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Review of the Competition Provisions of the *Trade Practices Act*

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Executive Summary

ANZ welcomes the opportunity to make a submission to the Dawson Review of the competition and authorisation provisions of the Trade Practices Act (TPA) and their administration by the Australian Competition and Consumer Commission (ACCC). ANZ fully supports strong competition laws and believes that the ACCC should be vigilant and seen to be vigilant, in enforcing those laws. By encouraging businesses to become efficient and responsive to the needs of their customers, competitive markets enable businesses to prosper and grow, and to deliver the economic returns required by shareholders.

ANZ also believes that there are important changes to the TPA and its administration by the ACCC that need to be made. ANZ supports the current "substantial lessening of competition test" for mergers but at present, the ACCC has no obligation to report on why it has approved/opposed a merger. More information is needed from the ACCC including more detailed reasoning on merger decisions. The Commission should also display the greatest possible recognition of the changes occurring in key markets. The forces of global integration, the expansion of information and communication technologies, increased pressures to innovate, and other factors are leading to significant changes to market definitions in all the relevant dimensions — geographic, product, functional and time. These forces of change are very important drivers of the modern business environment. If the ACCC explained its merger decisions fully, including a full analysis of the implications of these forces for the merger under consideration, this would lead to increased confidence in the Australian business community that the ACCC's decision making process was rigorous and fully cognisant of the important factors that drive the markets in which it operates.

ANZ supports section 46 of the TPA, which deals with the misuse of market power, in its current form. ANZ does not support the introduction of an effects test, reversing the onus of proof, or giving the ACCC cease and desist orders. Recent Court judgments in section 46 cases have confirmed that there is no need to strengthen this provision: ACCC has the power it needs to pursue instances of misuse of market power.

ANZ also supports criminal sanctions for price fixing and other forms of collusion, provided sufficient safeguards are put in place to ensure that business conduct is not subject to inappropriate prosecution, that the rights of accused persons are properly protected and that prosecution takes the normal route involving the police and the courts. It is the size and nature of the crime that matters, not the size and nature of the company. ANZ can therefore see no merit in any proposal to limit criminal sanctions for collusive behaviour to companies over a certain (arbitrarily determined) size.

ANZ believes that, third line forcing, as defined in section 47(6) of the TPA, should not be a *per se* offence and instead should be subject to a substantial lessening of competition test. The current provisions are anomalous and create unnecessary costs for business.

Chapter One

Introduction

ANZ welcomes the opportunity to make a submission to the Dawson Review of the competition and authorisation provisions of the Trade Practices Act (TPA) and their administration by the Australian Competition and Consumer Commission (ACCC). Nearly 10 years have passed since the last comprehensive review of the TPA by the Hilmer Committee.[1] Since that time considerable changes have occurred to the administration of competition law and significant competition cases have been decided in the Courts. Fundamental changes have occurred to the Australian economy, with many markets becoming characterized by greatly increased levels of competition. Several factors have contributed to this development: the forces of globalisation generally (i.e. the linking of markets for goods and services that previously were national or local in geographic scope); the specific effects of the new technologies in information, computing and telecommunications; and policy measures designed to liberalise markets that had been previously been monopolies or near monopolies.

Competition has increased very significantly in the markets in which ANZ operates. For example, over the past decade, the market for home loans has become extremely competitive and consumers are able to choose amongst many different providers offering a wide range of home loan products. Competition in the home loan market has resulted directly from the liberalisation of the financial markets in the 1980s, which enabled both the financial innovation of mortgage securitisation and the emergence of non-bank mortgage providers who have provided the required competitive impetus. Competition has also greatly increased in other aspects of banking and finance, such as the markets for investment products, deposits, consumer loans and small business banking products and services. The market for large business banking products and services is now fully international.

Several factors have contributed to these changes. Changing customer needs, rapid technological developments and an evolution of the prudential regulatory framework have all served to broaden the scope of banking and financial markets, reduce barriers to entry and generally make these markets more competitive. These changes have important implications for the application of the TPA to the structure and conduct of markets in which ANZ competes. Competitive pressures are continually breaking down market power throughout Australia's banking and financial markets, which means that the scope to misuse market power is rapidly diminishing. The blurring of market boundaries through regulatory and technological changes means that hypothetical mergers which at one time might have led to a substantial lessening of competition would no longer do so. Provisions against conduct like third line forcing are increasingly anomalous.

