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ANTITRUST REGIMES IN THE PACIFIC REGION: INTRODUCTION

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Antitrust regimes in the Pacific Region: Introduction

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1. Competition laws are economic statutes aimed at promoting and protecting competition in markets. While there is general agreement about the types of conduct deemed to be detrimental to competition, the form and content of competition laws vary. The political economies of individual jurisdictions, and particularly their legal systems and cultures, mean that enforcement of individual provisions is often approached quite differently from jurisdiction to jurisdiction. Even identical statutory provisions may be interpreted quite differently in different countries.

2. What constitutes an appropriate competition law or policy? Various factors influence the competition law and policy choices of individual jurisdictions. These include the size of a jurisdiction, the nature of its markets, and its stage of economic development. Ultimately different jurisdictions choose their laws based on what they perceive to be suitable for their own circumstances.

3. The following articles discuss more fully the competition regimes of Australia, French Polynesia and New Caledonia, which are all Pacific jurisdictions. French Polynesia and New Caledonia are technically overseas territories of France. New Caledonia has moved towards self-government, but it still depends on financial support from France. Australia is a constitutional monarchy theoretically governed by the Queen of England as head of state, although both the monarch and her vice regal representatives act in accordance with the advice of the government of the day.

4. This material considers issues of commonality and divergence between those regimes, drawing conclusions about the approach to competition law and policy in the Pacific region. It asks: is there a uniform approach within the region?

I. Small market economies

5. Market size within a jurisdiction is generally influenced by three main factors: "*population size, population dispersion and openness to trade*."[1] It has been suggested that an appropriately structured competition policy is more important in a small economy since the costs of improper design and application might be higher in both the short and long run.[2] However, the benefits of an appropriate competition policy are said to be greater in small market economies than in larger markets.[3] It follows that choice of competition law and policy is particularly important.

6. Each of the jurisdictions discussed here is classified as small market economy, meaning that it can support only a small number of competitors in many of its industries.[4] New Caledonia, an archipelago east of Australia, has a population of 269,000. French Polynesia is several archipelagos with a similar total population. Both New Caledonia and French Polynesia are fragmented island economies with associated competition law issues.[5] This means that the traditional competition law and policy frameworks of larger developed market economies are unlikely to be entirely appropriate to their competition law and policy needs.

7. By way of contrast, Australia is much bigger in area and population, being a continent with a population of around 25 million. It is still classified in theoretical terms, however, as a small market economy: "(…) *because most of its industries are characterised by concentrated market structures. This dispersion of its population over a comparatively large geographic area (albeit mostly around several urban centres) serves to create market regionalisation. This fact, coupled with its distance from its major trading partners, creates problems typical of small economies.*"[6]

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1 *See* M. S. Gal, Competition Policy for Small Market Economies, Cambridge, Harvard University Press 2003.

2 Ibid., 5.

3 Ibid., 7.

4 Ibid., 1.

5 E. M. Fox, Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries, in *Competition Policy and Regional Integration in Developing Countries*, Josef Drexl et al. (eds.) Edwards Elgar 2012.

6 Ibid., 2.

8. These issues are explored further below in the context of the content of individual laws and their policy approaches.

II. Competition laws and institutions

9. The competition laws and institutions of New Caledonia and French Polynesia are very new, while Australian competition law has been well established for many years.

10. The competition law of New Caledonia is set out in enactments which are referenced below in the country report. The competition authority of New Caledonia, the Autorité de la concurrence de la Nouvelle-Calédonie (hereinafter the "ACNC"), was constituted as an independent authority and had its first meeting in March 2018. Its role is to supervise competition and the state of competitive markets by consulting; reviewing mergers and acquisitions; reviewing the opening, or extending, of commercial premises, change of branding, change of sector, relaunch by a new operator (the latter functions relate to control of market structure particularly in the retail sector); and taking action in cases of anti-competitive behaviour or restrictive practices.

