

**2009 COMPETITION LAW CONFERENCE**

**SYDNEY**

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**IN HOPE OF CONVERGENCE  
- A REGIONAL PERSPECTIVE ON COMPETITION  
LAW**

**Chief Justice RS French**

**Introduction**

This is the twentieth year of the Competition Law Conference arranged by Christopher Hodgekiss SC and his wife, Chris. It was instituted to provide an alternative to the highly successful and equally durable Trade Practices Workshop, conducted annually by the Business Law Section of the Law Council of Australia. It was recognised many years ago that not everybody with an interest in the area was able to attend that Workshop. I congratulate the Hodgekiss's on their endeavours over the years and their contribution to ongoing discussions between the judges, lawyers, economists and regulators involved in this important area of law and public policy.

The focus of discussion at the conferences over the years has been on developments in domestic law and practice in competition regulation. Offered my own choice of topic for this opening address, I was not able to dredge up one new thought, worthy of repetition, on expert evidence, the secret lives of economists and lawyers, the forensic expansions and contractions of market definition, the authorisation process, ss 46 and 50, or the case management of complex anti-trust litigation. Even those judicially encrusted phrases "substantial lessening of competition", "purpose" and "likely effect" offered no inspiration. And the interface between access regimes and cooperative federalism seemed somehow to have lost its

intrigue. Any discussion of the normative tensions embedded in the amended s 46 or the legal and logistical challenges of cartel prosecutions, to be addressed by others in any event, would carry with it the risk of straying into territory that may require judicial attention in the High Court at some time in the future.

It seems to me, however, that there is a need to lift our gaze beyond the domestic horizon and contemplate what is happening in competition law and policy in other countries in our region. We need to be aware, in the context of a global economy whose operation affects us all, of the similarities and differences between the competition law regimes in our region and the challenges and opportunities they provide for cooperative approaches. There is diversity in the content of competition laws in the countries near to us. More importantly, their competition law systems are at different stages of development, the rates of which are affected by particular historical political and cultural factors. The newness of competition law in some of our neighbours and, particularly, India and China is striking.

What is also striking is the modest level of achievement in international cooperation in this area. Whether globally or regionally, subject to what one might say about Europe, harmonisation appears to be an impossible dream and possibly even a questionable objective. There is nevertheless both hope and promise in convergence of national competition law regimes supported and encouraged by mutual assistance, information exchange and regional education and training. In this respect there are opportunities for Australians well versed in the field to make contributions. Such contributions have been made and continue.

This paper is a little outside my comfort zone largely defined by the topics to which I referred earlier. It is derivative and based upon a reading of some of the excellent articles and books on the subject. It is a step in self education on which I would like to build and would like to suggest we can all further build in ongoing

discussion between ourselves and with other actors in the field of competition law and policy in the region.

### **The compatibility imperative**

21st century markets for goods and services and competitive activities within those markets cross national boundaries. So too do the effects of anti-competitive conduct. Dr Chris Noonan, the author of a leading Australian text on the topic, *Emerging Principles of International Competition Law*, has written<sup>1</sup>:

The growth in international business activity means that an increasing number of competition law cases will have an international element. The business practices that will be the subject of international competition law cases will include virtually all the types of conduct that could be the subject of a domestic competition law case.

National competition law regimes however are not globally harmonised nor particularly consistent. Sometimes their policy objectives and priorities differ significantly. Europe may be regarded as a region whose Member States operate under an almost unique single overarching competition law regime together with an array of domestic competition law regimes. It is suggestive of a proto-federation. No such legal harmonisation exists at a regional level in the Asia-Pacific area of which Australia is a part.

There are regions in which national competition laws and policies of different countries may have the potential for some convergence. Such a process

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<sup>1</sup> Noonan, *The Emerging Principles of International Competition Law*, (2008) 10.

can be supported by regional approaches to cross border competition problems<sup>2</sup>. As a general proposition, however, there is no credible system of international competition law. There is a diverse range of domestic legal regimes and a proliferation of free trade agreements and cooperative arrangements. This phenomenon has been described as "global bilateralism". Jane Rennie, who so described it in a discussion about competition regulation provisions in Free Trade Agreements, made the point that <sup>3</sup>:

Each regime which must be accommodated increases the compliance burden on companies and the potential for divergent regulatory outcomes.

Dr Noonan has observed, realistically it seems<sup>4</sup>:

It is not necessary to adopt one single multilateral agreement to realise most of the gains from international cooperation. States are unlikely to agree to a global competition law code, let alone empower an international body to effectively enforce such a code ... The practical resolution of problems will involve a combination of national and international actions, including the extraterritorial application of competition law, cooperation between competition law agencies, international judicial assistance, and international trade agreements.

Australia is part of a region characterised by diversity in national competition law regimes both as to their content and their stages of development. In some countries in the region there are no competition law regimes. This diversity raises

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<sup>2</sup> Vautier and Lloyd, "Competition and deregulation policy areas in APEC" in Yamazawa (ed), *Asia Pacific Economic Cooperation (APEC) Challenges and tasks for the twenty-first century* (2000) 255 at 258.

<sup>3</sup> Rennie, "Competition Regulation in SAFTA, AUSFTA and TAFTA: A Spaghetti Bowl of Competition Provisions?" (2007) 25(2) *Law in Context* 127 at 128.

<sup>4</sup> Noonan, *op cit*, at 11.

challenges and opportunities for our international trade actors, for the competition regulator and for competition law practitioners.

In 1996, Alan Fels, then Chairman of the Australian Competition and Consumer Commission, wrote about the centrality of domestic matters in discussion of competition policy in Australia<sup>5</sup>. He was nevertheless able to point to an emerging international agenda concerned with the relationship between trade and competition policy. He said<sup>6</sup>:

If trade barriers are lowered and it is easier for imports to enter a country, the effects of this liberalisation can be defeated if there are anti-competitive arrangements in domestic markets, especially in distribution sectors, which prevent the imports from reaching consumers or result in significant increases in their prices to consumers. Hence trade policy needs to be complemented by an effective domestic competition policy.

