Submission to the New Zealand Ministry of Business, Innovation and Employment on *Targeted Review of the Commerce Act 1986*

By
Malcolm Abbott[1]
And
Chris Carson[2]

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[1] Associate Professor of Economics, Swinburne University of Technology, Melbourne Australia. Formerly an employee of the Australian Competition and Consumer Commission and Ministerial Advisor to the Cabinet of the State of Victoria.
[2] Programme Leader, Bachelor of Construction, UNITEC, Auckland, New Zealand.

In this submission two aspects of the review of the Commerce Act are considered. In Section A the possible use of 'market studies', and placed in the context of past use of such studies in Australia in addressing competition policy problems. In Section B the more specific case of the New Zealand construction industry is analysed as being one section of the business sector that has a number of issues regarding competition.

SECTION A: MARKET STUDIES

Introduction

In 2015 the New Zealand Government's Ministry of Business, Innovation and Employment released an Issues paper entitled *Targeted Review of the Commerce Act 1986*, in which it raised the issue (amongst a range of other issues) of whether there should be provision in legislation for there to be a greater capacity for 'market studies' to be undertaken by government agencies with mandatory information gathering powers (New Zealand, Ministry of Business, Innovation and Employment 2015, section 4). More specifically, regarding the use of market studies, the paper raised the following questions:

45. Do the approaches to market studies described in the Issues Paper align with a gap in New Zealand's institutional settings for promoting competition?

46. If there is a gap, what procedural settings for a market studies power would best fit the identified gap, in terms of:

a. The appropriate body to conduct market studies;

b. Who may initiate a market study;

c. Whether mandatory information-gathering powers should apply;

d. The nature of recommendations the market studies body could make; and

*e. Whether the government should be required to respond (*New Zealand, Ministry of Business, Innovation and Employment 2015, p. 57).

Market studies have been used in a number of countries for a range of different purposes and are designed to explore various areas and issues that have an impact on the functioning of the market for consumers - such as choice, quality, safety, health, sustainability, prices and information, as well as consumer understanding, behaviour and decision-making. The findings of these studies are then used as a basis to improve, or change existing policies, or to further the implementation of competition law**.** Market studies, therefore, might be undertaken for a range of reasons by government agencies, including:

1) as part of an investigation of market/industry structures and policy/regulatory settings in order to assist in the development of major economic reform;

2) to determine if breaches of competition law have been carried out by companies and inform future action in the enforcement of competition law, and

3) as a means to monitor the results of past reforms and legal actions.

In New Zealand market studies (or similar exercises) are already undertaken by a range of different bodies (New Zealand, Ministry of Business, Innovation and Employment 2015, pp. 54). This is also the case in Australia, both at the national and state government level.

It would be expected that in undertaking market studies as part of the first of the three reasons they would be carried out by an agency such as the New Zealand Government's Productivity

Commission, or in the Australian context by the Australian Government's Productivity Commission and at the state level carried out by agencies such as, for instance, the Victorian Competition and Efficiency Commission. Although the New Zealand Productivity Commisison is a relatively new body its Australian counterpart, and its predecessor organisations, have been carrying out these types of investigations, with market studies, since 1974 and they have played an important role in the microeconomic reform process in Australia (Productivity Commission 2003). The New Zealand and Australian agencies' functions include: holding public inquiries on matters relating to industry, industry development and productivity; advising Ministers on matters relating to industry and productivity, as requested; initiating research on industry and productivity issues; and promoting public understanding of matters related to industry and productivity. Both bodies may invite comment as part of their investigations in the form of written submissions and one their investigations are complete final reports are forwarded to the respective governments. It is expected that the New Zealand Productivity Commission will continue to carry out these functions under existing legislation, and that this work is not within the scope of the issues raised as part of the Issues Paper. It is also worth bearing in mind that although in some jurisdictions that do not have an institution like the productivity commissions, the competition regulator undertakes market studies for the purpose of information policy makers on reform imperatives. This means that the scope for a competition regulator in the New Zealand context to undertake market studies is more constrained than it might be in some places

The second and third reasons given above, however, might conceivably be work that is under taken by the Commerce Commisison in New Zealand. Generally it would be expected that the second of these would be carried out by a competition regulator such as the Commerce Commission in the New Zealand case. It is also possible that the third example would be carried out by the Commerce Commission. As the competition regulator in Australia has greater powers to undertaken these types of studies, under the prices surveillance provisions of the *Competition and Consumer Act 2010*, it is worth having a look at the nature of these types of studies in the Australian context.

