



18 November 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper

COMPETITION POLICY REVIEW DRAFT REPORT

Thank you for the opportunity to provide a submission on the Competition Policy Review draft report.

The NSW Business Chamber (the Chamber) is one of Australia's largest business support groups, with a direct membership of more than 17,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

The Review's draft report covers an impressive range of issues and the Chamber generally supports the draft recommendations. Some comments on specific recommendations are provided below.

Draft recommendation 1

The Chamber supports the substance of this recommendation, but it is important to explicitly acknowledge that there are wider considerations than just consumers. Arguably this is encompassed by the inclusion of a general public interest test in addition to the specific competition policy principles. However, it would be useful to explicitly acknowledge that market power can create inefficiency regardless of whether it applies up or down the supply chain or to business to business rather than business to consumer transactions.

In practice, the majority of competition policy may be focused on protecting the interest of final consumers, but it would be unfortunate if the legitimate concerns of upstream suppliers were given less weight because the principles set out in this Review only mention consumers.

Draft Recommendation 2

The Chamber supports the Review's recommendations on increasing contestability in the delivery of human services. The concerns and recommendations expressed by the Review are similar to those outlined in the Chamber's 2012 Thought Leadership report, 'Diversity and Contestability in the Public Service Economy'.

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Greater application of competition principles to human service has the potential to significantly improve the delivery of public services. However, it is important to acknowledge that these are not new ideas. Proposals for introducing greater choice and competition have been debated for decades in a wide range of policy areas yet progress has been slow.

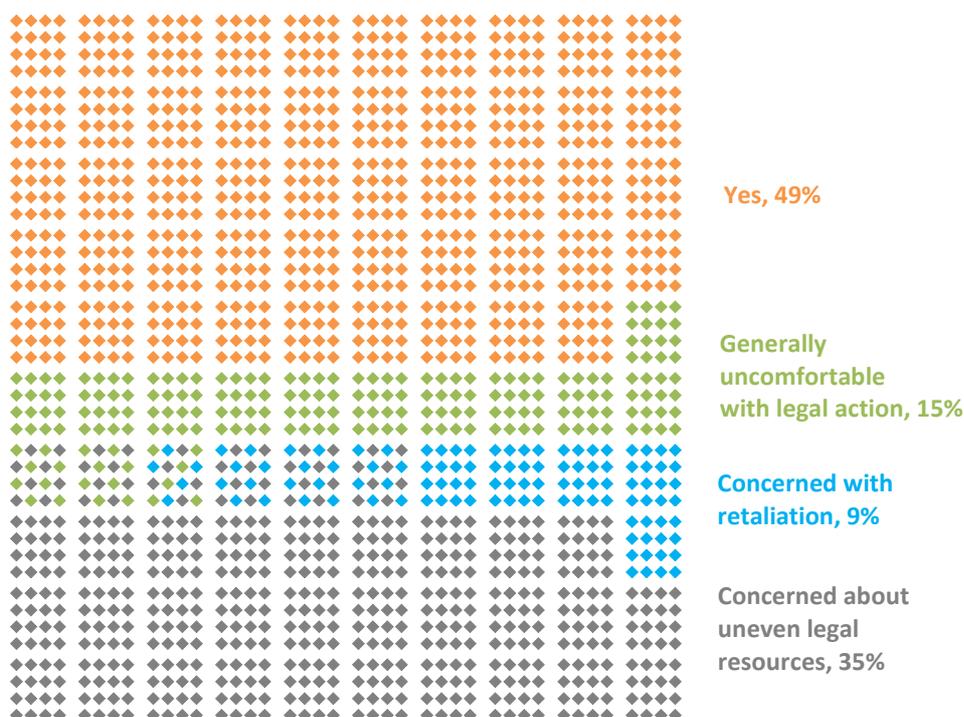
The Panel's recommendations will provide fresh impetus, but only if it can avoid its contributions being easily dismissed by demonstrating, in at least one area, how to overcome the objections that have prevented the more detailed application of competition policy principles. As was discussed at the Review's International Conference, each area of service delivery has a unique set of institutional and policy arrangements and relationships that can serve to derail the application of contestability. Showing in more detail in a specific area what would be needed to make contestability work will help illustrate the point that substantial effort is required to identify and rectify these potential barriers.

Private enforcement

The Chamber supports the need for specific measures to improve the ability of small businesses to assert their rights under the CCA.

In late June the Chamber asked its members whether they would be willing to take legal action to enforce their rights against a larger company. Around 51 per cent of respondents said no, with the main concern being their ability to succeed against a company with larger legal resources rather than commercial retaliation or general concerns with taking legal action (see Chart 1).

Chart 1. Are businesses comfortable enforcing their legal rights against a larger company?



Notes: Each cell represents one per cent. Multiple colors within a cell show where answers overlap. Results are from a June 2014 NSW Business Chamber member survey with 827 respondents.

To some extent, the cost of legal action will always be an unavoidable obstacle to a level legal playing field between small and large businesses, and small businesses simply have to do what they can to make the most of their other advantages.

Nevertheless, an uneven legal playing field is particularly problematic for competition law since it often applies in disputes between smaller and larger businesses.

While there are existing options for small businesses to access alternative dispute resolution (ADR) already, it is not clear whether these ADR providers have the expertise to deal with more complex competition law matters. As such, it may be useful to trial a competition law specific ADR mechanism.

Further work is required to understand this issue better. While we have received feedback that there is demand for an alternative to the federal court for resolving competition law disputes it is not clear whether a specialist ADR service would be sufficient, or a specialist tribunal is needed.

Since only a relatively small proportion of businesses ever consider pursuing competition law disputes, general business surveys are not particularly helpful for shedding further light on this issue. Instead we suggest that the way to progress this issue would be for the ACCC to conduct more targeted surveys of the businesses that approach them with competition concerns and lawyers that represent small businesses on competition related matters.

For further information on the issues raised in this submission, please contact the Chamber's business regulation and economics adviser, Mr Tim Hicks on (02) 9458 7259 or at tim.hicks@nswbc.com.au.

Yours sincerely

A handwritten signature in black ink that reads "Paul Orton".

Paul Orton
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