



17th November 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600

Online: www.competitionpolicyreview.gov.au

Dear Chairman,

Response to the Competition Policy Review Draft Report September 2014

Introduction

The Motor Trades Association (MTA Queensland or the Association) responds to the Panel's invitation for submissions to the September 2014 *Competition Policy Review Draft Report* (the Draft Report). The Association's comments are on behalf of its constituent Divisions and are confined to issues which relate to the interests and fall within the competence of the Queensland automotive value chain.

The Panel has proposed reforms to competition policy that have the potential to benefit consumers, increase productivity and efficiency and grow the economy.

The aspirational concept of the competition policy framework (CPF) contributing to Australia's economic performance for the benefit of communities, consumers, incorporated and private entities for the longer term should be accorded a priority. This should require recognition that Australia's competition policy, laws, and institutions constitute an 'economic' protocol that is intended to achieve enhanced 'economic' performance rather than a 'legal' framework which can be used to justify the distortion of markets by anti-competitive behaviour.

The underpinning Principles in conjunction with the essential 'public interest' test to guide Commonwealth, state, and local governments in implementing competition policy have the capacity to contribute to the architecture for ongoing reform. Both the CPF and the principles should have the competence to take account of both the regional and the national interests.

Attached is a general statement of views formed by the MTA Queensland in regard to the issues raised by the Panel in the Draft Report and related matters which are collateral to these issues. These are presented for consideration by the Panel in finalising its recommendations to the Government.

We would be please to provide further comment on any matters in our submission that may require further clarification or amplification.

Thank you for your consideration.

Yours sincerely

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**MTA Queensland
Submission
Response to the Competition Policy Review Draft Report September 2014**

1 MTA Queensland Background

1.1 The MTA Queensland is the peak organisation in the State representing the specific interests of some 2,000 businesses in the retail, repair and service sector of Queensland's automotive industry. In the State, there are some 14,291 automotive value chain businesses employing in excess of 73,000 persons.

1.2 The Association is an industrial association of employers incorporated pursuant to the *Industrial Relations Act* of Queensland. It comprises 11 separate divisions of the State's motor trades representing and advocating the issues of the automotive industries to all levels of government and within Queensland's economic structure. There is a high propensity for the automotive value chain to comprise small to medium scale enterprises.

1.3 The Association is the leading automotive training organisation in Queensland offering nationally recognised vocational training, covering all aspects of the retail motor trades industry. The Association's Motor Industry Training entity is the largest automotive apprentice trainer in Queensland employing 26 trainers based from Cairns to the Gold Coast and Toowoomba and Emerald. The MIT last financial year provided accredited courses to in excess of 1500 apprentices and trainees.

2. Competition Policy

2.1.1 In our response to the Competition Policy Review Issues Paper, we stated the Review came "at a critical time in the evolution of the policy's framework to support the next generation of Australian industry development and economic growth." The Panel has provided a detailed and pragmatic draft Report to establish the framework for an agenda to enable the growth and development of a balanced economy that delivers equitable outcomes for all its participants.

2.1.2 The MTA Queensland supports the Panel's endorsement of competition policy 'that focuses on making markets work in the long-term interest of consumers' (Draft Report p.23).

2.1.3 The aspirational concept of the competition policy framework (CPF) contributing to Australia's economic performance for the benefit of communities, consumers, incorporated and private entities for the longer term should be accorded a priority. This should require recognition that Australia's competition policy, laws, and institutions constitute an 'economic' protocol that is intended to achieve enhanced 'economic' performance rather than a 'legal' framework which can be used to justify the distortion of markets by anti-competitive behaviour.

2.1.4 We are pleased that focus was placed on small/medium enterprises addressing equity including a balance between business to business transactions in the market as this provides recourse where anticompetitive behaviour causes or threatens economic injury.

2.1.5 Australia is mainly a supplier of commodities (both soft and hard) to the global economy which is experiencing profound difficulties in restoring the pre-Global Financial Crisis (GFC) trend rate of economic growth. As a consequence, Australia is experiencing growth below pre-GFC long term trends. The G20 meeting in Brisbane is hoping to achieve a global consensus to stimulate global growth by between 1.8 and 2.0 percentage points to return economic activity to pre GFC modalities.

