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17 November 2014

Professor Ian Harper
Chair
Competition Policy Review Panel
c/Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper,

Competition Policy Review Draft Report (September 2014)

Thank you for the opportunity to comment on the Draft Report of the Competition Policy Review (the Draft Report) issued by the Competition Policy Review Panel (the Panel) on 22 September 2014.

The Australian Institute of Company Directors (Company Directors) is one of the two largest member-based director associations worldwide with over 35,000 members, including individual members from a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, charities, and government and semi-government bodies. As the principal professional body in Australia representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

Our submission focuses predominantly on the policy changes to section 46 of the *Competition and Consumer Act 2010* (CCA) that are contemplated in Draft Recommendation 25 of the Draft Report[1]. Key elements of this draft recommendation include that the conduct which is the subject of section 46 should have either the purpose or the effect of substantially lessening competition in a market, and the introduction of a defence based on the "rationality" of the conduct and whether it is in the long-term interests of consumers.

We contend that the case has not been made for the policy changes to section 46 outlined by the Panel, and as such they should not be progressed. More specifically, we make the following points:

- The current "purpose" test in section 46 remains an appropriate way of balancing the risk of deterring "pro-competitive" conduct against the risk of allowing "anti-competitive" conduct.
- The introduction of a test that relies on assessing whether the purpose or the effect of the conduct is a substantial lessening of competition in a market will introduce greater uncertainty and make it more difficult for the court to evaluate the operation of section 46.

[1] We acknowledge that the Panel has outlined draft recommended changes to section 46 in policy terms and has asked for further submissions on the more detailed wording of the section.

- The defence suggested in the Draft Report will produce much difficulty for the business community.
- The policy changes to section 46 suggested by the Panel will impact adversely on innovation and efficient outcomes, pro-competitive conduct and the long-term interests of consumers.
- Individuals working for corporations that are alleged to have contravened section 46 face potentially significant penalties, and as such there is a need for particular care to be taken in the formulation and drafting of any changes to the section.
- If the draft recommended changes to section 46 are advanced by the Panel, there should be consideration given to the establishment of a process by which corporations can, in appropriate circumstances, seek prior clearance or authorisation of conduct that might otherwise contravene the section.
- The Panel's recommendation with respect to section 46 would benefit from greater clarity as to the intended meaning of "substantial degree of power in a market".

The current "purpose" test in section 46 remains an appropriate way of balancing the risk of deterring "pro-competitive" conduct against the risk of allowing "anti-competitive" conduct.

We believe that the purpose test remains the most suitable basis for helping to distinguish between pro-competitive and anti-competitive behavior. This helps to explain why it has withstood the examination of successive policy reviews since its introduction.

We recognise that establishing a corporation's purpose is not always a straightforward exercise for regulators, and note the comments by the Australian Competition and Consumer Commission (ACCC) that "there have been occasions where the ACCC has investigated serious complaints from market participants alleging an anti-competitive effect as a result of unilateral conduct by a dominant firm, but the ACCC has formed the view, based on documents and evidence available, that despite the anti-competitive effect it would be unable to establish that the conduct had been engaged in for a proscribed purpose".[2] However, we point out that:

- there have been successful actions brought against corporations breaching section 46 ("...the ACCC has not lost a section 46 case in the courts on the basis it has failed to establish an anti-competitive purpose...."); [3]
- we consider it is not unreasonable that the ACCC should have to establish that the prohibited purpose existed, particularly remembering the investigatory powers the ACCC has at its disposal; [4]
- further consideration could be given to what more might be done under the current section 46, including the cases that are chosen for prosecution and the evidence that is being relied upon to show that the particular activity being challenged is being conducted for an anti-competitive purpose; and
- insufficient evidence has been presented (including by the Panel) of widespread egregious conduct that is contrary to the spirit of section 46 but has not been pursued by the ACCC due to difficulties in establishing purpose.

[2] ACCC Submission to the Competition Policy Review, 25 June 2014, page 77.
[3] ACCC Submission to the Competition Policy Review, 25 June 2014, page 77.
[4] CCA 2010, section 155.

The introduction of a test that relies on assessing whether the purpose or the effect of the conduct is a substantial lessening of competition in a market will introduce greater uncertainty and make it more difficult for the court to evaluate the operation of section 46.

