COMPETITION POLICY REVIEW

OF

ACT SCHOOL LEGISLATION

BY

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COMMISSIONED BY

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COMPETITION POLICY REVIEW OF A.C.T. SCHOOL LEGISLATION

EXECUTIVE SUMMARY

In reviewing the interaction of competition policy and education, this Review concludes that:

- there is no reason in principle why schools should be excluded as a threshold issue from any application of competition policy

- in applying competition law, the provision of education by a government school, as it is presently delivered, will be a non-business activity rather than a business and as such this major activity of schooling will not be subject to competition law

- the application of competition law to non-government schools is not so clearly decided and accordingly, while it is probable that a non-profit non-government school will also be characterised as a non-business activity, rather than a business, this cannot always be assumed. Legislation should therefore be prepared on the basis that non-government schools may be subject to the Trade Practices Act

- certain activities of schools could be classified as a business and as such subject to the Trade Practices Act. These activities are not specified or prescribed in legislation and so are not relevant for present purposes

- the establishment or closure of a government school is not a matter which is in the course of trade and is not therefore subject to the Trade Practices Act. Such activity could be brought within the course of trade by the conduct of the various decision makers who might be involved, but this will not be governed by the legislation and so is not relevant for present purposes

- the registration of schools is likely to be exempt from the provisions of the Trade Practices Act, but consistent with the Competition Principles Agreement it is recommended that any proposed legislation should ensure competitive neutrality in dealing with this aspect.

The application of these conclusions will be comparable to the application of competitive principles in other States and Territories within Australia.

INTRODUCTION

This Review was undertaken at the request of the Department of Education and Community Services.

The Review was conducted within the context of an overall review of A.C.T. school legislation. It is anticipated that new legislation will be proposed as part of this overall review.

This Review:

- examined existing legislation and regulatory procedures
- identified anti-competitive elements
- assessed the comparative costs and public benefits of these restrictions.

The existing legislation and regulatory procedures which were considered by this Review were:

- Schools Authority Act 1976
- Education Act 1937 (incorporating the Public Instruction Act 1880 and Free Education Act 1906)
- Board of Senior Secondary Studies Act 1997.

Summaries of this legislation are included as an attachment.

COMPETITION POLICY AND SCHOOLS

1.1 Introduction

Competition policy, in its broadest sense, is not a recent innovation nor one solely based on a limited range of legislation and intergovernmental agreements. In this broadest sense, the underlying policy exists wherever it is intended to introduce fairness into a situation while at the same time maintaining a diversity of alternatives. This notion of fairness is given practical effect by ensuring that no one entity can unduly restrict the activities of others by using its current strength.[1]

This inability to unduly restrict the activities of others is seen to have a beneficial economic and social impact by ensuring that those resources (being a term which can be defined for these purposes as broadly as possible) which may be available to the community are beneficially allocated amongst all members of the community. Where this occurs then the needs of community members should be satisfied to the maximum possible extent. This optimal satisfaction of needs, defines what is fair.

There is no objection in principle to this desire to encourage diversity in alternative approaches being applied to education.

In the narrower sense there is another imperative to conduct a review of competitive impacts on education legislation. This arises from two sources. The first is that the Australian Capital Territory, as part of the Council of Australian Governments at its meeting on 25 February 1994, agreed to undertake a legislation review of all of its legislation and without limiting the terms of such a review to

> "(a) clarify the objectives of the legislation;
>
> (b) identify the nature of the restrictions on competition
>
> (c) analyse the likely effect of the restriction on competition and on the economy generally;
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> (d) assess and balance the costs and benefits of the restriction; and
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> (e) consider alternative means for achieving the same result including non-legislative approaches."[2]

[1] compare the comments of S Waller, "The Internationalisation of Antitrust Enforcement" (1997) 77 Boston University Law Review 343 at 395.

[2] Competition Principles Agreement, 25 February 1994, Hobart Tasmania, clause 5(9).

In this Agreement it was also agreed to do a number of other things, including introducing a policy of competitive neutrality and the structural reform of public monopolies.

