Competition Policy Review Issues Paper

Submission by Australian Corporate Lawyers Association

Professor Ian Harper
Chair of the Review Panel
Competition Policy Review
Canberra ACT 2600

Dear Professor Harper

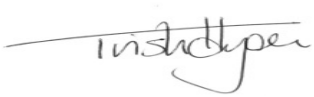
Thank you for the opportunity to present this submission in response to the Issues Paper released by the Competition Policy Review Panel. The Hilmer reforms opened Australia's economy up to competition and have made a significant contribution to Australia's economic success in the past 20 years. ACLA looks forward to the Review building on the successes of these earlier reforms.

ACLA is the peak body for in-house lawyers (lawyers working for businesses and governments) in Australia. ACLA has over 4000 members working across 2,000 organisations ranging from the ASX top 100 and equivalent through to start ups. As the actual conduits of legal practice in the business/government environment, ACLA members are at the coal face of competition law application in this country and are in the unique position of having both sound legal knowledge and a thorough understanding of regulatory impacts within organisations, industries and the broader economy. This puts ACLA in a unique position to comment on the law and its application. Accordingly, ACLA believes input from the in-house legal profession throughout the reform process is vital to ensure practical and effective reform that enhances Australia's business and government operations.

The purpose of this submission is not to present a detailed analysis of the competition law, but to identify at a high level the issues of importance to ACLA's members in terms of the Review and in respect of which ACLA will make more detailed submissions as the Review progresses.

Should you have any questions about our submission please contact Tanya Khan, Chief Legal Officer, on 03 9248 5500 or tanyakhan@acla.com.au

Kind regards



Trish Hyde
Chief Executive Officer

30 June 2014

WHAT SHOULD BE THE PRIORITIES FOR A COMPETITION POLICY REFORM AGENDA TO ENSURE THAT EFFICIENT BUSINESSES, LARGE OR SMALL, CAN COMPETE EFFECTIVELY AND DRIVE GROWTH IN PRODUCTIVITY AND LIVING STANDARDS?

ACLA endorses the Review Panel's definition of competition policy as a set of policies and laws which seek to protect, enhance and extend competition[1].

In ACLA's view, healthy competition is good for consumers and business. Consumers should benefit from competition through choice, quality options and fair pricing. Organisations should benefit from competition through economic growth, innovation and investment.

It is our view that competition policy and legislation should protect these principles. It should not protect organisations from competition, nor should it place an organisation in an uncompetitive position globally or locally.

Competition must continue to be promoted and enhanced through a level playing field where regulatory barriers to entry are minimised in order to generate innovation and least cost production. Regulation must operate to protect and enhance competition for the benefit of consumers, not to inhibit it or protect uncompetitive participants or favour or discriminate against particular competitors or sectors. Effective competition simulates markets and drives job growth and results in not just fair prices, but greater quality options and more choice for consumers. When we have a competition framework that is punitive or encourages risk aversion then productivity, growth and benefit for consumers is limited.

ACLA is a strong advocate for cutting red tape, as our members have a vested interest in increasing certainty and clarity for their own organisations and the marketplace within which they operate. ACLA's members seek a regulatory environment of certainty and one which encourages innovation and investment by removing those regulations which create unnecessary delay or which impose overly onerous requirements, and where compliance costs are minimised.

ACLA agrees with the Review Panel that *"a modern competition policy should provide a framework with the right incentives and enabling provisions that fosters vigorous and healthy competitive processes, allowing Australia to take advantage of the opportunities an increasingly global marketplace provides."*[2] Technology has allowed international borders to be easily crossed and barriers to entry reduced. Ease of doing business in Australia must be a paramount consideration of our competition policy as over-regulation can stifle innovation and force businesses to look to more viable regions[3]. While Australia is currently ranked 11th globally by the World Bank in the *Ease of Doing Business Index*[4] and currently enjoys a respectable position globally, locally we are slipping behind our neighbours in the region with Hong Kong, Singapore, New Zealand, United States, South Korea and Malaysia all in the top ten.

The fact that barriers to foreign trade are low in Australia[5], and it is the second easiest place to start a business in the world[6], brings both opportunity and challenge for Australian businesses. Australia's competition policy, and any legislative change, needs to take into account today's global marketplace and facilitate Australia's integration into global markets. The focus of any reform must consider enhancing competition and ensuring competition law makes Australia more competitive in all respects.

A balance must be struck between ensuring the primacy and protection of the consumer on one hand, and ensuring that Australian businesses can survive and be internationally competitive on the other - to do this requires certainty for business in terms of legislative and regulatory compliance, and the removal of unnecessary restrictions on Australian businesses which could hinder international competitiveness and put international firms in a better position to meet consumers' needs.

