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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution
from Australia****- Session II -****5 December 2019**

This contribution is submitted by Australia under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: oe.cd/cpta.

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Competition Provisions in Trade Agreements

- Contribution from Australia -

1. Australia's trade agreements

1. The Australian Government defines an FTA as an international treaty between two or more economies that reduces or eliminates certain barriers to trade in goods and services, as well as investment. Australia negotiates FTAs to benefit Australian exporters, importers, producers and investors by reducing and eliminating certain barriers to international trade and investment.¹
2. Australia has 11 FTAs currently in force, both with individual countries and groups of countries. A further four have been concluded but are not yet in force. Several are currently under negotiation.² The table below sets out Australia's FTAs in force, with reference to the classification in Laprévotte et al. (2015).³

¹ Australian Government Department of Foreign Affairs and Trade, Australia - Australia's free trade agreements, <<https://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx>>

² The Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), the Australia-Hong Kong Free Trade Agreement (A-HKFTA) and Peru-Australia Free Trade Agreement are currently going through Australia's domestic ratification processes. Three of the 11 signatories to the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) have ratified (Australia, New Zealand and Samoa); it will enter into force when eight signatories ratify. FTAs currently being negotiated include the Australia-European Union Free Trade Agreement, the Regional Comprehensive Economic Partnership (ASEAN, China, Japan, Korea, India, Australia and New Zealand), and the Pacific Alliance (Mexico, Chile, Peru and Colombia).

³ Laprévotte, F.-C., Frisch, S. and B. Can (2015), "Competition Policy within the Context of Free Trade Agreements", E15 Initiative, <http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevotte-Frisch-Can-FINAL.pdf>.

TA with	Competition Chapter?	Laprévôte et al. 2015 classification provision present?								
		A – Promote competition	B – Adopt or maintain competition laws	C – SOEs, designated monopolies and competitive neutrality	D – Regulate State Aid and subsidies	E – Competition-specific exemptions	F – Abolish trade defences (dumping / subsidies)	G – Enforcement principles (procedural fairness / transparency)	H – Cooperation and coordination	I – Competition related dispute settlement
FTAs in force										
Chile	Yes	✓	✓	✓		✓		✓	✓	✓
China	Only covers competition cooperation	✓							✓	
Comprehensive and Progressive Agreement for Trans-Pacific Partnership	Yes	✓	✓	✓		✓		✓	✓	✓
Japan	Yes	✓	✓	✓		✓		✓	✓	✓
Korea	Yes	✓	✓	✓		✓		✓	✓	✓
Malaysia	Yes	✓	✓	✓		✓		✓	✓	✓
New Zealand ⁶	No	✓					✓ ⁷			
Singapore	Yes	✓	✓	✓		✓		✓	✓	✓
Thailand	Yes	✓	✓			✓		✓	✓	✓
United States	Yes	✓	✓	✓		✓		✓	✓	✓
ASEAN and New Zealand	Yes	✓							✓	✓

2. Objectives of competition chapters in Australian trade agreements

3. Australia views competition chapters as an important standard feature of modern FTAs. Competition policy has a vital role to play in ensuring the potential economic gains

⁴ Australia's FTAs have limited to no commitments on subsidies.

⁵ Australia's FTA practice has been to exclude the Competition Chapter from the dispute settlement provisions in the FTA for any matter arising under the Chapter. A competition-related consultations article has been included to allow issues to be addressed between competition authorities.

⁶ Signed in 1983, The Australia - New Zealand Closer Economic Relations Trade Agreement (known as ANZCERTA) is one of the most comprehensive bilateral free trade agreements in existence. It covers substantially all trans-Tasman trade in goods, including agricultural products, and was the first to include free trade in services. ANZCERTA forms the foundation of a broader economic and trade relationship with New Zealand. It is supplemented by more than 80 government-to-government bilateral treaties, protocols and other arrangements — covering competition law, trade and the movement of people, investment, aviation, business law coordination, mutual recognition of goods and professions, taxation, health care, social security, superannuation portability, food standards and government procurement.