Australia

One point of difference between New Zealand and Australian competition law is that in the latter case the national competition regulator has scope under legislation to undertake markets studies as part of the 'prices surveillance' sections of the *Competition and Consumer Act 2010.* In Australia the national competition regulator in Australia, the Australian Competition and Consumer Commission (ACCC), undertakes market studies, mainly in pursuit of reasons 1) and 2). In doing so the ACCC determines if major breaches of Australia's competition law have occurred, and also monitors the impact of past economic reforms on consumer pricing and monitors consumer prices in areas of particular public sensitivity.

At the national level the legislative powers for the ACCC to undertake these roles are contained in the prices surveillance section of the *Competition and Consumer Act*. As such, the Australian Government has used these provisions, periodically to undertake studies that are in effect market studies. It is quite possible that the use of these types of studies might be instructive to those wishing to incorporate similar provisions in New Zealand legislation.

In Australian legislation under Part VIIA (Prices surveillance, notification and monitoring) of the *Competition and Consumer Act 2010* the ACCC is able to examine the prices of selected goods and services.

Under these provisions the ACCC can:

- Examine proposed price rises on 'notified' goods. The relevant Minister, or the ACCC with the Minister's approval, may declare goods or services of a specified description, or a particular firm in relation to goods or services, to be notified. Once notified, firms must advise the ACCC of any proposed price increases for these goods or services. The ACCC must make a determination about the notified price increase within a specified period (unless the firm agrees to an extension).
- Hold price inquiries in relation to the supply of goods or services, and to publicly report the findings to the responsible Minister. The Minister may direct the ACCC, or another body, to conduct a public inquiry into matters relating to the prices for the supply of particular goods or services, or the supply of goods or services by a particular firm or firms, or within an industry. Alternatively, the ACCC may conduct an inquiry on its own initiative with the Minister's approval. The inquiry body must report the results to the Minister
- Monitor the prices, costs and profits of an industry or business under the direction of the relevant Minister and to publicly report the results to the Minister.

The ACCC can also conduct informal monitoring as part of its general objective to promote greater transparency of pricing and price competition. In the past areas subject to informal monitoring have included: public liability, professional indemnity and medical indemnity insurance; bank fees and charges; and petrol prices. This informal monitoring relies on publicly available information, and the co-operation of the monitored firms (Australian Competition and Consumer Commission 2004).

The prices surveillance provisions in Australian law were originally introduced in Australia as part of the Incomes Accord agreement between government, business and unions in Australia in the early 1980s (Hall & Nieuwenhuysen 1987). These were incorporated into the *Prices Surveillance Act 1983*, which was reviewed by the Productivity Commission in 2001 and repealed on the 1 March 2004. When the legislation was repealed, however, the pricing provisions were incorporated into the *Trade Practices Act* and then later when the *Trade Practices Act* was replaced by the *Competition and Consumer Act* were incorporated into this Act.

The original intention of the pricing provisions in the *Prices Surveillance Act* were to act as a general anti-inflation measure that was designed to encourage pricing restraint on the part of companies. As such the notification provisions were used extensively over a range of industries including alcohol, tobacco, credit cards, glass containers, petrol, tea, coffee, toothpaste etc.

In the early 1990s, as inflation in Australia receded, companies were increasing exempted from these notifications and prices surveillance was concentrated on a small number of companies that were perceived to have significant market power (i.e. harbour towage, airport services and post). Harbour towage was removed from these notifications in 2003 and the reserved services of Australia Post are still notified.[3] Since 1 July 2002 the only airport services subject to prices notification are regional air services at Sydney Airport and the services of Airservices Australia, a state-owned enterprise which provides air traffic control, aviation fire-fighting and rescue services to airports and airlines.

