

Submission to Competition Policy Review on the Draft Report 2014

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Introduction

The Competition Policy Review Panel's *Draft Report* contains a number of commendable recommendations for the reform and simplification of Australia's competition laws. This submission focusses on some of the key proposals relating to the competition law provisions of the *Competition and Consumer Act*.

Purpose of competition law and policy

The Panel has (appropriately) endorsed in its *Draft Report* a competition policy focus on 'making markets work in the long-term interests of consumers' and has focussed on the importance of 'choice' as an outcome of an effective competition policy. This consumer welfare focus is consistent with the approach taken by most national competition authorities. The Panel has also appropriately clarified the purpose of competition law as being the protection of competition and not individual competitors.

It is suggested that the Panel recommend an amendment to the objects clause of the Act to reflect this focus. Although the *Draft Report* makes reference to s 2 of the Act, which contains an objects clause, that clause does not make clear whether or not the application of competition laws is intended to advance consumer or total welfare. It may be that it is deliberately vague on this point. However, it is suggested that this lack of clarity is undesirable, particularly given the ongoing and often highly politicised debate about the role of Australia's competition laws, particularly as they relate to small business. A clear objects clause, highlighting a preference for a consumer welfare (as opposed to a producer or total welfare) approach to the application of the competition law provisions of the Act would also provide an appropriate basis for examining efficiency and other public benefit claims.

Anti-competitive agreements, cartels and price signalling

Simplification of cartel laws

Draft recommendation 22 proposes appropriate changes to the cartel conduct prohibition, which is currently unnecessarily complex and, in the case of joint ventures, unnecessarily restrictive. In particular, the existing restrictive joint venture exemption was the product of political expedience; no justifiable policy grounds were proffered for the limitation of the exemption to contractual joint ventures. The proposed simplification of the cartel laws and the broadening of the joint venture exemptions is, therefore, appropriate.

Exclusionary conduct

Draft recommendation 23 recommends repealing the prohibition on exclusionary provisions. It is argued that the prohibition is unnecessary because in practice the conduct captured is materially the same as market sharing cartel conduct. Some forms of conduct currently prohibited as exclusionary provisions would also be captured as output restriction in s 44ZZRD(3)(a). On the assumption that overlap is such that all key forms of exclusionary conduct currently captured by s 45/s4D would be captured by the cartel laws, the proposed repeal of the specific exclusionary conduct prohibition is supported.

Repeal price signalling laws

Draft recommendation 24 appropriately recommends the repeal of the price signalling laws. They are poorly drafted and, particularly in relation to private disclosures, are out of step with international best practice. They are also inappropriately industry-specific. There is a legitimate concern about the restrictive interpretation of 'understanding' in the current legislation and its failure to capture anti-competitive concerted practices. The proposed introduction of a prohibition on anti-competitive concerted practices is appropriate; in particular, it is to be preferred over the existing price signalling laws.

Misuse of market power

The misuse of market provision has been reviewed an inordinate number of times and will remain controversial regardless of any change introduced. Many of the numerous reviews on the provision expressed hope that the law would be 'clarified' in future and this, in part, resulted in a recommendation to retain the status quo. The provision has now been tested on several occasions and concerns, particularly around the application 'take advantage' element, remain considerable.

Proposed effects test

The current absence of an effects test in s 46 is inconsistent with the approach taken elsewhere in the Act and with international best practice. The proposed substantive prohibition in *draft recommendation 25* is appropriate. However, the proposed defences pose some concerns.

The introduction of an effects test requires that some mechanism be retained for distinguishing between pro-competitive conduct (such as successful product innovation) and

anti-competitive conduct which is made possible only by virtue of the existence of substantial market power. However, the defence proposed appears to go further than necessary to ensure this connection is established. It is suggested that the first limb of the defence ('would it be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market') would be sufficient to establish this connection. In particular, it appropriately connects the conduct to the market power. It is also clearer than the existing 'take advantage' element, which has sometimes been established on the basis that a firm without market power 'could' engage in the same conduct, regardless of whether it would be rational to do so.

If there remained a concern that this defence would be too easily established in cases where the conduct was unlikely to benefit the long-term interests of consumers, it is suggested that where the 'rational business decision or strategy' defence was made out, the onus should revert back to the ACCC or other claimant to demonstrate that the effect or likely effect of the conduct would not benefit the long-term interests of consumers.

Retention of purpose test

It is suggested that, in addition to the introduction of the purpose or effect of substantially lessening competition test proposed above, consideration be given to retaining the existing prohibition, modified by the removal of the 'take advantage' element.

