

COMMUNICATION FROM AUSTRALIA

The following communication, dated 23 September 2002, has been received from the Permanent Mission of Australia with the request that it be circulated to Members.

A. CORE PRINCIPLES, INCLUDING TRANSPARENCY, NON-DISCRIMINATION AND PROCEDURAL FAIRNESS

Introduction

1. Australia considers the core principles of transparency, non-discrimination and procedural fairness to be the key foundations necessary to underpin any successful competition regime. Without these basic elements, a competition regime is likely to lack credibility, authority and respect within the community and therefore be ineffective.

2. In order for a competition regime to be effective it is imperative that these three core principles of transparency, non-discrimination and procedural fairness are considered and implemented collectively in order to develop an integrated strategy of open, fair and consistent competition regulation and administration.

3. The importance of these core principles is reflected in the fact that they have been largely already addressed in a range of other fora.

- The key WTO principles are: national treatment, most-favoured nation and transparency.
- The OECD Joint Group on Trade and Competition's set of core principles include transparency, non-discrimination and procedural fairness.
- In 1999 APEC Ministers endorsed the APEC Principles to Enhance Competition and Regulatory Reform that encompass non-discrimination, comprehensiveness, transparency and accountability.

4. These issues are not new, which is not surprising considering the fundamental need to commit to such principles if a country is serious about implementing an effective competition regime. The possibility of reinforcing these concepts through the WTO will only serve to strengthen the message that already exists within the competition policy community, which is basically that these core principles would be expected to already be on the list of objectives for any country wishing to adopt a competition regime.

5. A further benefit of adopting such a set of core principles within the WTO is the support that they could provide to a competition agency in its efforts to abide by these principles. It is often the case that the competition regulator will come under pressure by many different sectors of the

economy, including by business, consumers and the government, for special treatment or exemptions from the law, for example. By having these principles in place, they could provide additional support for a competition agency to do its job properly without being influenced by 'non-competition' arguments that often create obstacles that serve to hinder a competition regulator from doing what it was created to do.

6. This paper will address each of these core principles in closer detail and discuss some of the steps that Australia has taken to implement them.

1. Transparency

7. The concept of transparency is essential to ensure that businesses and consumers are aware of what legal conditions they operate under and to facilitate inter-governmental cooperation.

8. Ideally, transparency should encompass all aspects of a country's competition regime, including all legislation, policies, institutional structures, decision making processes, enforcement priorities, policy and procedural guidelines, case selection criteria, exemption criteria, appeal processes, and details of all relevant outcomes and decisions made. Further, while it is optimal to minimise the existence of any exemptions, exceptions or special competition rules, where they do exist, any such exemptions should be made public and the process and criteria for granting such exemptions should be clear and transparent.

9. As provided within other WTO agreements, such as the GATS, elements of an effective transparency mechanism should include:

- publication of relevant laws;
- inquiry points for requests about laws;
- notification to the WTO of changes to laws;
- mechanisms for the review of competition decisions upon request;
- mechanisms for advising complainants about the status of a matter; and
- mechanisms for procedural transparency, to ensure that competition laws are administered in a reasonable, objective and impartial manner.

10. Through perhaps a comprehensive website, this would provide a domestic consumer or business with easy access to legislative information and avenues for making inquiries or complaints to a foreign regulator where, for example, they are being affected by anticompetitive conduct in a foreign market, or are seeking to implement a multinational merger that would need to be cleared in a number of jurisdictions.

11. Mechanisms to promote procedural transparency would also provide useful and necessary information about how and where to lodge complaints, what processes will take place and the time frames involved in obtaining resolution of a problem.

1.1 Public Information

12. There is also a need to provide comprehensive access to information by the public, while of course making provision for the protection of confidential information.

13. Australia's competition authority, the Australian Competition and Consumer Commission (ACCC), achieves transparency through a range of different mechanisms and places a high priority on its information, compliance and media strategies.

