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Moving on from the ACCC Authorisation Monopoly

Since the Trade Practices Act 1974 ("TPA") commenced, it has reflected the principles that a single body, currently the Australian Competition and Consumer Commission ("ACCC"), is responsible for enforcement of the competition rules of the TPA and that only the ACCC is capable of authorizing conduct or arrangements which would otherwise breach the TPA.[1]

This is not the position in the United States where enforcement of the Federal antitrust laws is a shared, and to some extent overlapping, responsibility of the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC").[2] However, particular statutes grant power to other persons to exempt arrangements or conduct from the antitrust laws.[3] For example, in relation to inter airline agreements affecting international aviation, the Secretary of Transportation is authorized to grant antitrust exemptions[4].

The purpose of this submission is to suggest that there is significant merit in the TPA being amended to provide a mechanism for other statutory bodies or officers to be able to grant authorization of otherwise proscribed conduct in specific contexts. In particular, in relation to international aviation, there is a compelling case for the Secretary of the Department of Transport, as the key regulator of Australian international aviation,("SecDOT") to be given authority to grant authorization for inter airline agreements affecting Australian international aviation.("SecDOT Authorisation")

Over recent years various arguments have been put, mainly by the ACCC, as to why the ACCC should remain the exclusive competition regulator in Australia. To the extent that authorizations might be granted by others, these general exclusivity arguments might be expected to be repeated and therefore merit some comment It should be noted incidentally that the ACCC is a competition regulator, fair trading regulator, product safety regulator and a public utility regulator and is this combination of functions makes it unique. This is important to bear in mind because some of the arguments for maintaining the ACCC as the sole competition regulator are buttressed on various of its

[1] Section 102 of the TPA also provides that the Australian Competition Tribunal may grant an authorization.
[2] See "DOJ and FTC announce new clearance procedures for antitrust matters" March 5,2002 at www.usdoj.gov/atr.
[3] See testimony of Assistant Attorney General Charles A James on HR 1253,The Free Market Antitrust Immunity Reform Act of 2001 at www.usdoj.gov/atr/public/testimony for a history of the antitrust exemption process in the US shipping industry
[4] See 49 USC 41308 and 41309.

other functions. These arguments are in no particular order of precedence and many of them overlap to some extent.[5]

Argument 1
The dual roles of competition regulator and public utility regulator are mutually complementary and therefore diminishing the scope of the competition function may diminish the benefits e g information /coordination which have flowed from the combination of the two.
Comment
This is not compelling in the aviation context as the ACCC's relevant public utility function is quite limited being related to airport pricing, which role is in any case diminishing. It is also questionable whether it is proper that there should be cross information flows between these functions. If this broad argument was applied in the context of SecDOT Authorisation, significant benefits of coordination/information would flow between this function and SecDOT's other aviation responsibilities.

Argument 2
Decentralisation of competition regulation will enhance the risk of regulatory capture.
Comment
There is risk of regulatory capture in respect of any regulatory body . Experience in the United States does not indicate that industry regulators which are empowered to grant antitrust exemptions have necessarily suffered industry capture. An industry regulator such as SecDOT already has significant regulatory influence over international aviation and therefore adding an authorization power is unlikely to itself lead to capture. Diversification of sources of authorization may in fact diminish the risk of capture.

Argument 3
Having other than a single competition regulator requires that boundaries be drawn to define the jurisdiction of each and this is fraught with uncertainty and possibly duplication between competition regulators.
Comment
In the United States, the allocation of antitrust enforcement responsibilities between the DOJ and FTC has caused difficulties. However, there has been neither uncertainty nor duplication in respect of antitrust exemptions being granted by specific industry regulators such as the Secretary for Transportation in relation to aviation. The drawing of boundaries to define the area of exemption authority has not been a problem in the United States[6].

[5] These are the writer's summations of arguments presented in various speeches by ACCC officers in recent years.
[6] Refer to the provisions of the exemption mechanism 49 USC 41309

Argument 4
Competition law should be general and not sector specific to avoid the elaboration of different competition regimes for different industries.
Comment
The process of authorization necessarily recognizes exceptions to the general competition regime. Different industries have peculiar circumstances and different inherent levels of competition which should be recognized . For example, international aviation is intensely competitive but is built upon a mountain of inter airline agreements. A SecDOT Authorisation process would not necessarily lead to a materially different competition regime for international aviation[7].

Argument 5
A single competition regulator necessarily has an institutional commitment to maintaining competition and selling the benefits of competition.

Comment
This is does not mean that specific industry regulators do not have an equal or greater commitment to competition.

Argument 5
A single competition regulator has a better knowledge of competition principles and the issues to be pursued in applying competition assessments.
Comment
There is now a significant body of judicial decisions setting out the proper process for competition analysis so that knowledge is not confined The experience in the United States with shared responsibilities between DOJ and FTC suggests that having more than a single enforcement body does not necessarily detract or enhance general expertise. In relation a particular industry, the industry regulator is likely to have better knowledge of the issues to be pursued that a general competition regulator.

Argument 6
As various industry sectors converge, lines between particular competition regulators will blur which could lead to jurisdiction conflicts. This cannot occur with a single regulator.
Comment
Again the United States experience indicates that conflicts can be managed. In any case this argument has little relevance to decentralization of antitrust exemption authority

Argument 7
Any competition regulator must be independent from government to isolate the competition regulator from political influence and to preserve confidence in its decisions.

