LAW REFORM

Competition Policy and Reform of Public Utilities

National competition policy

Since the 1980s, Australian governments have followed the world-wide trend towards micro-economic reform, deregulation, and restructuring of the public sector. In Australia this trend has been evidenced by deregulation of the financial sector, the telecommunications industry, and the domestic two airlines policy. A meeting of the Council of Australian Governments (COAG) on 25 February 1994 elaborated on this theme: the Commonwealth, State and Territory governments agreed to the development of a national competition policy, as recommended by the National Competition Policy Review chaired by Professor Hilmer.

The National Competition Policy Review was commissioned in 1992, with a brief to inquire into the promotion of competition in Australian domestic markets. The key recommendations of the Hilmer Report were:

1. extension of competition conduct rules, such as Part IV of the *Trade Practices Act,* to limit anti-competitive behaviour in all forms of business;
2. reform of existing regulations which unjustifiably restrict competition;
3. structural reform of public monopolies to facilitate the introduction of competition into those markets;
4. appropriate regulation of natural monopolies to allow competitors access to facilities that are essential for competition;
5. restraint of monopoly pricing through prices monitoring and surveillance;
6. fostering 'competitive neutrality' between government and private businesses which compete in the same markets.

The Hilmer Report also proposed the creation of two new institutions as part of the implementation of national competition policy: the National Competition Council (NCC) would be responsible for policy decisions, and the Australian Competition Commission (ACC) would have jurisdiction to administer competition policy.

As a result of the August 1994 meeting of COAG, a draft legislative package consisting of legislation and two intergovernmental agreements was released for public comment in September. These documents provide for the implementation of national competition policy, including:

- amendment of Part IV of the *Trade Practices Act,* and extension of its application to cover all persons within State jurisdictions;
- the merger of the Trade Practices Commission and the Prices Surveillance Authority in order to establish the NCC and the ACC;
- pricing and access arrangements;
- procedures and principles for structural reform of public monopolies, legislative review, competitive neutrality, prices oversight, and access to essential facilities.

COAG's commitment to national competition policy allows all Australian governments to determine their own agenda for reform of public monopolies. Indeed, many State governments have already embarked on programs for reform of public utilities, including privatisation, corporatisation, deregulation and contracting out. The pace of change is particularly rapid in Victoria.

Reform of essential services in Victoria

Programs for the reform of Victoria's utilities have been underway since the late 1980s. The Kennett Government has continued this agenda with the production of information papers outlining proposals for reform of the gas, water and electricity industries, and the Victorian Parliament has already passed legislation which radically restructures Victoria's electricity industry.

In broad terms, restructuring of the electricity industry has involved:

- the vertical disaggregation of the State Electricity Commission (SEC) by separating its generation, transmission and distribution functions; and
- a horizontal break-up of these functions by splitting generation and distribution into separate competitive companies.

For example, five electricity companies have been created at the distribution, or retail, level. These companies will be able to compete to supply electricity to Victoria's top 50 businesses in December 1995. However, domestic consumers will remain franchised, and captive, until at least the year 2000. Privatisation of one of the distribution companies is expected between April and October 1995.

In July 1994, the Victorian Government established the Office of the Regulator-General to regulate utilities brought within the Victorian Government's reform agenda. In general terms, the objectives of the Office of the Regulator-General are to promote competition, facilitate efficiency, and to ensure that users and consumers benefit from competition and efficiency (s.7, *Office of the Regulator-General Act 1994).* Its powers include the regulation of prices (s.24), and such powers with respect to standards and conditions of service and supply, licensing, market conduct, and other economic regulatory matters as may be conferred by other relevant legislation (s.26).

While reform of Victoria's public utilities has been designed and implemented with little public consultation, the Regulator-General, Mr Robin Davey, has stated that he intends to create a customer consultative committee to advise the Office on community and customer affairs.[1] The exact nature of this committee, including its terms of reference, is yet to be finalised.

Some issues raised by reform of public utilities

Community service obligations

With corporatisation and privatisation, the public policy functions of utilities are distinguished from commercial ob-

jectives. The public policy functions are known as 'non-commercial' functions, or community service obligations (CSOs), for which the government assumes financial responsibility. The underlying assumption is that the utilities should perform as purely commercial operations.

This year, both the NSW and Victorian Governments released policies for the identification and costing of CSOs. However, the definition of CSOs poses difficult questions. For instance, the administration of concessions schemes benefits utilities by ensuring that low income customers are able to pay their bills, yet the utilities argue that responsibility for these schemes should lie with the government. On the other hand, the utilities perform a number of community-based activities to foster good public relations but do not claim that these are CSOs. An example was the SEC's sponsorship of the Victorian Neighbourhood Watch program.