14. The principal objectives of the ACCC's guidance and information activities are to:
- increase knowledge of rights and obligations under Australia's competition law – the *Trade Practices Act 1974* (TPA) and other legislation under which the ACCC has responsibilities;
 - increase public understanding of the ACCC's own procedures and policies; and
 - contribute more generally to public awareness of competition regulation issues to enhance the development of a competition culture.
15. The ACCC's compliance and information strategy includes educating and informing the public through the use of media releases, press articles and interviews, speeches, publications and guidelines, maintaining a comprehensive and up-to-date Internet website, and having effective liaison programs with all of the agency's stakeholders.
16. The ACCC is highly active in its use of all of these forms of communication. The ACCC generally issues well over 300 press releases every year – over 230 have been issued already in 2002, with 332 issued in 2001 and 371 in the year 2000, and has a dedicated media unit to manage its media strategy.
17. The ACCC's Chairman, Commissioners and senior staff deliver an estimated 150 speeches every year to a wide range of audiences.
18. The ACCC produces a wide range of publications, including regular reports and journals on the ACCC's activities; various corporate publications; numerous guidelines on how the ACCC administers the TPA, for example, merger guidelines; industry specific publications, for example, the health profession and for small business. The ACCC has 240 current publications.
19. The ACCC maintains a comprehensive and up-to-date Internet web site – the address is <http://www.accc.gov.au>. The site contains a detailed range of information including an overview of the role and functions of the ACCC, links to the legislation that it administers, copies of press releases and speeches dating from 1995, electronic copies of a majority of the ACCC's publications, career opportunities, ACCC contact information and links to other useful sites. The site also contains a range of public registers that provide detailed information to the community about the work being performed by the ACCC and details of its decisions. The registers include details of all merger and authorisation matters considered by the ACCC, and details of all administrative settlements reached by the ACCC.
20. Further, most of the ACCC's work units maintain sections on the site that provide detailed information about current priorities, copies of major reports, decisions and discussion papers in areas such as small business, telecommunications, aviation, rail, gas, electricity, petrol and transport.
21. Competition agencies have a very broad range of stakeholders, all of which have very different information requirements. It is therefore important that the agency's information and compliance strategy be sufficiently diverse that it meets the needs of all of its constituents. This issue is exacerbated in Australia by its immense geographic and cultural diversity.
22. The ACCC has made a particular effort recently to reach those involved in small business, and those in rural and regional Australia. For example, the ACCC's Small Business Unit organises regular seminars and meetings in each state and territory to ensure that small businesses are aware of their rights and obligations and are able to articulate any concerns they may have. The ACCC also holds regular 'Competing Fairly Forums', which provide Australians in rural and regional areas with the opportunity to ask questions about competition and consumer protection of a panel of experts via

satellite. Four forums have been held to date involving participants from over 300 different regional centres.

1.2 Confidentiality

23. It is Australia's understanding that any transparency provisions adopted within the WTO framework would not extend to the provision of confidential information. This is important because underlying this basic premise of transparency is the important need for competition agencies to be able to protect confidential information provided to it during the course of its investigations. If competition authorities are not able to protect such information, it would seriously jeopardise their ability to collect such information in the first place, therefore undermining their ability to conduct a thorough investigation of the facts of a case. Consequently, Australia considers it important that any decisions about whether information should be disclosed or protected, needs to lie solely with the domestic competition authority.

2. Non-discrimination

24. The principle of non-discrimination in the WTO context draws together the principles of most-favoured-nation (MFN) and national treatment. It effectively involves the application of competition principles in a manner that does not differentiate between or among economic entities on the basis of nationality.

25. Due to the difficulty involved in determining situations where discrimination may have occurred, it is again relevant to emphasise the importance of transparency in the activities and decisions made by competition authorities to support and reinforce the principle of non-discrimination.

26. The principle of non-discrimination raises the question about whether it would create a situation where particular industry, sectoral or other social policy considerations cannot be taken into consideration, and that it would not allow for particular industry policies to be implemented.

27. However, non-discrimination in this context relates to the behaviour and decisions made by the competition authority – ie. that the competition law is applied in a non-discriminatory way.

28. It is important to note that a comprehensive and well functioning competition policy can co-exist with other government policies. Australia maintains a non-discriminatory approach to the administration of its competition law. However, there are other government policies that co-exist which have allowed the Government to meet other priorities and goals eg. foreign ownership restrictions on Australian media.

29. Competition policy is not designed to prevent the development of market power, but instead will focus on eliminating the abuse of market power. It is not an end in itself, but instead is the tool used to create competitive market outcomes and to ensure that the benefits of trade liberalisation flow through to consumers.

