

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Methodologies for Conducting Market Studies – Note from Australia

20 June 2017

This document reproduces a written contribution from Australia submitted for Item 2 of the 125th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 20 June 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03415522

Australia

1. Key issues

1. Market studies are an important complement to the Australian Competition and Consumer Commission's (ACCC) traditional tools in its enforcement, compliance and regulatory functions, and in its competition advocacy work.
2. Market studies can be seen as a key component of the ACCC's competition advocacy role, which involves the promotion of a competitive environment by examining markets, seeking to understand barriers to competition and then proposing ways to remove those barriers. In this regard, market studies can assist the ACCC in identifying market problems and possible solutions, including appropriate enforcement action—or, conversely, can confirm that a market is functioning well and requires no intervention.
3. The Australian Government has recently confirmed the importance of market studies to the ACCC in informing its broader enforcement and regulatory work. Market studies will continue to have a meaningful impact for Australian consumers and markets across a diverse range of industries and market sectors.
4. The ACCC's experience demonstrates that there are a range of benefits to undertaking market studies, using both its formal powers after direction from the relevant Minister, or self-initiated reviews of specific sectors.

2. Market studies and the ACCC

2.1. Market studies – an important advocacy tool

5. Australia is a federation whereby powers are divided between a central government, referred to in this submission as the Australian Government, and individual states and territories. The Australian Government oversees matters that affect the whole country as defined in the Australian Constitution.
6. The ACCC is Australia's independent competition regulator and is responsible for enforcing the Australian competition laws, set out in the Competition and Consumer Act 2010 (CCA), and a range of other legislation, promoting competition, fair trading, and product safety. The ACCC also regulates some national infrastructure services, such as communications, energy and bulk water, and monitors other markets where there is limited competition.
7. Market studies are an important limb of the ACCC's advocacy work. In order to promote competition and protect, strengthen and supplement the way competition works in Australian markets and industries, the ACCC uses market studies to develop an in-depth understanding of why particular markets may not be working for consumers.
8. The ACCC's advocacy work forms part of a suite of tools available to the ACCC in promoting compliance with the law and a competitive economy. In carrying out its advocacy work, the ACCC engages with a range of stakeholders including Members of Parliament, government agencies, members of the public, representative bodies and the media.

9. Market studies, and their meaningful impact on Australian consumers and markets, are a strategic priority for the ACCC and form part of the ACCC's performance indicators in its 2016-2017 Corporate Plan.¹ Further, the ACCC's Compliance and Enforcement Policy emphasises the need for the ACCC to analyse selected industry or market sectors to improve its understanding of industry practices and dynamics.²

10. The ACCC's current ability to conduct market studies was examined as part of the 2015 Australian Competition Policy Review. The Australian Government's response to the Competition Policy Review confirmed that the ACCC currently has scope to conduct market studies, including pursuant to Ministerial direction under Part VIIA of the CCA. The Australian Government agreed that the ACCC should continue to have this role, highlighting the importance of this function in informing the ACCC's broader enforcement and regulatory work.³

11. One illustration of how market studies can inform the ACCC's broader enforcement functions is the ACCC's study into the competitiveness of retail prices for groceries. Following concerns expressed by the ACCC in its market study, supermarket operators entered into enforceable undertakings with the ACCC to phase out restrictive provisions in their leases with shopping centres. These undertakings are an example of positive changes which can flow from a market study process to enhance the competitiveness of a market, without the need for enforcement action.

2.2. Self-initiated market studies

12. The ACCC can initiate and undertake in-depth reviews of a market, sector or industry as part of its role in promoting effective competition in markets. Through such studies, the ACCC can assess whether market characteristics are conducive to competition and benefiting consumers, or whether market imperfections require intervention by the ACCC or others. These reviews also assist the ACCC to identify competitive practices within an industry and to encourage these more broadly.

