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Competition Enforcement and Regulatory Alternatives – Note by Australia

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm

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Australia

1. Overview

1. The Australian Competition and Consumer Commission (**ACCC**) is Australia's national consumer protection and competition regulator. Most of the ACCC's work is conducted under the provisions of the *Competition and Consumer Act 2010* (**CCA**). The purpose of the CCA is to enhance the welfare of Australians by:

- promoting competition among business
- promoting fair trading by business, and
- protecting consumers in their dealings with business.

2. In addition to enforcing Australia's competition laws, the ACCC has responsibility for the economic regulation of national infrastructure. The ACCC regulates price or access in several sectors including:

- Communications
- Airports and aviation
- Container stevedoring
- Wheat export ports
- Rail
- Water
- Postal services

3. The ACCC's role in sector regulation, and its relationship with other regulators is explained in greater detail in Australia's submission to a previous OECD competition roundtable on independent sector regulators[1]. This submission also highlighted the National Competition Policy (NCP) and related reforms in 1995 that were established to facilitate competition across the economy. This included structural and legislative reforms to promote competition in markets where it was limited, such as access regulation when in markets where competition was not feasible or desirable. The NCP has shaped Australia's approach to economic regulation over the last 25 years.

4. Australia has regulators for specific sectors or areas of law, for example, regulators for the energy, communications, and banking sectors, as well as regulator for privacy law. The roles and responsibilities of these regulators vary, but often incorporate elements of economic regulation[2].

5. It is generally the responsibility of the portfolio departments of the Australian government to design, implement, and remove regulation in line with the direction of the

[1] OECD Competition Committee Working Party No. 2 on Competition and Regulation, *Independent Sector Regulators – Note by Australia* (2019). Available at: https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)26/en/pdf

[2] For example, the Australian Communications and Media Authority, which has various regulatory responsibilities ranging from spectrum allocation to administering Australia's Do Not Call register that prevents unwanted calls from telemarketers

legislative and executive branches of government as appropriate[3]. Regulatory powers are conferred on independent statutory authorities at a national level by the Australian Parliament, and in some cases by the relevant government minister in charge of that portfolio.

6. Regulators give expert advice to the government and advocate both publicly and privately on matters relating to their regulatory responsibility. This could include advocating for changes to regulatory regimes, such as a making a submission to a government initiated inquiry relevant to their area of responsibility[4].

7. Economic regulation carried out by other agencies sometimes intersects with areas of competition policy. That is, regulatory regimes may have components that are designed to promote competition and ensure competitive outcomes in markets. However, there is no conflict between competition law and economic regulatory measures insofar as breaches of regulations generally do not lead to ipso-facto competition law breaches. Australia has a prosecutorial competition law model which requires a court to find on the balance of probabilities (civil) or beyond a reasonable doubt (criminal) that a corporation or person contravened one of Australia's competition laws[5]. There is no mechanism to directly rely upon findings made in other regulatory regimes in competition law enforcement in Australian courts.

8. The CCA provides for a number of exceptions to the application of competition law, including for anything specified in, and specifically authorised by another Act of Parliament, including any regulations under such an Act[6]. This means that if a firm is required to act in a certain way under a separate federal regulatory regime, the ACCC cannot take action against that firm for breaching competition laws, provided the conduct meets the exception criteria outlined in the CCA.

2. Targeted regulatory interventions

9. The ACCC considers that free and robust competition underpinned by well-designed competition laws is the best mechanism for maximising consumer welfare and ensuring economic prosperity. Competitive markets lead to lower prices, increased and differentiated service offerings, improved quality, and greater innovation by market participants.

10. Where there are market failures that limit the level of competition in a market, appropriate economic regulation can be effective in offsetting the negative impacts, and

[3] For instance, the Department of the Treasury has policy responsibility for the financial sector, and advises the government on the provision of regulation in financial services

[4] Occasionally the Australian Government will initiate public inquiries (either independent or government led) into specific issues or sectors, and regulators with responsibility in these sectors will typically make submissions on the issues, findings, and recommendations that arise in the inquiry. For example, the Australian Securities and Investments Commission made submissions to the independent 2014 Financial System Inquiry chaired by David Murray AO, providing views on potential regulatory reform options for the financial sector. See https://treasury.gov.au/review/financial-system-inquiry-murray.

[5] Contained in Part IV of the *Competition and Consumer Act 2010* (Cth), https://www.legislation.gov.au/Details/C2021C00151

[6] See *Competition and Consumer Act 2010* (Cth). S 51

ultimately deliver better public outcomes than would be possible in the absence of that regulation.

