

# Competition policy and its institutions

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Competition policy is a term often used these days but not a lot is said about what it actually is, where it comes from and how it is administered. This short article briefly explores competition policy in the Australian context, the institutions that administer it and asks, given recent decisions, is it time to revisit what impact their decisions are having on business and investment.

## Competition and Competition Policy

What is competition and competition policy? Competition is a dynamic process that centres on the active efforts of firms to keep ahead and seek profits by reducing costs, developing new products

and enhancing the quality of the goods and services that their customers desire and demand. It is a process that forces businesses to offer "more for less" by improving quality and/or lowering prices. So why do Governments promote the merits of competition? Because

competition improves the efficiency with which resources are used. This is crucial because improvements in efficiency and productivity are the key to not only increasing a business's viability but also increasing the welfare of society, that is, our living standards.

**Table 1: Australian Competition Policy Institutions**

Institution	Role
<b>Commonwealth</b>	
CoAG (Council of Australian Governments)	Develops and implements policy and reforms of national significance requiring State & Territory cooperation. Supported by inter-jurisdictional, ministerial-level councils covering a sector or industry, for example, the Transport & Infrastructure Council.
National Competition Council (NCC)	Recommends to the Commonwealth Treasurer what nationally significant infrastructure services are to be covered for regulation (i.e. declared), certifies access regimes and advises on competition issues.
Australian Competition & Consumer Commission (ACCC)	An independent statutory authority who administers the Competition and Consumer Act 2010 (C & C act), regulates access to nationally significant infrastructure under Part IIIA of the C & C act, investigates anti-competitive conduct, assesses mergers and takes enforcement action on competition issues.
Federal Court	Australia's competition law is enforced through proceedings in the Federal Court of Australia. Proceedings may be brought by the Australian Competition and Consumer Commission (ACCC) or by a person harmed by contraventions of the law.
Australian Competition Tribunal (ACT)	Reviews the decisions of Ministers and the ACCC under the Competition and Consumer Act 2010 and the national electricity and gas law and AER. <sup>1</sup>
<b>State &amp; Territory</b>	
State based regulators: QCA (Qld), IPART (NSW) ESC (Vic), ESCOSA (SA) ERA (WA), ICRC (Act) OTER (Tas) NTUC (NT)	Carry out functions under state legislation Administer state-based access regimes Undertake prices oversight and price monitoring of regulated state infrastructure Recommend what is to be regulated at a state level Recommend what is to be regulated at a state level Sets regulated prices for state services declared for regulation Sets regulated prices for state services declared for regulation Sets regulated prices for state services declared for regulation Resolves access and pricing disputes

<sup>1</sup>In relation to energy (gas and electricity) the institutions are a little more specific, for example the Ministerial Council on Energy and the Australian Energy Market Commission (AEMC) make the rules governing the energy markets; the Australian Energy Market Operator (AEMO) operates the national energy market through planning, forecasting and power systems information; and the Australian Energy Regulator (AER) regulates the energy market for example transmission and distribution pricing. Some State governments also regulate retail electricity where they have residual responsibilities.

<sup>2</sup>Part IIIA of the Competition & Consumer Act 2010 which facilitates access to monopoly assets needed by the business to compete in a market (for example, a rail business requiring access to rail track to compete in the haulage market or in the case of shipping, access to a channel to reach the port).

Competition policy is a set of policies and laws that protects, enhances and extends competition.

The origins of competition policy in Australia derive from the 1993 National Competition Policy Report known as the Hilmer Report named after its chair Fred Hilmer and initiated by the Keating Government in 1993.

The Hilmer Report stated "competition offers the promise of lower prices and improved choice for consumers and greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole". Hilmer also recognised competition policy is not about the pursuing competition for competition's sake. Rather, an effective competition policy seeks to facilitate effective competition while at the same time accommodate situations where competition may not be suited or conflicts with social objectives. As I have often said, any reform must be case by case, guided by the context and not some textbook ideology.

