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Competition Policy Review Secretariat
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Dear Competition Policy Review

COMPETITION POLICY REVIEW SUBMISSION

Thank you for the opportunity to provide input to this Review.

The NSW Business Chamber (the Chamber) is one of Australia's largest business support groups, with a direct membership of more than 16,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

General competition policy and law

The Issues Paper observes that:

Many of Australia's key markets are relatively concentrated...This is due partly to Australia's small population, distance between and to key markets, and also reflects our history of national development.
(p.1)

The Chamber is skeptical about the capacity of competition policy to alter this state of affairs. Often market concentration is simply the result of underlying economic realities, such as economies of scale or the tyranny of distance. Where concentration has arisen, it is inevitable that existing firms will use their market power to protect their position from competitors and deliver better outcomes in dealings with suppliers and customers.

As such, a key focus for competition policy should be dealing with the reality of highly concentrated markets that are likely to persist for many years. Unfortunately, it is also difficult for competition policy to prevent market power from being used in an inefficient or anti-competitive way without also stymying legitimate competition or normal commercial negotiations. Even the enforcement of existing law is extremely challenging and resource intensive.

Of course, there remain a number of ways that competition policy could be improved, at the margin.

NSW Business Chamber incorporates:

- Sydney Business Chamber
- Australian Business Solutions Group
- Australian Business Industrial
- Australian Business Defence Industry Unit

Firstly, the Chamber encourages the Review to devote significant effort researching the current competitive environment and any costs that it imposes. It could be argued that if there are no cost effective solutions then the current situation is optimal and there is no problem. However, we contend that a lack of obvious solutions makes it even more important to spell out the underlying problem. In this regard, the Chamber notes that the Terms of Reference direct the Review to:

4.1. examine the structure and behaviour of markets with natural monopoly characteristics with a view to determining whether the existing regulatory frameworks are leading to efficient outcomes and whether there are opportunities to increase competition;

4.2. examine whether key markets – including, but not limited to, groceries, utilities and automotive fuel – are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains;

It is also important for the Review to recognize that competition policy is about delivering better outcomes for businesses as well as consumers. Clearly, competition policy should not seek to protect uncompetitive businesses. However, the effect that a firm with market power has on its suppliers is just as problematic as the effect it has on its customers. Monopsony and monopoly are both inefficient, and cheaper prices for consumers can actually reduce overall welfare if they are the result of downstream firms exercising market power against their upstream suppliers, as the savings made by consumers are outweighed by the overall deadweight loss.

With respect to changes to competition law, the Chamber is supportive of the introduction of unfair contract terms for small business, as a mechanism for limiting the use of market power in commercial negotiations. However, the effectiveness of these provisions will not become clear until they are actually implemented. Anecdotally, many SMEs have contracts with larger businesses that would be considered unfair. However, businesses may not be willing to risk their commercial relationship in order to enforce their rights.

A prerequisite to effective laws is access to justice. The Panel is obviously aware of the Productivity Commission's research regarding this issue, and the Productivity Commission's findings accord with feedback that the Chamber has received from members.

The Chamber supports the introduction of a cheaper forum for resolving competition issues to allow small businesses to more effectively enforce their rights. We do not have a specific model in mind. However, it is vital

that such a forum has access to sufficient expertise. As such, establishing specialized tribunals may be more appropriate than simply allowing more matters to be heard in the Federal Magistrate's Court.

The Review should also consider establishing a fund to allow small and medium businesses to take action on competition issues separately from the ACCC. While a process would still be required to assess the merits of proposed actions, this may provide an opportunity for businesses to pursue cases that are less high profile than those that the ACCC normally deals with.

International price discrimination

It is well established that Australian households and businesses often pay more for products than their counterparts overseas. In some cases, these higher prices may be the result of higher costs. However, there is also undoubtedly a degree of price discrimination. Australian customers are generally more affluent, and there is also generally less competition than in other markets such as the US or UK. Suppliers would be acting against their own interests if they did not use these facts to improve their profits.

Price discrimination can improve efficiency because it means a supplier with market power can consider whether to supply a product based on the price it can charge at the margin, rather than having to take into account the change in the average sale price of its products. However, improved efficiency comes at the cost of reduced welfare for consumers. Within the domestic economy it is plausible that these distributional issues wash out, as businesses use the additional income earned to pay employees and shareholders, or purchase other inputs. However, in the context of the prices paid for imported goods, Australia seems a relatively unambiguous loser from international price discrimination.

International price discrimination is clearly a problem for Australia, but that doesn't necessarily mean that there is a feasible solution. Canada has recently responded to international price discrimination by announcing the introduction of laws to prevent companies from using their "market power to charge higher prices in Canada that are not reflective of legitimate higher costs". However, there appears to be a significant amount of uncertainty about the enforceability of this law because of the difficulty in identifying legitimate cost differences. It may also be possible for companies to circumvent such a law by making small variations in their products to justify the cost differences.

