



Australian
Competition &
Consumer
Commission

**Australian Competition and Consumer
Commission (ACCC) submission to
the Proposed National Ports Strategy**

June 2010

Australian Competition and Consumer Commission

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Summary

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to Infrastructure Australia and the National Transport Commission on the Proposed National Ports Strategy (May 2010).

The key points in this submission that the ACCC would like to emphasise are:

- competitive and efficient markets underpin the goals of the National Ports Strategy
- the ACCC is currently working with the ports and related industries to better understand what the industry's concerns are and to further educate businesses about competition law
- access regulation encourages infrastructure operators and the businesses that depend on them to be innovative, productive, efficient and to invest when appropriate.

The ACCC is available to discuss this submission in more detail. The ACCC contact for this submission is:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight Branch
Ph (03) 9290 1804
Email: Anthony.wing@acc.gov.au

The ACCC's role in the Proposed National Ports Strategy

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to Infrastructure Australia and the National Transport Commission on the Proposed National Ports Strategy.

The Proposed National Ports Strategy (p.81) identifies several guiding principles to Australia's transport policy framework. Of these, the ACCC has a role in the following:

- Infrastructure Pricing – Sending the appropriate signals to influence supply and demand for infrastructure
- Competitive Markets – Establishing competitive markets wherever possible to minimise the need for regulation
- National Regulation – A national perspective should be adopted where regulation is required.

The ACCC's objective as set out in the *Trade Practices Act 1974* ('the Act') is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The Act (at Part IIIA) also provides for those situations where competition depends upon access to monopoly infrastructure that is of national significance. In such cases, the objects of competition law are to:

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets, and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

By supporting the competitive process, the Act supports the purpose of the Proposed National Ports Strategy to drive the development of efficient sustainable ports and related freight logistics. Competition law underpins the objectives of the draft Strategy which are to:

- improve the efficiency of port related freight movements across infrastructure networks
- minimise externalities associated with such freight movements
- influence policy making in areas relevant to freight.

Competition and efficiency and the Proposed National Ports Strategy

Competitive markets support the general efficiency and welfare goals of the National Ports Strategy. First, competition pushes businesses to improve their performance by innovating and investing in new services and technologies. Second, competition benefits consumers with greater choice and better products. Competition ensures that prices will be lower and quality higher than would be the case if there were no competition (i.e. monopoly) or little competition. Third, through driving firms towards

greater efficiency, competition provides for higher levels of economic growth, increased employment and higher living standards. As such, competition is not a goal of itself, but a means of achieving higher standards of living for a nation's citizens.

Over the last two decades, competition law has supported important reforms including those achieved under the National Competition Policy (NCP) and those currently being implemented under the National Reform Agenda. At the heart of the NCP were policies designed to protect and facilitate competition across the economy. The second reading of the *Competition Policy Reform Act 1995* (part of the NCP reforms) stated that:

...It is not a radical notion that consumers generally benefit from greater competition, and that, where possible, greater competition should be encouraged. It is not a radical notion that in reviewing legislation or market structures, due consideration should be given to opportunities to enhance efficiency through competition...¹

The focus has been upon the economy-wide application of pro-competitive regulation, the removal of structural impediments to promote more efficient and competitive markets, improving the performance and competitiveness of businesses and addressing entrenched monopoly problems in the economy, especially those involving bottleneck infrastructure.

Competition ensures that the efficiency benefits of significant reforms are shared with the Australian community. The Productivity Commission found that the NCP reforms contributed to sustained economic growth, higher incomes and low unemployment—and, importantly, increased Australia's productivity.² These reforms were estimated to have added about 2.5 per cent to GDP, or about \$7 000 to 'average' household income each year.

In a similar way, competition will ensure the efficiency benefits that the Proposed National Ports Strategy targets are achieved and shared with the Australian community.

Long-term planning frameworks, competition and access laws should work well together to support the development of efficient frameworks for coordination of supply chains.

In this regard, the Proposed National Ports Strategy proposes a framework to ensure capital is employed most productively in ports and related businesses. When it is deployed properly, capital can be effective in enhancing growth and social and economic well-being. To deliver these outcomes, two important elements are necessary. First is the need for infrastructure investment to be deployed in well designed and planned networks. Second is the promotion of competitive markets that support efficient investment in, and use of, infrastructure.

National Competition Policy gave competition law an economy-wide application to all markets and to all businesses. Economy-wide application enables a consistent, uniform application of competition law. This creates a level playing field that fosters

¹ Commonwealth of Australia, 1995, *Second reading of the Competition Policy Reform Act 1995*.