## Competition Policy Institutions

At the Commonwealth level, competition policy is implemented through the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC), the Australian Competition Tribunal (the Tribunal) and the Federal Court of Australia.

At the State level, state-based regulators implement state-based legislation covering competition policy including determining prices for services declared by government to be regulated such as certain port, rail, energy and water services.

Given the Australian Constitution sets out the respective responsibilities of the Commonwealth versus States, some matters require coordinated action by all Australian governments, which is what CoAG (the Council of Australian Government) aims to achieve. Table 1 summarises the competition policy institutions.

## Multiple regulators and institutions

The 2015 Commonwealth Harper competition review highlighted that when state access and pricing regulators are added in with the national regulators, Australia has 11 separate competition-related regulators. In the case of water, Australia's seven water regulators serve a population of 23 million while, by comparison, the UK's single water regulator (Ofwat) serves more than 60 million people. In the case of rail, some Australian rail businesses operate their above rail operations under six different access regimes with multiple access providers and multiple access regulators.

Perhaps it is time to review the number of regulators and look at the merits of having a single national industry regulator where that makes sense, for example in road pricing, water and rail.

The existence of numerous institutions and various processes including the time it takes for competition regulators to make decisions also raises concerns about the impact these decisions have on the stability of the business environment and on the incentives to invest.

For example, reviews and appeals of decisions made under Part IIIA have taken years in the case of the Pilbara rail cases. A more recent example is the port of Newcastle, which operates the world's largest coal export facility (see box 1).<sup>2</sup>

The recent preliminary decision by the NCC (albeit advisory as the Treasurer has the final say) to remove declaration (therefore regulation of the channel) at the Port of Newcastle raises major questions about the effectiveness of the Part IIIA and its competition institutions. One lot of institutions say it should be regulated and the other lot say it shouldn't. It is unclear whether these institutions are achieving their mandate, let alone providing consistency and certainty in their decision making.

Perhaps it's time to review the workings of our competition policy institutions and ask, what impact are these multiple layers and processes having on business and how can their decision making processes be improved.



**About the Author:** Dominic L'Huillier is an independent economist with over 20 years' experience working at senior levels in the Commonwealth and State Governments including as Director of Transport and Prices oversight at the ACCC and as Director of Transport and Industry Sectors at the Essential Services Commission of Victoria. Dominic is currently a Director of Economic & Financial Consulting at FTI Consulting — a global business advisory firm that helps clients understand today's economic, financial and regulatory opportunities and challenges by providing evidence-based insight and analysis on a range of business and public policy issues. Contact: Dominic.L'Huillier@fticonsulting.com or 0418 495 168

## Port of Newcastle

May 2014 - Port of Newcastle privatised. New owner is Port Newcastle Operations (PNO).

January 2015 - PNO increase channel charge for ships entering port by around 40% allegedly without any change in the quality of the service provided.

May 2015 - Glencore (a port user who exports coal through the port) seeks declaration of the shipping channel from the NCC to regulate channel pricing.

Nov 2015 - NCC recommends no declaration, Treasurer accepts. Port remains unregulated.

June 2016 - Australian Competition Tribunal overturns NCC view. The port is now declared which means the ACCC can resolve disputes, arbitrate and determine pricing.

November 2016 - Glencore notifies pricing dispute to ACCC regarding pricing at the port.

Aug 2017 - Federal Court dismisses PNOs application for judicial review of ACT decision.

November 2017 - the criteria for declaration is changed.

March 2018 - High Court dismisses PNO's application to appeal declaration decision.

July 2018 - NCCC receives application from PNO to revoke declaration of the port.

September 2018 - ACCC released final determination in relation to the arbitration/ dispute notified by Glencore.

October 2018 - Glencore and PNO lodged application to the Australian Competition Tribunal to review the ACCC determination

19 December 2018 - NCC release preliminary view that declaration (regulation of the channel) should be revoked. Submissions due 4 February, 2019.