⁷ These were abolished in 1990 as part of a later agreement upon which ANZCERTA forms the foundation. Note that the 'Agreed Minute on Industry Assistance (1988)' and subsequent exchanges

to each country from an FTA are fully realised. Reform of trade policies (which have the potential to be anti-competitive) generally enhance the degree of competition in markets and benefit industries and consumers. Relatedly, access to markets can be compromised if there are no disciplines on the designation of future monopolies and state enterprises, no separation of interests (i.e. a regulator should not also be a commercial operator), and no independent tribunals and processes of natural justice to appeal or review decisions.⁸

4. A primary objective for Australia in including competition chapters in FTAs is to ensure there are agreed minimum standards for the key elements of a modern, functioning competition law system within each parties' jurisdiction. Competition law in Australia means laws relating to cartels and other anti-competitive agreements and arrangements, unilateral conduct or monopolistic practices, and merger control. Typically, FTA chapters will include provisions on the enforcement of competition law, principles of transparency, due process, procedural fairness and non-discrimination. In practice, these are generally outlined at a high-level and the detail of international best practice and policy is captured and developed through forums such as the OECD and International Competition Network.

5. More recently, FTAs typically contain some reference to cooperation. This typically occurs in the form of foreshadowing cooperation and agreements between the FTA parties' competition enforcement agencies.

6. In general, Australia has a consistent approach to the negotiation of competition elements of FTAs. The differences in the level of commitment on competition policy and cooperation in our trade agreements generally reflect the capacity of our negotiating partner to make the same level of commitment to a comprehensive competition framework as Australia at the time of conclusion of negotiations.

7. A number of Australia's existing or prospective trading partners do not have comprehensive competition regimes (although they may have sector specific arrangements with different levels of legal standing). In these cases, we seek a principles based competition chapter that might guide that FTA partner in its future development of a competition regime.⁹ Encouraging the development of competition regimes can also help prevent trade disputes by addressing weak competition laws and / or the possible use of competition law enforcement as quasi-trade protection.¹⁰

8. In addition to specific competition chapters, Australia's approach is to generally seek to include chapters on state-owned enterprises (SOEs) in FTAs. The purpose of these chapters is to ensure that market access outcomes for the export of Australian goods and services are not undermined by anti-competitive activities and that SOEs compete with private enterprises on a level playing field.¹¹

of letters maintains where a member intends to provide a subsidy they will take account of the other member's views before making a final decision.

⁸ Australian Government Department of Foreign Affairs and Trade Review of Bilateral and Regional Trade Agreements Submission to the Australian Productivity Commission April 2010 <pc.gov.au/inquiries/completed/trade-agreements/submissions/sub053.pdf>.

⁹ Ibid.

¹⁰ Productivity Commission, op. cit., 26.

¹¹ Australian Government Department of Foreign Affairs and Trade, Australia - European Union FTA: Summary of negotiating aims and approach

9. Australia is also actively considering the competition implications of digital platforms and supports international discussion of this issue so that FTAs can deal with this issue effectively.

3. Trade agreements and Australia's changing competition framework

10. Australia has a robust and highly-developed competition policy and enforcement approach that has been shaped by established international best practices and policy approaches, including those developed through international organisations such as the OECD and ICN. For Australia, FTAs can improve coordination and cooperation between the parties on competition and competition-related issues.

11. An example of this is Australia's FTA with New Zealand. Signed in 1983, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) required Australia and New Zealand to examine the scope for taking action to harmonise restrictive trade practices policy. This started a process of convergence largely through changes in New Zealand's competition law in order to facilitate the elimination of antidumping on the two countries' bilateral trade flows, which occurred in 1990.

12. At the same time, controls on subsidies that distort trade and competition within the free trade area were established; and soon after domestic competition law prohibitions on the misuse of market power were extended to trans-Tasman markets (referring to the Tasman Sea between the two nations). Measures to coordinate the enforcement of competition law are also now in place between the two countries.

4. Changes to the existing Australian framework following FTAs

13. As noted above, for Australia, the FTAs will rarely result in significant substantive changes to Australia's competition laws, policies and practices as Australia has a functioning, highly-developed competition law system.

14. The only example of reform to competition laws in Australia borne of an FTA relates to the misuse of market power in Trans-Tasman markets.¹²

4.1. Misuse of market power in Trans-Tasman markets

15. Australia and New Zealand agreed that nationals of one state could be made the subject of an enquiry by the competition authorities of the other state and be required to respond to requests for information. Australian (and New Zealand) competition legislation was amended to extend its scope to the behaviour of Australian and/or New Zealand firms with market power on either one of the national markets or the combined Australia/New Zealand market. In addition:

- courts are empowered to sit in the other country;

<<https://dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/summary-of-negotiating-aims-and-approach.aspx>>

¹² Harper Review, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf

- orders may be served in the other country; and
- judgments of courts or authorities of one country are enforceable in the other country.

