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**Competition Policy Review Panel**  
**Research Paper Summary**

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**Title: Report on Best Competition Advocacy Practices**

**Subjects Addressed:**

- Market/Sector studies
- Organization of regulatory authority
- Government as a market actor
- Regulatory review
- International best practices

*Organization of Industrial Regulation Internationally:*

The research paper reveals that most OECD jurisdictions impose some form of regulation on industries that serve important infrastructure needs or have unique economic characteristics, (esp. public utilities, broadcasting and other telecommunications, and sometimes transportation) however the scope of regulation varies. In regulated sectors usually the Competition Authority is not primarily responsible for regulating the sector, but has full autonomy to apply anti-trust laws to it. Some jurisdictions provide for private enforcement of the competition law through civil litigation, however private enforcement of competition legislation is controversial; arguments for include providing a “back-stop” against regulatory gaps, while arguments against private access revolve around the comparative in-expertise of normal courts and the possibility that private action would frustrate pending regulatory action. Research findings suggest that if a Regulatory Authority has exclusive jurisdiction over a sector [i.e. the law pre-empts the involvement of competition authorities] than that Agency should have competition as one of its key goals and metrics when regulating.

*Governments and Competition Advocacy:*

There are few general findings about the role of governments in competition advocacy but it has become an increasingly important priority of governments in the OECD to prevent themselves from creating barriers to market-place competition. Currently many industrialized countries are instituting review of new regulations for their competitive effect, but have been neglecting a thorough review of existing law, which may be equally deleterious. Australia is one jurisdiction that offers a promising model in both review of existing regulations and screening of new ones.

Australia’s National Competition Policy (NCP) of 1994 was built upon the principle that competition reducing regulation should only stand if it achieves a net public good that cannot be achieved through any other means that had a

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lesser impact on competition; however, the reform process was not institutionalized and it is not clear if it produced a self-sustaining change in the regulatory culture. Strong early performance in Australia's competition review/reform process suggest that "low-hanging fruit" was easily picked while slower progress towards specified goals in later years suggest that there are still some government barriers to competition remaining; the success of the NCC hinged on the Federal government's ability to provide financial incentives and penalties for States' performance in implementing pro-competitive reforms.

Contrasted with Australia, regulatory reform in Japan since 2001 has largely focused on closing the sectoral exemptions in the *Antimonopoly Act* of 1947, and the consequent inability to break-up cartels. However, Japan and Ireland both maintain bodies devoted to regulatory impact analysis for proposed regulations but their precise legal role is vaguely defined; though this has not been a significant barrier to their advocacy work. Only the UK requires all legislative and regulatory proposals to be vetted by competition authorities; this has necessitated preliminary screening of proposed regulations so that the UK competition authority is not overwhelmed by the volume of material it must review. The UK's competition authority has the ability to intervene directly in the regulatory process, conduct autonomous formal market studies (which can lead to proposed legal changes, enforcement action by competition authorities, or consumer education campaigns. Thus there are a variety of modes for competition advocacy (which can be stronger or weaker depending on the jurisdiction): the power to conduct market studies, the right to intervene before boards and tribunals, and the ability to comment on proposed and existing legislation.

Although, there is no pervasive model of the appropriate fusion or division of competition enforcement and advocacy functions in the studied jurisdictions the experiences revealed in the case studies suggest that jurisdictions should incorporate a specific competition criterion into regulatory principles and reviews; this function is presently administered on an ad hoc basis in Canada rather than a legislative one. The paper argues that significantly different skill sets are needed to effectively carry-out enforcement and advocacy functions and that this lends itself to the separation of functions between bodies. To support the review of regulation with competitive effects authorities should also create a triage system of new regulations to ensure timely and meaningful reviews of proposed regulations that could effect competition. To compliment the screening of new regulation research strongly suggests the creation of a systematic process to review existing legislation and regulations for its effect on competition; research strongly suggests that the competition advocacy authority should be independent from other organs of government.

#### *Federalism and Competition Advocacy:*

Federalism is a complication most often found in Anglo-Saxon OECD jurisdictions and is especially prevalent in the US, Canada and Australia. Federal

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governmental systems provide a challenge to reviewing existing and proposed laws for the competitive effect because the review agency may not have effective jurisdiction to mandate change; Australia overcame this issue through the use of federal fiscal power, whereas the US relies on the legal doctrine emanating from *Parker v. Brown* to bring anti-competitive legislation of lower jurisdictions into compliance.

#### *Competition Advocacy in Canada:*

The research paper indicates that Canada has a well placed competition regime: there are few exemptions to the *Competition Act*, where there is regulatory overlap the relationship between regulators and competition authority is co-operative, and the Competition Commissioner is proactive in his advocacy role (esp. vis-à-vis standing committees of Parliament). Nevertheless, like other federal systems, Canada faces a challenge to reviewing existing and proposed laws for the competitive effect because the review agency may not have effective jurisdiction to mandate change. The Competition Bureau also lacks a major advocacy tool in that it cannot intervene in judicial proceedings that may be relevant to competition policy. Competition authority intervention in judicial proceedings is important in the U.S. and has become permissible in the EU (with Ireland contemplating greater scope for this measure) but is not significant in other jurisdictions, indicating that Canada is not unusual in this respect but that it is also not emulating international best practices.

All reviewed jurisdictions, except Canada, provide their competition authorities with the power to conduct market studies; however, the freedom to autonomously initiate them varies. Research suggests that these can be an important tool for assessing the competitive effects of regulations. The research paper argues that Canada should grant an agency the explicit authority to conduct market studies and notes that the OECD recommended in 2005 that the Competition Bureau be given this task because of its expertise.

#### Conclusion:

The experience of several comparator jurisdictions indicates that Canadian authorities could be doing more to prevent government itself from being a barrier to effective competition in the country, despite the fact that Canada's competition regime compares favourably with other countries. The research paper argues that Canada should more pro-actively seek-out and adopt international best practices to maintain its position as a competition friendly jurisdiction. Research reveals that competition advocacy in other jurisdictions is conscious and supported by legislative authority and institutions devoted to the task, whereas in Canada it is *ad hoc* and competition advocates are undermined by a lack of a clearly specified mandate.