One particular example of the relationship between trade and competition policy relates to export and import cartels. Their effects in raising prices abroad and lowering them at home does not necessarily attract high priority concern from regulators focussing on anti-competitive conduct affecting domestic markets.

The history of international attempts to develop common approaches to competition law and policy has been somewhat patchy. A brief overview follows<sup>7</sup>.

Following World II there was an abortive attempt, sponsored by the United States under the auspices of the United Nations, to establish an International Trade Organisation (ITO) with a view to promoting trade liberalisation among member

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<sup>5</sup> Fels, "Competition Policy and Law Reform in the Asia Pacific Region", (1996) 6 *Australian Journal of Corporate Law* 143.

<sup>6</sup> Fels, op cit, at 144.

<sup>7</sup> This overview is drawn from Noonan, op cit, Ch 11 at 405 et ff.

countries. A Charter was adopted by a conference held in Havana in March 1948 and became known as the Havana Charter<sup>8</sup>. The ITO never came into existence. However articles of the Charter dealing with restrictive business practices informed subsequent endeavours to establish international competition rules<sup>9</sup>. Some aspects of the Charter are reflected in contemporary proposals for a WTO agreement on competition law<sup>10</sup>.

The Charter objectives were taken up by the United Nations Economic and Social Council, without any concrete outcome. The issue of restrictive business practices was raised in the context of the General Agreement on Tariffs and Trade (GATT)<sup>11</sup>. This led to the establishment of a mechanism for consultation between GATT parties on restrictive business practices. The mechanism was never invoked.

Restrictive business practices have been considered in GATT talks and in the WTO since the 1960s. Proposals have been made since the early 1990s for a WTO agreement on competition law<sup>12</sup>. No such agreement has emerged. One limited development in this area is a Reference Paper which forms part of the commitments of some WTO members in relation to telecommunications. The Reference Paper contains regulatory principles for the provision of domestic law support for market access in relation to telecommunications<sup>13</sup>. It should also be noted that the TRIPS Agreement, concluded under the auspices of the WTO, contains provisions for mutual assistance in the enforcement of competition laws<sup>14</sup>. In the end, however,

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<sup>8</sup> Final Act of the United Nations Conference on Trade and Employment made at Havana in March 1948.

<sup>9</sup> Havana Charter Art 46-56.

<sup>10</sup> Noonan, *op cit*, at 407.

<sup>11</sup> Noonan, *op cit*, at 408.

<sup>12</sup> Noonan, *op cit*, at 409.

<sup>13</sup> Noonan, *op cit*, at 411.

<sup>14</sup> Noonan, *op cit*, at 418.

evolutionary convergence aided by regional cooperative arrangements offers more for the development of compatible competition law regimes than ambitious schemes for their harmonisation.

### **Australia, APEC and competition law and policy**

Importantly for Australia and the region APEC, whose members are the major economies bordering the Pacific Ocean, has a particular focus on competition policy and law. The Member Economies of APEC comprise Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei, Thailand, the USA and Vietnam. Plainly, any development by this group of cooperative or convergent approaches to competition law and policy would be of major international significance. However, although there are interesting changes afoot in a number of the APEC members, they seem to be a long way from convergence, much less harmony.

The history of APEC dates back to the early 1990s. Professor Ross Garnaut has pointed out that the need for Asia Pacific economic cooperation "emerged from the reality of deepening economic integration of the East Asian, North American and South West Pacific economies during the period of sustained, rapid internationally oriented economic growth in East Asia"<sup>15</sup>. In 1994 APEC economic leaders made a Declaration of Common Resolve at a meeting at Bogor in Indonesia. This came to be known as the "Bogor Declaration". It reflected a commitment to chart a future course of economic cooperation. One of its stated objectives was the enhancement of trade and investment liberalisation in the Asia Pacific. Competition policy and deregulation were two areas particularly identified in APEC's subsequent action plan

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<sup>15</sup> Garnaut, "APEC ideas and reality: History on prospects" in Yamazawa (ed), *Asia Pacific Economic Cooperation (APEC): Challenges and tasks for the twenty-first century*, (2000) 1 at 1.

framework<sup>16</sup>. Member economies were asked to prepare Individual Action Plans so that progress in the policy areas covered by the Bogor goals could be assessed. Writing in 2000, Vautier and Lloyd observed in relation to the action plans as they then stood<sup>17</sup>:

Generally, the Individual Action Plans reveal a lack of agreement on the core objective of "competition policy" and widely divergent views on the scope of this policy area. Herein lies a major challenge for APEC in the twenty-first century, especially when considering competition principles and deregulation guidelines.

Vautier and Lloyd proposed that the central issue for APEC in respect of competition, deregulation and regulatory reform was to achieve convergence around policy objectives and policy direction, rather than rules<sup>18</sup>.

APEC established a Competition Policy and Law Group in 1996 by combining pre-existing work programs on competition policy and deregulation. These had been referred to as the Osaka Action Agenda (OAA). The combination was done on the basis that the two areas were mutually reinforcing.

In a recent statement about the Competition Policy and Law Group published by APEC it was said<sup>19</sup>:

In 2001, economic leaders agreed that the OAA should be broadened to "reflect fundamental changes in the global economy", including strengthening the functioning of markets. The implementation of competition policy and deregulation provides markets with a framework that encourages market discipline, eliminates distortions

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<sup>16</sup> Vautier and Lloyd, "Competition and Deregulation Policy Areas in APEC" in Yamazawa (ed), op cit, at 255.

<sup>17</sup> Vautier and Lloyd, op cit, at 256.

<sup>18</sup> Vautier and Lloyd, op cit, at 256.

<sup>19</sup> APEC, "Assessment Framework for the Daegu Initiative", (2008) at 94.

and promotes economic efficiency. Therefore, the area of competition policy/deregulation is one of the key elements contributing to both the "road map" and the broadening of the OAA.

In 1999, APEC ministers endorsed a set of principles entitled "APEC Principles to Enhance Competition and Regulatory Reform". Their preamble recognised "the strategic importance of developing competition principles to support the strengthening of markets to ensure and sustain growth in the region and that these principles provide a framework that links all aspects of economic policy that affect the functioning of markets". The preamble acknowledged the need to take account of and encompass diverse circumstances in economies in the region and different priorities that arose from them. It recognised that Member economies would have flexibility to take into account "their diverse circumstances in implementing this framework" and that policy and regulation in APEC economies might properly have objectives other than promoting competition.