16. In 1990, section 46A of the *Competition and Consumer Act 2010* (Cth) was enacted (with a reciprocal provision in New Zealand's *Commerce Act*). The object of section 46A was to use competition law as a safeguard against dumping-type conduct (that is, predatory pricing across the Tasman).¹³ The provision was enacted at the same time the countries agreed to abolish anti-dumping and subsidy defences. Section 46A is in substantially the same form as the domestic misuse of market power provision (section 46), save that it prohibits a firm taking advantage of substantial market power in a trans-Tasman market (a market in Australia, New Zealand or both) with the purpose of harming a competitor in an Australian market (other than a market for services, reflecting the dumping origins of the section).

17. Where a corporation takes advantage of market power in an Australian market or a market that spans both Australia and New Zealand, section 46A overlaps with section 46 in the CCA and is redundant. The principal circumstance in which the section may have additional operation is if a firm with substantial market power in a New Zealand market (but not an Australian market) takes advantage of that power to harm a competitor in an Australian market involving the supply of goods.

18. In March 2015, Competition Policy Review Final Report recommended reconsideration of section 46A with both jurisdictions cooperating to determine appropriate simplifications, amendments or removal of the provisions in each jurisdiction.¹⁴ The Review Panel questioned the continued utility of the section as it had only been used once (unsuccessfully). In the Review Panel's view, possessing market power in New Zealand would not be sufficient to successfully engage in predatory conduct in Australia.¹⁵ The Australian Government responded by noting the recommendation and agreed to consult further on options to reform the provision. To date there has been no change to the legislation.

5. Impact of competition provisions

19. FTAs can have significant impact for Australia on issues such as cooperation and capacity building. In addition, as noted in Section 3, they can have a significant impact in supporting our counterparts to develop comprehensive and effective competition regimes.

20. As noted in Section 3, in terms of improving detailed competition policy and practice, international organisations (predominantly the OECD and ICN) have been very influential in harmonising key aspects of competition frameworks. For instance, the OECD Recommendation concerning Effective Action against Hard Core Cartels (which recommended that OECD members have laws that stop and deter hard core cartels) has

¹³ Ray, R (Minister for Defence) 1990, Second reading speech: Trade Practices (Misuse of Trans-Tasman Market Power)

Bill 1990, Canberra, 22 May.

¹⁴ The Australian Government Competition Policy Review Final Report, March 2015 <competitionpolicyreview.gov.au/final-report/>.

¹⁵ *Berlaz Pty Ltd v Fine Leather Care Products Ltd* (1991) ATPR 41-118.

helped lead international changes towards effective sanctions, enforcement procedures and investigative tools. Australia considers these multilateral settings provide the greatest potential to achieve global consistency in competition laws, policies, practices, and guidelines, however, that they are most effective when supported by FTAs that ensure key aspects of an effective competition regime are in place.

5.1. International cooperation

21. International enforcement cooperation between competition agencies can have significant and positive effects on trade and competition. Sound and effective competition law enforcement can ensure that the benefits of trade liberalisation are not undermined by the imposition of barriers to effective trade, such as anti-competitive conduct. In an increasingly interconnected global economy, cooperation between competition agencies across borders is essential to effective enforcement of competition law.

22. Australia supports the inclusion of cooperation clauses in the competition chapters of its FTAs. A recent example of this was Article 16.4 in the Comprehensive and Progressive Trans-Pacific Partnership, which states:

1. The Parties recognise the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area. Accordingly, each Party shall:
 - cooperate in the area of competition policy by exchanging information on the development of competition policy; and
 - cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information.
2. A Party's national competition authorities may consider entering into a cooperation arrangement or agreement with the competition authorities of another Party that sets out mutually agreed terms of cooperation.
3. The Parties agree to cooperate in a manner compatible with their respective laws, regulations and important interests, and within their reasonably available resources.

23. One of the major impediments to effective international enforcement cooperation are limitations on a competition agency's ability to share confidential information. Often this is due to existing laws and procedures, and can also be underpinned by institutional or cultural divergence. Australia considers there would be considerable value if competition chapters in FTAs included commitments for parties to pursue the ability to allow for enhanced information sharing when it was in the mutual interests of both parties to do so, and for other forms of mutual investigative assistance.

24. Trade agreements can also facilitate further cooperation in relation to capacity building programs for developing effective competition regimes, as outlined below.

5.2. Capacity Building

25. Parties to an FTA can also commit to programs of economic cooperation as a means to support effective implementation of the commitments in an FTA while also building cooperation and capacity, including for competition law development and implementation.

