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COMPETITION ALERT
HARPER REVIEW DRAFT REPORT – OPPORTUNITIES FOR SUBMISSIONS

SEPTEMBER 2014

On 4 December 2013, the Federal Government announced an inquiry into Australia's Competition Law, which arises from the Federal Government's 2013 pre-election pledge to conduct a "root and branch review" of Australia's competition laws, policy and institutions. On 22 September 2014, the panel conducting the review (which has become known as the "Harper Review" after the review panel chair, Professor Ian Harper), issued its Draft Report.

The Draft Report is wide ranging in its recommendations, and sets the framework for competition law and policy reform in the coming years. Before finalising its report, the review panel now intends to hold public consultation on the findings and recommendations contained in the Draft Report, including public forums, and through further written submissions and feedback from interested parties.

In this alert, we highlight some of the key recommendations set out in the Draft Report.

Submissions in response to the Draft Report may be made to the Competition Policy Review Panel by 17 November 2014. If your business wishes to make submissions in response to the Draft Report, please do not hesitate to contact our Competition Law team who can assist you in drafting those submissions.

MISUSE OF MARKET POWER: THE INTRODUCTION OF AN "EFFECTS TEST"

Perhaps the most widely publicised and controversial aspect of the Harper Review has been its consideration of section 46 of the *Competition and Consumer Act 2010* (**Act**), which prohibits the "misuse of market power" by firms.

As the Act currently stands, the misuse of market power provisions prevent one party that has a substantial degree of market power from taking advantage of that market power for the ***purpose*** of substantially damaging a competitor.

Many have been critical of the section for making it too difficult to prove a breach. Critics, including the ACCC in its submission to the Harper Review, have instead promoted an "effects test" (which would also prohibit unilateral conduct which has the effect of substantially lessening competition, irrespective of the firm's purpose), and the removal of the "taking advantage" limb of section 46.

The Draft Report has recommended the introduction of an effects test. However, to address the potential for the amended provision to unintentionally make conduct which is pro-competitive unlawful, the Panel has recommended a two-stage defence for conduct where:

- the firm has a legitimate business purpose for engaging in the conduct; and
- the actions will result in a long-term benefit to consumers.

The review panel is seeking submissions as to whether this defence is sufficient to avoid an effects test inadvertently prohibiting legitimate competitive conduct by firms.

DEREGULATION OF RETAIL BUSINESS

The Draft Report tackles a number of retail industries, recommending the removal of regulatory restrictions. The recommendations include:

- removal of all restrictions on retail trading hours, or strictly limiting such restrictions to apply only to Christmas Day, Good Friday and the morning of ANZAC Day;
- deregulation of the market for taxi and hire car services, with the introduction of an independent regulator to ensure minimum standards for the benefit of consumers; and
- removal of restrictions on ownership and location of pharmacies, to be replaced with regulations to ensure access and quality of advice on pharmaceuticals that do not unduly restrict competition.

While the Draft Report stops short of making a recommendation, there is also a clear preference for removing restrictions on supermarket operators selling liquor. The continuation of supermarket "shopper docket" discounts on fuel is also endorsed, notwithstanding that submissions were made by a number of small retailers speaking out against the practice.

CARTEL CONDUCT

Reforms are recommended to the cartel conduct provisions to address a number of deficiencies that have been recognised in the current laws, including:

- by confining the cartel conduct prohibition to agreements between actual competitors, rather than the current approach which also includes agreement between potential competitors;
- replacing the current exemption for joint ventures with a broad exception that would include other forms of business collaboration (including joint ventures for the acquisition of goods, which currently fall outside the scope of the exemption);
- introducing a new exemption for trading restrictions that are imposed in connection with the supply or acquisition of goods, leaving this kind of arrangement to be assessed under the expanded exclusive dealing test recommended for section 47 of the Act.

The Draft Report also recommends the repeal of the controversial "price signalling" laws, which currently only apply to the banking sector.

MERGERS

A number of submissions to the Harper Review had sought greater transparency to be mandated in relation to the ACCC's decision making process when assessing mergers under its informal clearance regime. Instead, the Draft Report recommends that greater consultation between

the ACCC and business take place, with the objective of delivering more timely decisions.

In relation to the formal merger clearance and merger authorisation recommendations, however, more significant reform is recommended.

The Draft Report recommends that the current formal merger clearance process (which has never been used since it was introduced) be overhauled. This includes a removal of the prescriptive information requirements, which are widely recognised as the major drawback of the current regime.

The former merger clearance and merger authorisation regimes are also proposed to be combined into a single "formal merger exemption process". Under the proposed process, the ACCC would be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or if it is satisfied that the merger results in public benefits that outweigh the anti-competitive detriments. This would move the jurisdiction to consider merger authorisation requests away from the Australian Competition Tribunal to the ACCC, although decisions would be capable of appeal to the Australian Competition Tribunal.

While it isn't made clear in the Draft Report, the suggestion seems to be that only one formal merger exemption application could be made. This would differ from the current situation, where a merger can be assessed for clearance and then (if unsuccessful) be the subject of a separate merger authorisation application. That being the case, parties applying under the new process would presumably need to advance arguments in the same application that:

- the merger will not result in a substantial lessening of competition (and thus should be cleared); or
- alternatively, any lessening of competition is outweighed by public benefit that will result from the merger (and thus should be authorised).