² See Productivity Commission, 'Review of National Competition Policy Reforms', 2005, pp.XVI-XVII.

competition across all forms of a business enterprise regardless of its form of ownership.

While competition promotes efficient outcomes, in circumstances where there is market failure, the market may not be able to deliver the best outcome. In these circumstances, the Act allows the ACCC to grant immunity for conduct that might otherwise be considered anti-competitive—that is, the ACCC may ‘authorise’ certain conduct or arrangements if it is satisfied that the public benefits resulting from the conduct are likely to outweigh any public detriment generated by the conduct. The underlying principle of this provision is that where a net public benefit case for exempting the national competition law or restricting competition exists, this can be achieved using the specific processes under the national law.

The ACCC recognises that there may be some uncertainty as to how competition law applies in any particular circumstance. The ACCC will therefore continue to provide further clarity and guidance as the National Ports Strategy is developed.

Finally, although competition is preferable for driving efficiency, there may be some infrastructure in a supply chain where competition is unlikely, because the infrastructure has natural monopoly characteristics (some rail networks or intermodal terminals, for example).

A natural monopoly occurs when one firm can provide a service at lower cost than multiple businesses could. Examples include electricity wires, gas pipelines, railway track and major airports. In the absence of regulation, there is a tendency for such monopolies to provide a lower level of service at a higher price than if they were subject to competition. This results in a loss to the broader community as the monopolist produces less and holds back investment.

Access regulation may then be needed to replicate for these natural monopolies the disciplines that competition imposes on the majority of businesses in the Australian economy, and to ensure that monopoly power in relation to that infrastructure cannot be used to stifle competition across the supply chain as a whole.

In summary, the port infrastructure policy issues which the Proposed National Ports Strategy seeks to address reflect the importance of ensuring competitive and efficient infrastructure markets where competition is possible, and efficient, effective regulation of access to monopoly infrastructure where competition is not possible.

Specific comments on the Proposed National Ports Strategy

The ACCC has specific comments on three aspects of the Proposed National Ports Strategy: (1) supply chain coordination, (2) mergers and acquisitions and (3) monopolies and access regulation.

(1) Supply chain coordination

The Proposed National Ports Strategy identifies improvements to land-side efficiency as a priority for action. Greater supply chain coordination is included among the

recommended actions to achieve this priority (p.35). As stated, the ACCC agrees that promoting competition and efficiency is a desirable objective.

The Proposed National Ports Strategy notes that comment has been made by some industry stakeholders that the current application of the Trade Practices Act has a dampening effect on supply chain coordination because in their view authorisation was required for cooperation and also for the sharing of information (p.55).

The ACCC's view is that this is a misunderstanding of competition law for the reasons set out below. At the same time, the ACCC recognises that there may be some misunderstanding and uncertainty in parts of industry about how the law operates in this area and accordingly supports Recommendation 3.11 as an appropriate response.

As the Proposed National Ports Strategy (p.55-6) sets out, the ACCC's expectation is that, in many cases, industry proposals to exchange information to improve supply chain efficiency may not raise concerns under the Act. In some cases, potential trade practices issues can be avoided through the design of proposed supply chain coordination arrangements. Where industry-based arrangements cannot be structured in a way that alleviate trade practices concerns, but the benefits are considered to outweigh any detriment to competition, seeking ACCC authorisation under the Act may be appropriate.

The ACCC encourages firms or industry associations to identify at an early stage whether legal advice can assist in the development of supply chain solutions. Such advice can assist in recognising the risk of a potential breach of the Act and in designing alternative arrangements that may still achieve the desired supply chain outcome but lower the risk of a breach. For example, a lawyer could develop a meeting protocol for supply chain participants that could set out the agenda and also some subjects which will not be discussed.

Recommendation 3.11 proposes that more information should be provided to the port and related logistics community on information sharing and logistics cooperation practices relevant to relevant ports and port Freight Corridors in ways that seek to avoid competition issues (p.37).

The Proposed National Ports Strategy acknowledges the work the ACCC is currently undertaking with the ports and related industries to better understand what the industry's concerns are and to further educate businesses about the Act (p.56). Recent examples of such work include speeches at transport industry forums and participation in the development of the Australian Logistics Council's strategic plan.

To further support recommendation 3.11, the ACCC could potentially provide a facilitative role to industry associations whereby the ACCC could convene a series of roundtables with key industry representatives involved in supply chain movements around significant ports. Roundtables could be held on a port by port basis if the issues involved in a particular supply chain or the industry representatives were unique to a particular location. The purpose of these roundtables would be for the transport logistics sector to inform the ACCC about their needs and their proposals for better coordination and for the ACCC to inform and educate the transport logistics sector about compliance issues and information sharing practices. The ACCC could provide

industry representatives with some practical insight about the kinds of trade practices issues that are likely to arise in the context of establishing coordinated arrangements and enable them to provide guidance to their industry members.