11. Natural monopoly infrastructure is an area where economic regulation in the form of price and access controls can lead to better functioning markets. In the absence of regulation, infrastructure service providers can leverage their market power to increase prices or deny access to services, leading to inefficiencies and accordingly additional costs the public.

2.1. Industry codes of conduct

12. Australia's competition and consumer law framework allows the government to develop mandatory industry codes of conduct administered by the ACCC. Industry codes of conduct set out minimum obligations and standards of commercial conduct for industry participants. Mandatory industry codes can address industry-specific market failures that have not otherwise been addressed by industry participants or by other regulation but that nonetheless undermine the competitive process, leading to inefficient market outcomes and a loss of welfare for the public.

13. There are several mandatory codes of conduct under the CCA that have measures aimed at promoting competition, or addressing adverse outcomes stemming from a lack of competition.

2.2. Case study: News Media Bargaining Code (NMBC)[7]

14. In December 2017, the then Australian Treasurer directed the ACCC to look at the impact of digital search engines, social media platforms and digital content aggregators on the state of competition in media and advertising markets, and the issues that have arisen due to their growth. The ACCC provided the final report of the so-called Digital Platforms Inquiry (DPI) to the Treasurer in June 2019, and it was released to the public shortly thereafter.

15. In the DPI final report, the ACCC outlined its findings that the value of digital platforms to users and the lack of close alternatives has afforded both Google and Facebook substantial market power in a number of digital markets. In addition, the ACCC found that both companies had substantial bargaining power in their dealings with individual Australian news media businesses. Both of Google and Facebook are important channels through which consumers access news and are seen by many news media businesses as key sources of referral traffic, and important avenues for news media businesses to reach their audience and to monetise their content. Consequently, a significant number of Australian news businesses consider Google and Facebook to be unavoidable trading partners.

16. However, while Google and Facebook derived a benefit from the presence of Australian news on their services, no individual news business was as important to these platforms as these platforms are to individual news businesses.

17. Therefore, the ACCC found that there was a fundamental bargaining power imbalance between news media businesses and Google and Facebook that resulted in media businesses accepting less favourable commercial terms than they otherwise might accept. This affected their ability to monetise their news content and ultimately, to fund original journalism.

[7] ACCC, *News Media Bargaining Code*, https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code

18. While bargaining power imbalances do exist in many other sectors, the ACCC considered that regulatory intervention was appropriate because failure to address the particular bargaining power imbalance threatens the sustainability of strong, independent and diverse news media landscape, which is essential to a well-functioning democracy.

19. To address the bargaining power imbalance, the ACCC recommended the Australian government consider developing a code or codes of conduct to govern relationships between digital platforms and news businesses, including minimum commitments around data sharing, notification of changes to ranking and display of news content and fair negotiation of revenue sharing arrangements.

20. The Australian Government accepted the findings, and in December 2019 asked the ACCC to work with Google, Facebook, and Australian news businesses to develop and implement a voluntary code, or voluntary codes, of conduct before considering the development of a mandatory code if no satisfactory agreement was reached between the platforms and news businesses. In April 2020, the government asked the ACCC to accelerate the development of a mandatory code after it appeared that there would not be agreement to a voluntary code with satisfactory terms.

21. The ACCC worked with colleagues from the Treasury, the Department of Infrastructure, Transport, Regional Development and Communications and the Australian Communications and Media Authority to consult closely with affected stakeholders, and to make recommendations to government on the code over the course of 2020. The government considered those recommendations and following further amendments, the final legislation passed both houses of Australian Parliament on 25 February 2021. The code received royal assent on 2 March 2021 and is now law.

22. The NMBC was considered necessary because of the fundamental bargaining power imbalance between the leading digital platforms – Facebook and Google – and individual Australian news businesses; and because failure to address this bargaining power imbalance may risk threatening the continued provision of public interest journalism. This was unlikely to change in any meaningful way in the short to medium term. Therefore, the issue was best addressed through the introduction of an industry-specific code.

2.3. Case Study: Dairy Code[8]

23. In October 2016 the Australian government directed the ACCC to hold an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry (Dairy Inquiry). The Dairy Inquiry followed late-season retrospective changes to the farmgate prices paid by Australia's two largest dairy processors in April 2016 which caused substantial detriment to dairy farm businesses in the southern regions of the Australian dairy industry. These 'step-downs' caused severe and unforeseen reductions in the incomes of more than 2,000 dairy farmers and significantly impacted

24. One of the issues the ACCC was asked to examine was the nature of the commercial relationships between dairy producers and acquirers of raw milk products. In the Dairy Inquiry final report, the ACCC found that dairy farmers typically have very limited bargaining power when negotiating with processors, and limited scope to reposition their businesses or switch to a different farm enterprise. Processors also have access to better information about prices and general market conditions than farmers. Imbalances in bargaining power, information asymmetries and the historical use of cooperative

