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Global Forum on Competition

THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Australia

-- Session IV --

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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- Australia --

1. Australia's competition and consumer policy framework is designed to promote the wellbeing of the Australian people by fostering and developing competitive, efficient, well-informed and safe markets. Australia considers competition and consumer policy in an integrated way, reflecting the mutually reinforcing role of competition and consumer policies in driving market efficiency and achieving wider economic benefits.

2. Australia's competition policy approach serves to foster and promote well-functioning markets, both through structural reform and, more specifically, dealing with anti-competitive practices. Effective competition lets consumers benefit from lower prices and greater choice. Consumer policy empowers consumers to operate more effectively in markets and addresses conduct designed to exploit or harm consumers. Appropriately applied, it enhances competition by enabling consumers to drive competition through the exercise of effective choice.

3. In respect of competition and consumer policy, Australia's preference is for generic, economy-wide regulation. However, there are a small number of market sectors where specific regulation applies, to a greater or lesser degree.

1. Competition and consumer policy in Australia's federal system

4. The Australian Government does not have exclusive responsibility for competition and consumer issues under Australia's constitutional arrangements and in some respects powers are shared with the States and Territories. Almost all competition regulation is national, structural reform is a shared responsibility and significant areas of consumer regulation are the responsibility of the States and Territories.

5. Australia's national competition and consumer policy framework has four basic elements:

- the policy framework – the *Trade Practices Act 1974* (TPA) and associated regulations;
- policy development – the Minister for Competition Policy and Consumer Affairs and the Department of the Treasury (Treasury);
- enforcement – the Australian Competition and Consumer Commission (ACCC); and
- redress – through federal courts, principally the Federal Court of Australia.

6. Responsibility for structural reform, designed to create and foster well-functioning markets, is shared by the Australian Government and the States and Territories. Policy development and implementation is led by the Council of Australian Governments (CoAG), which is made up of the Prime Minister, State Premiers and Territory Chief Ministers.

Significant aspects of consumer regulation and enforcement are also the responsibility of the individual States and Territories, which have their own consumer policy and enforcement bodies. State consumer laws are enforced through state courts and tribunals. There is increasing national coordination in many areas through the Ministerial Council on Consumer Affairs. The States and Territories are generally responsible for the regulation of conduct affecting consumers by traders operating within State and Territory borders, and their functions typically include trades and professional regulation and licensing, product standards, product safety and fair trading.

1.1 Policy Framework: Trade Practices Act 1974

7. The TPA regulates competition and consumer issues at the national level. The nature of Australia's integrated approach to competition and consumer policy is reflected in section 2 of the TPA, which says "*the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and the provision of consumer protection.*" Central to the function of the TPA is its concern with the welfare of Australians, and it serves to promote economic efficiency by fostering and protecting competitive markets.

8. The TPA covers three broad areas:

- **competition regulation:** the TPA prohibits anti-competitive conduct, which includes the formation of cartels and other anti-competitive agreements, mergers and acquisitions that substantially lessen competition and the misuse of market power. The competition provisions of the TPA apply to all businesses in Australia, including financial services providers. The TPA also provides that the ACCC may monitor prices in a market.
- **economic regulation of infrastructure:** the TPA sets out a regime for the regulation of access to economic infrastructure of national significance and also specific access regulation for telecommunications networks; and
- **consumer regulation:** the TPA prohibits businesses from engaging in misleading or deceptive conduct and from unconscionably taking advantage of consumers, both of which can provide traders with an unfair advantage. They also set out a range of basic protections for consumers in their dealings with businesses and cover product safety. They apply to any business that trades across domestic and/or international borders, except financial services providers.¹

1.2 Policy development: Minister for Competition Policy and Consumer Affairs and Treasury

9. The Minister for Competition Policy and Consumer Affairs is responsible for national policy and is supported by the Treasury. The Minister operates within the Treasurer's portfolio. Treasury's policy making capability is split into three streams: competition policy, economic regulation of infrastructure and consumer policy.