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[1] *National Competition Policy: Report by the Independent Committee of Inquiry*, AGPS, Canberra, August 1993 (the "Hilmer Report").

All of this indicates that a review of the competition provisions of the TPA and their administration by the ACCC is timely and appropriate. ANZ fully supports strong competition laws and believes that the ACCC should be vigilant in enforcing those laws. ANZ also believes that there are important changes to the TPA and its administration by the ACCC, that need to be made. This is particularly so in respect of section 50 of the TPA (mergers and acquisitions) and section 47 (exclusive dealing). ANZ does not support the changes to section 46 (misuse of market power) that have been proposed by the ACCC and some others. ANZ supports the introduction of criminal sanctions for price fixing and other forms of collusion.

The remainder of this Submission is set out as follows. Chapter 2 discusses mergers. Misuse of market power and collusion are discussed in Chapter 3 and Third Line Forcing is discussed in Chapter 4.

Chapter Two

Mergers

Introduction

ANZ supports current merger law, which is to prohibit mergers that would lead to a substantial lessening of competition (TPA, section 50), but has concerns about the way the law is being applied by the ACCC. While the informal process used by the ACCC to evaluate nearly all merger proposals provides a reasonably fast resolution of most merger proposals, it also lacks transparency. ANZ submits that the administration of merger law would be improved if the ACCC were to publish detailed reasons for its merger decisions.

The Merger Test

Section 50 of the TPA prohibits mergers that have the effect, or are likely to have the effect, of substantially lessening competition (SLC) in a market.

ANZ believes that the interest of the Australian economy and the public interest generally, are enhanced by competitive markets and does not support the creation of anti-competitive market structures. ANZ thus supports the current "substantial lessening of competition" test for mergers.

This said, ANZ has some concerns about the ACCC's administration of the test.

The Merger Approval Process

At present, merger proposals can only gain formal approval from the ACCC through the authorisation process. Most merger applications appear to be considered by the ACCC through an informal process, where merging parties seek the ACCC's opinion about whether it will approve the application, or whether it will seek to stop the merger in the Federal Court. Where the ACCC believes the merger will create no concerns under section 50, it indicates that it will not oppose it. ANZ understands that at other times, the ACCC indicates that it does have problems under section 50, but that these problems may be overcome if the applicant is willing to give suitable Undertakings under section 87B of the TPA. This then sets off a round of negotiations between the applicant and the ACCC. The merger is approved when a satisfactory 'deal' is reached, or not approved, if the ACCC is not satisfied that the applicant's proposed Undertakings will alleviate its section 50 concerns.

If the ACCC indicates that it will oppose the proposed merger (with or without a preceding round of negotiations) applicants have the option of:

- deciding not to proceed;
- proceeding and forcing the ACCC to prove its case in the Federal Court; or

- applying for a formal authorisation from the ACCC, but only if the merger is likely to result in some public benefits which will outweigh the competitive detriment.

In practice, mergers are so time–critical and market–sensitive that if the ACCC were to form the view that a merger would result in an SLC (and hence it will attempt to prove its case in the Federal Court if the parties proceed), the risks and costs are so high that the applicants generally decide not to proceed. This is clearly indicated by the fact that no section 50 cases have gone to court under the SLC test. The end result is that the ACCC's decisions on mergers essentially become *de facto* rulings.

ANZ of courses acknowledges that there exists the possibility to apply for authorisation, under section 90 of the TPA, for a merger which might lead to a substantial lessening of competition, on the basis of "public benefit".

However, ANZ submits that the current authorisation process for mergers is flawed and consequently is rarely used. ANZ understands that since 1995, only four companies have sought authorisations for acquisitions, with the ACCC granting just one[2] and refusing two others, with the fourth being granted by the Australian Competition Tribunal. A major problem with the authorisation process is that any person that can establish a sufficient interest can make an application to the Australian Competition Tribunal. Thus even if the ACCC grants authorisation, an appeal may be lodged by one of the applicant's competitors, motivated by its strategic business interests.