[3] In a recent application Australia Post has been allowed to raise its price of a standard stamp in Australia to $1 (Australian Competition and Consumer Commission 2015).

Price notifications, therefore, are no longer used in Australia to a large degree, and have not been used extensively since the early 1990s, and it is not expected that there would be any significant use of these provisions in the near future. Despite this decline in the use of the notifications the other provisions of the Act, however, such as inquiries and monitoring have been used in recent times, and have made use of market studies. It is in this context that it would be useful for policy makers to observe how these provisions have been used.

Pricing inquiry

As noted above, the *Competition and Consumer Act* provides that the Minister may direct the ACCC, or another body, to conduct a public inquiry into matters relating to the prices for the supply of particular goods or services by a firm or firms, or within an industry. These pricing inquiries may investigate market situations to determine the nature, significance and causes of alleged pricing problems. The inquiry body makes recommendations to the Australian Government as to the appropriate response.

Pricing inquiries have been used for several purposes in the past, including to: determine whether pricing outcomes reflect competitive market forces; to advise the Minister on what types of prices oversight, if any, should be applied to the firm or firms under inquiry; assess price notifications in greater depth; encourage compliance with determinations about notified price increases; and play an educational role by bringing information into the public domain, facilitating public understanding of the pricing matters at issue.

Groceries

One past example of this type of inquiry being conducted was the one undertaken in 2008 by the ACCC into the competiveness of retail prices for standard groceries. On 22 January 2008 the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs requested the ACCC to hold this public inquiry. As part of the inquiry the ACCC was requested to take into consideration the current structure of the groceries industry at the supply, wholesale and retail levels including mergers and acquisitions by the national retailers; the nature of competition at the supply, wholesale, and retail levels of the grocery industry; the competitive position of small and independent retailers; the pricing practices of the national grocery retailers and the representation of grocery prices to consumers; factors influencing the pricing of inputs along the supply chain for standard grocery items; any impediments to efficient pricing of inputs along the supply chain; and the effectiveness of the Horticulture Code of Conduct, and whether the inclusion of other major buyers such as retailers would improve the effectiveness of the code. The ACCC provided its report on 31 July 2008 (Australian Competition and Consumer Commission 2008). This report concluded that the grocery market in Australia is workably competitive, however, there were a number of actions that could be taken to improve the level of competition in the Australian groceries market. The report also found that there were a number of impediments to the expansion and entry of new entrants to provide more competition in the Australian retail groceries market, including high barriers to entry and expansion - particularly in relation to planning laws and the attainment of new sites. One result, therefore, has been an increased focus on the part of the ACCC to investigate allegations of abuses in this industry since 2008.

Fuel

A second example of this type of inquiry was one that was conducted into petrol prices in 2007. Following a Senate inquiry into petrol pricing, and in response to a divergence movements between international benchmark prices and the domestic retail price of petrol, on 15 June 2007 the then Treasurer approved an ACCC price inquiry into the price of unleaded petrol under Part VIIA of the *Trade Practices Act*. Matters considered by the inquiry

included: the structure of the industry, the extent of competition at the refinery, wholesale and retail levels, including the role of imports; the determination of prices at each of these levels, including the methodology for determining wholesale price; and impediments to efficient petrol pricing and possible methods to address them. This report contains the findings of the ACCC following the completion of this inquiry (Australian Competition and Consumer Commission 2007).

Price monitoring

In addition to market studies being undertaken as part of general enquiries into industries studies have also been undertaken by the ACCC as part of its price monitoring function. This price monitoring has generally been undertaken to investigate the impact of economic reforms, while and after the reforms are undertaken, which might have had an impact on pricing.

A number of examples of this approach can be examined.

Container stevedoring monitoring 1999-

After the 1998 stevedoring dispute in Australia a levy was placed on the industry to pay for redundancies. As part of the negotiated settlement is was agreed that the ACCC should monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. These reports have been released on annual basis since 1999 and have continued even after the period of the levy expired. The reports provide valuable information to the government and the industry, which is dominated by two companies (Australian Competition and Consumer Commission 1999-2015).

