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COMPETITION POLICY REVIEW

COMMENTS

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GLOBALISATION AND THE DIGITAL REVOLUTION

It appears that the consequences of these issues are acknowledged but not fully explored in the report recommendations. The old concept of globalisation is related to the way companies internationalised in a physical sense and often related to the physical delivery of services or goods. The combination of globalisation with the digital revolution changes the scope and nature of competition and by implication, anti-competitive practices.

In a globalised digital world we cannot create barriers to keep competitors out. There is no internet border protection policy that will work. But nor should we reduce the barriers to anti-competitive behaviour. The challenge is to enable access but on a competitive basis. This will be the single greatest challenge facing every business and consumer in Australia. There are 5 areas that are of concern in terms of competition within the globalised digital environment.

1) Cross border restrictions

   This is restrictions on the delivery of services via the net. This reduces the marketplace and deprives consumers of options.

   E.g. Insurance coverage. Australian insurers are able to reinsure offshore. Australian consumers are only able to insure with domestic insurers. Insurance with an offshore registered insurer is not possible. (This assumes the client is willing to accept that policy failure etc. cannot be enforced under Australian law) The agreement that any offshore insurer can offer insurance in Australia if they are licensed to do so here is fallacious as the licensing is being used as an anti-competitive measure as, apart from a licence, the nature of the core business and services offered do not change.

   I note that the Federal parliament Standing Committee on Finance has indicated the potential to open up the insurance landscape to overseas insurers because Australian insurers offer inadequate cover for natural disasters.

   The offer of the current sale of Medibank is not available to USD residents. This is an example of the cross border service restrictions operating in reverse.

2) Behind the border barriers.

   These are regulatory processes used to stifle competition in an environment where competition has been formally permitted. This most commonly involves licenses, failure to recognise equivalent qualifications and the use of language tests. This is anti-competitive when the processes that are required for a foreign company are substantially or substantively different to those required of a domestic company.

Examples include the need to <top up> qualifications even though qualifications are equivalent or at times, better. This is most commonly used as a barrier to entry into professions and the supply of professional services. It should be noted that when this occurs to Australians seeking to move into foreign markets then this is labelled as unacceptable and anti-competitive. I.e. accountants working in Singapore or China.

It includes the need to apply inappropriate language tests for a variety of visa types. On the labour front this applies a university style language proficiency test to a welder working on plant construction – a test that his Australian counterparts are not required to undertake. This stifles competition. This is an area which the ACCC is excluded from, but it is an example of a behind the border barrier.

3) Geo locking of delivery and geo price differentials

This is very anti-competitive and often a misuse of market power. Microsoft, Adobe and Amazon are three examples. Microsoft and Adobe charge different price levels dependant upon the geographic location. The level of service does not alter, the product delivered is the same. Buyer are prevented from purchasing goods at the most competitive price. When purchased for Australian consumption, the transaction may be handled through a non-Australian subsidiary as a means of minimising company tax.

There was a time when the physical delivery of goods could be used to justify a price differential. This no longer applies to a piece of software downloaded from a server in the US but charged at a higher price to Australian customers.

For Amazon, geo locking means that some books ad products are not available for electronic delivery within a geographical region. It is unclear if this is a decision of the publisher or a decision by Amazon.

We are concerned that the TPP trade negotiations from the US side are seeking to criminalise tools and services and individuals who break or circumvent geo locks and geo pricing.

The world is flat and it provides a larger and wider competitive landscape. When this landscape is littered with artificial barriers then it encourages the growth of piracy as a way of overcoming or circumventing these barriers. This is an undesirable outcome.

4) Geo blocking of media and information access

The blocking of competitive service such as Netflix, from service provision in Australia is an anti-competitive process designed to protect existing media players. The lack of access is due to a regulatory ban and is not technology based. The competition is feasible but it is blocked by an anti-competitive regulatory environment. This lack of competition provides a protected environment that limits consumer choice.

The internet makes it possible to access Netflix, TV programs on release, films on release etc. at the time they are released. Consumers are able to access this. The regulatory blocking of this access limits competition and increases the uptake in piracy and copyright infringement.

(My business relies on internet delivery of product and services. Our largest piracy problem comes from Australia because users have become accustomed to the need to act as a pirate to access material that is denied them in an anti-competitive environment. These habits then transfer to legitimate services where material is not delayed or restricted)

5) Trade agreements

We are concerned that the US continues to push for the inclusion of extraterritoriality clauses in the TPP agreement. In particular the idea that US companies can sue the Australian Government for changes in Government policy that adversely impact on their business in Australia. (It should be noted that they do not propose for the reverse to be permitted i.e.

Australian companies suing the US Government in a similar fashion) This push has not be absolutely ruled out by the Australian Government.

Inclusions of these types of features in trade agreements are a significant issue in a globalised digital world. The ACCC has been clearly focussed on activity within Australia, but there is a need to become involved in the process of trade negotiation to ensure that competition principles are maintained and baked in to the agreement. By the time the agreement is exposed for public comment the foundations have already been laid and are too difficult to revise.

There is a need for the ACCC to expand its remit into those areas where the global digital environment impacts on the Australian competition landscape. Obviously the ACCC cannot extend its jurisdiction beyond Australia, however the ACCC does need to consider the impacts of the global digital environment on the choices available, or not available, to Australian consumers.

The web has exposed Australian business to global competition for the use and application of intellectual property. Clearing the space for competition and chose for Australian businesses within a digital environment needs to become a new priority for the ACCC.

COMMENTS ON RECOMMENDATIONS

Draft Recommendation 1 — Road transport

Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, there should be a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.