Because the authorisation process for assessing public benefits is flawed, it is possible that mergers are being rejected on competition (section 50) grounds where these mergers would be approved under the authorisation process if the process were more effective. Equally, some mergers may not be proposed at all, because there exists no effective way of testing their public benefits.

Assessment of the Process

The informal merger approval process has both strengths and weaknesses. The strengths are that mergers which obviously do not create any competition concerns can be dealt with expeditiously. Most of the merger applications before the ACCC appear to fall into this category and they are the source of the ACCC's position that the vast majority of merger applications (around 95 per cent) are not opposed.[3]

This aspect of this informal process is a genuine strength and should not be lost through any reforms aimed at rectifying the weaknesses of the process. One such weakness is that it leads to 'deal making', but unlike commercial negotiations where both sides have an incentive to conclude discussions satisfactorily and as quickly as possible, the ACCC has no such incentive. During the course of negotiations the ACCC's actions are sometimes difficult to understand and it is under no obligation to explain them.

[2] *Re Adelaide Brighton Ltd* (1999) ATPR (Com) 50-272. The ACCC accepted certain undertakings and authorised the acquisition by the applicant of a 49 per cent share in Adelaide Brighton Cement ltd held by joint venture between CSR and Pioneer.

[3] This number is somewhat misleading and makes the ACCC appear more merger-friendly that it actually is. Between 1997 and April 2002, the ACCC opposed 45 out of 685, or 6.6 per cent, of merger applications. However, a further 37 (5.4 per cent) of merger applications were only approved after applicants made Undertakings under section 87B of the TPA. Thus over this period the ACCC unconditionally approved only 88 per cent of proposed mergers.

Another weakness of the informal process is that it places no obligations on the ACCC to report on why it has approved, or opposed, a merger. Currently, the ACCC reports only minimally on its merger decisions. The amount of reporting from the ACCC for its decisions appears to be entirely at its discretion.

The ACCC does provide a "Competition Analysis" of proposed mergers. Commendably, these analyses are available on its website (http://www.accc.gov.au/pubreg/pubreg.htm). However, the analysis, in nearly every case, is perfunctory at best, usually just a couple of short paragraphs and rarely more than one page, even when the ACCC has opposed the merger, or approved it only with Undertakings.[4]

Because the ACCC is not required to give a full account of its reasons for accepting or rejecting a merger, and rarely does so, companies that seek to examine the ACCC's past decisions for planning their own acquisitions or mergers have little to guide them. Potential merging parties have the TPA (which is not a practical guide to action), the ACCC's own Merger Guidelines, which are more practical, but still necessarily rather general, and very little else. In particular, they very rarely have the benefit of the detailed reasons that the ACCC may have had for accepting or rejecting a previous merger in their industry. Without these reasons, potential merging parties can only guess at what the ACCC's thinking might be on such crucial questions as market definition, the existence (or otherwise) or barriers to entry, the role of imports as a pro-competitive force in that industry, the existence (or otherwise) of countervailing power in the industry, and so on. This creates a high level of uncertainty for potential merging parties and if parties are of the view that their proposal may be 'border line', the possibility of having to prove their case in a lengthy court battle acts as a significant deterrent.

The absence of sufficiently detailed reasons for the ACCC's merger decisions compares badly with the practices of the best regulators in Australia,[5] and in fact with the ACCC itself, in its capacity as regulator of electricity, telecommunications and other industries. The ACCC's regulatory decisions with respect to these industries, for example in setting regulated access prices, are always argued in full and the interested parties are left in no doubt as to the reasons for them. These decisions and in particular the reasoning behind them, have precedent value which can be used to predict, albeit imperfectly, the ACCC's decisions in future cases.

While regulatory decisions are public processes, there is no reason why this part of the process should not apply to merger decisions as well. In complex cases and those that cross its concentration thresholds, the ACCC should be obliged to publish detailed reasons for its merger decisions — those approved as well as those declined — including its reasons for accepting any Undertakings that have been offered by the merging parties. Any confidential commercial information could be easily suppressed, as it is in many of the ACCC's industry–specific regulatory decisions.