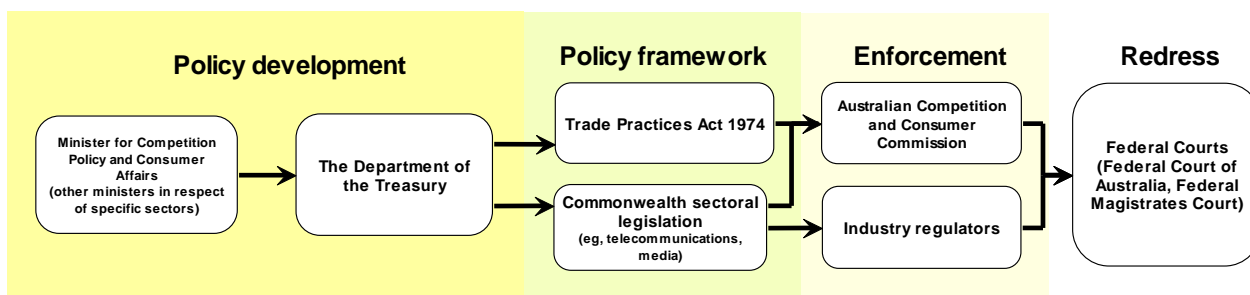
1.1.1 Competition policy

10. Australia's general competition policy aims to ensure and (where necessary) develop well-functioning markets. This is achieved through targeting anti-competitive practices and structural reform.

11. The TPA prohibits cartel conduct, agreements that substantially lessen competition, secondary boycotts, misuse of substantial market power, mergers or acquisitions that may substantially lessen

¹ The *Australian Securities and Investments Commission Act 2001* regulates financial services nationally.

competition and resale price maintenance. In 2003 the Australian Government conducted a review of the effectiveness of the anti-competitive conduct provisions of the TPA, chaired by Sir Daryl Dawson, a retired High Court judge (the Dawson Review). The Dawson Review concluded that the TPA was largely effective and worked well but that improvements were needed in some areas, including, improving the administration and accountability of the ACCC, improving the ACCC's regulatory processes, specifically through a new merger clearance process and changes to the collective bargaining provisions, and also recommending increases to penalties and the introduction of criminal sanctions for cartel conduct.



12. In response to the review's recommendations, and widespread publicity about recent cartel cases, the Australian Government proposes to criminalise cartel conduct by allowing for the gaoling of persons who make, or give effect to, agreements between competitors that aim to fix prices, restrict output, divide markets or rig bids. The Australian Government intends put this legislation before the Australian Parliament in 2008 and is presently consulting on it.

13. Australia embarked on extensive structural reform from the mid-1990s with the implementation of the National Competition Policy (NCP) by the Australian Government and the States and Territories. NCP was focussed on reforming Australia's institutional and regulatory frameworks to create new markets and introduce competition into existing markets. NCP included the extension of competition regulation to cover all businesses, the disaggregation of previously vertically-integrated monopoly service sectors, such as publicly owned utilities, to create competitive markets, the introduction of competitive neutrality between public and private sector businesses and the introduction of a regime for access to essential facilities (see below).

14. A second wave of structural reform commenced in 2005, with the introduction of the National Reform Agenda (NRA) under the auspices of CoAG. The NRA covered reforms in the areas of human capital, competition and regulatory reform, aimed at further raising living standards and improving services by lifting national productivity and workforce participation. A key element of the NRA is the introduction of regulatory best practice by all Australian Governments, including the requirement to consider at an early stage the impact of proposed reforms on markets.

1.1.2 Economic regulation of infrastructure

15. The TPA provides for a national access regime for infrastructure (under Part IIIA TPA). Access regulation in Australia seeks to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in markets and overall economic efficiency.

16. Part IIIA of the TPA provides for the regulation of third-party access to nationally significant infrastructure on reasonable terms and conditions where commercial negotiations with the infrastructure owner have failed. In such instances, a party wanting access to a particular infrastructure service may apply to have the service 'declared' to be an essential service. In addition, the regime provides a

framework and guiding principles to encourage a consistent approach to access regulation in each industry. The regime therefore provides for the designated Australian Government Minister to ‘certify’ a state or territory access regime as an ‘effective’ access regime. Where an effective access regime is found to exist, declaration is not available and an access seeker must use the effective regime.