The proposed effects test would not capture conduct which deliberately targeted individual firms. Although the overriding policy objective of the CCA is (and should be) to protect competition, not competitors, it is suggested that in the case of firms with substantial market power, it is appropriate that predatory conduct having the *purpose* of eliminating, substantially damaging a competitor or preventing a person engaging in competitive conduct should nevertheless be prohibited. This conduct damages *competition*, even if not substantially in each individual instance. A major corporation which, for example, engages in predatory pricing activity or other exclusionary conduct which prevents a new entrant from competing, harms competition in the long term by deterring entry, expansion or other competitive conduct by smaller participants. Individual instances of such conduct might not be prohibited under the proposed competition test precisely *because of* the level of market power held by the incumbent, but should be considered unlawful abuses of power. Such conduct is appropriately prohibited because it has as its object the elimination of rivals and, by extension, harm to the *competition*.

Removal of the take advantage element should not risk capturing *competitive* conduct, such as innovation leading to new products or other improved efficiencies. These might have the effect of damaging a competitor, but do not have this *object* (purpose).

No divestiture remedy

For the reasons expressed by the Panel, no divestiture remedy should be available for contraventions of s 46.

Related provisions

The recommendation to remove the Birdsville amendment and other post-2007 amendments to the legislation is appropriate. The Birdsville amendment, in particular, was largely politically driven and is not supported by any sound policy rationale and is inconsistent with international best practice, particularly in its adoption of market share thresholds.

Exclusive dealing

The Panel's *Draft Report* recommends that the per se ban on third line forcing be removed (*draft recommendation 27*) and that the exclusive dealing provisions be simplified (*draft recommendation 28*). Both recommendations are sound and should be implemented. The volume of third line forcing notifications allowed to stand make clear that the conduct is not always (or often) anti-competitive and that the per se ban is not justified. The remainder of s 47 is unnecessarily complex and would benefit from the proposed simplification.

The Panel is to be commended for recognising that a full repeal of s 47 would not be appropriate; in particular, section 45 would not capture all vertical conduct of concern (such as refusals to supply) that are appropriately captured by the exclusive dealing provisions.

Resale price maintenance

The retention of the per se ban on resale price maintenance is appropriate (*draft recommendation 29*). Although there have been some moves to remove a per se ban on RPM in some jurisdictions (most notably at the federal level in the US), these moves have been controversial and there is no universal consensus on the appropriate approach to RPM. There is some evidence that removal of per se bans on RPM in some US states have led to price increases (which is to be expected). There is also no evidence that the per se ban in Australia has had any significant adverse consequences on business activity. Authorisation has been available for this conduct; to date only one application has been made and it appears it will be supported by the ACCC. Given the potential for RPM conduct to produce consumer harm, and given its prevalence in Australia prior to the introduction of the Trade Practices Act, the Panel's more cautious approach of retaining per se prohibition while introducing the option of notification is to be preferred.

Mergers

The Panel's *Draft Report* appropriately supports the retention of the substantial lessening of competition test for mergers in s 50, consistent with international best practice. The Panel also appropriately supports the retention of the informal merger notification process; in particular, it does not recommend introduction of a mandatory pre-merger notification process. Although this represents a departure from the international norm, it is justified based on the size of the Australian economy and the development by the ACCC of an effective

alternative in the form of informal notification, which is widely recognised as suitable (and preferable) for the vast majority of mergers.

The formal merger clearance system introduced following the Dawson Review has, however, failed to provide a viable alternative to informal clearance for parties to highly complex mergers. The proposed combination of the formal clearance process with the authorisation process (*draft recommendation 30*) would represent an improvement on the current system. This would ensure that both competitive effects and countervailing public benefit could be considered in a single process and would help to expedite the review process.

In the event that the two processes are combined, it is appropriate that there be a two stage process; in particular that there be a possibility for merits review. Consequently, *draft recommendation 30*, that the ACCC to be the decision-maker at first instance subject to review by the Australian Competition Tribunal, should be supported.

Authorisation and notification

The proposal to expand and simplify the authorisation and notification process is strongly supported (*recommendation 34*). The authorisation and notification provisions are currently unnecessarily complex and require an unnecessary duplication of process for single transactions. Allowing the ACCC to grant authorising or accept notification where conduct is not likely to substantially lessen competition, even absent any other demonstrable public benefit, ensures a focus on the core concern of the legislation – impact of conduct on the competitive process - while still permitting consideration of public benefit factors in the event of market failure.

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