LAW COUNCIL OF AUSTRALIA

Business Law Section – Trade Practices Committee

Submission to the Productivity Commission - Review of National Competition Policy Reforms – December 2004.

The following submissions are provided by the Trade Practices Committee of the Business Law Section of the Law Council of Australia (the "Law Council Committee"). While these submissions of the Law Council Committee have been approved by the Section Executive, they have not been considered by the Law Council itself.

The continuation of the national competition policy agenda and processes

The Law Council Committee supports the continuation of the national competition policy agenda of the Federal Government. Whilst it believes that the structure and role of the National Competition Council (the "Council") should be reviewed from time to time, it sees the current program of payments to the States and Territories for implementation of the national competition policy agenda, with appropriate “penalties” being recommended by the Council in relevant circumstances, as being both conducive to continued appropriate attention being paid to this agenda, and its implementation by all involved.

Competitive neutrality

The Law Council Committee also supports the retention of the competitive neutrality regime. Whilst from time to time the implementation of this regime has created difficulties for specific sectors of the community (eg universities), in principle it does impose a discipline which can be utilised by the Australian Competition and Consumer Commission and others on government business participants in markets to ensure that there is greater adherence by government businesses to the principles of the Trade Practices Act in competing in relevant markets.

Legislation review program

The Law Council Committee also supports the continued legislation review program. The recommendations in page 231 of the Draft Report are laudable in principle. The Law Council believes that, in the past, many of the reviews that have been

undertaken by both the Federal and by State and Territory bodies have been perfunctory in nature with observers left unclear just how the relevant processes are administered. The information that has been released has often been too general in nature to be meaningful. The recommendation that future reviews should be more targeted should help to address this problem.

Government businesses and the Trade Practices Act

It is the Law Council Committee's view that government businesses, whether run through statutory marketing authorities or otherwise, and whether Federal or State/Territory businesses, should be subject to the operation of the *Trade Practices Act* 1974 ("TPA") unless the relevant business, or the activities associated with the business, can justify on public benefit/public policy grounds enunciated in the authorisation regime of the TPA that they should be "exempt". The recent decision of the High Court, *NT Power Generation Pty Ltd v Power and Water Authority,* 6 October 2004, makes it clear that Part IV of the TPA does apply to the Crown in so far as it carries on a business.

The submission to this Inquiry by The Association of Consulting Engineers Australia dated 23 June 2004 expresses the view that the provisions that make the Act apply to Government businesses are too narrow and "there currently exists a loophole whereby the definition of a 'commercial service' can be broadly interpreted to sometimes exclude such services provided by Government agencies." This submission seems to be mistaken. Section 2A (relating to the Commonwealth) and section 2B (relating to the States and Territories) allow no such loophole.

The 'example' provided by the ACEA submission seems to go to a different point. This is that Governments (other than when carrying on a business) may be substantial buyers of goods or services – just as one might conceive of a very-wealthy household being a substantial buyer of a particular type of good or service. The point made by the example offered by the ACEA is that a Government purchaser may use its power as buyer to damage competition or otherwise infringe the Act.

It would seem very unlikely that a Government would infringe the provisions of Part IV in this way; but the possibility raised by the example is that it may infringe the provisions of Part IVA. We note that, as currently drafted, s2A provides that Part IVA

applies to the Commonwealth – to the extent that it carries on a business; but s2B does not make the States and Territories subject to the provisions of Part IVA.

The Draft Report rightly relies on the process of authorisation as the means by which Government Business Enterprises should justify any restrictions they intend to impose on competition. In this context, the Law Council Committee believes that it is timely for an appropriate body (perhaps the Commission) to be planning a thorough review of the institutions and processes involved in authorisation and declaration. In particular, the review should address the relationship between the Tribunal on the one hand and the ACCC and the NCC on the other.

The multi-layered processes currently available under the TPA under the general rubric of the authorisation regime or related processes - eg review of access related matters - where the work of the Australian Competition and Consumer Commission is able to be reviewed by the Australian Competition Tribunal, has created unnecessary and unwarranted opportunities for delay and expense for all concerned. In this Discussion Draft the Commission does not deal with these particular matters. But by insisting on the continued reliance on authorisation (which the Law Council supports) the Commission has, in the Law Council Committee's view, signalled a need to review these matters.

Regulation of Access

The Law Council Committee supports the general sentiments expressed by the Commission with regard to making efficient access regulation, and price setting, a key objective. Given the importance of this, the Law Council Committee encourages the Commission to elaborate on its recommendations in its Final Report, as far as possible making more specific recommendations to advance this objective.

The Law Council Committee also supports the concept of best practice regulatory principles, applied on a nationally consistent basis.