In summary the principles are as follows:

1. *Non-discrimination* – application of competition and regulatory principles in a manner that does not discriminate between or among economic entities in like circumstances whether those entities are foreign or domestic.
2. *Comprehensiveness* – requiring broad application of competition and regulatory principles to economic activity including goods and services and private and public business activities.
3. *Transparency* – in policies and rules and in their implementation.
4. *Accountability* – requiring clear responsibility within domestic administrations for the implementation of the competition and efficiency dimension in the development of policies and rules and their administration.
5. *Implementation* – is the most extensively elaborated "principle". It sets out the various measures which APEC Member economies will make efforts to put in place. While these measures are directed to the other overarching competition law principles, it is clear that they do not require anything like a harmonised approach to the content of competition law or policy with the Member economies.

The claimed achievements of APEC's Competition Policy and Law Group, as they appear from the APEC website, are relatively modest. That is not to say they are not important. They include:

- . A seminar exploring ways to apply an APEC/OECD integrated checklist on regulatory reform covering the relationship between regulatory reform and competition policy and law. Outcomes were treated as recommendations for actions enabling APEC Member economies to make better use of the checklist in policy harmonisation.
- . An APEC training course on competition policy which commenced in 2005 and continues until 2009. This involves technical cooperation and assistance focussed on building capacity especially in developing economies by utilising APEC's knowledge and expertise on competition policy and regulatory reform.
- . A competition policy and law database managed by Chinese Taipei which covers the whole of the APEC geographic area.
- . Experience-sharing discussion among members regarding recent developments and updates in their competition policy and legislation is being encouraged.
- . Review of operations and terms of reference of the Competition Policy and Law Group.

Information-sharing and mutual assistance in training and the development of consistent approaches to regulatory reform across the region are important first steps towards more effective substantive arrangements for trans-national enforcement of competition policies with a workable degree of consistency. The difficulty of achieving substantive outcomes of that nature is not to be underestimated. It is indicated by the history to which I have already referred and the varying stages of development of domestic competition regimes in different

countries in the region. There are a number of bilateral trade agreements between Members of the Asia Pacific region. Australia is now a party to Free Trade Agreements with Thailand<sup>20</sup>, Singapore<sup>21</sup>, the USA<sup>22</sup> and Chile<sup>23</sup>.

This is part of something of an explosion of Free Trade Agreements. In 1997/1998, during the Asian financial crisis, there were six Free Trade Agreements in the Asia Pacific region. By the end of 2006 there were more than 60 agreements being developed or negotiated. In addition to its existing Free Trade Agreements, Australia is also negotiating with ASEAN jointly with New Zealand, The Gulf Cooperation Council, China, Japan and Malaysia. It has also commenced feasibility studies on possible Free Trade Agreements with India, Indonesia and Korea<sup>24</sup>.

There are a number of bilateral cooperation agreements between APEC countries. These agreements provide, inter alia, for consultation and cooperation between the regulators and governments and for the exchange of information. There is also provision for negative comity. This term refers to an undertaking to refrain, in respect of the interests of another country, from applying national laws to conduct within the home jurisdiction<sup>25</sup>. One writer in the area, PJ Lloyd, has observed that bilateral cooperation agreements have had limited success mainly because they are not binding. They have, however, assisted in resolving some disputes about the application of competition laws<sup>26</sup>.

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<sup>20</sup> With effect from 1 January 2005.

<sup>21</sup> With effect from 28 July 2003.

<sup>22</sup> With effect from 1 January 2005.

<sup>23</sup> With effect from 8 March 2009.

<sup>24</sup> Priestley, "Australia's Free Trade Agreements", Parliament of Australia, Parliamentary Library [www.aph.gov.au](http://www.aph.gov.au)

<sup>25</sup> Lloyd, "Competition Policy in the Asia-Pacific Region" (2000) 14 *Asian Pacific Economic Literature* 1.

<sup>26</sup> *Ibid*, at 8.

Against this general background it is interesting to consider briefly some emerging national competition law regimes and the extent to which they differ and may raise issues for cooperative arrangements. I have chosen to look first briefly at India. It is not part of APEC but is obviously of great significance to the region. A number of APEC Members have relatively new competition laws and it may be expected that there will be a degree of evolution of their jurisprudence and administrative practice before they can be regarded as settled. This as we know all too well in Australia is a process which will take its own time. With that evolution may be expected a greater confidence in the benefits of competition policy and recognition of the importance of trans-national cooperation.

### **India – from command and control to market forces**

Part IV of the Constitution of India contains provisions entitled "Directives of State Policy". Article 39 in particular requires that the State direct its policy towards securing:

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- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment...

India's first competition law was *The Monopolies and Restrictive Trade Practices Act 1969* (the MRTP Act). Studies carried out before its enactment disclosed the existence of industrial concentration, restrictive trade practices and the

pre-emption by large enterprises of industrial licences to block entry by competitors<sup>27</sup>. In its preamble the MRTP Act was said to be:

An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The link between the language of the Preamble and Art 39 of the Constitution is clear. The MRTP Act has been described as a product of the "command and control" mindset which informed economic policy at the time of its enactment<sup>28</sup>. Before the MRTP Act an extensive industry licensing system inherited from the time of British rule in the 1940s had been in place.

The Act provided that so called MRTP companies, exceeding certain asset or market share thresholds, had to be registered and to obtain government approval to expand existing undertakings, establish an undertaking or carry out a merger, amalgamation or takeover<sup>29</sup>. It also identified restrictive trade practices including refusal to deal, full line forcing, exclusive dealing, collusive practices, resale price maintenance and territorial restrictions. Monopolistic trade practices were those likely to have the effect of maintaining prices at an unreasonable level. Unreasonable increases in the costs of production, charges for services and the prices of goods were all covered under the heading of monopolistic trade practices.

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<sup>27</sup> Bhattacharjea, "India's New Competition Law: A Comparative Assessment", (2008) 4 *Journal of Competition Law and Economics* 609 at 612.