The second, is to determine the extent to which the Trade Practices Act applies to schools, irrespective of any intergovernmental agreements. This Act applies, for present purposes, to any activity "insofar as the Crown carries on a business, either directly or indirectly or by an authority of the ....Territory",[3] and for these purposes, a business does not include:

> "imposing or collecting taxes; or levies; or fees for licences;
>
> granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions).....".[4]

The threshold question which must be addressed to satisfy these two sources of the Review is whether schools are excluded from the application of the Competition Principles Agreement or the application of the Trade Practices Act.

If schools are (in the entirety of all activity which involves them) excluded, then this will conclude the Review and meet its purpose.

1.2 Prima facie exclusion of schools from competition law and policy.

It has been argued that schools are excluded as a threshold issue from competition law and policy as they are either a non-commercial activity[5] or as a matter of public policy[6].

a) Schools as a non-business activity

In considering whether activities can be classified as those of a business, it is first necessary to define what is a business. Over a considerable number of years the courts (both in Australia and internationally) have considered what this term, and the related expression of 'engaged in trade' might mean. In summary, the courts have established three broad tests:

firstly, the extent to which commercial activity is a predominant characteristic of the entity. For something to be a trading entity, the commercial aspect must be substantial,[7]

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[3] Trade Practices Act 1974 section 2B

[4] Trade Practices Act 1974 section 2C(1)

[5] for example see: T Cobbold "Competition Policy and Schools" ACT Council of P&C Associations Newsletter, November 1998 pp 9-10; letter from ACT Council of Parents & Citizens Associations Inc to the Reviewer dated 2 December 1998.

[6] compare the approach adopted in Yale University v Town of New Haven (1899) 42 A 87 at 92 per Hamersley J where the public benefit of public education was considered in relation to revenue laws.

secondly, whether an examination of all activities of the entity being considered indicate that it has 'trade' as its purpose - irrespective of whether this trade amounts to a significant proportion of its activities,[8] and

thirdly, whether the constitution of the entity defines its purpose as one of 'trade'.[9]

In applying these tests, the courts have examined whether the processes involved have been performed as a community service[10] or as the carrying on of a business.[11] Where the question is not one of whether the entity is a trading body, but whether the activity is one which is in trade, or part of a business, then similar issues still arise. For example, and specifically in relation to schools, it has been held that:

> "it is more appropriate to consider the provision by the Government of State schools to members of the public, at which school attendance is made compulsory by legislation, save for certain specified exceptions, and the provision of instruction which is free of charge, both historically and traditionally as a service to the community provided by the Government, rather than as an activity which, as between the Government and the community, can be characterised as a business".[12]

This is consistent with the Second Reading Speech on the introduction of the Competition Policy Reform Bill, where Senator Robert Ray said:

> " For instance, government schools are not normally engaged in business activity. While they may be seen as competing with private schools (for students), this is not competition to earn revenue and profits, and is therefore not a 'business' activity to which the competitive neutrality principles apply."

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[7] R v Trade Practices Tribunal, ex parte St George County Council (1974) 130 CLR 533 at 539, 543 per Barwick CJ; R v The Judges of the Federal Court of Australia ex parte Western National Football League Inc ('The Adamson Case') (1979) 143 CLR 190 at 208 per Barwick CJ, at 233 per Mason & Jacobs JJ, at 239 per Murphy J; Sun Earth Homes Pty Ltd v Australian Broadcasting Commission (1991) 98 ALR 101 at 111; Commonwealth v Tasmania ('The Tasmanian Dam Case') (1983) 158 CLR 1 at 156 per Mason J, at 179 per Murphy J; State Superannuation Board v TPC (1982) 150 CLR 282 at 303-4 per Mason, Murphy and Deane JJ .

[8] St George County Council supra p562 per Gibbes J; The Adamson Case supra at 213 per Gibbes J; The Tasmanian Dams Case supra at 117 per Gibbes J.

[9] E v Australian Red Cross (1991) 27 FCR 310 at 339-343.

[10] The term 'community service' as used here was the term adopted by Wilcox J in McMullin v ICI Australia (1997) 72 FCR 1 as being the generic description for a non-business activity. Elsewhere in this Review the term 'non-business activity' is preferred as aspects of the provision of a community service, as that term is more generally used, may in fact be a business activity for the purposes of the Trade Practices Act. This is recognised in the report National Competition Policy: Practices and Procedures Manual prepared by A Lennon and P Quinton, Attorney General's Department (Canberra, 1997), p.17.