13. The ACCC can self-initiate market studies with the approval of the Minister, pursuant to Part VIIA of the CCA, in which case it can draw upon the price inquiry powers in the CCA, including requiring information and or documents. In addition, section 28 of the CCA confers upon the ACCC functions in relation to dissemination of information, law reform and research, pursuant to which the ACCC can undertake self-initiated market studies (without price inquiry powers).

14. Self-initiated market studies are selected based on a range of factors having particular regard to the ACCC's strategic priorities and its Compliance and Enforcement Policy. An illustration of this link is found in the ACCC's current new car retailing market study, which was announced in June 2016 following the identification earlier that year of consumer issues in this sector as a priority area for the ACCC.⁴

¹ The ACCC and AER Corporate Plan 2016-2017 is available at <https://www.accc.gov.au/system/files/ACCC%20and%20AER%20Corporate%20Plan%202016-17.PDF>

² The ACCC's Compliance and Enforcement Policy is available at <https://www.accc.gov.au/publications/compliance-and-enforcement-policy>.

³ Australian Government Response to the Competition Policy Review, 24 November 2015, 35.

⁴ See ACCC Chairman Rod Sims' announcement of the ACCC's 2016 compliance and enforcement priorities: <https://www.accc.gov.au/speech/accc-compliance-and-enforcement-priorities-for-2016>

Case study: Market study into the new car retailing industry

The ACCC is currently undertaking a market study into the new car retailing industry in Australia, focusing on competition and consumer issues that may be present in the industry. The market study will be informed by a range of enforcement, education and research projects focussing on the sector.

The ACCC and state and territory based regulators of the Australian Consumer Law continue to receive a high volume of complaints from consumers about defects with vehicles, covering a broad spectrum of manufacturers. These complaints reveal that many consumers are having difficulty enforcing their consumer guarantee rights, which are in addition to the warranties provided by manufacturers.

Following the ACCC's Fiat Chrysler Australia (Jeep) investigation into consumer guarantee complaints concerning vehicle faults and Chrysler's handling of those complaints, the ACCC is considering concerns about compliance with the consumer guarantee provisions in the motor vehicle industry more generally, and is looking at complaints and practices of specific brands.

The market study is also reviewing industry practices in the sector to assist in identifying risks to consumers and the competitive process.

The ACCC has released an issues paper and a draft report of its findings will be released in mid-2017.

15. By initiating market studies based on its strategic priorities, the ACCC seeks to ensure that the outcomes achieved by these studies can positively leverage off, or contribute to, outcomes achieved by way of the ACCC's other tools, such as enforcement action.

2.3. Market studies that the ACCC is directed, or required, to undertake

16. Under Part VIIA of the CCA, the ACCC can also conduct formal price inquiries and monitoring of prices, costs and profits in particular industries, upon direction from the relevant Minister.

17. The ACCC is regularly directed to perform such inquiries pursuant to Part VIIA. The East Coast Gas Inquiry and regional petrol market studies (see case studies below in section 3) are prominent recent examples.

18. Other areas of the ACCC also rely on directions under Part VIIA for regular industry monitoring purposes, including price monitoring of airports and stevedoring.

19. An inquiry pursuant to Part VIIA allows the ACCC to compel the provision of information or documents to inform its price inquiries, monitoring or notifications, and conduct an inquiry which has additional information gathering powers allowing, for example, public hearings to be conducted.

20. Market studies could also potentially be performed pursuant to a Ministerial direction under section 29(1) of the CCA.⁵⁵

21. The ACCC also has a range of sector-specific market study functions. For example, the ACCC is required:

- Under an order from the Australian Senate (the upper house of the Australian Parliament), to provide an annual report on competition and consumer issues within the private health insurance industry.
- Under Part XIB of the CCA, to report annually to the responsible Minister on competitive safeguards within the telecommunications industry.
- Under the Water Act 2007, to report on particular issues relating to the Murray-Darling Basin.

3. Importance of market studies in promoting competition and consumer welfare

22. The primary benefit of market studies is enabling the ACCC to strengthen its understanding of particular industries or markets. Gaining a better understanding of an industry or market allows the ACCC to: identify concerns among stakeholders about the competitiveness of the market; test the extent to which these concerns relate to anti-competitive conduct or systemic market failures; and develop a targeted response where appropriate.