Seeking authorisation under Part VII of the Act

The Proposed National Ports Strategy also notes that seeking authorisation under the Act may be appropriate if the public benefits associated with a proposed arrangement outweigh the detrimental impact of restricting competition.

If applications for authorisation are to be lodged, they will need to clearly specify the nature of the arrangements for which authorisation is sought. The ACCC must follow a public statutory process to assess each application separately on its merits, taking account of all relevant issues, including port-specific ones. The Act provides a 6 month time frame for assessment of authorisation applications, with public consultation before and after the issuing of a draft determination. Final determinations issued by the ACCC may be reviewed by the Australian Competition Tribunal, upon application by any interested party.³

Further guidance on the authorisation process is available from ACCC staff and the ACCC web site.

(2) Mergers and acquisitions

The Proposed National Ports Strategy also states that:

...there are more fundamental market-based solutions to interfacing costs – including the potential for organisations to merge so that a function is conducted by a single organisation or the potential for appointment of an independent coordinator. Of course there may be competition concerns regarding mergers, and there also could be competition concerns about a monopoly operating in an upstream/downstream market where it faces competition and addressing these concerns may lead to a model of intrusive access regulation.

Mergers between corporations or persons which increase vertical integration will fall for consideration under s.50 of the Trade Practices Act. Section 50 prohibits acquisitions that result in, or are likely to result in a substantial lessening of competition in a market. The ACCC's Merger Guidelines recognise that in the majority of cases, vertical mergers will raise no competition concerns.⁴ However, where insufficient competitive constraints remain post-merger, such transactions can raise issues, in particular if the acquirer has substantial market power in one market, and the merger is likely to lead to foreclosing rival firms at other levels of the supply chain. Where the

³ Infrastructure Australia and the National Transport Commission, "*The Proposed National Ports Strategy*" May 2010, p.51.

⁴ The ACCC's Merger Guidelines are available at <http://www.accc.gov.au/mergerguidelines>.

public benefits of such a transaction might outweigh the competitive detriment, parties may seek authorisation of the transaction from the Australia Competition Tribunal.

Where there is an opportunity for a market to have a competitive structure, this will generally be more desirable than allowing a market to become less competitive through mergers that create vertical integration and subsequently regulating that market's conduct.

(3) Monopolies and access regulation

In most areas of the economy, efficiency in supply chains will be driven by competition between them. However, the Proposed National Ports Strategy suggests that, particularly in the case of supply chains connected to ports in metropolitan areas, the prospect of direct competition is unlikely. In such cases, it appears that some concerns around efficiency in port supply chains may be characterised as the need for shared use of 'bottleneck' infrastructure. That is, a 'bottleneck' exists because businesses rely on using the service provided by the infrastructure and cannot take their business elsewhere.

It is the shared use of bottleneck infrastructure that access regulation seeks to address. The Proposed National Ports Strategy identifies that there is a range of stakeholder views about access regulation. Some of the arguments made against access regulation include the perceived uncertainty in its precise application; and the perceived dampening effect on private investment in infrastructure facilities (p.56). The paper also notes (at para 5.6.1, p.54) that 'Regulation generally restricts some type of activity ... (and) includes economic regulation aimed at curbing monopoly behaviour'.

Access regulation is indeed designed to address the incentive problems that arise when a market has a natural monopoly element. As has been stated previously, a natural monopoly occurs when one firm can provide a service at lower cost than multiple businesses could. In the absence of regulation, there is a tendency for such monopolies to provide a lower level of service at a higher price than if they were subject to competition. This results in a loss to the broader community as the monopolist produces less and holds back investment. Access regulation therefore seeks to replicate for monopolies the disciplines that competition imposes on the majority of businesses in the Australian economy.

For some monopolies, additional problems arise from 'vertical integration'. Vertical integration refers to the situation where a firm undertakes a number of stages in the supply of a product. In a supply chain context, an example of vertical integration could be the ownership by one firm of both rail track and train operation. A monopolist who is vertically integrated may have an incentive to discriminate in favour of its own business and against those of businesses who seek to compete with it. For example, a monopolist could require a competing firm to provide information on customers and business practices that it can then use to the advantage of its own related business. This would of course damage the incentive for the competing firm to undertake innovation.

