



Tuesday, 10<sup>th</sup> June 2014

Competition Policy Review Secretariat  
The Treasury Langton Crescent  
PARKES ACT 2600

Lodge online at [www.competitionpolicyreview.gov.au](http://www.competitionpolicyreview.gov.au)

Dear Competition Policy Review Secretariat

## **Response to the Competition Policy 'Review Issues Paper**

### **1. Introduction**

1.1 The Motor Trades Association – Queensland (MTA Queensland or The Association) responds to the Competition Policy Review Panel's call for submissions to the *Competition Policy Review Issues Paper* (Issues Paper). The MTA Queensland's comments are on behalf of its constituent Divisions and are confined to issues which relate to the interests of the Queensland automotive value chain.

1.2 This submission refers to three chapters in the Issues Paper. These are:  
Chapter 1 - *Competition Policy*,  
Chapter 5 - *Competition Laws*, and  
Chapter 6 - *Administration of Competition Policy*.

### **2. Competition Policy (Chapter 1)**

2.1 The review of Competition Policy comes at a critical time in the evolution of the policy's framework to support the next generation of Australian industry development and economic growth. The economy is undergoing a fundamental transformation. There has been and continues to be capacity shedding in the resource sector and restructuring in manufacturing. The importance of Small Business / Medium Enterprises (SMEs) as the drivers of growth is assuming greater importance in economic policy and, increasingly is taking up the capacity shed by the majors.

2.2 Competition policy is a necessary element of Australia's economic agenda to enable the growth and development of a balanced and equitable economy. Whilst this policy has many aspects, the MTA Queensland's submission will focus on the elements that apply to SMEs. The Association confines its views to the concepts of Competition Policy as a way of providing market place equity for stakeholders and as a stimulant to the economic development of regional and national economies.

2.3 The Competition Policy framework has evolved to a point where it has the competence to support the growth and development of an extensive middle stratum of industries provided the

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administration and operational arrangements are effectively resolved. From the perspective of the MTA Queensland, for the evolving framework to be effective, key issues need to be addressed including:

- In the case of SMEs, the dominant issue is having a statutory framework that ensures equity and a balance between business to business transactions in the market, and provides recourse where anticompetitive behaviour causes economic injury;
- A need to redefine what constitutes small to medium business. To date the emphasis has been on absolute definitions based on scale. We strongly support the adoption of one based on relativity. That is an enterprise, irrespective of its size that can be subjected to unconscionable behaviour or injured by improper imposition of economic or market power in a business transaction with another enterprise, should be considered a small to medium enterprise relative to which it does business. (E.g. if a \$100 million enterprise is doing business with a conglomerate such BHP Billiton, the \$100 million enterprise is a small business relative to this relationship.)
- The recognition that SMEs are ‘consumers’ when dealing with a larger business and should be accorded protection in these situations. The foreshadowed legislative reforms to business to business standard form contract provisions relating to unfair terms and conditions are important as they will confer the rights of a consumer on small business.
- Equity for SMEs is dependent on recourse to Competition Policy in circumstances where they have been subjected to unconscionable behaviour or market or financial power, and are likely to suffer economic injury. It is important therefore, that legal precedents or statutory definitions are established if the framework is to effectively operate in a judicial or administrative environment.

### **3. Competition Laws (Chapter 5)**

3.1 The MTA Queensland provides the following responses to selective focus questions that are relevant to its Membership in the automotive value chain.

3.2 *Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?*

The current framework of competition laws have been the subject of contestability and legal debate financed by large corporations. This does not allow SMEs to have timely and cost effective recourse when they are faced with anticompetitive behaviour. The essential issue confronting the ability of the framework to secure equitable and balanced market places for all participants is the difficulty in defining when behaviour to protect legitimate commercial interests of a corporation transgresses into unconscionable behaviour, and when legitimate contracts impose unfair terms and conditions due to market power on smaller parties in the market place.



- 3.3 *Given structural changes in the economy over time, do the definitions of 'market' in the CCA operate effectively, and do they work to further the objectives of the CCA?*

The definition of 'market' does not appear to be as critical as the defining of market power and unconscionable conduct.

- 3.4 *Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?*

The misuse of market power can be attended to in large part if SMEs are accorded the status of consumers under the CCA. An initial step would be to extend the provisions of the unfair terms and conditions protections currently available to consumers to business to business in standard form contracts.

- 3.5 *Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?*

See 3.4 above.