[11] McMullin v ICI Australia (1997) 72 FCR 1 at 102 per Wilcox J

[12] Durant v Greiner (1990) 21 NSWLR 119 at 128 per Rolfe J

The comment in the Second Reading Speech should not be taken to mean that all non-profit activities are non-commercial as this would be contrary to the express words of the Trade Practices Act[13] and to decided authority.[14] The Second Reading speech merely addresses the issue of whether government schools are generally engaged in a business activity.

It should also be noted that whether an activity operates solely in reliance on public funds is not conclusive as to whether it is a business.

Accordingly, it can be concluded that the general conduct of a government school will not be a business, commercial or trade activity. This conclusion cannot however be extended to also say that:

- no activity of a government school can ever be a business, commercial or trade activity, or that

- education provided by other bodies should be treated likewise, or that

- other activities which might be incidental to a government school providing educational services will be treated similarly.

Such extensions would not be justified by the authorities or the rationale upon which they are based.

Where it is necessary to determine that a particular activity is a business, then this must occur on a case by case basis. Nor can any conclusion be made that merely because the controlling body is not a business, that each of its activities are not businesses or that each activity relating to it is not a business. Thus, the fact that a charity or the Crown controls a school, does not mean that no activity of that school can ever be a business.

There is therefore be no prima facie exclusion of all schools, or all activities associated with schools, from competition policy. It is not possible to assert that all school activities are inherently non-business activities.

b) Schools and public policy

Contrary to the position in other jurisdictions, and in particular the courts of the United States, Australian courts have declined to accept an argument that particular community services (as this term is generally understood) are excluded from competition as a matter of public policy. In each case Australian courts have examined the activity of the particular charity, teaching hospital, educational or

[13] see section 4(1) which defines a business as including a reference to "a business not carried on for profit".
[14] E v Australian Red Cross (1991) 27 FCR 310

other government agency to determine whether it is a business activity within the meaning specified by the Trade Practices Act.[15]

This is consistent with the Trade Practices Act and the Competition Principles Agreement. Each of these specifically refer to express and documented exclusions. If it had originally been intended that exclusions could be implied then there would have been no need to provide for such express and specific exclusions. Where public policy does require the exclusion of a particular community service, this can be accommodated by an express exclusion.

There is therefore no express or prima facie implied exclusion of schools, or activities associated with schools, from competition policy on the grounds of public policy.

[15] For example: E v Australian Red Cross (1991) 27 FCR 310; McMullin v ICI Australia (1997) 72 FCR 1; Durant v Greiner (1990) 21 NSWLR 119.

CURRENT EXAMPLES OF THE INTERACTION OF EDUCATION AND COMPETITION POLICY

While it has been proposed, on the basis of authority such as Durant v Greiner[16], that the general provision of free public schooling is a non-business activity, and so not subject to competition principles, there are examples (primarily from outside of Australia) where an educational activity has been characterised as a business activity.

Examples of where education related activities have been held subject to competition policies or laws include:

- the pricing of text books sold in a bookshop located on an educational facility [17]
- restrictions based on student residency[18]
- restrictions on offered financial assistance to students[19]
- advertising the accredited status of an educational facility or institution[20]
- restrictions on enrolments to residential students[21]
- issues surrounding the quality of education which is being delivered[22]
- accreditation of an educational facility[23]
- the provision of education using only specified equipment, where the specification is based on an intent to exclude a competitor from the market place[24]
- an educational facility refusing to give advanced standing to students of other facilities[25]

Examples of where education related activities have been held not subject to competition policies or laws include:

- a decision to close a school[26]
- setting a curriculum[27]

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[16] (1990) 21 NSWLR 119

[17] Sunshine Books v Temple University (1982) 697 F2d 90

[18] American National Bank and Trust Company of Chicago v Board of Regents for Regency Universities (1984) 607 F Supp 845

[19] United States v Brown University anors (1993) 5 F3d 658

[20] Armstrong v Accreditation Council for Continuing Education and Training (1997) 961 F Supp 305

[21] Hamilton Chapter of Alpha Delta Phi Inc v Hamilton College (1997) Trade Cases 71,946

[22] by analogy with cases such as X (Minors) v Bedfordshire County Council [1995] 1 All ER 353; Grant, Woolley, Staines and Grant v Victoria University of Wellington unreported 13 November 1997; London College of Science and Technology Ltd v Islington LBC, The Times 23 July 1996.