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[4] ANZ notes that the ACCC's decision in the Westpac/Bank of Melbourne merger was explained at length, and to a lesser extent so was the ACCC's decision in the Commonwealth acquisition of Colonial Limited. However, these cases are exceptional.

[5] The exemplary regulator in Australia, in this sense, is the Victorian Essential Services Commission, (previously Office of the Regulator General) whose regulatory decisions are explained in great detail.

ANZ is of the view that the ACCC should be given strong guidance on improving transparency, including a requirement for more detailed reasoning to be publicly available. This would impose a degree of analytical rigour on the ACCC that may be lacking at present. For example, currently, the ACCC's approach to market definition appears to be at times dictated more by the availability of data than first-principles considerations. For example, on occasion the ACCC has defined the geographic scope of some banking markets to be state-based. The only rationale that ANZ can see for this is that market share data have historically been available on a state basis, but not on any other regional basis.

However, the definition of banking markets, and other markets, is not static. The forces of global integration, the expansion of information and communication technologies, increased pressures to innovate, and other factors are leading to significant changes to market definitions in all the relevant dimensions — geographic, product, functional and time. These forces of change are very important drivers of the modern business environment. If the ACCC explained its merger decisions fully, including a full analysis of the implications of these forces for the merger under consideration, this would lead to increased confidence in the Australian business community that the ACCC's decision making process was rigorous and fully cognisant of the important factors that drive the markets in which it operates.

Chapter Three

Misuse of Market Power

Section 46 of the TPA prohibits a corporation with substantial degree of power in a market from taking advantage of that market power for the purposes of eliminating or substantially damaging a competitor, preventing entry into a market or deterring a person from engaging in competitive conduct in a market.

ANZ supports unequivocally the proscription of the misuse of market power. ANZ believes that section 46 maintains a reasonable balance between permitting vigorous competitive conduct, which is desirable, and the misuse of market power, which is not. ANZ supports section 46 as it currently stands and opposes recent calls to alter section 46 viz:

- to add an effects test to the purpose-based test;
- to reverse the onus of proof so that a defendant corporation would have to demonstrate that it did not act for a proscribed purpose; and
- to give the ACCC “cease and desist” orders.

ANZ is also concerned that recent Court rulings have judged that substantial market power can be held, and therefore possibly misused, by corporations with only a small market share. These judgments have greatly expanded the “reach” of section 46. In any case, these cases have certainly demonstrated that the powers under section 46 are substantial and no change to section 46 is required.

An Effects Test

The idea of replacing the purpose test in section 46 with an effects test is not new. In fact, it has been considered and rejected by seven inquiries since 1979.[6] Nonetheless, the ACCC has recently called for the purpose-based test currently applying to section 46 to be replaced by an effects-based test.[7] Under an effects test, it would no longer be necessary to prove that corporations which possess substantial market power are motivated to substantially damage or eliminate a competitor in taking certain actions, but merely that their actions have that effect.

[6] These were the Blunt Committee review (1979), the Griffiths Committee review (1989). The Cooney Committee review (1991), the Hilmer committee review (1993), the Reid Committee review (1997), the Baird Committee Review (1999), and the House of Representatives Standing Committee on Economics, Finance and Public Administration (2001). For a summary of these reviews’ conclusions about an effects test, see Mitchell Landrigan, Anne Peters and Jason Soon, “An effects test under s 46 of the Trade Practices Act: Identifying the real effects”, *Competition and Consumer Law Journal* 9(3), March 2002.

[7] According to the ACCC, the purpose test would not be deleted from the law; it would be supplemented by an effects test. *Transcript of Evidence*, Senate Legal and Constitutional References Committee, Amendments to the Trade Practices Act 1974, Public Hearings Wednesday 17 April 2002.

In other words, corporations who damage their competitors *as an accidental by-product* of their conduct may face action in the Courts for misuse of market power. For example, a firm may lower its prices in an attempt to increase its sales and its market share. This is an entirely respectable business practice and would not normally be considered to be anti-competitive conduct (unless this pricing policy is predatory); in fact lower prices are normally considered to be the outcome of a competitive process. However, it may be that, as part of this competitive process, a competitor of the corporation in question loses sales; in fact, by definition, at least one of those competitors will lose market share. Thus it could be argued that the *effect* of the conduct will be to damage or eliminate a competitor, however innocent the motives underpinning that conduct.

