Doubts about Dawson

Henry ERGAS[2]

The Report of the Dawson Committee[3] has generally been well received by trade practices practitioners. The reasons for that favourable reception are well known and I do not intend to repeat them. What I do intend to do is to raise some concerns about several of the Report's main recommendations. I want to focus specifically on the recommendations with respect to the per se provisions, the merger provisions, authorisation, collective bargaining and section 46.

1 The per se provisions

There are three recommendations with respect to the per se provisions that I find troubling. The first relates to exclusionary provisions, the second to the joint venture exemption and the third to Dual Listed Corporations.

As I understand the Report's recommendations, section 4D of the Act would be amended so as to confine it to conduct that targets competitors. While I share the concern that many have expressed about the narrow way in which 4D has at times been interpreted, the Report's recommendation seems to me seriously misguided. This is because I believe 4D ought to target conduct that amounts to market division – that is, conditions by means of which

---

2 This paper was prepared for presentation to the Competition Law Conference, held in Sydney on May 17th, 2003. I am grateful to Chris Hodgekiss for inviting me to present this paper and to Jill Walker and Mitchell Landrigan for very helpful discussions of the issues covered here. That said, the views expressed are my own, as is the responsibility for any errors.

3 Review of the Competition Provisions of the Trade Practices Act, Commonwealth of Australia: Canberra, January 2003. The Review was carried out by a Committee chaired by Sir Daryl Dawson and whose other members were Jillian Segal and Curt Rendall.

competitors agree to share markets, by allocating customers, territories,
product lines or functions among themselves. To the best of my knowledge, conduct of this kind would not be covered by the deeming provision in s45A; but at least some variants of it amount to price fixing and are no less likely to be harmful than explicit price fixing. Indeed, most economists would take the view that market division arrangements are likely to be substantially easier to devise and implement, and hence more stable and potentially harmful, than pure price-fixing cartels.

The Report itself implicitly recognises this when it says that bid rigging and similar conduct are so capable of inflicting harm as to warrant being sanctioned by criminal penalties. Given that, the recommendation that that conduct should not be subject to a *per se* prohibition is very difficult to understand. The Report would, in my view, have done better to set out the conduct which the *per se* prohibition ought to capture (such as bid rigging) and ought not to capture (such as the ancillary restrictions in a patent license), leaving to the parliamentary draftsman the task of translating the distinction into legislation.

Turning now to the provisions with respect to joint ventures, I share the view that the current exemptions are too narrowly framed to be of real use. However, as I understand the Committee's proposal it would extend the protection of the exemption, so long as it could be proved that the conduct was for the purpose of a joint venture and did not involve an SLC. My concern here is that because the definition of a joint venture is (as the Report notes) so open-ended, this is an exception that could swallow the rule – i.e. that would provide a ready way out of the deeming provision. That said, it is not clear to me what mechanism would be available for parties to get comfort that they fell within the scope of the exemption, and hence the reverse onus of proof element of the test will create potentially undesirable uncertainty. The New Zealand provisions, narrow though they are, seem to me to be better thought through.

Finally, the Report's discussion of Dual Listed Corporations (DLC) is again, difficult to understand. The Report notes that the formation of a DLC can amount to a merger; but it states, without giving much reasoning, that the formation of a DLC would fall outside of the scope of s 50. It then recommends that that fact notwithstanding, the agreement establishing a DLC should not be caught by s 45. If so, the result would be to create a situation where firms could use a DLC to effect a merger that substantially lessened competition without being capable of being caught by the Act.

Quite what the policy basis is for the Report's proposal with respect to DLC is unclear. It would make far more sense to ensure that the formation of a DLC is captured by s 50, but its ongoing operation is then not caught by s 45.

2 The merger provisions

The Committee takes a fairly dismissive view of the 'creeping acquisitions' issue and quite rightly says that the goal of competition policy is to protect the competitive process, not individual competitors. While that is true, I suspect there is more to this issue than the Committee makes out.

The fundamental concern, it seems to me, is that the provisions of the Act refer to 'an' acquisition, with the requirement – for there to be a contravention – that the acquisition result in a substantial lessening of competition. This is obviously not a problem when acquisitions come in large, discontinuous lumps: at some point, there will be a transaction that crosses the line, and hence is prohibited unless specifically authorised. However, the same does not hold where acquisitions involve assets that are small relative to the market as a whole, so that no single acquisition will result in a substantial lessening of competition, particularly when the acquisitions are spread out in time and space.

