

GUIDE TO COMPETITION LAW AND COLLECTIVE PROCUREMENT

Compliance with the Competition Law requires health services to consider the effects of the procurement activity on competition in the market.

Background

HPV identifies collective procurement opportunities and manages the sourcing projects to achieve savings and benefits for mandated health services across Victoria.

There may be further opportunities at a local or regional level for health services to combine to conduct their own collective procurement to take advantage of savings and efficiencies that would result from combining spend and resources.

When such opportunities arise health services are required to comply with the competition laws, including the Competition and Consumer Act 2010 (Cth) (the Competition Act). Under the Competition Act it is unlawful for a health service(s) to enter into a contract or arrive at an understanding with another party which has the purpose or effect of substantially lessening competition in a market. There is potential for health service(s) collective

procurement activities to have this unintended effect because the purchasers are able to aggregate their buying power, which could have an anti-competitive effect.

The Competition Act will also prohibit a health service(s) that has a substantial degree of power in a market of substantially lessening competition in the market¹.

Health services should assess the risks involved in undertaking collective procurement activities and take steps to manage the risks. This may include obtaining independent legal advice.

Health services concerned about the potential risk of breaching the CCA should contact HPV, directly or through their Regional Procurement Advisor, to discuss the potential for HPV to assist.

The key considerations in assessing the risk are:

1. Identifying the market

Description	Comments
Health services should consider the market in which they are procuring goods or services. The Competition Law defines market to include the market for goods or services that are substitutable for, or competitive with, the goods or services.	Health services should identify the number of suppliers and purchasers in the relevant market. The relevant market may be defined by reference to the following elements: <ul style="list-style-type: none">the type of goods or services which are being procured,period of time for which the health service will be bound by the contract to purchase the goods or services,the level (for example: manufacturing, wholesale, retail), andthe area in which the goods or services are being supplied.

¹ This is based on the recommendation of the Harper review, legislation for which has been foreshadowed by the Federal Governments

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2. How competitive is the market?

Description	Comments
<p>Once health services have identified the market, they should consider the extent to which the market is competitive.</p> <p>Conversely, market power is concentrated and the market may not be competitive if those conditions do not exist.</p>	<p>Although competition in a market is a relative concept, a market which is 'perfectly competitive' will generally have the following features²²:</p> <ul style="list-style-type: none"> • there will be a large number of suppliers and purchasers, • the market share of each participant will be small, • each market participant has access to all the relevant information about the market, • the product offered by each supplier is functionally the same, and • there are low barriers to entry and exit.

3. Identifying the health service's market power

Criteria	Comments
<p>Market power may be concentrated in a purchaser if there are many suppliers relative to few purchasers. In order to determine whether the health service has substantial power in the market the health services should consider whether its conduct is constrained by its suppliers.</p>	<p>Health services should consider:</p> <ul style="list-style-type: none"> • Can the health services impose its terms of trade on the supplier(s)? • If the health services didn't purchase from a supplier, could the supplier find another buyer for its goods or services? • How reliant is the supplier on the health services buying from it (how much of the supplier's business comes from the health services)? • If the health services can impose its terms of trade on the supplier, it is more likely that the health services have substantial power in the market. • If the supplier could find another buyer for the goods or services, it is less likely that the health services have substantial power in the market. • If the health services are a very large customer relative to the suppliers other customers, it is more likely that the health services have substantial power in the market

² Application by Chime Communications Pty Ltd (No 2) [2009] ACompT

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4. Identifying the effect on competition in the market

Criteria	Comments
<p>It is unlawful for a health service to:</p> <ul style="list-style-type: none">engage in conduct (on its own or together with other health services) which has the purpose or effect of substantially lessening competition in a market,enter into an arrangement with another entity to collectively procure the goods or services if this arrangement will have the purpose or effect of substantially lessening competition in a market.	<p>Health services need to consider the competition in the market with and without the collective procurement initiative. In some situations, the market power of health services may be aggregated to 'neutralise' the market power of suppliers. This can make the market more competitive and could lead to suppliers lowering their prices or offering better service levels.</p> <p>It is also possible for collective procurement activities to lessen competition in a market by making the market power of purchasers more concentrated. Further, such an arrangement could force a supplier to exit the market which would make the market less competitive over the long term. If health services are concerned about these effects, it should take steps to manage the risk. Refer to "Managing the risk – risk mitigation strategies".</p>

Managing the risk – risk mitigation strategies

Risk minimisation

If health services have concerns about its conduct contravening the Competition Act, there are measures which may be implemented to minimise the risk. These measures may include:

- conducting an open tender for the goods or services,
- considering whether a single or multiple suppliers should be appointed,
- considering whether the supplier will have the exclusive right to supply the goods or services to the health service(s),
- considering the appropriate term of the agreement,
- requesting assistance from HPV in managing the tender process and contracting with a supplier, and
- (if relevant) obtaining authorisation from the ACCC.