23. The ACCC's use of market studies provides a number of benefits to governments, businesses and consumers. Market studies can assist in the identification of market problems and possible solutions—or, conversely, can confirm that a market is functioning well.

24. Developing an in-depth understanding of why particular markets—as distinct from individual firms—are not functioning well, facilitates a holistic assessment of issues impacting particular industries or markets, from both a competition and consumer perspective. It can also provide an opportunity to measure the effectiveness of work previously undertaken by the ACCC in the industry or market, and to determine whether a further regulatory or policy response is necessary.

25. Market studies may also provide an opportunity to provide guidance to businesses or consumers through information campaigns; and to establish partnerships with industry bodies or other government regulators to advance competition and consumer issues.

26. In some cases, the in-depth knowledge obtained through a market study may identify anti-competitive behaviour, which may lead to the identification of matters for further investigation or enforcement action. The enforceable undertakings entered into by supermarket operators, outlined in section 2, is a prominent example of this.

3.1. Market studies and greater market transparency

27. There are also notable benefits stemming from the transparency of the market study process. The transparency of market studies' outcomes helps to inform consumers, encourage debate, inform the ACCC's advocacy work and bring about necessary changes

⁵⁵ However, this provision expressly excludes directions that relate to restrictive trade practices provisions (Part IV of the CCA), the access provisions (Part IIIA of the CCA), authorisations or notifications (Part VII of the CCA) or the telecommunications provisions (Parts XIB and XIC of the CCA).

to promote the competitiveness of an industry or market. More broadly, market studies benefit market economies because an educated and informed market can lead to better decisions by government, businesses and consumers.

28. The below case study with regards the Australian city of Darwin petrol market study illustrates the potential flow-on benefits of increased transparency in markets. Over recent years the ACCC has conducted a series of regional petrol studies to examine the price drivers of petrol in regional markets, following concerns about petrol prices in some regions within Australia. These market studies provided an opportunity to identify markets in which there was a lack of vigorous and effective retail price competition and to suggest ways to increase transparency and promote competition.

29. The ACCC noted that the occurrence of these market studies can in itself, without subsequent enforcement action, lead to changes in the dynamics of some markets.

Case study: Regional Petrol market study—Darwin

December 2014 the Minister for Small Business directed the ACCC to monitor the prices, costs and profits of unleaded petroleum products in Australia for a period of three years. The monitoring arrangements included the preparation of separate market studies into the petrol markets in four Australian regional centres—Darwin, Launceston, Cairns and Armidale. These market studies aimed to explain why petrol prices are higher in certain regional locations, and where profit is being made in the petrol supply chain.

The petrol market in Darwin (which is the capital of the Northern Territory, a federal Australian territory) was the first regional location examined. This followed a Northern Territory Fuel Summit in October 2014, organised by the Northern Territory Government, to explore why fuel prices in that part of Australia were persistently high.

A key finding during the market study into the Darwin petrol market, released in November 2015, was that, since the Northern Territory Fuel Summit, and the March 2015 announcement of the ACCC's market study into the Darwin petrol market, retail pricing behaviour in Darwin changed. Monthly average petrol prices in Darwin in June 2015 were 134.9 cents per litre (cpl), which was 5.7 cpl lower than in Australia's five largest cities. This was the first time in approximately 15 years that monthly average Darwin prices were lower than those other cities.

This study showed the benefits of market studies and transparency. Although pricing to achieve very high margins is not against the law, it can be helpful in some circumstances for the ACCC to highlight where competition is inadequate. This is especially so where significant public concerns have been expressed about the prices consumers are paying for petrol.

30. While matters of law reform in Australia are for government to determine, some market studies which the ACCC is directed to undertake do require the ACCC to report any recommendations that it considers desirable with respect to law reform. In this way, market studies may provide an avenue through which the ACCC can recommend law reform, where it considers this is necessary.