In these circumstances, the framing of the Act creates a situation reminiscent of the so-called Sorites paradox that was much loved by the classical philosophers. Turning to an example that has personal poignancy, at what point does loss of hair result in baldness? Clearly, no single hair can be sufficient to make the difference between being bald and not being bald; but if so, and hairs can be removed individually, then baldness is impossible. As all those who have studied logic will recall, it is the inherent vagueness of a predicate term – baldness in my case, competition in the case of s.50 – relative to a sequence of individually small changes that gives this paradox its force.

There are many ways in theory of resolving Sorites paradoxes. Of greatest relevance here is the use of an incipiency concept, which allows the decision-maker to view the individual event – the single acquisition – in its wider context. I recognise that there are difficulties involved in translating this into acceptable statute, but it would have been useful if the Committee had more fully recognised and addressed the problem, again leaving the specifics of implementation to the Parliamentary draftsman.

3 Authorisation

I have no particular affection for the manner in which the ACCC has handled recent merger authorisation processes – most especially those in which I have been involved – but I am not convinced the Report's recommendations will in any way improve matters. Indeed, at least one of these recommendations will, in my view, make the situation worse.

As I understand the Report, applications for the authorisation of mergers would be required to go directly to the Tribunal, with the ACCC then acting as *amicus* in the Tribunal proceedings. If the Tribunal considered that the application merely involved a determination that there is no competitive detriment, it would have the power to remit the matter for consideration by the ACCC.

This proposal raises a number of technical difficulties. For example, how would applications that involve both a s 50 authorisation and (say) an authorisation under s 45 be handled? This is obviously an especially difficult problem when the applications are inter-conditional, and hence cannot sensibly be viewed separately. Additionally, at what point in the process and on what precise grounds would the Tribunal remit an application to the ACCC, and what would happen then to the timelines?

That said, the greatest problems are in the impact the changes would have on the Tribunal's functioning. More specifically, I have never been convinced that it makes sense to ask the Tribunal to take on an inquisitorial role. It has always seemed to me that restricting the Tribunal to an adjudicative role, clearly separate from the task of independent investigation, plays a central role in ensuring the Tribunal's independence, just as it does in respect of our Courts. Additionally, I find it difficult to understand how, at a practical level, the Tribunal would carry out an inquisitorial role, much less do so without compromising its independence.

What the Report seems to say is that it is the ACCC that would carry out that inquisitorial role on the Tribunal's behalf. This, in my view, would be seriously harmful from the point of view of many applicants. This is for at least three reasons. First, having directed the ACCC, the Tribunal would be associated with the ACCC's arguments in a way in which it now is not. Second, the applicants would have to develop their arguments to the Tribunal without having seen the substance and detail of the ACCC's arguments, all the more so given the time frames the Report recommends. And third, there would no longer be any real review on the merits of the ACCC's findings.

It may be that there are some applicants who are willing to bear these costs and risks. However, I suspect that they are few and far between. As a result, requiring all applications that involve public benefit to adopt this process seems to me to be extremely harmful.

In my view, the Committee would have done better to focus on other aspects of the authorisation process. In particular, it seems to me important to set straight the test the ACCC ought to implement in assessing applications that involve benefits in the form of efficiencies. This could, in my view, be done by inserting a provision similar to section (3A) which was inserted into the New Zealand **Commerce Act** in 1990. That section states that:

> Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.

Additionally, legislative guidance should be given to ensure that when efficiencies are considered as an element of public benefits, the focus should be on efficiency in the aggregate rather than on the distribution within society of the gains from those efficiencies. In other words, what is at issue in the consideration of public benefit is not the impact on any one element in, or component part, of society. Rather, the focus must be on Australian society as a whole, netting out what are transfers between its component parts. Just as competition policy is not concerned with protecting individual competitors, so a consideration of public benefits looks to promote not individual interests within society but rather efficiency and the process of economic growth overall.

