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Regional Cooperation: Building Blocks

ASEAN viewed from Australia



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Overview

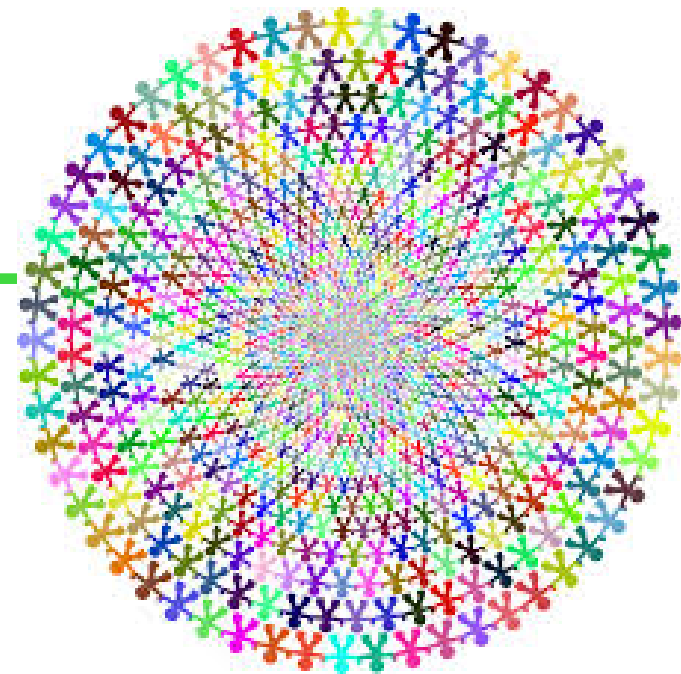
1. Why cooperate?
2. Ways to cooperate
3. ACCC experience
4. ASEAN's opportunity
5. Conclusions



Why cooperate?

Absent international cooperation, we risk being:

- **Less informed**
 - Being aware of international commercial, enforcement trends an important tool for detection and enforcement.
 - Other agencies may have information we don't.
- **Less coordinated**
 - Without consulting international counterparts early in an investigation we risk loss of valuable evidence through destruction before raids; interviews might yield less
- **Less efficient**
 - Knowing how other agencies are running a corresponding matter can reveal shortcuts, new investigative strategies and leads
- **Less effective**
 - As a result of the above factors we would be more challenged to deliver results.
 - There would also be a risk if regulators enforcing inconsistently or in a way that unnecessarily burdens business.

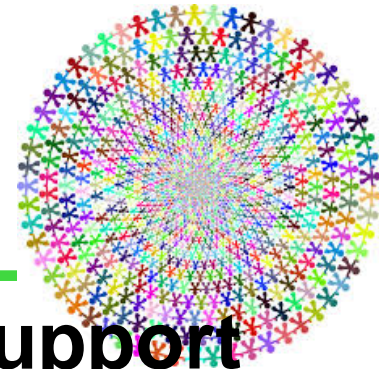


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Why cooperate?



1. Improve agency practices and/or support law reform

2. Share case specific information:

- Non Confidential (e.g. information in the public domain about companies involved in an investigation)
- Agency Confidential (e.g. notification an investigation has commenced; case theory)
- Confidential (e.g. evidence from third parties)

Domestic laws/legal system will dictate what kind of cooperation is possible and what conditions must be fulfilled.



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Ways to cooperate



- International cooperation has become integral to the work of the ACCC.
- Formal mechanisms include:
 - Waivers (e.g. ICN model waivers: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/waiver.aspx>)
 - Gateway provisions (e.g. s155AAA of Australia's *Competition & Consumer Act (2010)*)
 - MOUs (e.g. JFTC-ACCC second generation agreement; ACCC-CCS-NZCC tri-lateral)
 - ICN (e.g. Cartel Working Group *Framework for sharing of non-confidential information*)
 - FTA Competition Chapters
 - Domestic laws (e.g. *Mutual Assistance in Business Regulations Act 1992*, *Mutual Assistance in Criminal Matters Act 1987*, *Trans-Tasman Proceedings Act 2010*)



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Ways to cooperate



- Informal mechanisms include:
 - International fora such as the ICN, OECD Competition Committee, UNCTAD, APEC
 - Capacity building initiatives such as CLIP (managed by the ACCC under the ASEAN-Australia-New Zealand Free Trade Area Economic Cooperation Support Program)



- Most common form of international cooperation undertaken at the ACCC?