Milk market deregulation 2000-2001

On 10 April 2000 the Minister for Financial Services and Regulation, Joe Hockey, directed ACCC to formally monitor prices, costs and profits of businesses dealing with market milk product sales. Subsequent to the issuing of this ministerial directive, all Australian State Governments agreed to abolish regulated farmgate price controls for market (drinking) milk from 1 July 2000. A levy similar to the stevedore levy was introduced (11 cents per litre) to pay for dairy farmers leaving the industry as a result of the deregulation. This levy was used to justify the direction to the ACCC to monitor costs, prices and profits along the milk supply chain for leviable milk products. Monitoring was to commence three months before the introduction of the 11 cents per litre Dairy Industry Adjustment Levy on 8 July 2000 and conclude six months later on 8 January 2001. Under the ministerial directive, the ACCC was required to present a report of its findings to the Australian Government within three months of completing its monitoring activities (Australian Competition and Consumer Commission 2001).

Introduction of the GST

The largest price monitoring activity undertaken by the ACCC was the project to monitor the impact on prices of the introduction of the Goods and Survives Tax (GST) in Australia in 2000. The ACCC reported on the impact of the introduction of the GST on prices in order to reassure consumers that companies were not taking advantage of the new tax to take advantage of consumers (Australian Competition and Consumer Commission 2003).

Carbon tax repeal

The *Clean Energy Legislation (Carbon Tax Repeal) Act 2014*, which received Royal Assent on 17 July 2014, gave the ACCC powers under the *Competition and Consumer Act 2010* to

monitor prices and ensure cost savings attributable to the carbon tax repeal were passed on in the regulated industries.

In addition to its existing powers, the ACCC's role and powers during the carbon tax repeal transition period, 1 July 2014 to 30 June 2015, included: taking action against businesses supplying regulated goods that attempted to exploit other businesses and consumers by failing to pass through all of their cost savings from the carbon tax repeal (carbon tax price reduction obligation) and taking action against businesses that made false or misleading claims about the effect of the carbon tax repeal or the carbon tax scheme on the price for the supply of goods or services (false or misleading representations).

Airports

After the price notifications were abolished in 2003 for airports, price monitoring was retained for Australia's largest airports. This means that the ACCC monitors prices, costs and profits and quality of aeronautical services and car parking at Brisbane, Melbourne, Perth and Sydney airports (Australian Competition and Consumer Commission 2003-2006, 2007-2014)

Petrol

Originally the major oil companies were required to notify the government of proposed price increases for the supply of certain wholesale petroleum products including petrol and diesel. At the retail level, service station operators were free to set prices as market conditions allowed. In 1998, in response to reports by the Industry Commission and the ACCC, formal prices surveillance ceased as part of the government's reform package for the petroleum industry (Industry Commission 1994). As part of the reform package the refiner-marketers agreed to support an independent price monitoring system for 100 country towns to be monitored by the Australian Automobile Association, and the ongoing monitoring of petrol prices by the ACCC, with a particular focus on 'hot spots'. This ongoing monitoring role has involved the ACCC in a number of major projects on petrol pricing. The government asked the ACCC (in 1999) to consider how international crude oil price movements had been translated into Australian retail prices. Also, in response to consumer concerns about fluctuations in retail petrol prices, the ACCC's informal monitoring role was extended to informing consumers (in 2002) about how to take advantage of petrol price cycles. These include, 'Assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sector' in 2004.

On 17 December 2007, under the powers of the *Trade Practice Act 1974* (section 95ZE of Part VIIA), the Assistant Treasurer and Minister for Competition and Consumer Affairs, Chris Bowen, directed the ACCC to monitor the prices, costs and profits of unleaded petroleum products for a period of three years and report to him by 17 December each year. In 2010, the Minister for Competition and Consumer Affairs, Craig Emerson, directed the ACCC under the same powers to monitor the prices, costs and profits of unleaded petrol products for one year and report to him by 17 December 2011. On 9 May 2011, the Parliamentary Secretary to the Treasurer, David Bradbury, issued a direction for the ACCC to prepare a monitoring report to the end of 2012. On 6 July 2012, the Assistant Treasurer, David Bradbury, issued a further direction for the ACCC to prepare a monitoring report to the end of 2013. On 15 July 2013, the Minister for Competition Policy and Consumer Affairs, David Bradbury, issued a further direction for the ACCC to prepare a monitoring report to the end of 2014. On 9 December 2014, the Minister for Small Business, Bruce Billson, issued a further direction for the ACCC to prepare monitoring reports for period of three years from 17 December 2014 (Australian Competition and Consumer Commission 2008-14).