2.1.6 Australia has an overall marginal propensity to import that exceeds 0.80 (80%). In the case of motor vehicles after 2017, the marginal propensity to import will approximate 1.00 (100%).

2.17 Competition policy should require that goods that are imported into Australia for final retailing should be required to have a substantial responsible entity incorporated under Australia's Corporations Law that assumes the duty of care and fiduciary responsibility in respect of recourse in relation to warranties and guarantees and health and safety standards.

2.1.8 The imposition of the national competition policy (NCP) on the purchasing activities of Local Governments imposes difficulties that should be recognised by the CPF. In particular, there is a need for consideration in regard of the principle of contestable tendering of equipment purchases and public works programmes as these are affected by economies of scale and the vertical structure of supply chains. The local dealer/supplier of machinery/public works/services is often uncompetitive because of exclusive government marketing arrangements conducted at national or state levels but precluded at the regional level.

2.1.9 In many instances, the national importer or distributor has government budget allocations that can be applied to government purchases which are not available to the local franchisee yet the local business is required to service any equipment or services delivered locally. These franchisees for example, do not receive the advantages of representing the Original Equipment Manufacturer. Such arrangements could be construed to a form of second line forcing.

2.1.10 NCP, if it is to be an effective 'economic' protocol for all Australians, irrespective of scale, must recognise and take into account the 'economic' multiplier and accelerator that applies to the local purchases of goods or services supplied by Local Governments. These benefits must form part of any evaluation of NCP in relation to the capital programmes of Local Government.

2.2 Principles

2.2.1 The underpinning Principles in conjunction with the essential 'public interest' test to guide Commonwealth, state, and local governments in implementing competition policy have the capacity to contribute to the architecture for ongoing reform. This will ensure enhanced consumer choice and encourage a diversity of providers.

2.2.2 Having indicated general support, the MTA Queensland submits that the CPF and the principles should have the competence to take account of both the regional and the national interests.

2.2.3 In addition, there are matters that need careful consideration. The issue of consistency is one such matter. The framework is comprised of the competition policy, laws, industry codes and institutions. This has resulted in differential treatment for important underlying principles of the policy.

2.2.4 An obvious example is the differential treatment of the concept of 'acting in good faith' which is a fundamental tenet of the industry codes. The 'Franchise Code' which has recently been reviewed, has reverted to a reliance on the common law deification of this principle. By comparison, the 'Grocery Code' has a more rigorous definition of this term which is specific to the Code.

2.2.5 Such inconsistencies across the framework mean that equity is difficult to achieve, remedies are likely to vary and market distortions likely to persist. Importantly such inconsistencies mitigate the effectiveness of competition policy to contribute to 'economic' reform.

2.2.6 In respect of the Panel's findings relating to Parallel Importing, the MTA Queensland acknowledges the recommendation, but contends the government's duty of care and fiduciary duty to protect the general and motoring public mitigates the application of competition principles (Draft Report Draft Recommendation 1 p.24). In the case of motor vehicle imports 'Parallel Importing' would contravene the public interest.

2.2.7 The public interest and the objectives of the policy can only be achieved by restricting the imports of motor vehicles by mandating that these comply with government regulations in respect of motor vehicle standards.

2.3 Human Services

2.3.1 The Panel emphasises that extending competition policy in human services is a priority reform and 'user choice' a priority. It is noted that Draft Recommendation 2 states that Australia's governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.

2.3.2 The MTA is substantially in agreement to extend the provisions of the CPF to human services as this will be an important issue in 'economic' policy reformation confronting Australia in the 21st century. The central issue will be the reconciliation of established workplace relations regimes which permit uncompetitive behaviour in relation to labour organisations while requiring employers to comply with a highly regulated system that is distorted in favour of organised labour.