<sup>28</sup> Ghosh and Ross, "India's New Competition Law: A Canadian Perspective" (2008) 23(1) *Canadian Competition Record* 23 at 25.

<sup>29</sup> Ghosh and Ross, op cit, at 25.

The regulator was the MRTP Commission. Applications by MRTP companies for government approval for expansion or new undertakings or mergers could be referred to the Commission by the government. However, it was not required to refer such applications and was not bound by the Commission's advice when it did. The system was known as the "licence permit raj"<sup>30</sup>.

In July 1991, the government of India announced a move towards market liberalisation and competition. Merger control was effectively removed from the Act<sup>31</sup>. However public sector enterprises, cooperative societies and financial institutions previously exempt were brought under it. Notwithstanding these changes, the MRTP Act remained an inadequate response to the globalised economy. This was emphasised by a decision of the Supreme Court of India in 2002 which held that, as a matter of statutory construction, the MRTP Act did not have an extra-territorial operation<sup>32</sup>. As a result the MRTP Commission could not bring proceedings against foreign cartels or in relation to the pricing of exports to India. Nor could it restrict imports<sup>33</sup>.

Eventually, India opted for more modern competition legislation designed to enhance consumer welfare through sustaining competition in the market place<sup>34</sup>. A new *Competition Act* 2002 was passed and received the assent of the President of India on 13 January 2003. It provided for the establishment of a Competition Commission of India.

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<sup>30</sup> Bhattacharjea, op cit, at 612.

<sup>31</sup> Ghosh and Ross, op cit, at 26.

<sup>32</sup> *Haridas Exports v All India Float Glass Manufacturers Association* [2002] AIR 2728.

<sup>33</sup> Bhattacharjea, op cit, at 622.

<sup>34</sup> Singh, "The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators", (2009) 81 *Washington University Global Studies Law Review* 71 at 80.

The Competition Commission was to be selected by a committee set up by the Central Government. Before it could begin functioning, it was subject to challenge on the basis that the Act conferred judicial powers on it<sup>35</sup>. This was unconstitutional, so the argument ran, because the separation of powers mandated by the Indian Constitution required that appointment of persons to exercise judicial functions on the Commission should be vested in the Chief Justice of India or his nominee. It also required, so it was said, that the chairman of the Commission be a retired Chief Justice or judge of the Supreme Court or of the High Court to be nominated by the Chief Justice or a committee presided over by him.

The government capitulated and amended the Act so that the chairman and members of the Commission would be selected by a committee presided over by the Chief Justice or his nominee. The Court disposed of the proceedings leaving open the issues of the validity of the Act and Rules made under it.

The purpose of the *Competition Act*, as set out in the judgment of the court disposing of the petition, was to provide for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. Balasubramanyan J, who wrote the judgment of the court, also said<sup>36</sup>:

The statements of objects and reasons indicates that the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the country's focus from curbing the monopolies to promoting competition.

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<sup>35</sup> *Brahm Dutt v Union of India* [2005] 2 SCC 431; [2005] AIR 730.

<sup>36</sup> (2005) 2 SCC 431; (2005) AIR 730 at 731.

The proceedings in the Supreme Court were disposed of in January 2005. The Competition (Amendment) Bill, foreshadowed by the Indian government, was passed in September 2007. Competition Commission positions were advertised in May 2008. During the whole of that period the MRTP Act continued in force as it was only to be repealed when the substantive provisions of the new Act came into operation<sup>37</sup>.

I have mentioned the history of the MRTP Act and the delay in implementation of the *Competition Act* because it is relevant to the lead time that may be expected for the gaining of experience in the administration and enforcement of competition law and policy in India. For the last 20 years most of the cases dealt with by the MRTP Commission were in the area of consumer protection rather than anti-competitive practices. Many of the anti-trust provisions of the MRTP Act were interpreted as prohibiting practices and resolving contractual disputes with no bearing on competition. A leading commentator on the Act, Professor Bhattacharjea, has observed<sup>38</sup>:

Thus, although India has one of the oldest competition laws in the developing world, there is very little relevant experience or expertise to draw on for implementing the Competition Act.

The Act contains provisions dealing with anti-competitive agreements, abuse of market dominance and mergers<sup>39</sup>. It prohibits horizontal and vertical agreements in relation to the production, supply, distribution, storage, acquisition or control of goods or the provision of services which cause or are likely to cause an appreciable

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<sup>37</sup> Bhattacharjea, op ci, at 610.

<sup>38</sup> Bhattacharjea, op cit, at 610.

<sup>39</sup> The outline that follows is taken from Ghosh and Ross, op cit, at 28 et ff.

adverse effect on competition in India (AAEC in India). There are four types of horizontal agreements presumed to have an appreciable adverse effect on competition. These provisions approach a per se prohibition. They extend to agreements determining prices, limiting or controlling production, supply, markets, technical development, investment or provision of services. Agreements effecting bid rigging or collusive bidding are also covered. Certain vertical agreements are subject to review under the AAEC in India test. These are tied selling and exclusive supply or distribution agreements, refusals to deal and resale price maintenance<sup>40</sup>. There are exceptions from the application of the preceding provisions. They include protection of rights conferred by intellectual property rights statutes and export cartel arrangements. The Act also sets out various categories of abuse of a dominant market position. There is no quantitative measure of dominance. The definition refers to a "position of strength" in the relevant market in India<sup>41</sup>.

Merger control has returned under the *Competition Act*<sup>42</sup>. Threshold limits differ between enterprises and groups and according to whether the proposed combination has its assets or turnover in India or whether they extend beyond India. Where the assets or turnover extend beyond in India, there is a "local nexus" clause which sets up a minimum asset value of the combination in India in addition to the global asset or turnover limits. Any combination which causes or is likely to cause an AAEC in India is not permitted<sup>43</sup>. There are notification requirements in respect of such combinations. Notification is compulsory for firms proposing combinations above designated thresholds.

The Competition Commission can issue cease and desist orders. It can impose penalties for any competitive practices or abuse of dominance. It can order

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<sup>40</sup> *Competition Act*, s 3(4).

