



QBE submission to the Competition Review's Draft Report

November 2014

Introduction

QBE welcomes the opportunity to respond to the recommendations in the Competition Policy Review Panel's draft report (**Draft Report**) of September 2014.

QBE provided a submission in response to the Issues Paper released on 14 April 2014 (copy attached) (**QBE Submission**).

QBE supports the Panel's view that the aims of competition policy should be to:

- 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.

QBE also supports the Panel's call for the simplification of the Competition and Consumer Act (**CCA**) by removing overly prescriptive provisions and certain redundant laws and looks forward to participating in the proposed public consultation process.

Regulatory restrictions (draft recommendation 11)

As noted in QBE's Submission¹, overlapping, duplicative and inconsistent regulation between the states, territories and Commonwealth on the same activity creates significant inefficiencies and, in some instances, inequities and adds considerably to the cost of doing business in Australia, which in turn impacts competition.

QBE notes the examples of regulatory restriction on competition given by the Panel² and, in particular, the reference to compulsory workers' compensation insurance and third-party personal injury transport insurance, which are only available from government monopoly providers in some States. QBE agrees with the Panel that the regulation review process, which began under the National Competition Policy, should be reinvigorated.

QBE believes that it is timely to consider whether it is appropriate or necessary for governments to continue to underwrite non-catastrophic personal injury compensation schemes, such as workers compensation and compulsory third party (**CTP**). QBE encourages the Panel to specifically include workers' compensation and CTP in its considerations (as it has done with, for example, human services and intellectual property).

Competitive neutrality (draft recommendations 13-15)

QBE supports the Panel's view that "the principle of competitive neutrality is a key mechanism for strengthening competition in sectors where government is a major provider of services"³ and agrees that there is scope to extend the principles to markets where governments and other providers are supplying services.

As noted in QBE's Submission, QBE believes that governments providing insurance should do so in a competitive market. Governments providing insurance should be subject to the

¹ QBE Submission, page 2.

² Draft Report, page 76.

³ Draft Report, page 75.

same prudential and other regulatory requirements that apply to the provision of insurance in Australia.

Misuse of market power (draft recommendation 25)

QBE is concerned with the proposal to amend section 46 of the CCA by replacing the current test with an 'effects test'.

Section 46 of the CCA currently prohibits corporations that have a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor of the corporation;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct.

The Panel has proposed that the primary prohibition in section 46 be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, *or would be likely to have the effect*, of substantially lessening competition in that or any other market. Significantly, the 'take advantage' element is removed and the 'purpose' test is amended to an 'effects' test.

This means that corporations which strongly compete can be found to have breached this law if the effect or likely effect of their competitive actions is judged to have substantially lessened competition.

In order to avoid the risk of 'inadvertently capturing pro-competitive conduct' (and damaging the interests of consumers), the Panel has proposed a defence so that the primary prohibition would not apply if the conduct in question:

- would be a rational decision by the corporation that did not have a substantial degree of power in the market; and
- would be likely to have the effect of advancing the long-term interests of consumers.

Significantly, the onus of proving that the defence applies is on the corporation engaging in the conduct.

The effects test will most certainly lead to an increase in the capture of pro-competitive conduct (which the Panel has obviously recognised in its proposal for a defence), with corporations then being required to prove the allegations wrong. In circumstances where a company has engaged in legitimate and vigorous competitive behaviour (to the ultimate benefit of consumers), running a defence against allegations of the misuse of market power could have significant reputational impacts, as well as major cost implications.

Determining what the meaning of 'would be likely to have the effect of' through court interpretation will result in many years of uncertainty while this meaning is settled by the courts. It is also contrary to one of the aims of competition policy stated above, namely, to 'establish competition laws and regulations that are clear, predictable and reliable'.

It will also most certainly have a detrimental impact on productivity, a significant factor when, as a country, we are increasingly looking at what we can do to increase our productivity. Businesses wishing, for example, to take innovative steps in order to improve their productivity or increase their market share may ultimately be reluctant to do so in light of the proposed changes. They will almost certainly need to obtain legal advice before proceeding and will either have to tread very carefully or make the decision not to proceed due to the uncertainty and the prospect of having to defend allegations of misusing market power.

The Panel does not provide any compelling evidence to support the introduction of an effects test, nor any examples of the misuse of market power which the proposed amendments would seek to rectify.

The Panel does however refer to the large number of independent reviews and parliamentary inquiries that have previously debated the sole 'purpose' vs 'effect's test (see Box 16.2 on page 207), which QBE notes overwhelmingly did *not* recommend an effects test.

Given the potential cost and reputational implications for corporations, the benefits of the proposed effects test should be clearly stated and analysed thoroughly against the cost implications and impact on productivity.

Conclusion

QBE welcomes the opportunity to provide this submission in response to the Panel's Draft report for the Competition Policy Review. If there is any further detail or information which QBE could provide that would assist the Panel in finalising its report, please do not hesitate to contact Kate O'Loughlin, Head of Government Relations & Industry Affairs (kate.oloughlin@qbe.com).