[23] Massachusetts School of Law at Andover Inc v American Bar Association (1996) 914 F Supp 688 at 691 per Lasker DJ

[24] Allied Tube and Conduit Corp v Indian Head Inc (1988) 486 US 492

[25] by comparison with the decision in Australian Medical Council v Human Rights and Equal Opportunities Commission (1996) EOC 92-838

[26] Durant v Greiner (1988) 21 NSWLR 119

- academic selection criteria for the admission of students[28]

These are activities which are, in the main, not specifically prescribed in legislation, instead they arise from how a school, as a legal entity conducts its affairs. To the extent that legislation does not prescribe the activity, it is not necessary, in a legislative review, to further consider the interaction of these activities and Competition Policy. Consideration in this Review is limited to those activities which are legislatively prescribed.

REGISTRATION

3.1 Registration and the Trade Practices Act

The registration of either schools or courses is an activity which is required by legislation to be performed. It is the only legislatively prescribed process which affects the interaction of schools amongst themselves and with the student population. As such, in very general terms, it is a process involving possible competitors for the same consumers in a single market. Registration therefore needs to be considered in any application of Competition Principles.

When applying the Trade Practices Act, it has already been noted in section 1.1 that certain activities are exempt from the provisions of that Act, and in relation to other activities, only those involving business activities are relevant.

Those government activities which are expressly exempt from the provisions of the Trade Practices Act include the "granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions)"[29]. The question to be answered is therefore whether registering a school, or a course delivered at a school, is the same as licensing.

A licence is a permission to do a certain act which you would not otherwise be allowed to undertake[30]. In the absence of registration a person cannot establish, maintain or conduct any non-government school in the Territory.[31] While the terminology differs, the essential element of registering a school is the granting of permission to do something which would otherwise be denied. It is therefore reasonable to conclude that registering a school is the same as licensing a school. As licensing is an exempt activity so the act of registering a school can be characterised as an exempt activity for the purposes of the Trade Practices Act.

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[27] Hamilton Chapter of Alpha Delta Phi Inc v Hamilton College (1997) Trade Cases 71,946; R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 All ER 651

[28] Selman v Harvard Medical School (1980) 494 F Sup 603 affirmed on appeal (1980) 636 F2d 1204.

[29] Trade Practices Act 1974 section 2C(1)(b).

[30] for example, see: Federal Commissioner of Taxation v United Aircraft Corporation (1943) 68 CLR 525; Computermate Products (Australia) Pty Limited v Ozi-Soft Pty Limited (1988) 20 FCR 46; Sinclair v Judge [1930] StRQd 220.

[31] Education Act 1937 section 21(1)

In relation to courses, accreditation or registration is a voluntary activity. The Act only states that an entity 'may apply' for accreditation or registration of a course to the Board of Secondary Studies[32]. This removes the sense of being granted permission to do something which is not otherwise possible. Non-government schools can therefore offer courses and certificates which are not accredited or registered by the Board or which do not entitle the student to receive a certificate from the Board. Indeed, apparently one school does not have courses which are accredited or registered in the ACT.

From a practical perspective, however, accreditation or registration does give access to a local endorsement and credibility which would otherwise not be available. The benefit which is acquired from this endorsement or credibility may arguably be sufficient to render accreditation or registration also being classified as a licence.

If, contrary to these suggestions, accreditation or registration of either schools or courses does not amount to a licence then, while reliance cannot be placed in the statutory exemption, it is still necessary to establish that the activity of registering is a business prior to the Trade Practices Act being relevant. While no Australian case, which is specifically on the point, has been identified it is noted that the conduct of a wool subsidy scheme[33], the provision of a veterinary disease eradication service[34], the provision of a finance scheme for soldier settlers[35] and the provision of agricultural advice or publications for a fee[36] have all been characterised as non-business activities provided by a government, rather than a business. As was said in one case:

> "Many, if not all departments and authorities of the Commonwealth and of the States carry on their activities in a business like way, efficiently, involve the use of valuable capital assets, engage many employees and use extensive consumables. Clearly, such activities are not within the ambit of the provision [being an activity in the nature of a business] simply because they are business like."[37]

It is therefore likely that registering non-government schools will not be subject to the Trade Practices Act.