There is little doubt that the policy changes to section 46 being contemplated by the Panel will introduce greater uncertainty as to what will constitute prohibited conduct, as it is easier for corporations to know their purpose when engaging in conduct than it would be for them to determine whether the effect or likely possible effect of their conduct was to "substantially lessen competition" in "any" market. In our view the changes (particularly when combined with the defence being contemplated by the Panel – see below) will also make the task facing the court much more difficult when trying to deal with the section effectively.

We understand that one of the concerns held by some opponents to the introduction of an effects test into the current section 46, is that corporations with a substantial degree of market power will need to consider the effect of their conduct on individual competitors. In this context, the Panel puts forward that the test of substantially lessening competition would "enable the courts to assess whether the conduct is harmful to the competitive process"[5]. We note, however, that the courts have continually (at least since the decision in *Queensland Wire Industries Limited v Broken Hill Proprietary Limited* (1989)), interpreted section 46 by reference to the impact that the relevant conduct being examined has on competition and the competitive process. To assert that we need to change the language of section 46 in order to capture how the relevant conduct relates to the competitive process is therefore wrong in our view.

Rather than addressing the intended issue, the introduction of a test of substantially lessening competition would create another set of issues. In particular, while the test is present in other provisions of the CCA, there is uncertainty inherent in it and the test has proved a very difficult stumbling block not only for the ACCC (and its predecessor), but also for civil litigants. We believe it will be equally difficult for these parties to establish such an element in the context of the proposed revision to section 46.

The defence suggested in the Draft Report will produce much difficulty for the business community.

The potential that an effects test will impact adversely on pro-competitive behaviour has been recognised both in previous reviews[6] and by the Panel ("...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"[7]). We understand the Panel currently hopes to mitigate concerns about "over-capture" of pro-competitive conduct by recommending a defence which states, in essence, that section 46 is not contravened where the conduct in question would have been "rational" for a corporation without a substantial degree of market power and had the effect (or likely effect) of benefiting "the long-term interests of consumers". The Panel suggests that the onus of proof that the defence applies should fall on the corporation engaging in the conduct in question. As such, corporations

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[5] Competition Policy Review, Draft Report, September 2014, page 210.
[6] For example, the Dawson Review 2003.
[7] Competition Policy Review, Draft Report, September 2014, page 44. Also, "....the Panel recognises that a business might be deterred from undertaking a business strategy that enhances its competitiveness and creates durable consumer benefit for fear that, if the strategy is successful, it might be assessed as having the effect of substantially lessening competition" (p43).

seeking to rely on the defence under the suggested formulation will need, under the first limb, to produce evidence that the conduct in question would be rational for a corporation that did not have a substantial degree of market power, and under the second limb, demonstrate that the conduct had the effect (or likely effect) of benefiting the long-term interests of consumers.

As a matter of principle, we do not feel it is appropriate that a corporation wishing to avail itself of a defence under section 46 should have to demonstrate that its conduct benefits the long-term interests of consumers. We suggest this approach:

- is unusual;
- introduces an undesirable degree of uncertainty;
- potentially goes too far in extending the interests that directors need to consider;[8] and
- is likely to present challenges for the court insofar as it will be required to assess economic concepts in a way that is usually left for the Tribunal.

In relation to the rationality element of the defence, we consider it would be unreasonable for corporations wishing to rely on the defence to have to prove that the conduct in question would be rational for another corporation.[9] This would be onerous and require a degree of conjecture that is inappropriate.

We believe the defence currently being contemplated by the Panel does not compensate for the poor policy underpinnings of the proposed effects test. We maintain it is preferable to draft a clear and unambiguous requirement at the outset, which meets desired policy objectives, rather than to try and address the uncertainty arising from a provision by way of a defence.

The policy changes to section 46 suggested by the Panel will impact adversely on innovation and efficient outcomes, pro-competitive conduct and the long-term interests of consumers.

We are of the view that rather than promoting competitive outcomes or fostering a "heightened capacity for agility and innovation"[10], the policy changes to section 46 suggested by the Panel will have a dampening effect on innovation and efficiency, and lessen pro-competitive conduct through:

- increased business risk associated with engaging in such conduct due to the range of conduct that is now potentially caught by the suggested revisions to section 46;
- in some cases forcing parties into court because of the uncertainty of knowing what they are required to do;
- putting unnecessary red tape and cost on corporations in having to defend pro-competitive conduct; and

[8] The query was raised during our own consultations as to how such a requirement on corporations would sit with the requirement in the Corporations Act for directors to, amongst other things, act in the best interests of the corporations they serve (*Corporations Act 2001*, section 181).