26. The ACCC's Competition Law Implementation Program (CLIP) delivers targeted capacity building and technical assistance to Association of South-East Asian Nations (ASEAN) Member States (AMS) to help combat anti-competitive activities in individual markets and the ASEAN region.

27. CLIP is supported by the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) Economic Cooperation Support Program. The AANZFTA Chapter on Competition (Chapter 14) establishes a framework for cooperation in the promotion of competition, economic efficiency, consumer welfare and the curtailment of anti-competitive practices. The Chapter covers the establishment of contact points, exchange of information and experience on the promotion and enforcement of competition law and policy, and exchanges of officials between Parties for training purposes and to participate in advocacy programs. There is also provision for Australia and New Zealand to assist AMS with implementation of the Chapter, subject to appropriate identification of competition policy-related needs and availability of resources. The Chapter is not subject to AANZFTA's dispute settlement provisions.

5.2.1. About the program

28. Under CLIP, AMS receive tailored training, mentoring and other support from the ACCC, the New Zealand Commerce Commission (NZCC) and other international experts to introduce and implement national competition laws to meet commitments under AANZFTA, as well as ASEAN's regional goal of building a globally integrated, highly competitive economic region through effective competition laws, enforcement agencies, and enhanced regional cooperation mechanisms.

29. CLIP's intensive, sustained and strategically programmed activities have played an important role in supporting competition law implementation at both a national and regional level in ASEAN.¹⁶

¹⁶ The AMS are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

Figure 1. Asean Competition Landscape



5.2.2. How CLIP delivers

30. As shown in the below graphic, the maturity of individual competition law regimes varies across AMS. The ACCC and NZCC work with ASEAN competition agencies to deliver CLIP activities that cater to the prevailing needs of AMS, and acknowledge the differences between jurisdictions in their stages of introducing and implementing competition policy and law.

31. Since the program commenced in October 2014, CLIP has supported:

- capacity building workshops, including modules of training and sectoral interface workshops
- heads of competition agency and commissioner engagements
- secondment and study programs for ASEAN officials to Australia and New Zealand
- expert visits and placements of ACCC staff in Cambodia, Lao PDR, Malaysia, Myanmar, the Philippines, Vietnam and Thailand
- the provision of technical and mentoring assistance to ASEAN countries including Cambodia, Lao PDR, Myanmar and the Philippines
- e-learning modules through 'CLIP Academy'
- toolkits, competition primers and other reports.

32. CLIP initiatives provide valuable opportunities for AMS to develop and maintain informal networks essential to the development of meaningful long-term cooperative regional relationships.

33. Australia believes capacity building is a crucial component of future FTAs with jurisdictions whose competition regimes are new or limited, as well as those that currently have no competition framework. When CLIP commenced in 2014, only five of the 10 AMS had national competition laws in place, compared to nine out of 10 today.¹⁷ Over this period, CLIP has worked with each of the 10 AMS to progress efforts to, where relevant, draft, introduce and/or reform the legal and institutional mechanisms necessary for implementation of national competition laws.

34. CLIP has also succeeded in drawing attention to the importance of national, as well as international, regulators coordinating and cooperating to address issues of overlapping jurisdiction to deliver better competition outcomes. Through sectoral interface workshops CLIP has brought together and, in some AMS, made the first introductions between national competition and sector regulators in energy, construction, telecommunications and aviation to explore practical examples and case studies of good (and problematic) regulatory practices.

35. Capacity building programs are also essential for ensuring that any high-level commitments to establish the core elements of a competition regime are effective in practice. We have established that young competition agencies benefit substantially from this type of targeted technical assistance. Following these positive outcomes, the ACCC is currently in the process of seeking additional support to undertake a fourth phase of CLIP capacity building.

5.3. The efficacy of Lapr votte et al. competition provisions in FTAs

36. As outlined above, competition chapters in FTAs can play an important role in ensuring critical procedural elements of competition frameworks are implemented, and enhancing cooperation between competition agencies. Enhanced global enforcement and coordination on competition issues is critical, and FTAs play an important role in facilitating a culture of cooperation.

5.4. Competition chapters and FTA dispute resolution

37. We are not aware of any instances where disputes have arisen in relation to the competition chapter of an FTA to which Australia is a party. Australia's FTA practice has been to exclude the Competition Chapter from the dispute settlement provisions in the FTA for any matter arising under the Chapter. A competition-related consultations article has been included to allow issues to be addressed between competition authorities. Australia's view is that competition enforcement in Australia is generally most effectively pursued through the existing comprehensive domestic enforcement mechanisms than through a dispute under an FTA.