- 3.6 *Are there other measures that would support small and medium sized business participation in markets?*

The unfair and conscionable provisions are seminal to the effective working of the CCA in respect of SMEs. Presently, there is a lack of legal precedent or statutory definition that establishes the scope of unconscionable behaviour. This denies SMEs effective recourse because of the cost and time of litigation. The Australian Competition and Consumer Commission (ACCC) in taking the Coles Supermarket to the Federal Court on the basis that, inter alia, it acted unconscionably. If successful this would establish a very necessary legal precedent. It appears important that the ACCC undertakes such legal action when appropriate, so that a body of precedent can be established which would facilitate the resolution of disputes involving unfair and unconscionable conduct.

- 3.7 *Should the recommendations in the Productivity Commission's report on the National Access Regime be adopted? Are there other changes that could be made to improve competition in the relevant markets?*

The NAR deals with a very difficult and sensitive commercial matter. There would be considerable advantages to the Australian economy and particularly SMEs if they could obtain access to under utilised assets or infrastructure and surplus capacity. This should be done on fair and reasonable commercial terms. Inevitably, the corporate owners of excess infrastructure or communications capacity deny such access to third parties, the ACCC would need to be given comprehensive powers if such access was to be achieved and the economic benefits secured for industry and the national economy.



3.8 *Should the price signaling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?*

Referring to the automotive value chain, the provisions covering the private disclosure of pricing or other confidential price sensitive information should be extended to all participants in this sector. E.g. motor vehicle insurance companies now are vertically integrated with motor vehicle collision repair enterprises. Yet their agreements with authorised independent repairers require as a precondition, the declaration of the cost structures for repairing vehicles as a prerequisite to be accredited as an authorised repairer.

3.9 *How accessible is the collective bargaining process for small businesses, and can they use it without requiring substantial legal assistance or advice?*

The MTA Queensland has found the approach by the ACCC to requests for collective bargaining to be facilitative.

3.10 *Is the code framework leading to a better marketplace, having regard both to the aims of the rules and the regulatory burden they could create?*

There are a number of codes that relate to the automotive value chain. The most significant is the Franchise Code which is evolving to accommodate changes in the market place and, it like the general competition framework, has to deal with the inequity that exists between usually large franchisors and less powerful franchisees. In general, the Franchise Code has the competence to handle most issues relating to franchising and it appears to have the competence to replace sector specific regulation such as the Oilcode.

3.11 *What has been the experience of businesses in the use and implementation of codes of conduct?*

The individual Codes relating to the automotive industry value chain are micro-reflections of the issues facing the competition policy framework. That is, they also have to deal with unconscionable conduct and anti-competitive behaviour arising from the unfair use of market power.

3.12 *Are the enforcement powers, penalties and remedies, including for private enforcement, effective in furthering the objectives of the CCA?*

The enforcement powers and penalties arising from the ACCC versus Coles Supermarket currently before the Federal Court will be the benchmark. We note in this instance, that individual directors and executives are subject to the prosecution as is the corporate entity.

3.13 *What are the experiences of small businesses in dealing with the ACCC?*

The MTA Queensland has had long and satisfactory engagement with the ACCC on matters of mutual interest.



#### **4. Administration of Competition Policy (Chapter 6)**

- 4.1 *Are competition related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?*

Inasmuch as this relates to the ACCC, we are of the view it should have sufficient powers, financial and intellectual capacity to be able to administer the complex legislation and regulation in an environment where business is developing sophisticated and corporate structures. These need to be evaluated for their effect on the market place as far as business to business competition is concerned and ultimately the cost to the consumer and the national economy.

#### **5 The MTA Queensland background**

5.1 The MTA Queensland is the peak organisation in the State representing the specific interests of businesses in the retail, repair and service sector of the automotive industry located in Queensland. There are some 14,000 automotive value chain businesses employing in excess of 73,300 persons operating within the State.

5.2 It is an industrial association of employers incorporated pursuant to the Industrial Relations Act of Queensland. The Association represents and promotes issues of relevance to the automotive industries to all levels of government and within Queensland's economic structure.

5.3 The Association is the leading automotive training provider in Queensland offering nationally recognised training, covering all aspects of the retail motor trades industry through the MTA Institute of Technology (MIT). The MIT the largest private automotive apprentice trainer in Queensland employing 26 trainers based from Cairns to the Gold Coast and Toowoomba and Emerald. MIT last financial year accredited courses to in excess of 1500 apprentices and trainees.

#### **6 Conclusion**

6.1 We would be pleased to provide further comment on any matters in our submission that may require further clarification or amplification.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kellie Dewar', written in a cursive style.

**KELLIE DEWAR**  
General Manager