[8] ACCC, *Dairy Code of Conduct*, https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct/dairy-code

contracting models in the industry have resulted in contracts and practices that favour processors and/or reduce farmers' ability to switch, such as:

- processors' ability to vary farmgate milk prices throughout a season or within a contract period
- processors' ability to unilaterally vary terms in contracts, including indirectly by changing requirements detailed in ancillary contract documents
- farmers having limited time and information with which to make critical decisions about which processor to supply
- farmers being subject to unnecessary switching barriers in contracts, such as conditional loyalty bonuses and extended notice periods, and
- the absence of effective dispute resolution processes.

25. The ACCC found that these practices lead to inappropriate risk allocation between producers and processors, a weakening of competition between processors for raw milk supply, and potentially inefficient investment decisions by farmers.

26. The ACCC determined that Australia's competition and consumer laws are able to retrospectively address isolated instances of behaviour and conduct which harm competition and efficiency in the industry. These laws include the unfair contract terms laws and prohibitions on misleading and deceptive, and unconscionable, conduct. However, the problems identified in the dairy industry emanate from the broader and inherent bargaining power imbalance across the industry, particularly between processors and farmers. The resulting effects and risks to the industry are widespread, and cannot be effectively addressed through Australia's competition laws.

27. In its final report, the ACCC recommended that a mandatory code of conduct should be developed to address these systemic issues over the long term. The Australian Government accepted this recommendation, and developed a mandatory code in consultation with stakeholders that came into effect on 1 January 2020[9]. The Code imposes several obligations that improve the clarity and transparency of trading arrangements between dairy farmers and those buying their milk, helping to address the bargaining power imbalances identified during the Dairy inquiry.

28. The ACCC is responsible for enforcing the Dairy Code. The Code contains penalty provisions that the ACCC can enforce by taking court action seeking a financial penalty for the breach, or issuing an infringement notice.

29. Both the Dairy Code and NMBC arose following Government direction to the ACCC to undertake inquiries. In both cases, the ACCC identified that a bargaining power imbalance was causing adverse market outcomes. While bargaining power discrepancies can indicate a lack of competition in the market, this is not inherently at odds with Australia's competition law. Businesses with a substantial degree of power in a market are not prevented from utilising that power. Instead, they are constrained from misusing their power in a way that has the purpose, effect or likely effect of substantially lessening of competition in a market.

[9] Competition and Consumer (Industry Codes—Dairy) Regulations 2019, https://www.legislation.gov.au/Details/F2019L01610

3. Recognising competition in regulatory regimes

30. Recognising the important role competition has to play in maximising welfare for Australians, there are several examples of Australian regulators incorporating competition principles and considerations into their regimes.

31. One example of this is in the financial sector. The Australian Securities and Investments Commission, Australia's integrated corporate, financial services and consumer credit regulator has legislated objectives that require it to consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system[10].

32. The Australian Prudential Regulation Authority, responsible for maintaining the safety and soundness of financial institutions, is required to balance its responsibility to maintain financial sector stability with other considerations including competition and efficiency[11].

33. Similarly, the Reserve Bank of Australia (**RBA**) has policy and regulatory responsibility for payments systems in the Australian financial sector. This responsibility extends to promoting competition in the payment services market consistent with the overall stability of the financial system[12].

34. Where there is crossover between regulatory responsibility and competition, a close relationship between the competition agency and the relevant sector regulator can be beneficial in addressing issues that impact competition in the sector. This could involve the development of mechanisms for cooperation between regulators where appropriate, such as in the area of payment systems regulation in Australia.

3.1. Case study: Visa payments system undertaking[13]

35. In March 2021, the ACCC accepted a court-enforceable undertaking from payment card provider Visa in relation to concerns that Visa may have limited competition in relation to debit card acceptance through its dealings with large merchants.

36. The ACCC investigated allegations that Visa may have engaged in anti-competitive conduct, by offering certain large merchants cheaper interchange rates (known as 'strategic merchant rates') for processing credit card payments if they agreed to process Visa branded dual-network debit card payments through the Visa network.

37. Visa debit cards and credit cards are accepted by a significant proportion of merchants across Australia. Almost all Visa debit cards are dual-network debit cards that can be processed using either the Visa or eftpos debit card network, Australia's domestic debit card network.

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[10] *Australian Securities and Investments Commission Act 2001*. S 1(2A), https://www.legislation.gov.au/Details/C2021C00205

[11] Australian Prudential Regulatory Authority, *APRA's objectives,* https://www.apra.gov.au/apras-objectives.

