Voluntary Bipartite Peer Review of Competition Policy: Fiji and Papua New Guinea

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Outline of presentation

- The jurisdictions: similarities and differences
- The laws: general comments
- The laws: specific issues
- The regulators
- Enforcement
- Conclusions and recommendations

The jurisdictions: similarities and differences

1. *"The size of a market necessarily affects the competition policy it should adopt."*

2. A small market economy is:

   "*one which can support only a small number of competitors in most of its industries"* [1]

1 Michal S. Gal, *Competition Policy for small market economies, (2003)* 1

Political economy crucial to content and operation of competition laws

- Both are small fragmented market economies
- Both are developing countries with the associated competition law issues
- Traditional competition law and policy frameworks of larger developed countries unlikely to be entirely appropriate

Political economy crucial to content and operation of competition laws

PNG

- Independent country for 39 years; developing jurisdiction; highly concentrated industries where well-resourced operators engage in conduct which disadvantages competitors, small business, farmers and the community
- Population of 7 million; more than 800 languages; 75% live in rural-urban settings in rugged terrain
- Small size, internally isolation and fragmentation mean market is unlikely to attract large numbers of competitors, or even multiple competitors in many of its industries
- Pricing regulation in some industries

Political economy crucial to content and operation of competition laws

Fiji

- “middle income country and one of the more developed of the Pacific Island economies”
- Developing country with a large subsistence agriculture sector
- 330 islands, 100 inhabited, population is less than 1m
- 83% land owned communally by indigenous Fijians, 9% by the state, 8% freehold
- Only 16% suitable for intensive agriculture
- Agriculture and tourism basis for industry
- Issues of size, relative isolation from other markets and fragmentation raise similar issues to those in PNG about the nature of markets

The laws and their objectives

Independent Consumer and Competition Act of PNG (ICCC Act) 2002

3 primary (and 7 facilitating objectives):

- Enhancing welfare through promotion of competition, fair trading and consumer interests;
- Promotion of economic efficiency; efficiency in industry structure, investment and conduct;
- Protect long term interests of people of PNG with regard to price, quality and reliability of significant goods and services.

Commerce Commission Decree of Fiji (Decree) 2010 (Commerce Commission established in 1998 under earlier law)

- To promote effective competition in the interests of consumers;
- To facilitate an approximate balance between efficiency and environmental and social considerations;
- To ensure non-discriminatory access to monopoly and near monopoly infrastructure.

Laws modelled on those of Australia and New Zealand

The laws in brief

The laws address the following relevant conduct:

PNG ICCC Act

- Horizontal, unilateral conduct, mergers, resale price maintenance

Fiji Ordinance

- Horizontal, vertical, unilateral conduct, mergers, resale price maintenance and price discrimination

Regulators

PNG

- Independent Consumer and Competition Commission, an independent statutory authority under the ICCC Act

  - functions include competition , consumer protection, economic regulation such as the Prices Regulation Act (price control)

Fiji

- Commerce Commission, an independent statutory body

  -functions competition, consumer protection, price regulation and monitoring

General recommendations on substantive provisions

- Price regulation may be warranted in some industries but should not be expanded without substantial investigation; regular review to determine effectiveness and opportunities to revert to the market (Fiji- still 400-500 items price controlled)

- Many suggestions for amendment in both jurisdictions to laws which have been in place for a relatively short time and not regularly applied or enforced

- Amendments should be made with caution given the lack of enforcement experience (which does not appear to be linked to the wording of the laws themselves)

Specific recommendations on key competition provisions

Application of the laws – clarify provisions

Fiji Ordinance

- Add definition of “market” and clarify the meaning of “consumer”

ICCC Act

- Application to commercial activities of government should be clarified - add a definition to catch the relevant activities of government bodies- whether it be by defining “trade” or in some other manner
- Extraterritorial application clarified
- Statutory exemption for conduct “specifically authorised”- define this in more detail

Cartel provisions

PNG/Fiji: both considering criminalisation

- Add cartel provisions or modernise the existing provisions?
- Criminalisation of cartel conduct?
- Advantage: deterrence
- Disadvantage: more difficult to prove
- Look to new NZ provisions
- Consider current Harper Review in Australia which has thoroughly considered the issue for some guidance as to what might suit
- PNG- leave provisions on joint ventures and recommended prices
- Fiji- other issues