11. The consultative role of the ACNC is notable as it is extremely broad and is specified in great detail in the law. The ACNC may consult on all competition-related matters and proposals. Congress must consult the ACNC on matters relating to price regulation and the formal decisions on setting prices for specific regulated goods and services. The Government of New Caledonia (hereinafter the "GNC") must consult the ACNC as soon as a decision is envisaged in a sector in which market structures and conditions limit competition: for example, import markets and services dealing with dispatch, stocks and distribution (wholesale or retail). The GNC can consult the ACNC on any matter relating to competition. Congress and the GNC must consult the ACNC on any proposal to amend the law, and any draft decision or decree setting up or renewing a regime with direct effect in terms of quantitative restrictions on entry to a profession or access to a market; establishment of exclusivity within certain catchment zones; or the imposition of standard practices in terms of prices or conditions of sale. Similar obligations exist in relation to the local commercial code. The ACNC can also act on its own initiative to mount sectoral inquiries or issue recommendations on a competition matter. It may also make recommendations to the GNC on specific measures. There was a high demand for consultation in the first three months of the ACNC operation.

12. The French Polynesian Competition Code (hereinafter the "FPCC") was implemented in 2015.[7] The regulator is the Polynesian Competition Authority (hereinafter the "PCA"), an independent authority. The PCA has three missions. It can issue at its own initiative, or be referred to for, opinion on any matter related to competition or legislative proposals; enforce competition law at its own initiative or following complainants' requests; or guarantee a priori control of merger transactions.

13. Provisions on consultation here are far less specific than in New Caledonia. The president of French Polynesia may consult the PCA on draft legislation or matters linked to fair competition. The PCA may suggest to government steps to remedy arrangements which will distort competition.

14. By way of contrast to the other two jurisdictions, Australia has had a long history with competition law, introducing its Trade Practices Act in 1974, and renaming its amended law the Competition and Consumer Act (hereinafter the "CCA") in 2010. The CCA has the objects of enhancing the welfare of Australian through the promotion of competition and fair trading and provision for consumer protection. Its regulator, formerly the Trade Practices Commission, was reconstituted and became known as the Australian Competition and Consumer Commission (hereinafter the "ACCC") in 1995. The ACCC has a very wide range of functions and powers. In addition to investigating potential breaches of competition provisions, it has power to allow individual exemptions through its authorisation and notification processes, where it weighs anti-competitive conduct against public benefit. It plays an important role in the National Access Regime for third party access to declared services of infrastructure facilities that have monopoly characteristics. It has functions related to the provision of gas and electricity and telecommunications. It has always dealt with consumer protection issues, and the current consumer protection law is contained in the Australian Consumer Law, which is a Schedule to the CCA. It oversees product safety.

15. The ACCC conducts formal inquiries and informal market studies to support competition by identifying issues which prevent markets from delivering efficient outcomes and proposing options to address issues. It can be directed by the relevant government minister to undertake inquiries, which involve public consultation and extensive analysis. For these purposes it has formal information gathering powers. It is currently undertaking inquiries including one into the effect that digital platforms have on competition in media and advertising services. It has functions in relation to the dissemination of information for business and consumers.

7 Proposals for reform are currently being examined by the French Administrative Supreme Court.

III. Anti-competitive practices

16. This section contains a brief review of competition law provisions and is followed by a discussion of some of the more unusual approaches in each jurisdiction.

17. In New Caledonia prices are generally determined by the market but some prices are regulated. The competition law itself covers cartels, abuse of dominance, exclusive import agreements, abuse of dependence of a commercial partner and predatory pricing. Agreements or practices with the intention or effect of setting up exclusive import agreements are prohibited unless they can be justified based on economic efficiency with benefits shared equitably by consumers, provisions which are reminiscent of the EU approach. Abusively low consumer prices are prohibited.

18. All of these practices are punishable by sanctions imposed by the ACNC, with a maximum sanction of 175,000 Pacific Francs (approximately €1,500) and 5% of turnover since the commencement of the practices. Agreements or commitments in breach of the law are void, and individuals can be fined. Of note are provisions and remedies in relation to the conduct of businesses with a dominant position (i.e., more than 25% market share and turnover of over 600 million Pacific Francs [€5 million]). Remedies in relation to high prices or high margins include undertakings or structural injunctions. These provisions are similar to those employed in other territories.