FUEL PRICING already includes a component for this, and has done so since 1987. The proposed new fuel level for infrastructure is flawed because enquiry after enquiry has found it is impossible to track the flow of these funds to the purpose for which they were designed.

FAILS To take into account vital infrastructure that is a precursors to competition. I.e. north south road has high value, but low volumes and would be disadvantaged by the suggested road pricing model.

Draft Recommendation 2 — Coastal shipping

Noting the current Australian Government Review of Coastal Trading, the Panel considers that cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved.

We support the removal of cabotage restrictions on airlines. Removal of these restrictions for Darwin means that flights can come from Singapore, pickup domestic passengers, and then continue with a mix of international and domestic passengers to Melbourne. This increases the market for this route and increases competition.

We note that Jetstar through its joint-partner operations actively advocates the abolition of cabotage on its Asian routes but actively supports the continuation of cabotage within Australia.

Cabotage is not in the public interest and denies the consumer of choice because competitors in the market place are locked out due to regulation and not due to any lack of ability to supply relevant services.

Draft Recommendation 3 — Intellectual property review

The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission.

The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.

SUPPORT In trade agreements Australian IP rights should be the same as the partner rights. Protection of IP is essential for commercialisation of IP.

Draft Recommendation 4 — Parallel imports

Remaining restrictions on parallel imports should be removed unless it can be shown that:

- they are in the public interest and
- the objectives of the restrictions can only be achieved by restricting competition.

CONSIDER issues of geo-lock pricing. This is fiercely anti-competitive with Microsoft, Adobe and other mainly US software producers.

Resist moves to criminalise removal or by-passing of geo locking and geo pricing.

Draft Recommendation 5 — Regulation review

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- they are in the public interest and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

FULL INVESTIGATION of the way these become behind the border barriers. Make it easier for complainants to lodge a complaint. I.e. new child safety seats. Approved in Europe to a high standard and used for years, but require modification before use in Australia. This is a behind the border competition barrier. This is anti competitive.

Draft Recommendation 6 — Electricity, gas and water

State and territory governments should finalise the energy reform agenda, including through:

- application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions
- deregulation of both electricity and gas retail prices and
- the transfer of responsibility for reliability standards to a national framework.

The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration.

All governments should re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:

- economic regulation of the sector and
- harmonisation of state and territory regulations where appropriate.

Where water regulation is made national, the body responsible for its implementation should be the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).

FAILS TO UNDERSTAND OR ACKNOWLEDGE the non-competitive landscape created by economy of scale. The challenges of service provisions within remote and sparsely populated areas is properly a function of Government as the costs are too high and margins too slim to be attractive to a commercial entity. This is a situation where basic infrastructure services fall under a community service obligation most properly addressed by Government via the taxation system.

Draft Recommendation 7 — Price signalling

The 'price signalling' provisions of Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

Section 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.

AGREE. This opens the ways for comparative pricing apps, such as have been applied in the fuel pricing sectors. Companies have an obligation under ASIC for continuous disclosure and this should include changes to pricing. It is inconsistent to require continuous disclosure but then class this as price signalling.

We do not apply this to supermarket <special> advertising which is a clear price signal to competitors. .

Where a market is dominated by one or two players – banking, airlines, telecoms, insurance, then pricing announcements are a matter of competitive advantage.

Draft Recommendation 8 — Misuse of market power

The Panel considers that the primary prohibition in section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.

To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market and
- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined.

I*MPROVE THE MECHANISMS for the ease of lodgement of complaints. Improve the mechanism for dealing with the unintended negative consequences of competition. Examples of misuse use of market power are:*

Jetstar credit card fee surcharges applied per passenger rather than per transaction and applied at a rate that is higher than the actual merchant fee charge.

Card fee surcharges imposed by dominant players, but unavailable to used by smaller players due to true competition and price sensitivity.

Fuel pricing in regional markets

Fuel surcharges by airlines

Provide a framework for complaints that separates grumbling from genuine abuse of market power concerns and which expedites the investigation process. This may be considered as an app.

Draft Recommendation 9 — Price discrimination

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the recommended revisions to section 46, see Draft Recommendation 25).

Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include the removal of restrictions on parallel imports (see Draft Recommendation 9) and ensuring that consumers are able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.

SUPPORT. This is the removal of geo locks and geo pricing structures. Resist moves to criminalise removal or by-passing of geo locking and geo pricing.

Draft Recommendation 10 — Mergers

There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal review process.

The formal merger exemption processes (i.e. the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use. The specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC. However, the general framework should contain the following elements:

- the ACCC should be the decision-maker at first instance
- the ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or it is satisfied that the merger results in public benefits that outweigh the anti-competitive detriments
- the formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information
- the formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties and
- decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.

THE DOUBLING UP ON process delays the completion of business. This is further complicated by FIRB approvals processes which can be used, in a de facto way, to disrupt the completion of the deal and operation of the market. This becomes a significant behind the border barrier and increases the level of sovereign risk thus making Australia less able to attract the required foreign investment.

Draft Recommendation 11 — Small business access to remedies

The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

DEVELOP SPECIFIC dispute resolution system for small business that is cost effective and easy to use.

Draft Recommendation 12 — Retail trading hours

The Panel notes the generally beneficial effect for consumers of deregulation of retail trading hours to date and the growth of online competition in some retail markets. The Panel recommends that remaining restrictions on retail trading hours be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day.

SUPPORTED and the removal of penalty rates so that the nature of modern business and the nature of modern customers in a fragmented workplace can be recognised.

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