Misuse of market power: general

- Essential and important provisions in each jurisdiction given market structures
- Both should consider these provisions and suggested amendments further
- Willingness of courts to take an economic view is crucial to determining the ultimate effectiveness of these provisions
- Should be reviewed in light of the outcomes following the Harper Review of Competition Law and Policy in Australia

Misuse of market power

PNG

- Current provision similar to an earlier version of Australian provision- (not described in an entirely accurate fashion in the PNG Report) re protection of competitors
- Not all competitors should be protected
- Dominance standard would not assist in the small market economy environment
- Reversal of onus would chill competition
- List of specific prohibitions too broad
- Test re intellectual property should be retained
- Unfair conduct should be placed in a statute which is not based on economic considerations

Misuse of market power

Fiji

- No changes sought for the basic part which is as Australia
- Addition of new provision with an “effects test” with additional clauses specifying conduct such as price signalling, predatory pricing
- Additions to cover price signalling and also predatory pricing may not be necessary
- Consider Australian Harper Review outcomes

Other provisions

PNG

RPM

- Modelled on Australian provisions
- Could be simplified but MUST contain the concept of “price specified” as provisions do not work without this concept
- RPM should remain per se at this stage

Third Line Forcing

- Should be prohibited if at all under a substantial lessening of competition test

Fiji

Price discrimination

- Should be deleted

Mergers

General recommendations

- Should only be made subject to compulsory notification if it can be shown that there would be some benefit- risk assessment clearance works well in Australia

PNG

- Prohibition with a substantial lessening of competition test
- No compulsory notification- clearance based on risk assessment/authorisation on public benefit grounds
- Court action for breach/Judgment on one case from 2012 still pending
- Authorisation granted in another case
- Compulsory notification would take time and resources

Mergers

Fiji

- Prohibition with a dominance test
- Include “merger factors”
- Authorisation is available- 3 authorised in 2013

Authorisation

General

- Experience in small market economies shows that it is useful and workable especially where further market entry is unlikely e.g. Australia
- Based on the idea that there are areas of market discontinuity where competition does not necessarily deliver the best outcomes
- Transparent process of individual administrative permission when demonstrated public benefit outweighs likely anticompetitive detriment

PNG

- Public register key to transparency
- Prescribed forms should be developed
- Should include express power to impose conditions
- No reason why ICCC should not be both enforcer and decision-maker
- Appeal to a separate tribunal- nature of appeal and role of ICCC on appeal should be specified
- Fees could be retained by the ICCC

Enforcement : general

- There should be increased efforts to publicise and enforce the laws, with careful case selection and use of resultant publicity
- There should be increased education of business and consumers , through mechanisms such as vibrant websites, to increase awareness, emphasis risk and increase compliance

Enforcement

PNG

- Court enforcement; civil penalties on a civil standard of proof
- Broad range of additional general powers sought for the ICCC to issue substantiation notices, compliance notices, public warning notices, advisory notices, enforceable undertakings, seeking compensation for breaches
- This would avoid lengthy court proceedings; appeal to court would be necessary to ensure procedural fairness
- leniency policy

Fiji

- Enforcement by courts; civil penalties and civil standard
- Supplementation of on the spot penalties
- Setting up a Tribunal with appeals to the Court of Appeal

Role of judiciary

- Both are common law countries
- Courts are traditionally important
- Both seek to move outside/ work around the courts

Role of regulators

PNG

Suggested amendments re:

- Composition and work program
- Information gathering powers
- Access to information by third parties
- Advocacy role re other government bodies

Fiji

Suggested amendments re:

- Composition, functions and procedures

Recommendations to governments

- Regulators have broad mandates covering many areas and including competition (antitrust) provisions
- This diverts resources from enforcement of those provisions and education
- The provisions are novel and based in economics
- The regulators are relatively small
- Increase resources
- Increase the numbers of staff and improve the quality of staff training

IMPROVING RESOURCES AND THE FUNDING OF THE REGULATORS IS THE CORE RECOMMENDATION OF THE COMPARATIVE ASSESSMENT

Recommendations to competition regulators

- Enforce the laws more effectively

  - high profile cases following dawn raids

  -important sanctions

will raise regulator profile and make funding politically easier

- Pursue offenders to a court solution in selected cases rather than settling -court shame for business reinforces the importance of the law

- Prioritise effective training for the judiciary and staff

Conclusions

- The laws and enforcement problems are similar in both jurisdictions
- More active enforcement is the key to effective competition law for both
- PNG and Fiji should strengthen their ties informally to exchange expertise and co-operate on enforcement
- Joint training activities to enhance networking and the development of professional relationships should be considered