ANZ submits that corporations facing the likelihood, or even the possibility, of being pursued under Section 46 in these circumstances, would most likely refrain from cutting their prices, or engaging in other pro-competitive conduct. That is, an effects test would deter pro-competitive behaviour.

It would also cause tremendous uncertainty for business. The future effects of commercial actions cannot be known with certainty and often are not known for many years hence.

It has been argued by the advocates of an effects test that it is necessary because of the difficulty in obtaining evidence that proves purpose. To ANZ, this is not a compelling argument. If insufficient evidence exists, then there would seem no basis for pursuing the case. The supporters of an effects test seem to be arguing that because purpose is difficult to prove, then it follows that a different offence should be created, which may be easier to prove.

ANZ suggests this argument is based on incorrect premises. The advocates of the effects test implicitly *assume* that many instances of misuse of market have occurred and are continuing to occur, but few cases reach the Courts because the evidentiary burden is too high. However, ANZ is unaware of any evidence to support this hypothesis.

Furthermore, section 46(7) states that a corporation's purpose in taking advantage of its market power can be inferred from its conduct. In other words, to prove purpose, it is not necessary to discover the "smoking gun" (to use the ACCC's phrase) which sets out a corporation's plan to substantially damage or eliminate a competitor. Purpose can be inferred by the corporation's market conduct, for example its pricing policies. This was demonstrated in the recent *Boral* case.

The onus of proof

ANZ is concerned by suggestions that the onus of proof should be reversed, so that a defendant corporation would have to demonstrate that it did not act for a proscribed purpose. ANZ's concerns with this proposal are:

- It is fundamentally unjust. Defendants against charges of unlawful conduct (including in civil cases) should not have to demonstrate their innocence.
- It is not possible, as a matter of logic, to prove that the purpose of particular business conduct was not to eliminate or damage a competitor. Defendants may claim, with complete sincerity, that that was not their purpose, and perhaps even provide a documentary trail consistent with those claims. However, Section 4F of the TPA provides that a corporation may have more than one purpose, so that even if they can satisfactorily demonstrate a legitimate purpose for the conduct, corporations would not be able to demonstrate that they had no other purpose.
- As conceded by the ACCC,[8] the reversal of the onus of proof would not achieve its intentions. Even if corporations introduced evidence that their purpose was not improper, the ACCC would still have to prove the purpose of corporation's conduct, or at least have to prove that the purpose put forward by the respondent corporation was not its true purpose.[9]
- It would provide a disincentive to pro-competitive conduct.
- Purpose can already be inferred from conduct.

Cease and desist orders

The ACCC has indicated that it wants power to issue "cease and desist" orders in the cases of alleged misuse of market power. ANZ does not support this proposal, for several reasons:

- Such orders would be equivalent to interim injunctions issued by a Court. The ACCC is not a Court and should not be given judicial powers.
- When issuing injunctions, Courts are bound to apply certain well-established principles, such as that the balance of convenience lies in granting an injunction. However, these principles would not apply to the ACCC.
- A cease and desist order would have damaging, perhaps unrecoverable, effects on a corporation's reputation. It could also destroy time critical projects so that if the company is later shown to be innocent, it suffers both financial and opportunity costs.

Recent section 46 cases

Some recent section 46 cases have demonstrated that the ACCC has ample legal power under the current Act to pursue corporations which it believes misuse their market power.

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[8] For example, in its submission of February 2002 to the Senate Legal and Constitutional References Committee.

[9] However, in evidence to the Committee on 17 April 2002, the Chairman of the ACCC appeared to say that not just the evidentiary burden of proof, but also the legal burden of proof, would also be reversed, so that corporations would have to prove, not just introduce evidence, that their purpose was not unlawful.

ANZ submits that one of these cases, in particular, seems to have set a disturbing precedent. Market power cannot be misused if it doesn't exist, and there is very little dispute in standard economic analysis that a necessary condition for the existence of market power is a high market share.[10]

Yet, in a case decided in the Federal Court in December 2001 (*ACCC v Universal Music* and *ACCC v Warner Music*), Hill J found that each of Universal and Warner had sufficient market power for the purposes of section 46, even though each of them had a market share of just 15-18 per cent in the same market. This decision turned on the fact that the products in the market in question are highly differentiated, and according to the judge, this conferred on the defendants a "temporary monopoly"; hence they possessed a substantial degree of market power.