<sup>41</sup> *Competition Act*, s 4.

<sup>42</sup> *Competition Act*, ss 5 and 6.

<sup>43</sup> *Competition Act*, s 6(1).

the break-up of a dominant firm. A Competition Appellate Tribunal can hear appeals against decisions of the Competition Commission. The Tribunal can also award compensation to any enterprise for loss or damage suffered as a result of the contravention of the provisions of the Act.

There are many challenges ahead for the new regime. Not least among those is the existence of potentially overlapping sectoral regulators for each of the petroleum, electricity, insurance, telecom and securities industries<sup>44</sup>. Professor Bhattacharjea has pointed to the need to sensitise members of the Competition Commission and the Tribunal to the techniques of modern competition analysis. He contends there are lacunae in the Act which will allow for idiosyncratic ideas about "fair" pricing and intervention in contractual disputes to reappear. He writes<sup>45</sup>:

The urge to protect the competitors rather than competition will also have to be tempered. Although some scholars have tried to make a case for "pro-poor" competition policy, it has to be recognised that competition often hurts the poor. In a country with no unemployment benefits this can be devastating. There will inevitably be pressure to restrain rather than promote competition. [Footnotes omitted]

The urge to protect competitors rather than competition is something which will have a familiar ring about it to Australian practitioners.

It is helpful next to turn to what might be called the "elephant" in the region, APEC Member, the Peoples Republic of China.

### **The Peoples Republic of China**

Rules relating to competition in the Peoples Republic of China date back to regulations issued by the State Council in 1980 entitled "Interim Provisions on

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<sup>44</sup> Singh, op cit, at 71.

<sup>45</sup> Bhattacharjea, op cit, at 636-637.

Carrying Out and Protecting Socialist Competition". They provided that products should not be subject to monopolised control unless authorised by law and that regional blockades were to be broken down. The regulations marked the beginning of economic change in China. But they and the rules that followed them did not prove to be effective<sup>46</sup>.

In 1993, China amended its Constitution so that Article 15 declared that "the State practices a socialist market economy". In the same year the Standing Committee of the National Peoples Congress enacted a Law against Unfair Competition. This was China's first attempt at a law regulating competition. It comprised five Chapters with 33 Articles. They covered a range of matters more to do with consumer protection than with competition. There were however some competition provisions. The law prohibited monopolists and other businesses from using predatory pricing against new entrants. It prohibited tie-in sales of unrelated goods and bid rigging. It also prohibited anti-competitive conduct by administrative monopolies<sup>47</sup>. In 1997, a Price Law was enacted. Article 14 of that Price Law prohibit enterprises engaging in price fixing.

Clearly the problem of administrative monopolies was an ongoing and, to some extent, intractable one. Mark Williams has written that the 1993 Law enjoined government organs from restricting freedom of choice of supplies of products, restricting the business freedom of operators arbitrarily and abusing administrative powers to prevent or restrict marketing of non-local products within their administrative area. He said<sup>48</sup>:

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<sup>46</sup> Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, (2005) at 165-166.

<sup>47</sup> Williams, *op cit*, at 166.

<sup>48</sup> Williams, *op cit*, at 166.

Consequently, it can be seen that one of the most pressing issues for China, the AM problem, was already identified as a significant problem 10 years ago; it will be recalled that the 1980 State Council Regulations addressed the same matter. However, in China there is a world of difference between the expression of legislative will and execution in practice. The recurrent and intractable nature of AM was emphasised yet again by the promulgation on 21 April 2001 of another administrative circular outlawing AM practices; presumably this Regulation was issued because the previous measures were ineffective. [Footnotes omitted]

The regulator under the 1993 Law was the State Administration for Industry and Commerce (SAIC). It reported to the State Council which is the executive arm of the Chinese government. The effectiveness of SAIC was compromised by its organisation into branches funded at different levels of government. So if there were a contravention involving the municipal government of a city, the municipal branch of SAIC in that city was responsible for law enforcement action. Williams observed:

Needless to say, few investigations were pursued with vigour, when the subjects of their potential investigations controlled the pay, promotion and privileges of the local SAIC staff.

The SAIC was redesignated in 2001 and became a full ministerial body. This gave it additional administrative authority within government<sup>49</sup>.

In 2003, because of concerns about the possibility of foreign investors acquiring dominant market shares through mergers and acquisitions, the Ministry of Foreign Trade and Economic Cooperation issued "Interim Provisions" on the mergers and acquisitions of domestic enterprises by foreign investors. These were upgraded into "Provisions" in 2006. Their merger control content was not changed. Professor Xiaoye Wang, China's leading academician in the development of its new

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<sup>49</sup> Williams, *op cit*, at 167-168.

competition law, described the anti-monopoly provisions, as they stood before 2008, as scattered and flawed. The 1993 Law prohibited abusive behaviour only on the part of public utility enterprises. The merger and acquisition rules regulated merger activities only with foreign investors. The sanctions and remedies were inadequate. Administrative fines were able to be imposed on a public utility enterprise found to have engaged in abusive conduct were only about the equivalent of 20,000 Euro<sup>50</sup>.

Professor Wang, has written recently<sup>51</sup>:

To fulfil the task of developing such a market economy, China has been making efforts to build itself into a country under laws that fit into the global market. Especially important among these laws are those that protect competition because under a market economy, the producers must put their products on the market for appraisal by consumers, and this process requires competition.

On 30 August 2007, the Standing Committee of the 10<sup>th</sup> National Peoples Congress adopted a new Anti-Monopoly Law. The Law came into effect on 1 August 2008. Its drafting had much input from international experts including representatives of the US Department of Justice, the US Federal Trade Commission and the European Commission, as well as from Australia and other countries.

Reflecting the international input, according to Professor Wang's analysis, are a "domestic effects doctrine", provision for "consent decrees" and a "leniency policy". The European experience has informed provision in the law for block exemptions for certain agreements, the factors relevant to

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<sup>50</sup> Wang, "Overview of China's New Anti-monopoly Law", conference paper delivered at *Unleashing the Tiger – Competition Law in China and Hong Kong*, Melbourne Law School, October 2008 at 2.