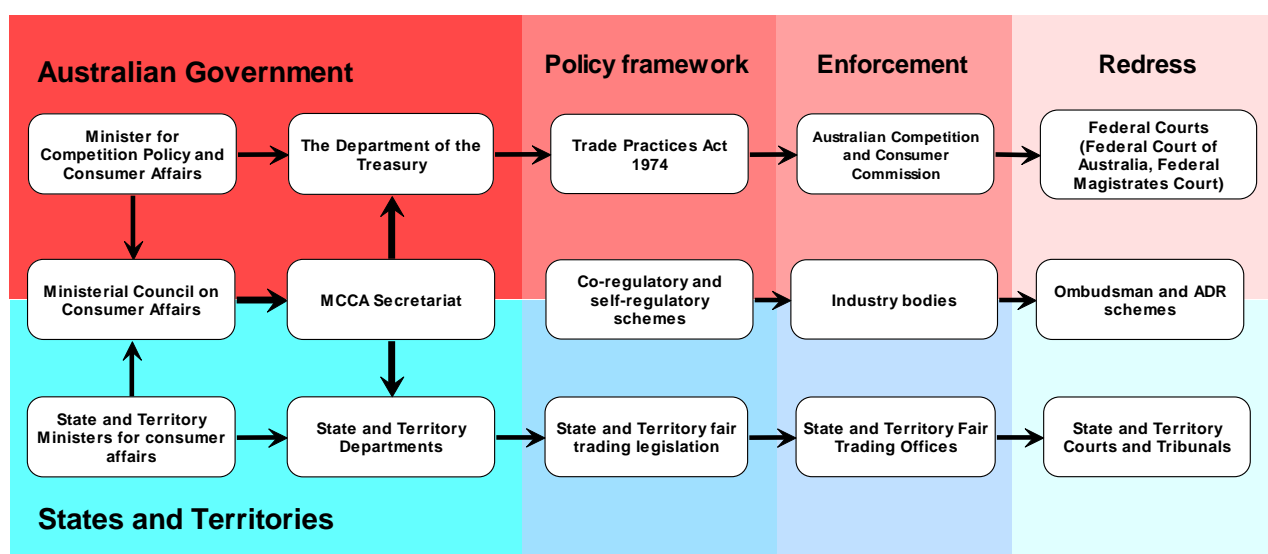
17. The National Competition Council (NCC) is an independent statutory authority established under Part IIIA of the TPA. The NCC’s role involves making recommendations to the relevant Minister on whether essential infrastructure services should be declared and on whether certain state and territory access regimes should be certified. It reports annually on the national access regime, including on recent legislative developments and the operation and effectiveness of the regime (copies of NCC reports can be obtained from its website, www.ncc.gov.au).

1.1.3 Consumer Policy

18. Australia regards consumer policy and competition policy as part of an integrated approach to regulating markets and ensuring consumer well-being. Australian consumer policy is focussed on demand-side issues, enabling consumers to make effective choices and providing protection, where required, from misleading, exploitative or harmful conduct by traders. It serves to activate competition, leading to wider economic benefits, such as increased productivity and growth.

19. Consumer laws provide a range of approaches for action against businesses that mislead, exploit or harm consumers, including private rights of action, providing specific guarantees of fitness for purpose and quality, regulating labelling and contract terms, prohibiting specific forms of conduct and product safety regulation.

20. Australian consumer policy is developed, implemented and enforced at the national and state levels. Generally speaking, national laws apply to businesses operating across state borders and internationally, and state laws apply within their jurisdiction. The Australian Government works closely with the States and Territories to integrate and harmonise policy development and consumer law enforcement. Australia’s governments are also active in consumer information and education campaigns and encourage the use, where possible, of industry self-regulation to address issues in the market.



1.3 Enforcement: Australian Competition and Consumer Commission

21. Australia's competition and consumer policy arrangements separate policy and enforcement functions. While national policy responsibility rests with the Minister and Treasury, enforcement is the responsibility of the ACCC (www.accc.gov.au). The ACCC's role goes well beyond simply taking action for breaches of the TPA, but seeks to "*enhance the welfare of Australians by promoting vigorous, lawful competition and informed markets, encouraging fair trading and protecting consumers and regulating national infrastructure services and other markets where there is limited competition.*" The States and Territories also have their own enforcement bodies, which enforce State and Territory consumer laws.² The ACCC and the State and Territory enforcement bodies work cooperatively through formal and informal links.

22. The ACCC is an independent statutory commission, made up of the chairman and a board of commissioners, which is responsible to Parliament, with supporting staff. It was set up in 1995 to take over the functions of the Trade Practices Commission and the Prices Surveillance Authority, so as to achieve better coordination of competition and consumer law enforcement. Like the Treasury in relation to policy issues, the ACCC provides advice to ministers on law enforcement issues.

23. Enforcing both competition and consumer laws gives the ACCC synergies and efficiencies in carrying out its functions. For example, understanding the competitive dynamics of a market can assist the ACCC to identify and assess likely consumer detriment. The ACCC has a range of enforcement powers at its disposal, so as to use the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education to achieve compliance with the TPA.

24. The ACCC recognises that the vast majority of businesses wish to comply with the law, and widely utilises education and awareness tools to inform businesses and consumers about their rights and obligations, with the aim to reducing potential breaches. The ACCC takes a targeted approach to enforcement, including targeting conduct that has a national or international focus or where the implications of the case can have a broad educational or deterrent effect. This is to ensure that their resources are utilised effectively in the delivery of well functioning markets.