To address this, access regulation can be tailored for situations where vertical integration is a feature of the market structure. Where competitors depend on access

and vertical separation is not an option, the ACCC considers measures would need to be included in any proposed access arrangements or other regulation to address issues arising from vertical integration. These measures might include:

- robust prohibitions covering discrimination against competitors
- adequate ring-fencing arrangements (including regular independent audits) to ensure the separate operation of the monopoly and competitive components of the integrated business
- protocols dealing with treatment of access seekers' commercially sensitive information
- protocols regarding provision of information to access seekers
- efficient, effective and clear complaints and dispute resolution procedures to handle any alleged breaches of the provisions above.

Access regulation under the Trade Practices Act

The Australian approach to, first, identifying a natural monopoly that should be regulated and, next, providing the regulatory framework to regulate that monopoly, is set out in Part IIIA of the Act.

Part IIIA provides for those situations where competition in related (upstream or downstream) markets depends upon access to monopoly infrastructure that is of national significance. The objects include promoting the efficient operation of, use of and investment in Australia's key infrastructure, thereby promoting competition in upstream and downstream markets. In this way, providing access to infrastructure provides supply chain participants that depend upon that infrastructure with certainty to undertake investment.

There are several examples of how Part IIIA has been applied and how access regimes can underpin efficiency in supply chains. For example, the ACCC's recent draft decision on the proposed access undertaking from the Australian Rail Track Corporation (ARTC) relating to its Hunter Valley rail network took into account as an important consideration the extent to which ARTC's arrangements work together with those at the port to ensure functioning contractual alignment across the entire coal chain. Those arrangements go beyond the direct terms of access and include coordination with the Hunter Valley Coal Chain Coordinator (HVCCC). The ACCC's view in the draft decision is that in relation to the operation of the capacity management provisions in the proposed access undertaking, ARTC should be obliged to conduct a clear and robust consultation process with the HVCCC regarding the impact of decisions made under those provisions on the efficient utilisation of coal chain capacity across the Hunter Valley network.

In such ways the ACCC, through assessing undertakings lodged with the ACCC pursuant to Part IIIA of the Act, can facilitate shared access to bottleneck infrastructure which results in more efficient and effective end-to-end supply chains. The ACCC takes into account the degree to which proposed access arrangements promote efficient use of, and investment in, infrastructure. The certainty of the terms upon which access

will be offered through access regimes encourages infrastructure operators and the businesses that depend on them to be innovative, productive, efficient and to invest when appropriate.

Further development of the National Ports Strategy

The ACCC is pleased to assist with the development of the National Ports Strategy and is available to discuss this submission in more detail.

Contacts

Infocentre: 1300 302 502

Website: www.accc.gov.au

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For other business information go to www.business.gov.au

Addresses

National office

23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

Tel: (02) 6243 1111
Fax: (02) 6243 1199

New South Wales

Level 7, Angel Place
123 Pitt Street
Sydney NSW 2000

GPO Box 3648
Sydney NSW 2001

Tel: (02) 9230 9133
Fax: (02) 9223 1092

Victoria

Level 35, The Tower
360 Elizabeth Street
Melbourne Central
Melbourne Vic 3000

GPO Box 520
Melbourne Vic 3001

Tel: (03) 9290 1800
Fax: (03) 9663 3699

Queensland

Brisbane

Level 24
400 George Street
Brisbane Qld 4000

PO Box 12241
George St Post Shop
Brisbane Qld 4003

Tel: (07) 3835 4666
Fax: (07) 3832 0372

Townsville

Level 6, Central Plaza
370 Flinders Mall
Townsville Qld 4810

PO Box 2016
Townsville Qld 4810

Tel: (07) 4729 2666
Fax: (07) 4721 1538

Western Australia

3rd floor, East Point Plaza
233 Adelaide Terrace
Perth WA 6000

PO Box 6381
East Perth WA 6892

Tel: (08) 9325 0600
Fax: (08) 9325 5976

South Australia

Level 2
19 Grenfell Street
Adelaide SA 5000

GPO Box 922
Adelaide SA 5001

Tel: (08) 8213 3444

Fax: (08) 8410 4155

Northern Territory

Level 8 National Mutual Centre
9–11 Cavenagh St
Darwin NT 0800

GPO Box 3056
Darwin NT 0801

Tel: (08) 8946 9666 (general)

Tel: (08) 8946 9610 (reception)

Fax: (08) 8946 9600

Tasmania

3rd floor, AMP Building
86 Collins Street
(Cnr Elizabeth and Collins streets)
Hobart Tas 7000

GPO Box 1210
Hobart Tas 7001

Tel: (03) 6215 9333

Fax: (03) 6234 7796