ANZ submits that this decision, if it survives appeal, sets a very poor precedent. If the possession of "temporary monopoly" is to be the standard which determines whether or not a corporation possesses substantial market power, then there will be very few corporations in Australia who do not possess it. All firms who produce an innovative product or service have a temporary monopoly, by definition, because they are the only firm in the market producing that product or service. In a competitive market, however, that monopoly will not be sustained as others in market, or perhaps new entrants, imitate the innovating firm or produce a superior innovation.[11] This dynamic process is what drives competitive markets.

In short, there would be very few corporations which did not have at some stage a "temporary monopoly". But if they have only a "temporary monopoly" then they possess no significant market power which they could misuse.

If Hill J's reasoning were to be combined with an effects test, then the problems associated with the effects test would be much worse. A corporation with just a small market share could be accused of misusing its market power if it cut its prices and subsequently won market share from one of its competitors, perhaps one with a much larger market share.

To illustrate, if a small bank or home loan provider cut its home loan rate and subsequently won market share from a large bank, it could be pursued in the Courts for misuse of market power and have to prove that its actions did not substantially damage the large bank. This would be nonsensical and would be sure to instantly freeze any competition in that market.

In a press release on 14 December 2001, the ACCC welcomed the judgment in the *Universal Music/Time Warner* case and the reasoning behind it. This case followed soon after two other section 46 cases. In February 2001, the Full Federal Court decided that Boral had engaged in predatory pricing. According to an ACCC press release of 28 February 2001

> "The ACCC welcomes this landmark Full Court decision which clarifies when predatory pricing could constitute a misuse of market power under the Trade Practices Act", ACCC Chairman, Professor Allan Fels, said today.

[10] However, a high market share is not a sufficient condition for the existence of market power; a firm might have a high market share yet possess little or no market power.

[11] For example, in the market for operating systems for personal computers, a number of different firms possessed a temporary monopoly, until eclipsed by better systems. Microsoft is the current (near) monopolist with its Windows system, but its monopoly is now seriously threatened by the Linux system.

> … Professor Fels said that the decision is a boost to the competitive process.

On 15 March 2001, following the High Court's decision in the *Melway* case, the ACCC issued a press release that the judgment "confirmed and enhances (the) current approach to the misuse of market power".

These cases and the ACCC's reaction to them, demonstrate that Section 46 — even with the supposedly restrictive purpose test — can be used, and is being used, to great effect by the ACCC in pursuing cases of misuse of market power. Apart from being undesirable, for the reasons argued in this chapter, an effects test (and other extensions of the ACCC's regulatory armoury) is simply unnecessary. In case after case, the Courts appear to be enhancing the ability of the ACCC (and private parties) to pursue section 46 cases. The purpose test, with the burden on proof falling on the ACCC, does not appear to be a barrier to this pursuit.

Criminal sanctions for collusion

ANZ views with abhorrence price fixing and other forms of collusion and supports the introduction of criminal sanctions for these actions, provided sufficient safeguards are put in place to ensure that business conduct is not subject to inappropriate prosecution, and the rights of accused persons are properly protected.

These safeguards include changing the standard of proof to beyond reasonable doubt, trial by jury with unanimous verdicts, prosecution by the DPP, and others.

ANZ can see no merit in any proposal to limit criminal sanctions for collusive behaviour to companies over a certain (arbitrarily determined) size. If, as the ACCC has argued, collusion is a form of theft comparable to fraud, then criminal sanctions should apply to all who commit the offence. The laws which make fraud and other forms of theft a criminal offence do not apply only to large businesses; neither should criminal sanctions for collusion.