19. Ex ante control in relation to concentration in the retail sector means that transactions are reportable over set turnover thresholds. Such proposals can be authorised quickly if they raise no issues but are subject to further consideration by the ACNC based on the impact on competition. Public interest is a factor in such consideration. Appeal from these determinations is to the administrative court of Nouméa and ultimately may be to the administrative court of appeal in Paris.

20. Finally, the government can bypass a decision of the ACNC citing public interest such as industrial development, competitiveness of business facing international competition, or creation or protection of employment. Where commercial concentration is involved, after identification of the reasons a decision authorising a concentration can be withdrawn. This can be appealed.

21. The French Polynesian Competition Code (hereinafter the "FPCC") prohibits a broad range of cartels and related horizontal conduct, including concerted action, which has the purpose or effect of preventing, restricting or limiting, or distorting free competition in a French Polynesian market. It also deals with abuse of dominance, nominating seven specific practices which constitute abuse. Exclusions apply for cartels and for abuse of dominance where conduct ensures "*economic progress, including by creating or maintaining jobs*" and which, in short, spreads resulting profits to users without substantially eliminating competition. Certain categories of agreement, particularly those which are intended to improve the management of small or medium-sized undertakings, may meet these conditions if recognised by a regulatory order adopted following a favourable opinion by the PCA.

22. Mergers and joint ventures (concentrations) are subject to the FPCC, with compulsory notification over a set threshold. Lower thresholds for notification apply in relation to retail premises. Concentrations must be approved prior to completion. Time limits apply to the process. Commitments may be given by the parties to remedy anti-competitive impact. A more detailed examination may be undertaken where the PCA has serious concerns about a transaction. In these circumstances the PCA examines whether the transaction lessens competition and, whether it creates or reinforces a dominant position, or reinforces buying power that places suppliers in a position of economic dependence. The PCA examines the contribution to economic progress to offset the adverse impact on competition. It may fine parties to a merger who fail to notify when required to do so or which proceed with a transaction before approval.

23. Other PCA sanctions include financial penalties determined individually for companies or organisations, and reasons must be given. The maximum penalty for a company is 5% of turnover in the jurisdiction. Coercive fines may be imposed. A leniency program has been developed but is not yet in operation. Additional enforcement provisions apply for abuse of dominance.

24. The PCA has broad powers to adopt "Precautionary Measures" to stop practices which "*seriously and immediately undermine the general economy, consumer interests or a plaintiff undertaking*." Measures include suspension of the conduct and an order returning the parties to their prior position. Any measures undertaken here must be strictly linked to the emergency in question.

25. In Australia the CCA prohibits cartels and other anti-competitive agreements; secondary boycotts; misuse of market power; exclusive dealing; and resale price maintenance. Criminal cartels are those which involve price fixing, market sharing, controlling output and bid rigging. These are illegal per se and may be prosecuted as civil contraventions or criminal offences depending upon the circumstances. The ACCC may resolve anti-competitive conduct by informal agreements with parties to remedy conduct or court enforceable undertakings. The ACCC has an Immunity and Co-operation Policy for Cartel Conduct.

26. Anti-competitive agreements include "concerted conduct" but these provisions may only be the subject of civil proceedings.

27. Mergers are prohibited if they have the effect or likely effect of substantially lessening competition. There is no compulsory notification over a set threshold. Where parties believe that their merger or acquisition has the potential to breach the CCA they may notify under a formal process, which is rarely done. Alternatively, the parties may approach the ACCC under an informal process to seek the ACCC's views on the conduct. This well-established process with set time frames is almost universally used, although it is not binding on third parties. The ACCC gives a transparent view of the anti-competitive impact of the conduct and warns the parties that if they proceed with it the ACCC is likely to seek an injunction in court to prevent it. Mergers may also be authorised by the ACCC if the parties apply and can show that the transaction would result in such a benefit to the public that it ought to be allowed.

28. Businesses may also seek authorisation or notification, which is an individual administrative permission, in respect of particular conduct under tests where the ACCC looks at anti-competitive detriment and public benefit. Class exemptions may also be granted.

29. The ACCC does not have the power to decide contraventions or impose pecuniary penalties. These decisions must be made by a court. Large penalties may be imposed on individuals and corporations, and a wide variety of other orders may be made by a court. In respect of criminal contraventions there are fines for corporations and individuals, and potential prison sentences for individuals.