[9] During the course of our own consultations it was suggested that should this element be retained it would be more appropriate for the onus of proof to be shifted, and for a party or parties alleging anti-competitive conduct under section 46 to have to demonstrate that the conduct in question would not be rational for a corporation that did not have a substantial degree of power.

[10] Competition Policy Review, Draft Report, September 2014, Executive Summary, p4.

- excessive risk-averse behaviour on the part of boards and other relevant decision makers within corporations as a consequence of the liability provisions of the CCA (see below).

We believe this will result in inefficient outcomes at the organisational (eg productive efficiency), market (eg allocative efficiency) and economy (eg national productivity) levels, as well as having an adverse impact on the long-term interests of consumers (eg pricing, product enhancements) across the markets concerned.

Individuals working for corporations that are alleged to have contravened section 46 face potentially significant penalties, and as such there is a need for particular care to be taken in the formulation and drafting of any changes to the section.

The CCA imposes liability on individuals for conduct found to be in contravention of section 46, amongst other sections. We note that by virtue of Part VI of the CCA, liability extends beyond the corporation to those who are accessories to the contravention. Directors making strategic decisions, which have different effects to those anticipated, could cause the corporation to contravene section 46 and in turn could face personal liability and significant penalties as a result.

Given the potential for civil penalties of up to $500,000 for individuals relating to breaches of section 46[11] and the prohibition on corporations from indemnifying their officers against this conduct[12] it is critical that section 46 is clear and capable of readily being complied with.[13] We do not believe these outcomes will follow from the draft policy changes to section 46 put forward by the Panel.

We are concerned that the uncertainty created by draft changes to section 46, alongside liability provisions which impose significant penalties, will create a burdensome liability risk for directors and lead to an increase in risk-averse behaviour.

If the draft recommended changes to section 46 are advanced by the Panel, there should be consideration given to the establishment of a process by which corporations can, in appropriate circumstances, seek prior clearance or authorisation of conduct that might otherwise contravene the section.

We note there is currently provision for corporations to obtain clearance from the ACCC[14] or authorisation from the Tribunal[15] for proposed mergers.[16] We believe a process akin to what exists for mergers should be considered in relation to conduct that may be inappropriately caught by section 46. The ability to seek clearance or authorisation of conduct can help address the uncertainty that is likely to be experienced by some corporations that are concerned about engaging in conduct they consider is appropriate but could result in a breach of section 46.

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[11] CCA, section 75B(1B).

[12] The CCA prohibits corporations from indemnifying their officers against civil liabilities incurred in their capacity as an officer of a corporation, and the legal costs of defending against them, where the officer is found to have such a liability. See CCA, sections 77A and 77B.

[13] We also note that the Panel identifies one of its guiding considerations to be that a law is "clear, simple and predictable". Refer to Competition Policy Review, Draft Report, September 2014, Executive Summary, p5.

[14] CCA, section 95AC(1).

[15] CCA, section 95AT(1).

[16] We further note that the clearance and authorisation process for mergers is currently being considered by the Panel: Competition Policy Review, Draft Report, September 2014, pp 200-203. During the course of our consultations the feedback we obtained suggested that the current merger authorisation process with respect to the Tribunal is effective.

The Panel's recommendation with respect to section 46 would benefit from greater clarity as to the intended meaning of "substantial degree of power in a market".

While we appreciate that the Panel is focusing on policy issues rather than detailed drafting changes, we believe that care needs to be taken with the key concepts that are included in its recommendations, particularly "substantial degree of power in a market"[17]. The appropriateness of the changes being recommended by the Panel will rest, in part, on the meaning ascribed to these terms. We would encourage the Panel to give greater clarity to the intended meaning of key terms such as "substantial degree of power in a market".

We would be happy to elaborate on any of the comments made in our submission.

Yours sincerely,

John H C Colvin
Chief Executive Officer & Managing Director

[17] The Panel simply states that "the threshold test of 'substantial degree of market power' is well understood": Competition Policy Review, Draft Report, September 2014, p6. We do note that there is some (albeit limited) discussion by the Panel of the term "market" in the context of mergers: Competition Policy Review, Draft Report, September 2014, p192.