Conclusion

None of an effects test in section 46, reversal of the onus of proof, or cease and desist orders, is needed to pursue cases of misuse of market power. Following recent judgments in section 46 cases, the ACCC already has all the power it requires. Moreover, an effects test could quite easily catch conduct which is pro-competitive. If an effects test for misuse of market power were in place, in many markets, the competitive process would cease, as each firm would not risk the (mistaken) wrath of the ACCC by engaging in vigorous competitive conduct. The Australian commercial landscape would then resemble the Australian domestic airline market during the period of the two airlines policy: stable market shares and stable profits for the incumbents but with high prices, little consumer choice, highly inefficient production practices and little innovation.

ANZ supports criminal sanctions for collusion, provided sufficient safeguards are in place and these sanctions are not limited to large businesses.

Chapter Four

Third Line Forcing

Introduction

Third line forcing is the practice by one supplier of supplying goods or services on the condition that that the buyer acquires goods or services from a different supplier. It is a form of exclusive dealing or tying. Section 47(6) of the TPA makes third line forcing a per se breach of the Act, unlike other forms of exclusive dealing, like full-line forcing, which are prohibited only if they have the purpose or are likely to have the effect of substantially lessening competition. However, third line forcing can be notified under section 93 of the Act or authorised under section 90.

ANZ submits that, as recommended in the Commonwealth Treasury's 2001 Discussion Paper, "Amendments to the Trade Practices Act 1974 Third Line Forcing Proposal", the TPA should be amended to introduce a substantial lessening of competition test for third line forcing.

ANZ supports these changes for two main reasons:

- the present per se prohibition of third line forcing assumes that such arrangements are inherently anti-competitive. However, there is no presumption in economic analysis that tying is inherently anti-competitive — it may be anti-competitive or pro-competitive, depending on the particular case at hand.[12] Bundling or tying behaviour is more often than not a method of providing consumers with creative product and service offerings and is designed to distinguish those offerings from others in an increasingly competitive market for financial services; and
- practical anomalies arise out of the per se prohibition of third line forcing contained in sections 47(6) and (7) which would be addressed if a competition test were applied to those sections.

ANZ believes the application of a competition test to sections 47(6) and (7) will allow corporations more scope to structure product and service offerings in ways which will ultimately benefit consumers.

Anti Competitive Behaviour

The per se prohibition assumes that conduct caught under sections 47(6) and (7) is inherently anti-competitive. The provisions assume that the party tying the two products will always be engaging in conduct intended to increase its market power. However, bundling or tying products is more often about adding value to existing product offerings, in turn making them more attractive to customers. Increased competition in the financial services market has placed a premium on providing customers with unique products and services which differentiate the provider from other participants in the market.

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[12] See, Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization*, Harper Collins, New York, 1994.

ANZ does not agree that product bundling is inherently anti-competitive but rather can be attributed to either of the following factors:

- it may not be possible to offer a particular product unless it is tied to another product (eg. online products may only operate effectively if they are linked to a particular product); and
- a provider may bundle its product with that of a related company or third party to improve the overall quality of the product. The bundling may enable more efficient access to the tied product by the customer than if they were to acquire the products separately. For example, a large financial institution will often be able to offer third party add-on services to their core products, either at significant discounts or at no extra cost to the customer, due to the volume of customers of the tying product.

Anomalies created by present provisions

As well as strictly prohibiting behaviour which is not inherently anti-competitive, the third line forcing provisions as currently drafted give rise to anomalies which may frustrate the intent of the provisions, and as noted in the discussion paper, result in the inconsistent treatment of corporate groups compared with single corporate entities.

The first anomaly arises from the treatment of corporate groups under sections 47(6) and (7). Related bodies corporate are treated as separate corporations for the purposes of third line forcing and therefore, are prohibited from bundling each other's products. However, where divisions of the same corporation tie each other's products or services, the behaviour is subject to the competition test under the 'full line forcing' provisions in section 47(2).

Consider a financial institution bundling its deposit account product and its credit card product whereby a reduced interest rate is offered on the credit card for all account holders of the deposit product. If the two tied products are both issued by the parent company, the conduct is subject to a competition test. However the same conduct will be strictly prohibited if the financial institution is a conglomerate and its credit card business is owned by a subsidiary rather than the parent company.

The behaviour in both cases is the same, however one is prohibited per se for no apparent policy reason. This may place a corporate group such as ANZ at a disadvantage as it cannot bundle products across its subsidiaries without incurring the expense and delay involved in lodging a notification under section 93 of the Trade Practices Act with the ACCC.