> *Recommendation: ACLA recommends the Competition Policy Review recognises the need to support Australian businesses to be globally competitive and foster a strong economy, while still providing consumer protections.*

---

[1] *p9, Competition Policy Review Issues Paper, 14 April 2014*
[2] Ibid at p2
[3] A recent example where there have been concerns in regards to this was where Carsales.com was prevented from expanding in Australia and had to resort to investing offshore Davidson, Darren. *Carsales forced offshore for growth*, The Australian (March 6 2014). Accessed online: http://www.theaustralian.com.au/business/latest/carsales-forced-offshore-for-growth/story-e6frg90f-1226846499073?nk=78b6452459558dd54becdaf277780e5a
[4] The World Bank, *Ease of Doing Business Index,* World Bank Business Project. Accessed online: http://data.worldbank.org/indicator/IC.BUS.EASE.XQ/countries?display=default
[5] OECD, *Chapter 2, Reducing Regulatory Barriers to Competition: Progress since 2008 and Scope for Further Reform*, Economic Policy Reforms 2014: Going for Growth Interim Report. 2014.
[6] Australian Trade Commission, Data Alert: The Ease of doing Business in Australia Remains Strong, 2012.

ARE THE CURRENT COMPETITION LAWS WORKING EFFECTIVELY TO PROMOTE COMPETITIVE MARKETS, GIVEN INCREASING GLOBALISATION, CHANGING MARKET AND SOCIAL STRUCTURES, AND TECHNOLOGICAL CHANGE?

The Competition and Consumer Act (CCA) is generally working well to protect and promote competition. To increase efficiencies and competition for the benefit of Australian consumers, as well as supporting the integration of Australian businesses into global markets, Australia needs a competition framework that is consistent with international best practice.

ACLA would support amendments to the legislation which reduced inefficiencies, cut red tape and reduced the need for business to unnecessarily obtain costly legal advice on commercial arrangements where they may not have in-house counsel. Certain provisions of the CCA require specialist advice in advance to ensure compliance, which may involve large amounts of data collection and analysis at significant cost to business.

The exclusive dealing provisions are such an example. These provisions require businesses to incur sometimes significant costs given that there is a risk certain commercial arrangements with legitimate aims will be unenforceable and attract penalties if they breach the CCA – this should not have to occur in very competitive markets and the provisions should be reviewed accordingly. For example, the European Union has defined certain classes of cases which are not prohibited under the EU competition rules – such safe harbours could be effective in reducing the inefficiencies and costs to Australian business associated with the current provisions.

ACLA would also support amending section 47 of the CCA to make all third line forcing subject to a substantial lessening of competition test, rather than the current per se approach. The per se third line forcing prohibition creates high compliance costs (time spent preparing authorisation forms, payment of ACCC lodgement fees, delayed conduct until immunity is confirmed) as businesses must seek authorisation from the ACCC, even in circumstances where the proposed conduct would have a neutral or even pro-competitive effect in the market. Again, the position in Australia contrasts with jurisdictions including the USA and European Union where greater reliance is placed on self-assessment of the competition law risk of any third line forcing. Given the requirement of lodging authorisations with the ACCC to obtain express immunity for this type of conduct imposes unnecessary financial, administrative and time burdens on businesses, and that both the Hilmer (1993) and Dawson (2003) committees considered that the per se element of the third line forcing prohibition should be replaced with a competition test, ACLA considers this would be a welcome change to the CCA.

ACLA is also concerned that very literal interpretations of the CCA may have unintended consequences.[7] For example, there is some concern that where organisations put tenders together in consortiums, those organisations may be at risk of falling within the cartel provisions, even though individually the organisations could not tender for the relevant project. The joint-venture exception does not necessarily help to avoid that outcome. ACLA considers that legitimate bidding consortiums and teaming agreements with no anti-competitive impact should be encouraged rather than discouraged as a means of achieving greater economic and competitive benefits. The US government encourages teaming agreements and we believe that Australia could profitably follow its lead.

Other drafting anomalies in the cartel provisions in s.44ZZRD of CCA (and exceptions to the cartel offenses) also lead to business uncertainty, as does s.4E of the CCA under which defining "the market" is usually the hardest part of any competition issue and often determinative of the outcome.

Ultimately, any proposed legislative amendments should be assessed in the context of whether they protect competition or competitors, whether they remove or increase impediments to competition, whether there could be unintended anti-competitive effects and the resultant compliance costs.

> *Recommendation: ACLA recommends the Competition Policy Review considers global best practice and the consequences of any changes to avoid unintended consequences or increased cost of compliance.*

[7] For example, the case of *Norcast S ár L v Bradken Limited (No 2)* [2013] FCA 235.

ARE COMPETITION-RELATED INSTITUTIONS FUNCTIONING EFFECTIVELY AND PROMOTING EFFICIENT OUTCOMES FOR CONSUMERS AND THE MAXIMUM SCOPE FOR INDUSTRY PARTICIPATION?

ACLA respects the right of regulatory bodies to pursue legal remedies and penalties where competition laws are breached. However, if large national companies are the focus of enforcement and compliance actions by the ACCC, competition could be distorted by smaller companies should they choose not to incur compliance costs (for example, in respect of third line forcing notifications) knowing that their actions will have less effect on competition and they are at low risk of enforcement action. Yet the size of a business is not necessarily correlated to market power.