Accountability

With corporatisation and privatisation, traditional mechanisms of public accountability are significantly altered. For instance, the scope for ministerial direction and parliamentary scrutiny of the activities of public utilities is narrowed, or disappears entirely. In addition, under the Victorian reform agenda, utilities will not be subject to the *FoI Act,* and will fall outside the jurisdiction of the State Ombudsman. This is already the case in relation to the Victorian electricity companies.

In the words of one commentator, 'the net effect is a fundamental shift away from the exercise of civil and political rights to the notion of the supremacy of the consumer, accountability through the market, and to the shareholder'.[2]

Enforcement and dispute resolution

In recent years, reports by the State Ombudsman and from financial and legal counsellors, have highlighted the large and increasing[3] number of consumers who experience difficulties in dealing with providers of energy and water. Case studies show that problem areas include disconnection practices, security deposits, and electricity surges.[4]

In Victoria, the main avenue for resolution of consumer disputes with utilities has been the State Ombudsman, but this jurisdiction will be removed with the implementation of reforms. To date, Victorian consumers have not been advised of their options for resolution of disputes, although the Regulator-General has stated that the new electricity companies will 'develop and publish (their) own complaint handling, escalation and resolution policies, practices and procedures'.[5]

Public consultation and the role of public interest groups

The reform of public utilities is being implemented with little consultation with consumer, welfare or public interest organisations. Consequently, in April of this year a national coalition of consumer, welfare and environmental organisations released a statement outlining objectives and principles for competition policy and utilities reform, and calling upon all Australian governments to act on the statement in their policy development.[6]

At the State level, examples of initiatives by public interest groups include:

- The Public Interest Advocacy Centre (PIAC) in NSW has co-ordinated a Public Utilities Forum (PUF). PUF comprises activists and organisations seeking to safeguard the public interest in the context of corporatisation and privatisation of government services. PUF meets monthly at the offices of PIAC.
- The Victorian Council of Social Service (VCOSS) in conjunction with the Consumer Law Centre Victoria held a policy development forum on 17 June 1994 to enable the community sector to discuss the issues raised by reform of Victoria's gas, water and electricity utilities. Based on the workshops held at the Forum, VCOSS has endorsed a policy statement on Regulation of the Gas, Water and Electricity Industries

In addition to contributing to public debate and commenting on the design and implementation of reform, adequately resourced public interest groups can:

- provide consumer advocacy;
- represent consumer interests;
- participate in public inquiries; and
- provide independent monitoring and feedback.

During his visit to Australia in October, well-known US consumer activist and lawyer Ralph Nader was emphatic about the invaluable role that can be played by well-resourced, independent consumer advocacy organisations, and urged Australia to consider the role played by Citizens' Utility Boards (CUBs) in the USA. For example, the CUB in Illinois has a membership of approximately 200,000 electricity consumers. In 1993, it negotiated a $1.7 billion refund for its members from a Chicago electricity company which had been charging consumers excessive prices.

CUBs exist in Illinois, Wisconsin and New York. They are funded through voluntary donations made by residential consumers, who have the right to elect the board of the CUB. The CUB employs full-time professional staff, including economists and lawyers, to represent the interests of consumers.

CUBs are one example of the manner in which consumer interests may be represented in the context of reform of industries which provide essential services.[7]

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References

1. See 'The Office of the Regulator-General', paper presented by Robin Davey, Regulator-General, Victoria, at the National Power Industry Conference *The Victorian Reforms: A Blueprint For Australia's Power Industry*, 21-22 July 1994; also 'Empowering Customers', paper presented by Robin Davey, Regulator-General, Victoria, at the Australian Federation of Consumer Organisations' Conference *Competing Interests: Protecting the Public Interest in a Competitive Environment*, 10 October 1994 (the AFCO Conference).
2. 'Captive Consumers: The Myth of Competitive Markets', paper presented by Liza Carver at the AFCO Conference, at p.3.
3. A survey by the Consumer Advocacy and Financial Councillors Association conducted in June 1994 revealed that the utility-based casework of financial counsellors has increased from 18% of cases in 1993 to 26% in the survey period. One-off telephone inquiries increased form 11% in 1993 to 25% in the survey period.
4. See 'The Past — Does It Have Lessons For The Future?' paper presented by Dr Barry Perry, Acting State Ombudsman at VCOSS and CLCV Policy Development Forum *Gas, Water & Electricity: Everyone's Right to Essential Services*, June 1994, at pp.9-10. See also Appendix 1 to 'Regulating the Price and Quality of Water and Energy', Paper No. 3 in *Reforms to the Victorian Water and Energy Utilities: Consumers and the Public Interest*, Amanda Cornwall, April 1994, at p.32; and State Ombudsman's Report 1991-92.
5. See 'Empowering Customers' paper presented by Mr Robin Davey, Regulator-General, Victoria, at the AFCO Conference, at p.6.