To overcome this problem, related companies could be effectively treated as one business entity under sections 47(6) and (7). Alternatively, ANZ submits that this anomaly be removed by the application of a competition test to third line forcing in line with the 'full line forcing' provisions. The per se nature of sections 46(6) and (7) has forced the courts to apply a strict interpretation of these provisions, concentrating on the form of arrangements rather than their effect on competition (eg. whether the tying behaviour has increased the market power of the tying firm).

Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd illustrates that it is possible for corporations to restructure their behaviour so that conduct which would otherwise constitute third line forcing will escape the scope of the prohibition. For example, a corporation can avoid the third line forcing provisions if it purchases the product of a third party and then packages the product with its own to form one product offering, rather than forcing the consumer to purchase or deal with a third party as a condition on the supply or offer of its own product. Conduct that may have the same purpose and effect as third line forcing will not be caught by the prohibition because of the form of the arrangement.

ANZ believes that the application of a competition test to the third line forcing provisions will focus attention on the effect of the conduct on the market rather than on the structure of arrangements. The change would remove anomalies caused by the predominance of form over substance.

Business Problems due to the Third Line Forcing Provisions

The following are examples of ANZ third line forcing notifications which were deemed necessary due to the fact that it is a per se breach and there is no regard to the competitive impact. Each notification entailed significant cost to ANZ.

ANZ Margin Lending and E*Trade Australia.

ANZ Margin Lending offers two products:

- a standard margin lending facility where the customer can use a broker of their choice; and
- a margin lending online facility where all trades must be done through E*Trade Australia. This is due to systems constraints and the required interaction between the computer systems of ANZ and the online broker.

As ANZ could not provide the online facility through other brokers, it was forced to seek protection under the notification provisions of the TPA. There was no competitive detriment to customers through this restriction as ANZ had another product, and ANZ is a relatively small player in margin lending with several competitors.

eVouchers on ANZ chip credit cards.

ANZ notified the ACCC under section 93 to seek protection for conduct that may contravene the third line forcing provisions. With the new chip card, and chip card reader, ANZ can offer "eVouchers". An eVoucher can offer the customer a benefit in the form of a discount, entry into a competition and free goods. If the customer inserts his or her chip card into a card reader at a store offering an eVoucher, they may receive a discount off the purchase price (eg, there was a $20 discount at Prouds Jewellers). While ANZ notified the ACCC of this action, the parties that would technically be in breach would be the merchants as they are providing a discount based upon the customer using an ANZ chip card with an eVoucher.

Qantas ANZ Visa Card

Changes to the Qantas Telstra Visa Card (which became the Qantas ANZ Visa Card on 24 June 2002) mean that the only rewards available will be Qantas Frequent Flyer points. ANZ is notifying the ACCC based upon the requirement that customers have QFF membership in order to receive reward points. There was no competitive detriment to customers through this restriction — under the old scheme, over 90 per cent of Reward Points were redeemed for QFF points — there are a large number of competitor products offering rewards and ANZ itself already offers an alternative credit card rewards scheme under the TVC and will soon launch another with ANZ First.

Conclusion

The current provisions of the Act, where notification of third line forcing conduct must be given to the ACCC, even where that conduct is harmless to competition, is costly to ANZ and acts as a disincentive to engage in alliances with other suppliers to provide customers with innovative products and services. Indeed, it can reasonably be argued that the current situation forces firms to act less competitively, by impeding their ability to innovate.

This does not mean that all third line forcing conduct is harmless. ANZ supports the application of a substantial lessening of competition test to the third line forcing provisions so that all forms of exclusive dealing are treated in a consistent manner. A competition test would acknowledge that third line forcing behaviour is not inherently anti-competitive and would distinguish between *bundling* (which aims to improve the overall quality of a product and therefore provide a competitive alternative for customers) and *forcing conduct* which is used to exploit the market power of the tying firm.

ANZ also submits that the Act should be amended in order to treat related companies as a single corporate entity for the purposes of third line forcing. This would overcome the present anomaly that sees ‘full line forcing’ between internal corporate divisions subject to a competition test, whilst forcing across related companies is prohibited per se.