Summary of price monitoring

Price monitoring is used for two main purposes in Australia. First of all it is used to evaluate the impact of a government policy change on consumers. This was the case with the stevedore and dairy industry levies, the GST and carbon-tax renewal cases. The ACCC investigated the results of the implementation of these policy changes in order to reassure policy makers and consumers that they policies introduced were having the results that were expected of them.

The second reason is to retain an ongoing oversight role in areas of some sensitivity to consumers. This was the case with petrol price monitoring and in the case with monitoring of the major airports after 2003. It was also the case with the stevedoring industry, where monitoring was continued even after the expiry of the levy period.

Mandatory reporting

The prices surveillance provisions of the various pieces of relevant legislation have always contained mandatory information gathering powers. These powers have always had penalties in them for non-compliance, although, the penalties have been more ones that are slight and more a case show than anything else. The resent legislation has a penalty of 20 units (or $3,600 in 2015) for non-compliance. Companies have tended to comply, the publicity surrounding non-compliance being a greater deterrence that the actual dollar amounts applied.

In reporting on monitoring projects the ACCC has often reported data in such to protect commercial in-confidence information. In the case of stevedore monitoring for instance data is aggregated and index numbers are used extensively. It is, however, not universally the case and in airport monitoring, for instance, data is firm specific.

Conclusion

Given that there is already the Productivity Commission in New Zealand, with supporting legislation, the role of market studies under the *Commerce Act* might be left to be more constrained in scope that is the case in many other countries. Instead it might be reasonable to expect that the Commerce Commission might be given additional powers to conduct market studies where there are possibilities of breaches of the *Commerce Act*, or in those circumstances where price monitoring of a market/industry is regarded as beneficial. In response to the questions in the Issues paper, therefore, the following might be stated.

45. Do the approaches to market studies described in the Issues Paper align with a gap in New Zealand's institutional settings for promoting competition?

Yes there is a gap. It is conceivable that New Zealand would gain from the sort of market studies undertaken by the ACCC in the form of inquiries and monitoring. Notifications of the sort that were once common in Australia would tend to be far less useful and therefore unnecessary.

46. If there is a gap, what procedural settings for a market studies power would best fit the identified gap, in terms of:

a. The appropriate body to conduct market studies;

It would be expected that markets studies will continue to be undertaken by the Productivity Commission as part of the general review of policy in New Zealand, but it would be useful in other contexts for the Commerce Commission to be also able to carry out these studies.

b. Who may initiate a market study;

The relevant Minister, or the Commerce Commission with the approval of the Minister.

c. Whether mandatory information-gathering powers should apply;

Yes, but penalties for non-compliance should be slight rather than onerous.

d. The nature of recommendations the market studies body could make; and

The market studies body would be expected to make a variety of recommendations depending on the circumstances. If breaches of law were detected then recommendations of prosecutions might be made, otherwise a Productivity Commission studies might lead to recommendations of policy reform etc.

e. Whether the government should be required to respond.

The government would be required to respond if it was shown there was some breach of law, but otherwise not.

SECTION B: THE CONSTRUCTION INDUSTRY

Introduction

The consideration of anti-competitive practices in the construction industry in New Zealand is made complex by a number of factors that, while not confined to New Zealand, are amplified by the small size and nature of the New Zealand construction industry.

The New Zealand landscape is characterised by a late European settlement with strong differentiation between a few large urban centres and diffuse small rural towns. A complex terrain has favoured road transport over rail which, together with city-centric industries, have resulted in retail conglomeration and high demand for housing and roading especially in Auckland, the largest city.