Such a law would make companies selling into Australia reluctant to price discriminate to such a degree that it is obviously not the result of cost differentials. Companies could also incur adjustment costs, but probably only if they are already engaging in a country pricing strategy, and if the company already price discriminates it will be difficult for it to pass these costs on to the domestic population. It is possible that an anti-country

pricing law could be followed by retaliatory legislation in other countries. However, it is not clear whether this is likely to occur or whether it would affect Australians significantly if it did.

On balance, the benefits of action on country pricing appear to outweigh the costs, but it would be appropriate for the Australian Government to observe the results of the Canadian changes before acting.

Inconsistent regulatory enforcement and surveillance

Inconsistent enforcement of regulation can confer unfair advantages on businesses that are treated more leniently. While a lack of effective surveillance can mean that some businesses gain an edge over their competitors by disregarding regulatory restrictions.

According to the NSW Business Chamber's 2013 Red Tape Survey, 59 per cent of businesses agree or strongly agree that inconsistent enforcement is a concern for their business. In contrast, only 43 per cent are concerned that enforcement is overly strict – although 63 per cent are concerned that the rules themselves are overly strict.

Inconsistent enforcement is particularly problematic where approvals or licenses are assessed on the basis of general merit, as compared to regulatory regimes where approvals or licenses are granted on the basis of the applicant meeting predefined criteria. The consideration of development approvals by local government is an obvious example of an area of regulation where there is a significant risk of inconsistent decision making. A less obvious example is the treatment of tax debts, where, anecdotally, the payment terms agreed to by the ATO can differ significantly between staff members, and may mean that some businesses can access finance more cheaply than others.

In some situations, regulations can be so strict that they drive non-compliance beyond a degree that can be cost effectively enforced. An example of this is waste regulation in NSW, where the Waste Levy is so high that it has created significant incentives to dump waste illegally or to truck waste from Sydney to Queensland, which has a lower levy. To combat this, the Environmental Protection Authority is seeking to introduce further red-tape, such as weigh bridges and surveillance equipment at all waste facilities.

Impact of planning restrictions on retail competition

The Productivity Commission recognised in its 2011 review of the *Economic Structure and Performance of the Australian Retail Industry* (the PC Review) that planning and zoning regulation appears to be the root cause of many of the problems that arise in retail tenancy.

As planning regulation can restrict the number and use of retail sites, they can also confer significant negotiating power on established landlords and restrict commercial opportunities for others.

In circumstances where there is a large shopping centre landlord and many small tenants competing for limited retail space, imbalances in negotiating power are likely to exist. Without any other options available for tenants, the landlord can simply operate on a “take it or leave it” basis.

As the Australian Retailers Association commented in its submission to the PC Review:

Where a general retail shopping centre is permitted, there is invariably an exclusive zoning which excludes any further development of a competing shopping centre in a similar area. As such, the existing shopping centre is granted an effective monopoly on the marketplace for consumers wishing to shop from a shopping centre in that area.

It is a false assumption to think that a shopping centre retailer can choose to relocate out onto the strip in the same area if they don't like the centre operators. Invariably, the retailer is forced to meet the shopping centre's terms because retailing from the outside strip is simply not commercially viable and any relocation will almost certainly realise the failure of that business.

(sub. 71, p. 7)

Removing unnecessary constraints on planning and zoning regulation would help new development and increase competition in the marketplace. It would also help “level the playing field” for small retailers, especially those who operate in large shopping centres.

Liquor restrictions

Since June 2011, with the commencement of the Liquor Amendment (Freeze on Certain Liquor Licenses) Regulation 2011, many hospitality businesses seeking to establish or expand their restaurant, café or bar operations within the City of Sydney have been blanket banned from doing so.

This “blunt force” approach to liquor licensing in the CBD has left many businesses, especially those that wish to provide an alfresco or late night dining experience, at a significant competitive disadvantage to their neighbouring businesses (whose licences to provide alcohol had been approved prior to 23 June 2011).

The current freeze on liquor licensing should be lifted – at least for restaurants – so as to allow licence applications to be assessed on their individual merits.

Electricity

Asset Privatisation

The privatisation of state-owned electricity assets should enhance competition in NSW. Selling the remainder of publicly-owned generation assets in NSW, as well as transferring transmission and distribution assets into private ownership, will make these assets more efficient which will place downward pressure on electricity prices in NSW which is important from a business competitiveness perspective.

The Productivity Commission recently concluded that:

the rationale for government-ownership of electricity network businesses no longer holds. This reflects the development of sophisticated incentive regulations that function best when regulated businesses have strong profit motives...State governments often impose multiple constraints on state-owned corporations that are incompatible with their central purpose of maximising their returns to their shareholders. These constraints include:

- *social and environmental obligation;*
- *requirements to procure locally;*
- *requirements to reduce returns to restrain prices;*
- *requirements to limit capital spending when governments are concerned about debt levels;*
- *employees benefits and job security for employees out of kilter with those associated with most businesses; and*
- *poor governance.*

A report conducted on behalf of the Energy Users' Association of Australia examined revenues collected by privately and publicly owned distributors and found that revenues owned by government-owned distributors in NSW and Queensland have grown far faster than revenues of privately-owned distributors in Victoria and South Australia and this is mostly driven by the size of their regulated asset base. The regulated asset base is growing much more quickly for government-owned distributors because their capital expenditure is around four times higher per connection compared to privately owned distributors. The same report found that government-

owned distributors are, on average, half as efficient as the non-government-owned distributors.

