

17 November 2014

Competition Policy Review Secretariat
The Treasury
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Competition Policy Review Draft Report September 2014

IAG welcomes the opportunity to provide comment on the Competition Policy Review Draft Report.

IAG endorses the Draft Report's view that competition policy should:

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

IAG believes that the majority of the recommendations in the Draft Report are consistent with these competition policy objectives.

In particular, IAG agrees with the Draft Report recommendations in relation to the need for competitive neutrality and that competition principles should apply to all activities of government.

IAG endorses the content and sentiment of the submission made by the Insurance Council of Australia.

Changes to Misuse of Market Power Provisions (Draft Recommendation 25)

IAG does not support the recommended changes to the Misuse of Market Power provisions of section 46 of the Competition and Consumer Act (the CCA) (Recommendation 25).

IAG has a number of concerns with the proposed changes, in particular that the proposed "effects test" would have a negative effect on competition as well as imposing an additional unnecessary compliance burden on business. The proposed changes are also likely to increase uncertainty in this aspect of the competition law.

As outlined in IAG's initial submission to the Competition Policy Review and acknowledged in the Draft Report, "effects tests", by their nature, are at risk of capturing pro-competitive conduct and vigorous competition between competitors. The Draft Report has acknowledged this and

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attempted to reduce this risk by recommending a two limbed defence to the proposed “effects test”. However, it is IAG’s view that this will be an inadequate protection to organisations engaged in rigorous but fair competition. It will also increase uncertainty and reduce clarity of the law to market participants as well as generate additional compliance costs.

The nature of the proposed two limbed defence exempts conduct that:

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

The onus of proof falls on the corporation accused of engaging in the anti-competitive conduct.

This reverse onus of proof means that, to avoid inadvertently breaching the law in developing new products and competitive strategies, businesses will have to undertake assessments of their current and proposed practices to establish how a hypothetical rational business would behave and operate. They will also have to undertake additional assessments and analysis into the potential long term effect of their business strategy on competition in their particular market. To do this effectively would require an extensive and high level undertaking that would be both time consuming and costly.

Consequently, the proposed “effects test” will discourage competition and fail to distinguish between anti-competitive conduct specifically designed to eradicate or cripple competitors as opposed to rigorous but fair competition which may result in some competitors becoming unable to compete.

The recommended changes to section 46 are also likely to increase uncertainty in the law which may only be resolved through testing the legislation in court and developing case law spanning several years. This will inadvertently undermine the objective that competition policy should establish competition laws and regulations that are clear, predictable and reliable.

Finally, IAG queries whether the recommended changes to the section 46 are required or necessary to ensure that organisations do not misuse their market power. For example, we note that consumer group CHOICE, while commenting that the panel should examine the case for an effects test, note that a review of cases over the past 15 years indicate that section 46 is generally operating correctly and there is no systemic difficulty in prosecuting misuse if market power cases before the courts (Choice p 31).

Similarly, assertions that the current provisions in section 46 of the CCA are inadequate in preventing misuse of market power appear based on anecdotal evidence rather than specific examples. Until such time as a comprehensive cost benefit analysis of an “effects test” is undertaken IAG submits that an “effects test” should not be considered.

If you have any queries regarding this submission please contact David Wellfare, Senior Manager, Public Policy & Industry Affairs on (02) 9292 8593.

Yours sincerely



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