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Market Assessment

The following tables may be used to determine the competitiveness of the market and whether the collective procurement should proceed. It is based on the [HPV Market Analysis Tool](#) (Porter's Five Forces) which is located on the HPV website. The tool is designed to assist with identifying the impact of a collective agreement on the competitiveness of the market. A [separate word template](#) is provided for download from the HPV website.

The Market Assessment should be completed as part of step 3, Analysis, in the HPV Procurement Model.

Identifying the market:

Health services should consider the market in which they are procuring goods or services. The Competition Law defines market to include the market for goods or services that are substitutable for or competitive with the goods or services.

Defining the market in broader geographic and category terms may increase the number of potential suppliers and therefore competition. Consideration of new entrants and product substitution may assist in defining a broader category.

Description	Considerations	Suggested Evidence	Comments (Summary of research)
Possibility of New Entrants			
Power is also affected by the ability of new entrants to enter the market. In the context of a collective agreement, if it costs little in time or money to enter the market and compete effectively, and if there are few economies of scale in place, then new competitors can quickly enter the market resulting in a more competitive market.	The barriers to entry such as time and cost. Number and size of incumbents which may make it difficult for new businesses. Economies of scale. If high volumes are required to be cost competitive then significant capital investment may be required. Cost advantages of incumbents. Such as capital equipment having been fully depreciated, Technology/IP protection in place limiting new entrants.	Relatively new industry therefore there are new businesses being attracted. Profitable industry attracting new entrants. Existing and proven technology in place. No IP required to enter market.	
Possibility of Substitution			
Substitution refers to alternatives to the good or service that have the same function as the supplier's offering. If substitution is easy and substitution is viable then the more competitive the market.	Availability of substitutes which could expand the category definition therefore creating a larger market and competition.	Products and services are generic in nature. Differentiation between suppliers is mostly around cost and performance.	

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Competitiveness of the market.

Once health services have identified the market, they should consider the extent to which the market is competitive, although competition in a market is a relative concept.

Description	Considerations	Suggested Evidence	Comments (Summary of research)
How competitive is the market?			
Greater number of suppliers implies greater competition reducing the anti-competitive effect of collective procurement.	<p>Number of suppliers in the market and the end to end supply chain.</p> <p>Uniqueness of the service or products.</p> <p>The geographical area defined in the category plan.</p> <p>Market share of each supplier.</p> <p>The fewer supplier choices your suppliers have, and the more they need their suppliers' help, the more powerful their suppliers are, and the less control they have over their prices.</p> <p>Consider uniqueness of products and services that are being purchased, strength and control, switching costs etc.</p>	<p>A large number of suppliers.</p> <p>The supply chain has many inputs and many suppliers providing the inputs.</p> <p>Inputs for suppliers are easily substitutable.</p> <p>A large market area would increase the chances of including more suppliers, therefore increasing competition.</p> <p>How easy is it for suppliers to hold or drive up prices? Supplier's prices may be driven by volume of key inputs for manufacturers, raw materials etc.</p>	

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Market power

In order to determine whether the health service has substantial power in the market the health services should consider whether its conduct is constrained by its suppliers. In some situations, the market power of health services may be aggregated to 'neutralise' the market power of suppliers.

Description	Considerations	Suggested Evidence	Comments (Summary of research)
Identifying the health service's market power			
The resulting market power in the collective agreement may drive prices down. This may be driven by the number of health services in the market and the importance of the collective agreement to the supplier. The collective agreement may result in ability to dictate terms to suppliers.	<p>More buyers in the market the less chance of domination by a collective agreement.</p> <p>Proportion of market represented by the collective agreement</p> <p>Would the collective agreement result in the health services' own terms of trade being imposed?</p> <p>How easy is it to drive prices down via the collective agreement? This is driven by the number of customers in the market, the importance of the collective agreement to the supplier, the cost of switching from one supplier's products and services to another's.</p>	<p>Few customers in the market resulting in the supplier not being able to easily move to new customers.</p> <p>Proportion of supplier's business from collective agreement would have significant impact if there were a change of suppliers.</p> <p>If the collective agreement is a significant proportion of the supplier's business, does it represent excessive power?</p>	
Rivalry Among Existing Competitors			
Where there are many competitors, and they offer equally attractive products and services, then the more competitive the market. Also if no-one else can provide the same product/service, then there will be limited strength in the negotiation of the collective agreement.	<p>Large number of competitors with not one dominating. Quality differences amongst suppliers creates competition. Other factors to differentiate between suppliers.</p> <p>Low switching costs: more likely to change supplier.</p> <p>No customer loyalty.</p>	<p>Suppliers have been in the market for a very long time.</p> <p>It is a mature industry</p> <p>It is difficult to obtain cost reductions through further improvements in processes.</p>	

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Recommendation

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Suggested content:

- Brief overview of category and list of health services participating in the collective sourcing project.
- Summary of the analysis above and overview of the market possibly focussing on
 - possibility of new entrants and the impact on the procurement project
 - number of potential suppliers and what the impact is on the competitiveness of the market
 - the size of the category compared to the size of the market and what power would the combined health services have on the market
 - the risks and how they will be managed and mitigated.
- Recommendation on whether to proceed or not and why.