<sup>51</sup> Wang, "Highlights of China's New Anti-Monopoly Law", (2008) 75 *Anti Trust Law Journal* at 133.

determination of the existence of dominant market position and rebuttable presumptions of dominant position. These are based on German competition law<sup>52</sup>.

The Anti-Monopoly Law provides for the prohibition of monopoly agreements, abuse of dominant position and for merger and acquisition reporting and control. There is a chapter dedicated to Administrative Monopolies on the basis that the most significant restrictions on competition comes from governments. Professor Wang nevertheless observes<sup>53</sup>:

But unfortunately, because the anti-monopoly authority may find it difficult to deal with administrative monopoly, this provision may not deter government agencies from restricting competition.

Enforcement of the Anti-Monopoly Law is conferred by the Act upon an anti-monopoly law enforcement agency. It appears, however, that enforcement in fact may be divided among different agencies as was the case under the pre-existing law. The other relevant agencies are the National Commission for Development and Reform, the State Administration of Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM). Professor Wang says that these agencies have parallel authority to enforce the Anti-Monopoly Law. The State Council is also required to establish an Anti-Monopoly Commission to organise, coordinate and guide anti-monopoly work.

Looking realistically to the immediate future, Professor Wang believes that the initial enforcement of the Anti-Monopoly Law will not be smooth. However, as she has said<sup>54</sup>:

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<sup>52</sup> Wang, "Highlights of China's New Anti-Monopoly Law", op cit, at 134-135.

<sup>53</sup> Wang, "Highlights of China's New Anti-Monopoly Law", op cit, at 135.

<sup>54</sup> Wang, "Highlights of China's New Anti-Monopoly Law", op cit, at 150.

...that should not be surprising. It took decades for the United States to iron out its enforcement mechanisms and its laws to develop a coherent anti-trust policy.

In that respect economic globalisation will be a motivating force for China to continue down the path towards an effective competition policy.

## **Hong Kong**

The current entry for Hong Kong in the APEC Competition Law and Policy database contains the following statement:

We consider competition is best nurtured and sustained by allowing the free play of market forces and keeping intervention to the minimum. We will not interfere with market forces simply on the basis of the number of operators, scale of operations, or normal commercial constraints faced by new entrants. We will take action only when market imperfections or distortions limit market accessibility or market contestability and impair economic efficiency or free trade, to the detriment of the overall interest of Hong Kong. We will strike the right balance between competition policy considerations on the one hand, and other policy considerations such as prudential supervision, service reliability, social service commitments, safety, etc, on the other hand.

Despite that rather anodyne disclaimer of any need for a competition law, a draft Competition Law is under preparation in Hong Kong. It is likely to be enacted this year.

The development of competition policy on the Island seems to have stemmed from a speech by former Governor Patten to the Legislative Council in 1992. He acknowledged Hong Kong's free and competitive markets but said<sup>55</sup>:

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<sup>55</sup> Hong Kong Legislative Council Official Record of Proceedings, 7 October 1992 at 16; cited by Williams, *op cit*, at 243.

... a more sophisticated and prosperous community has become increasingly unwilling to accept unfair and discriminatory business practices. The public has already begun to voice alarm at the use of market power by suppliers in areas of special importance to the ordinary family's wellbeing ... I shall ask my Business Council to put at the top of its agenda the development of a comprehensive competition policy for Hong Kong.

Sectoral investigations were undertaken between 1993 and 1996 in such areas as banking, supermarkets, gas supply, broadcasting, telecommunications and private residential property<sup>56</sup>. The Consumer Council published a report on the investigation in November 1996. It was entitled "Competition Policy: The Key to Hong Kong's Future Economic Success". The Council found that the sectoral investigations disclosed market imperfections and that other economic sectors suffered from similar problems. By not having a competition law, Hong Kong was said to lack necessary weapons to ensure that the domestic economy remained competitive which, in the long run, would affect the Hong Kong's ability to remain an internationally economically competitive. Taiwan and South Korea were noted as newly industrialised economies that had recently introduced competition laws. The Council recommended the adoption of an effective competition policy and the enactment of a general competition statute<sup>57</sup>.

The government of the day, without conceding that there were any serious problems, accepted that there was "possible room for improvement". Among other measures it established a Competition Policy Advisory Group to discuss competition policy development<sup>58</sup>. Nevertheless, the government argued against a general competition law and contended that it was not essential to successful competition

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<sup>56</sup> Williams, op cit, at 244.

<sup>57</sup> Williams, op cit, at 257.

<sup>58</sup> Williams, op cit, at 260.

policy. It pointed to divergence between different national competition regimes and the absence of unanimity on prohibited acts<sup>59</sup>.

In 2006, the government commissioned a Review of Hong Kong's Competition Policy which was undertaken by a Competition Policy Review Committee. The Committee recommended that a Cross-sector Competition Law should be enacted and an Independent Competition Commission established. On 6 November 2006, the government issued a public discussion document and invited views from the public. The responses indicated wide support for a Cross-sector Competition Law in Hong Kong and for a stronger regulatory environment for competition. On the other hand, there were business sector concerns that a competition law could lead to "higher costs and time consuming litigation".

The Hong Kong government has decided to accept the recommendations and to introduce a Cross-sector Competition Law and establish an Independent Competition Commission. It aims to introduce the Competition Law this year. The Commerce and Economic Development Bureau has begun working on its design. Under the proposed legislation there would be a regulator in the form of the Commission. There would also be a Competition Tribunal to provide a forum for a full review of decisions by the Competition Commission. There would be a right of appeal against Tribunal decisions in the Court of Appeal. The Tribunal would also be able to hear private actions under the Competition Law.

The substantive provisions of the Act include prohibitions against anti-competitive conduct in two broad areas:

1. Participation in agreements and concerted practices that have the purpose or effect of substantially lessening competition.

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<sup>59</sup> Williams, *op cit*, at 261-262.

2. Abusing substantial market power with the purpose or effect of substantially lessening competition.

The focus of the prohibition on agreements will be on horizontal rather than vertical agreements which will only be addressed in the context of abuse of substantial market power. There will be no per se infringements. There is to be provision for a leniency program. There will also be a right to institute private action. There does not appear to be any provision for merger control.