2.1 Authorisation

30. Further, maintaining a system of non-discrimination does not mean that there is no scope for granting exceptions from the law. Provided that any domestic regime is administered in a reasonable, transparent, objective and impartial manner, it could still exist within the WTO framework. Australia has a non-discriminatory competition regime but also has the power to grant exemptions from the TPA under its 'authorisation' process.

31. Under the authorisation provisions of the TPA the ACCC has the power to grant immunity from legal proceedings for some arrangements or conduct that might otherwise breach the anticompetitive practices provisions of the TPA where the public benefits from the conduct outweigh any anticompetitive effects. While the concept of 'public benefit' has not been legally defined in Australia, it has included factors such as increased business or industry efficiency, the more efficient allocation of resources, employment growth, improved international competitiveness, industrial harmony, improved product safety and quality, and the provision of assistance to efficient small businesses.

32. The authorisation process is governed strictly by the TPA and there are clear rules for maintaining a highly public and transparent process for the consideration of authorisation applications. Therefore, while certain types of conduct can be granted an exemption from the operation of the law, the criteria and process for considering and granting exemptions is clear and very public. The ACCC is required to keep a public register of all documents relating to an authorisation decision, with provision for the protection of commercially sensitive and other confidential information. Any interested parties are free to make submissions to the ACCC during its consideration of an authorisation application. Except for mergers, the ACCC must publish a draft decision on the matter and must allow opportunity for a conference of interested parties prior to making its final decision on a matter. Authorisation decisions made by the ACCC are also subject to review, on application, by an independent statutory appeal body – the Australian Competition Tribunal.

2.2 *Exemptions from competition law*

33. Australia's competition law also allows for legislated exemptions from provisions of the TPA. However, where an exemption may have the effect of restricting competition, it must be demonstrated that this restriction is in the public interest. These requirements are in accordance with an agreement by Australia's Commonwealth, State and Territory governments not to introduce legislation which restricts competition unless it is in the public interest.

34. The broad competition policy framework in Australia also includes a commitment to review existing legislation which restricts competition to ensure such restrictions are in the public interest.

2.3 *Enforcement cooperation*

35. One point worth mentioning separately relates to enforcement cooperation between competition authorities. The question arises as to whether the adoption of a non-discrimination principle within the context of competition policy in the WTO would create a situation where a competition agency providing assistance to another agency through a formal bilateral arrangement would be obliged to provide assistance or cooperation to all other WTO members on the same terms. Australia is of the opinion that such obligations should not be created within any WTO competition policy framework. Even though commitments on cooperation within the WTO context are likely to be voluntary, this point needs to be made clear. While a system of voluntary cooperation based on a set of general principles would be likely to be useful and appropriate within the WTO context, individual agencies need to retain the discretion over the details of their individual relationships with other agencies, and have the sole discretion to decide what information should be shared and with whom, despite whether such relationships are formalised through bilateral arrangements.

36. Relationships between competition regulators vary considerably and are based on mutual understanding of each others' laws and policies, and the existence of trust and frameworks for the exchange and handling of information. There needs to be discretion and flexibility for Members to address these issues on a case by case basis.

3. *Procedural fairness*

37. In order to achieve procedural fairness, there are a number of factors that are worth mentioning: transparency (which has been covered already), due process, accountability, predictability and independence.

3.1 Due process

38. In order to achieve due process it is important that parties be given, on a non-discriminatory basis, effective access to domestic judicial and/or administrative remedies in a timely manner. Australia supports the following list of factors developed by the OECD Joint Group on Trade and Competition as essential in ensuring procedural fairness.

- Rights of complainants to petition competition authorities to take action and to seek explanations for inaction on matters.
- Rights of complainants to bring complaints before the competition authority.
- Rights of private parties to directly access the judicial system to seek remedies for injury suffered by anticompetitive practices.
- Due process for all parties in administrative or judicial procedures including protection of confidential information.
- Where competition authorities make dispositive case decisions, publication/explanation of such decisions by the competition authorities.
- Appropriate access to avenues of appeal.