This focus on the overall impact (the 'size of the pie'), rather than the consequences for particular individuals or groups (i.e. the pie's allocation among alternative claimants), reflects the fact that competition policy is not an efficient or even effective means of securing goals of income distribution. Important though these goals are, they are not well pursued by tinkering with the structure of markets, as the implications of different market structures for income distribution are at best highly uncertain.

Additionally and importantly, the reality is that there are few efficiency-enhancing proposals, if any, which do not in some way alter the distribution of income, with adverse implications for at least some. Were distributional considerations relevant to the assessment of overall benefit, issues about the distributional consequences of proposed transactions would encroach on all applications for authorisation. Those responsible for the administration of the authorisation process would then bear the burden of having to adjudicate as between the merits of competing claimants, without any basis for making the inherently political decisions that this involves. The overall result would be to make the administration of that policy more uncertain and discretionary, without any real prospect of a better income distribution actually being secured.

For these reasons, the Act should state clearly that when the claimed public benefits relate to efficiencies, the relevant test is **whether there will be an enhancement of the efficiency of the Australian economy as a whole**, rather than of any particular component of or beneficiary from, that economy. This test should apply to all conduct that is capable of authorisation, and not merely to mergers.

Together with a more cost-effective process for the consideration of matters in the Tribunal, such a clear statement would make the authorisation option far more relevant to merger transactions, as well as to Part IV issues generally. With authorisation a more attractive

option, greater constraints would bear on the ACCC's ability to extract concessions in the form of undertakings, ensuring that a process that currently experiences few disciplines would operate in a manner more likely to promote socially desirable outcomes.

4 Collective bargaining

The Committee's gesture to small business comes in its discussion of collective bargaining. The essence of its proposal there is to allow collective bargaining and collective boycotts by smaller businesses to be subject to a notification process. As I understand it, this would apply to businesses which fell below some size threshold, regardless of whether the organisations they were bargaining with had substantial market power.

I find the presumption that collective bargaining will increase economic efficiency to be a strange one; on standard economic analysis, there is no such presumption, even when the 'other side' has substantial market power. Rather, this is plainly about advantaging some competitors, rather than promoting competition – so it sits oddly with the Report's disparaging comments about industry policy. That said, perhaps there are cases in which it is desirable, but the question is whether the notification process is the appropriate way of identifying those cases.

The difficulty here is that the Report is very unclear as to how notification would work. My understanding of the notification provisions is that – apart from the current 3rd line forcing provisions, which are per se and involve a different test – the ACCC, to withdraw protection must find an SLC. In other words, were the Committee's approach adopted, the ACCC could not withdraw protection if the conduct were economically harmful – i.e. reduced efficiency – but did not substantially lessen competition. This is more serious than it seems as many collective boycotts could do just that, for example by unravelling economically efficient price discrimination.

As a result, even if a streamlined process for handling these cases were to be adopted, it should involve a balancing test, rather than needing an SLC to be found for protection to be denied.

5 Section 46

I am not a supporter of having an effects test in section 46, and hence endorse the Report's strong words in that regard. However, that certainly does not mean that I think all is well with the section – rather, it seems to me that there are serious difficulties with its key component, which is the "taking advantage" limb.

The Report itself makes the confusion and uncertainty that surrounds this
limb plain in a rather nice way. At page 81, it says "Use of market power by a corporation occurs where the existence of market power facilitates the corporation's conduct." In the very next sentence, it then says "The ultimate test of the use of the market power is whether the corporation's conduct was **made possible** by the absence of competitive conditions.". Now, these are different concepts: the fact that I jog may facilitate my taking long walks, but it does not make it possible. The point, as the Report rightly recognises, is that this section of the test is unclear and its current application unpredictable. In my view, there is little in the High Court decisions in Melway or in Boral that addresses that situation.

This is not to say that there are any quick fixes. However, it seems plain that choices need to be made about the kind of conduct that should be protected as not involving a taking advantage of power and then a clarifying amendment considered in that light. Again, a more thorough discussion of this issue would have been helpful.

6 Conclusions

In short, however sensible the Report is overall, there are important elements in its recommendations which are likely to cause more harm than good. It is to be hoped that the Government will be open to reconsidering these elements, if need be by revising its initial response to the Committee's Report. In any event, it is clear that the Dawson Report will not and should not be the last word on the future of the Part IV provisions – indeed, it may, at least in the longer run, be viewed as having raised more questions than answers.