An interesting intersection will no doubt arise between the Hong Kong regulator and its Chinese equivalent or equivalents given that there are markets for goods and services extending beyond Hong Kong and well into the Peoples Republic of China.

### **Chinese Taipei**

Chinese Taipei enacted its Fair Trade Law in February 1991 and it came into effect in 1992. The law regulates monopolies, mergers and "concerted actions". It permits monopolies to exist so long as they do not abuse market power. There is a notification requirement for mergers involving parties reaching a certain threshold of turnover or market share. The law prohibits unfair competition including resale price maintenance and vertical restraints likely to impede fair competition.

An OECD review of competition law and policy in Chinese Taipei published in April 2006 found that the competition law follows mainstream practice relating to restrictive agreements, monopolies and anti-competitive mergers and has a particularly clear statutory basis for directing enforcement attention to horizontal collusion. Rules about market deception and unfair practices connect the competition law to consumer interests. The report did raise a caution that rules based on a cultural tradition of fairness might lead to interventions to correct differences in bargaining power resulting in a dampening of competition, rather than its promotion.

The regulator, the Fair Trade Commission, was described as "a stable, experienced administrative agency" which followed "an appropriate sequence in introducing competition policy, emphasising transparency and guidance to encourage compliance before undertaking stronger enforcement measures". Fair Trade Law does also allow for private action and the possibility of multiple damages for international violations<sup>60</sup>.

### **Brunei Darussalam**

Brunei Darussalam has no specific competition policy or law.

### **Indonesia**

Indonesia's Monopolistic Practices and Unfair Business Competition Law was adopted in 1999. The Chairman of the regulator, the Indonesian Anti-monopoly Authority, wrote in 2004<sup>61</sup>:

Many Indonesian lawyers agree that the Law is a revolutionary business legal reform, as it prohibits almost all business actors, including state-owned enterprises, from employing unfair business practices. ... When the economic crisis hit Indonesia in 1998, people suddenly realized that something was fundamentally wrong with the way Indonesian business actors conducted business and with the way the government developed its industrial and economic development policies.

This competition law was not preceded by any strong history of legislative regulation of competition. It prohibits anti-competitive agreements which involve controlling production, fixing prices or dividing territories. It also prohibits resale price maintenance and exclusive dealing. Monopoly or monopsony, which may

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<sup>60</sup> OECD Policy Brief, April 2006: [www.oecd.org](http://www.oecd.org) accessed May 2009.

<sup>61</sup> Maarif, "Competition Law in Indonesia: Experience To Be Taken For The Development of Competition Law in China" (2004) 3 *Washington University Global Studies Law Review* 333.

result in monopolistic practices or unfair competition where one firm controls more than 50% of sales or purchases of a market segment, is also prohibited. Firms are prohibited singly or jointly from impeding other firms from conducting the same business, engaging in discriminatory practices or predatory pricing. The statute also prohibits abuse of a dominant market position. This is defined as one firm having more than 50% or two or three firms controlling more than 75% of a market<sup>62</sup>.

Some of the work of the regulator is advisory to government. The APEC database lists a series of "suggestions and judgments for the government" in successive years, the most recent of which is 2006.

## Japan

The history of competition law in Japan is of considerable longevity. In 1947 the Law Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade was enacted, modelled on the Sherman Act, the Clayton Act and the Federal Trade Commission Act of the United States. The model proved incompatible with the operation of the Japanese economy and the Act was amended in 1953. It introduced exceptions to the prohibition against cartels and allowed collaboration among competitors with regard to research and development<sup>63</sup>. The Act has been further amended in 1977 and 2005. The most recent amendments were aimed at strengthening the regulation of cartels. The Act covers four main areas, referred to as unilateral action, horizontal restraints, vertical restraints and market concentration. The classification approach is said to be similar to that of the United States anti-trust law<sup>64</sup>.

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<sup>62</sup> Fox, "Equality, discrimination and competition law: Lessons from South Africa and Indonesia", (2000) 41 *Harvard International Law Journal* 579 at 591-592.

<sup>63</sup> Inoue, *Japanese Anti-trust Law Manual: Law Cases and Interpretation of Japanese Antimonopoly Act*, (2007) at 1.

<sup>64</sup> Inoue, *op cit*, at 11.

## **Korea**

South Korea has a *Monopoly Regulation and Fair Trade Act* 1980. The Korea Fair Trade Commission was established in 1981 as the competition law regulator and has operated as an independent government agency since 1994. The Commission gives priority to prohibiting abuse of market dominance, preventing excessive concentrations of economic power and regulating "undue collaborative activities and unfair business practices".

## **Malaysia**

According to the APEC database, Malaysia has no specific competition law but states that its government has, since the 1980s, embarked on policies of deregulation and liberalisation of its economy.

## **Papua New Guinea**

Papua New Guinea enacted an *Independent Consumer and Competition Commission Act* 2002 (ICCC Act). The principal provisions of the ICCC Act relating to promoting and maintaining competitive market conduct are to be found in Part VI. Competition is defined in the Act to mean "workable or effective competition including competition from imports or substitutes"<sup>65</sup>. Part VI prohibits making or giving effect to agreements which have the purpose or are likely to have the effect of substantially lessening competition in a market. It prohibits agreements containing exclusionary provisions unless it is shown that the provisions do not have the purpose and are not likely to have the effect of substantially lessening competition in a market. Agreements containing price fixing provisions are deemed to have the purpose or have or be likely to have the effect of substantially lessening competition. There is also a prohibition against firms with a substantial degree of

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<sup>65</sup> ICCC Act, s 45(1).

power in a market taking advantage of that market power to prevent or deter persons from engaging in competitive conduct in that or any other market.

Section 69 of the Act prohibits acquisitions which would have or be likely to have the effect of substantially lessening competition in a market. The Act sets out a number of matters, including some of those mentioned by the former Trade Practices Tribunal which are required to be taken into account in determining whether a proposed acquisition would be or likely to have that effect.

The term "market" in the Act refers to a "market in the whole of Papua New Guinea for goods or services as well as other goods or services that, as a matter of fact and commercial commonsense, are substitutable for them, including imports".