3.2 Accountability

39. Establishing a clear and concrete framework for the implementation and administration of competition law and policy is a necessary component in achieving credibility and confidence in the competition authority. Unless a framework is established to hold the relevant competition authorities accountable for their decisions, neither businesses nor consumers will have faith in the competition authority to independently and appropriately protect their interests against anticompetitive behaviour. It is therefore clearly in an agency's best interests to be independent and maintain a transparent, open and accountable approach in its daily operations.

3.3 Predictability

40. Predictability is essential for businesses and consumers to feel confident that the regulator will adopt consistent, well-defined decision-making criteria and time lines. Predictability is necessary for consistent treatment of entities, over time, and across jurisdictions. Competition agencies can further promote greater predictability by educating its constituents about the role and functions of the regulator, by providing detailed information about its decision making processes and time frames, and by publishing the results and reasoning behind its decisions.

3.4 Independence

41. This point ties in with several others that have already been discussed, particularly transparency. It is important that the competition agency is functionally and operationally independent from government, even though it is likely to be publicly funded. If this independence is not achieved, both in fact and in the perception of the community, then the competition agency will be, or be seen to be, influenced by the politics of the government of the day, and therefore subject to other political agendas. Such a situation need not necessarily be in the best interests of competition and achieving competitive market outcomes.

42. Without independence, the agency may lack credibility and the community will not have the requisite degree of faith that their complaint or problem will be dealt with in a fair and reasonable

manner. Without this element of trust, the result may be a sceptical public and an ineffective regulator.

Conclusion

43. The core principles of transparency, non-discrimination and procedural fairness are key factors influencing the development of effective competition regulatory structures, and if any one of these factors are neglected, it may well result in a competition regime that lacks substance, public acceptance or that is too difficult or impossible to enforce.

B. TECHNICAL ASSISTANCE AND CAPACITY BUILDING

44. Provided below is a brief summary of the ACCC's most recent technical assistance and capacity building activities in the area of competition law and policy.

- In April 2002 the ACCC participated at an UNCTAD Regional Seminar on Competition Policy and Multilateral Negotiations. The seminar, held in Hong Kong, focussed on the outcomes of the WTO Doha round, particularly for participants in attendance which were drawn largely from the Asia-Pacific region.
- The ACCC participated in a competition policy event organised by the OECD in conjunction with South African authorities, in Pretoria in June 2002. The conference on promoting competition in telecommunications and seaports was for staff of the South African Competition Commission and other officials from SADC (Southern Africa Development Community) countries.
- In May and August 2002 the ACCC held two investigation courses in Australia that were attended by officers from the Hong Kong Consumer Council and the Macau Consumer Council.
- In September 2002 the ACCC participated at an UNCTAD sponsored workshop held in Halong Bay and Hanoi to review Vietnamese draft competition law and set modalities for its implementation.

C. OTHER BUSINESS, INCLUDING STOCKTAKING OF NATIONAL EXPERIENCE AND LEGISLATION

45. On 15 October 2001, the Prime Minister announced that there would be an independent review of the competition provisions of Australia's competition law – the *Trade Practices Act 1974* (TPA) and their administration.

46. In setting the terms of reference for the review the Government stated that it was timely to review some key provisions of the TPA in view of the significant structural and regulatory changes that are occurring in Australia that impact on the competitiveness of Australian businesses, economic development and affect consumer interests.

47. In establishing the review, the Government made reference to:

- Australian businesses being increasingly faced with global competition and the need to be able to compete locally and internationally;
- the fact that excessive market concentration and power can be used by businesses to damage competitors; and
- the need for businesses to have reasonable certainty about the requirements for compliance with, or authorisation under, the TPA.

48. The Review Committee has been specifically instructed to examine the operation of the competition, authorisation and associated penalty provisions of the TPA to determine whether they:

- inappropriately impede the ability of Australian industry to compete locally and internationally;
- provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
- promote competitive trading which benefits consumers in terms of services and price;
- provide adequate protection for the commercial affairs and reputation of individuals and corporations;
- allow businesses to readily exercise their rights and obligations under the TPA, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances; and
- are flexible and responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas.

49. The Committee is to report to the Government by end of November 2002. Further information about the review, including copies of all public submissions, can be found on the review website at: <http://tpareview.treasury.gov.au>.