Rather than litigation as a means to enforcement, ACLA is a strong advocate for alternative dispute resolution as a means to more efficiently and collaboratively facilitate and restore business relationships and rectify non-compliance. Our members' organisations are not in the business of litigation and with in-house counsels' dual duty to the Court and client, the sooner a commercial dispute can be appropriately settled the better for all, including reducing the burden on the courts and reserving access for those in greatest need. Where Australia has a competition framework that is punitive, prosecutorial, gives precedence to publicity over the productivity of Australian businesses or encourages risk aversion then productivity, growth and benefit for consumers is reduced.

As such, ACLA's members favour an approach of early identification of issues or concerns, a consultative and collaborative approach to rectification and one which minimises unnecessary compliance costs on businesses which could otherwise be avoided through early discussions and resolution of concerns. ACLA is aware of occasions where investigations have been launched by the ACCC which have later proved unfounded, but not before significant legal fees and management hours were unnecessarily incurred by the affected businesses. Whether founded or not, it is imperative that the ACCC ensures, in any investigation or engagement with business, that delay and business disruption is minimised, requests for information are kept to an absolute minimum (or at the very least the same information not repeatedly requested), and that when establishing the scope of any investigation the ACCC takes into account the resources that the affected business will be expected to apply in respect of that investigation.

ACLA also notes the *ACCC Cooperation Policy for Enforcement Matters (July 2002)* which allows businesses to "own up" to cases of breach in exchange for possible leniency where particular criteria can be demonstrated. In ACLA's 2012 Trends Survey[8], in-house counsel were asked to rate the extent to which they agreed with the following two statements: "ACCC understands the needs of business" and "ACCC is extremely easy to deal with". The ACCC received a score of below average (less than 3 out of 5)[9] on each, lagging behind its ASIC and APRA counterparts on both indicators. As decisions regarding enforcement action often involve a fair degree of judgement, it is imperative that the ACCC does, and is perceived to, understand the way businesses operate as well as the markets and environments in which they operate. This could be facilitated by ensuring that the ACCC's internal operations are as efficient as possible, officers of appropriate seniority and business understanding investigate compliance issues, markets are correctly defined and investigations are sufficiently justified before being commenced. This should assist businesses to have confidence that they can engage constructively with the ACCC, including when considering whether to report known breaches under the Cooperation Policy.

In addition to reducing compliance costs, ACLA would also encourage, where possible, early engagement and consultation to occur to minimise or reduce the chance of breach actually occurring. This could involve, for example, a private ruling system similar to the ATO Private Ruling System. The ATO Private Ruling System is essentially an exercise in legislative risk management which also provides taxpayers with the certainty required given private rulings apply even if the ATO gets the interpretation of the law wrong. This could be effective in reducing actual breaches as well as providing an opportunity for the ACCC to identify those areas of the CCA in respect of which there is ambiguity or uncertainty.

[8] ACLAs annual Trends Survey investigates the current trends of the in-house legal profession and reflects the view of Australian based in-house lawyers representing over 150 commercial organisations and government bodies

[9] A scope of 5 meaning the respondent completely agreed with the statement

Recommendation: ACLA recommends the Competition Policy Review considers redefining the role of the ACCC to include:

- *an ATO-like Private Ruling mechanism;*
- *a broader understanding of business and active engagement with in-house counsel; and*
- *a greater focus on assisting to clarify ambiguity and providing guidance for all businesses in manners other than the use of punitive measure aimed at large national operators as a means of communicating to the broader marketplace.*

WHAT INSTITUTIONAL ARRANGEMENTS WOULD BEST SUPPORT A SELF-SUSTAINING PROCESS FOR CONTINUAL COMPETITION POLICY REFORM AND REVIEW?

There is an important role for government in regulating markets and their participants. However, increased regulation and governmental oversight of functioning competitive markets can reduce new entrants, innovation and productivity thereby reducing choice, quality and price benefits for consumers. As such, ACLA does not believe the answer lies in increasing the levels of competition bureaucracy, but would look favourably on the consolidation of regulatory functions where this minimised costs and burden on business. Minimising compliance costs for business includes ensuring roles between regulators are clear and complementary, a transparent and certain regulatory regime exists and having a greater focus on prevention through education than prosecution.

Independent monitoring of the implementation of the reforms will be critical to achieving meaningful reform. As will the need for competition-related institutions to become learning organisations, with appropriate transparency around decisions made and actions taken to ensure the principles of competition policy are being upheld.

Finally, organisations that have in-house counsel are better placed to understand their compliance obligations, and the focus of the regulator for those organisations should be ensuring that they have appropriate compliance programs in place. Those organisations without in-house counsel (typically small business) – may not have the resources to identify and manage complex competition law issues and are therefore at greater risk of inadvertent infringement. This means the regulator must provide appropriate access to education and sufficiently detailed guidelines to enable businesses, regardless of size, to achieve compliance.

Recommendation: ACLA recommends the Competition Policy Review considers:

- *consolidation of regulatory bodies to minimise the cost of compliance;*
- *introduction of independent monitoring to create transparency and a learning environment; and*
- *an increased focus on facilitating and guiding compliance ahead of punitive measures.*