The Law Council Committee recommends that a comparative analysis of access and pricing decisions, and appeal rights, under the TPA and other access regimes would be desirable, with a view to encouraging as uniform and consistent an approach as possible. By way of example, we draw the Commission's attention to the fact that a decision to declare a service under Part IIIA is reviewable by the Tribunal (s. 44K),

whereas Tribunal review of a declaration decision under Part XIC, the telecommunications access regime, is not available – although exemption order decisions and decisions regarding undertakings, under Part XIC, may be subject to Tribunal review.

In the Law Council Committee's opinion, elements of the TPA's institutional design, such as these, lack logical consistency, and this ultimately is likely to have an impact on investment incentives. Given the Commission's emphasis on 'improving incentives for providers to undertake investment to maintain existing facilities and expand networks', the Law Council Committee considers that streamlining regulatory arrangements where possible, and maintaining consistency between the approaches for different access regimes, is highly desirable.

In passing, the Law Council Committee also points out that the telecommunications access regime specifically requires consideration of 'the economically efficient use of, and the economically efficient investment in … infrastructure', but this is not a requirement of Part IIIA. Given that efficient investment in infrastructure is an important policy objective, consideration should be given to making this explicit in Part IIIA. We note that this recommendation was made by the Commission in its 2002 National Access Regime Report (Chap. 11.2; recommendation 6.1), but has not yet been adopted.

Other matters relating to competition law

The Law Council Committee is concerned at the lack of speed with which governments have implemented reforms to the TPA where these have been subject to a rigorous evaluation by specialist organisations such as the Commission and others. So, for example, the Law Council Committee notes that the recommendations of the Ergas Committee (see page 220 of the Discussion Draft) have yet to be implemented by the Federal Government. Whilst the Law Council Committee accepts that there may be some difficulties in governments obtaining appropriate parliamentary time for the consideration of certain legislation, these delays have had a negative impact on the expectations of the business community.

Draft Proposals on electricity and gas reforms

The Law Council Committee supports the remarks in the Discussion Draft about the need for nationally consistent principles for access regulation (see page 175 of the Discussion Draft). However, this seems to be contradicted by the Draft Proposal (on the same page) that the MCE give priority to "assessing whether processes for screening the competition implications of any reintegration in the electricity industry need strengthening". The Law Council Committee urges the dropping of the Draft Proposal on the ground that the competition provisions of the TPA should apply equally to all industries.

The Draft Proposal follows debate before the Productivity Commission over the implications of the decision of the Federal Court in *Australian Gas Light Company v Australian Competition & Consumer Commission (No 3)*. Although this decision (like any recent hard-fought litigation) arouses the passions of those who were involved, their opinions should not prompt a reconsideration of the general reach of competition law.

The decision of the Court in *AGL* stands for two propositions that may, indeed, have implications for those who are contemplating future mergers in the electricity industry. The first is that the effect of a merger on competition should be assess with a long-run perspective; and, from this perspective, a merger is only likely to raise competition problems if a relevant market is surrounded by high barriers to entry. In the words of the relevant judge, French J:

> "I am prepared to accept that there are periods of high demand where a generator may opportunistically bid to increase the spot price. I do not accept that such inter-temporal market power reflects more than an intermittent phenomenon nor does it reflect a longrun phenomenon having regard to the possibilities of new entry through additional generation capacity and the upgrade of interconnections between regions. It does not amount to an ongoing ability to price without constraint from competition." [1]

The second key point arising from the judgment is that the market (wholesale) electricity market embraces the whole of the National Electricity Market. This finding of fact by the Court is related to the first proposition in that the Court defined the

[1] Reasons for judgment, paragraph 493

market consistent with its consideration of future patterns of competition – looking well into the future.

These two key propositions on which the AGL decision was based create no new law in relation to Part IV of the TPA. They arise from an application of the facts to well-established principles that stem from the decision of the Tribunal in the seminal decision of *Queensland Co-operative Milling*. These principles should apply uniformly to the consideration of mergers in all industries in Australia.

Consumer protection and small business

The Law Council Committee supports the establishment of a process to review the interaction of the consumer protection provisions and the competition provisions of the TPA (see page 218 of the Draft Report). Indeed, the Law Council believes that this review should look more broadly to take into account the interaction of the consumer protection legislation and small business protection legislation with the competition provisions of the TPA.

The original design of the TPA dealt with two (complementary) matters: the promotion of competition and the protection of consumers. In the two decades since 1974 this structure has been complicated by the addition of provisions dealing with the protection of small business. So that the Act now deals with three sets of objectives rather than the original two. Whilst no specific recommendations have been made by the Commission in relation to small business, often the principles and issues to be addressed in this area can be linked to the critical issues arising in the context of consumer protection. The Law Council would be pleased to assist in the work of any committee established to undertake this review.

International trade

The Law Council suggests that the recommendations in relation to the Australia-US Free Trade Agreement are too narrow in their thrust. It is not only this free trade agreement but all free trade agreements that need to be reviewed to evaluate how they may create or strengthen restrictions on competition.

23 December 2004