherwise in very narrow terms.

It is tempting to argue that what we really need are decent anti-trust laws. In fact, anti-trust laws which prevent the abuse of market power, should have been introduced long ago in Australia. Given that we now have more of the public and the community

sector now subject to the Trade Practices Act, my concern would be that anti-trust laws would be primariloy against the public sector, especially with the current highly unsatisfactory public interest test in place.

In summary, the problems that I see are not just in the TPA but in the whole package which is and has been rolled out as part of National Competition Policy. Adjustments to the Trade Practices Act may simply be using more of a blunt instrument when part of the problem may involve the Commonwealth, States and Territories coming back together to honesty address where they went wrong in the whole process.

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