2.3.3 This lack of symmetry institutionalised in the *Fair Work Australia Act 2009* and the system of negotiated enterprise bargaining arrangements has resulted in wage rate inflation that have exceeded the wage rate of our trading partners. This has acted to the detriment of the Australia's economy and impacts the standard of living of all participants.

2.3.4 The Commonwealth Government has released a *Reform of the Federation White Paper* which refers to service delivery and jurisdictional responsibilities and establishes that these are open to debate. It appears prudent to await Intergovernmental Agreement before finalising any decision on the jurisdictional responsibility to deliver human services.

2.3.5 The guiding principles includes that 'funding, regulation and service delivery should be separate' (Draft Report p.26). This is one of the long standing principles of competition policy. Economic modeling and theory suggests that this principle has currency, but the anecdotal practical information from the consumer's perspective is that its implementation means either increased taxation or costs to fund the various bureaucratic institutional silos proposed.

2.4 Road Transport

2.4.1 For the automotive value chain, road transport is a basic requirement for business to business or business to consumer commerce and individual pursuits. The Investment in road infrastructure and its maintenance, seemingly, has not kept pace with economic and social demands over the longer term. To advance investment in new road infrastructure, 'tolling' has become increasingly popular as the preferred financing model for new state-of-the-art road construction.

2.4.2 The recent examples of tolling indicate that over the longer term the model is effective but the accuracy and reliability of **forecasting toll** revenue needs to be enhanced and perhaps some guidelines developed in relation to prudential risk modelling in respect of transport infrastructure.

2.4.3 The Federal Government has indexed fuel excise to create the funding finance for the largest road infrastructure programme ever undertaken in this nation. In view of this fiscal development, in the longer term, road infrastructure programmes such as tunnels and freeways to relieve urban congestion should be financed from this fiscal stream of revenue. In the near to medium terms road user charges such as tolling (with appropriate pay back periods) would appear to be an equitable and appropriate model to achieve this outcome.

2.5 Parallel Imports

2.5.1 The MTA Queensland acknowledges the duty of care and the fiduciary responsibility the Government has in protecting the health and safety of Australia's motoring public and amenities in respect of private and public motor vehicle importation and operation. In this regard, the Association adds its endorsement to the Panel's statement of principle that a "public interest test" (Draft Report p.24) should form the central tenet of competition policy.

2.5.2 The MTA Queensland draws the Panel's attention to the fundamental structure of the automotive value chain. This is based on an import regime which regulates the standards of motor vehicles entering Australia's motor vehicle market for the purpose of health and safety of communities and the motoring public.

2.5.3 In respect of the Panel's findings relating to Parallel Importing, the MTA Queensland acknowledges the recommendation but contends the government's duty of care and fiduciary duty to protect the general and motoring public mitigates the application of competition principles (Draft Report Draft Recommendation 1 p.24). In the case of motor vehicle imports 'Parallel Importing' would contravene the public interest. The public interest and the objective of the policy can only be achieved by restricting the imports of motor vehicles.

2.5.4 The Commonwealth Government is in the process of reviewing the *Motor Vehicle Standards Act* 1989. It would be prudent to take into consideration its recommendations before formulating a decision.

2.6 Planning and Zoning

2.6.1 Planning and zoning regulations set the circumstances for either public or private sector development or change of material use of scarce land resources. Generally, the market determines the economic allocation of land between business or public or private sector usage.

2.6.2 The MTA Queensland is supportive of the proposal that all governments should include competition principles in the objective of planning and zoning legislation so that they receive due weight in decision making. Whilst not a panacea, such an approach may lessen the incursion of the large supermarkets into petrol retailing and the aggressive petrol discounting from cross subsidisation to the disadvantage of competition, independent retailers, and consumers.

2.7 Regulatory Restrictions

2.7.1 The MTA Queensland is supportive of the proposal that Australian Governments should review regulations to ensure that unnecessary restrictions on competition are removed.

2.7.2 Specifically, referring to shop trading hours the MTA Queensland is of the view that the impediment to trading hours is in fact caused by the penalty rates imposed on retailers by the workplace relations regime. The Association is of the view that the industrial relations' system should be subjected to urgent review in the context of the wider economic reform agenda that is implied in the Draft Report.