¹⁷ AT THE TIME OF WRITING, CAMBODIA WAS YET TO ENACT ITS COMPETITION LAW.

5.5. Implementation of FTA competition chapters

38. Australia has had a comprehensive competition law since 1974 that has been developed in line with global best practices since that time. Australia's established competition law framework and ability to adhere to the principles in competition chapters has meant few substantive issues regarding implementation of competition chapters in FTAs have arisen.

5.6. Monitoring the effects of FTAs

5.6.1. FTA reviews

39. As part of the ratification process, the Parliamentary Joint Standing Committee on Treaties has been appointed by the Australian Parliament to review and report on all treaty actions proposed by the Government (including FTAs) before any action that binds Australia to the terms of the treaty is taken. The Committee was first established in 1996 as part of a package of reforms to improve the openness and transparency of the treaty making process in Australia. The Committee on Treaties has just completed reviews of the Australia-Hong Kong Free Trade Agreement and the Indonesia-Australia Comprehensive Economic Partnership Agreement.¹⁸

40. DFAT, in collaboration with relevant domestic agencies, works with partner governments on implementation of FTAs. This can involve general discussion on the impact of the FTA and implementation issues during regular Joint Commission and topic-specific committee meetings, discussion of specific issues in mandated reviews or as they arise, or general reviews mandated under the FTA.

5.6.2. Review of the AANZFTA Competition Law Implementation Program (CLIP)

41. The ACCC works with the AANZFTA Competition Committee, ASEAN Secretariat and the AANZFTA Support Unit to ensure that the collection and analysis of results information on activities is effective and timely. The ACCC's CLIP team has a monitoring and evaluation action plan that includes:

- documenting and tracking of program information, results, lessons learned and recording of successful practices for possible future replication, and
- publishing clear and meaningful reporting about results in a timely manner.

42. The CLIP team works to ensure that feedback received from participants in activities, as well as delivery teams, is reviewed and analysed and, where appropriate, used to make meaningful adjustments to future CLIP activities. CLIP places considerable importance on the feedback obtained through participants' evaluation surveys as well as debriefing sessions with delivery teams and host agency partners. This information is collated in Activity Summary Reports, which the CLIP team provides to the AANZFTA Support Unit and to the AANZFTA Competition Committee at least twice a year.

¹⁸ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties

5.7. Additional competition provisions for inclusion in FTAs

43. Australia's current FTA competition chapters are comprehensive and include all but two of the Laprévotte et al. 2015 classification provisions (State aid and subsidies, and abolition of trade defences) in some form. The ACCC believes the competition chapters are fit for the agency's purposes and contribute to a general trend in enhancing competition cooperation with counterparts across the globe.

6. ACCC role in FTA negotiations

6.1. ACCC involvement in the negotiation and implementation of FTAs

44. As Australia's competition enforcement agency, the ACCC generally plays the role of technical advisor to DFAT in the development, negotiation and implementation of FTAs.

45. Prior to most negotiation rounds, the ACCC provides comments on the draft text proposed by each party and on DFAT's brief to their negotiators. Additionally, the ACCC provides responses to ad hoc queries on technical questions.

46. In some instances, the ACCC may lead the negotiations in the competition chapters in close consultation with DFAT and Australian Treasury. The ACCC at times also participates in technical sessions during FTA negotiation rounds. This occurs when the negotiating teams believe that relevant technical experts should play a role in the negotiations, normally in relation to topics that require a greater understanding of each party's domestic laws.

47. As discussed above, with the exception of New Zealand, there have been no changes to domestic competition laws arising out of FTAs to which Australia is a party. In the event changes to Australia's competition policy or legislation were raised in a future FTA negotiation, the ACCC would provide the requisite technical advice on the implications of any such proposal.

48. As the agency with the significant expertise and exposure to the challenges being faced by competition agencies, the ACCC has a role in advising on where FTAs may assist with resolving these issues, such as in relation to cooperation and capacity building. Where the ACCC identifies such an issue, it works with its counterpart agencies (DFAT) to consider how these issues may be advanced. In Australia's view, the best outcomes for competition chapters in FTAs arise when there is effective collaboration and understanding between the trade policy, competition policy, and competition regulatory agency of the government. Accordingly, there needs to be the commitment and necessary resourcing to support these productive relationships, and to ensure the final competition chapters in FTAs utilise this combined expertise.