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## **OECD Global Forum on Competition**

**THE OBJECTIVES OF COMPETITION LAW AND POLICY  
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- AUSTRALIA --

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## AUSTRALIA

### OBJECTIVES OF COMPETITION POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY

#### 1. Objectives of Australia's Competition Policy

##### 1.1 Introduction

Australia's competition policy framework encompasses both the competition law, and a broader range of policies and processes (referred to as National Competition Policy) that are aimed at encouraging competitive market outcomes.

While the competition law has explicitly stated objectives, it allows some scope for interpretation of these objectives by Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC), and by appellate bodies. The broader National Competition Policy framework also requires Governments to consider whether measures to implement reforms are in the public interest.

##### 1.2 Competition Law

The competition law is primarily embodied in the *Trade Practices Act 1974* (the Act), which deals with various types of anti-competitive conduct and stipulates a range of enforcement and other remedies. The Act also contains consumer protection provisions. A general objects clause was inserted into the Act in 1995. It reads:

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

While the competition and consumer protection functions of the Act tend to operate discretely, the objectives are interrelated. For example, it is generally accepted that promoting competition between companies can be an effective way of protecting consumers in relation to matters such as pricing and consumer choice.

An independent review of the competition provisions of the Act and their administration is currently being conducted, and is scheduled to report to the Government by 31 January 2003. Among other things, the review may consider the stated objectives of the Act, and whether they continue to be appropriate. The review's website address, which includes public submissions, is: <http://tpareview.treasury.gov.au>.

##### 1.3 National Competition Policy

The broader framework for National Competition Policy was developed in the early 1990s. Governments recognised that particular sectors needed reform, and that the competition law alone was not sufficient to ensure that all sectors of the economy were subject to competitive pressures.

In 1995 the Federal, State and Territory governments agreed to the elements of National Competition Policy. The policy is based on the recommendations of a comprehensive review of competition policy in Australia (the Hilmer Report). It draws together various strands of microeconomic reform into a cohesive policy that extends beyond the competition laws, to principles and processes for future reform.

The National Competition Policy framework consists of six elements:

- universal application of the competitive conduct rules contained in the *Trade Practices Act 1974* to all sectors of the Australian economy;
- the review of legislation which restricts competition to ensure that such restrictions are necessary to achieve the objects of the legislation and that there is a net benefit to the community as a whole as a result of the restriction;
- structural reform of public monopolies where a government has decided to introduce competition or undertake privatisation;
- enabling access to services provided by means of significant infrastructure facilities;
- price oversight of government business enterprises; and
- competitive neutrality principles which state that government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

The broad objective of National Competition Policy is to increase living standards, productivity and employment through a broad structural reform program. It involves reducing business costs (including red tape), providing lower prices and greater choice for consumers, and more efficient delivery of public services.

The separate elements of the National Competition Policy arrangements are underpinned by three Inter-Governmental Agreements. The agreements do not have a legislative basis, but contain commitments by the Commonwealth, State and Territory Governments to a coordinated approach, with financial incentives for the State and Territory Governments to implement the competition policy elements.

#### **1.4 Public benefit test**

Australian competition policy recognises that the public interest may not always be met by the operation of competitive markets. Both the competition law and other elements of National Competition Policy in some cases require an assessment as to whether particular conduct or arrangements are in the public interest.

##### **1.4.1 Authorisation**

The Act allows the ACCC to adjudicate applications for authorisation, which provides immunity from prosecution to corporations engaging in anti-competitive conduct that is nevertheless in the public interest.

Authorisation is available for the competition provisions of the Act, except the misuse of market power provision. Public benefit for the purpose of authorisation is not generally defined in the Act, however the

Australian Competition Tribunal (the appellate body for ACCC decisions) has stated that a public benefit is:

Anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

The decision to grant an exemption through the authorisation process is based on an assessment of public benefit gains from the conduct. This involves a trade off between the objectives of preventing anti-competitive conduct and attaining public benefits from well functioning markets.

While authorisation is not granted lightly, the public benefit test in the authorisation process is flexible and has responded to the transitional needs of industries and communities affected by structural change and to the requirements of rural and regional areas.

Both economic and non-economic public benefits are included in the concept of 'public benefit' for authorisation of anti-competitive conduct. Examples of economic benefits recognised by the ACCC and the Australian Competition Tribunal include: fostering business efficiency, growth in export markets and industrial harmony. Examples of recognised non-economic benefits include: improvements to health and safety, environmental protection, avoiding conflicts of interest and adopting provisions that lead to equitable dealings between businesses.

In relation to applications for authorisation of mergers, the ACCC is required by the Act to take into account the following as public benefits:

- a significant increase in the real value of exports;
- a significant substitution of domestic products for imported goods; and
- all other relevant matters that relate to the international competitiveness of any Australian industry.