2.8 Electricity, Gas and Water

2.8.1 The MTA Queensland notes the recommendations in respect of public sector utilities. The Panel states that the "reforms of electricity, gas and water have not been finalised and the benefits have yet to be realized" (Draft Report p.36). The natural utility monopolies are in most cases regulated by significant bureaucracies which unilaterally determine the architecture and pricing structure that private and public consumers face. Australia's future economy is likely to have its comparative advantage determined, inter alia, by the cost of utilities such as electricity, gas and water.

2.8.2 These utilities are essential industrial inputs and critical in determining the standard of living and quality of life for the citizens of Australia. If the CPF is to perform the role of a driver for 'economic' reforms, a complete review of the pricing models of utilities should be undertaken and benchmarked against the costs of these inputs in the markets of our trading competitors to ensure our trade exposed businesses are not disadvantaged by the costs of public utilities and infrastructure.

2.8.3 It appears incongruous that electricity generated by coal exported from Australia is cheaper than power generated by the same resources available locally. Similarly, it is difficult to rationalise that Australia's gas exported to East Asia can retail at considerably lower rates than those available to Australia's domestic industrial users and consumers.

2.8.4 Unless the competition policy has the competence to address these anomalies it will be difficult to justify its status as a primary driver of 'economic' reform and its ability to influence the structure of markets will be marginal.

3 Competition Laws

3.1.1 The MTA Queensland is supportive of the *Competition and Consumer Act (CCA)*. The Association was a participant in the several rounds of consultation on specific issues relevant to the motor trades. The remaining outstanding policy issue relates to business to business in standard form contracts. We are hopeful the Commonwealth Government will address this policy issue in the near to medium term.

3.1.2 The current competition laws in the context of small/medium enterprises (SMEs) have been the subject of contestability and legal debate financed by large corporations. This has not allowed the SMEs to have timely and cost effective recourse when they are faced with anticompetitive behaviour.

3.1.3 The essential issue is to secure equitable and balanced market places for all participants. It is difficult to define when behaviour to protect legitimate commercial interests of a corporation transgresses into unconscionable behaviour, and when legitimate contracts impose unfair terms and conditions due to market power on smaller parties in the market place.

3.2 Misuse of Market Power

3.2.1 The MTA Queensland suggests that if the CPF is to perform effectively in reforming the economy it must be consistent and equitable in the way it operates. Emphasis (2.1.3) has been placed on the need for greater recognition of the framework as an 'economic' protocol. The debate about the application of section 46 (Misuse of Market Power) is perhaps the most obvious instance of the derogation of the 'economic' functionality of the framework.

3.2.2 The MTA Queensland supports the reform of S46 by extending its evaluation methodology by including an 'economic effects' test to determine the misuse of market power while retaining the judicial 'purpose test' as proposed by the Panel. This would be both an important functional reform, increasing the effectiveness of the 'market power' provisions of the framework and reinforce the standing of the framework as an 'economically' competent protocol that intends to remedy market distortion and repair market failure.

3.2.3 The MTA Queensland has formed the view that the 'economic effects' evaluation of competitive behaviour is essential across the CPF if it is to be an effective 'economic' reform mechanism.

3.2.4 From the perspective of the Association, the misuse of market power can be attended to in large part if SMEs are accorded the status of consumers under the CCA. An initial step would be to extend the provisions of the unfair terms and conditions protections currently available to consumers to business to business in standard form contracts.

3.3 Unconscionable Conduct

3.3.1 The unfair and conscionable provisions are seminal to the effective working of the CCA in respect of SMEs. Presently, there is a lack of legal precedent or statutory definition that establishes the scope of unconscionable behaviour. This denies SMEs effective recourse because of the cost and time of litigation.

3.3.2 The ACCC in taking the Coles Supermarket to the Federal Court on the basis that, inter alia, it acted unconscionably. If successful this would establish a very necessary legal precedent. It appears important that the ACCC undertakes such legal action when appropriate, so that a body of precedent can be established which would facilitate the resolution of disputes involving unfair and unconscionable conduct.

