

Your ref: Root and Branch Review – Competition Policy Review – Draft Report

Our ref: 857/4 – Competition and Consumer Law Committee

12 November 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Submission electronically uploaded: [here](#)

Dear Secretariat

Competition Policy Review – Draft Report

Thank you for the opportunity to comment on the Competition Policy Review – Draft Report. The Society would like to acknowledge and commend the amount of work that went into consultation, researching, distilling and preparing the draft Report.

The **attached** submission has been prepared with the assistance of the Queensland Law Society's Competition and Consumer Law and Technology and IP Committees. Please note this submission is not intended to be an exhaustive review of competition law and the *Competition and Consumer Act (CCA)*.

Queensland Law Society is happy for the submission to be published and would be pleased to be involved in any public fora, conferences and consultations with respect to the review.

If you have any further queries, please do not hesitate to contact Mr Shane Budden, Manager Advocacy and Policy on s.budden@qls.com.au or (07) 3842 5889.

Yours faithfully



Michael Fitzgerald
Deputy President

Submission

Competition Policy Review - Issues Paper

*Competition Policy Secretariat
The Treasury*

*A Submission of the
Queensland Law Society*

17 November 2014

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1. Overview

The Society would like to acknowledge and commend the Panel for undertaking an extensive consultation process, regularly reporting and advising on submissions and particularly for meeting with the Society to discuss key issues of competition law reform. The Society considers this integral for the development of good policy and good law and commends the Panel for undertaking a wide, comprehensive and transparent process to the Review.

The Society would also like to commend all the work undertaken by the Panel in preparing the draft Report. The Society agrees, in principle, with the underlying premise of the draft Report and note that it accords with the majority of the principles set out in our earlier submissions.

The Society will take this opportunity to provide feedback on specific recommendations.

2. Recommendations in support

The Society supports, in principle, draft recommendations 1, 11,14, 15, 17-21, 23, 24, 26, 27 - 29, 31-36, 45, and 48 - 50.

3. Further consideration

The Society raises the following issues with respect to the draft recommendations below.

3.1. Draft Recommendation 8

The Society is concerned that the removal of the s51(3) may result in unintended consequences for patent owners and other IP owners. There is a distinction between registered and unregistered marks and removing the exemption may also result in inconsistencies with registered marks owners' rights.

The Society notes that in its present form s51(3) is difficult to comprehend. The Society recommends in the alternative that the s51(3) exemption be revised in simplified language.

QLS Recommendation 8

The Society recommends that the s51(3) exemption be revised in simplified language.

3.2. Draft Recommendation 13

Local government protection of businesses that are not significant business activities is defeating competition.

On the basis of the Competitive Neutrality Principles applying only to significant business activities, it is necessary to insert a definition of "significant business activities". The courts have considered the meaning of that term in the context of akin phrases in legislation and have determined appropriate rules for determining what is, and what is not, a significant business activity. The adoption of those principles into a definition would provide clear direction for local governments to determine whether the competitive neutrality principles will apply in a particular situation. A definition of

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significant business activities should be developed as” activities having a commercial purpose or character having regard to the fact and degree of operations, taking all factors into consideration and having the essential quality of trade and which, in the context, is significant”.

QLS Recommendation 13

That a definition of “significant business activity” be adopted for the purpose of clarifying what is and what is not covered.

3.3. Draft Recommendation 22

The Society endorses the Panel’s comments in relation to cartel conduct, and supports the Panel’s Draft Recommendation 22.

The Society is pleased that the Panel has recognised the significant deficiencies in the current cartel framework, particularly in relation to the extreme prolixity with which the concept of a ‘cartel provision’ is currently defined, as well as the artificial and random limitation of a defence for legitimate collaborative conduct to limited types of joint ventures.

The Society suggests that Draft Recommendation 22 be expanded to explicitly recommend re-drafting the cartel provisions with a view to simplifying the way in which, and the length at which, they are expressed. Given that the cartel provisions (rightfully) create per se offences, with potential criminal consequences, it is critical that they be expressed in terms that are sufficiently simple and certain to enable market participants to clearly understand the types of conduct that are prohibited.

QLS Recommendation 22

The Society supports the Panel’s Draft Recommendation 22 in relation to cartel conduct.

The Society suggests that Draft Recommendation 22 be expanded to explicitly recommend re-drafting the cartel provisions with a view to simplifying the way in which, and the length at which, they are expressed.

3.4. Draft Recommendation 23

QLS Recommendation 23

The Society supports the panel’s proposed recommendation 23 as a recommendation consistent with the first submissions the Society made to the panel.

3.5. Draft Recommendation 24

The Society supports the repeal of the current price signalling provisions. The Society agrees that these provisions are not ‘fit for purpose’ in relation to addressing the concerns that led to the introduction of these provisions.

The Society believes that any proposal to introduce a provision prohibiting specified ‘concerted practices’ should be examined further, seeking input on the proposed

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legislative drafting in relation to such a provision. Ensuring an appropriate definition of what is considered to be a 'concerted practice' is critical. It is important to gather views and expert opinion on the definition of this concept, and how it differs from the existing (and well-understood) concepts of 'contract, arrangement or understanding', in relation to which the cartel provisions are presently framed. The courts have judicially considered the meaning of "acting in concert" as those words are used in section 45D. These considerations are relevant.

QLS Recommendation 24

The Society supports the Panel's Draft Recommendation 24 repeal of the current price signalling provisions.

The Society believes that any proposal to introduce a provision prohibiting specified 'concerted practices' should be examined further, seeking input on the proposed legislative drafting in relation to such a provision, and that an appropriate definition may be similar to the definitions adopted by the Courts in relation to "acting in concert" in relation to section 45D.

3.6. Draft Recommendation 25

The Panel has sought submissions as to the scope of the defence outlined as part of the Panel's proposal for reform of section 46 of the *Competition and Consumer Act 2010* (Cth) (the Act).

The Society addressed the general question of revision of section 46 of the Act in pages 6, 7 & 8 in Chapter 5 part 5.3 of its Submission dated 27 June 2014. This submission addresses two issues in relation to Draft Recommendation 25:

- the scope of the proposed defence;
the potential for better circumscribing the markets in respect of which there must be a purpose, effect of likely effect of substantially lessening competition.
The Society's Committee considering these submissions had different approaches to the defence. One approach suggested that the defence be made out if either the first or the second limbs, and not both, were made out. As to the proposed defence, the other view is that a corporation should only be required to prove the second limb, and not both limbs, of the proposed defence set out in the Draft Recommendations. The argument in relation to the second view is this:
- The first limb of the proposed defence would require a corporation to prove that its decision that gave rise to the contravention "would be a rational business decision by a corporation that did not have a substantial degree of power in the market". This is a reformulation of the "take advantage" requirement that exists in the current section 46. It gives rise to the same problems that flow from the "take advantage" test. It requires the application of a counterfactual test that inverts the traditional counterfactual test applied elsewhere in the Act to determine whether conduct substantially lessens competition and in other areas of the law in determining causation and damages. In the traditional counterfactual test, a Court must determine whether the world would look different if certain conduct did not occur. The test is hypothetical but the hypothesis looks forward from the date of the conduct. The take advantage test inverts this test by identifying certain conduct and then asking whether that conduct would or could have occurred if the world was different. The task of hypothesis is much more difficult because it is necessary to hypothesise the correct counterfactual world and then identify the links, if any, between the real world and the conduct before then

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attempting to determine whether and to what extent those links would have existed in the hypothetical alternative world. Having said this, if a corporation satisfies the first limb of the proposed defence the relevant conduct should not contravene s 46.

If a corporation can prove that its conduct is in fact in the long-term interests of consumers, that ought to be a sufficient defence. The Society believes that one way of satisfying such a defence would be to prove that the relevant conduct is efficient, and the Society recommends rephrasing the second limb of the defence to clarify that position. This approach would be reasonably consistent with EU and US anti-monopolisation laws. There is little risk of a defence of this nature leading to precautionary behaviour by corporations that adversely affects consumers because the conduct that would be encouraged is efficient conduct.

The other matter that the Society considers ought to be addressed is the market in which competition must be substantially lessened for a contravention to occur. The contravention should not be made out unless the substantial lessening of competition occurs in the market in which the corporation possesses substantial market power or a related market. The prohibition should not extend to substantially lessening competition in a market unrelated to the market in which the corporation possesses substantial market power.

QLS Recommendation 25

As to the proposed defence, a corporation should only be required to prove the second limb, and not both limbs, of the proposed defence. Alternatively, the defence should be satisfied if either the first or the second, but not both, limbs are made out.

The other matter that the Society considers ought to be addressed is the market in which competition must be substantially lessened for a contravention to occur. The contravention should not be made out unless the substantial lessening of competition occurs in the market in which the corporation possesses substantial market power or a related market. The prohibition should not extend to substantially lessening competition in a market unrelated to the market in which the corporation possesses substantial market power.

3.7. Draft Recommendation 26

QLS Recommendation 26

The Society supports Draft Recommendation 26 in that there is no reason to justify the re-introduction of a prohibition on price discrimination.

3.8. Draft Recommendation 27

The Society supports Draft Recommendation 27, which has been supported by the overwhelming majority of legal theory for almost 20 years. Third line forcing is often pro-competitive, or competitively benign.

Consistent with the recommendations of the previous two competition reviews, third line forcing should be subjected to a competition test, rather than being prohibited per se.

QLS Recommendation 27

The Society supports Draft Recommendation 27. Third line forcing should not be prohibited per se but should instead be subjected to a competition test.

3.9. Draft Recommendation 28

QLS Recommendation 28

The Society supports Draft Recommendation 28 which will simplify the otherwise cumbersome provisions of section 47.

3.10. Draft Recommendation 29

QLS Recommendation 29

The Society supports Draft Recommendation 29 in both its limbs, namely that resale price maintenance should be retained as a per se prohibition but allow the notification process to be extended to include that conduct. The Society further supports that conduct between related parties should be exempted for RPM as it is under sections 45 and 47.

3.11. Draft Recommendation 30

The Society does not support the Panel's proposed changes to the formal merger exemption process in Draft Recommendation 30. The formal merger exemption process has not been used frequently to date, however has recently been used in a small number of cases.

It is too early to draw any conclusions regarding potential reforms from the limited use of this process to date, and the Society recommends that this process be retained in its current form for the time being.

QLS Recommendation 30

The Society does not support the Panel's proposed changes to the formal merger exemption process in Draft Recommendation 30. It is too early to draw any conclusions regarding potential reforms from the limited use of this process to date.

3.12. Draft Recommendation 31

The Society considers it is desirable for the operation of the Act to prohibit contracts between employers and employee organisations that hinder the trading freedom of the employer, in respect of the supply and acquisition of goods and services. This includes the selection of contractors. The Society believes that protecting competition requires that businesses should be free to supply and acquire goods and services, including contract labour, if they choose.

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By way of example, the *Employee Relations Information for Contractors on BHP Billiton Iron Ore Projects* dated 19 November 2012 includes provisions setting the calculation for hourly rates of any employee of a contractor to the total project. The *Employee Relations Information for Contractors Working on Wheatstone Project LNG Plan* includes similar provisions.

Obligations of this nature prevent the contractor from setting and paying their own wage rates to both employees and sub-contractors, and over time, significantly raise the costs of infrastructure projects in Australia. This reduces Australia's ability to compete internationally.

QLS Recommendation 31

The Society supports Draft Recommendation 31 for the ACCC to include in its annual report the number of complaints made to it in respect of secondary boycott conduct and the number of such matters investigated and resolved annually.

3.13.Draft Recommendation 32

QLS Recommendation 32

The Society supports the extension of jurisdiction to hear matters relating to sections 45D, 45DA, 45E and 45EA to the State and Territory Supreme Courts.

3.14.Draft Recommendation 33

QLS Recommendation 33

The Society supports Draft Recommendation 33 to remove the limitation under sections 45E and 45EA to persons with whom an employer 'has been accustomed, or is under an obligation' to deal with.

3.15.Draft Recommendation 34

QLS Recommendation 34

The Society supports Draft Recommendation 34 to ensure that a single authorisation application is required for a single business transaction or arrangements. The Society also recommends clarification of the language, so that a course of conduct linked to the same overall project / objective only requires one authorisation, rather than needing multiple authorisations for each agreement forming part of a single project or objective.

3.16.Draft Recommendation 35

QLS Recommendation 35

The Society supports Draft Recommendation 35 to introduce block exemptions for authorisations and notifications.

3.17. Draft Recommendation 36

QLS Recommendation 36

The Society supports Draft Recommendation 36 to introduce a ‘reasonable search’ requirement or defence in relation to s155 notices.

3.18. Draft Recommendation 37

The Society does not believe that Draft Recommendation 37 is appropriate.

The legislative and judicial laws and rules in relation to Australia’s Court system share a common policy regarding the benefits of encouraging parties to litigation to settle disputes wherever possible, and the Society is concerned that such an amendment would undercut this important public policy objective.

An amendment as suggested in Draft Recommendation 37 removes a key option currently available to a litigant: the ability to compromise existing proceedings by making an admission for the purposes of those proceedings. If this option is removed, a litigant will be forced to choose between making an admission for all purposes and all time everywhere, or refusing to concede or compromise on issues and putting the applicant to the proof regarding the various contentions at issue in the proceedings.

The Society believes that litigants will be understandably reluctant to make admissions in these circumstances, due to the difficulty of anticipating every possible implication of consequence of making an admission. Limiting the incentives for litigants to make admissions will have a detrimental effect on the efficient administration of justice. This detriment is disproportionate to the benefit that will be achieved by an amendment of the sort recommended by the Panel.

There may also be implications for an insured litigant, both in terms of compromising an insurer’s future position, as well as a current insurer’s ability to make an admission that may affect the litigant in relation to a liability for which they are not insured (or not insured by that insurer).

The Society also notes that there are no boundaries currently proposed in relation to the Courts, litigants, subject matter or time frame for which the proposed amended section 83 will operate. Whilst Draft Recommendation 37 is expressed to be intended to “facilitate private actions”, the Society is concerned that the broad language in which the draft recommendation is expressed may lead to a similarly broad amendment to section 83, which would have legal implications beyond the competition laws, to which the present review is directed.

Given the fundamental shift in the nature of a litigant’s rights and liabilities that such a change will cause, the Society believes that any such proposed change should be subjected to a broader review involving stakeholders across the spectrum of litigants, Courts and legal representatives. The Society is of the view that prior to instituting a change of this breadth, extensive stakeholder consultation should be undertaken..

QLS Recommendation 37

The Society does not support Draft Recommendation 37.

The Society is concerned that such a change proposed in Draft Recommendation 37 represents a fundamental and detrimental change to the options and incentives for litigants, and consequently, the efficient administration of justice,

The Society believes that any such proposed change should be subjected to a broader review involving stakeholders across the spectrum of litigants, Courts and legal representatives. Prior to instituting a change of this breadth the Society recommends seeking the views of these other groups.

3.19. Draft Recommendation 45

QLS Recommendation 45

The Society supports Draft Recommendation 45 to retain competition and consumer functions solely with the ACCC and recommends that consumer law enforcement regarding financial matters should be moved from ASIC to the ACCC.

3.20. Draft Recommendation 48

QLS Recommendation 48

The Society supports Draft Recommendation 48 to introduce a Media Code of Conduct for the ACCC.

3.21. Draft Recommendation 49

QLS Recommendation 49

The Society supports Draft Recommendation 49 to enable the ACCC to connect small business to alternative dispute resolution schemes.

3.22. Draft Recommendation 50

QLS Recommendation 50

The Society supports Draft Recommendation 50 to introduce greater flexibility into the notification process for collective bargaining for small business.