The combined formal exemption process is also recommended to include strict timelines that can only be extended with the consent of the merger parties, which would provide far greater certainty to business, but put significant pressure on the ACCC.

ARRANGEMENTS BETWEEN A FIRM AND ITS CUSTOMERS OR SUPPLIERS

In relation to vertical arrangements between a customer and its suppliers, the Draft Report recommends a number of changes to the Act.

As had been widely anticipated, the Draft Report recommends that the per se prohibition against "third line forcing" be removed. This is a reform that appears to have widespread support. The current prohibition prevents common conditional supply arrangements unless they are notified to the ACCC through an administrative approval procedure, even where they have no possible effect on competition.

The Draft Report also recommends the broadening and simplification of section 47 of the Act. Currently, section 47 prohibits certain types of conditional supply or acquisition arrangements where they have the purpose, effect or likely effect of substantially lessening competition in a market. The Draft Report essentially recommends replacing these provisions with a prohibition against *any* conditional supply or acquisition arrangement which has that purpose, effect or likely effect.

In relation to resale price maintenance (which prohibits a supplier from preventing a reseller of its goods or services from discounting the price at which they re-sell those goods or services), the Harper Review has rejected proposals for the conduct to be competition tested. However, a simple notification process has been recommended, which will make it much easier for resale price maintenance to be administratively approved where a public benefit can be demonstrated, outweighing any anticompetitive effect.

REMOVAL OF INTELLECTUAL PROPERTY EXEMPTIONS

One of the recommendations of the Draft Report which is likely to create significant controversy, is its approach to intellectual property rights. There is a natural tension between the statutory monopoly that is afforded to intellectual property rights holders and competition policy (which generally regards monopolies as inconsistent with the promotion of free competition).

Subsection 51(3) of the Act currently provides some limited exemptions to intellectual property rights holders. Some (including the ACCC) have argued these exemptions should be removed altogether, while intellectual property rights holders have generally argued that the exemptions don't go far enough.

The Draft Report addresses the issue in two recommendations:

- First, it recommends the repeal of the section 51(3) exemption for intellectual property licence arrangements. The effect of this change would be that any licence of intellectual property which has the purpose, effect or likely effect of substantially lessening competition would be illegal.
- Second, it recommends that there be an overarching review of competition policy issues in intellectual property arising from new developments in technology and markets.

This proposed amendment may have far reaching implications for intellectual property rights holders. While the Draft Report identifies that the granting of statutory IP rights is unlikely in and of itself to raise competition law issues, it is concerned that the use of those rights may have the purpose or effect of substantially lessening competition.

HUMAN SERVICES

Deepening and extending access to high quality "human services" (such as education, health care, aged care and community services) is identified in the Draft Report as an important focus for competition policy.

The Draft Report recommends that a national framework be developed, with agreement between the Commonwealth and State and Territory governments establishing choice and competition principles in the field of human services, with guiding principles including that:

- user choice should be placed at the heart of service delivery;
- funding, regulation and service delivery should be separate;
- a diversity of providers should be encouraged, while not crowding out community and voluntary services; and
- innovation in service provision should be stimulated, while ensuring access to high-quality human services

The Draft Report stops short of giving specific recommendations, but there is a clear emphasis on the importance of increasing the involvement of the private sector in the delivery of healthcare and other human services (including through public private partnerships (PPPs), although the Draft Report notes that PPPs must be carefully managed in view of previous mixed results).

ELECTRICITY, GAS AND WATER

The Draft Report acknowledges that much reform of electricity, gas and water regulation has already taken place. However, concern is expressed that these reforms have slowed.

The Draft Report strongly recommends a detailed review of competition in the gas industry, in particular, and recommends a more national approach to water reform to help drive competition.

ROAD TRANSPORT

A direct funding model is proposed, which links road use directly to the associated costs of construction, maintenance and safety. It is proposed that indirect taxes (such as fuel excise and vehicle registration charges) could then be replaced with direct, cost-reflective prices.

This is perhaps one of the more ambitious reforms recommended, which would require a complete overhaul of current overlapping State and Commonwealth regulation and taxation. It would also create significant political obstacles, as a "user pays" model is likely to be unpopular, and perhaps misunderstood, by the general public.

SMALL BUSINESS

Despite the protection of "small business" being a central theme in the Terms of Reference for the Harper Review, there is very little direct reform recommended for this purpose.

The Draft Report supports retaining the current unconscionable conduct provisions and the existing industry codes framework. The new industry code remedies and powers framework which has just been legislated (and is expected to apply to breaches of the Franchising Code of Conduct from 1 January 2015) is noted as a significant development. However, the Draft Report acknowledges that experience with administering such new provisions is needed before determining whether they should be applied more broadly.

One aspect of small business protection which is discussed is the issue of "access to justice". The Harper Review received numerous submissions noting that the cost of obtaining redress through the Courts can effectively render the protections under the Act irrelevant, as litigation is too expensive for small businesses to enforce their rights.

The Draft Report requests submissions on whether there should be a specific low-cost dispute resolution scheme established to deal with matters covered by competition laws.

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