3.2 Registration and Competition Principles

[32] Board of Senior Secondary Studies Act 1997 sections 21(1) and 25(1).
[33] Australian Woollen Mills Ltd v The Commonwealth (1954) 92 CLR 424 at 457
[34] Administrator of the Territory of Papua New Guinea v Leahy (1961) 105 CLR 6
[35] Milne v Attorney-General for the State of Tasmania (1956) 95 CLR 460
[36] McMullin v ICI Australia (1997) 72 FCR 1 at 102
[37] State Authorities Superannuation Board v Commissioner of Taxation (1988) 21 FCR 535.

In addition to the Act, consideration should also be given to the Competition Principles Agreement which calls for "the benefits of a particular policy or course of action to be balanced against the costs of the policy". The Legislation Review under the Agreement therefore has as its guiding Principle, that legislation should not restrict competition. This Principle is not expressly qualified by restricting the legislation in question to only that which deals with business activities. This Principle should be contrasted with the Competitive Neutrality Principles of this Agreement which are expressly stated to only apply to significant business activities of public owned entities.

Therefore, this provision requires that an examination of legislative provisions concerning registration of non-government schools should include a consideration of the implications of competition. This shall be undertaken in the concluding section 3.3.

3.3 Current registration laws and practices

Registration of schools and courses shall be separately considered.

a) *registration of schools*

The application of competition policy to the registration of schools shall be considered from three different perspectives. These are whether any differences apply in the registration requirements between government and non-government schools; whether the requirements are applied differently, and the significance of planning and establishing new schools.

(i) differentiation of government and non-government schools

The Education Act (refer to the summary of this Act in the Attachment) currently provides for the registration of non-government schools. There is no requirement for non-government schools to meet the same requirements. This can lead to qualitative differences between the two.

By way of example, a failure by a non-government school to meet safety requirements will render it liable to closure as well as liable to prosecution under Occupational Health and Safety legislation, whereas for a government school only a prosecution may result. Indeed, it is possible that government practices may restrict the ability of one government agency to sue or prosecute another. If this is the case, then this will even further minimise the consequences of an Occupational Health and Safety breach. This could be a competitive difference.

Another example is that corporal punishment will place at risk the registration of a non-government school but if it takes place in a government school it merely renders a claim for an injunction or damages possible. Again, this could be a competitive difference.

(ii) the application of standards

In considering whether to register a school the Act requires that consideration be given to a number of different aspects of the educational service to be delivered. The purpose of these standards is said to be an assurance "that schools equip students to take a full and productive part in Australian society".[38]

In accordance with this purpose the registration process considers facilities, the nature and content of instruction, teaching standards, disciplinary policies and the like.[39] While each of these can be manipulated in a way which could have anti-competitive motivations, especially seeing that some potential competitors might be on the registration panel[40], this does not raise issues which need to be addressed in the legislation other than to the extent that the legislation specifies the standard of conduct which is expected of such panels.[41]

If it is desired to have a process which sets standards which are informed by current practices then the process must involve practitioners and these practitioners must be potentially competitive parties. The alternative would be to only utilise staff of non-school bodies (such as universities) with the consequent risk of creating a process which is not as well informed as it might otherwise have been.

Any registration system will by definition have the ability to preclude certain entities from offering a service. Where the system does no more than establish minimum quality standards for the benefit of all students, and hence the general community within the Territory, then even where these standards might amount to a barrier to entry (for which see below) they will not be anti-competitive.

Once the panel has made an assessment based on objective standards set with the best interests of the student in mind, the Minister is then required (in the case of provisional registration for a new school) to give consideration to a separate issue. The Minister is to "have regard to the immediate need for the proposed school, or the proposed educational level or levels of the school, in the relevant location"[42]. This issue is separate from the assessment of the panel. It is informed by notions of whether this sort of non-government school should, notwithstanding compliance with all educational standards, be permitted to provide a service or a business in a particular location.

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[38] Guidelines for the registration of non-government schools in the ACT (Canberra, 1994) as published by the then Department of Education and Training and Children's, Youth and Family Services at p. 5.
[39] see Education Act 1937 sections 22(5) and 23 (3), and para. 2.7.1. to 2.7.12 of the Guidelines (as described in fn 38).
[40] see para. 2.3 to 2.4 of the Guidelines (as described in fn 37).
[41] For an example of alleged anti-competitive behaviour see: Massachusetts School of Law at Andover Inc v American Bar Association (1996) 914 F Supp 688
[42] Education Act 1937, section 22(8),

A number of reasons for such a provision can be advanced. Each would concentrate on different aspects of the planning process whereby the Minister exercises responsibility for a comprehensive education system being developed across the Territory with a commensurate need to ensure that overservicing or underservicing does not occur.