31. Similarly with market studies initiated by the ACCC, these may also give rise to opportunities to recommend appropriate reforms. A self-initiated market study can activate momentum for change within an industry where it uncovers issues of widespread

concern, and may provide a mechanism for the ACCC to recommend reforms to address those issues.

Case study: Market study into the cattle and beef industry in Australia

In 2016-17 the ACCC conducted a market study of the Australian cattle and beef sector. This market study was self-initiated by the ACCC and was undertaken in order to enhance the ACCC's understanding of the competitiveness of this particular agricultural supply chain. The agricultural sector is an area of current strategic priority for the ACCC.

In recent years, participants in the cattle and beef industry have expressed a number of concerns about anti-competitive conduct and market structures. While the ACCC prior consideration of these concerns—via specific enforcement matters and merger reviews—did not reveal evidence which demonstrated likely breaches of the CCA, the continued concerns of stakeholders warranted examination of the industry more broadly. The use of an ACCC initiated market study allowed the ACCC the flexibility to do this.

The cattle and beef market study examined competition, transparency and efficiency in cattle and beef supply chains. The study involved consultations with all parts of the supply chain, and analysis of available market information and industry data. It found that changes are needed to improve transparency and competitiveness in Australia's cattle and beef markets.

The final report highlighted shortcomings in price reporting, a lack of trust in the carcass grading system, and concerns about anti-competitive conduct affecting competition in cattle and beef sales. It made 15 recommendations, which the ACCC believes will improve transparency, competition and efficiency in the industry.

The ACCC continues to closely monitor the progress of the industry in implementing these recommendations, and we understand that some progress, particularly on greater transparency of pricing, has already been made.

32. Many of the benefits described above arise from both market studies initiated by the ACCC, as well as those which the ACCC is directed to undertake under Part VIIA of the CCA. There are, however, some unique benefits to having access to the formal information gathering powers under Part VIIA, as highlighted in the following case study.

Case study: East Coast Gas Inquiry

On 13 April 2015 the Australian Government directed the ACCC to conduct a public inquiry into the competitiveness of wholesale gas prices in Eastern and Southern Australia. The inquiry was a formal price inquiry held under Part VIIA of the CCA pursuant to Ministerial direction. The ACCC concluded the inquiry in April 2016.

The inquiry arose in part out of growing concern about the price impact of the unprecedented level of investment in the development of liquefied natural gas (LNG) facilities in Queensland, which significantly altered the supply and demand dynamics in the domestic gas industry in Eastern Australia. A number of government inquiries and reports had previously considered the impacts of these LNG facilities on the domestic gas market; however these were hampered by confidentiality restrictions and conflicting accounts by industry players on whether gas is being made available, and at competitive prices.

Being a formal price inquiry held under Part VIIA of the CCA, the ACCC was able to compel information and hold hearings to assess the level of competition in the market. This meant the ACCC could bring together information that had previously not been available to other inquiries.

The Inquiry received in excess of 73,000 documents and held 32 public and private hearings and numerous additional discussions and consultations with gas market participants. In its public hearings in July and August 2015, the inquiry heard from over 30 market participants, including large gas users, gas retailers and shippers, small and large producers and pipeline owners.

The ACCC's final report, which was generally received well across the industry, cautioned that the east coast gas supply outlook in the medium term was uncertain, and emphasised that there was an urgent need for new gas supply from diverse sources to support the domestic market.

The ACCC also made a number of recommendations around improving gas market operations and transparency.

On 15 March 2017, the gas industry agreed on measures with the Australian Government to help deliver cheaper and more reliable gas.

On 19 April 2017, the Treasurer directed the ACCC to inquire into the supply of, and demand for, wholesale gas in Australia, as well as publishing regular information on the supply and pricing of gas for the next three years.

33. With both industry and government introducing measures to increase transparency in the gas market in response to the findings contained in the ACCC's final report, this market study also further demonstrates the important role the ACCC plays in improving the transparency and functioning of markets.