The Act does not provide an explicit weighting to different public benefits. However, the Australian Competition Tribunal has observed in relation to mergers that "if such a merger benefited only a small number of shareholders of the applicant corporations through higher profits and dividends, this might be given less weight by the Tribunal, because the benefits are not being spread widely among members of the community generally" (*Re Howard Smith Industries Pty Ltd* (1977) ATPR 40-023). This appears to reflect a concern that efficiency gains might be eroded in the absence of effective competition. It may also indicate that the 'public benefit' test applied to authorisation applications is not based on a total welfare approach.

#### *1.4.2 National Competition Policy – public interest test*

In relation to National Competition Policy, Governments are only required to implement measures to the extent that the benefits to be realised from implementation outweigh the costs. Governments have recognised that encouraging effective competition may not always deliver efficient resource use and maximum community benefit, or may conflict with other social objectives.

Accordingly, the *Competition Principles Agreement* provides a mechanism – the public interest test – to examine the relationship between the overall interest of the community, competition and desirable

economic and social outcomes. These factors are broader than the economic benefits and costs of a proposed reform, and include:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including Community Service Obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

The list is open-ended, and the process requires that all relevant matters should be considered in assessing the public interest.

Under the National Competition Policy framework, individual Governments ultimately make an assessment of the public interest. However, each jurisdiction's performance in implementing the required competition policy reforms is assessed by the National Competition Council (NCC). Among other things, the NCC may consider whether a robust and objective review was undertaken prior to the decision, as such reviews increase the likelihood of policy outcomes that are in the public interest. The Commonwealth makes competition payments to those jurisdictions assessed as making satisfactory progress towards implementation of competition and related reforms.

## **2 Optimal Design of a Competition Agency**

### **2.1 Introduction**

Australia's competition regulator, the ACCC, was created in 1995 by a merger of the Trade Practices Commission and the Prices Surveillance Authority. This was consistent with the recommendations of the 1993 Hilmer Report on competition policy, which found broad support for the competition rules being administered by a single, economy-wide body. The Government at the time also considered that prices oversight powers should be carried out by a body with broad competition regulation functions.

A general object clause was also inserted into the Act at the time of the creation of the ACCC. The ACCC's mission statement, which is consistent with the objects clause of the Act, is as follows:

Enhance the welfare of Australians by:

- promoting effective competition and informed markets;
- encouraging fair trading and protecting consumers; and

- regulating infrastructure services markets and other markets where competition is restricted.

Generally speaking, a competition regulator should be independent from the Government, follow transparent processes and communicate effectively with the public, have its decisions subject to review, and have sufficient resources. These broad principles are discussed further below.

## **2.2 *Independence from Government***

Australia places high importance on the independence of the competition regulator from the Government. If this independence is not achieved, both in actual fact and in the perception of the community, then application of competition law will be, or be seen to be, influenced by the politics of the government of the day, and therefore subject to other political agendas, which may not be in the best interests of competition and achieving competitive market outcomes.

If the Government considers that the ACCC should take new or different objectives into account, it has the discretion to propose legislative amendments. The Act provides that in certain areas, the Minister may give the ACCC directions connected with the performance of its functions or the exercise of its powers (s 29(1)). To date, this provision has been rarely utilised, and does not apply to the competition provisions of the Act.

## **2.3 *Transparency and Communication***

Transparency and accountability are essential to ensure that businesses and consumers know what legal conditions they operate under and to facilitate inter-governmental cooperation. This applies both *ex ante* (formulating clear rules for potential economic operators) and *ex post* (making those concerned aware of enforcement decisions).

The actions most essential to promoting the transparency and accountability of the competition policy system (both in terms of the laws and its regulators) entail effective communication by policy makers and the regulator. Foremost, laws and regulations should be made publicly available. Second, any current gaps in coverage should be specified and consideration should be given to a 'standstill' or 'roll back' of such gaps. If any special rules exist for certain sectors, they should also be specified. All exceptions to laws and regulations should be publicly stated and justified. Where exemptions exist, exemption criteria – whether predetermined or through rule of reason analysis – should be set out in the published regime or guidelines, or judicial opinions. Third, provisions should be made to ensure that modifications to the regime are published. Finally, transparency of the enforcement policy should also be established through the publication of priorities, guidelines, case selection criteria and exemption criteria

As noted above, the ACCC is required to make trade-offs in consideration of applications for authorisation. It is also required to make assessments in other cases, for example regarding whether a merger may substantially lessen competition. It is therefore important that assessment processes be transparent and, where appropriate, consultative and public.