Network costs make up around half of a NSW residential gas bill in 2013/14. Therefore, it is clear that government ownership of the networks is outdated and privatisation of these significant assets would help lower pressures on electricity bills going forward.

Pricing

There remains scope to reform the electricity tariff structure and consumer data provision so that it better reflects time-of-use costs. Sending clearer price signals to consumers will enable them to better manage their energy demand profile which should have flow on effects to the network by better spreading demand. These benefits should then flow onto users as it reduces the need to invest in peak capacity. However, that being said, these changes may raise some equity issues for those unable to respond to price signals which will need to be dealt with through a more appropriate mechanism.

The Australian Energy Market Commission's (AEMC) Power of Choice review looked at this issue extensively and made sensible recommendations, including:

- Reform distribution network pricing principles to improve consumer understanding of cost reflective network tariffs and give people more opportunity to be rewarded for changing their consumption patterns;
- Expand competition in metering and related services to all consumers, putting greater discipline on competitive metering suppliers to provide services at efficient cost and consistent with consumer preferences; and
- Give consumers better access to their electricity consumption data;

Once implemented, these recommendations will help to make our energy markets more competitive.

Retail Markets

We note that the NSW Government has recently announced the full deregulation of electricity markets by 1 July 2014, based on findings provided by the AEMC. A deregulated market is only sensible if consumers are no worse off than if the market was regulated. While there does appear to be evidence indicating rivalry between electricity retailers and that competitive profit margins exist across NSW, there remains a lack of

transparent, comprehensible information available to electricity consumers. The AEMC found:

- there is confusion about the options available to consumers and a low level of awareness of the comparison tools available such as the Australian Energy Regulator's (AER) energymadeeasy website;
- there is a low level of awareness of consumer rights and protections and a mistrust of retailers; and
- many consumers are not aware they may save money by changing their energy plan.

The AEMC followed up with a consumer engagement blueprint to address some of these issues which included recommendations for a suite of initiatives, including:

- providing information to consumers through a media campaign that uses different channels to target specific consumer segments as well as the broader community;
- refinements to existing comparison tools, many of which are already being considered by the AER; and
- providing additional support to consumers that need it.
It is also important that the NSW Government maintains its commitment to continue monitoring electricity markets to assess the state of competition across NSW.

There is currently insufficient evidence to support the existence of adequate competition for the deregulation of retail gas markets across NSW.

Increased contestability

Opportunities for increased contestability within all modes of public transport service delivery should be considered. The apparent success of the private management of Sydney Ferries should serve as an indicator that other parts of the transport network should be opened up to private sector management. In particular, all bus routes in Sydney and Newcastle should be contestable. If it is deemed that contestability would not currently be appropriate for a particular component of public transport, then action should at least be undertaken to ensure all service delivery entities are fully corporatised, so that if and when contestability is introduced, it will not be delayed due to the need to restructure current service delivery agencies.

User charging

User charging provides a mechanism for improving the contestability of infrastructure provision. We support greater discussion on opportunities for user pays models to be used in infrastructure projects and support the relevant recommendations put forward in the Productivity Commission's draft report on Public Infrastructure. It is clear that governments providing full funding of public infrastructure projects is not efficient nor is it sustainable. While there may be some community opposition, it is important for these discussions to be had so that the community at large becomes more comfortable with the concept.

While it is contentious, a debate about an increased level of user pays for road users is absolutely critical. Currently, user pays is applied to road users in a highly ad-hoc manner. Clearer strategies and initiatives drawing on world's best practice road pricing which promotes efficient use and investment of road infrastructure should be considered.

Lessons from the COAG Road Reform Project should be considered in a discussion concerning light vehicles, and the Chamber believes the following principles should be incorporated in the design of a road pricing scheme:

- Changes to the road pricing regime should be revenue-neutral i.e. corresponding changes to excise charges would need to occur.
- Changes to road charging would need to occur in concert with changes to road funding models, including hypothecation of revenue, to ensure that more efficient investment in road infrastructure occurs.
- There must be a clear policy purpose behind the scheme – policy makers would need to ensure the scheme is designed to increase efficiency of road use charging and funding, rather than to cost environmental externalities for example. The costing of congestion into a road use charging scheme would need to be considered in much more detail.
- Significant consideration of equity issues needs to be reflected.



For further information, please contact the Chamber's business regulation and economics adviser, Mr Tim Hicks on (02) 9458 7259 or at tim.hicks@nswbc.com.au.

Yours sincerely

[signed, Luke Aitken, Senior Manager, Policy]

for Paul Orton
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