Sandra McCullough and Dieneke Walker have taken over as Co-ordinators of the Law Reform Column. They invite people who have ideas for the column to contact them on (03) 629 6965 or (03) 629 6934. Written contributions are also welcome. Send c/- Editorial Co-ordinator, Law Faculty, Monash University, Clayton Victoria 3168.

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offers students the chance to integrate theoretical knowledge of law, based largely on appellate decisions learned in the classroom, with the everyday experience of legal practice and the legal system. Students discover that causes of action or remedies may not be available to a client for a variety of reasons including cost, delay, lack of evidence or enforceability.[4]

When support in principle is achieved there are many issues, both of a policy and practical nature, that need to be addressed by those establishing a clinical legal education program including:

- What control will the university have over the running of the course? What control will the university have over what goes on at the legal service? Should the university be represented on the Management Committee? What other mechanisms should be established to facilitate communication between the organisations?
- How can the university be assured of the quality of education conducted in the course? How can the educational experience of the students be guaranteed? If the students are to be supervised by non-academic staff, what control/accountability will there be for these staff? Would these staff undergo some training?
- How will students be assessed? Will the assessment requirements have to meet university and/or faculty requirements? Will non-academic staff have a say in the students assessment?
- How does this course fit into the curriculum? Will students receive additional credit because the subject is more time consuming? Do students undertake other subjects at the same time? Will there be any prerequisites? How will it fit into the timetable? Will it run over summer?
- What does it mean for staff involved? Are they seen as second class academics? Will they have the same status as 'normal academics'? How will full-time staff in the course get time to do research and writing? Will staff involved in course enjoy normal academic working conditions or have to spend 48 weeks supervising etc? Who will teach it over summer?

Conclusion

Clearly there will be specific issues arising from each new proposal to establish of a clinical legal education program. The aim of the above is to provide a starting point for discussion by highlighting the most obvious concerns.

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References

1. Two comprehensive surveys of relevant literature and discussion of issues are contained in: Evans, Adrian, 'Survey of International Trends in Clinical Legal Education and their Relevance to Australia', Report to the Dean, Faculty of Law, Monash University, February 1992; Rice Simon, 'Review of the Clinical Legal Education Program in the Law Faculty of the University of New South Wales', Final Report, June 1991.
2. The Australian Law Deans have resolved that the staff:student ratio in clinical legal education should be 1:8.
3. Rice, above, p.30.
4. Campbell Susuan, 'Blueprint for a Clinical Program', 1991 p.3.

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6. Statement of Principles and Objectives for Competition Policy and Utilities Reform, April 1994, Australian Federation of Consumer Organisations, Australian Council Of Social Service, Greenpeace, Australian Conservation Foundation, Australian Consumers' Association, New South Wales Council of Social Service, Consumer Law Centre Victoria, Public Interest Advocacy Centre, Consumer Credit Legal Service (Victoria), Consumer Credit Legal Centre (NSW), Communications Law Centre, Consumers Telecommunications Network.
7. See for example 'Consumer Utility Boards' paper presented by Dusanka Sabic at the Trade Practices Commission Conference *Consumers and the Reform of Australia's Utilities: Passing on the Benefits,* March 1994.

Review of Litigation Costs Rules

The Australian Law Reform Commission (ALRC) has been asked to consider whether any changes should be made to how costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction.

The costs rules are the laws and practices that determine how courts and tribunals apportion the costs of the parties that appear before them. In Australia the general rule is that the loser pays the winner's costs in addition to his or her own costs (the costs indemnity rule). This rule does not apply in all jurisdictions. For example, different costs rules apply in prosecutions and family law proceedings.

There is debate about how the costs indemnity rule and other costs rules affect access to the legal system and how litigation is conducted. For example, the extent to which the costs indemnity rule compensates the winner, deters 'unmeritorious' litigation and encourages settlement is not clear. The ALRC will examine the effects of the costs rules and of possible reforms in light of what the rules should achieve and the context in which they operate.

The ALRC will be considering a number of alternatives to the rule, including:

- that parties bear their own costs either generally or subject to certain exceptions;
- costs rules that allow only one party to recover his or her costs if successful (one-way fee shifting); and
- special costs rules for certain areas of litigation, such as an immunity from an adverse costs order for applicants in public interest cases.

The ALRC will also be looking at reforms that may alter the impact of the costs indemnity rule such as extending the use of indemnities against adverse costs orders.

An Issues Paper is available from the ALRC free of charge (tel 02 284 6325). Written and oral submissions are welcome. Consultations and hearings will be conducted in early 1995. The final date for written submissions is 17 March 1995 and the ALRC's final report is due on 30 September 1995. For further information contact Philip Kellow on 02 284 6314.

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