25. In addition to the ACCC each state has its own consumer regulatory body, with broadly similar enforcement powers within their jurisdictions. There are also a number of markets regulated on a sectoral basis. These include:

- financial services, where the Australian Securities and Investments Commission (www.asic.gov.au) works with the ACCC to enforce consumer regulation;
- communications and the media, where the Australian Communications and Media Authority (www.acma.gov.au) has primary responsibility for the enforcement of competition and consumer laws, but also works with the ACCC; and
- energy, where the Australian Energy Regulator (www.aer.gov.au) works closely with the ACCC to enforce laws regulating national energy networks and whose role will expand to cover consumer regulation in the near future.

² State and Territory enforcement bodies include: New South Wales Office of Fair Trading, Consumer Affairs Victoria, Queensland Office of Fair Trading, Western Australian Department of Consumer and Employment Protection, South Australian Office of Consumer and Business Affairs, Tasmanian Office of Consumer Affairs and Fair Trading, Australian Capital Territory Office of Fair Trading and the Northern Territory Department of Justice.

26. The role of educating and informing consumers rests primarily with the ACCC and other national and State and Territory government agencies, with industry support. The ACCC has a highly visible and effective role in educating consumers and businesses on consumer and competition related matters. Australian markets have responded to market failures, particularly in the area of information provision, and have created a number of tools that can aid consumers in making decisions in the market, such as intermediaries and price comparators.

2. Redress

27. Actions for breaches of national competition and consumer laws, brought by either the ACCC or by private litigants, are conducted in the Federal Court of Australia in the first instance. Reviews of decisions made under Australia's national infrastructure access regime are conducted by the Australian Competition Tribunal, from which matters of law may be appealed to the Federal Court. In both cases, appeals are then made to the Full Court of the Federal Court and then, subject to leave to appeal being granted, the High Court of Australia.

28. State and Territory consumer laws are enforced through State and Territory courts and administrative tribunals. Appeals proceed through the state court systems and then, ultimately, to the High Court of Australia, subject to leave being granted. The ultimate appellate role of the High Court gives some coherence to the interpretation of similar national, State and Territory laws.

29. There are also many industry based schemes for informal redress and dispute resolution between consumers and traders. These are generally industry-based and initiated or, in some cases, co-regulatory, with government sponsorship and approval or subject to mandatory application.

3. Future reform priorities

30. The regulation of Australian markets face continual challenges to address the ongoing development of competition, greater product choice and complexity, changes in spending patterns, technological change, changes in essential services provision and greater consumer diversity and expectations.

31. In addition to the extensive reform of Australia's competition laws in recent years, Australia's consumer policy framework is currently undergoing its first comprehensive review in over 20 years, which is being conducted by the Productivity Commission (the Commission) (see <http://www.pc.gov.au/inquiry/consumer>).

32. The Commission has been asked to report on improvements to the policy framework to assist and empower consumers, the harmonisation and coordination of consumer policy across jurisdictions, rationalisation of consumer protection laws, more effective use of self-regulatory, co-regulatory and consumer education and information approaches and principles-based regulation and changes to the consumer policy framework to facilitate greater economic integration between Australia and New Zealand.

33. The Commission's final report is due at the end of April 2008. However, after extensive public consultation, the Commission has made a number of draft recommendations aimed at improving the functioning of Australia's consumer policy framework. These include introducing clear objectives for consumer regulation, better integrating national and state approaches to policy and consumer law enforcement, including reducing regulatory complexity and cost, introducing a national generic consumer law, introducing national "unfair contract terms" laws and improving the quality of information disclosure.

4. Specific questions for written contributions

- 1. How does consumer policy interact with competition policy in your country, if at all? Can you give examples where they have conflicted? Where have they been complementary?**

Answered in the main text.

- 2. What do you feel are the benefits and drawbacks to your own country's choice of "dual-function" or "separate agencies" for handling competition and consumer policy?**

Answered in the main text.

- 3. Has your country required that "no frills" versions of complicated products be offered, to help vulnerable consumers? If so, who provided the product and how was its supply enforced? What was the effect on competition, if any?**

No.

- 4. Can you identify areas where a better convergence of both competition and consumer policies globally would be beneficial?**

Given Australia's preference for generic, economy-wide competition and consumer regulation, it considers that coupling, rather than the convergence of, competition and consumer policies would be beneficial for the development of well-functioning supranational and international markets.

- 5. Can you provide examples of sectors or products where an increased international cooperation between competition authorities and consumers representatives could render the markets more competitive while ensuring an adequate protection of consumers around the globe?**

Given Australia's preference for generic, economy-wide competition and consumer regulation, it considers that increased international cooperation between competition authorities and consumers representatives could render markets more competitive in relation to all sectors and products.