[12] *Reserve Bank Act 1959.* S 10B(3).

[13] ACCC, *Visa undertakes to address competition concerns over debit card payments*, https://www.accc.gov.au/media-release/visa-undertakes-to-address-competition-concerns-over-debit-card-payments

38. When a consumer uses a debit or credit card to pay for goods or services, the merchant incurs fees as a result of accepting the payment. This fee will depend on what is called the 'interchange rate' that is set by a card scheme. For dual-network debit card payments, the fees paid by a merchant can vary depending on the debit card network used for processing the transaction.

39. In its undertaking, Visa acknowledged the ACCC's competition concerns but made no admissions of any breach of the competition laws. Visa offered the undertaking to address the ACCC's competition concerns.

40. The undertaking prevents Visa from offering strategic merchant rates for credit card payments to merchants on condition that the merchant processes debit card payments through the Visa network. The undertaking also ensures that merchants can make decisions about which debit card network processes Visa branded dual-network debit card payments without Visa increasing the cost of processing their Visa credit cards payments as a consequence.

41. The payments sector is regulated by the RBA. Since 2017, the RBA has supported merchants having the ability to choose which debit card network processes their contactless (i.e. 'tap and go') dual network debit card payments. This initiative promoted by the RBA is referred to as 'merchant choice routing' or 'least-cost routing' and is intended to improve competition in the debit card market and reduce the costs associated with processing debit card payments.

42. At the time the undertaking was accepted, the RBA was conducting a Review of Retail Payments Regulation, which among other issues is considering competition and efficiency in the debit card market and potential regulation relating to the processing of dual-network debit card payments and least cost routing.

43. In the Visa example, the ACCC was concerned that Visa's conduct was in violation of competition laws. However the relevant payment markets were also subject to regulation by the RBA.

44. The scope of the alleged conduct intersects with the role of the RBA, which through its Payments Systems Board has regulatory powers to designate payment systems as being subject to regulation, impose an access regime to establish rules of participation in a payment system, and give direction to, gather information from, and arbitrate between, payment system participants.

45. The ACCC and RBA have a longstanding memorandum of understanding (MOU) that was last updated in 2018[14]. The MOU defines the roles of both the ACCC and RBA with respect to the payments system industry. In particular, the ACCC has general responsibility for competition and access in the industry through administration of the CCA. Whereas the RBA has specific responsibilities under the Payment Systems (Regulation) Act 1998. The MOU also establishes cooperation between the agencies on competition and access in the payments system.

46. This dissection of responsibility ensures there is no regulatory overlap, as the RBA's intervention involves designation of a payments system, followed by imposing an access regime or determining standards for the payment system if appropriate. Where the RBA takes this action, members of that system will not be at risk of enforcement under

[14] Memorandum of Understanding, the Australian Competition and Consumer Commission (ACCC) and the Reserve Bank of Australia (RBA), signed 11 December 2018, https://www.rba.gov.au/payments-and-infrastructure/payments-system-regulation/mou/accc-and-the-rba/

Australia's competition laws by complying with the RBA's access regime or by complying with aspects of particular standards[15].

47. In the Visa case study example, if the ACCC did not reach the enforceable undertaking outcome, the RBA could have potentially utilised its regulatory powers to address the issues that emerged if it deemed the conduct at odds with its regulatory responsibilities in the sector, which includes promoting competition in the market for payment services. It is open to the RBA to use its regulatory powers to address competition issues in payment systems.

48. Wherever there is crossover in regulatory responsibilities, there is a natural potential for conflict arising from differences in objectives and priorities between regulators. The MOU between the RBA and ACCC recognises this potential, and to promote consistency in payments system regulatory policy, it establishes a mechanism for notifications and consultation on new regulatory measures that relate to competition in the payments system.

4. Conclusion

49. Since 1995, Australia has had a national approach to competition policy characterised by the wide application of competition law across the economy. This coordinated approach agreed to by the federal and state governments recognises the role economic regulation has to play in limiting consumer harms from markets where there is limited competition[16].

50. This national competition policy framework has established a strong foundation for economic regulators to incorporate the principles of competition into their activities. This in turn has supported the national competition agency's mission of maintaining and promoting competition in the Australian economy to the benefit of Australians.

[15] The exemption from enforcement under competition law referred to in this paragraph is derived from s 51(1)(a) of the CCA, which when considering whether a person has contravened competition law, disregards anything specified in, and specifically authorised by an Act of parliament, or regulations made under such an Act.

[16] Parliament of Australia, *Australia's National Competition Policy, 3 June* 2003, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief