

Competition Policy Review Draft Report

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 comprehensive Draft Report released by the Competition Policy Review Panel.

ACLA considers that our key recommendations and concerns have largely been addressed in the Draft Report, and we support in principle a number of the reforms.

We look forward to reviewing the Final Report and resulting legislative changes, and continuing to support appropriate and effective competition reform.

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

Kind regards



Trish Hyde
Chief Executive Officer

17 November 2014

COMPETITION POLICY & LAWS

ACLA previously submitted that the Competition and Consumer Act (CCA) is generally working well to protect and promote competition, but that it may benefit from simplification and flexibility concerning characterisation of certain business conduct. As such, ACLA welcomes the proposed:

- broader protection for legitimate joint ventures¹;
- simplification of the cartel provisions²;
- removal of the per se ban on third line forcing³; and
- simplification of the exclusive dealing provisions⁴.

ACLA supports amendments which reduce inefficiencies and cut red tape and compliance costs for businesses, and notes the Panel has recognised the burden that businesses operate under in order to comply with the current section 155 regime. ACLA supports the recommendation⁵ to make compliance with section 155 notices subject to a 'reasonable search' qualification, and for the ACCC to review its guidelines on section 155 to take into account the impact of the digital age on businesses' compliance burden.

COMPETITION INSTITUTIONS & GOVERNANCE

ACCC

ACLA supports reform which enables the ACCC to be more representative of stakeholder viewpoints and increases the oversight, accountability and transparency of the ACCC's operations and decision making processes. As such:

- ACLA supports the proposals to incorporate into the ACCC's governance a wider range of business, consumer and academic viewpoints, and to increase the ACCC's accountability to Parliament⁶. Doing the former through a Board structure would likely increase credibility and the perception of independent oversight, rather than through an Advisory Board that has no decision making powers. In either case, the terms of reference, composition and governance processes will be critical in achieving any stated objectives;
- ACLA considers the recommended Media Code of Conduct⁷ might go some way to addressing the perception of impartiality in enforcement by the ACCC, but we suggest it should also specifically address the privacy issues and reputational damage at stake for businesses investigated by the ACCC; and
- while ACLA supports in principle the suggested approach to dispute resolution for small businesses,⁸ we feel that it could provide greater benefit by being implemented more broadly. Litigation is costly for all parties involved and should be reserved for cases of serious, wilful and/or repeated breach. The decision to pursue litigation should be made after due and transparent consideration of the public interest outcomes and likelihood of success. While regulatory bodies should have the option to pursue legal remedies and penalties where competition laws are breached, the focus needs to shift from punitive and prosecutorial approaches to the ACCC working with businesses and their in-house counsel to support the implementation of compliance programs and minimise inadvertent infringement.

¹ Recommendation 22

² Recommendation 22

³ Recommendations 27 & 28

⁴ Recommendations 27 & 28

⁵ Recommendation 36

⁶ Recommendation 47

⁷ Recommendation 48

⁸ Recommendation 49

ACCP and consolidation of regulatory functions

In principle, ACLA supports the establishment of a body like the Australian Council for Competition Policy (ACCP) to provide thought leadership and regulatory scrutiny without an enforcement agenda. Again, structure, accountability and resourcing will be critical in ensuring the ACCP can appropriately discharge its duties and achieve the stated objectives of providing competition advocacy and leadership and driving implementation of the evolving competition and policy agenda⁹. We suggest facilitating Australia's integration and competitiveness into global markets should also be a key priority for the ACCP.

ACLA notes the recommendation to transfer the key regulatory functions of the ACCC, the National Competition Council and the Australian Energy Regulator to a single, national economic regulator¹⁰, and favours the consolidation of regulatory functions where this minimises costs and burden on business. In our view, this can only occur where the roles between competition regulators/institutions are clear and complementary, a transparent and certain regulatory regime exists and a greater focus is placed on prevention through education than prosecution.

⁹ Recommendation 39

¹⁰ Recommendation 46