

S G Corones
COMPETITION LAW
IN AUSTRALIA
3rd Edition

COMPETITION LAW IN AUSTRALIA

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PREFACE



The *Trade Practices Act 1974* (Cth) (the Act) is by far Australia's most comprehensive and complex piece of legislation dealing with economic policy.

The Act has now been in place for nearly 30 years. This may seem like a long time however, this is an area of the law that evolves slowly. Very few litigants can afford to run test cases. Accordingly, it takes a considerable period of time for the law to become 'known'.

There are still a large number of 'gaps' in our understanding. For example, the courts have only just begun to deal with how to measure the market power of firms in oligopoly market structures. The extent to which strategic behaviour, such as raising rivals' costs through entry deterring tactics, has been touched on by the High Court in the *Boral* case but left open for another day. There has not yet been a fully argued case on the meaning of the 'new' substantial lessening of competition test in s 50 adopted in 1992. No access disputes have been notified to the ACCC for arbitration on the terms and conditions of access under Pt IIIA, although there have been a number of arbitrations under Pt XIC in relation to the telecommunications industry. No final decision in relation to a competition notice under Pt XIB regarding anti-competitive conduct in the telecommunications sector has been handed down by a court.

Given this uncertainty, great care needs to be exercised before amending the Act. The courts should be given time to interpret and give meaning to its provisions, and amendments only made when a perceived gap or deficiency is confirmed by a finding of the court.

Nevertheless, the Act is the subject on-going review and reform. Since the second edition of this book was published in 1999, there have been seven reviews of the provisions of the Act regulating anti-competitive conduct and access:

- the Review of international liner cargo shipping (Part X) (PC 1999a);
- the Review of anti-competitive conduct of supermarket chains, *Fair Market of Market Failure?* (Parliament of Australia, August, 1999);
- the Review of Intellectual Property legislation under the Competition Principles Agreement (September 2000);
- the Review of Telecommunication Competition Regulation (Parts XIB and XIC) (PC 2001d);
- the Review of the National Access Regime (Part IIIA) (PC2001b);
- the Review of Section 2D of the *Trade Practices Act 1974*: Local Government Exemptions (PC 2002d); and

- the Review of the Competition Provisions of *Trade Practices Act* (the Dawson Committee) (January 2003).

The Productivity Commission has also undertaken public inquiries that have examined competition regulations outside the Act, in particular the *Prices Surveillance Act 1983* (Cth) (PC 2001c). In line with the Productivity Commission's recommendation, the Government will repeal the *Prices Surveillance Act* and insert a new part into the *Trade Practices Act* which will preserve the existing prices surveillance powers. The new Part will enable inquiries to be undertaken into 'monopolistic pricing' and also in certain other circumstances in the public interest.

In December 2002 the Parer Review Committee released its report, *Towards a Truly National and Efficient Energy Market* which recommended the establishment of a National Energy Regulator (NER) that would encompass the energy roles of the Australian Competition & Consumer Commission, State and Territory regulators and the National Electricity Code Administrator (NECA).

Some major legislative changes are in the pipeline. The Dawson Committee recommendations for reform, which have been largely accepted by the government, are being drafted and a bill is expected to be introduced into Parliament early next year.

Change is on-going. Two further reviews of the Act are just getting under way — the Review of the Effectiveness of the *Trade Practices Act 1974* in protecting small business (Senate Economics References Committee) and the Productivity Commission's Review of the National Gas Pipeline Access Regime.

Apart from the legislative changes that have accompanied these reviews, there has been a substantial body of new case law since the second edition; most notably, four decisions of the High Court (*Melway*, *Boral*, *South Sydney*, and *Visy Paper*) have clarified the law considerably, especially in relation to s 46.

The justification for any law that regulates market conduct rests firmly on the belief that the promotion of competition leads to economic efficiency, not just in the production of existing goods and services at the least cost, but in the creation of new products and in the development of continuous product and process improvements. Competition and economic efficiency are two separate concepts for the purposes of the Act and the way that they inter-relate has yet to be fully worked out. One of the main themes of this edition is to highlight this inter-relationship in each Chapter.

Chapter 14, Access to Essential Services: Part IIIA, is a joint work. My co-author, Antra Hood, is a partner in the Brisbane office of Mallesons Stephen Jacques. In 2000 we collaborated on the preparation of a comprehensive Discussion Paper for the Trade Practices Committee of the Law Council of Australia. That Discussion Paper formed the basis of a Symposium on Third Party Access held at the Melbourne Business School on 28 July 2000. Much of the work done in relation to the preparation of the Discussion Paper has been incorporated in Chapter 14. I thank her for allowing me to reproduce this material.

I am extremely grateful to Georgiana Pringle, the product developer at Lawbook Co. and to Lara Weeks, the editor, for seeing the project through to completion.

The law is stated from the materials available to me as at 28 August 2003, although it has been possible to incorporate some changes after that date.

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