[7] The US experience does not indicate that there is a materially different regime of antitrust law for international aviation

Comment
In the United States stringent rules of administrative due process govern industry regulators in exercising antitrust exemption authority and decision making is subject to judicial review. It is not imperative that exemption authority be vested in a body with some structural independence from government.

Argument 8
A single competition regulator is best able to assure due process and procedural fairness.
Comment
These standards are to a large extent set by general law so that a single regulator does not necessarily have a particular advantage in this regard.

Argument 9
A monopoly competition regulator is best placed to fund and prosecute enforcement action.
Comment
This is debatable but is not relevant in the context of a SecDOT Authorisation process.

Argument 9
In a relatively small economy, it is efficient to have all the economic and legal resources needed for competition regulation in a single body.
Comment
This again is debatable. There are more likely than not to be efficiencies in devolving the authorization process from a single competition regulator to an industry specific regulator with existing knowledge of an particular industry.

None of the arguments set out above are decisive against a mechanism in an amended TPA to devolve authorisation authority, including adoption of an SecDOT Authorisation process, for international aviation agreements between carriers.

An SDOT authorization process would provide a basis to fix a number of current anomalies and inefficiencies which currently exist due to the requirement that authorization for otherwise anticompetitive conduct be granted only by the ACCC.

Agreements between airlines affecting international aviation cover a myriad of subjects. Many agreements (eg city designators, communication protocols and documentation formats) have little anti competitive impact. Others such as code share agreements and alliance arrangements can be anti competitive but can also provide significant public benefits. The largest single source of airline agreements is the inter airline conferences of the International Air Transport Association ("IATA"). Through these conferences, international airlines enter into some hundreds of agreements each year on a range of

matters such as passenger and cargo tariffs, product distribution arrangements, standardization and other arrangements mainly designed to foster interlining[8].

In the United States anti trust oversight of activities in IATA (and the agreements it produces) is mainly exercised by the Secretary of Transportation through the anti trust exemption mechanism for international aviation agreements.[9] Subject to various conditions, the constitutional arrangements for airline participation in the IATA Conference system have an anti trust exemption and most agreements are filed with the Secretary for antitrust exemption. Code share agreements, alliance agreements and other interairline agreements are also filed. There is an ongoing process of public notification and , if appropriate, approval with anti trust exemption[10]. The volume and complexity of the IATA agreements (but not other agreements between carriers) has prompted the European Commission to take an alternative approach being to give, subject to conditions, an antitrust exemption to the IATA constitutional arrangements and to all the agreements which may be produced therefrom.("a block exemption") There is no mechanism at the Commission level for scrutiny of particular agreements.[11]

In Australia the ACCC has approved the IATA constitutional arrangements, arguably without a block exemption, and there is no general practice for IATA generated agreements to be separately lodged with the ACCC for authorization. However, a package of IATA agreements relating to the IATA Passenger Agency system has been separately filed and authorized and the ACCC has recently issued a draft determination proposing to re authorize those arrangements.[12] The ACCC is proposing to approve some agreements in the package solely as they now stand and others as they may be amended over the life of the authorization. A minimal number of alliance agreements and code share agreements involving Australian carriers have been submitted to the ACCC and have been authorized. However most such code share agreements been approved by the International Air Services Commission, having regard to inter alia ,competition effects but this does not provide any TPA authorization.

Inter airline agreements, particularly IATA agreements, have a remarkable potential to materially affect a diverse range of interests well beyond the airline parties including, for example, travellers, shippers, tourism businesses, airports, aviation support services, agents, regional destinations. Apart from the IATA constitutional arrangements and the Passenger Agency package referred to above, there is no comprehensive system as in the United States for regulatory oversight of these important agreements on an agreement by agreement basis[13]. Given that the ACCC currently processes a total of only about 50

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[8] For a brief explanation ,see submission by IATA dated 14 May 2001 to ACCC on the application by IATA for reauthorization of the Passenger Agency Programme

[9] See 49 USC 42308 and 41309

[10] This process can be tracked electronically at www.dot.gov on the DOT Docket Management System.

[11] SeeEuropean Commission Press release dated 25 June 2001which extends the IATA block exemption to 30 June 2005.

[12] See ACCC Press Release dated 17 May 2002 "ACCC Reviews Arrangements between International Airlines"

[13] It should be noted that the International Air Services Commission reviews code share agreements involving Australian capacity but its approval does not provide any de jure anti trust approval.

authorisations per year[14], application of the current ACCC authorization procedures to each of several hundred IATA agreements per year and scores of code share agreements would swamp the ACCC. A simplified and thorough process for testing the public benefit of these agreements needs to be established and the best working model is the United States system built around the filing of each agreement and, if appropriate,the grant of anti trust exemption by the aviation industry regulator.

Devolving authority to grant authorizations in respect of inter airline agreements to SecDOT would provide a number of positive advantages:

1. It would strengthen the industry regulator's knowledge and expertise in international aviation issues.

2. It would allow better policy coordination between competition issues and other regulatory considerations.

3. It would provide to airlines and other affected parties more certainty than has been provided to date through the ACCC authorization mechanism

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4. It would of necessity provide a faster process than the ACCC mechanism.

5. It would provide a mechanism for interested parties to have an input in respect of airline arrangements that affect their interests.

There is really no convincing case for retaining the ACCC as the sole body capable of granting authorizations under the TPA and the opportunity should be taken to introduce some devolution, particularly in respect of inter airline agreements, in the interests of better public administration.

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[14] The ACCC procedures are generally regarded as time consuming and expensive for persons seeking authorisation.