Informal sharing of non-confidential information (email, telephone, videoconference, face-to-face)



ACCC case study: Air cargo cartel

- Investigations commenced in 2006
- Proceedings against 15 major airlines – 13 consented to court ordered penalties totalling \$98.5 million
- The High Court unanimously dismissed Garuda's claim of sovereign immunity
- Judgment in proceedings against Garuda and Air NZ
 - court found no market in Australia
 - appeal decision pending



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ACCC case study: International shipping cartel

- Alleged cartel conduct in connection with the transportation of vehicles, including cars, trucks, and buses, to Australia between July 2009 and September 2012.
- Immunity application in mid-2012 and an in-depth investigation commenced in late 2012. ACCC commenced proceedings on 14 July 2016.
- First criminal charge laid against a corporation under the criminal cartel provisions of the *Competition and Consumer Act 2010*.
- Proceedings are continuing against the accused and the ACCC's investigation into other alleged cartel participants is continuing.



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Regional cooperation in ASEAN: Building on a solid foundation

- ASEAN has sagely invested in building regional dialogue on competition enforcement.
- The ASEAN Experts Group on Competition (AEGC) celebrates its 10th anniversary in 2017.
- CLIP project: *Update of the ASEAN Competition Law Capacity Building Roadmap*: one interviewee noted the local competition authority to be the **most internationally connected of all government agencies**.
- The work of the AEGC, under the purview of the ASEAN Economic Ministers, represents a solid foundation for tackling challenges and embracing opportunities for regional enforcement cooperation.
- Many ASEAN authorities are in the process of greenfield or brownfield development of their competition law and enforcer: a window of opportunity to collectively build regional cooperation into the DNA of competition enforcement in ASEAN.

AEGC



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The case for ASEAN cooperation on competition enforcement

- **Strengths**

- Part of an economic block, the AEC



- Geographic proximity
- Similar or shared time zones
- Sustained track record of regional dialogue: a foundation for mutual understanding and trust
- Shared targets, e.g. omnipresent MNCs

- **Potential constraints**

- Different levels/styles of competition law and enforcement
- Language barriers
- Confidence/risk aversion causing reluctance
- High staff turnover/leadership changeover
- The ASEAN way of “non-interference” means an EU styled model may not be suitable



ASEAN-Australia-New Zealand: valuable cooperation happening *now*

- Secondments between agencies including the VCA, PCC, MyCC, CCS, ACCC, NZCC
- Case specific cooperation – e.g. between the CCS and ACCC on the bearings case (NSK, Koyo & Nachi).
- ACCC and KPPU discussion of beef cattle issues.
- Information sharing among economists, e.g. CLIP Economics Workshop in Brunei (February 2017)
- Other confidential engagement in a range of sectors (e.g. recent face to face meeting between the ACCC and an ASEAN regulator for cooperation on a live matter.)



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Conclusions



- While international cooperation entails some cost and complication, the ACCC/international experience shows it to be a worthy investment.
- Divergent systems may complicate but do not necessarily rule out effective cooperation on competition enforcement.
- ASEAN has laid good foundations through the AEGC dialogue.
- ASEAN member states also have an opportunity to proactively anticipate international cooperation in implementing rules and regulations.
- Cooperation is best embarked upon one step at a time. Small wins through low-risk cooperation can gradually be built upon.
- A formal framework is not required to get started.
- Still, the potential benefits of cooperation under a formal mechanism is worth considering (perhaps with opt-in participation to cater to divergent levels of capacity/will to participate).



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