Needless to say, the development of competition law in Papua New Guinea is still in its early stages and no doubt their regulator and judiciary are experiencing the same sort of learning process through which the Australian regulator and judiciary have been since 1974.

## **Russia**

Russia adopted an Anti-monopoly Law in 1991 and has established an Anti-monopoly Authority. The law has been amended progressively from 1992. Laws relating to natural monopolies, competition in financial markets and commodity markets have also been enacted.

## Singapore

Singapore's competition law, the *Competition Act 2004*, is modelled on the UK *Competition Act 1998* (UK). Its stated objective is to promote the efficient functioning of Singapore's market and hence enhance the competitiveness of its economy.

The Act establishes the Competition Commission of Singapore, which is the regulator. Part 3 of the Act sets out the three main areas of prohibited activities. These are:

- Anti-competitive agreements, decisions and practices.
- Abuse of dominant position.
- Mergers which substantially lessen competition.

Part 3 does not, however, apply to any activity carried on by, or any agreement entered into, or any conduct on the part of, government or statutory bodies, or anyone acting on their behalf. The Competition Commission of Singapore has powers of investigation and adjudication. There is also a Competition Appeal Board which hears appeals against the decision of the regulator.

The first phase of the Act commenced on 1 January 2005, limited to those provisions establishing the regulator. The provisions on anti-competitive agreements and abuse of dominant position commenced on 1 January 2006. The merger control provisions came into effect on 1 July 2007. The first two decisions of the Competition Commission, which were issued in the first quarter of 2007, involved agreements between airline operators who had sought clearance through a notification process for which the Act provides.

Australia has a Free Trade Agreement with Singapore and Chapter 12 of that agreement deals with competition policy. Both parties agree to promote competition by addressing anti-competitive practices in the territory<sup>66</sup>. They agree that all businesses registered or incorporated under their domestic laws are subject to the relevant competition laws<sup>67</sup>. They commit to competitive neutrality<sup>68</sup>. Specific measures or sectors may be exempted from the Chapter on the grounds of public policy or public interest<sup>69</sup>. There is also provision for consultation with a view to eliminating particular anti-competitive practices that affect trade or investment between the parties<sup>70</sup>.

### **Thailand**

Thailand enacted a *Price Fixing and Anti-Monopoly Act* in 1979. The anti-monopoly provisions of the 1979 Act were directed to the promotion of fair competition. The Act was divided into two statutes, the *Trade Competition Act* which came into effect on 30 April 1999 and the *Price of Goods and Services Act*. There is a Competition Commission. The Act prohibits abuse of market power by businesses with dominant positions, including betting on fair prices or trading conditions, restricting customers' normal business practices, limiting the supply of goods and services to create a shortage of supply and intervening in other businesses without proper reasons. Market domination is defined by reference to market share thresholds and sales volumes prescribed by the Commission.

There is a requirement for authority for mergers which may create "monopolistic power or reduce competition". There is also a prohibition against

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<sup>66</sup> Singapore-Australia Free Trade Agreement (SAFTA), Chapter 12, Article 2.

<sup>67</sup> SAFTA, Chapter 12, Article 3.

<sup>68</sup> SAFTA, Chapter 12, Article 4.

<sup>69</sup> SAFTA, Chapter 12, Article 5.

<sup>70</sup> SAFTA, Chapter 12, Article 6.

collusive arrangements between business operators in order to create monopoly power or reduce competition.

Section 28 of the Act deals with agreements between domestic and overseas business operators undertaking activities which would restrict the freedom or opportunity of persons residing in Thailand to purchase goods or services directly from business operators outside Thailand.

Business operators are prohibited from conduct, other than in free and fair competition, which results in the destruction, impairment, obstruction or restriction of business operations of other business operators or which would prevent other persons from carrying out their business<sup>71</sup>.

The Act applies to all business operations save those of central, provincial or local administration, State enterprises, groups of farmers and cooperative societies and businesses prescribed by ministerial regulation.

Thailand and Australia have entered into a Free Trade Agreement. There are provisions in that Agreement by which each party agrees to promote competition by addressing anti-competitive practices in its territory and agrees to ensure that all businesses are subject to such generic or relevant sectoral competition laws as may be in force in their respective territories. Either party may exempt specific measures or sectors from the Competition Policy Chapter of the Agreement provided that such exemptions are "transparent and are undertaken on the grounds of public policy or public interest". Importantly, Article 1205 of the Agreement provides:

The Parties recognise the importance of cooperation and coordination in achieving effective enforcement outcomes under their respective competition laws. The Parties also recognise the importance of

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<sup>71</sup> OECD, Global Forum on Competition, Contribution from Thailand, (26 September 2001)

confidentiality in respect of these arrangements. Accordingly, the parties shall cooperate, where appropriate, on issues of competition law enforcement, including through the exchange of information, notification, consultation and coordination of enforcement matters that are cross-border in nature.

There are also provisions for consultation and review of the Competition Policy Articles in the Agreement<sup>72</sup>.

### **Vietnam**

In 2004, the Tenth Congress of the National Assembly of Vietnam passed a Competition Law comprising six Chapters and 123 Articles. It is described in the APEC database as comprising regulations covering, inter alia, anti-competitive conduct, common economic concentration and unfair competition. The Competition Law took effect from 1 July 2005.

### **Conclusion**

The preceding brief survey of India and some of the Member countries of APEC and their competition law regimes serves to demonstrate the diversity in the national economies involved in our region and the stages of development of their competition laws and policies. While significantly compatible competition laws and policies exist between States such as Australia and New Zealand, Canada and the USA the differences, particularly developmental differences, between some of the countries in the region point to long term convergence as the most practical policy objective. Exchange of information, mutual assistance in enforcement in relation to cross-border conduct and capacity building amongst and between regulators are measures that will assist in a more effective regional approach to competition law. In this respect exchanges and discussions between practitioners in the field of

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<sup>72</sup> Thailand-Australia Free Trade Agreement, Article 1206.

competition law and policy including lawyers, economists and regulatory officials constitute an area in which Australia can make a substantial contribution.