As this aspect is not based upon an open and transparent process which concentrates upon minimum standards for student well-being, the anti-competitive aspects of any barrier to entry require further consideration. Prior to doing so, a discussion on barriers to entry is appropriate.

(iii) barriers to entry

As was said in section 1.1, in terms of competition theory, the number of participants in a given market, and the extent of their participation in that market, will be significant factors in determining how that particular market efficiently allocates available resources and satisfies the demands of consumers. If therefore, there is an impediment to participants entering a market this will detrimentally effect how these factors will operate.

Many factors can be impediments to the entry of new participants. These could include labour intransigence, unionism and inflation.[43] In a similar fashion minimum standards imposed for the well-being of consumers could be regarded as a barrier to entry. But not all barriers to entry are addressed by competition policy. Rather, the policy looks not to those barriers which are common to all participants but instead, only to those barriers which are artificially imposed by existing participants. These barriers created by existing participants exclude others (either entirely from the market or from full participation) by ensuring that later comers are burdened by costs which did not have to also be met by those who were first in the market. These artificially imposed barriers restrict mobility into and within the market.[44] The barriers manipulate the number and variety of participants, and the extent of the participation.

On this basis, it can be seen that minimum standards for the well-being of students which are common to all participants should not be regarded as anti-competitive barriers to entry. In a competitively neutral environment these minimum standards should require both government and non-government schools, existing and new entrants, to each attain the same level.

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[43] G. de Walker, "Structure conduct and the test of competition in Australia" (1976) 31 The Antitrust Bulletin 657 at 671-4.

[44] see: O. E. Williamsson "Review" (1979) 46 University of Chicago Law Review 526 at 529; O. E. Williamsson, "Antitrust enforcement: where has been; where is it going" in J.V. Craven (ed.) Industrial Organisation, Antitrust and Public Policy (Boston, 1983), p.46; W.S. Bowman "Contrasts in antitrust theory" (1965) 65 Columbia Law Review 401 at 419; V Korah, Competition Law of Britain and the Common Market (The Hague, 1982) p. 221; C.C. von Weizsacker, Barriers to Entry: a theoretical treatment (Berlin, 1980) p.13.

(iv) Planning and the establishment of schools

Having discussed barriers to entry it is necessary to return to the earlier issue of the requirement of the Minister to have regard to the further issue of location, in approving provisional registration.

This issue is determined by the Minister who has responsibility for the establishment and maintenance of government schools within the same locality. While these government schools may not be competitors (because they are not businesses or trading corporations) from an application of competition theory the government school will still be a participant within the same educational market. To ensure that both government and non-government schools are treated with parity it must be demonstrable that each is considered comparably.

This is not expressly and explicitly the case under the present legislation. The goal of planning educational delivery throughout the Territory need not however be defeated by ensuring that this will be the case in the future. All that is required is for the legislation to provide a common consideration against known (or able to be known) parameters. This will remove the element of a potential competitor being able to impose costs upon others which might have the effect of restricting mobility of competitors.

The Minister can take into account factors such as the financial viability of proposed or existing schools so long as this consideration is not motivated by anti-competitive reasons. The decision is to be founded on underlying policies that require a proper and balanced approach to the allocation of resources or implementation of Government policies on the type of education to be publicly funded. The Minister should not act in a way which discriminates, for reasons of competition, against a certain type of school being established or the registration of an existing school being challenged.

For example, a decision can be made that it is not the best use of resources to publicly fund 3 schools in close proximity to each other, or a decision can be made that students will not receive an adequate education within a proposed establishment. The decision cannot be made that a school will not be registered because this will deplete numbers at a local government school or because a policy decision has been made not to register schools which adopt the, say, Callithumpian ideology. The latter decisions are attempts to unduly exert ‘market’ power whereas the former are proper decisions to be made as part of the day to day activities of a regulatory body.

b) *accreditation or registration of courses*

It has previously been established that the accreditation or registration of courses may be exempt as the exercise of a government licensing scheme and therefore not anti-competitive. If this conclusion is not the case, then it has been argued

that, in any event, the granting of accreditation or registration is a non-business activity.

