

# WORLD TRADE ORGANIZATION

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**Working Group on the Interaction  
between Trade and Competition Policy**

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## COMMUNICATION FROM AUSTRALIA

The following communication has been received from the Permanent Mission of Australia with the request that it be circulated to Members.

### The Australian framework for competition policy

Any examination of the principles and objectives of competition policy has to take place to a considerable extent in the context of the national institutions available to promote competition and to enforce competition laws. In the case of Australia, three national agencies are relevant for this.

### The Australian competition agencies

#### *Australian Competition and Consumer Commission (ACCC)*

The ACCC is an independent statutory authority which seeks to improve competition and efficiency in markets, foster adherence to fair trading practices in well-informed markets, promote competitive pricing wherever possible and restrain price rises in markets where competition is less than effective. It administers the *Trade Practices Act 1974*, State and Territory Application Acts and the *Prices Surveillance Act 1983*. Apart from incorporated bodies and Australian Government-owned enterprises, the *Trade Practices Act*, in conjunction with the State and Territories Application Acts, now covers unincorporated businesses and State and Territory Government Business Enterprises (GBEs).

#### *National Competition Council (NCC)*

The NCC is an independent advisory body for all governments (i.e. Federal, State and Territory Governments) involved in implementing the national competition reforms resulting from the 1993 National Competition Policy (Hilmer) Review. Among its tasks are to bring about major change in such areas as the reform of public utility structures, the removal of anti-competitive regulation, the promotion of greater competition through interstate trade and the achievement of competitive neutrality between government and private businesses. The NCC also plays a substantial role in relation to the application of access arrangements to essential facilities.

#### *Australian Competition Tribunal*

This Tribunal deals with applications for review of decisions made by the ACCC on authorizations and notifications (exemptions from the competition provisions of the Act) and decisions by the relevant Ministers concerning access to essential facilities. It may also make declarations relating to offshore mergers and undertake enquiries under the international liner cargo shipping provisions of the *Trade Practices Act* at the request of the relevant Minister.

### Aspects of competition policy relevant to development and economic growth

At the first meeting of the Working Group on Trade and Competition Policy many delegations drew attention to the role competition policy plays in achieving development and economic growth. The analytical evidence would in fact suggest that a well-defined and adequately enforced competition policy is equally beneficial to economies regardless of their stage of development, and that the same basic principles can be applied in all cases. What may differ between economies and their sizes or their developmental stage is the extent to which some aspects of competition policy may have to be refined or adapted in order to deal with the actual conditions in the marketplace.

A particular challenge small or developing economies may face is that of ensuring that firms can grow sufficiently large in the domestic market place to have the muscle and capital reserves to succeed in the international markets. Markets may be fragmented and in this way form an obstacle to the growth of firms. Sometimes governments seek to alter this situation through the promotion of national champions or development of large firms through some form of administrative encouragement.

In some circumstances, targeted rationalization of the number of firms in an industry can make a useful contribution towards the removal of loss-making capacity. It does not, however, automatically lead to firms able to withstand market forces. Ultimately, only the rigours of the market itself can achieve that. In other words, competition is the crucial factor.

A national competition policy therefore has to be able to accommodate the growth of firms, regardless of whether this occurs through organic growth or through mergers and acquisitions. However, it has to be able also to deal with anti-competitive mergers and acquisitions as well as abuses of market power by individual firms without limiting the ambit of competition policy itself.

The following paragraphs briefly describe Australia's approach to mergers and acquisitions and the misuse of market power.

### Merger policy

Section 50 of the *Trade Practices Act* prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services. Section 50A prohibits acquisitions outside Australia of controlling interests in corporations where these would have the effect or likely effect of substantially lessening competition in an Australian market.

The potential benefits of mergers are well understood. They can promote economies of scale and asset rationalization, produce savings in previously duplicated output, and they can generate reductions in transaction costs associated with financial operations. They also have the potential to lead to superior management techniques, risk reduction through diversification of operations and improved capital formation.

Two important principles underlying Australian merger policy are (a) no participant in the market should be able to engage in anti-competitive conduct that does not result in outweighing public benefits, and (b) conduct with anti-competitive potential said to have outweighing public benefits should be assessed by an appropriate transparent assessment process, with provision for review to demonstrate the nature and evidence of the public costs and benefits claimed. This process is also known as authorization.

In a discussion of trade and competition policy, national approaches to consider the actual or potential level of import competition in the market can be assumed to be of special interest.

The *Merger Guidelines* revised by the ACCC in July 1996 recognize the increased exposure of Australian business to global markets. The ACCC now is unlikely to oppose any merger where a sustained and competitive level of imports exceeds 10% of the market. The ACCC instead focuses on mergers in highly concentrated markets not subject to substantial import competition.

The assessment of actual and potential import competition, however, needs to be undertaken with care. In some markets, market shares may understate the competitive constraint provided by imports because of the potential to expand the supply of imports rapidly in response to higher prices. This can often be true of commodities. In other cases, market shares will overstate the likely role of imports in constraining the conduct of the merged firm. The fact that imports have established a small market share does not necessarily imply that they could expand in response to the exercise of market power by the merged firm.

#### Misuse of market power

In Australia, misuse of market power is dealt with by Sections 46 and 46A of the Trade Practices Act. Section 46 states that a business that has a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market.

Section 46 is not aimed at stopping competitive conduct by powerful corporations. It states that a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

- (a) eliminating or substantially damaging a competitor or of a body corporate that is related to the corporation in that or any other market;
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46A is concerned with misuse of market power in trans-Tasman markets. Under legislation passed in both Australia and New Zealand, provisions against misuse of power extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand and irrespective of where the conduct takes place. The Federal Court of Australia may sit in New Zealand, and the equivalent New Zealand Court may sit in Australia to deal with any action under these provisions.

In the view of the Australian Competition and Consumer Commission, in many instances where smaller businesses are damaged by larger corporations with whom they deal (e.g. in disputes between commercial lessors and tenants, or between suppliers and dealers), the conduct will not be caught by Section 46 because none of the anti-competitive purposes exist.

Final comments

The mandate for this Working Group agreed at the Singapore Ministerial Conference requires it to take the development dimension fully into account. Our view is that an appropriate and transparent mergers and acquisitions policy can make a major contribution to the domestic development of an economy and in this way to strengthen its ability to compete internationally.