30. The CCA is also enforceable by private parties who can seek an injunction and other orders in relation to conduct which breaches the CCA and seek to recover the amount of loss or damage suffered as a result. The ACCC can intervene in such proceedings.

IV. Bespoke provisions

31. Each of the jurisdictions has drafted its laws ostensibly to suit its particular circumstances and to encourage competition in areas of perceived weakness. This section discusses some of the more unique provisions in each of the laws which reflect individual issues.

32. The competition laws of New Caledonia and French Polynesia are very new and envisage price regulation and the setting of prices for specific regulated goods and services. Clearly in small, fragmented, isolated economies there are special problems in relation to pricing of particularly essential products which would never manifest in a larger, more accessible or developed economy. In New Caledonia, for example, misuse of market power and exploitation in pricing of essential items are real risks given the small fragmented market size and the relative isolation. The likelihood of meaningful market entry and competition for sales is therefore remote for some products and services, even if prices of these essential items are raised significantly by incumbent suppliers. Price control may be the best mechanism in some essential product markets at this stage of development; however, regulators should ensure that it limits the application of price control to a small range of goods and services, should regularly review the need for it and seek out opportunities to attract additional competitors into any of these markets which could potentially be deregulated. Growing consumer sophistication about some products may further open-up markets but in relation to others it is unlikely that markets will ever be truly competitive.

33. Both New Caledonia and French Polynesia have merger provisions aimed at assessing the impact of retail store creation and control. In French Polynesia, for example, all mergers involving managing a new or existing retail store with a floor surface over three hundred square metres must be notified to the PCA. Transactions may be allowed or prohibited, or the applicant may be ordered to take all appropriate steps to maintain competition. Failure to comply may lead to a fine of up to 5% of turnover in the jurisdiction. These specific provisions indicate the impact of competition in retail in this type of jurisdiction.

34. Australia, by way of contrast, is a well-established competition law jurisdiction. Of interest in the context of its small market economy status is its threshold setting for its unilateral conduct "Misuse of market power" provision.[8] This is set at a "*substantial degree of market power*," rather than the more common "dominance" test, although measures of market power itself are approached similarly to the methodologies of the European Union. This threshold was implemented in 1986 with the express purpose of lowering the existing threshold of "*in a position to substantially control*" a market, which was said to be "*widely acknowledged* [as] *a most rigorous one if strictly applied* (…) [A]*s a result the section had no application except to a few very powerful corporations with requisite*

8 CCA, s. 46.

market control."[9] The change was expressly made to ensure that the test could apply to more than one player in the market, which was appropriate for a jurisdiction which contains many oligopoly markets. Its setting for merger analysis was also amended quite some time ago from tests which focused on control or domination of the market following a merger to a broader test which now prohibits mergers which have the effect or likely effect of substantially lessening competition.[10]

V. Conclusion

35. Analysis of the three jurisdictions indicates that while there are some areas of commonality, the competition laws do not share a truly common approach. The laws of New Caledonia and French Polynesia are more similar but the reason for this likely lies in their French influences, as well as their very small fragmented market economy status. The structure and realities of Australian markets are quite different as its its law.

36. The standard competition prohibitions are present in all of the jurisdictions, although New Caledonia does not appear to look at all mergers. Compulsory notification of mergers subject to the laws is present in New Caledonia and French Polynesia but not Australia. French Polynesia and Australia have Leniency Programs, although the former is not yet operative.

37. Unique perspectives exist in all of the laws and reflect their individual competition law environments. A more fruitful examination of these laws in action should be undertaken once the two newer laws are well established and showing an enforcement history which will begin to indicate their true worth as laws which will foster and protect the competitive process.

9 Explanatory Memorandum to Exposure Draft Trade Practices Amendment Bill 1984, para. 24. More recently the provision has been amended to implement a purpose, effect or likely effect of substantially lessening competition test for breach, rather than a purpose test alone (Act No. 87 of 2017, s. 3 and Sch.1 item 1, effective 6 Nov. 2017).

10 CCA, s. 50.