Construction Sector

The construction sector in New Zealand is relatively sharply differentiated between many small scale residential and small commercial construction firms but few large firms in the large commercial and infrastructure sector. This space is dominated by one or two firms. The high setup costs for large commercial projects compared to small residential buildings represents a significant barrier to new entrants as tenders are awarded to firms with experience and resources. Furthermore the small size and distance of the country acts as a barrier to foreign construction competitors where extra setup costs and low profits deter investment.

Construction Cycle

The business cycle in New Zealand over recent decades has paralleled similar international cycles but with more variation indicating the force of external economic influences. The construction cycle shows a much more exaggerated cycle with more rapid increase and slow downs. This means high costs during the upturn and loss of specialist skills during the downturn. Large firms require large resources to see out downturns giving them an advantage over smaller and new entrant firms in the event of an upswing. New entrants face very high setup costs in essential capital equipment such as craneage, heavy haulage and, excavation and drilling.

This dominance in market power enables them to take advantage by virtue of their longevity rather than purposeful crowding out. i.e. the barriers pre-exist rather than erected by the larger firms. There is evidence to suggest the construction sector, while technically efficient, is not scale efficient (Chancellor, Abbott and Carson 2015).

The residential portion of the construction industry is made up of a large number of small firms using semi-skilled labour and small subcontractors. Attempts to introduce franchising and co-operative firms have had little impact on the competitive nature of this part of the industry. Entry of new firms is easy setup costs relatively low. The Commerce Commission has identified the practice of cover pricing as possible collusion however it is difficult to see this as restricting competition in this part of the industry. (Commerce Commission 2015)

Small pool of large firms

Of concern when considering anti-competitive behaviour in construction, within the large firm high-end commercial construction sector the small number of firms means that of necessity there are close relationships between members of the various firms. Firm A

may be client, contractor or subcontractor of firm B and vice versa. Similarly there is a limited pool of skilled and experienced labour especially in management. This results in rapid escalation of wage costs and mobile employment in an upturn with diffusion of intellectual property which may resemble collusive behaviour.

In addition the pool of potential tenderers is restricted. This is exaggerated in an upturn where because construction projects by their nature typically take months and years to complete. Few firms can take on many projects at the same time further restricting the pool.

Need to retain experienced skilled workforce

During a downturn in the construction cycle the reduction in the workforce reduces the pool of experienced managers and overseers in an industry characterised by relatively low education levels (Abbott and Carson 2015). In turn this often causes difficulties to recruitment when there is an upturn in the construction cycle.

Supply chain restrictions

The Commerce Commission study identified a concern amongst commercial building contractors about a perception of cartel activity in the materials supply chain. Specialist building materials especially in the fit out stages require imported specialist materials where there are relatively few such importers (Commerce Commission 2015).

Infrastructure Projects

Recent infrastructure projects involving roading and tunnelling such as the Northern Gateway motorway extension, the Victoria Park tunnel, the South Western motorway link through Waterview, the raising of the NorthWestern motorway, the electrification of the urban rail system, to name a few have given rise to the practice of alliances. The nature of these projects have required resourcing beyond the scope of the large firms so temporary alliances between a number of large firms have been constructed. This has given the advantage of increasing skills and experience, sharing capacity risk. It also gives rise to the possibility of collusive practices and continued anti-competitive behaviour.

Transaction costs

For many years there has been significant concerns in the construction sector about payments; late payments, non-payments and withholding retention monies. The Construction Contracts Act 2002 was passed to give some basis for certainty about payment methods and the recently amended NZS3910 2013 some regard to retention monies especially in the case of client bankruptcy.

5. What justifications can there be for a purpose-based (rather than effects-based) approach?

The effects based test is better suited in the New Zealand construction sector than a purpose based test which is more likely to give rise to type 1 false liability.

Conclusion

Given the ranges of problematic competition issues that exist in the New Zealand construction industry any additional powers given under the Commerce Act for the Commerce Commission to undertake market studies would be useful. Such subsequent studies might be useful at identifying areas where action might be taken under the

Commerce Act, or be useful in providing direction to agencies such as the Productivity Commission when it undertakes studies of the industry as a part of policy reform

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