It is also important that the competition regulator is able to inform the broader public of their rights and obligations under the law, and of how it applies the law. The provision of information to the public helps to promote confidence in the law and its administration, and is also a form of accountability and transparency. It also helps promote compliance with the law and the achievement of desirable economic objectives such as a more competitive economy.

## **2.4**      *Accountability*

Related to the principle of transparency, it is also desirable for decisions of the competition regulator to be subject to independent review.

In order to fully gain consumer and business confidence, additional measures must be taken to ensure the transparency and accountability of the enforcement agency and the body that sees appeals to the competition laws.

### *2.4.1*      *The Enforcement Agency*

The mission of a general competition enforcement agency could be expected to enhance the total welfare of the economy's people by achieving comprehensive compliance with the competition legislation and its objectives. Compliance is attained by timely and efficient enforcement action, competition policy advocacy, information dissemination and increasing market transparency.

For a competition agency to provide timely and efficient administration and enforcement of the competition legislation, it is important that it adopt a predictable and transparent approach – both internal and external to the organization.

Internal openness can be created by regularly communicating management goals and objectives, minimizing reporting layers, developing efficient IT systems and providing the necessary support and empowerment to employees to establish an interested and motivated workforce.

External openness would include the development of easily readable brochures concerning the legislation and the creation of a web-site on the Internet which could explain the purposes and structure of the organization, facilitate complaint handling, provide information on the various provisions of the competition legislation and public notices of decisions.

A regulator should be required to protect commercial secrets and other confidential information, in order to secure confidence in its impartiality and to encourage frank and complete disclosure.

### *2.4.2*      *Competition Appeal/Adjudicative Body*

In order to promote transparency and accountability for decisions, it is considered important that an appeal body exist to consider matters that are dealt with by the competition enforcement agency. An appeal body is necessary to protect the integrity of the decision making process. It is also important that this level of accountability is both real and perceived in the wider community.

In Australia, the Australian Competition Tribunal is able to conduct merit review of ACCC authorisation and notification decisions, and arbitration decisions in cases involving access to essential

facilities. The ACCC is also subject to judicial review in relation to decisions that are required under an enactment.

If an individual wishes to raise concerns regarding the ACCC, it can do so via the Commonwealth Ombudsman. The Commonwealth Ombudsman can investigate complaints about the ACCC's actions to see if they are wrong, unjust, unlawful, discriminatory or unfair. However, the Ombudsman has no determinative powers.

The Parliament also provides some scrutiny over the ACCC's actions. The ACCC's annual report can be referred to a Standing Committee for inquiry, representatives of the ACCC are required to appear various times during the year before the Senate Economics Legislation Committee, and either House of Parliament may request information of the ACCC.

## **2.5 Review and Access to Remedies – Due Process**

In order to promote transparency and accountability for decisions and to provide natural justice, it is considered important that both merits and process review mechanisms exist. Such mechanisms will protect the integrity of the decision-making process. As noted above, it is also imperative that the wider community has confidence in this level of accountability.

In addition, firms should receive effective access to domestic judicial or administrative remedies on a non-discriminatory basis. Consideration should be given to implementing the following types of provisions in a competition regime:

- *The rights of complainants to petition* the competition authority and seek explanations for inaction on matters;
- *The rights of complainants to bring complaints before the competition authority;*
- *The rights of private parties to access the judicial system* to seek remedies for injury suffered by anti-competitive practices;
- *Due process for all parties* in administrative or judicial procedures including protection of confidential information;
- Where the competition authority makes dispositive case decisions, *the publication/explanation of such decisions by the competition authority;* and
- Appropriate access to avenues of appeal on merits and process.

## **2.6 Resources**

It is also essential that the competition regulator be adequately resourced. This includes having a sufficient budget, and reasonable security about future availability of adequate funding.

The competition regulator should also have access to suitably qualified staff - for example, staff with economic or legal skills, and with experience in particular sectors of the economy.

## 2.7 *Current Reviews of Australia's competition regime*

The structure and governance arrangements for the ACCC are under consideration in a number of contexts.

- *Trade Practices Act Review* – As noted above, a review is being carried out into the competition provisions of the Act and their administration by the ACCC (the Dawson review). The Dawson review is scheduled to report to Government by the end of January 2003. The Government will release the report in due course.
- *Energy Market* –The Independent Energy Market Review (the Parer Review) was established to identify strategic issues for Australian energy markets, including regulatory approaches. The review's final report was released on 20 December 2002. The Government is considering its response to the report.
- *Governance of Statutory Authorities* – a broader review of corporate governance arrangements for certain statutory authorities (including the ACCC) and office holders was announced on 14 November 2002 (the Uhrig review). The review is scheduled to report in May 2003.

These reviews are expected to provide further guidance on the appropriate design and administration of Australia's competition regulator.