3.4 Vertical Structures -Third-line forcing & Exclusive Dealing

3.4.1 The high level of consumer goods importation has resulted in the development of vertical structures as an important modality in the supply of goods to consumers. Importers and distributors have developed sophisticated franchising and marketing arrangements to achieve market penetration and maintain a close surveillance on final consumption trends. The dependence of franchisees and retailers on importers and distributors creates market power for the supplier. The MTA Queensland is of the view that 'vertical integrations' need to be carefully evaluated.

3.4.2 The MTA Queensland notes the Panel's recommendation in respect of 'third line forcing' and suggests that provisions for 'exclusive dealing' which allow franchisors or importers and distributors to impose and register with the ACCC financing or other business imposts on the retailer (i.e. second line forcing) should be subject to far greater scrutiny than is the case presently.

3.4.3 This form of anti-competitive behaviour is often used as a ‘modus operandi’ to circumvent individual elements of the framework arrangement especially if the importer/distributor is a monopoly supplier or is the sole manufacturer of a good. In this situation an ‘economic effects test’ should be applied to any application to register a third party exclusive dealing arrangement and the views of the franchisee or retailer given considerable weight.

3.5 Institutions and Governance

3.5.1 The Draft Report’s recommendations include the evolution of a new generation of institutions to oversee and implement Australia’s restructured CPF. The MTA Queensland is concerned about such a development. The present centralised structures of a policy Council and an executive arm has served Australia well.

3.5.2 The proposal to divest the framework of its integrity appears prima facie to be costly, may have the effect of fragmenting the present arrangements and may result in further silo administration with major policy and administrative rigidities. The MTA Queensland would favour the retention of the present arrangement to see how it would function with an enhanced competition framework at its disposal. An evaluation of the effectiveness of the structure, policy and executive arrangements could be taken two years after the date that the CPF is enhanced.

3.5.3 The evolution of the competition policy into an effective instrument of ‘economic’ policy reform should by definition mandate a streamlining of the policy, administrative process, a conscious programme to reduce the compliance burden on the economy and ongoing beneficial outcome for all stakeholders.

3.5.4 The MTA Queensland would support some strengthening of the National Competition Council’s ‘economic’ credentials and a similar bolstering of the ACCC’s capacity to apply economic expertise to the evaluation of market behaviour. If indeed, CPF was to be elevated to the status of a driver of beneficial ‘economic’ reform, these enhanced economic credentials appear highly desirable.

3.5.5 The MTA Queensland had formed a view that the State and Territory institutions monitoring the equity of trading behaviour in markets (e.g. Office of Fair Trading) should retain their roles but that there should be harmonisation of regulations across the Commonwealth and greater coordination of all aspects of the CPF.

3.5.6 The model proposed by the Panel appears to conflict with the Federation White Paper which appears to favour a more co-operative model of Federation involving a harmonisation of specific laws across the Commonwealth. This includes an institutional model requiring co-operation between State and Federal authorities to manage a framework that is agreed across the Commonwealth. This model could be used to coordinate ‘economic’ reform of markets across the Commonwealth.

3.5.7 Before considering the centralised model proposed by the Panel, it may be prudent to await the outcome of the consideration of the Federation White Paper.

4 Small Business & Industry Codes of Conduct

4.1.1 The MTA Queensland previously has expressed to the Panel views in respect of the application of the CPF to facilitate equitable market outcomes for small business entities. It would appear that the Commonwealth Government envisages a development path for the economy which involves the small business sector taking up the capacity shed by the contraction in the manufacturing sector.

4.1.2 If the CPF is to act as an effective economic protocol, it will require a competence to provide a stimulus for small business to take up the future role envisaged by the Government's strategy. This will require the development of a framework including industry codes that ensure a small business can sustain a presence in the markets of the Australia's economy on an equitable basis. Such a regime will allow SMEs to communicate effectively with competition institutions and to have certainty about the business environment and remedies available to them under the CFP.