As accreditation or registration is common to all schools or vocational education and training providers there is no cost to be borne by one participant in the market which is not also borne by all other participants.

The Board of Senior Secondary Studies, as the granting body of the accreditation or registration, is not a provider of education and is not therefore a potential competitor in its own right. The situation cannot therefore arise where its actions can give itself a competitive advantage over others.

However, the Board can have as one of its members, individuals who may also be competitors or officers of competitors within the educational or training provider markets.[45] As has been alleged in other cases[46] individual members might engage in anti-competitive behaviour. There is an existing provision referring to the disclosure of personal or pecuniary interests which might be suitably modified to also explicitly accommodate this issue.

CONCLUSION

This Review has therefore concluded that there is no reason in principle why each aspect of education should be excluded from any application of Competition Policy.

While education has no general exemption, the essential elements of teaching within government schools and most non-government schools, as generally conducted within the ACT, will be non-business activities. A significant range of activities associated with schools can however be business activities.

Of the activities which are required by legislation to be undertaken those of registration and accreditation raise issues of competition policy. It is concluded that some changes need to be made to avoid differentiation in practice and to ensure that those exercising these powers are aware that they must not do so in ways which are anti-competitive.

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[45] Board of Senior Studies Act 1997, section 8

[46] for example: Massachusetts School of Law at Andover Inc v American Bar Association (1996) 914 F Supp 688

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Following his admission as a legal practitioner in 1979 he worked in private practice in Sydney. After becoming an equity partner in Conway Maccallum, Solicitors he joined the public sector in 1990.

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He completed his Master of Laws at the University of Sydney in 1985 where his thesis was on "the meaning of competition within the Trade Practices Act". He was awarded a High Distinction for this thesis.

Publications include the volume on Landlord and Tenancy in Halsbury's Laws of Australia and a number of articles on education law. He has delivered papers at four annual conferences of the Australia and New Zealand Education Law Association.

Attachment to the Review

EDUCATION ACT 1937

In summary, this Act governs the following situations:

- it requires compulsory attendance at school for children who are not less than 6 nor more than 15 years of age

- it restricts the ability to employ a child who is compulsorily required to attend school

- it requires non-government schools to be registered. In considering registration, the Minister is to have regard to the "immediate need for the proposed school ....in the relevant location"[47] as well as considering whether the school addresses the safety, health and welfare of its students; provides satisfactory instruction; meets standards of orgainsation, equipment and teaching and does not exercise corporal punishment.[48]

- permits the provision of school transport and the granting of financial assistance or prizes

- permits the Minister to alter trusts for educational purposes

- denies certain defences to staff of any school where the staff member administers corporal punishment but, contrary to the heading, does not prohibit corporal punishment in government schools.[49]

Free Education Act 1906

In summary, this Act governs:

- the fees which can be charged for education in "primary and superior public schools"[50] - by prohibiting them. It is presumed that as this Act is to be "construed with the Public Instruction Act 1880"[51] that this restricts the definition of school to government schools.

[47] section 22(8)
[48] sections 22(5) and 23(3)
[49] section 36
[50] section 2
[51] section 1

Public Instruction Act 1880

In summary, this Act governs:

- religious teaching by establishing that teaching in all government schools is to be non-sectarian, but can include "general religious teaching as distinguished from dogmatic or polemical theology"[52]. The religious teaching must not exceed 1 hour per school day and must be authorised by a Church.[53]

- each government school day must have at least 4 hours of secular instruction

Board of Senior Secondary Studies Act 1997

In summary, this Act:

- permits the accreditation of courses offered by a registered or government school by a Board

- stipulates that accreditation is to address issues of coherence, appropriateness, clarity, teaching intent, relevance to general guidelines and policies.[54]

- permits courses to be registered

- permits certificates to be issued for satisfactory completion of accredited courses

Schools Authority Act 1976

In summary, this Act:

- permits a structure for the establishment of government schools

[52] section 7
[53] section 17
[54] section 24. These powers can not be directed by the Minister to be exercised in relation to a particualr student or assessment, section 7, but there is no preclusion of a direction aimed at a particular school or type of school.